



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2021-001385
DC/50018/2020
LP/00331/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 10 March 2023

Before

UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

ARTUR HOTI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Toal, instructed by Gulbenkian Andonian Solicitors
For the Respondent: Ms H. Gilmore, Senior Home Office Presenting Officer

Heard at Field House on 18 January 2023

DECISION AND REASONS

A. INTRODUCTION

1. By a decision dated 21 September 2020, the Secretary of State decided to deprive Mr Hoti of his British citizenship on the basis that she was satisfied that he had obtained his naturalisation certificate by means of fraud (“the Decision”). Mr Hoti appealed that decision to the First-tier

Tribunal (“the FTT”) and his appeal was allowed by FTT Judge Kudhail in a decision dated 16 December 2021. The Secretary of State then appealed Judge Kudhail’s decision to this Tribunal.

2. By a decision dated 30 September 2022 (“the error of law decision”), we allowed the Secretary of State’s appeal, set aside the First-tier Tribunal’s decision and gave directions for the underlying appeal to be re-made in the Upper Tribunal.
3. In the error of law decision, we considered a number of procedural and substantive issues that arose. The error of law decision is included as an **Annex** to this decision. In summary, we:
 - (a) decided that the effect of submitting a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 after the deadline is that, absent the grant of an extension of time, a respondent may not rely on any additional grounds set out therein other than those that formed the basis of the decision appealed against (paras 47-53);
 - (b) granted an extension of time for filing Mr Hoti’s Rule 24 response, but declined to admit the evidence that was contained therein that had not been before the FTT (paras 54-60);
 - (c) decided that the FTT had failed to consider one of the two ways in which the Secretary of State had decided in the Decision that Mr Hoti had acquired his naturalisation by means of fraud and that this was a material error of law (paras 60-66);
 - (d) decided that the FTT had, despite citing both R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7; [2021] Imm AR 879 and Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC), not applied them and had instead decided for itself whether the matters of which the relevant statutory provisions provide that the Secretary of State must be satisfied were made out, which was also a material error of law (paras 67-75). In doing so, we explained:
 - (i) that the post-Begum approach to deprivation appeals permitted an appellant to rely on any of the grounds that would be available to them in judicial review (para 68);
 - (ii) why the administrative law type approach applied to an appeal against a decision under section 40(3) of the British Nationality Act 1981, as well as to decisions (with which Begum was concerned), under section 40(2) (para 68); and
 - (iii) that notwithstanding that an administrative law approach is applicable to both types of appeal (and on its face to the question of statelessness under section 40(4)), as in judicial review generally, the intensity of review in relation to whether a

decision was not one which a reasonable decision-maker could reach varies according to the issues which the decision-maker had to decide (paras 71-73).

(e) decided that the FTT had assumed, without evidence, that there was a rule that indefinite leave to remain would be granted under the Legacy Programme where there was residence of 6-8 years and no conviction attracting a sentence of 12 months or more, and on that basis found that the causation requirement in section 40(3) was not made out, which was a further error of law.

4. In our directions, we sought assistance from the parties in relation to a number of issues that we considered foreseeably might arise at this re-making hearing. We received a skeleton argument from the Secretary of State (late) purporting to address those issues, as well as a separate note making submissions on a perceived conflict between the authorities of this Tribunal and the Special Immigration Appeal Commission ("SIAC") as to the admissibility of post-decision evidence in a deprivation appeal. Contrary to our directions, we did not receive a skeleton on behalf of Mr Hoti. At the start of the hearing however, Mr Toal, counsel for Mr Hoti, confirmed that (a) the challenge was confined to whether the Secretary of State was lawfully satisfied that Mr Hoti's naturalisation as a British citizen was "obtained by means of" his admitted frauds; (b) that his challenge was based on the documents that were before the Secretary of State at the time of the Decision, and not on any post-decision evidence, and (c) that no Article 8 ground was being relied on. Many of the issues on which we had sought assistance, as well as the question of the conflict of authorities on the admissibility of post-decision evidence, therefore have fallen away.

5. It is in those circumstances that the matter resumed before us in order to re-make the decision.

B. FACTUAL BACKGROUND

6. We set out the facts and the Decision in detail at paras 6-21 of the error of law decision. For present purposes it suffices to note the following, which is not in dispute:

(a) Mr Hoti arrived in the UK and claimed asylum in April 2001. In that application, he dishonestly claimed:

(i) to be a Kosovan national, born in Luqan, in Serbia, close to the Kosovan border (he is Albanian and was born in Kukes, in Albania);

(ii) to have been born on 25 August 1987 (his real date of birth is 25 August 1986); and

(iii) that he did not know his parents' whereabouts.

- (b) His asylum claim was initially refused on the basis that he had not complied with a request for a completed Statement of Evidence Form (“SEF”). It was later discovered that Mr Hoti had in fact timeously completed and returned his SEF. By that time however there were no longer difficulties for Kosovans in Serbia sufficient to give rise to a protection claim, but he was thought to be an unaccompanied minor. A decision was accordingly made by the Secretary of State, on 5 November 2004, to grant him Discretionary Leave to Remain until 24 August 2005, that is, the day before his claimed 18th birthday.
- (c) On 20 July 2005, shortly before his Discretionary Leave was to expire, Mr Hoti applied to extend his leave to remain. In that application he continued to rely on the false particulars previously provided.
- (d) No decision was ever made by the Secretary of State in relation to Mr Hoti’s 2005 application. However, on 7 April 2008, he completed a Legacy Casework Programme Questionnaire. We have set out how the Legacy Programme operated at para 12 of the error of law decision.
- (e) On 30 April 2010 Mr Hoti was granted Indefinite Leave to Remain under the Legacy Programme. As we noted in the error of law decision, the Secretary of State did not record the basis for that grant in the Decision (or otherwise in these proceedings).
- (f) On 15 October 2013, Mr Hoti applied to naturalise as a British citizen, completing Form AN. This asks a number of questions (set out at para 16 of our error of law decision) relevant to the question of whether an applicant is of good character. Although Mr Hoti gave details of his criminal offending (a conviction in 2008 for possession/control of an article for use in fraud) and his caution in 2005 for travelling on a railway without using a ticket, in response to the question ‘*Have you ever engaged in any other activities which may indicate that you may not be considered a person of good character?*’, Mr Hoti ticked the ‘no’ box. He signed to declare that ‘*to the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British Citizenship*’. The information given in the application was however not correct, in that Mr Hoti continued to use his false date of birth and to allege that he and his parents had been born in Kosovo. He now accepts that he was dishonest in the provision of this false information. Mr Hoti also ticked to confirm ‘*I have read and understood the Guide AN and the Booklet AN*’, to which we will return below.
- (g) On 14 January 2014, Mr Hoti’s naturalisation application was granted and he was issued with a certificate of naturalisation. From Mr Hoti’s perspective all was then well for a period of 5 years. However, Mr Hoti’s frauds were discovered when, as a result of his father applying for a visa on 19 September 2019, checks were undertaken and Mr Hoti’s true details and his fraud were discovered.

- (h) After providing Mr Hoti with an opportunity to provide representations as to why he should not be deprived of his British citizenship, the Secretary of State decided, by letter dated 21 September 2020, to revoke Mr Hoti's British citizenship. The Decision is set out in some detail in para 20 of our error of law decision.
- (i) In the Decision, the Secretary of State advanced two separate bases on which she concluded that Mr Hoti had acquired his naturalisation by fraud:
 - (i) First, it was said that Mr Hoti's wrongful declaration of his good character in his Form AN was itself a means by which he had obtained his naturalisation.
 - (ii) Second, it was said that Mr Hoti's naturalisation was obtained by means of his deception in his earlier applications. We refer to this below as the Secretary of State's "chain of causation" case.

C. LEGAL FRAMEWORK

Deprivation of nationality

7. The power to deprive someone of a "citizenship status" is conferred on the Secretary of State by section 40 of the British Nationality Act 1981, which provides, so far as relevant, as follows:
- "(1) In this section a reference to a person's "citizenship status" is a reference to his status as-
 - (a) a British Citizen...
 - (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 be 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) [if certain exceptions apply]."

8. In a case under section 40(3), there was no dispute that this requires the Secretary of State to be satisfied of two separate matters before the power to deprive arises:
 - (a) First, that the individual concerned has engaged in wrongdoing of the type set out in section 40(3)(a)-(c) (which we refer to compendiously below as “deception”); and,
 - (b) Second, that the naturalisation or registration was “obtained by means of” that wrongdoing.
9. In relation to the first element, there was no dispute that Mr Hoti had engaged in such deception throughout his interactions with the Secretary of State. We therefore do not need to say anything more about that aspect of section 40(3).
10. In light of a dispute between the parties as to precisely what “obtained by means of” deception means, we do need to say something more about this second aspect of section 40(3), particularly given that the focus on any appeal is now likely to be on whether the Secretary of State has directed herself correctly as to the statutory test or otherwise committed an error of law.
11. It is well established that this second element imports considerations of causation. Where someone lies about a particular aspect of their characteristics so as to obtain leave, which in turn leads to the grant of indefinite leave to remain, which itself then leads to the grant of naturalisation, there will not, in many cases, be any real question that naturalisation has been obtained by means of deception. However, where someone obtained indefinite leave to remain, or would have done had their deception been known about, that did not or would not have depended on their deception, it cannot be said that their naturalisation was ‘obtained by means of’ their deception: Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367 (IAC). This may be illustrated by two examples:
 - (a) First, it may be that, had the deception been known about, the Secretary of State would have refused the individual concerned any lawful status to remain in the UK, but, as a matter of fact, would not have removed him and he would not have left voluntarily. In such a case, that person may instead have eventually been granted indefinite leave to remain because of the length of time he had been in the UK. In those circumstances, the grant of indefinite leave to remain would not have been obtained by means of the deception, but by virtue simply of his continuous residence in the UK. Subject to the question of whether his deception would have led to a refusal of his naturalisation application on the separate ground that he was not of good character, such a person’s naturalisation will not have been obtained by means of their earlier misconduct. Thus for the Secretary of State to be satisfied that someone obtained their naturalisation “by

means of” relevant misconduct in an earlier application, she must have some proper basis beyond “speculative assertion” (Sleiman, [67]) for considering that they would either have left and/or been removed from the UK between the refusal of the application that was initially granted as a result of their deception and their acquisition of 14 years continuous residence prior to the change to the Immigration Rules in 2012, or 20 years continuous residence thereafter, or that such leave would have been revoked by reason of the earlier deception (as to which see R (Matusha) v Secretary of State for the Home Department (revocation of ILR policy) [2021] UKUT 175 (IAC); [2021] Imm AR 1452).

- (b) Second, under the Legacy scheme, indefinite leave to remain could be granted notwithstanding that deception had been used. As set out in para 12 of the error of law decision, the decision to grant leave under the Legacy scheme involved an assessment of all relevant factors, including deception, but it did not necessarily follow that because deception had been used previously indefinite leave to remain would be refused. In Sleiman, the deprivation decision recorded that the appellant in that case had been granted indefinite leave to remain under the Legacy scheme because of the length his application had been pending, not on the basis of the false age he had previously given. In those circumstances, and in light of the fact that the Secretary of State had not suggested that the fact of deception itself would have prevented the grant of naturalisation, the deception was irrelevant to the appellant’s naturalisation and his appeal was accordingly allowed.
12. A case such as Sleiman, where there is a record that the deception relied on in the deprivation decision was not taken into account at all in relation to the grant of indefinite leave to remain, is clear cut. However, in relation to Legacy cases, and other cases where an applicant’s deception may be a relevant but not necessarily determinative factor, a more difficult question arises: for the Secretary of State to be satisfied that naturalisation was “obtained by means of” deception, does she have to be satisfied that, had she known about the fraud, she would not have granted leave, or is it sufficient for it to have been a factor that she would have taken into account? This question arises most obviously in relation to decisions to grant leave under the Legacy scheme and decisions about whether someone is of good character, but it could in principle apply to other multifactorial decisions.
13. This question is also potentially complicated by the fact that the wording of section 40(3) is very similar to that in Article 8(2)(b) of the UN Convention on the Reduction of Statelessness 1961 (which the UK has ratified) and Article 7(1)(b) of the European Convention on Nationality 1997 (which the UK has not ratified, but which it was intended would be ratified when the Nationality, Immigration and Asylum Act 2002 was passed, by which fresh sections 40 and 40A of the 1981 Act were introduced, and with which these sections may have therefore been

intended to be consistent (see Al-Jedda v Secretary of State for the Home Department [2013] UKSC 62, [2014] AC 253 at [14]-[22]; E3 v Secretary of State for the Home Department [2023] EWCA Civ 26 at [43]-[44])). Each of those Conventions prohibit the exercise of deprivation powers where that would render an individual stateless, save in certain exceptions, one of which is that contained in section 40(3).

14. In light of these complexities, we sought assistance by way of skeleton arguments in relation to this question in our directions in the error of law decision. It is therefore regrettable that no skeleton dealing substantively with these issues was provided. No skeleton was provided by Mr Hoti (the responsibility for which failure does not, we understand, lie with Mr Toal). That filed by the Secretary of State, with respect, misses the point, instead setting out the process she follows under Chapter 55 of her Nationality Instructions (“Chapter 55”) and suggesting instead that the fact that under section 40(3) the Secretary of State can make someone stateless is irrelevant.
15. In oral argument before us, Mr Toal’s position was that in order for the Secretary of State to be satisfied that a person’s naturalisation had been obtained by means of deception, she had to be satisfied that, had she known of the deception, she would not on the balance of probabilities have granted the application for naturalisation, i.e. a ‘but for’ test of causation applied. In support of this, Mr Toal submitted that this was the natural meaning of the words “by means of” in section 40(3) and that a lower causative threshold would lead to absurd consequences, in that someone whose deceptions were known about and taken into account at the time of the naturalisation decision, but whose application for naturalisation was nonetheless granted, would then be liable to be deprived of that grant of naturalisation, which cannot, he suggested have been the intention of Parliament in passing section 40(3). Because of his late instruction, Mr Toal was not in a position to address the international materials.
16. Ms Gilmore, adopting what was said by Mr Clarke in the Secretary of State’s skeleton argument by reference to para 55.7.1 of Chapter 55, submitted that, in relation to these sort of multifactorial questions, it is enough that the deception would have “affected” the decision to grant citizenship. We understand that to be a submission that, for naturalisation to have been obtained by means of relevant misconduct, it is sufficient if it that misconduct was a relevant factor to be taken into account. She too was unable to address the international law materials.
17. We are provisionally inclined to agree with Mr Toal, that naturalisation will not have been “obtained by means of” misconduct unless that misconduct is the but for cause of the grant of naturalisation. If it was only a factor to be taken into account, but naturalisation would have been granted in any event, that naturalisation will have been obtained *despite*, not by means of, the misconduct. However, given the lack of assistance received by the Tribunal in relation to the international materials, and given that we are able, for the reasons set out below, to decide this appeal without resolving

this issue, we consider that that is what we should do. This is an issue of wider significance which is in our view more appropriately decided in a case in which it is necessary to do so and full submissions on the point have been heard.

The requirements for the grant of naturalisation

18. Given that in determining whether someone has obtained their naturalisation by means of relevant misconduct it is necessary to consider what would have happened had the deception not been used, it is necessary to understand some of the required elements to the grant of naturalisation. Section 6(1) of the 1981 Act provides that:

“(1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.”

19. Schedule 1 requires, *inter alia*, that an applicant for naturalisation:

- (a) not be subject to any restriction on the period for which he might remain in the United Kingdom during the 12 month period ending on the date of his application, unless he is serving outside the United Kingdom in Crown service under the government of the United Kingdom (paras 1(1)(a), 1(2)(c) and 1(3)); and,
- (b) be of good character (para 1(1)(b)).

20. Certain of the requirements in para 1 of Schedule 1 may be treated by the Secretary of State as having been fulfilled, disregarded or waived in the special circumstances of the particular case (see para 2 of Schedule 1 to the 1981 Act). The good character requirement is not such a requirement. Although there is a power to disregard any restriction on the period for which a person might remain in the UK during the 12 months prior to the date of application, this is conditional upon the applicant being free of any such restriction by the date of application. In other words, it is a power to waive the period for which someone has had ILR (or other status which does not impose a time limit on the period for which a person may remain in the UK), but not the requirement to have ILR (or equivalent status) itself.

The proper approach on an appeal against deprivation

21. The parties were agreed that the principles to be applied on a deprivation appeal post-Begum is in a section 40(3) case is as summarised in Ciceri. The guidance given in para 30(2)-(5) of Ciceri relates to the proper approach to Article 8, which is not in issue in this appeal. The parts relevant to this appeal are therefore the following:

“(1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the 1981 Act 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. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; has disregarded something which should have been given weight; has been guilty of some procedural impropriety; or has not complied with section 40(4) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3) and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good."

22. As the Tribunal made clear at para 29, this guidance was an attempt to reformulate principles articulated by Leggatt LJ (as he then was) in KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, [2018] 4 WLR 166 taking into account subsequent authorities, in particular the Supreme Court's judgment in Begum. Such guidance is, of course, a helpful starting point, but, as with any judicial guidance, must not be treated as if it were a statute or carved in stone, must be considered in light of subsequent authorities, and must be approached in the light of the particular problem that was before the Tribunal. Notably, the sole issue before the Tribunal in Ciceri was whether the FTT had erred in its approach to the effect of delay for the purposes of Article 8 ECHR. This Tribunal has already given further guidance in respect of the approach to Article 8: see Muslija (deprivation: reasonably foreseeable consequences) [2022] UKUT 337 (IAC).
23. As noted, Ciceri was not a case to which the guidance given in para 30(1) or (6) set out above had any application. As we set out in the error of law decision, it is also apparent from subsequent authorities that the implications of the Begum decision were not then (and may not have yet been) fully worked through by this Tribunal, SIAC and the higher courts. We would therefore reiterate that, for the reasons given in the error of law decision, in a challenge either to the existence of the statutory conditions precedent (to which sub-para 30(1) of Ciceri relates) or to the lawful exercise of the discretion that arises once the statutory conditions precedent are met (to which sub-para 30(6) applies), any ground that could be relied on in judicial review is in principle available to an appellant. As well as the grounds mentioned in sub-para 30(6) of Ciceri, we would

highlight that the exercise of the Secretary of State's discretion under section 40 is constrained by the statutory requirement in section 55 of the Borders, Citizenship and Immigration Act 2009 to make arrangements for the discharging of the Secretary of State's functions in relation to nationality having regard to the need to safeguard and promote the welfare of children in the UK, and by the common law principles relating to the following of and/or departing from policies, such as Chapter 55.

24. Having set out the proper approach, we can now turn to apply it to the two ways in which the Secretary of State suggests that Mr Hoti obtained his British citizenship by means of deception.

D. DECEPTION IN FORM AN

25. The misconduct relied on by the Secretary of State in relation to Form AN is Mr Hoti's declaration that he was of good character, when he had previously engaged in deception in obtaining leave to remain.

26. As noted in para 16 of our error of law decision, there are a number of questions on Form AN about whether an applicant for naturalisation is of good character. Although it might be thought to be obvious, those questions do not themselves expressly make clear that previous fraud or deception in applications for leave (or in the Form AN itself) is something which should be declared as relevant to good character. However, in the declaration section of Form AN, applicants are asked to confirm that they have read and understood both Guide AN and Booklet AN, and Guide AN (as it stood when Mr Hoti applied for naturalisation) does make this clear. It stated on page 9 (in the section on Good Character):

"You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago it was... If you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so.

You must tell us if you have practised deception in your dealings with the Home Office or other Government Departments (e.g. by providing false information or fraudulent documents). This will be taken in to account in considering whether you meet the good character requirement."

27. In our judgment the Secretary of State is in principle entitled, in the absence of any explanation to the contrary and where the above or an equivalent version of Guide AN was in place at the relevant time, to be satisfied that someone has committed a dishonestly false representation or concealed a material fact in their Form AN in answering "No" to the question "Have you ever engaged in any other activities which might indicate that you may not be considered a person of good character" where that person has confirmed that they have read and understood Guide AN, but nonetheless failed to draw their previous deception to the Secretary of State's attention.

28. Mr Hoti meets these criteria. He confirmed that he had read Guide AN and Booklet AN, but ticked “no” to confirm that he had not engaged in any other activity (beyond his declared conviction for possession of an article for use in fraud and caution for travelling on the railway without paying a fare) that might indicate that he may not be considered a person of good character. No explanation for his doing so has been provided. Indeed, although Mr Toal did not expressly confirm that Mr Hoti accepted that this amounted to a dishonest misrepresentation, he did not make any positive submission to us to the contrary.
29. Mr Toal’s central submission was, rather, directed to the next question, whether the Secretary of State was lawfully satisfied that Mr Hoti’s naturalisation was ‘obtained by means of’ his false representation as to his good character. As noted above, there was a dispute about what precisely has to be shown in order for the Secretary of State to be satisfied of this element of the statutory test. In relation to Mr Hoti’s Form AN fraud however, we consider that, even assuming in Mr Hoti’s favour that the higher ‘but for’ threshold is required, the Secretary of State was entitled to be satisfied that Mr Hoti’s naturalisation was ‘obtained by means of’ his misrepresentation as to his good character.
30. In this respect, section 9.3 of the Secretary of State’s Nationality Policy Guidance and Casework Instruction, Chapter 18, Annex D, that was in force at the time of Mr Hoti’s naturalisation decision (“section 9.3”) is of central relevance. It provides that:

“The decision maker will normally refuse an application where there is evidence that a person has employed deception either:

- a. during the citizenship application process; or
- b. in a previous immigration application.

It is irrelevant whether the deception was material to the grant of leave or not.”

31. Mr Toal’s submitted that this policy does not compel the decision maker to refuse a naturalisation application and that the Secretary of State in the Decision has misdirected herself as to the effect of this policy in considering that it does so. She makes this error, Mr Toal submitted, in paras 32-33 of the Decision. These stated:

“32. It is clear from the above [i.e. section 9.3], that had the caseworkers at the point of your ILR application and subsequent Naturalisation application been aware of your genuine identity, and you had not concealed these facts, [they] would not have granted you in either case. You failed to meet the good character requirement and your decision to commit deception and fraud would have compelled the caseworker to refuse you in line with the above instructions. Therefore, it is clear, that you would not have accrued the necessary leave at the stage of ILR, in order to meet the requirements for citizenship.

33. For the reasons given above it is not accepted that there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is considered that you provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where your application(s) would have been unsuccessful had you told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship.”
32. We accept the submission that section 9.3 does not require the refusal of a naturalisation application where deception is employed. As it clearly states, that is the normal, not inevitable, result.
33. However, when this part of the Decision is read fairly and as a whole, we do not consider that the Secretary of State was committing the error alleged. She was not in our judgment elevating the refusal of an application where deception is used from the “normal” result into one which a decision maker is “compelled” to make, in the sense that he or she has no other option. Rather, “compelled” in para 32 of the Decision is being used as a synonym for “caused”. The deception is being given as a compelling reason why the normal policy position would have been followed in Mr Hoti’s case.
34. Mr Toal’s further submission was that the Secretary of State was not lawfully satisfied that the naturalisation was obtained by means of Mr Hoti’s fraud because she has not given any consideration to how decisions were in practice taken at the relevant time. For example, Mr Toal submitted, the policy does not state the circumstances in which the Secretary of State would depart from the “normal course”. In order for the Secretary of State to be lawfully satisfied as to the causation requirement, the Tribunal would, so Mr Toal submits, need to be provided with evidence as to how that judgment would have been exercised at the relevant time.
35. We cannot accept that submission. In the absence of any explanation why the decision maker would not have decided an applicant’s naturalisation application on the “normal” basis, we consider that the Secretary of State is in principle entitled to be satisfied that, on the balance of probabilities, the normal process would have been followed by a decision maker. Thus where an application for naturalisation which uses deception fell to be considered under section 9.3, or another policy to like effect, the Secretary of State is entitled to be satisfied that, had she known that a declaration that an applicant was of good character was a dishonest misrepresentation, she would have refused the application and that naturalisation was accordingly ‘obtained by means of’ relevant misconduct.
36. Mr Hoti was provided with an opportunity to respond to the Secretary of State’s reason to believe that he had acquired his British citizenship by fraud and, by a detailed letter from his solicitors dated 9 January 2020, he availed himself of that opportunity. That letter does not however provide any reason why, had the Secretary of State been aware of Mr Hoti’s

misrepresentation as to his good character, she would have nonetheless granted his naturalisation application in any event.

37. It follows from the above that Mr Hoti's challenge to the decision to deprive him of his British citizenship by reason of the fraud perpetrated in his Form AN fails.

E. CHAIN OF CAUSATION DECEPTION

38. In the Decision, it is suggested by the Secretary of State that Mr Hoti obtained his naturalisation by means of deception in previous immigration applications in two ways.

39. First, it is said in para 26 of the Decision that "Had the Home Office been aware of your genuine identity, the Home Office could have traced your parents and returned you to Albania safely. Therefore, you would not have been granted further leave". This is however a logical non sequitur - that someone could do something, does not mean that they would have done so - and rests on a speculative assertion wholly lacking in an evidential basis as to whether Mr Hoti would in fact have been removed. No evidence is cited about removals at the relevant time in the Decision, nor was any sought to be relied on before us. The Secretary of State is therefore not lawfully satisfied that Mr Hoti would not have been granted naturalisation because he would have been removed instead of being granted discretionary leave to remain and that his naturalisation was therefore obtained by means of his deception in that application.

40. Second, it is said at para 32 that, had the Secretary of State's caseworker been aware at the point of Mr Hoti's deception at the point of his indefinite leave to remain application, this would have been refused. The grant of indefinite leave to remain was however a grant under the Legacy Scheme, which decision, as this Tribunal set out in some detail in R (Matusha) v Secretary of State for the Home Department (revocation of ILR policy) [2021] UKUT 175 (IAC), [2021] Imm AR 1452, required an in-the-round assessment of all relevant factors, only one of which would have been Mr Hoti's deception.

41. Given the serious public policy issues that arise in respect of individuals who come to the UK putting forward false claims to refugee status, set out in para 26 of Matusha, quoted at para 12(e) of the error of law decision and with which we agree, it *may* be that, had the Secretary of State set out the factors she took into account in relation to Mr Hoti's grant of leave and given proper consideration to how the caseworker's knowledge of his deception would have likely affected that decision-making process taking into account all the other relevant factors, she could have lawfully satisfied herself that indefinite leave to remain would not have been granted under the Legacy Scheme. However, that is not what she has done. Instead, the Decision simply claims, without explanation, that the decision-maker would have adopted such an approach. That is, again, simply speculative assertion.

42. We note also that the Secretary of State might, consistent with the argument put forward by her as to what “obtained by means of” should be understood to mean in the context of multifactorial assessments such as decisions under the Legacy Scheme, have suggested that Mr Hoti’s deception would have been taken into account in deciding whether to grant him indefinite leave to remain, and that that was sufficient for the purposes of section 40(3). That is not however the basis put forward in the Decision and cannot therefore avail her in this appeal.

F. CONCLUSIONS

43. Notwithstanding that the Secretary of State’s conclusion in the Decision that Mr Hoti’s naturalisation was obtained by means of his fraud in his applications for leave to remain in the UK is not lawful, her conclusion that Mr Hoti’s naturalisation was obtained by means of his fraud in his Form AN is lawful. The unlawful aspect of the Decision is accordingly immaterial and Mr Hoti’s appeal must be dismissed.

Notice of Decision

1. The decision in the appeal is re-made so that the appeal is dismissed.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 March 2023

ANNEX



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DC/50018/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 31 March 2022**

Decision sent to parties on:

.....

Before

**UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ARTUR HOTI
[NO ANONYMITY ORDER MADE]**

Respondent

Representation:

For the appellant: Mr D. Clarke, Senior Home Office Presenting Officer

For the respondent: Mr F. Farhat, solicitor, of Gulbenkian Andonian Solicitors

DECISION AND DIRECTIONS

A. INTRODUCTION

1. The Supreme Court in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7; [2021] Imm AR 879 explained that the previous understanding, set out in decisions of this Tribunal and the Court of Appeal, of the role of the First-tier Tribunal in an appeal against a

decision to deprive someone of their British nationality was incorrect. As explained below however, the decision of the First-tier Tribunal (“the FTT”) under appeal, and the way in which that appeal was argued, indicate that the significant shift in approach which Begum requires does not yet appear to have been fully understood.

2. Mr Hoti, the respondent to this appeal by the Secretary of State, was born in, Kukes, Albania on 25 August 1986. He arrived in the UK on 8 April 2001 and on 14 January 2014 he was issued with a certificate of naturalisation and became a British citizen. In his dealings with the Secretary of State however, as he accepts, he practised fraud. He claimed on various occasions that he was a national of Kosovo, and that he was born on 25 August 1987, one year later than his true date of birth. That fraud came to light in 2019, when the Secretary of State undertook checks on his identity. On 21 September 2020, the Secretary of State decided to deprive Mr Hoti of his status as a British citizen pursuant to section 40(3) of the British Nationality Act 1981 (“the Decision”).
3. No anonymity order was made by the FTT and no application was made for one before us. We therefore likewise make no anonymity order.
4. The hearing before us took place in person at Field House.
5. A draft of this decision was initially prepared shortly after the hearing on 31 March 2022. It is right to recognise however that there has been a significant period of delay in finalising it due to the ill health of one of the members of the Tribunal. This delay is regrettable and the Tribunal apologises for it. We are nonetheless satisfied that no unfairness or other procedural irregularity has been caused by this delay.

B. BACKGROUND AND THE DEPRIVATION DECISION

6. As noted, Mr Hoti arrived in the UK on 8 April 2001. He claimed asylum on 23 April 2001. The Decision records (omitting cross-references) that:

“On this application form you claimed that your name is Artur Hoti, born 25 August 1987 in Loqan, Serbia. You claim that your mother is Xufe Murati, your father is Rasim Hoti and your sibling is Ardian Hoti. Your claim all these relatives’ whereabouts are unknown. You signed to confirm that *‘To the best of my knowledge all the answers I have given are truthful and complete’*.”

9. Accompanying your asylum application, you provided a statement claiming that you were a persecuted Albanian. You claimed: *‘I was born and I have always lived in the village of Loqan which is in the territory of Serbia but very close to the Kosovan border’*. You further claimed: *‘I am Albanian. My village was mixed half and half Albanian half Serb. By religion I was Muslim.’* You claimed not to know where your relatives were, that your home village was a war zone and that you believed your family had been killed. You also claimed that Serbian authorities had continually come to your home and assaulted you and your family and that they had killed people. You claimed that on one occasion,

after leaving your home, you encountered Serbian soldiers who had begun shooting at you. You claimed that during this, you became separated from your parents as you fled in different directions. You claimed that you later saw them being stopped, but you continued to flee as there was nothing you could do. You then claimed that you heard more gunshots, and therefore you thought your family had been killed.” (italics original)

7. The Decision records that Mr Hoti’s asylum application was refused on the basis that it was believed by the Secretary of State that he had not complied with a request for a completed Statement of Evidence Form (“SEF”). Mr Hoti remained in the UK without leave on receipt of that refusal.
8. It was subsequently discovered by the Secretary of State however that Mr Hoti had in fact timeously completed and returned his SEF and that the basis for the refusal had therefore been wrong. A decision was accordingly made, on 5 November 2004, to grant him Discretionary Leave to Remain until 24 August 2005, that is, until the day before his claimed 18th birthday. The reasons for this decision were minuted by the Secretary of State’s caseworker as follows:

“There are no longer any protection problems for Albanians in Serbia. However this applicant is an NSA minor and no reception arrangements exist for his return, we are minded to grant discretionary leave to remain in accordance with a ministerial commitment that we would not return a minor unless suitable arrangements are made in place for the child’s return. As no reception arrangements exist for this child’s return and solely on the basis that he is a minor, discretionary leave to remain is appropriate.”
9. Mr Hoti was by this time 18 years old (but believed to be 17).
10. On 20 July 2005, shortly before his Discretionary Leave was to expire, Mr Hoti applied to extend his leave to remain. In that application he continued to use his false date of birth and to claim that he was an ethnic Albanian from Serbia, who had been separated from his parents and that he had not seen them since leaving Serbia.
11. No decision ever appears to have been made by the Secretary of State in relation to Mr Hoti’s 2005 application. However, on 7 April 2008, he completed a Legacy Casework Programme Questionnaire.
12. As will be seen below, the fact that this was an application under the Legacy Casework Programme features in the FTT’s reasons for allowing the appeal and it is therefore necessary to say something about it here. The Legacy Casework Programme has been considered in a number of judicial review claims: see, in particular, R (Hakemi) v Secretary of State for the Home Department [2012] EWHC 1967 (Admin), R (Geraldo) v Secretary of State for the Home Department [2013] EWHC 2763 (Admin) and R (Matusha) v Secretary of State for the Home Department (revocation of ILR policy) [2021] UKUT 175 (IAC), [2021] Imm AR 1452. It is not necessary for the purpose of this judgment to consider these decisions in detail. It is

however at this point worth noting some of the features of the Programme recorded in those decisions (and which we do not understand to be controversial):

- (a) The Legacy Casework Programme was a scheme set up to manage some 500,000 immigration applications received prior to 5 March 2007 with the aim to have made decisions on them by July 2011: Hakemi [1].
- (b) The programme was an operational programme only – that is to say that it was a programme designed to deal with the backlog, with its own internal priorities and procedures, but did not involve any kind of amnesty and cases handled within the programme would have applied to them the same generally prevailing law and policy which applied to all other immigration and asylum cases: Geraldo [40], Matusha [19].
- (c) In deciding whether to grant leave under the Programme, regard was required by para 395C of the Immigration Rules to be had to all the relevant factors known to the Secretary of State, including “personal history, including character, conduct and employment record”: Hakemi [6], Matusha [19].
- (d) Para 395C was supplemented by guidance, part of which also required that “Caseowners must also take account of any evidence of deception practised at any stage in the process... The caseowner must assess all evidence of compliance and non-compliance in the round”: Hakemi [36].
- (e) Personal history of an applicant, including evidence of deception, formed part of the assessment. Even if the assessment was viewed through the operational objective of the Legacy Programme, the nature and extent of any negative factors still formed part of an evaluative assessment of whether it was appropriate to grant leave to remain; negative factors relating to a person’s immigration history might range in scale and seriousness: Matusha [22]-[24]. As was noted further in Matusha in this respect:

“26. At the more serious end of the scale are those who deliberately put forward what they know to be a false protection claim in a fraudulent attempt to obtain leave to remain in the UK. This might include a fabricated account, but could include lies about a person's nationality or age. The reason why this type of behaviour is so serious is because it exploits provisions designed to protect the most vulnerable and those in need of protection. A knowingly false claim to be a national from a refugee producing country undermines the integrity of the Refugee Convention and other international protection mechanisms. If false nationality claims are made in large numbers it might give rise to suspicion of genuine applicants from that country, making it more difficult for them to obtain protection. Policies and public services designed to support [unaccompanied asylum-seeking children]

are undermined by those who lie about their age to gain a greater level of support or a period of limited leave to remain to which they are not entitled. Public resources are wasted investigating and processing fraudulent claims.”

13. On 30 April 2010 Mr Hoti was granted Indefinite Leave to Remain under the Legacy Programme. The Secretary of State has not recorded the basis for that grant in the Decision (or otherwise in these proceedings). There are extracts from case notes in the Mr Hoti’s rule 24 response, which purport to show the basis for the decision. However, as explained below, these were not before the FTT, appear to be partial and selective extracts and we have decided not to admit them into evidence for the purpose of this error of law hearing.
14. On 28 May 2010, Mr Hoti applied for a Travel Document. In that application and the documents that accompanied it, he continued to assert his false date and place of birth, and stated that he was unable to obtain certain documents from Kosovo because the Kosovan Embassy had inadequate infrastructure in place to provide them. It is not clear whether this application was granted, but nothing turns on that.
15. On 15 October 2013, Mr Hoti completed Form AN to apply for British Citizenship. In the Decision, the Secretary of State records the following:

“On this form, you continued to claim your identity as Artur Hoti born 25 August 1987 in Kosovo. You continued to claim your mother and father were also from Kosovo. You ticked no in response to: *‘Have you ever engaged in any other activities which may indicate that you may not be considered a person of good character?’* You signed to confirm that: *‘I declare that, to the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British Citizenship’...* You ticked to confirm *‘I have read and understood the Guide AN and the Booklet AN’.*” (italics original)
16. There are certain notable aspects of Form AN and Mr Hoti’s answers to the questions posed therein:
 - (a) At question 3.6, the Form asked whether he had been convicted of a criminal offence in the UK or any other country. He ticked “yes” and confirmed that he was sentenced on 2 October 2008 in the UK for possession/control of an article for use in fraud. He noted however that it was a spent conviction.
 - (b) At question 3.10, Mr Hoti was instructed to give details of any cautions, warnings or reprimands, and answered that he had received a caution on 15 April 2005 for travelling on a railway without using a ticket.
 - (c) On page 12 of Form AN, questions 3.12-3.18 asked about: whether he had been sentenced to notification orders, sexual offence prevention orders, foreign travel orders and or risk of sexual harm orders; whether he had been charged with a criminal offence for which he or

she has not yet been charged; whether he had been involved in or suspected of involvement in war crimes, crimes against humanity or genocide; whether he had ever been involved in, supported or encouraged terrorist activities; whether he had ever been a member of or given support to an organisation which has been concerned in terrorism; whether he had ever by any means or medium expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts; and whether he had ever engaged in any other activities which might indicate that you may not be considered a person of good character.

- (d) Underneath these questions on page 12, the Form AN states “If you have answered yes to [any of the above questions] you must give further details in the space provided below...For the purposes of answering [these questions] please refer to Booklet AN which provides guidance on actions which may constitute war crimes, crimes against humanity, genocide or terrorism.” There is no suggestion here that Booklet AN contains guidance on what activities might indicate that an applicant is not to be considered a person of good character beyond this.
 - (e) As noted however, question 6.2 required Mr Hoti to tick that he had read Guide AN and Booklet AN. Guide AN and Booklet AN do not appear to have been adduced in evidence before the FTT and are also not before us.
17. On 14 January 2014, Mr Hoti’s naturalisation application was granted and he was issued with a certificate of naturalisation. As it is a requirement for naturalisation that an applicant is “of good character”, it appears that the Secretary of State considered Mr Hoti to meet this criterion notwithstanding his fraud-related conviction and caution for travelling without a ticket.
 18. On 19 September 2019, Mr Hoti’s father applied for a visa to visit the UK. In consequence of checks that were undertaken as a result of this application, Mr Hoti’s true details were discovered.
 19. On 20 December 2019, the Secretary of State wrote to Mr Hoti to inform him that she had reason to believe he had obtained his certificate of naturalisation by fraud and invited him to make representations in relation to this. On 9 January 2020, Mr Hoti’s solicitors provided representations on his behalf. Among other issues, they brought to the Secretary of State’s attention that Mr Hoti has an Albanian partner and two British children in the UK.
 20. By letter dated 21 September 2020, the Secretary of State decided to revoke Mr Hoti’s British citizenship. The Decision’s reasoning may be summarised as follows:
 - (a) Mr Hoti’s initial asylum application was made when a minor, and he is therefore not ‘complicit’ in the fraud perpetrated therein. However,

the fraud was repeated in subsequent applications when he was an adult (para 25).

- (b) At para 26, the Secretary of State rejected Mr Hoti's representations in relation to his alleged 'freeze response' to excuse the continued fraud into adulthood.
- (c) In a second para 26, the Secretary of State noted that the decision to grant Mr Hoti discretionary leave in 2004 was based on the fact that he was an unaccompanied minor. The Decision states that,

"Had the Home Office been aware of your genuine identity, the Home Office could have traced your parents and returned you to Albania safely. Therefore you would not have been granted leave.

Additionally, you were 19 years of age upon submitting your application for Further Leave [i.e. in July 2005] and continued to deceive the Home Office with regards to your genuine place of birth. You continued to advise that you had been separated from your parents and that you had been unable to contact them. As previously referred to in this letter, the Home Office received an application from your father in August 2019. Your father, evidently, was not killed and indeed stated on his own application that he was Albanian and lived in Albania. This demonstrates that the information you provided to your representatives when making your Further Leave application was false."

- (d) Para 27 relates to a claim brought against the Home Office for unlawful detention in which Mr Hoti maintained his fraud to the court.
- (e) Paras 28-33 (there is no para 31) merit setting out in full as they contain central elements of the decision-maker's relevant reasoning:

"28. Furthermore, you signed to acknowledge the good character requirements on Form AN when applying for your citizenship. It is necessary to note that Chapter 18 of the caseworker instructions advises: *'The Secretary of State must be satisfied that the applicant is of good character on the balance of probabilities. To facilitate this, the applicant must answer in full all of the questions asked of them on the application form for naturalisation or registration as a British citizen to inform the assessment of good character. They must also inform the Nationality Group of any significant event that could have a bearing on the good character assessment.'*

29. Also, that: *'Concealment of information or lack of frankness will raise doubts about - and therefore reflect poorly on - their character. The decision maker will normally refuse an application where the person has attempted to lie or conceal the truth about an aspect of their application, whether on the application form or in the course of enquiries.'*

30. Section 9 of the caseworker instructions states: *'The decision maker will normally refuse an application where there is evidence that a person has employed deception either: a. during the citizenship*

application process; or b. in a previous immigration application. It is irrelevant whether the deception was material to the grant of leave or not. The decision maker will also normally refuse any subsequent application for citizenship if it is made within 10 years from the date of the refusal on these grounds.'

32. It is clear from the above, that had the caseworkers at the point of your ILR application and subsequent Naturalisation application been aware of your genuine identity, and you had not concealed these facts, [they] would not have granted you in either case.

33. For the reasons given above it is not accepted that there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is considered that you provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where your application(s) would have been unsuccessful had you told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship." (italics original)

Thus, the case advanced by the Secretary of State in the Decision in relation to causation was that it was Mr Hoti's frauds both (i) in his ILR application under the Legacy Programme, and (ii) in his naturalisation application, which were material to the grant of naturalisation.

- (f) The Decision then, at para 34 onwards, acknowledges that the decision to deprive is discretionary and considers how Article 8, the best interests of Mr Hoti's children and the possibility of statelessness impact the exercise of the discretion in this case. The Secretary of State concluded that, taking the matter at its highest, deprivation would be a reasonable and proportionate step.

21. On 1 October 2020 Mr Hoti lodged an appeal to the FTT under section 40A(1) of the 1981 Act.

C. PROCEEDINGS BEFORE THE FTT

The parties' positions

22. In support of his appeal, Mr Hoti filed an Appeal Skeleton Argument ("ASA"), drafted by counsel (who did not appear at the hearing below or before us) dated 8 June 2021 - over 3 months after the Supreme Court handed down its decision in Begum. This submitted that the essential questions for the Tribunal were: (a) Has Mr Hoti used deception in his applications for asylum, further leave to remain and naturalisation? (b) If so, was that deception material to the grant of citizenship? (c) If so, should discretion be exercised not to deprive Mr Hoti of his British citizenship, notwithstanding that material fraud? (d) Does the Decision breach Mr Hoti's rights under Article 8 ECHR?

23. Mr Hoti's ASA further (a) accepted that he had engaged in fraud, and had done so dishonestly, in asserting that he was from Kosovo, not Albania; (b) submitted that it was necessary for the deception to have been material to the grant of citizenship and must have motivated the acquisition of citizenship and that it was for the Secretary of State to prove that the deception was material and that Mr Hoti's deception had not been material in this case; (c) submitted that the Secretary of State's discretion should be exercised differently by the FTT; and (d) argued that the Decision breached Mr Hoti's Article 8 rights.
24. In relation to the scope of Mr Hoti's concession, we note that although no concession is expressly recorded in relation to the dishonesty of Mr Hoti's assertion that he did not know the whereabouts of his parents or as to his age, this does not appear to have been contested in any significant way and, so far as we can ascertain, his counsel did not suggest that any of his misstatements had been honestly made. It is unclear to us whether it was conceded that in stating on his Form AN that Mr Hoti was of good character, he engaged in fraud (or other relevant wrongdoing).
25. The Secretary of State conducted a review of the Decision in light of the ASA. In it was noted that the ASA omitted reference to caselaw handed down by this Tribunal since the ASA had been drafted, namely Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC). As well as the deception itself in relation to Mr Hoti's identity used in his various applications said to be relevant to the grant of leave which was itself a necessary precondition to the grant of citizenship, the Secretary of State further expressly relied on Mr Hoti's failure to 'come clean' on his Form AN and his declaration of good character.

FTT's decision

26. After noting Mr Hoti's immigration history, his case before the FTT and the Secretary of State's case as set out in the Decision, the FTT considered the legal framework and burden and standard of proof at paras 10-14. In particular, at para 12, the First-tier Tribunal Judge Kudhail ("the Judge") said as follows:

"I have considered the Upper Tribunal's guidance in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT00238 and Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC) as to the approach that should be adopted by Tribunal decision makers in assessing the respondent's exercise of her discretion in deprivation cases. I also considered the more recent case of Begum v SIAC and Secretary of State for the Home Department [2021] UKSC 7, which clarified the jurisdiction of the courts in the course of this assessment..."

27. At this point it suffices to say that it is not clear to us from this passage (or otherwise) precisely what the Judge considered the effect of Begum to be. This is particularly so in light of para 14, in which he stated that "In deprivation of citizenship appeals, the burden of proof rests with the

Secretary of State. The standard is the civil standard, namely the balance of probabilities.” It therefore does not appear that the FTT understood the effect of the authorities cited in para 12 to be that an administrative law approach, rather than a primary fact-finding role, was required.

28. Having set out the evidence before the FTT and described the hearing, at paras 22 to 32 in a section entitled “Findings of fact and reasons”, the Judge:

- (a) recorded Mr Hoti’s concession that he had committed fraud in relation to his age and nationality;
- (b) recorded that in the case of Sleiman (deprivation of citizenship: conduct: Lebanon) [2017] UKUT 367 (IAC) the Upper Tribunal held that the statutory wording that the acquisition of naturalisation must be “by means of” the relevant deception meant that the deception must be “directly material” to the grant of citizenship;
- (c) noted the Secretary of State’s guidance in Chapter 55.7 of her Nationality Instructions on whether deception is “material” to the acquisition of nationality;
- (d) considered (at para 26) the argument made by the Secretary of State in her review that Mr Hoti’s initial asylum claim was material to the grant of citizenship and stated:

“The respondent in her review accepts the appellant was a minor at the time of his asylum claim, this she accepts means he was not complicit in the fraud committed at that time or the subsequent grant of discretionary leave (paragraph 13/RR). She however argues that the circumstances were material in the grant of citizenship, as the appellants [sic] identity and family situation were inextricably linked. I have carefully considered this argument and I do not agree as the asylum claim was rejected...”

- (e) In the first part of para 27, the Judge considered the materiality of Mr Hoti’s deception to the grant of his discretionary leave, as follows:

“The respondent argued that the fraud was material to the grant of discretionary leave of 24 August 2005, in support of this she has included the consideration minute by the caseworker who granted that leave. I accept that the consideration minute refers to the appellant [sic] age as a factor in granting leave, as well as him having no contact with family. This consideration minute is inconsistent with the fact the appellant [sic] asylum claim was rejected as it seems to accept parts of his account.”

We interpose here to note that we do not understand this reasoning. An asylum claim may be rejected for many reasons. It does not follow from the fact that Mr Hoti’s asylum claim failed that his account was rejected. Indeed, as the Decision records, Mr Hoti’s asylum claim was

rejected for administrative reasons, not by reference to its merits. There was therefore no such inconsistency.

- (f) In the second half of para 27, the Judge then recorded Mr Hoti's counsel's submission that:

"Mr Toal argued it was insufficient for the respondent to argue what she would have done had she known the appellant [sic] parents were alive in Albania. She has not produced evidence to show what she was doing at the time to appellants with his profile. Thus the materiality of the deception in the decision making cannot be shown, simply by asserting what she would have done. Mr Toal also argued that the respondent had not discharged the burden of proof as it had not been shown that this was a material consideration to the grant of nationality."

- (g) In para 28, the Judge set out his reasoning in response to this submission as follows:

"The grant of citizenship was made following the appellant acquiring indefinite leave to remain under the legacy programme. I note I have not been provided with the consideration minute or decision letter for that grant of leave or the nationality grant. Considering the nationality instructions as cited above, it is clear that there is no evidence before me that the appellant's indefinite leave to remain or subsequent nationality, were granted on the basis of his nationality or age or that these were material facts under consideration."

Notable by its absence from this passage is any consideration of whether the fact of Mr Hoti's frauds would have been material to the decisions to grant ILR or citizenship, had they been known about at the time.

- (h) At para 29, the Judge noted parts of the Secretary of State's Nationality Instructions, in particular 55.7.4 which "goes into some details about using different names." The Judge then makes a curious statement that "It is arguable that someone using a false name is more egregious than nationality or date of birth and yet will not necessarily lead to a decision to deprive." As both parties however accepted before us, there is no inherent hierarchy of false information - it all depends on the purpose for which the false information is being used. For example, as the Administrative Appeal Chamber of this Tribunal noted in ED (claiming as "AA") v Secretary of State for Work and Pensions [2020] UKUT 352 (AAC) at [84], where the substantive conditions are otherwise met for the grant of some social entitlement, the use of a pseudonym may not be terribly important.
- (i) At para 30, the Judge stated that in relation to decisions under the Legacy Scheme,

“What is plain from both Hakemi...and from the chief inspectors [sic] report, is that absent a criminal conviction attracting a sentence of 12 months or more, indefinite leave to remain would generally be granted where there was residence of at least 6-8 years. In this case the appellant had been in the UK by the time he was granted ILR, the respondent has not shown that he would not have been granted the same leave, citizenship and been removed had the material facts been known at the time.”

In fact, Hakemi does not say anything of the sort and the “chief inspectors report” (which we take to mean the report by John Vine, then Independent Chief Inspector of Borders and Immigration, entitled ‘An inspection of the UK Border Agency’s handling of legacy asylum and migration cases’ of March-July 2012) was not in evidence before the FTT (nor before us).

- (j) At para 31, the Judge noted the Secretary of State’s submission based on para 55.7.8 of the Nationality Instructions, namely that Mr Hoti had been complicit in the fraud committed in applications made after the expiry of his discretionary leave, given that he was then over 18. The Judge’s response was that,

“as the Immigration history above confirms, the respondent did not grant the appellant leave on the basis of that application but did so under the legacy programme. She refers to the appellants [sic] deception in subsequent interactions with the respondent, this is accepted by the appellant. The issue is was it material to the grant of nationality and for reasons I have given I am unable to ascertain on the evidence as presented it was.”

- (k) At para 32, the Judge concluded that “the respondent has not established to the requisite standard, that the appellant obtained his naturalisation by means of fraud...As a result of this I do not go on to consider the reasonably foreseeable consequences of deprivation.” We take this final sentence to be a reference to Mr Hoti’s Article 8 claim.

D. GROUNDS OF APPEAL

29. In her application for permission to appeal, the Secretary of State advanced the following three grounds of appeal:

- (a) Ground 1: that the FTT failed to consider or make findings in relation to the Secretary of State’s case that Mr Hoti’s application for naturalisation fell to be refused by virtue of fraud within the Form AN itself, by reference to the good character requirements.
- (b) Ground 2: that the FTT has failed to apply the correct legal standard, in that, instead of the error of law approach mandated by Begum, the Judge considered the facts were for him to decide on the balance of probabilities.

(c) Ground 3: that the FTT misapplied Sleiman in considering the question of whether Mr Hoti's fraud was material to the grant of nationality.

30. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 12 January 2022. She considered that the Judge arguably made an error of law in failing to take into account material matters and/or failing to make findings in relation to the Secretary of State's case as set out in the refusal letter that Mr Hoti's nationality application fell to be refused on account of the fraud within the Form AN itself, by reference to the good character policy requirements and the erroneous answer to Q3.18, in addition to his continued use of the false identity within the AN. Although she considered Grounds 2 and 3 less meritorious, she considered them as also arguable and granted permission on all grounds.

E. MR HOTI'S RESPONSE TO THE APPEAL

31. On 16 February 2022, Mr Hoti, through his solicitors, made an application for expedition. This was refused by Upper Tribunal Judge Gleeson on 18 February 2022.

32. On 29 March 2022 – just two days prior to the hearing of this appeal – Mr Hoti's solicitors filed a response purportedly pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UTPRs").

33. We discern the following substantive points from the Rule 24 response:

(a) In relation to Ground 1, Mr Hoti's direct response to the ground of appeal is that the Judge did in fact consider the question of deception in the application form at para 31 of the determination but found the deception to be immaterial. Further, it is said that para 9.3 of Chapter 18 of the Secretary of State's Nationality Instructions (set out at para 30 of the Decision) is to be read subject to Chapter 55 and the Instructions at 55.7.3 and 55.7.4, which are said to contain a specific allowance for grants of leave by way of concession. Likewise, para 9.3 of Chapter 18 must be read in the context of para 9.5 and the examples given therein of cases where fraud in the naturalisation process would not lead to a refusal of naturalisation. In other words, it is said that any failure to consider the Secretary of State's case in relation to the fraud in the Form AN itself is immaterial because it would necessarily have led to the FTT dismissing this aspect of the case too.

(b) In relation to Ground 2, the rule 24 response mischaracterises the ground as a challenge to a finding of fact and does not engage with Begum. Instead, the response provides a lengthy discussion of the role of materiality of fraud in relation to deprivation decisions and seeks to bolster the FTT's finding that Mr Hoti's deception in his earlier applications was not material to the grant of leave by reference to new evidence not before the FTT, namely (a) various screenshots from decision minutes, and (b) training slides.

- (c) Ground 3 is said not to be its own ground of appeal but “simply splashes back on Ground Two” (which we understand to be a submission that it raises the same issue as Ground 2).

F. ERROR OF LAW HEARING

34. At the hearing we heard from Mr Clarke for the Secretary of State and Mr Farhat for Mr Hoti. Neither appeared before the FTT. We are grateful to them both for their submissions.
35. Mr Clarke in his oral submissions emphasised that there were two bases on which Mr Hoti’s naturalisation was said to have been acquired by means of his fraud: first, there was a “chain of causation” argument, based on the acquisition of leave – itself a precondition to the grant of naturalisation – by fraud; and second, fraud in the Form AN itself. The FTT had not considered this second basis. This is Ground 1. Had it done so, it would have had to do so by considering whether no reasonable Secretary of State could have reached the position she reached (see [124] of Begum), which is important when considering the Rule 24 response.
36. As to Ground 2, Mr Clarke identified four alleged misdirections in the FTT’s determination: (i) the self-direction at para 14 as to the burden and standard of proof; (ii) the finding at para 32 that the Secretary of State has not established the relevant facts; (iii) the conclusion at para 30 that in relation to the decision under the Legacy Programme that “the respondent has not shown” that Mr Hoti would not have been granted that leave; and (iv) the statement at para 29 that “It is arguable that someone using a false name is more egregious than nationality or date of birth and yet will not necessarily lead to a decision to deprive”. In relation to para 55.7 of the nationality instructions relied on in the rule 24 response, this is not applicable, because it relates to grants under concessions, which was not the case here.
37. In relation to Ground 3, Mr Clarke submitted that the FTT had failed to distinguish Sleiman, where the case advanced by the Secretary of State was considerably narrower than in this case. In any event, it was assessed on a balance of probabilities approach, not through the administrative law principles approach, applicable post-Begum.
38. Mr Clarke invited us to retain the case in the Upper Tribunal rather than remitting it to the FTT if we were satisfied that the decision of the FTT involved the making of an error of law.
39. Mr Clarke made the following points in relation to the rule 24 response: it does not address Begum; it attempts in relation to Ground 1 to litigate arguments not made before the FTT; it refers in this respect to “normative statements” which are discretionary statements to caseworkers, but [124] of Begum is appropriate to consider in relation to those; in relation to ground 2, it ignores the appropriate test and focuses on Hakemi; at para 79 of the rule 24 response Mr Hoti appears to accept that the policy

considerations relied on by the Secretary of State were relevant (but asserts that that is not the test); ground 3 is not substantively dealt with.

40. Mr Farhat, for Mr Hoti, relied on the rule 24 response and submitted that the FTT's decision does not disclose errors of law. In relation to Begum, he accepted that deprivation appeals are to be determined through the prism of public law, but submitted that "this does not mean that the decision maker's words become gospel". For the Secretary of State's discretion to exist, the naturalisation still has to be "by means of" fraud, and Sleiman holds that this means that the deception has to bear on or be material to the decision. The FTT's role is to decide whether findings are unsupported by evidence. Nothing in the determination is incompatible with Begum: the Judge looked at materiality and found, against the backdrop in Sleiman, that there was no evidence that the deception was material.
41. In relation to the deception used on the Form AN, Mr Farhat submitted that, first, the wording of para 55.7.4 of the Nationality Instructions suggests that there can be an incorrect detail on the form (see also para 34 of the Rule 24 response) and the overriding point is that it needs to be material. Secondly, Annex D to Chapter 18 again reiterates the need for materiality - here, fictitious nationality on the form is irrelevant. Third, the question on the form at 3.1.3 is a wide one. It is an opinion-based question with subjective elements running through it. It is not the same as "have you been convicted?", which is clear cut.
42. As to the issue of materiality of the deception, the point of the legacy scheme, submitted Mr Farhat, was that delay by the Secretary of State was seen as a significant factor. Hakemi holds that the policy objective was to clear the backlog. The training slides submitted with the Rule 24 response were not before the FTT, but were before the Court in Hakemi so should be admitted.
43. On the question of the burden of proof in deprivation appeals, Mr Farhat submitted that just because the proper approach is to consider the lawfulness of the Secretary of State's decision through the framework of administrative law, this does not mean that the burden of proof is not on the decision maker.
44. Mr Clark in his reply, made the following points:
 - (a) para 9.5 of Annex D to Chapter 18 relied on at paras 53-54 of the rule 24 response is the wrong policy. It was not effective when the nationality decision was made. The correct version is that in the Secretary of State's bundle.
 - (b) as to Mr Hoti's reliance on para 55.7.4, no concession was ever made.

G. DISCUSSION AND ANALYSIS

The issues for determination

45. In light of the above, it seems to us that the issues in this appeal can be sensibly addressed as follows:
- (a) first, two procedural questions arise: whether we should permit reliance on (i) the late rule 24 response and/or (ii) the evidence contained therein that was not before the FTT;
 - (b) second, whether the FTT erred in not considering the Secretary of State's case in relation to fraud undertaken in the Form AN itself (Ground 1);
 - (c) third, whether the FTT erred in its approach to deprivation appeals and failed to apply Begum (Ground 2);
 - (d) fourth, whether the FTT erred in its approach to causation (Ground 3); and
 - (e) fifth, if any of the Grounds are made out, what are the appropriate next steps?

Issue 1: Rule 24 response / new evidence

46. At this juncture, it is necessary to highlight some relevant procedural rules.

Rule 24 responses

47. Rule 24(1A) of the UTPRs provides that, subject to any direction given by the Upper Tribunal, a respondent to an appeal may provide a response to a notice of appeal. Although expressed in permissive rather than mandatory language, in a case where a respondent wishes to rely on a ground on which they were unsuccessful below they are under an obligation to provide a response: Devani v Secretary of State for the Home Department [2020] EWCA Civ 612, [2020] 1 WLR 2613.
48. The Rules prescribe both the timing and content of a Response under Rule 24. We deal first with timing. As to this:
- (a) Rule 24(2) requires that, in a case such as this in which the application for permission to appeal stands as the notice of appeal, the response be "sent or delivered to the Upper Tribunal so that it is received...no later than one month after the date on which the respondent was sent notice that permission to appeal had been granted".
 - (b) By Rule 24(4), "If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time."

49. Compliance with these rules is important to enable the Tribunal to further the overriding objective of dealing with cases fairly and justly, in accordance with rule 2. The provisions as to timing in rule 24(2) is of particular significance, because of the impact of a response on the further conduct of the appeal. In particular, receipt of the response requires the Tribunal to send a copy to the appellant (rule 24(5)), which in turn triggers the starting gun on the time for an appellant's reply under Rule 25. That reply must be received within one month of the date on which the Tribunal sent the Rule 24 response, or five days before the hearing of the appeal, whichever is the earlier (rule 25(2A)). It is thus essential to enable an appellant a fair opportunity to draft a rule 25 reply that the Rule 24 response is provided to the Tribunal within the prescribed time frame. Further, as Underhill LJ noted at [31] of Devani, "The point of the additional grounds provision [in rule 24(3)(e), set out below] is, evidently, that the appellant and the UT should know in advance of the hearing what matters will be in issue". Significant delay in providing a rule 24 response accordingly undermines the purpose of that rule.
50. The Court of Appeal in Devani did not decide what the effect of non-compliance with rule 24 is, though the Court and the parties seem to have proceeded on the assumption that it was that any additional grounds sought to be relied on could not be argued. That issue was however considered, albeit obiter, by Nugee J in Acornwood LLP v Revenue and Customs Commissioners [2016] UKUT 361 (TCC). He held at [108] that if a respondent wishes to rely on any grounds in support of his opposition to an appeal (other than simply relying on the decision which is being appealed) then he should say so in his rule 24 response, and if he fails to say so, and fails to obtain an extension of time, then the consequence is that he cannot run such arguments on the appeal without the permission of the Tribunal.
51. We agree with that conclusion. If there were no consequence for failing to provide a rule 24 response within the prescribed time limit, there would be no purpose in requiring, as Rule 24(4) does, a respondent to request an extension of time. If it were otherwise, the refusal to grant such an extension would likewise be of no effect. This cannot, in our judgment, have been the intention of the drafters of the Rules. If a respondent does not file a rule 24 response in time, unless he or she obtains an extension of time for doing so, he or she cannot rely on any grounds put forward therein which did not form the basis of the decision under appeal.
52. Turning now to the substance of a rule 24 response, Rule 24(3) requires that:
- "The response must state-
- (a) the name and address of the respondent;
- (b) the name and address of the representative (if any) of the respondent;

(c) an address where documents for the respondent may be sent or delivered;

(d) whether the respondent opposes the appeal;

(e) the grounds of which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and

(f) whether the respondent wants the case to be dealt with at a hearing.”

53. What is envisaged, beyond the provision of generally useful information for the Tribunal and an appellant to have where an appeal is contested, is a concise statement of the grounds to be relied upon. This is a document that is intended to inform an appellant of the case they are required to meet on appeal. Such a concise statement will help the Tribunal to further the overriding objective, in accordance with the parties’ duty under UTPR 2(4)(a). What is not in our view envisaged by the rules (and does not help the Upper Tribunal to further the overriding objective) is a long and prolix document containing a lengthy discussion about the grounds, screenshots of the FTT’s judgment, nor long quotes from authorities or other documents. The layout and format of the document should be such that it assists the reader to understand the points that are being expressed.

54. In relation to Mr Hoti’s rule 24 response it is worth noting the following:

(a) It is very late, no reason has been given for that lateness and no request for an extension has been expressly made.

(b) The contents of the response do not contain the prescribed information, save for the grounds on which Mr Hoti relies, and those grounds are set out in a manner which is not conducive to the promotion of the overriding objective. In that respect we note that:

(i) The response itself is 110 paragraphs long over 17 (unpaginated) pages and contains an annex of a further 53 pages;

(ii) The response contains a remarkably wide array of formatting. In the text of the document itself, this includes underlined words, italicised words, bold underlined words, italicised bold underlined words, highlighted bold words and bold (mostly but not always) underlined words that have been highlighted in yellow. Certain headings (which are also bold and underlined) are highlighted in a different shade of yellow. In quoted documents, certain passages are (in addition to being emboldened and underlined) also highlighted in yellow, others are underlined in red. No attempt is made to clarify whether any formatting in quoted documents is original or added. Authorities cited are sometimes in bold italics, sometimes underlined bold italics. At the risk of

understatement, none of this assists the readability or comprehensibility of the document.

- (iii) It contains numerous screenshots of documents, including the FTT's judgment, the Home Office's website (though it is not made clear on what date) and of other documents whose source is simply said to be "SAR" and which do not appear to have been before the FTT.

55. The above would, we consider, amply entitle us to refuse to extend time for the provision of the rule 24 response. However, this is a case of some complexity and we consider that we would be assisted by the rule 24 response (though we underline that we would have been *significantly* better assisted if it were more concisely and clearly drafted). Further, no objection to us considering the rule 24 response, or to Mr Farhat pursuing the points therein, was made by Mr Clarke on behalf of the Secretary of State and we are satisfied that, although he did not have an opportunity to file a rule 25 response, he was in a position fairly to respond to the points made in it. In those circumstances, on balance, we have decided to extend time for the rule 24 response.
56. Whether to admit the new evidence contained in the response is however a separate question, to which we now turn.

New evidence

57. UTPR Rule 15(2A) provides that:

"In an asylum or an immigration case-

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party-

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence."

58. In addition to the question of unreasonable delay mentioned in rule 15(2A) (b), the Upper Tribunal is entitled to take into account the failure to comply with rule 15(2A)(a) and the Ladd v Marshall principles of whether the new evidence could not with reasonable diligence have been obtained for use at the hearing before the FTT, whether the new evidence would probably have had an important influence on the result of the case, and whether the new evidence was apparently credible: see Kabir v Secretary of State

for the Home Department [2019] EWCA Civ 1162, [2020] Imm AR 49 at [33].

59. We are in no doubt that it would be inappropriate in this case to admit the new evidence that is contained in (and appended to) Mr Hoti's rule 24 response. There has been no attempt to comply with rule 15(2A), no explanation has been provided as to why this evidence was not adduced below and there has been delay in producing it. In the absence of any explanation as to when the documents were (or could reasonably have been) obtained, the obvious inference is that there is no good reason for the delay. More particularly:
- (a) The appended slide pack was said to be in the public domain by virtue of a freedom of information request and it is difficult to understand why it was not therefore adduced before the FTT if it was relevant.
 - (b) In relation to the extracts from documents apparently obtained by a subject access request (which is what we believe the designation "SAR" under each excerpt to mean), we have not been told when these were received and it is not clear on what basis the parts extracted have been selected and whether they therefore present a fair impression of those documents as a whole.
 - (c) In relation to the version of Chapter 18, Annex D, annexed to the rule 24 response, there was already what appeared to be the correct version of this part of the Nationality Policy Guidance and Casework Instruction for the relevant time in the Secretary of State's bundle before us and before the FTT and Mr Clarke confirmed in his oral submissions that the (undated) guidance on which Mr Hoti now sought to rely was not applicable at the relevant times. Mr Farhat did not dispute this, and we can therefore see no basis on which it could overcome the second Ladd v Marshall principle (or indeed a relevance threshold).
60. In those circumstances, we extend time for providing the respondent's response under rule 24, but we decline to admit, for the purposes of the error of law hearing, the new evidence contained therein. For the avoidance of doubt, it remains open to the respondent to apply, in accordance with Rule 15(2A), to rely on this evidence at any further hearing.

Issue 2: Fraud in Form AN

Error of law

61. As is set out in para 32 of the Decision quoted above, the issue whether Mr Hoti had used deception in his Form AN, in particular in relation to the question of whether he was someone of good character, was clearly a basis on which the Decision was taken. The FTT could only therefore allow an appeal if valid grounds of appeal were made out against that aspect of

the Decision. The Secretary of State's case before us is that the FTT simply failed to assess that aspect of her case.

62. As set out above, Mr Hoti submits that the FTT did in fact consider this part of the Secretary of State's case at para 31 of its determination.
63. We agree with the Secretary of State. In our judgment the Judge did not consider this part of the Secretary of State's case. It is correct that in para 31 the Judge refers to the Secretary of State's reliance on deception in subsequent interactions with the Secretary of State, which may conceivably have included the nationality application itself (although this is not clear on the face of that paragraph). However the Judge then concluded that this deception was not material "for reasons I have given", but the reasons given in relation to the nationality application are contained in the final sentence of para 28 and there the FTT states that "it is clear that there is no evidence before me that the appellant's... nationality [was] granted on the basis of *his nationality or age* or that these were material facts under consideration" (emphasis added). That was however not the Secretary of State's case in relation to the nationality application. Her case was that it was Mr Hoti's representations in his Form AN about *his good character*, which amounted to the deception in this respect. That issue has, in our judgment, simply not been considered by the Judge.
64. At the hearing before us, there was a brief discussion about the extent to and circumstances in which representations in the Form AN as to an applicant's good character could amount to deception, and about the evidence that might be necessary for the Secretary of State to be rationally satisfied that those representations were dishonestly made. We raised the fact that the Form AN cross-refers to Guide AN and Booklet AN, which could conceivably have contained detailed instructions about whether someone can properly say that they are of good character, but which we do not have before us (and were not in evidence before the FTT). This is a point that is of some general importance and has only, so far as we are aware, been touched on, obiter, in the authorities: Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 (IAC). That issue is however better considered in light of all the relevant evidence at any remaking hearing. It does not affect the fact that the FTT did not in this case consider the Secretary of State's case that there was fraud in the representation by Mr Hoti as to his good character in the Form AN, which amounts to an error of law.

Materiality

65. Before leaving this ground, we note Mr Hoti's fall-back position, namely that the error was immaterial because, had this ground been considered, the FTT would necessarily have found, by reference to Chapter 55 and Annex D to Chapter 18 of the Secretary of State's Nationality Instructions, that even had Mr Hoti notified the Secretary of State in his Form AN that

he had engaged in fraud, his application would necessarily have been granted.

66. There may be arguments to be had about what the Secretary of State would have been required to do by virtue of her various policy documents had she known about Mr Hoti's fraud on the Form AN, but we do not accept that the arguments made in relation to this are so powerful as to overcome the high threshold necessary to show that the error is immaterial. These are matters can be determined at any remaking hearing. We accordingly find that ground 1 is made out.

Issue 3: Failure to apply Begum

67. The power to deprive someone of a "citizenship status" is provided to the Secretary of State in section 40 of the 1981 Act. It provides, so far as relevant as follows:

"(1) In this section a reference to a person's "citizenship status" is a reference to his status as-

(a) a British Citizen...

(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 be 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) [if certain exceptions apply].

68. Begum was a case about deprivation of citizenship on the grounds that it is conducive to the public good under section 40(2) of the 1981 Act, not on the grounds that naturalisation or registration had been obtained by means of relevant wrongdoing under section 40(3). The Supreme Court held that the proper approach to appeals under section 40(2) was for the relevant statutory Tribunal to apply the principles applicable in administrative law (see [68]-[69]). The Special Immigration Appeals Commission has since confirmed in U3 v Secretary of State for the Home Department [2022] UKSIAC SC_153_2018 at [27] (and we agree) that the full range of grounds on which a decision could be impugned in judicial

review proceedings are available to an appellant on a deprivation appeal where administrative law principles apply.

69. In Ciceri, this Tribunal updated the guidance that had previously been given to the FTT as to how to determine deprivation appeals. In doing so, it held at [30(1)] that

“The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the 1981 Act 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. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.”

70. The Tribunal in Ciceri did not explain why it considered that the approach mandated by Begum in relation to section 40(2) cases also applied to section 40(3) cases, but we are satisfied that it does so. As the Supreme Court held in Begum ([59] and [67]), the basis for such an approach is (a) the statutory allocation of responsibility for the decision is placed on the Secretary of State (it is she that must be “satisfied” of the relevant conditions precedent, not the Tribunal), and (b) the absence of any positive indication in statute that the appeal should be a de novo remaking of the decision. Those considerations apply equally to a decision under section 40(3) as to one under section 40(2). Subject to reading the final sentence of the above guidance as, in light of U3, including reference to all grounds that could be argued on a judicial review claim, we agree that this remains the correct approach in a section 40(3) case.
71. We note that in E3, N3 and ZA v Secretary of State for the Home Department [2022] EWHC 1133 (Admin) at [47] Jay J expressed concern about the guidance in Ciceri and, in particular, about the suggestion that administrative law principles apply as much to whether the condition precedent exists for the exercise of the discretion to deprive on one or more of the means specified in section 40(3) as they do to the national security question at the centre of section 40(2). The cause for this concern was that it would, he considered, call into question the proposition that SIAC (and the FTT) makes its own factual findings in relation to whether deprivation will render someone stateless for the purposes of section 40(4), to which the same rationale as the Supreme Court applied in relation to section 40(2) would appear to apply.
72. We understand the concern, but we respectfully do not share it (and in any event are not satisfied that Ciceri is plainly wrong, such that we should not follow it). The fact that the approach to be taken is an administrative law one is the starting point of the analysis, not the end of it. It is now well established that different levels of deference or intensities of scrutiny apply in different contexts. This is what we understand Lord Reed to be

saying in Begum at [69] where he referred to different principles applying where different aspects of a decision (and presumably also different decisions) give rise to different considerations. In particular, the high level of deference to be shown in the context of national security assessments by the executive with which Begum was concerned does not apply in relation to deprivation decisions outside that context (see Secretary of State for the Home Department v P3 [2021] EWCA Civ 1642 at [114] per Elisabeth Laing LJ; U3 at [23]-[25]). Indeed, as the House of Lords made clear in ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6, [2009] 1 WLR 348 at [23], some questions are only susceptible to one rational answer and in those circumstances, a court or tribunal, even applying an administrative law approach, must ask itself the same question as the decision-maker and, if it reaches the contrary conclusion, will necessarily conclude that the Secretary of State's view was irrational. Precisely how deferential to the Secretary of State the FTT and SIAC are required to be in relation to different questions that arise in deprivation decisions is something that will require consideration as they arise in different cases, but we can see force in the suggestion that the question of whether someone will be rendered stateless by a deprivation decision falls at the least deferential end of the spectrum and may well only be capable in any particular case of one rational answer, particularly where significant further evidence has been heard on appeal.

73. While the precise level of scrutiny or deference will depend on the subject matter, the overall approach which the FTT is required to take in a deprivation appeal under section 40(3) is an administrative law one. It will be apparent therefore that we consider that Ground 2 is successfully made out. Notwithstanding the Judge's reference to both Begum and Ciceri, it appears from para 14 of his decision that he did not appreciate that an administrative law approach is now required and he has not applied those authorities correctly. Instead of considering whether the Secretary of State was lawfully satisfied that Mr Hoti's naturalisation was acquired by means of his admitted fraud, the Judge sought to decide that question for himself by the application of a burden and standard of proof as the primary decision maker. In our judgment, that constituted an error of law.
74. We note that the Judge was not assisted in this respect by Mr Hoti's previous counsel's ASA, which also failed to adopt an administrative law approach to the questions which the FTT was required to answer in setting out the issues. It is unfortunate that some 3 months after the decision in Begum was handed down by the Supreme Court, it appears to have been simply overlooked by counsel.
75. Mr Hoti invited us to find that this error was immaterial because the Tribunal would necessarily have come to the same conclusion on causation regardless of whether it applied an administrative law approach or not. However, for the reasons we give below, we consider that the Tribunal's consideration of the causation questions itself contains an error of law and will need to be reconsidered. In our judgment therefore, the error identified under Ground 2 is material.

Issue 4: Causation

76. Ground 3 relates to the FTT's conclusion that the Secretary of State failed to prove a chain of causation between the fraud or misrepresentations as to his identity, nationality and age in Mr Hoti's various earlier applications and other dealings with the Secretary of State and his grant of naturalisation. We are not at this stage concerned with the alleged misrepresentation in the Form AN in relation to his good character which was the subject of Ground 1 considered above.
77. The Secretary of State's submissions on this ground are that the Judge (a) was wrong to construe Sleiman as an authority that a previous grant under the Legacy Programme necessarily broke the chain of causation; (b) failed to reason/consider or make findings as to whether Mr Hoti would have been refused ILR or citizenship had the Secretary of State been aware of his frauds at the time ILR and citizenship were considered.
78. We do not consider that the Judge construed this Tribunal's decision in Sleiman as authority for the proposition that a previous grant under the Legacy Programme necessarily broke the chain of causation between an earlier fraud and the subsequent grant of nationality. However, what the Judge did do was to assume, without evidence, that there was a rule that ILR would be granted under the Legacy Programme where there was residence of 6-8 years and no conviction attracting a sentence of 12 months or more, and on that basis find that the Secretary of State had not shown that Mr Hoti would not have been granted ILR, and then citizenship on the basis of that ILR, had his true details been known. As well as relying on matters that were not in evidence, this ignores (a) the terms of para 395C of the Immigration Rules, which applied to the decision whether to grant Mr Hoti ILR, and in respect of which personal history, including character, conduct and employment record were to be taken into account in the way explained in Matusha, above; and (b) section 9 of the relevant caseworker instructions relied on by the Secretary of State in para 30 of the Decision, which indicates that, at least normally, where deception has been used in a previous application, this will cause a decision-maker to refuse an application for naturalisation.
79. As with the other grounds, Mr Hoti invites us to find that the error is not material. We decline to do so. In essence, his submission was that as a result of this Tribunal's decision in Sleiman, it was inevitable that, even if the Judge had approached the matter correctly, he would have found that the grant of naturalisation was not obtained "by means of" his lies, by virtue of the way in which that phrase was held to be interpreted in Sleiman. It is correct that what the condition that naturalisation be "by means of" the relevant misconduct requires was considered in Sleiman. However, what was said by the Tribunal in that case must be seen in its proper context. In particular, that was a case in which the fact of the wrongdoing (as opposed to the attributes about which misrepresentations were made) was not relied on by the Secretary of State and the file note in respect of the decision under the Legacy Programme expressly recorded

that the appellant's age (which was the relevant particular fraudulently given) was not a relevant consideration. Moreover, what the causative threshold required is where the lies told factor into a multifactorial assessment (such as that under para 395C of the Immigration Rules or the good character requirement in issue here) was not considered in Sleiman and the matter is not so obvious in our judgment so as to reach the threshold for immateriality. It is something that will likely need to be considered at any re-hearing.

80. We accordingly consider that Ground 3 is made out.

Issue 5: Next steps

81. In light of the above, the decision of the FTT will be set aside. We consider that this is an appropriate case to be retained in the Upper Tribunal. Both the 'chain of causation' and the Form AN frauds relied on by the Secretary of State will need to be considered, as will, if the decision to deprive is otherwise lawful, whether it breaches Mr Hoti's Article 8 rights.

82. In considering these issues (and without seeking to limit the scope of the submissions the parties may otherwise wish to make within the scope of the grounds of appeal), we consider that the Tribunal would be assisted by submissions on the following issues:

- (a) What is the proper approach to deprivation appeals under section 40(3) and what evidence is this Tribunal entitled to take into account?
- (b) What is necessary for the Secretary of State to be lawfully satisfied that an appellant has engaged in fraud by virtue of a representation that he is of good character in the Form AN? Is merely ticking the relevant box sufficient to be so satisfied on the balance of probabilities, or is something more required in light of the requirement that the fraud be dishonest and deliberate? If so, what? Are Guide AN and/or Booklet AN relevant in this respect?
- (c) What is necessary for the Secretary of State to be lawfully satisfied that the acquisition of nationality was "by means" of relevant wrongdoing where the issue is how that wrongdoing would have been considered as part of a multifactorial assessment? Is the Secretary of State required to be satisfied that leave would not have been granted on the balance of probabilities had that wrongdoing been taken into account, or is it enough that it would have been taken into account in making that assessment?
- (d) In considering this issue of causation, we would be assisted by the parties' submissions on:
 - (i) whether the meaning to be ascribed to "by means of" in section 40(3) is the same regardless of whether the effect of the decision is to render someone stateless or not, and, if so,

- (ii) what is the relevance to the question of causation, if any, of the fact that the power to deprive on the grounds of fraud etc appears to be intended to give effect to the UN Convention on the Reduction of Statelessness and/or the European Convention on Nationality (see Al-Jedda v Secretary of State for the Home Department [2013] UKSC 62, [2014] AC 253 at [14]-[22])? In this respect (and without intending to limit the parties' researches on this) we would draw the parties' attention to: the UNHCR's Guidelines on Statelessness No. 5, Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05 (para 51); the Secretary General's Report to the UN Human Rights Council of 19 December 2013, entitled 'Human rights and arbitrary deprivation of nationality' (A/HRC/25/28) (para 10); and the Council of Europe's Explanatory Report to the European Convention on Nationality of 6 November 1997 (para 61).
- (e) Is, and if so to what extent, the fact that the European Court of Human Rights has recently taken the opportunity to clarify its methodological approach to deprivation cases (see Usmanov v Russia (2021) 72 EHRR 33; Ahmadov v Azerbaijan [2020] ECHR 96; Hashemi v Azerbaijan [2022] ECHR 44; Johansen v Denmark (Application no. 27801/19, 1 February 2022)) something that the Tribunal can (as a matter of precedent) and/or should take into account in relation to Article 8?

DECISION

83. For the foregoing reasons, we are satisfied that the decision of First-tier Tribunal Judge Kudhail dated 16 December 2021 discloses an error of law. We set aside that decision. We make the following directions for a resumed hearing.

DIRECTIONS

1. Within 7 days of the date when this decision is sent, the parties shall file with the Tribunal their dates to avoid in the period November 2022 - February 2023.
2. The appeal is to be relisted before the Upper Tribunal for a hearing at Field House on a face-to-face basis with a time estimate of 1 day taking into account the parties' dates to avoid.
3. By no later than 14 days before the relisted hearing:
 - (a) the Secretary of State is to file and serve:
 - (i) any relevant public guidance on the completion of Form AN (including Guide AN and Booklet AN); and

- (ii) any file notes or other documents evidencing the basis of the decision dated 30 April 2010 to grant Mr Hoti indefinite leave to remain.
- (b) the parties shall make any application to:
 - (i) adduce any other evidence that was not before the FTT in accordance with UTPR 15(2A); and/or
 - (ii) amend the grounds of appeal.
- 4. By no later than 7 days before the relisted hearing the parties are to file and serve skeleton arguments of no more than 10 pages addressing (without prejudice to anything else relevant to the grounds of appeal which they wish to address) the matters set out at para 82 above.
- 5. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying with them.

Signed Paul Skinner
Deputy Upper Tribunal Judge Skinner

Date: 30 September 2022