



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DC/00094/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Skype  
On 11 February and 13 May 2021

Decision & Reasons Promulgated  
On 07 June 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMIR RAMAZAN

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer  
(13 May 2021)  
Mr C Howells, Senior Home Office Presenting Officer  
(11 February 2021)

For the Respondent: Mr R O’Ryan instructed by Lei Dat & Baig Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Amir Ramazan (the appellant) and the Secretary of State (the respondent).

## Introduction

2. The appellant was born on 9 January 1975 and is a citizen of Iraq by birth. He arrived in the United Kingdom in 2002. On 14 February 2002 he claimed asylum. His claim was refused on 29 May 2002. He was, however, granted exceptional leave to remain for 4 years. Subsequently, on 1 May 2007 the appellant was granted Indefinite Leave to Remain.
3. On 4 April 2002, the appellant was cautioned by the Northumbria Police for two offences - indecent assault on a female 16 or over contrary to s.14 of the Sexual Offences Act 1956 and using threatening, abusive or insulting words likely to cause harassment, alarm or distress contrary to s.5(1) of the Public Order Act 1986. As a result of the sexual offence, the appellant was placed on the Sexual Offenders Register for 2 years.
4. On 15 April 2008, the appellant applied to become a British citizen by naturalisation. In his application form dated 11 April 2008, the appellant did not disclose either of his cautions or that he had been placed on the Sex Offenders Register between 2002 and 2004.
5. In response to the application, the appellant became a naturalised British citizen on 29 September 2008.
6. Following an investigation by the Home Office, the appellant was notified of the Secretary of State's intention to deprive him of his British citizenship on 14 March 2019 under s.40(3) of the British Nationality Act 1981 (the "1981 Act") on the basis that his British citizenship had been obtained by fraud, false representation of concealment of material facts.. The Secretary of State was satisfied that the appellant had misrepresented certain person details, including his name and his date and place of birth in Iraq having given different details in his dealings with the Home Office in his asylum application and passport applications made on behalf of his children in Iraq. Further, the appellant had failed in his nationality application to disclose his two cautions or that he had been placed on the Sex Offenders Register.
7. On 27 June 2019, the Secretary of State made a decision to deprive the appellant of his British citizenship under s.40(3) of the 1981 Act.
8. The appellant appealed to the First-tier Tribunal. In a determination sent on 11 November 2019, Judge Andrew Davies allowed the appellant's appeal.
9. The Secretary of State sought permission to appeal that decision to the Upper Tribunal. On 28 January 2020, the First-tier Tribunal (DJ Woodcraft) granted the Secretary of State permission to appeal.
10. The appellant filed a rule 24 response seeking to uphold the judge's decision.
11. The hearing was initially listed on 11 February 2021 at the Cardiff Civil Justice Centre sitting remotely. I heard oral submissions from Mr O'Ryan who represented the

appellant and Mr Howells, who then represented the Secretary of State. In addition, Mr O’Ryan filed a skeleton argument dated 11 February 2021.

12. Following the conclusion of that hearing, I issued directions re-listing the appeal for a continuation of the error of law hearing in order to deal with a number of legal issues upon which I invited further submissions.
13. That hearing took place on 13 May 2021 when the appellant was again represented by Mr O’Ryan who submitted an additional skeleton argument. At this hearing, the respondent was represented by Mr Clarke but further written submissions were also made in advance of the hearing by Mr Howells who had represented the Secretary of State at the initial error of law hearing.

### The Judge’s Decision

14. Judge Davies set out the background to the appeal at paras 4–12 of his determination as follows:
  - “4. The appellant entered the United Kingdom in 2002. He claimed asylum. His asylum claim was rejected but he was granted exceptional leave to remain for 4 years. The appellant had claimed to originate from Mosul in Government Controlled Iraq (GCI). The exceptional leave policy applied to asylum applicants from such areas as against the then Kurdish Autonomous Zone (KAZ). After completing the 4 years of his exceptional leave to remain the appellant applied successfully for indefinite leave to remain. He then naturalised in September 2008.
  5. On 27 June 2019 the respondent gave notice to the appellant of a decision to deprive him of British citizenship under **Section 40 British Nationality Act 1981**. The basis of the decision was that citizenship was obtained fraudulently. When the appellant arrived in the UK in February 2002 he claimed to be from Mosul in GCI. His asylum claim was refused but he benefited from the policy of granting exceptional leave to remain for applicants from GCI. Evidence subsequently provided by the appellant in support of passport applications for children in Iraq indicates that he had made false representations as he originated from Ranya, Sulaymaniyah. Had those facts been made known to caseworkers at the time of the asylum claim and subsequent applications, the applications would have been refused and he would have been subject to removal.
  6. A variety of representations were made by the appellant’s solicitors on 2 April 2019 which were summarised in the decision letter. He claimed that there was an error in his name due to advice provided by the Home Office interpreter. He had been advised by an ‘agent’ not to provide his true identity. He referred to language difficulties in respect of the place of birth, Iraqi names and dates of birth were casually used in Iraq. He feared repatriation to Iraq which was wracked with violence. In short, the respondent did not accept his explanations for reasons which are set out in full in the decision letter. The appellant had only attempted to correct the position after receiving notice of the intention to deprive him of British citizenship. The respondent’s case is that the appellant has admitted making false representations and omitted material facts so as to obtain

leave to which he was not entitled and used his fraudulently obtained status to proceed in an application and naturalise as a British citizen.

7. The respondent also relies upon police cautions issued to the appellant for indecent assault on a female under the Sexual Offences Act 1956 and on the same occasion disorderly behaviour or the use of threatening/abusive/insulting words likely to cause harassment, alarm or distress under the Public Order Act 1986. The appellant did not disclose the name under which he was cautioned. The respondent considered that the appellant failed to disclose his cautions and deliberately abbreviated his name in order to avoid a refusal of British citizenship under the good character provisions of the 1981 Act.
8. The appellant also contended that the deception employed was not directly material to the grant of citizenship. The respondent's view is that it was the claimed place of birth that was material to the grant of leave. Had the true position been known the application for leave to remain would have been refused with the consequent effect on any application for indefinite leave and naturalisation.
9. The appellant's case is that, although he was born in Sulaymaniyah, he was travelling back and forward to Mosul and he also resided in Mosul immediately before he left Iraq. Under the Iraq **Rashid** policy it was the stated policy of the Secretary of State to grant exceptional leave to remain for those asylum applicants from Iraq refused asylum between April 1991 and 20 March 1993 and who originated from GCI. It was the policy of the Secretary of State at the time not to argue internal relocation. For all intents and purposes the appellant's home area was Mosul.
10. The respondent referred to the application form for naturalisation and the failure of the appellant to show his true name, date and place of birth and provide any information about offending. Deprivation of citizenship is in the public interest and will be appropriate and proportionate in the public interest in preserving the integrity of British citizenship and to maintain immigration control. While it was acknowledged that the decision to deprive on grounds of fraud is discretionary, taking all the factors into account the respondent felt the decision to be reasonable and proportionate.
11. The respondent also stated in the decision letter that the removal of citizenship did not preclude an individual from remaining in the UK. It was not necessary to take account of the impact of removal on himself and any family members such as under Article 8. Nor was it accepted that **Section 55 Borders, Citizenship and Immigration Act 2009** applied in respect of the appellant's children in Iraq although notwithstanding that statement the respondent also indicated that the 2009 Act had been taken into account.
12. The respondent carried out no detailed analysis of whether deprivation would leave the appellant stateless. The statutory requirement to do so was only applicable where the deprivation was deemed conducive to the public good under **Section 40(2) and (4) 1981 Act**".

15. At paras 13–24, Judge Davies then set out the law including ss.40(2) and (3) and the relevant (at the time) case law including Deliallisi (British citizen: deportation appeal: Scope) [2013] UKUT 439 (IAC), Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 (IAC), BA (deprivation of citizenship: appeals) [2018] UKUT 00085 (IAC), Sleiman (Deprivation of citizenship; conduct) [2017] UKUT 00367 (IAC) and R(KV) v SSHD [2018] EWCA Civ 2483.
16. Importantly, in the light of subsequent developments in the Supreme Court, the judge concluded that his task in the appeal was to consider whether the Secretary of State’s “discretion should be exercised differently” under s.40(3) (see para 22) and that he must “form a view not just whether it was rational to make [an order depriving the appellant of his citizenship] but whether it was right to do so” (para 24).
17. At paras 28–39, the judge set out the relevant circumstances including the respondent’s claim that the appellant had dishonestly failed to disclose his police cautions and that he had been on the Sex Offenders Register for two years and had misrepresented his name, date of birth and place of birth in order to assist in his citizenship application.
18. At para 41, the judge was not satisfied that the latter allegations were established:
  - “41. I am not satisfied that the respondent has made out the allegation that the appellant had varied his name in order to mislead either about the cautions or otherwise. Nor are the variations in the date of birth of any great significance. The dates are little more than a week or so apart”.
19. However, as regards the failure to refer to the cautions, the judge said this at para 42:
  - “However, I do accept that the appellant made a conscious decision not to refer to the cautions for the reasons set out above”.
20. The “reasons set out above” were in order to avoid being refused British citizenship under the good character provisions of the 1981 Act.
21. As regards the non-disclosure of the cautions, the judge concluded, applying the approach of the UT in Sleiman, that those cautions were “directly material” to the decision to grant him citizenship. At paras 47–48, the judge said this:
  - “47. I am, however, satisfied that the appellant’s police cautions are directly material and that includes his failure to declare them. On his application form for naturalisation in April 2008 the appellant completed section 3 of the form which deals with the matter of good character. There were a number of questions. Question 3.7 asked whether the appellant’s details had been recorded by the police in respect of certain sexual offences. The appellant answered in the negative. I accept that the question was specific and clear. Question 3.12 dealing with other activities which might be relevant to good character is of a more general nature and I put no weight on the appellant’s answers which were also ‘no’. So the question of good character is part of the process towards naturalisation and is directly material.

48. I am also satisfied the appellant would have been aware of the purpose of the form and would have understood the meaning of the relevant section about whether his details had been recorded by the police in respect of a sexual offence. The events leading to a caution and registration on the Sex Offenders list had taken place just six years previously. The appellant had the assistance of a friend in completing the form. I find therefore that the failure to report the cautions, the deception, did motivate the acquisition of citizenship”.
22. At paras 49–51, the judge concluded that the deprivation of the appellant’s citizenship did not breach Art 8 of the ECHR.
23. At para 52 the judge went on to consider, in accordance with the then case law, whether discretion should be exercised differently under s.40(3). The judge said this:
- “However, notwithstanding my conclusions above, I must consider whether the Secretary of State should have exercised his discretion differently and I must carry out the balancing exercise referred to in **KV**. I remind myself that it is not just a matter of whether discretion was rational, it must also be right”.
24. At paras 53–59, the judge considered the proportionality of the decision to deprive the appellant of his citizenship including having regard to the relevant Nationality Instructions. The judge said this:
- “53. Although, as I indicate below, I find the respondent’s position unsatisfactory in the failure to implement his own guidance as to dealing with proportionality, nonetheless I must give significant weight to the decision because there was dishonesty and in part I am satisfied that the appellant was motivated by his application for citizenship to omit the details of his cautions and also that the matter of the cautions was material to the decision.
54. The published Nationality Instructions do deal with the matter of whether deprivation is proportionate. At paragraphs following 55.7.10 under the heading ‘Reasonable/Balanced’ the caseworker is advised to consider whether the deprivation would be seen to be a balanced and reasonable step to take, taking into account the seriousness of the fraud, misrepresentation or concealment.
55. Caseworkers are also advised (paragraph 55.7.11 onwards) to take account of mitigating circumstances. The examples considered there do not assist the appellant. The guidance emphasises that where advice to provide false details is relied upon or the person claims that someone such as a family member acted on their behalf (thereby exonerating him from responsibility) that is not to be regarded as constituting mitigation. On the other hand, the caseworker is exhorted to take account of Article 8 rights and to consider granting leave in accordance with the guidance on family and private life. This does not take account of the fact that the person deprived of citizenship does not revert to the stage before citizenship (indefinite leave) but effectively returns to the starting point.
56. I have taken account of the fact in assessing proportionality that the respondent has not followed his own guidelines. At least as far as I can

judge from the decision letter. Indeed I find the decision letter at paragraph 50 unsatisfactory. While indicating that deprivation of citizenship might in certain circumstances result in the loss of right to abode and with it the loss of the ability to enter and remain in the UK without any restriction or time or purpose, the respondent also indicates that the decision did not in itself preclude an individual from remaining in the UK. Then it was indicated that, although deprivation might culminate in a decision to remove him, it is not necessary to take account of the impact of removal on the appellant and his family.

57. The respondent did not deal with whether the deprivation decision would represent a reasonable and balanced approach. At paragraph 55.7.9 of the Nationality Instructions it is stated that the caseworker must consider that issue. Only at paragraph 47 does the respondent refer to proportionality and there appears simply a bald statement that the action proposed '*would be appropriate and proportionate in the public interest*' as part of preserving the integrity of citizenship and maintaining immigration control. There is no evidence in the decision letter of a full evaluation carried out.
58. I have considered whether the deprivation decision is right. I give considerable weight to the respondent's decision in the light of my findings about dishonesty and materiality. Moreover, I am not satisfied that ultimately the end product of the decision will be the removal of the appellant from the UK. Statelessness is not an issue. However, on the other side of the balance sheet, are some very significant factors in the appellant's favour. He has lived in the UK for the best part of eighteen years and aside from an unfortunate episode in 2002, which has not been repeated, the evidence suggests that he has been a hardworking, law-abiding citizen. Nearly seventeen years have elapsed since his police cautions.
59. There are practical legal consequences of deprivation of citizenship including the loss of voting rights. The appellant would be forced to start his applications all over again. No indication is given that the appellant is to be granted leave to remain. Inevitably there will be uncertainty and worry. There may be an impact on the appellant's position in the labour market. I also take account of the fact that public policy is traditionally aimed at allowing citizens to rehabilitate themselves from criminal convictions through the provisions of the Rehabilitation of Offenders Act."

25. Having set those matters out, at para 60 the judge reached the following conclusion:

"60. For these reasons, to use the words of the respondent's own guidelines, deprivation would not be seen as a balanced and reasonable step to take taking into account the misrepresentation involved and what the representation was attempting to hide".

26. As a result, the judge allowed the appeal.

### **The Issues**

27. The Secretary of State's grounds of appeal, upon which permission had been granted, challenged the judge's exercise of discretion under s.40(3) in the appellants favour on

the basis that he had been wrong to conclude this was a “rare case” or one where there was “some very compelling feature” where the public interest was outweighed and an appeal should be allowed applying what was said in BA (at [44]). It was perverse of the judge to take into account that the appellant had not committed any further crimes since 2002 and the Rehabilitation of Offenders Act 1974. It was upon this basis that the appeal was argued by the Secretary of State at the initial hearing on 11 February 2021.

28. The appellant also contended that there had not been any fraud or misrepresentation as the matters relied on were “spent” under the Rehabilitation of Offenders Act 1974 and, in any event, the judge had not found that any failure to disclose was material to the grant of citizenship. Mr O’Ryan accepted that establishing the latter point was not without some difficulty as the judge had treated it as material by determining the appeal on the basis of how the discretion under s.40(3) should be exercised. I would add that it also does not fit with what the judge said at paras 47 and 53 about the ‘materiality’ of the non-disclosure.
29. Following that hearing, I directed that the appeal be re-listed in order for there to be further submissions on the application of the Rehabilitation of Offenders Act 1974 and the respondent’s guidance to the non-disclosure of the cautions and that the appellant had been placed on the Sex Offenders Register.
30. At the resumed hearing, the issues between the parties became more focused. A central issue was whether the Supreme Court’s decision, reached since the initial hearing in February, in R (Begum) v SIAC [2021] UKSC 7 limiting the scope of an appeal against a decision to deprive an individual of citizenship under s.40(2) in an appeal to the Special Immigration Appeals Commission (“SIAC”) to public law grounds, applied to an appeal to the First-tier Tribunal against a decision to deprive an individual of citizenship under s.40(3) of the 1981 Act.
31. Further, Mr Clarke no longer sought to sustain the respondent’s decision on a number of bases which had been rejected by Judge Davies including that the appellant could be properly deprived of his citizenship on the basis of any misrepresentation relating to his name, date of birth or place of birth. Mr Clarke eschewed all reliance upon that basis for the respondent’s decision.
32. Mr Clarke focussed upon the appellant’s two cautions which he received in 2002 for a sexual offence of indecency and a public order offence. In addition, reliance was placed upon the fact that the appellant had been placed upon the Sex Offenders Register for a period of two years between 2002 and 2004 as a result of accepting the caution for the sexual offence.
33. Mr Clarke accepted on behalf of the Secretary of State that the appellant’s convictions, by accepting the cautions, in relation to both offences were “spent” under the Rehabilitation of Offenders Act 1974 and the appellant was not required to disclose those offences in response to questions in the application form, in particular at question 3.6 and 3.7. Mr Clarke also accepted that the appellant was not required



to disclose that he had been on the Sex Offenders Register between 2002 and 2004 in answering question 3.7 which related to only whether the appellant's details were, at the date of the application in 2008, recorded on the Sex Offenders Register. He accepted that the appellant had no obligation to disclose that he *had been* on the Sex Offenders Register in the past in answer to question 3.7. Instead, Mr Clarke submitted that the appellant's failure to disclose the underlying facts that had given rise to both the cautions and his being placed on the Sex Offenders Register in answer to question 3.12 in the application form for citizenship amounted to fraud, false representation or concealment of a material fact.

34. Mr O'Ryan, on behalf of the appellant, whilst accepting Mr Clarke's concessions, submitted that the appellant was under no obligation to disclose the underlying facts that had given rise to the convictions, cautions and being placed on the Sex Offenders Register in response to question 3.12 on the form.
35. The effect of the parties' positions in relation to the appeal was, therefore, accepted to be as follows. The issue of whether the judge had erred in law in his approach to the appeal under s.40A of the 1981 Act against a decision to deprive the appellant of his citizenship under s.40(3) of that Act determined whether the judge had erred in law. The judge had adopted a merits assessment in the appeal which, in the context of the circumstances in Begum, had been rejected by the Supreme Court as the proper approach on appeal to SIAC against a decision under s.40(2). If that approach also applied to the present appeal, then the judge had erred in law in considering, for himself, whether s.40(3) applied rather than in determining whether the Secretary of State reached her decision in breach of public law principles.
36. Secondly, if that approach was, indeed, an error of law because the approach in Begum applied, Mr O'Ryan submitted that that error was immaterial as the judge was bound to have allowed the appeal since it could not be established that the appellant had obtained his citizenship by fraud because he had not failed to disclose something which he was required to do, in particular in response to question 3.12 of the application form.
37. If that was the case, the representatives invited me either to uphold the First-tier Tribunal's decision to allow the appeal or, if necessary, to find that there was an error of law and to substitute a decision allowing the appeal on the basis that the requisite misrepresentation or fraud required by s.40(3) was not established. Otherwise, if an error of law was established but no more, I was invited to re-list the appeal for a resumed hearing in order to re-make the decision.

### **The Relevant Legal Provisions**

38. Sections 40(2)-(4A) of the 1981 Act set out the provisions by which the Secretary of State may make an order depriving an individual of citizenship either on the basis that that deprivation is "conducive to the public good" or because the citizenship has been obtained by "fraud", "false representation" or "concealment of a material fact". The provisions are as follows:

- “40. (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
- (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of –
- (a) fraud,
- (b) false representation, or
- (c) concealment of a material fact.
- (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
- (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if –
- (a) the citizenship status results from the person’s naturalisation,
- (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
- (c) the Secretary of State has reasonable grounds for believing that the person is liable, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

....”

39. An appeal against a decision under either s.40(2) or s.40(3) lies principally to the First-tier Tribunal under s.40A(1) of the 1981 Act. Section 40A(1) provides as follows:

“A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal”.

40. However, in a case where the Secretary of State has certified under s.40A(2) that the decision was taken wholly or partly in the interests of national security, state relationships or otherwise in the public interest, an appeal lies to SIAC under s.2B of the Special Immigration Appeals Commission Act 1997.

41. In relation to appeals to the FtT, s.40A(3) sets out the provisions in the Nationality, Immigration and Asylum Act 2002 (“the NIA Act 2002”) which apply to an appeal under s.40A(1) as they apply to an appeal under s.82 of the 2002 Act. Those provisions are limited to “section 106 (Rules)”, “section 107 (Practice Directions)” and “section 108 (Forged document: proceedings in private)”. Significantly, the grounds of appeal set out in s.84 of the NIA Act 2002 and which apply in appeals to the FtT under s.82 of the NIA Act 2002, do not apply in appeals against deprivation of

citizenship decisions made under ss.40(2) and (3) of the 1981 Act. There are, therefore, no statutory grounds of appeal although, of course, the FtT must consider an individual's human rights because s.6 of the Human Rights Act 1998 applies to the respondent's decision-making.

### The Pre-Begum Case Law

42. In a series of cases, the Upper Tribunal considered the jurisdiction of the First-tier Tribunal in an appeal under s.40A of the 1981 Act.
43. In Deliallisi, the UT was concerned with an appeal against a decision to deprive an individual of their citizenship under s.40(3), namely on the basis of fraud, etc. The Upper Tribunal, disagreeing with the approach of the First-tier Tribunal in that appeal, concluded (at [31]) that:
- “If the legislature confers a right of appeal against a decision, then, in the absence of express wording limiting the nature of that appeal, it should be treated as requiring the appellate body to exercise afresh any judgment or discretion employed in reaching the decision against which the appeal is brought”.
44. The UT held, in other words, that the appeal was a merits appeal and it was for the judge to determine the underlying facts and whether the discretion to deprive the individual of their citizenship should be exercised against them.
45. Subsequently in Pirzada, a differently constituted panel of the UT reached a different view. At [9E], the UT said this:
- “The restrictions on the rights of appeal imposed by s.84 of the 2002 Act do not apply to appeals against a s.40 decision: therefore, any proper ground of appeal is available to an applicant. The grounds of appeal are, however, limited by the formulation of s.40 and must be directed to whether the Secretary of State's decision was in fact empowered by that section. There is no suggestion that a Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-ss (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State's discretion”.
46. Consequently, for the UT in Pirzada, the scope of any challenge was, in effect, limited to public law grounds and the First-tier Tribunal could not exercise the discretion under s.40(2) or (3) for itself.
47. Subsequently, the Upper Tribunal in BA disapproved Pirzada and reaffirmed the approach in Deliallisi.
48. The approach in Deliallisi and BA was endorsed by the Court of Appeal in KV v SSHD. At [6] Leggatt LJ (with whom Sir Geoffrey Vos C and Haddon-Cave LJ agreed) said this:
- “6. Pursuant to section 40A(1), a person who is given such a notice may appeal against the decision to the First-tier Tribunal. The task of the tribunal on such an appeal has been considered by the Upper Tribunal (Immigration and Asylum Chamber) in a number of cases including *Deliallisi (British Citizen: deprivation*

*appeal; Scope*) [2013] UKUT 439 (IAC) and, more recently, *BA (deprivation of citizenship: Appeals)* [2018] UKUT 85 (IAC). I would endorse the following principles which are articulated in those decisions and which I did not understand to be in dispute on this appeal:

(1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.

(2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.

(3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection.

(4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.

(5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently.

(6) As it is the Secretary of State who has been charged by Parliament with responsibility for making decisions concerning deprivation of citizenship, insofar as the Secretary of State has considered the relevant facts, the Secretary of State's view and any published policy regarding how the discretion should be exercised should normally be accorded considerable weight (in which regard see *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799)."

49. Each of the cases involved appeals to the First-tier Tribunal against decisions taken under s.40(3) of the 1981 Act although in *Pirzada* the UT's public law approach (subsequently rejected in *BA*) was said to apply to appeals against decisions both under s.40(2) and s.40(3). None of the cases was concerned with appeals to SIAC against decisions taken under s.40(2) on the grounds that deprivation of citizenship was "conducive to the public good".
50. The settled law, therefore, at the time of the FtT's decision in this appeal was that the FtT had to determine on the evidence whether the underlying basis for deprivation of citizenship under s.40(3) was established (fraud etc) and, if established, it was for the judge to determine how the discretion (whether or not to deprive an individual of their citizenship) should be exercised.

51. That settled law came under scrutiny by the Supreme Court in its decision in Begum, decided on 26 February 2021 after the initial error of law hearing in this appeal.

### The Begum Decision

52. In Begum, the Supreme Court was concerned with an appeal to SIAC under s.2B of the Special Immigration Appeals Commission Act 1997 against a decision taken to deprive the individual of her citizenship under s.40(2) on a not 'conductive to public policy' basis. In such an appeal, the Supreme Court rejected the submission that SIAC could engage in a merits appeal deciding for itself the underlying facts and exercising the discretion under s.40(2) whether to deprive the individual of their citizenship. Arguing for a merits based approach, Counsel for Ms Begum relied upon the UT's decisions in Deliallisi and BA.
53. Giving the only judgment, Lord Reed (with whom Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Sales agreed) was critical of the UT's reasoning in those cases. At [40]-[45], Lord Reed said this:

"40. There does not appear ever to have been any statutory provision relating to the grounds on which an appeal under section 2B may be brought, the matters to be considered, or how the appeal is to be determined (as mentioned in para 34 above, section 4 of the 1997 Act was repealed on the same date as section 2B came into force; and sections 84-86 of the 2002 Act were not applied to appeals under section 2B). The same appears to be true of an appeal to the Tribunal under section 40A of the 1981 Act.

41. In relation to the scope of the jurisdiction created by section 2B, counsel for Ms Begum and for Liberty referred to some decisions of the Upper Tribunal in which the jurisdiction of the First-tier Tribunal in an appeal under section 40A of the 1981 Act was considered. The earliest of them is *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 439 (IAC) (unreported) given 30 August 2013, which was concerned with deprivation of citizenship under section 40(3) of the 1981 Act. That provision applies where the citizenship results from registration or naturalisation and "the Secretary of State is satisfied that the registration or naturalisation was obtained by means of - (a) fraud, (b) false representation, or (c) concealment of a material fact".

42. In that case, the First-tier Tribunal concluded that it had no power to exercise the Secretary of State's discretion differently, since such a power could only be conferred by express statutory provision. Subject to compliance with the Human Rights Act, the scope of an appeal under section 40A of the 1981 Act, in the view of the First-tier Tribunal, was to examine the facts on which the Secretary of State made the decision, examine the evidence and determine whether the basis upon which the decision was made was made out.

43. The Upper Tribunal, chaired by Upper Tribunal Judge Lane, adopted the opposite approach, holding (para 31) that "[i]f the legislature confers a right of appeal against a decision, then, in the absence of express wording limiting the nature of that appeal, it should be treated as requiring the appellate body to exercise afresh any judgement or discretion employed in reaching the decision against which the appeal is brought". The judge found support for that position in the earlier judgment of the Upper Tribunal in *Arusha and Demushi (Deprivation*

*of Citizenship*) [2012] UKUT 80 (IAC); [2012] Imm AR 645, another case concerned with a decision made under section 40(3). However, the judge mistakenly understood the judgment in that case to have “approved” (para 28) remarks made by the First-tier Tribunal, which the Upper Tribunal had in reality merely recorded (see paras 11 and 14 of its judgment). The judge also found support in remarks made by a minister in the course of a debate during the passage of the 2002 Act through Parliament, which he mistakenly treated (para 34) as revealing Parliament’s intention, applying *Pepper v Hart* [1993] AC 593 in a manner which was disapproved in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 58-60. The judge also cited textbook authority that a fresh exercise of judgment was excluded if the decision involved a consideration of matters which were non-justiciable, and stated that that could not possibly be said of a decision under section 40: a questionable proposition so far as some decisions under section 40(2) are concerned, but one which can be accepted in relation to section 40(3). However, the apparent reasoning, that (1) an appellate body’s ability to re-take a discretionary decision is excluded if the subject-matter is non-justiciable, and (2) the subject-matter of this decision is not non-justiciable, therefore (3) this decision can be re-taken by the appellate body, is fallacious. It depends on the unstated premise that an appellate body can always re-take a discretionary decision unless the subject-matter is non-justiciable: a premise which, as explained below, is incorrect. The judge also referred in *Deliallisi* to a number of potentially helpful authorities concerned with the scope of appellate jurisdiction, but did not discuss them. It will be necessary to return to some of those authorities.

44. A different approach was adopted by the Upper Tribunal, chaired by Mr C M G Ockelton, in *Pirzada (Deprivation of Citizenship: General Principles)* [2017] UKUT 196 (IAC); [2017] Imm AR 1257. He stated at para 9 of his judgment that section 84 of the 2002 Act did not apply to appeals under section 40A of the 1981 Act, but added that the grounds of appeal, in appeals under section 40A of the 1981 Act, must be directed to whether the Secretary of State’s decision was empowered by section 40, and that “[t]here is no suggestion that a Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-sections (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State’s discretion.”

45. In *BA (Deprivation of Citizenship: Appeals)* [2018] UKUT 85 (IAC); [2018] Imm AR 807 the Upper Tribunal, chaired by Lane J, repeated what had been said in *Deliallisi* and stated that the passage just cited from *Pirzada* was accordingly not to be followed. In support of his view of the proper ambit of an appeal under section 40A, Lane J cited the decision of this court in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799. However, that decision was not concerned with an appeal under section 40A, but with an immigration appeal subject to the pre-2014 version of section 84 of the 2002 Act (para 36 above), and was therefore not in point.”

54. At [46]–[50], Lord Reed dealt with two cases concerned with the scope of appeals and which were referred to in *Deliallisi*: *John Dee Ltd v Comrs of Customs and Excise* [1995] STC 941 and *Banbury Visionplus Ltd v Revenue and Customs Comrs* [2006] EWHC 1024 (Ch); [2006] STC 1568. At [46], Lord Reed observed:

“It is apparent from them that the principles to be applied by an appellate body, and the powers available to it, are by no means uniform. At one extreme, some

authorities, concerned with licensing appeals to courts of summary jurisdiction, have held that such appeals should proceed as re-hearings, reflecting the terms of the relevant legislation and the procedures followed by such courts. Other authorities, concerned with appeals to the Court of Appeal against discretionary decisions by lower courts, have held that the scope of the appellate jurisdiction was much more limited. Modern authorities concerned with the scope of the jurisdiction of tribunals hearing appeals against discretionary decisions by administrative decision-makers have adopted varying approaches, reflecting the nature of the decision appealed against and the relevant statutory provisions.”

55. At [51]–[62], Lord Reed considered the decision of the House of Lords in SSHD v Rehman [2001] UKHL 47 concerned with an appeal to SIAC under s.2 of the 1997 Act against a deportation decision made on the basis that the Secretary of State deemed the individual’s deportation to be “conducive to the public good”. Lord Reed pointed out that the Secretary of State had relied on interests of national security in that case.
56. At [63]–[70], Lord Reed set out his reasoning which led to his conclusion that the scope of any appeal to SIAC against a decision under s.40(2) was limited to public law (or human rights) grounds and SIAC was not entitled to determine the underlying statutory criterion (‘conducive to the public good’) or exercise the statutory discretion for itself. Lord Reed said this:

“63. Considering, against that background, the functions and powers of SIAC in an appeal under section 2B of the 1997 Act against a decision to deprive a person of their citizenship under section 40(2) of the 1981 Act, it is clearly necessary to examine the nature of the decision and any statutory provisions which throw light on the matter, bearing in mind that the jurisdiction is entirely statutory.

64. It is also necessary to bear in mind that the appellate process must enable the procedural requirements of the ECHR to be satisfied, since many appeals will raise issues under the Human Rights Act. Those requirements will vary, depending on the context of the case in question. In the context of immigration control, including the exclusion of aliens, the case law of the European Court of Human Rights establishes that they generally include, in particular, that the appellant must be able to challenge the legality of the measure taken against him, its compatibility with absolute rights such as those arising under articles 2 and 3 of the ECHR, and the proportionality of any interference with qualified rights such as those arising under article 8. SIAC must also be able to allow an appeal in cases where the Secretary of State’s assessment of the requirements of national security has no reasonable basis in the facts or reveals an interpretation of “national security” that is unlawful or arbitrary: see, for example, *IR v United Kingdom* (2014) 58 EHRR SE14, paras 57-58 and 63-65 (concerning an appeal under section 2 of the 1997 Act, prior to the amendments made by the 2014 Act). A more limited approach has been adopted in cases concerned with deprivation of citizenship. The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under article 8. In determining whether there is a breach of that article, the Court has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant. In determining arbitrariness, the Court considers whether the

deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE18, paras 49-50 and 54-61.

65. Section 2B of the 1997 Act confers a right of appeal, in distinction to sections 2C to 2E, which provide for “review”. The latter provisions require SIAC to apply the principles which would be applied in judicial review proceedings, and enable it to give such relief as may be available in such proceedings: see section 2C(3) and (4), and the equivalent provisions in sections 2D and 2E. No such limitations are imposed upon SIAC when determining an appeal under section 2B. It is also relevant to note section 5(1)(b), which enables the Lord Chancellor to make rules regulating “the mode and burden of proof and admissibility of evidence”. Clearly, appeals involving questions of fact as well as points of law are contemplated. That is also reflected in the rules made under section 5.

66. In relation to the nature of the decision under appeal, section 40(2) provides:

“(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.”

The opening words (“The Secretary of State may ...”) indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State’s exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.

67. The statutory condition which must be satisfied before the discretion can be exercised is that “the Secretary of State is satisfied that deprivation is conducive to the public good”. The condition is not that “SIAC is satisfied that deprivation is conducive to the public good”. The existence of a right of appeal against the Secretary of State’s decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.

68. As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of



statutory appeals, from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

69. For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29."

57. Then at [71], Lord Reed set out SIAC's function in an appeal against a decision under s.40(2) as follows:

"71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State

could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

58. Lord Reed repeated, in slightly different language, the scope of any such appeal limited to public law grounds or human rights challenge at [119] as follows:

"119. The scope of SIAC's jurisdiction in an appeal against a decision taken under section 40(2) was summarised in para 71 above: first, to determine whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety; secondly, to determine whether he has erred in law, for example by making findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held; thirdly, to determine whether he has complied with section 40(4); and fourthly, to determine whether he has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act."

59. As will be plain, in an appeal to SIAC against a decision taken under s.40(2) of the 1981 Act, the approach in *Deliallisi* does not apply. The challenge is limited to public law or human rights grounds. Subject to the need for rationality, the underlying facts are a matter for the Secretary of State and the discretion cannot be exercised by SIAC.

### **Is the Approach in *Begum* Applicable to this Appeal?**

60. Mr O'Ryan submitted that it did not. He submitted that the Supreme Court had been concerned with an appeal under s.40(2) and with an appeal to SIAC where national security issues were in play. He submitted that approach did not apply to an appeal against a decision under s.40(2) – as in this case – or, indeed, to the First-tier Tribunal in such circumstances. I do not accept those submissions.

61. First, whilst the Supreme Court was concerned with an appeal to SIAC and an appeal against the decision under s.40(2), its reasoning cannot be limited to such appeals and not be applicable to appeals to the First-tier Tribunal against decisions taken under s.40(3).
62. The Supreme Court referred extensively to the Upper Tribunal's decisions in Deliallisi and BA which were concerned with appeals to the First-tier Tribunal against decisions taken under s.40(3). The Supreme Court was highly critical of those decisions. Lord Reed plainly saw it as a necessary stepping stone to his ultimate conclusion as to the scope of an appeal to SIAC against a decision under s.40(3) that the approach of the Upper Tribunal was wrong. It would be very surprising if the Supreme Court, whilst expressing this trenchant criticism, intended to leave standing the UT's decisions in appeals to the FtT against decisions made under s.40(3). The very same criticism undermines the Court of Appeal's "endorsement" of the UT's decisions in KV. Whilst KV was not apparently cited to the Supreme Court, and was definitely not referred to by Lord Reed, it cannot any longer be taken to represent the law.
63. Secondly, Lord Reed's reasoning applies equally to appeals to the First-tier Tribunal against decisions taken under s.40(3). The legislative scheme that was important in determining the scope of the appeal in Begum applies to appeals to the First-tier Tribunal against decisions whether taken under s.40(3) or s.40(2).
- (1) There are no stated grounds of appeal whether the appeal is to SIAC or the FtT. There is no statutory ground explicitly allowing a consideration of factual matters or allowing either tribunal to exercise discretion for itself.
  - (2) Both s.40(2) and s.40(3) are phrased as vesting determination of the triggering criterion in both provisions in the Secretary of State ("...if the Secretary of State is satisfied...") and not the tribunal.
  - (3) Both s.40(2) and s.40(3) place the discretion on the Secretary of State ("may") to deprive an individual of their citizenship on the stated grounds and not the tribunal.
  - (4) The stated grounds under both s.40(2) and s.40(3) fall within the purview of the Secretary of State. Where issues of national security etc. arise, a tribunal is likely to be cautious in taking a different view from the Secretary of State. That, however, does not alter the jurisdiction of the relevant tribunal but rather points to the need for deference or, in some cases, recognition of the non-justiciable nature of the subject matter. Of course, that is much more likely to occur in an appeal to SIAC. It is also more likely to occur in an appeal against a decision under s.40(2). But there can be no assumption that appeals against decisions under s.40(2) will be to SIAC and appeals against s.40(3) decisions to the FtT. Some decisions taken under s.40(2) may not be certified on national security grounds and the appeal will be properly brought in the FtT. Likewise, some decisions taken under s.40(3) may be certified on national security grounds such that an appeal could only be brought to SIAC.

It is, therefore, neither the judicial forum (necessarily), nor whether the decision is taken under s.40(2) or s.40(3), that informs the scope and nature of an appeal. Rather, it is the nature of the statutory provisions which vest decision making in the Secretary of State including deciding whether to exercise discretion if satisfied that the relevant condition whether found in s.40(2) or s.40(3) is met and limits, therefore, the scope of any appeal to public law principles and not permitting of a ‘full-blown’ merits appeal.

64. It is, perhaps, noteworthy that the Upper Tribunal in Pirzada expressed the view that the First-tier Tribunal’s jurisdiction was limited, in effect, to public law grounds in appeals against decisions made both under s.40(2) and s.40(3). That was a decision which, not only did Lord Reed not seek expressly to disapprove, but in the context of his consideration of the decisions in the Upper Tribunal appeared to find favour with him over the decisions in Deliallisi and BA.
65. In my judgment, the Supreme Court in Begum set out the proper scope of an appeal, under s.40A of the 1981 Act whether the appeal is brought to SIAC or the First-tier Tribunal and whether the appeal is against a decision taken under s.40(2) or s.40(3). The scope of such appeals is as set out Lord Reed in [71] and [119].
66. For these reasons, therefore, I reject Mr O’Ryan’s submissions and I accept those of Mr Clarke.

### **Begum Applied to this Appeal**

67. It is readily apparent, therefore, that Judge Davies erred in law in his approach to the scope of the appeal in this case. At [16]–[24], Judge Davies plainly applied the approach of the UT in Deliallisi, BA and of the Court of Appeal in KV and went on to find the underlying facts. At para [52] he said this:
- “... I must consider whether the Secretary of State should have exercised his discretion differently and I must carry out the balancing exercise referred to in KV. I remind myself that is not just a matter of whether the decision was rational, it must also be right”.
68. The judge then concluded that the decision was not “right” and allowed the appeal. In doing so, the judge failed to apply the approach now set out in Begum and in doing so erred in law. Given this approach was the settled law at the time, the judge’s approach is entirely understandable but, in retrospect, as a result of Begum that was the wrong legal approach.

### **Materiality of the Error of Law?**

69. Mr O’Ryan’s case at the resumed hearing was that the appellant’s answers in response to questions 3.6, 3.7 and 3.12 on his nationality application form were not false. He was not required to disclose his cautions or that he had been on the Sex Offenders Register between 2002 and 2004 or, as Mr Clarke now argued, the underlying facts of those convictions/cautions.

70. Mr O’Ryan submitted that, if the approach in Begum was applicable, the Upper Tribunal applying public law principles should conclude that there was no evidence upon which the Secretary of State could, properly directing herself, reach the conclusion that the appellant had acted fraudulently, had made false representations or had concealed material facts as required by s.40(3).

71. Question 3.6 of the citizenship application form was as follows:

“Do you have any criminal convictions in the UK or any other country (including traffic offences) or any civil judgments made against you?”

Below that question it is stated:

“If you have answered **Yes** to question 1 above please give details below for each sentence starting with the most recent one. If you have received more than two sentences you should continue on page 13. Convictions spent under the Rehabilitation of Offenders Act 1974 need not be disclosed (see guide page 18). If you have answered No please go to question 3.7”.

72. In response to that question the appellant ticked the box “No”.

73. Question 3.7 was in the following terms:

“Are your details recorded by the police in respect of certain sexual offences, i.e. on the ‘Sex Offenders Register’, or are you subject to a notification order, a sexual offences prevention order, a foreign travel order, or a risk of sexual harm order?”

74. In response to that question the appellant ticked the box “No”.

75. Question 3.12 was in the following terms:

“Have you engaged in any other activities which might indicate that you may not be considered a person of good character?”

76. In response to that question the appellant ticked the box “No”.

77. Mr Clarke, as I have already indicated, did not rely on the appellant’s answers to questions 3.6 or 3.7. He accepted that the appellant had no obligation to disclose his conviction and two cautions as they were “spent”. That, as question 3.6 itself recognises, in the form’s own rubric, is correct.

78. Further, Mr Clarke did not contend that the appellant was required to disclose that he had been on the Sex Offenders Register between 2002 and 2004 in answer to question 3.7 as that question was phrased in the present tense “Are your details recorded by the police” (my emphasis) and, entirely truthfully, the appellant answered ‘No’ to that question as he had ceased to be on the Sex Offenders Register in 2004, some four years before he completed the form.

79. Mr Clarke, however, submitted that the appellant was under an obligation to disclose the underlying circumstances of his offending in answer to question 3.12 as those were “any other activities which might indicate” that the appellant may not be considered “a person of good character”. He submitted that “other activities” meant

anything which did not fall within the earlier questions which might be relevant to the appellant's good character.

80. Mr O'Ryan submitted that the appellant had no such obligation in response to question 3.12. He submitted that the question could not require the appellant to disclose, in effect, the matters relating to his convictions which were spent. He submitted that it was not consistent with the respondent's own guidance on "Naturalisation as a British Citizen – a guide for applicants" (April 2008) at page M21 of the respondent's bundle. That referred to disclosure of offences such as terrorism, crimes against humanity, war crimes and genocide but also that applied, on its own terms, only to circumstances where an individual had *not been convicted of an offence* but his character might be in doubt.
81. I do not accept Mr Clarke's submissions and, with one caveat, I prefer those of Mr O'Ryan.
82. I do not accept that question 3.12 requires an individual to disclose the circumstances which gave rise to a conviction or convictions when those convictions are themselves spent. To do so runs counter to the provisions in the Rehabilitation of Offenders Act 1974, in particular s.4(2) of that Act which provides as follows:
- “(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, *conduct or circumstances* is put to him or to any other person otherwise than in proceedings before a judicial authority –
- (a) the question shall be treated as not relating to spent convictions or *to any circumstances ancillary to spent convictions*, and the answer thereto may be framed accordingly; and
- (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or *any circumstances ancillary to a spent conviction* in his answer to the question”. (my emphasis)
83. Although the provisions of the Rehabilitation of Offenders Act 1974, as both parties recognise, applies to the appellant the position would be different after 1 October 2012 as a result of s.56A of the UK Borders Act 2007 which disapplies the relevant provisions of the 1974 Act in respect of a "relevant immigration decision" which includes a decision made under the 1981 Act as to a person's good character (s.56A(2)). However, as I have said, it was common ground that s.56A has no application to the appellant's application in 2008 which was made before s.56A came into force.
84. In my judgment, as the emphasised words in s.4(2) of the Rehabilitation of Offenders Act 1974 make plain a person when asked about not only their convictions but also their "conduct or circumstances" is not required to respond in relation to any spent convictions or "to any circumstances ancillary to spent convictions". In my judgment, the information which Mr Clarke submitted the appellant should have

disclosed in answer to question 3.12 is captured by that provision and the appellant was not required to disclose it.

85. In any event, in considering what “*other activities*” might be contemplated by section 3.12, it would be a natural and reasonable interpretation of that provision that it related to matters not otherwise covered by the earlier questions including the appellant’s spent convictions, his cautions and that he had been on the Sex Offenders Register.

86. Further, the respondent’s own guidance, to which I was referred, relates the relevant questions to character issues not arising from convictions. The relevant section at paras 3.7–3.11 begins with the crossheading:

“What if you have *not been convicted* but your character may be in doubt?” (my emphasis)

87. Clearly, the appellant had been convicted of these offences, that is accepted as a result of him agreeing to the cautions. He did not fail to disclose conduct which might go to court or which was awaiting a hearing in court which is specifically covered in para 3.7 of the guidance. Whilst the guidance goes on to refer to such very serious offences as terrorism, genocide, crimes against humanity and war crimes, I do not accept that “*other activities*” are necessarily so restricted. As the guidance itself states:

“You must say whether you have been involved in anything which might indicate that you are not of good character”.

That is altogether broader and, in my judgment, properly reflects what question 3.12 seeks by way of information from an applicant for citizenship.

88. However, as I have indicated, “*other activities*” cannot, in my judgment, encompass the underlying circumstances that gave rise to the spent convictions and placing of an individual, in the past, on the Sex Offenders Register when that information, as Mr Clarke accepted, is not required by questions 3.6 and 3.7.

89. It follows, therefore, that if the judge had approached his task in this appeal in the light of what was subsequently determined in Begum to be the correct approach, there was only one possible outcome. The judge could not rationally be satisfied that the appellant had committed fraud, misrepresentation or concealed a fact in relation to information which he was required to disclose in answer to question 3.12 (and of course also questions 3.6 and 3.7).

90. Applying the approach summarised by Lord Reed at [71] and [119] in Begum, the only possible outcome of the appeal was that the judge should have allowed it, albeit on a different basis than he actually did, because there was no factual basis upon which the Secretary of State could be satisfied, applying public law principles, that the requirement in s.40(3) was met (see Edwards v Bairstow cited by Lord Reed at [68]). As a result, the Secretary of State unlawfully decided to deprive the appellant of his citizenship under s.40(3).

91. In those circumstances, although I have concluded, as a result of the law as now understood following the Supreme Court's decision in Begum, that the judge erred in law in his approach to the appeal, the outcome of the appeal was inevitable and the judge's decision to allow the appellant's appeal should stand and not be set aside.

**Decision**

92. For the above reasons, the decision of the First-tier Tribunal did involve the making of an error of law. However, the outcome of the appeal would, applying the correct law, have inevitably been the same, namely that the appeal would have been allowed. In those circumstances, the judge did not materially err in law in allowing the appeal and his decision to allow the appeal stands. Alternatively, if I were to re-make the decision, for the same reasons, the appeal is allowed.
93. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
25 May 2021