



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005689

First-tier Tribunal No: DC/00012/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th October 2023

Before

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VLADIMIR BARDOSHI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr A. Pipe, counsel instructed by Latitude Law

Heard at Field House on 18 August 2023

DECISION AND REASONS

Introduction

1. In this appeal the Secretary of State is the Appellant but for ease of reference we refer to the parties as they were at the First-tier Tribunal.

The procedural history

2. In a decision promulgated on 20 October 2022, Judge Karbani (hereafter “the Judge”), allowed the Appellant’s appeal against the Respondent’s decision to deprive him of his British citizenship by way of a decision dated 20 January 2021. The order depriving the

appellant of his British citizenship was made under s.40(3) of the British Nationality Act 1981 ("BNA 1981").

3. The Respondent appealed to the First-tier Tribunal for permission to appeal to the Upper Tribunal; this was initially refused by Judge Thapar on 22 November 2022.
4. The Respondent however renewed her challenge and permission was granted by Upper Tribunal Judge Canavan on 13 December 2022. In granting permission, the Upper Tribunal Judge concluded in the following way, at para. 2:

"The judge made clear that she had regard to the guidance given by the Supreme Court at [71] in R (Begum) v SIAC [2021] UKSC 7 [69]. It was open to her to consider whether the Respondent had taken into account relevant considerations before coming to a decision. However, it is at least arguable that, despite her self-direction, the judge appeared to conduct her own assessment of the relative weight of each piece of evidence relating to the condition precedent required for deprivation of citizenship, and arguably incorrectly required the Respondent to discharge a burden of proof, rather than considering whether the decision was within a range of reasonable responses to the evidence."

Relevant background

5. For the purposes of our error of law decision we highlight the following relevant record of the evidence and findings (paragraph numbers refer to the Judge's decision unless otherwise stated):
 - a. The Appellant entered the United Kingdom on 21 January 2000 and claimed asylum. When the Appellant completed his 'statement of evidence' form with his associated witness statement (dated 23 October 2000) he claimed that his parents were named Din Bardhoshi (father) and Hatixhe Bardhoshi (mother). His asylum claim was refused by the Respondent on 21 June 2001, but she went on to grant him Exceptional Leave to Remain ("ELR") until he turned 18 years of age (20 March 2002) based on the date of birth given as 20 March 1984, (para. 2).
 - b. At this stage the Appellant gave his personal details as 'Vladimir Bardoshi', born in Irush, Gjakove, Kosovo, (para. 1). We add that the Appellant in fact used the spelling 'Prushe' in the statement of evidence form at (RB/25 (B8)) of the Respondent's bundle but we have continued to use the spelling 'Irush' as deployed by the Judge in the decision (and at times the Respondent) for ease of reference.
 - c. The Appellant was later granted Indefinite Leave to Remain ("ILR") on 31 March 2011. He applied for British citizenship on 14 October 2013. In his application for British nationality, the Appellant claimed that his parents are named: Pullumb Bardoshi and Shqiponja Bardhoshi, both born in Irush, Gjakovo, Kosovo (para 45 of the decision letter). The Appellant was naturalised on 16 December 2013, (paras. 4 & 7).

- d. On 24 July 2020, the Appellant was informed by the Respondent that enquiries into his background had been conducted and that this had led to confirmation that he is in fact an Albanian national and not Kosovan as he had claimed when he first entered the United Kingdom in 2000 (para. 8).
- e. The Respondent further asserted (based on evidence obtained from the British Embassy in Tirana) that the Appellant's genuine identity is in fact Vladimir Bardhoshi and not 'Bardoshi' as had been predominantly claimed in the past. The Respondent also contended that the Appellant was in fact born on 20 March 1983 and not 20 March 1984 as he had asserted in 2000 and subsequently (para. 9).
- f. The Respondent also contended that evidence from the British Embassy in Tirana confirmed that there were no Albanian or Kosovan nationals with the names of Pullumb Bardhoshi or Shqiponja Bardhoshi - the Appellant has more recently claimed that these are the names of his parents (para. 9).
- g. The Respondent further asserted that the Appellant was in fact an adult at the time he was granted ELR as a minor and if the Respondent had known that the Appellant was an Albanian national it is likely that he would have been refused. It was contended that the Appellant's asserted Kosovan nationality was material to the Respondent's decision to grant ILR. This therefore amounted to deception and dishonesty both in the application for ILR and for naturalisation (para. 10).

The issue between the parties

6. The key issue materially in dispute between the parties in the appeal before the Judge is summarised at the beginning of the Respondent's notice of decision to deprive the Appellant of his British nationality under section 40(3) of the British Nationality Act 1981, namely: the Respondent asserts that the Appellant's genuine identity, date of birth and nationality are: Vladimir Bardhoshi, born on 20 March 1983 in Kukes, Albania.
7. The Appellant however maintains that he is Vladimir Bardoshi, born on 20 March 1984 in Gjakove, Kosovo.
8. The Respondent's position is that the Appellant lied about his identity, age and nationality when claiming asylum in the UK in 2000 and that this dishonesty led to him receiving ELR in 2001 and later a grant of ILR in 2011 which led to British nationality in 2013.

The evidence before the Judge

9. The Judge heard oral evidence from the Appellant at the hearing and also had a number of relevant documents before her in respect of the question of the Appellant's identity, nationality and date of birth.

10. It is therefore important for us to engage with the relevant documents, and additionally whether or not they were before the Respondent at the time of the making of the decision to deprive (20 January 2021).

The British Embassy letter, dated 11 April 2019

11. At GG1 (RB/204) of the Respondent's bundle is a letter from the British Embassy in Tirana (dated 11 April 2019) in which the Embassy confirm that, as a result of checks undertaken by the General Directorate of Border and Migration and the General Directorate of the Civil Registry at the Ministry of Interior of Albania, they were able to confirm that an Albanian national is registered on the National Civil Register of Albania with the following details, name: Vladimir Bardhoshi, his father's name: Din, and mother's name: Hatixhe.
12. The letter also states that checks conducted with the Agency for Civil Registrations in Kosovo resulted in a response indicating that the name of Vladimir Bardhoshi was not registered in Kosovo as a national.
13. At HH1 (RB/207) of the Respondent's bundle is an Albanian family certificate laying out the registration of Vlaimir Bardhoshi, his parents and siblings.

The British Embassy letter, dated 15 December 2020

14. At II1 (RB/208) of the Respondent's bundle is a further letter from the British Embassy in Tirana in which it is confirmed that further verification checks were carried out with the Albanian authorities in relation to "Din Bardoshi *aka* Din Bardhoshi" which confirmed that Din Bardhoshi is registered on the National Civil Register of Albania.
15. The letter also states that no national is registered in Kosovo with the details of Din Bardoshi.
16. There is a further letter from the British Embassy also dated 15 December 2020 at JJ1 (RB/211) of the Respondent's bundle which confirms that checks were also made in respect of the names "Hatixhe Bardoshi *aka* Hatixhe Bardhoshi" with the Ministry of the Interior of Albania, which confirmed that a person called Hatixhe Bardhoshi is registered in Albania.
17. Unhelpfully though, the same letter also states that Din Bardoshi is not registered in Kosovo - it appears then that this British Embassy letter does not detail any checks made in respect of Hatixhe Bardhoshi or Bardoshi with the Kosovan authorities.
18. There is another British Embassy letter dated 15 December 2020 at KK1 (RB/214) which describes checks with the Ministry of Interior of Albania in respect of the two names given by the Appellant (in his more recent representations, see for example our para 5.c above) for his parents.
19. The response indicates that no Albanian national is registered on the National Civil Register of Albania with the names or surnames Pullumb/Pellumb Bardoshi/Bardhoshi, nor Shqiponja/Shqiponje Bardoshi/Bardhoshi.

20. The letter also states that no individuals with those names and alternate spellings are registered in Kosovo.
21. Whilst these particular documents are not expressly particularised in the Respondent's notice of decision to deprive, we note that there was no argument at the First-tier Tribunal that the Respondent's decision-maker had not taken into account the various British Embassy letters which we have detailed above.

Evidence postdating the Respondent's decision to deprive (20 January 2021)

The Kosovan Central Register of Civil Status document, issued on 18 February 2016

22. In the Appellant's bundle to the First-tier Tribunal (AB/15-19), which Mr Pipe helpfully re-served for the hearing before us, is a document which purports to have been issued by the Kosovan authorities on 18 February 2016. It was not before the Respondent when she made her decision to deprive.
23. The document is said to be an extract from the Central Register of Civil Status in the Republic of Kosovo and records a person with the name Vladimir Bardoshi (born on 20 March 1984) in Jashanicë.
24. At para. 18 of the Appellant's witness statement (dated 27 November 2021), the Appellant states that he travelled to Kosovo in February 2016 and obtained this document himself. He also states that this document mis-records his place of birth and that he did not notice the error at the time he obtained it.

The Kosovan Ministry of Affairs document, (stamped and dated 5 April 2022)

25. In response to the Kosovan registration document referred to at our para 23 above which the Appellant states that he acquired in Kosovo in February 2016, the Respondent carried out a further check with the Kosovan Ministry of Internal Affairs (on 29 March 2022) for data verification of the name 'Vladimir Bardoshi'.
26. The response states (para. 65) that the name (Vladimir Bardoshi) with the date of birth 20 March 1984, born in Jashanicë was registered with the Civil Registration Agency in Kosovo on 27 August 2015; the document goes on to state that the registration was cancelled "*with a regular procedure, with Resolution*" on 26 December 2019.

The Judge's decision

27. On that summary alone, it is clear that this is a relatively unusual appeal with relatively complex issues relating to the documentary evidence provided by both parties. We therefore now turn to the approach taken to the competing evidence by the Judge.
28. From para. 47 onwards, the Judge sought to quote the "relevant law", in doing so she cited the requirements of section 40(3) of the BNA 1981 and then quoted the headnote from the Upper Tribunal's Presidential decision in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC) at para. 48.

29. However, at para. 49 the Judge also cited the Court of Appeal's decision in KV, R (On the Application Of) v Secretary of State for the Home Department [2018] EWCA Civ 2483. The Judge summarised the ratio of this decision in the following way at para. 49:

"KV [2018] EWCA Civ 2483 clarified that an appeal under section 40A is not a review of the Secretary of State's decision but a full reconsideration of the decision of whether to deprive the appellant of British citizenship. It is for the tribunal to find the relevant facts on the basis of the evidence produced before the tribunal, whether or not it was before the Respondent when making the order..."

30. Later at para. 54, the Judge began her findings and reasons by reference to KV and stated the following:

"54. As per KV, the first question for the tribunal is whether the condition precedent exists for the making of a deprivation order. To determine this, the approach in Begum is to be followed. This requires the Tribunal to consider whether the Respondent has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not be reasonably held..."

31. Approaching the material issue in this way, the Judge made the following key findings at paras. 66 - 68:

"66. I find that the Respondent has not had sufficient regard to the information provided in support of the Appellant's claim that he was born in Kosovo, namely the Extract from the Central Register of Civil Status and his Kosovan birth certificate. The Respondent has conducted her own enquiries which confirm that an individual with the Appellant's name and date of birth, as he claims it is, was registered by them. The response provided to her enquiries from the Republic of Kosovo dated 5 April 2022 does not explain why the registration was cancelled by resolution dated 26 December 2019. The Respondent has not established why the evidence provided by the Appellant should be rejected or be given less weight.

67. Further, I have closely considered the enquiries made by the Respondent with IEI Tirana. At RB205 the IEI reports that checked [sic] with [sic] conducted with Agency for Civil Registrations in Kosovo, with details Vladimir Bardhoshi born 20 March 1984. There is no evidence that enquiries were made to check for Vladimir Bardoshi, as the Appellant spells his surname. I find this is a reasonable enquiry which ought to have been [sic] given the issues in this appeal. The Respondent also relies on IEI checks for individuals named Pullumb/Pellumb Bardhoshi/Bardoshi and Shqiponje/Shqiponja Bardhoshi/Bardoshi, which found no nationals were found registered, RB217. However, this later evidence conflicts with the April 2022 checks by the Respondent, and the evidence provided by the Appellant. The Respondent has not indicated how this information is to be reconciled.

68. I have looked at the evidence in the round and reminded my self of the serious nature of deprivation and the severity of the consequences which can flow from it. I find that by failing to explore the basis on which the Appellant appears to have obtained identity documents from Kosovo. There is no further query why he was deregistered in 2019. On that basis I find that, [sic] Respondent has acted in a way which no reasonable decision maker could have acted and/or (ii) the Respondent has disregarded something to which he should have given weight, a question which can

encompass factual questions, the relevant one here being, how and why the Appellant was able to obtain Kosovan identity documents.”

32. The Judge drew these findings together in the following way at para. 69:

“69. As such, I find that the Respondent has erred in law and has not discharged her burden to show on the balance of probabilities, the condition precedent, by either way of fraud, false representations or concealment of material fact(s) has been made out as matters stand, §71 Begum [2021] UKSC 7 and Ciceri applied.”

33. It therefore can be seen that the Judge allowed the Appellant’s appeal purely on the basis that the Respondent had not lawfully made out the *condition precedent* in respect of fraud or false representation under s. 40(3). There is no finding in respect of Article 8 ECHR.

The parties’ positions at the error of law hearing

34. At the error of law hearing before us, both representatives made submissions on the most recent decision of the Upper Tribunal in Chimi v The Secretary of State for the Home Department (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 115 (IAC), (“Chimi”):

“(1) A Tribunal determining an appeal against a decision taken by the Respondent under s40(2) or s40(3) of the British Nationality Act 1981 should consider the following questions:

- (a) Did the Secretary of State materially err in law when she decided that the condition precedent in s40(2) or s40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not,
- (b) Did the Secretary of State materially err in law when she decided to exercise her discretion to deprive the Appellant of British citizenship? If so, the appeal falls to be allowed. If not,
- (c) Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the Appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed.

(2) In considering questions (1)(a) and (b), the Tribunal must only consider evidence which was before the Secretary of State or which is otherwise relevant to establishing a pleaded error of law in the decision under challenge. Insofar as Berdica [2022] UKUT 276 (IAC) suggests otherwise, it should not be followed.

(3) In considering question (c), the Tribunal may consider evidence which was not before the Secretary of State but, in doing so, it may not revisit the conclusions it reached in respect of questions (1)(a) and (b).”

35. On behalf of the Respondent, Mr Tufan relied upon both sets of Grounds to the Tribunal but emphasised that the Judge’s assessment of the documentary evidence post-dating the Respondent’s deprivation decision (20 January 2021) was contrary to

the Supreme Court's decision in Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7, ("Begum") and the Upper Tribunal's decisions in Ciceri and Chimi.

36. Mr Tufan also asserted that the Judge had not looked at the condition precedent through the correct prism of whether or not the deprivation decision taken was within a reasonable range of responses.
37. In response Mr Pipe also relied upon headnote (2) of Chimi but additionally drew our attention to the fuller reasoning of the Tribunal at paras. 61 & 62:

"61. The question which then arises is as to what if any material which was not before the Respondent at the time the decision was reached could be taken as admissible in respect of this jurisdiction. Again, we are clearly of the view that the evidence to be considered in relation to the exercise of the error of law jurisdiction in respect of the statutory decision (as distinct from any human rights consideration) is not limited to that before the Respondent at the time when the Respondent's determination was made. However, any evidence must be strictly relevant and admissible only because it directly pertains to an error of law which the Appellant has specifically pleaded. Furthermore, the evidence will bear upon the facts and circumstances pertaining at the time when the decision was reached. The principles are identical to those which apply in judicial review, further guidance in respect of which might be found at paragraph 23.3.3 of the Administrative Court Guide 2022 and 16-081 of De Smith's Judicial Review, Eighth Edition.

62. It is relatively straightforward to imagine examples of where material which was not before the Respondent could be admissible in order to support an argument that an error of law has occurred. The jurisdiction in respect of an established error of fact may require material to be produced so as to demonstrate that there was such an established error of fact bearing upon the decision which was reached in relation to the condition precedent and that it was material. Mr Clarke was correct, therefore, to accept in this case that a witness statement from Mr Lefebvre, admitting that he had confused the Appellant's case with that of someone else, would have been admissible through this gateway. In order to support an allegation that there had been a breach of the Tameside duty again it may be necessary to receive evidence which was not before the decision maker as to what the decision maker ought to have researched and brought into account when making the decision in order for that contention to be established."

38. We note for ourselves that at para. 65, the Presidential panel added:

"...The decision which is to be reviewed by the Tribunal is that which is under appeal and not any subsequent decision in which the Secretary of State might provide altogether different reasons for that decision. That is the established position in judicial review (R v Westminster City Council ex parte Ermakov [1996] 2 All ER 302) and we see no reason to adopt a different approach in appeals of this nature. The focus in such an appeal must therefore be on the decision actually taken by the Secretary of State and the evidence which was before her at that time, subject to the limited exceptions we have set out above. As in the Administrative Court (as to which see paragraph 28 of Kenyon v Secretary of State for Housing & Anor [2020] EWCA Civ

302; [2021] Env LR 8) the Tribunal must be astute to guard against a 'rolling review' in such cases."

39. Mr Pipe averred that the Appellant's case before the First-tier Tribunal was analogous to the example given at para. 62 of Chimi and that the Judge had ultimately stayed within the "tramlines" of the guidance provided. Mr Pipe contended that the Judge's conclusion at para. 69 was in accordance with the public law review principles emphasised in Chimi and by reference to Begum. Mr Pipe also relied upon his r. 24 response dated 6 March 2023.
40. In response, Mr Tufan added that the Appellant himself had used the Bardoshi/Bardhoshi spellings of his surname interchangeably in the Travel Document applications (dated 17 July 2001 (RB/54-60 (D2-D6))), 18 April 2011 (RB/110-115 (R1-R6)) and 4 September 2012 (RB/126-140 (T1-T8))). He also asserted that the names of the Appellant's parents (Din and Hatixhe), as checked by the Respondent with the British Embassy, came from the Appellant's own statement of evidence form when he claimed asylum in 2000.
41. In respect of the legal approach in Chimi, Mr Tufan averred that the exceptions identified by the Upper Tribunal did not apply in this case and that the principles in Ladd v Marshall [1954] 1 WLR 1489 were still applicable.

Findings and reasons

42. We of course start with the observation that the Judge cannot be blamed for not taking account of the Upper Tribunal's decision in Chimi as it plainly did not exist at the time of the appeal hearing and when the Judge made her decision.
43. However, it is nonetheless clear that the Chimi decision is to be applied by us and that it further clarifies the relationship between the Supreme Court's decision in Begum and the assessment of s. 40A(1) appeals against decisions taken under s. 40(3) of the BNA 1981:

"55. It follows from our conclusion that we are satisfied that when considering an appeal under section 40A(1) of the 1981 Act against a decision made by the respondent exercising the power under section 40(2) or 40(3) of the 1981 Act the task of the Tribunal is to scrutinise, using established public law criteria, whether or not the conclusion that the condition precedent to depriving the appellant of citizenship has been vitiated by an error of law. It is not the task of the Tribunal to undertake a merits-based review and redetermination of the decision on the existence of the condition precedent, as it were standing in the shoes of the respondent. This is consistent with paragraph 1 of the headnote in Ciceri which requires the adoption of the approach set out in paragraph 71 of the judgment in Begum."

44. The Upper Tribunal went on at para. 56 to refer to the ongoing applicability of the Court of Appeal's decision in E v Secretary of State for the Home Department [2004] EWCA Civ 49:

“56. ...We see no basis for reading what Lord Reed said in *Begum* as excluding other types of public law error which were not specifically identified from being potential grounds upon which a decision could be impugned. We see no reason to conclude that Lord Reed’s reference in paragraph 71 to a consideration of whether the respondent has “erred in law” should be restricted to whether the respondent has acted in a way that no reasonable decision maker could have acted or taken account of irrelevant considerations or disregarded matters which should have been taken into account. Questions of fairness beyond procedural impropriety may be relevant to the assessment in some cases, as may the jurisdiction arising from an error of established fact derived from the case of *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044, or a failure to undertake sufficient enquiries commonly referred to as the Tameside duty, from *Secretary of State for Education Science v Tameside Metropolitan Borough Council* [1977] AC 1014...”

45. Therefore, as a consequence of *Chimi*, the overall state of the law is that a judge deciding the condition precedent issue must do so by reference to the full panoply of public law principles and by carrying out a review of the material available to the Respondent at the time the decision was taken with *certain exceptions*. Those exceptions are governed by the application of *Ladd v Marshall* principles as we lay out below.

The hypothetical scenario in Chimi

46. In order to decide the issue before us, we start by considering whether, despite the Judge not having the benefit of the Upper Tribunal’s decision in *Chimi*, she nonetheless carried out a *Chimi* compliant assessment of the evidence applying public law principles.

47. We have considered Mr Pipe’s submission that ultimately the Judge asked herself (and answered) the correct public law question at the end of the judgment and that the full range of documentary evidence (including the post-decision evidence) was available to her as part of the public law review, applying the more detailed reasoning of the Upper Tribunal in *Chimi* at paras. 62 & 63.

48. We have therefore looked carefully at the example given by the Upper Tribunal at para. 62 of *Chimi* which Mr Pipe heavily relied upon in his argument.

49. At para. 62, the Presidential panel gave two hypothetical examples. The first was whether a witness statement from the decision-maker admitting that he had confused that person’s case with someone else be admissible for the purposes of the public law review. The panel concluded, with agreement from the Respondent, that it would. The second example concerned the admission of evidence that was not before the decision-maker in order to support an allegation of a breach of the Tameside duty, i.e. in order to establish what the decision-maker ought to have researched and taken into account when making the decision.

50. This accords with the general judicial review principles referred to by the Upper Tribunal at paras. 56 & 61 of *Chimi* (as above). We have also reminded ourselves that the paragraph of the Administrative Court guidance (2022) referred to by the Upper

Tribunal is itself drawn from the High Court's decision in The Law Society, R (On the Application Of) v The Lord Chancellor [2018] EWHC 2094 (Admin) at para. 98:

“The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see Associated Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. Boddington v British Transport Police [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontroversial and objectively verifiable played a material part in the decision-maker's reasoning: see E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044.”

51. It can therefore be seen that this guidance, and the Upper Tribunal's reasoning at para. 56 of Chimi, both draw upon the decision in E v Secretary of State for the Home Department [2004] EWCA Civ 49, in which the Court concluded, in respect of Ladd v Marshall principles in the public law setting, in the following way:

“82. We would respectfully accept the statement of the Master of the Rolls quoted in the previous paragraph as accurately reflecting the law applicable in a case of this kind (whether it takes the form of a direct appeal from the IAT to the Court of Appeal, or comes by way of judicial review of the IAT's refusal of leave to appeal). However, we would not regard it as showing that Ladd v Marshall principles have "no place" in public law. Rather it shows that they remain the starting point, but there is a discretion to depart from them in exceptional circumstances.”

52. In respect of those principles, we have also borne in mind the Court of Appeal's summary of the current approach in SWP, R (On the Application Of) v Secretary of State for the Home Department [2023] EWCA Civ 439) (“SWP”):

“65. It is well established that the principles in Ladd v Marshall [1954] 1 WLR 1489, at 1491 (Denning LJ) remain relevant to the exercise of the Court's discretion: (1) the evidence could not with reasonable diligence have been obtained for use at the trial; (2) the evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and (3) the evidence is apparently credible though it need not be incontrovertible. See Terluk v Berezovsky [2011] EWCA Civ 1534, at paras. 31-32 (Laws LJ).”

53. Turning back then to the example given by the panel at para. 62 of Chimi, it is clear why the admittance of the hypothetical witness statement from the Respondent's decision-maker accepting that the underpinning decision was legally flawed would meet the Ladd v Marshall test as articulated in SWP.
54. In respect of the Tameside duty also mentioned in the latter part of para. 62 of Chimi, we note that this was not referred to by Mr Pipe in his submissions – as we have explained, the thrust of his argument related to the first hypothetical example given in para. 62. However, for completeness, we note that it cannot be argued that the Tameside duty was breached in this case on the straightforward basis that the Kosovan registration document (referred to at our para. 23 above) was not before the Respondent at the time she made her decision and she therefore had no reason to conduct any further enquiries at that time.

The reasoning in the Judge's decision – our conclusions

55. In this appeal however, it is plain that neither party addressed the First-tier Tribunal on whether or not the post-decision documents should be admitted for the purposes of the assessment of the lawfulness of the condition precedent decision.
56. There is therefore no clear finding by the Judge as to why the 18 February 2016 Kosovan Central Register of Civil Status document (our paras. 23-24 above) which the Judge considered at para. 66 of her decision was not provided to the Respondent prior to the deprivation decision taken on 20 January 2021.
57. Equally there was no assessment by the Judge as to whether or not the document was *apparently credible*. Whilst it might be said that the Respondent's own checks with the Kosovan authorities (in 2022), which appear to partly corroborate the 2016 Kosovan document provided by the Appellant, could amount to showing that the 2016 document was "apparently credible" (applying the third element of the Ladd v Marshall test as explained in SWP), we also note that the Judge herself was still nonetheless concerned by the lack of any proper explanation as to the way in which the Appellant obtained the document in 2016. At para. 63 she observed that:

"There is no supporting evidence as to how he was able to obtain this document, such as what documents or evidence he was required to produce as evidence of it."

58. The Judge's concerns are also articulated in the following at para. 64:

"The appellant has provided an email chain dated 3-5 November 2021, between his solicitor Caroline Bagley and the Embassy of Kosovo. In it, she attaches a copy of the Extract from the Central Register of Civil Status and asked that they verify the document. The response confirms that Mr Bardoshi is a Kosovan citizen and he has his family are found in Kosovan records, and a further email provides the details of his place of birth and names of his parents and their dates of birth. There is no information as to what documents have been checked. The appellant argued that such information makes the respondent's claim that the appellant is Albanian, irrational. I have noted that the appellant was convicted of a serious offence involving dishonesty and find that it is relevant to how reliable his oral evidence is likely to be. I therefore attach little

weight to it. However, I find that some weight can be attached to the documents he has provided as he has demonstrated that they have been obtained from Kosovo and verified by the Embassy.”

59. Furthermore, we feel it necessary to reiterate the view the Judge took at para. 68 as to the nature of the overall applicable legal assessment and the approach to the post-decision evidence before her:

“I have looked at the evidence in the round and reminded my self of the serious nature of deprivation and the severity of the consequences which can flow from it. I find that by failing to explore the basis on which the appellant appears to have obtained identity documents from Kosovo. There is no further query why he was deregistered in 2019...”

60. Looking at the Judge’s conclusions overall, it is firstly apparent that the language used by the Judge is problematic as being difficult to understand; it may be that para. 68 contains a half-completed sentence.

61. Secondly, the Judge was required to assess *for herself* whether or not the post-decision documentation should be admitted for the purposes of the Appellant’s public law challenge to the Respondent’s finding on the condition precedent.

62. In that regard, we have decided that the Judge’s conclusions are not otherwise compliant with the Ladd v Marshall test on the basis of the equivocal nature of her findings on the post-decision documentation and her decision to only give “some weight” to the 2016 Kosovan identity document, (para. 64).

63. We also add in our earlier observation that the Judge made no finding as to why the Appellant had not produced the 2016 Kosovan document prior to the Respondent’s decision in 2021.

64. In our judgement then, the Judge’s approach to the post-decision evidence ultimately amounted to the kind of *rolling review* discouraged by the Upper Tribunal in Chimi at para. 65.

65. Thirdly, we also take the view that the Judge misapplied the law at, inter alia, para. 68 by “looking at all of the evidence in the round” when apparently carrying out a public law review of the decision.

66. Additionally, the mixed legal language in paras. 59, 62 & 64 (in which the Judge accords weight to certain parts of the evidence) underpins our ultimate finding that the Judge did not clearly understand the legal approach to the condition precedent assessment.

67. We therefore accept the Respondent’s argument that the Judge did, at times, carry out her own assessment of the evidence (whether pre or post-dating the Respondent’s decision to deprive) rather than viewing the evidence through the prism of public law principles. This is despite the Judge also, at times, directing herself to the language of public law review and referring to the authorities of Begum and Ciceri.

Notice of Decision

68. In light of our findings we have concluded that the Judge's decision is vitiated by material errors and must be set aside. We have also concluded that no findings within the decision can be retained and that due to the complexity of the appeal, the matter should be reheard by the First-tier Tribunal. This appeal is therefore remitted to the FtT for a judge of that Tribunal (other than Judge Karbani) to re-make the decision on the appeal on the merits on all issues.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 October 2023