Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00058/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Remotely by Microsoft Teams
On 22 July 2021

Decision & Reasons Promulgated
On 26 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SHABAN CEVANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Foot, Counsel instructed by Direct Access
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

1. At the outset of the hearing before me, Ms Foot who represented the appellant sought an anonymity direction under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). The basis of that application was that the appellant has a 2 year old daughter. The case concerns the appellant obtaining British citizenship by fraud (which he accepts) and that this may cause problems for his child in the Albanian community.

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2. On behalf of the respondent, Mr Bates opposed the making of an anonymity order pointing out that the proceedings had not been anonymised to this point and there was no evidence to support the claim that the fact that the appellant had obtained his nationality by deception would cause problems for his child in the Albanian community.

3. I indicated that I would make a decision on the application in my written decision on the appeal which I now do. In reaching my decision, I take into account the UTIAC President's Guidance Note 2013 No 1 on anonymity orders. I bear in mind the best interests of the appellant's child and I note that the presumption is in favour of 'open justice' (see Smith (appealable decision; PTA requirements; anonymity) [2019] UKUT 00216 (IAC) at [68]).

4. I have found helpful the approach of the UT in Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 128 (IAC) at [120]-[122]:

> "120. We are mindful of Guidance Note 2013 No 1 concerned with the issuing of an anonymity direction and we observe that the starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: *Re: Guardian News & Media Ltd* [2010] UKSC 1; [2010] 2 AC 697.
>
> 121. Paragraph 18 of the Guidance Note confirms that the identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. We observe that we have not named either the appellant's wife or their children and no reference is made to where the family reside, the ages of the children or what school they attend.
>
> 122. Even in cases involving exploration of intimate details of an appellant's private and family life, the full force of the open justice principle should not readily be denigrated from: *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB**)** …"

5. There is, as Mr Bates submitted, no evidence to support any risk or direct adverse consequence to the appellant's child as a result of his deception in obtaining British nationality. I have not identified the appellant's daughter in this decision or the family's whereabouts in the UK. In my view, neither the interests of the child nor in the proper administration of justice outweigh the 'open justice' principle which is a fundamental principle of the English legal system.

6. In those circumstances, I decline to make an anonymity direction in this appeal.

Introduction

7. The appellant is a citizen of Albania who was born on 20 August 1986. He arrived in the United Kingdom on 25 July 1999 together with his brother, K. On 20 August 1999, both the appellant and his brother claimed asylum. At that time, they gave their nationality as Kosovan and misrepresented their dates of birth. The appellant claimed that he had been born on 20 August 1987 and his brother claimed that he

was born on 22 March 1989 when, in fact, they were each a year older. In other words, in addition to misrepresenting their nationality as Kosovan they both claimed to be one year younger than they in fact were.

8. The appellant was granted four years' leave as a minor on 26 July 2001. His brother was also granted leave as a minor.

9. On 20 August 2004, the appellant became an adult on his 18th birthday. Of course, on the basis of the age that he was (then) claiming to be he would not have been 18 until 20 August 2005.

10. On 13 July 2005, both the appellant and his brother applied for ILR. They were both granted ILR on 8 November 2005. At the time, due to the misrepresentation of the appellant's date of birth, he was said to be a minor at the date of the application on 13 July 2005 although he was, in fact, an adult as, on his true date of birth, he had become 18 years old on 20 August 2004. His brother, whether on the basis of his falsely claimed date of birth as 22 March 1989 or on the basis of his true date of birth of 22 March 1988, was a minor both at the date on which his ILR application was made on 13 July 2005 and on the date that it was granted on 8 November 2005.

11. On 12 June 2016, the appellant made an application for British citizenship with his brother (who at the time was claiming to be a minor) as a dependant. Both the appellant and his brother gave a false nationality (Kosovan) and their false dates of birth in the application. Both were granted British citizenship on 20 December 2006.

12. Subsequently, the Secretary of State discovered as a result of verification checks carried out by the Status Review Unit that both the appellant and his brother had falsely stated their nationality and place of birth, together with their dates of birth.

13. The Secretary of State, relying upon the appellant's false statements as to his nationality, place of birth and date of birth both at the time of his application for ILR and also in his application for British citizenship, decided to deprive him of his British nationality under s.40(3) of the British Nationality Act 1981 (the "BNA 1981").

14. As I understand it, from what I was told by the representatives before me, the Secretary of State decided not to deprive the appellant's brother of his British citizenship on the basis that, unlike the appellant, at the time he applied for ILR he was a minor.

15. On 11 March 2020, the appellant appealed against the respondent's decision to deprive him of his British citizenship under s.40(3) of the BNA 1981. The appellant accepted that he had obtained his nationality by fraud but argued that discretion under s.40(3) should have been exercised in his favour, not least because his brother had not been deprived of his citizenship. In addition, the appellant relied upon Art 8 of the ECHR.

16. In a decision sent on 17 February 2021, Judge K R Moore dismissed the appellant's appeal. Accepting, as the appellant had conceded, that the appellant had obtained

his British citizenship by deception, the judge found that there were no "compelling mitigating factors" which would render deprivation of his citizenship unfair and unreasonable and that discretion should be exercised differently so as to not deprive him of that citizenship. In addition, the judge found that the decision to deprive him of citizenship did not breach Art 8 of the ECHR.

The Appeal to the Upper Tribunal

17. The appellant appealed to the Upper Tribunal. He did so on three grounds.

18. First, the judge erred in law by failing to give adequate reasons why there were not compelling mitigating factors which rendered deprivation of his citizenship unfair and unreasonable such that discretion should be exercised in his favour.

19. Secondly, the judge had erred in law in failing to apply the respondent's policy set out in chapter 55 "Deprivation and Nullity of British Citizenship" at para 55.7.5.

20. Thirdly, the judge failed properly to assess the appellant's claim under Art 8 and the exercise of discretion under s.40(3) independently.

21. On 16 March 2021, the First-tier Tribunal (Judge Parkes) granted the appellant permission to appeal on the basis that it was difficult to see what distinction there was to draw between the appellant and his brother both of whom had entered as minors and both applied for citizenship as adults knowingly using false details.

22. The appeal was listed for a remote hearing on 22 July 2021 at the Cardiff Civil Justice Centre. I was based in court and Ms Foot, who represented the appellant, and Mr Bates, who represented the respondent, joined the hearing remotely by Microsoft Teams as did the appellant.

The Law

23. Section 40(3) of the BNA 1981 provides as follows:

> "40.(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."

24. An appeal against a decision under s.40(3) lies principally to the First-tier Tribunal under s.40A(1) of the BNA 1981. 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".

25. In relation to appeals, 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 NIA Act 2002. 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 s.40(3) of the BNA 1981. 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 and to the FtT.

The SSHD's Policy/Guidance

26. In reaching decisions in relation to deprivation of citizenship, the Secretary of State has a policy set out in Chapter 55, "Deprivation and Nullity of British Citizenship".

27. Paragraphs 55.7.1-55.7.3 set outs out the general position concerning depravation under s.40(3):

> "55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.
>
> 55.7.2 This will include but is not limited to:
>
> • Undisclosed convictions or other information which would have affected a person's ability to meet the good character requirement
>
> • A marriage/civil partnership which is found to be invalid or void, and so would have affected a person's ability to meet the requirements for section 6(2)
>
> • False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration
>
> 55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action."

28. Paragraph 55.7.5 provides for circumstances in which the Secretary of State will not "in general" deprive a person of British citizenship:

> "55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:
>
> • Where fraud postdates the application for British citizenship it will not be appropriate to pursue deprivation action.
>
> • If a person was a minor on the date at which they applied for citizenship we will not deprive of citizenship
>
> • If a person was a minor on the date at which they acquired indefinite leave to remain and the false representation, concealment of material fact or fraud arose at that stage and the leave to remain led to the subsequent acquisition of citizenship we will not deprive of citizenship
>
> However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation."

29. Paragraph 55.7.7 indicates that in depriving a person of citizenship there should be "an intention to deceive" and that "an innocent error or genuine omission should not lead to deprivation".

30. At para 55.7.8, the guidance deals with "complicity" as follows:

> "55.7.8 **Complicit**
>
> 55.7.8.1 If the person was a child at the time the fraud, false representation or concealment of material fact was perpetrated, the caseworker should assume that they were not complicit in any deception by their parent or guardian.
>
> 55.7.8.2 This includes individuals who were granted discretionary leave until their 18th birthday having entered the UK as a sole minor who can not be returned because of a lack of reception arrangements. Such a minor may be granted ILR after they reach the age of 18 without need to succeed under the Refugee Convention or make a further application but the fraud was perpetrated when the individual was a minor.
>
> 55.7.8.3 However, where a minor on reaching the age of 18 does not acquire ILR or other leave automatically and submits an application for asylum or other form of leave which maintains a fraud, false representation or concealment of material fact which they adopted whilst a minor, they should be treated as complicit.
>
> 55.7.8.4 In the case of an adult, the fact that an individual was advised by a relative or agent to give false information does not indicate that they were not complicit in the deception.
>
> 55.7.8.5 All adults should be held legally responsible for their own citizenship applications, even where this is part of a family application. Complicity should therefore be assumed unless sufficient evidence in mitigation is provided by the individual in question as part of the investigations process."

31. Para 55.7.10 requires that the decision should be "balanced and reasonable" "taking into account the seriousness of the fraud, misrepresentation or concealment":

> "55.7.10 **Reasonable/Balanced**
>
> 55.7.10.1 The caseworker should consider whether deprivation would be seen to be a balanced and reasonable step to take, taking into account the seriousness of the fraud, misrepresentation or concealment, the level of evidence for this, and what information was available to UKBA at the time of consideration.
>
> 55.7.10.2 Evidence that was before the Secretary of State at the time of application but was disregarded or mishandled should not in general be used at a later stage to deprive of nationality. However, where it is in the public interest to deprive despite the presence of this factor, it will not prevent the deprivation."

32. Then at para 55.7.11 mitigating factors are considered. At 55.7.11.1 caseworkers are instructed to "consider any mitigating circumstances", examples of which are then given in para 55.7.11.3-55.7.11.5.

33. Paragraph 55.7.11.2 deals with applications made on behalf of an adult and indicates examples of what will not amount to mitigation as follows:

> "55.7.11.2 All adults are expected to take responsibility for the information they provided on acquisition of ILR and/or citizenship and the following will not be examples of mitigation:

- Where the applicant claims that a family member acted on their behalf
- Where the applicant claims that a representative or interpreter advised them to provide false details
- Where an applicant claims that he or she was coerced into providing false information or concealing a fact, but has since had the opportunity to advise the Home Office of the correct position but failed to do so"

R(Begum) v SIAC

34. At the outset of the hearing I raised with both representatives the recent decision of the Supreme Court in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7.

35. In that case, the Supreme Court considered the scope of an appeal to the SIAC against a decision to deprive an individual of their citizenship under s.40(2) of the BNA 1981 on the basis that it was "conducive to the public good". In Begum, the Supreme Court did not follow, and disapproved, the earlier approach in the Upper Tribunal in Deliallisi (British citizenship: deportation appeal: scope) [2013] UKUT 439 (IAC). The Supreme Court concluded that the scope of SIAC's jurisdiction was limited to public law principles or whether the decision breached s.6 of the Human Rights Act 1998, in particular breached Art 8 of the ECHR. The Supreme Court concluded that the appeal to SIAC was not a merits based appeal apart from the requirement to determine whether the decision breached the individual's human rights. Consequently, it was not for SIAC to determine whether the condition precedent for deprivation was satisfied under s.40(2), namely whether it was conducive to the public good and it was not for SIAC to exercise for itself the statutory discretion to deprive the individual of citizenship.

36. Ms Foot, in her oral submissions, accepted that the approach in Begum applied not only to appeals under s.40(2) to SIAC but also in appeals to the First-tier Tribunal where the deprivation of citizenship was effected under s.40(2) on the basis that the individual had obtained citizenship by means of "fraud", "false representation" or "concealment of a material fact". Mr Bates reserved the Secretary of State's position on this issue.

37. Both representatives indicated that given the grounds of appeal, the issue of whether the UT's cases such as Deliallisi (and BA (Deprivation of Citizenship: Appeals) Ghana [2018] UKUT 85 (IAC)) were no longer good law in an appeal against a decision under s.40(3), was immaterial as the substance of the grounds were either a public law challenge to the exercise of the discretion to deprive the appellant of his citizenship or the challenge was to the judge's decision in respect of Art 8. It was, therefore, not material whether the judge, not at all surprisingly as his decision preceded that of the Supreme Court in Begum, had applied the approach in the UT's cases such as Deliallisi.

38. The approach of both representatives is, no doubt, a pragmatic one in the context of this appeal. A similar approach was adopted before the Court of Appeal in Laci v SSHD [2021] EWCA Civ 769 at [40]. It is accepted that the appellant satisfied the

condition precedent for depriving him of his citizenship, namely that he had obtained that citizenship by means of "fraud" or a "false representation". Further, the appellant's challenge to the judge's approach to his appeal itself rested upon public law principles. Those were that the judge had erred in law by failing properly to apply the Secretary of State's policy in relation to deprivation of citizenship in reaching a decision to deprive the appellant of his citizenship whilst reaching the opposite decision in relation to the appellant's brother. That is a public law challenge (see Lumba (Congo) v SSHD [2011] UKSC 12). Also, the grounds contend that the judge failed to consider at all, or at least properly, the exercise of discretion under s.40(3). To that extent, therefore, the issues are essentially public law issues in any event.

39. Finally, in large part, the judge's decision concerned Art 8 of the ECHR which, even after Begum, required the judge to form his own view, based upon the evidence, as to the merits of the appellant's claim that the deprivation of his citizenship breached Art 8 of the ECHR.

40. That said, therefore, it is strictly unnecessary to determine whether the approach in Begum applies in an appeal to the First-tier Tribunal against a decision made under s.40(3). As I indicated to both representatives at the hearing, in an earlier unreported decision (DC/00094/2019), I directly addressed this issue and concluded that the approach in Begum did, indeed, apply in an appeal to the First-tier Tribunal against a decision under s.40(3). Given the position taken by the representatives in this appeal, it is only necessary to set out my reasoning relatively briefly.

41. In Begum, Lord Reed (delivering the judgment of the Supreme Court) set out at [63]–[70] his reasons for concluding that the approach adopted in the earlier UT decisions such as Deliallisi did not apply in an appeal to SIAC against a decision to deprive an individual of her citizenship under s.40(2) on the grounds that it was "conducive to the public good".

42. At [61]–[65] of my decision in DC/00094/2019, I set out my reasons why, in my view, Lord Reed's reasoning applied equally to appeals to the First-tier Tribunal against decisions taken under s.40(3). Those reasons (with typographical corrections) were as follows:

> "61. First, whilst the Supreme Court was concerned with an appeal to SIAC and an appeal against the decision under s.40(3), 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 he 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 [by] Lord Reed in [71] and [119]."

43. In consequence, the scope of an appeal to the FtT against a decision under s.40(3), reflects the scope of an appeal to SIAC under s.40(2) as set out in Lord Reed's judgment at [68], [71] and [119]. The summary at [119] is 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."

44. However, as I have already noted, and it is common ground between the parties, the substance of the appellant's challenge is based upon public law principles and a challenge to the judge's decision under Art 8 which had, necessarily, to be a decision made by the judge on the evidence.

45. With that in mind, I turn to the grounds.

Discussion

46. Grounds 1 and 2 both relate to the judge's assessment of the appellant's claim when contrasted with that of his brother whom the Secretary of State had decided not to deprive of his citizenship. The essence of the appellant's case is that the judge was wrong to draw a distinction between the respondent's decision in relation to the appellant and that of his brother when he concluded at para 26 of his decision that:

> "I do not accept that there are compelling mitigating factors in this case which would render deprivation unfair and unreasonable taking into account the appellant's history and that he was only 12 years of age when he came to the United Kingdom, and that his brother who entered with him was also a minor, but was not facing deprivation, and that bearing all this in mind a discretion to deprive should be exercised differently in relation to this appellant".

47. In the grounds and Ms Foot's oral submissions, it is contended that the judge failed to give adequate reasons for that finding, in particular at para 27 wrongly concluding that

> "the only reason for [the differential treatment of the appellant and his brother] was due to the age of the younger brother at the time of the initial application and subsequently".

48. Tying that up to ground 2, and the respondent's policy as set out in chapter 55.7.5, Ms Foot submitted that the judge had wrongly taken into account that the appellant's brother was "younger" (implicitly a minor) subsequent to his "initial application". In fact, although the respondent had been deceived by the appellant and his brother as to their ages, whilst the appellant was an adult both at the time of applying for ILR (and its grant) and when applying for citizenship (and its grant), the appellant's brother had only been a minor at the time of the ILR application and grant. By the time of the citizenship application, the appellant's brother was, on his true date of birth, an adult.

49. Relying on para 55.7.5 of the respondent's policy, Ms Foot submitted that the judge's decision was not within the spirit of the policy, although she recognised that the policy differentiated between an individual who, although an adult at the time of the

citizenship application and decision, was a minor at the time they acquired indefinite leave to remain.

50. Finally, Ms Foot submitted, relying upon ground 3, that the judge had simply failed to deal with the issue of the exercise of discretion under s.40(3) separate from whether the decision breached Art 8 of the ECHR.

51. Ms Foot's reliance upon the underlying "spirit" of the respondent's policy is difficult to pin down, certainly in any application to the appellant on the basis of a comparison with the decision made in relation to the appellant's brother not to deprive him of his citizenship.

52. Both the Secretary of State and the judge, had to apply the terms of the respondent's policy set out in chapter 55 and, in particular, para 55.7.5 (see Lumba at [26] per Lord Dyson). Of course, a decision maker must follow a published policy unless there are good reasons for not doing so. It is not suggested in this appeal that there was any good reason to depart from the respondent's policy. As will shortly become clear, the respondent properly applied her policy both to the appellant and to his brother, at least so far as what is known about his brother's citizenship application and its precursors.

53. Ms Foot accepted in her oral submissions that by any reference to "substantive unfairness" in the appellant's grounds of appeal, that had to be understood as a public law challenge based upon Wednesbury reasonableness or irrationality as there is no separate public law principle of substantive unfairness. I agree. It suffices to refer to two passages from the judgments in the Supreme Court case of R (Gallaher Group Ltd) v Competition Marketing Authority [2018] UKSC 25 which make that plain.

54. At [41] Lord Carnwath (with whom Lords Mance, Sumption, Hodge and Briggs agreed) said this:

> "In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand - or, in Lord Dyson's words at para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances" - is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

55. At [50] Lord Sumption added:

> "…to say that the result of the decision must be substantively fair, or at least not "conspicuously" unfair, begs the question by what legal standard the fairness of the decision is to be assessed. Absent a legitimate expectation of a different result arising from the decision-maker's statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense."

56. It will be helpful first to consider the respondent's policy set out in chapter 55. In particular the paragraph at 55.7 "Material to the Acquisition of Citizenship" is

relevant. At 55.7.1, the decision-maker is reminded that "if the relevant facts". had they been known at the time of the application for citizenship was considered, would have affected the decision to grant citizenship then deprivation of that citizenship should be considered. At 55.7.2, having set out non-disclosures that may be relevant at 55.7.3, it is stated that the "fraud, false representation or concealment of material fact" should have a "direct bearing on the grant of citizenship" if deprivation is to follow. Jumping ahead slightly to 55.7.7, it is noted that the individual must have an "intention to deceive" and that it not be "an innocent error or genuine omission" before deprivation should follow.

57. At 55.7.8 under the heading "Complicit", it is noted at 55.7.8.1 that if the person under consideration was a child at the time of the "fraud, false representation or concealment of material fact", it should be assumed that they were *not* complicit in any deception by a parent or guardian.

58. Again, at 55.7.8.2, the policy refers to a minor who is granted ILR after they have reached the age of 18 but the fraud was perpetrated when the individual was a minor. That would also be a case where they should also not be assumed to be complicit in any earlier deception.

59. However, at 55.7.8.3, if having reached the age of 18 and having not acquired ILR, an individual makes an application for asylum and maintains a "fraud, false representation or concealment of material fact" which they adopted whilst a minor, in those circumstances, they should be treated as complicit.

60. Finally, in relation to adults the fact that an individual is advised by a relative or agent to give false information, is not a case where they are to be treated as not complicit in the deception (55.7.8.4) and all adults are responsible for their "own citizenship applications, even where this is part of a family application" and complicity should be assumed unless there is sufficient evidence in mitigation (see 55.7.8.5).

61. It follows, as a generality, that the policy recognises that in order to establish the condition precedent there must be an intention to deceive (and not an innocent error); by and large adults are responsible for what is done by them or on their behalf; but minors are not responsible for what is done on their behalf unless, possibly, that fraud or false representation is repeated in an asylum claim once they reach adulthood. But, that later caveat is specifically limited to a case where the minor (now adult) has not acquired ILR.

62. Paragraphs 55.7.11.2 and 55.7.5 are particularly important in this appeal. I have set them out above but, the relevant parts, need to be repeated here. They are relevant, respectively, to the decisions made in respect of the appellant and his brother respectively.

63. Paragraph 55.7.11.2 recognises the responsibility of an adult:

> "All adults are expected to take responsibility for the information they provided on acquisition of ILR and/or citizenship…"

64. Paragraph 55.7.5 provides, so far as relevant:

> "55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:
>
> …
>
> - If a person was a minor on the date at which they applied for citizenship we will not deprive of citizenship.
> - *If a person was a minor on the date at which they acquired indefinite leave to remain and the false representation, concealment of material fact or fraud arose at that stage and the leave to remain led to the subsequent acquisition of citizenship we will not deprive of citizenship.*
>
> However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation".

65. It seems to me that the italicised bullet-point was precisely the one correctly applied by the Secretary of State to the appellant's brother.

66. By contrast, the appellant was an adult both at the time of the ILR application and decision and at the time of his citizenship application and decision. It is accepted that, throughout, he has practised fraud or made a false representation in order to obtain ILR and subsequently citizenship. On the basis of the policy (see 55.7.11.2), his deliberate representations were such as to make him complicit. The italicised bullet-point did not apply to him. Subject to the reasonable and rational exercise of discretion, the Secretary of State and, indeed, the judge correctly applied the policy to him.

67. The appellant's brother was simply in a different position under the policy. He was a minor at the time of the ILR application and grant but he was an adult at the time of the citizenship application and decision. Whilst the policy recognises that following adulthood, an individual may become complicit in a repeated fraud or false representation made previously when he was a minor, 55.7.5, makes plain that "in general" a person who was a minor at the date he acquired ILR (and at which stage the fraud or false representation was initially made) but who subsequently acquires citizenship will not be deprived of citizenship.

68. Mr Bates tentatively suggested this was because, had the person not applied for citizenship, the Secretary of State would not seek to revoke his ILR based upon fraud for which he was not complicit as he was a minor when he acquired the ILR. A person should be in no worse position if he subsequently acquired citizenship as an adult and who would, by virtue of that grant, no longer have ILR which would, of course, not be revived by the loss of citizenship. That may well explain the exception in 55.7.5 which applied to the appellant's brother (but not the appellant). I am not in a position to reach a concluded view upon it. Of course, Ms Foot does not challenge the rationality of the policy but merely its application – differentially – to the appellant when compared to his brother. I see no basis, put forward before me, that

would make the policy (and the differential outcome it creates in a case such as the present) irrational.

69. In summary, Ms Foot might regard the differential treatment of the appellant and his brother as "substantively unfair", that cannot be based upon a misapplication of the respondent's policy, in particular 55.7.5. Both the decision in relation to the appellant and his brother was in accordance with that policy as written.

70. It is impossible, therefore, to conclude that in some way the decision made in relation to the appellant is not in accordance with the "spirit" of the policy. That argument cannot have any purchase if the terms of the policy apply so as to create a differential approach to decisions to deprive the appellant, on the one hand, and his brother, on the other hand, of their citizenship. Likewise, it is simply not possible to establish that, in applying the policy, in accordance with its own terms that there is any argument that the decision in relation to the appellant (on that basis alone) was Wednesbury unreasonable or irrational.

71. It is far from clear to me that in para 27, as Ms Foot contended to be the case, the judge misunderstood the difference between the appellant's situation and that of his brother. When the judge said that the "only reason" for the differential outcome was the age of the younger brother "at the time of the *initial application and subsequently*", the judge does not make clear what he means by the "initial application". It is difficult to construe those words as applying to the deprivation of citizenship application. That was not, on any view, an "initial application" but, in fact, the concluding or final application. Perhaps, or naturally, the reference to the "initial application" is to the ILR application which, as everyone accepts in this appeal, was a necessary precursor to making the citizenship application subsequently. In my view, that is the proper interpretation of what the judge was saying in para 27, namely that, unlike the appellant, the appellant's brother was a minor *initially* at the time of the ILR application and, indeed, *subsequently* for a time although not by the time of the citizenship application. The judge was well aware of the respective histories of the appellant and his brother and I see no reason to read what he said in para 27 as misrepresenting those respective histories. It is perhaps worth noting that at para 11, when relating the appellant's applications history, the judge noted that:

> "…unlike the appellant [the] younger brother had not made a *subsequent application* as an adult and even though there was only an 18 month difference between this appellant and his younger brother, the Respondent will be taking no action against the younger brother whilst depriving the appellant of his nationality, since that citizenship had been obtained by fraud". (my emphasis)

72. The reference to the "subsequent application" is, clearly, there a reference to the citizenship application and not the ILR application which, sensibly read, the judge referred to in para 27 as the "initial application".

73. For these reasons, therefore, I reject both grounds 1 and 2 to the extent that it is contended that the judge failed properly to apply the respondent's policy to the appellant and, in effect, in doing so, reached a Wednesbury unreasonable or

irrational decision in the light of the respondent's decision not to deprive the appellant's brother of his citizenship.

74. Under ground 3, Ms Foot relied on a couple of points in her oral submissions. Ground 3, taken at face value, contends that the judge wrongly simply focused on Art 8 rather than determining whether discretion should be exercised differently.

75. The ground simply fails to recognise what the judge said in para 26 of his decision in which he did not accept that there were any "compelling mitigating factors" which led him to conclude that discretion "should be exercised differently in relation to this appellant". That, in itself, is a separate decision, independent of Art 8, concerning the exercise of discretion. Reading the judge's decision as a whole, it take into account those factors relating to the appellant's circumstances, including that a different decision was made in relation to his brother, in concluding that a breach of Art 8 had not been established.

76. Of course, following Begum applied to an appeal under s.40(3) to the FtT, the true scope of the judge's enquiry should have been whether or not the Secretary of State reached her conclusion in relation to the exercise of discretion contrary to public law principles. Of course, if the judge applying a merits approach, albeit wrongly following Begum, did conclude that discretion should be exercised against the appellant, it would be difficult to reject an argument that he would have reached any conclusion other than that the Secretary of State, on the same evidence, reached a rational and reasonable decision in examining discretion against the appellant.

77. Finally, it is not entirely clear whether Ms Foot sought to challenge the judge's decision under Art 8 other than by reference to a failure to properly apply either the letter or spirit of the respondent's policy: a contention which I have, earlier, rejected.

78. The judge correctly identified the "heavy weight" which must be placed upon the public interest when an individual has by fraud or false representation obtained British citizenship. At para 22 of his decision, the judge set out a passage from the Upper Tribunal's decision in Hysaj where the UT said (at [31]) that:

> "... where the requirements of section 40(3) are satisfied, the Tribunal is required to place significant weight on the fact that Parliament has decided, in the public interest, that a person who has employed deception to obtain British citizenship should be deprived of that status".

79. Mr Bates placed reliance upon what was said by the Court of Appeal in Laci v SSHD. At [37], Underhill LJ (with whom Newey and Baker LJJ agreed) said this:

> "As to point (4) in *BA*, the broad thrust of what the UT says is that only exceptionally will it be right for a person who has obtained British citizenship by (in short) deception to be allowed to retain it. In my view that is entirely correct: the reason is self-evident. It is in line with what Leggatt LJ says in the first half of para. 19 of his judgment in *KV [(Sri Lanka) v SSHD* [2018] EWCA Civ 2483]. I note that he uses the term "unusual" rather than "exceptional". That may be because the Courts have been wary of treating "exceptionality" as a test as such, but I do not think that there is a problem here: the reason why such an outcome will be exceptional is that it will be unusual for a migrant to be able to mount a sufficiently compelling case to justify their retaining an advantage that

> they should never have obtained in the first place. The UT was also right to recognise that the necessary assessment arises both as a matter of common law and (potentially) in relation to Convention rights."

80. At [38], Underhill LJ noted that Aziz v SSHD [2018] EWCA Civ 1884 the Court of Appeal concluded that the First-tier Tribunal:

> "... ought not, at least normally, to undertake any 'proleptic assessment' of the likelihood of removal. Loss of British citizenship and loss of leave to remain are different things, appealable by different processes. However, it should be noted that Sales LJ's reasoning does not apply to other adverse consequences of a deprivation decision. One example of such an adverse consequence was statelessness, which was the issue in KV. Another may be a 'limbo period'. ... Such consequences will in principle be relevant to the exercise of the common law discretion under section 40(3), and to the extent that they constitute an interference with the appellant's Article 8 rights they will need to go into the proportionality balance: see para 17 of Leggatt LJ's judgment in KV".

81. The court in Aziz noted there that the issues arising under Art 8 are directed to the impact of the deprivation of citizenship rather than the individual's removal – a decision yet to be made. At [73] in Laci, Underhill LJ stated:

> "In all ordinary cases deprivation of citizenship will indeed be the inevitable outcome of a finding that it was obtained by deceit: see para 37 above. The appellant can muster a number of points in his favour, but most of them could not, whether by themselves or cumulatively, outweigh the obvious strong public interest in depriving him of a status of fundamental importance to which he was not entitled".

82. In this appeal, the judge did consider all the circumstances put forward on the appellant's behalf including the differential decision made in relation to his brother. However, the judge also took into account that the appellant was an adult when he applied for ILR as well as when he applied for citizenship and was, as a result, complicit in the "ongoing deception which continued throughout the appellant's application for citizenship" (see para 20). There was, undoubtedly, a very strong public interest based upon the sustained deception practised by the appellant over a period of time and a number of applications.

83. At para 27, the judge said this:

> "This is a difficult case, not least of all because the appellant's younger brother by 18 months has not been deprived of citizenship but it would be reasonable to presume that the only reason for such was due to the age of the younger brother at the time of the initial application and subsequently. I am also satisfied that this appellant has been in a long term relationship with his current partner for a number of years and that there is one child of the family aged approximately 2 years and the partner is currently pregnant with a child expected in or around August 2021. I am also satisfied that during the years that this appellant has been in the United Kingdom he has conducted himself with credit, obtaining a number of academic qualifications and seeking a variety of different jobs in order to financially support himself. I weigh all these factors in mind before reaching a decision in this matter".

84. At para 28, the judge concluded as follows:

> "It is of course significant that this appellant was an adult when he persisted with his deception in order to gain British citizenship. This was clearly an attempt to undermine the immigration system in this country and notwithstanding the valiant submissions

> made by [Counsel] on behalf of the appellant, I am satisfied that deprivation is a proportionate and balanced response.
>
> Taking into account the duty under Section 55 of the 2009 Act I am satisfied that the best interests of the appellant's young daughter are not infringed by the decision of the respondent. I am not satisfied that the child would suffer by the appellant losing British citizenship, whilst accepting that for a period of time the appellant would lose the rights and benefits of a British citizen which for a period of time would include loss of employment and entitlement to a driving licence and other state benefits which he might be entitled to flowing from citizenship. While in the United Kingdom the appellant has been able to benefit from the education system despite his deception.
>
> The appellant is a national of Albania who has parents and family continuing to live in that country. I remind myself of the decision in the aforementioned case of **Hysaj [2020]**, and that there is a 'heavy weight to be placed upon the public interest in maintaining integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship, any effect on day-to-day life that may result from a person being deprived of British citizenship is a consequence of that person's fraud or deception and, without more, cannot tip the proportionality balance so as to compel the Respondent to grant a period of leave, whether short or otherwise'.
>
> Having considered all the evidence before me I am not satisfied that the proportionality balance has been tipped in favour of the appellant compelling the Respondent to grant a period of leave to this appellant. I would only wish to reiterate that case law and statutory provisions are of significance importance in decisions such as these, and whilst I am satisfied the appellant has acted with credit and resourcefulness while in this country subsequent to his deception, I find that the evidence before me supports the public interest in deprivation of citizenship and that this appeal must fail".

85. I see nothing that could conceivably give rise to an error of law in the judge's reasoning under Art 8 which, of course, must be read across to his finding that discretion should be exercised against the appellant.

86. Having properly assessed the application of the respondent's policy to the appellant and, by contrast, his brother, the judge could only conclude that the decision was in accordance with that policy and, on any basis of differential treatment, could not be shown to be a disproportionate decision. I do not accept Ms Foot's submission that it is not possible to discern why there were not any "mitigating factors" which rendered deprivation unfair and unreasonable. The judge's assessment is detailed, considering all the evidence, and he carried out the balancing exercise required for proportionality having regard to the strong public interest as a result of the appellant's fraud or false representation in obtaining British citizenship including maintaining that deception as an adult from the earlier time when he successfully applied for ILR which was a necessary step in his obtaining British citizenship. The disadvantages which the appellant would suffer in the UK as a result of his loss of citizenship were, of course, benefits which he was only entitled to because he had obtained that citizenship by fraud.

87. For these reasons, I reject each of the grounds relied upon by the appellant. The judge reached a lawful decision to dismiss the appellant's appeal and uphold the respondent's decision to deprive the appellant of his British citizenship under s.40(3) of the BNA 1981.

Decision

88. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

89. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
9 August 2021