IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000215

First-tier Tribunal No: DC/50001/2022
IA/05854/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2 November 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

The Secretary of State for the Home Department

Appellant

and

Amjad Ali Chaudhry
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr Raza, Counsel instructed by Marks and Marks Solicitors

Heard at Field House on 10 July 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State. However, for convenience, I will refer to the parties as they were designated in the First-tier Tribunal.

2. By my decision promulgated on 22 June 2023, I set aside the decision of the First-tier Tribunal. I now remake the decision.

3. The appellant is a citizen of Pakistan who was naturalised as a British citizen in 2005. He is appealing against the respondent's decision of 23 December 2021 ("the SSHD decision") to deprive him of British citizenship under section 40(3) of the British Nationality Act 1991 ("the BNA").

4. The appellant entered the UK in 1990 and was granted ILR in 2000. He then made two applications for citizenship (in 2000 and in 2004) that were refused because he had not met the requirement to have lived in the UK for five years without being in breach of immigration law. The appellant's third application,

made in September 2005, was successful and in December 2005 he was issued with a certificate of naturalisation.

5. The reason the respondent decided to deprive the appellant of citizenship is that, following an investigation (and interview, which took place in 2017), the respondent reached the conclusion that the appellant made a false representation/concealed a material fact in his citizenship application by failing to declare that in 1998 he fraudulently obtained a British passport using the identity of child who died in 1967. I will refer to the child as "ARA" and the passport the appellant is said to have obtained as "the ARA passport". The respondent states that had the appellant's fraudulent activity in respect of obtaining the ARA passport been known when he applied for citizenship the application would have been refused on "good character" grounds.

6. In July 2017 the appellant was interviewed under caution about obtaining the ARA passport. Amongst other things, the appellant stated at the interview that the photograph in the ARA passport was of his cousin, who had resided with him in the UK for 8 –9 months in either 1994 or 1995. In November 2018 the allegations about using ARA's identity were put to the appellant in a letter, who responded in December 2018, denying them. In November 2020 a further letter was sent to the appellant, but no response was provided.

7. Before me, one of the issues raised by the appellant was whether certain evidence could be relied on by the respondent without expert evidence. Neither party was able to identify any authorities on this issue and therefore I invited them to provide any authorities (or articles) addressing this issue after the hearing. I am grateful to the appellant's representatives for the post-hearing submissions and material submitted. I also wish to express my appreciation to both Ms Cunha and Mr Raza for their clear and helpful submissions at the hearing.

The SSHD decision

8. The respondent states in the SSHD decision that in January 1998 Her Majesty's Passport Office (HMPO) received an application in ARA's identity and that a passport in ARA's name (the ARA passport) was issued in February 1998. The respondent also states that in August 2010 an application was made in ARA's name for a driving licence, but this was refused as it was identified that ARA was deceased.

9. The respondent states that the person who made the two applications in ARA's identity was the appellant. The respondent's reasons are the following:

   (a) The interviewer at the interview in 2017 believed that the picture in the ARA passport and the picture in the appellant's genuine passport were of the same person (the appellant).

   (b) At the interview in 2017 the appellant stated that he recognised the photograph in the ARA passport as being his cousin. He stated "that is my cousin. Yeah I know him very well". He maintained this view in further questioning. However, he later (in the letter of 5 December 2018) denied knowing that it was his cousin and stated that he only said it looks like his cousin. The respondent considered this contradictory.

   (c) At the interview the appellant stated "I know my cousin pays some money to get the passport that's it and I haven't seen the passport before. I

know the name very well" but subsequently (in his letter of 5 December 2018) denied saying this. The respondent considered this contradictory.

(d) The appellant failed to provide documentary evidence to corroborate his claim that his cousin exists, or lived with him in the UK. He also failed to provide any photographs of him and the cousin together. The respondent stated that the paucity of information about the alleged cousin was surprising.

(e) The photographs the appellant provided that he said were of his cousin did not match the photograph in the ARA passport and driving licence application made in ARA's identity, but these pictures did resemble the photograph of the appellant in his British passport and Pakistan identity document. The respondent considered that this was strongly indicative that it was his – and not a cousin's - photograph in the ARA documents.

(f) The appellant gave a discrepant answer when asked at the interview if he had knowledge of ARA's family. He stated that he did not have any such knowledge. The discrepancy identified by the respondent is that in his first naturalisation application (in 2000) he stated that he had a business partner with ARA's name.

(g) The appellant's previous partner was listed as the emergency contact in the ARA passport and the appellant did not provide a credible explanation for this.

(h) The handwriting in the emergency contact details in the ARA passport is "strikingly similar" to the handwriting in the appellant's citizenship application forms submitted in 2004 and 2005.

(i) No explanation was given as to how the cousin would have been able to apply for a driving licence in 2010 using the ARA identity giving the same address as the address given in the appellant's citizenship applications in 2000, 2004 and 2005 if he only stayed with the appellant for a short period in 1994/5.

(j) The countersignatory in the ARA driving licence application states that he owned a business at an address which is the address of a business where the only owners are listed as the appellant and his partner.

10. The respondent stated that even if the person who obtained the ARA passport was the appellant's cousin (which is not accepted), the appellant would in any event have failed to meet the good character requirement because he would have assisted in the evasion of immigration control by allowing the cousin to live with him whilst passing himself off as a British citizen.

11. The SSHD decision states that had the appellant's deception in respect of the ARA passport been known, his application for citizenship would have been refused on good character grounds. It is stated that by ticking the box "no" in response to a question as to whether he had engaged in conduct relevant to the assessment of good character the appellant advanced a false representation.

12. The respondent considered whether deprivation would be disproportionate under article 8 ECHR. It was noted that the appellant has a British partner and British children, but the respondent was of the view that the upheaval caused by deprivation (which would not necessarily result in the appellant's removal from the UK) would not outweigh the strong public interest in deprivation. It was not

accepted that there was evidence that the deprivation would impact on the children's education, housing, financial support or contact with the appellant.

13. The respondent acknowledged that the decision to deprive was discretionary and stated that the respondent's view was that deprivation would be both reasonable and proportionate.

The legal framework

14. Section 40(3) of the BNA gives the Secretary of State power to deprive a person of citizenship resulting from naturalisation, 'if the Secretary of State is satisfied that the …naturalisation was obtained by means of fraud, false representation or concealment of a material fact'.

15. In *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 00115 (IAC) the Upper Tribunal set out a framework for deciding appeals against decisions taken by the respondent under section 40(3). It is stated that the Tribunal 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.

16. One of the requirements that the respondent must be satisfied of when an application for naturalisation is made is that the applicant is of "good character": paragraph 1(1)(b) of Schedule 1 of the BNA.

17. Guidance about what constitutes good character is provided in Annex D to Chapter 18 of the Nationality Staff Instructions, where it is stated in paragraph 9.1 that caseworkers should:

> 'normally count heavily against an applicant any attempt to lie or to conceal the truth about an aspect of the application for naturalisation - whether on the application form or in the course of inquiries. Concealment of information or lack of frankness in any matter must raise doubt about an applicant's truthfulness in other matters'.

Did the respondent materially err in law when deciding that the appellant's naturalisation was obtained by means of fraud, false representation or concealment of a material fact?

18. The appellant argues that the SSHD reached a decision that was not reasonably open to her for the following reasons:

19. First, the appellant argues that it was not reasonably open to the respondent to attach weight to the immigration officer's opinion (at the interview in 2017) as to the resemblance between the appellant and the photograph in the ARA passport. Mr Raza submitted that there was no evidence that the interviewing officer had training or expertise in facial recognition or was in a position to decide whether

the photograph was actually of the appellant. This was particularly the case because the photograph was from over 20 years earlier and of poor quality. He argued that if the respondent wanted to rely on a similarity in appearance between the appellant and a poor quality photo taken over 20 years earlier this needed to be supported by expert evidence from an expert in facial recognition.

20. Second, the appellant argues that it was not reasonably open to the respondent to rely on the decision maker's impression as to the similarity between the handwriting in the ARA passport and the appellant's 2004 citizenship application. The appellant submits that expert evidence would be necessary for this to be capable of attracting any evidential weight. Mr Raza observed that no information about the decision-maker having any expertise or experience in comparing handwriting has been provided.

21. Third, the appellant submits that the respondent failed to take into account (or adequately consider) the appellant's explanation in his witness statement about his relationship with his cousin and the extent of his knowledge about his cousin's activities.

22. Fourth, the appellant submits that the fact that someone gave the appellant's address when applying for the driving licence in ARA's identity does not mean that the appellant was responsible for making the application.

23. Fifth, the appellant submits that there is no positive evidence of fraud, as the appellant has never been found in possession of the ARA passport and there is no evidence that he has ever used it. Moreover, the respondent has not addressed why the appellant would apply for a driving licence in ARA's identity when he holds his own driving licence and would have no need for it.

24. Ms Cunha argued that the respondent identified multiple sustainable reasons in the SSHD decision for deciding that the appellant applied for the ARA passport and the driving licence in ARA's identity, including that the driving licence application was made from his address. She also submitted that the photograph in the ARA passport is plainly of the appellant and the respondent was entitled to take this into consideration. She also relied on the interview record (for the interview in 2017) which shows that the appellant clearly stated that the photograph was of his cousin. Ms Cunha submitted that the SSHD decision was adequately reasoned and not irrational; and that there had not been a public law error.

25. I am not persuaded that the respondent erred in law, for the following reasons:

26. First, I do not accept that the respondent cannot, in the absence of expert evidence, attach weight to her impression (or, more specifically, the impression of an immigration officer) as to the resemblance of a person to a photograph (or the resemblance between two photographs). Mr Raza was unable to identify any authority to support his contention that this was not open to the respondent. In the appellant's post-hearing submissions reference is made to *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6. However, this case does not address whether expert evidence is necessary for a comparison between photographs to be made. I accept that mistakes can (and often will) be made when comparing a person to a photograph (or comparing different photographs), particularly when identifying someone from a different ethnicity, as highlighted in the articles submitted on behalf of the appellant after the hearing. I also accept that an expert in facial recognition could be helpful in making comparisons of this type.

These factors mean that it would, in my view, have been unlawful to treat the immigration officer's view on the resemblance of photographs as determinative. However, that is not what occurred: the immigration officer's view as to the resemblance of the ARA passport photo to the appellant (and the photograph in the appellant's passport), and as to the lack of resemblance between the ARA passport and the photographs the appellant provided of his cousin, was just one of multiple factors which, considered cumulatively, led to the conclusion that it was the appellant who had applied for the ARA passport.

27. Second, I am not persuaded that it was not open to the respondent to form a view as to the resemblance between the handwriting in the 2004 application and ARA passport. As with the photographic evidence, the respondent's position might have been strengthened had she obtained expert evidence, but this does not mean that it was not reasonably open to her to treat her impression as to the resemblance in handwriting as a factor weighing against the appellant. Mr Raza was invited – but was unable - to identify any authority supporting his proposition that comparisons of handwriting by a decision maker cannot be given any weight absent expert evidence.

28. Third, the respondent gave multiple reasons, unrelated to the photograph and handwriting, for reaching the conclusion that the appellant applied for the ARA passport. These are summarised above in paragraph 9 and include that (i) the appellant was inconsistent about whether the photograph in the ARA passport was of his cousin; (ii) the appellant was inconsistent about what he knew of his cousin obtaining a false document; (iii) the appellant failed to provide documentary evidence to corroborate the existence of his cousin or any photographs showing him and his cousin together; (iv) the evidence he gave about having any knowledge of ARA's family was inconsistent; (v) he was unable to explain why his former partner was the emergency contact on the ARA passport or why his address was used for the application for a driving licence in ARA's identity; and (vi) the address of the countersignatory in the driving licence application was said to be a business owner where the only listed owners were the appellant and his partner. These reasons clearly establish that the respondent reached a conclusion on the question of whether the appellant applied for the ARA passport that was properly reasoned, supported by evidence, and based on a view of the evidence that could reasonably be held. No public law error was made when deciding that the applicant applied for the ARA passport.

29. Applying for a passport in the name of a deceased child is undoubtedly conduct that is indicative of a person not being of good character. Accordingly, when asked on the citizenship application form whether he had engaged in conduct relevant to the assessment of good character, the applicant was required to tick the box "yes". It was within the range of reasonable responses for the respondent to take the view that by ticking "no" in answer to the "good character" question the applicant made a false representation. Given the good character requirement for naturalisation (as set out in paragraph 1(1)(b) of Schedule 1 of the BNA), it was plainly not irrational for the respondent to take the view that had the applicant not made the false representation in the citizenship application the application would have been refused. I am therefore satisfied that the respondent did not materially err in law when deciding that the appellant's naturalisation was obtained by means of false representation.

Did the respondent materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship?

30. It was not argued by Mr Raza (whose submissions were focused on whether the respondent erred when deciding that the appellant engaged in fraud) that the respondent erred in the exercise of the discretion under s40(3) of the BNA and I am satisfied that there was no such error. Having decided in the SSHD Decision that the appellant had made a false representation in his citizenship application, the respondent noted that the decision to deprive is discretionary. The respondent then had regard to the various considerations that were relevant to the exercise of her discretion in this case, including article 8 ECHR, section 55 of the Borders Citizenship and Immigration Act 2009, and whether the appellant would be made stateless. Given the strong public interest in maintaining the integrity of the nationality system, I am in no doubt that the respondent reached a decision that was open to her.

Is the respondent's decision unlawful under s6 of the Human Rights Act 1998 because it is incompatible with Article 8 ECHR?

31. The relevant legal principles for assessing whether a deprivation decision is consistent with Article 8 ECHR are summarised in two recent Upper Tribunal decisions: *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC) and *Muslija (deprivation: reasonably foreseeable consequences) Albania* [2022] UKUT 00337 (IAC). In summary:

(a) The standard of proof is the balance of probabilities.

(b) Judges must assess for themselves, having regard to all of the evidence before them up to the date of the hearing, whether deprivation would be incompatible with Article 8 ECHR. This entails determining the reasonably foreseeable consequences for the appellant and his family without speculating about whether he will be permitted to remain in the UK.

(c) Following the deportation order taking effect the appellant will have no legal status for an uncertain duration whilst he awaits a further decision on his status (i.e. whether he will be removed or what leave, if any, he will be granted) from the respondent. This is frequently referred to as a "limbo period". A lengthy limbo period is "without more" unlikely to tip the balance in the appellant's favour, but what occurs during the limbo period may be significant because, inter alia, the appellant may lose his ability to work and face other significant implications of the "hostile environment".

(d) The public interest in depriving a person of citizenship who has committed fraud is high because of the importance of maintaining the integrity of British nationality law.

32. There is very little evidence before me about the appellant's life in the UK. It is apparent from his witness statement that he has a partner and three young children who are British citizens; and has lived in the UK for a very long time. Given these facts, it is clearly the case that he has a strong family and private life in the UK that engages article 8 ECHR.

33. There was no evidence before me indicating that during the "limbo period" the appellant and his family would become destitute or would fall into poverty. Nor was there any evidence indicating that the distress that they would inevitably experience will give rise to any mental health issues.

34. Based on the (limited) evidence before me, I consider that the reasonably foreseeable consequence of depriving the appellant of citizenship is that he will face a period of uncertain duration without lawful status in the UK where he will the unable to work and will face the "hostile environment" experienced by those without lawful status in the UK. This will no doubt cause him and his family distress. However, there was no evidence to suggest that, as a consequence of this, he and his family would become homeless or fall into poverty. As British citizens, his wife and children will be able to access benefits and support should that become necessary.

35. The best interests of the appellant's children are a primary consideration. No doubt they will be negatively impacted by the uncertainty and difficulties (and potential fall in living standards) that will ensue as a consequence of the appellant's loss of legal status. However, they will not be separated from their parents, need to move to a different country, or be unable to continue with their education. Their material circumstances are unlikely to change in a very significant way. Accordingly, I find that it is in the best interests of the appellant's children for the appellant to not be deprived of citizenship but that the effect on them will not be very significant.

36. Adopting a "balance sheet" approach, I weigh the factors for and against the appellant as follows.

37. Weighing against him (on the respondent's side of the proportionality scales) is the public interest in the maintenance of the integrity of the nationality system. As *Ciceri* and other cases make clear, significant weight attaches to this public interest. In this case, there has been a substantial delay by the respondent in progressing the case against the appellant: the allegations of fraud were not put to him until 2017 despite concerns first been identified by the respondent in 2010 (when the driving licence application was refused). This significant (and unexplained) delay reduces the public interest.

38. Weighing for the appellant (on his side of the scales) are the following factors, which are the foreseeable consequences of deprivation:

    (a) The appellant has young children and it would be in their best interests for him to not be deprived of citizenship. However, although the children will be negatively impacted, the deprivation decision will not result in them being separated from the appellant or in the disruption of their education or many other aspects of their lives.

    (b) The appellant and his family may suffer financially, but not to the extent that they will become homeless or fall into poverty.

    (c) The appellant and his wife will suffer significant distress but not such that they will suffer from significant mental health issues.

    (d) There may be a lengthy "limbo" period where the appellant and his family experience uncertainty and financial difficulties, and where the appellant experiences the consequences of the "hostile environment" for people without lawful status in the UK.

39. I have carefully considered the factors weighing on both sides of the scales and have reached the conclusion that the foreseeable consequences of deprivation do not come close to outweighing the strong public interest in depriving the appellant of his British citizenship, even after discounting this to take into

consideration the delay. The proportionality balance under article 8 ECHR falls firmly in favour of the respondent.

Notice of Decision

Having set aside the decision of the First-tier Tribunal, I now remake the decision by dismissing the appeal.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 September 2023

THE ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000215

First-tier Tribunal Nos: DC/50001/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

The Secretary of State for the Home Department

Appellant

and

Amjad Ali Chaudhry
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Basra, Senior Home Office Presenting Officer
For the Respondent: Mr Raza, Counsel, instructed by Marks and Marks Solicitors

Heard at Field House on 24 April 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience, I will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant entered the UK in 1990. In 2005, he applied for and was issued with a certificate of naturalisation as a British citizen. On 23 December 2021, the respondent served a notice of decision to deprive the appellant of British citizenship under Section 40(3) of the British Nationality Act 1981 on the basis that he had committed fraud that was material to the acquisition of his British citizenship. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Clarke ("the judge"). The judge allowed the appeal. The respondent is now appealing against the judge's decision.

The respondent's decision to deprive the appellant of citizenship

3. According to the respondent, in 1998 the appellant obtained a British passport using the identity of a deceased British child. I will refer to this passport as "the false passport".

4. The appellant denied having done this and stated that it was most likely that his cousin (who no longer resides in the UK) was responsible for obtaining the false passport. The respondent rejected this argument and stated that as the appellant did not declare in his citizenship application that he had obtained the false passport (as he was required to do in response to a question on the application form concerning his good character), she was satisfied that, on the balance of probabilities, he had obtained his citizenship in circumstances where, had he told the truth, his application would have been unsuccessful. It followed from this that he had committed fraud that was material to the acquisition of British citizenship.

The correct legal approach where citizenship is deprived under section 40(3)

5. Section 40(3) provides:

> The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.

6. There are two steps a judge must take when applying section 40(3). First, the judge must establish whether the condition precedent is established (i.e. whether British citizenship was obtained by fraud, false representation, or concealment of a material fact). Second, if one or more of the condition precedents are established, the judge must consider whether deprivation of British citizenship would violate the ECHR (normally, the only relevant provision of the ECHR is article 8).

7. Until recently, it was considered that both of the two steps required a full merits appeal; that is, a judge would need to decide for him or herself, on the basis of the evidence before her, whether or not, on the balance of probabilities, the respondent had discharged the burden of establishing British citizenship was obtained by fraud, false representation, or concealment of a material fact. In the event that this was decided in the affirmative, the judge would then proceed to decide for herself the article 8 question.

8. Following *R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 and Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769 it is now established that this is incorrect and that the first stage (i.e. determining whether any of the condition precedents of fraud, false representation, or concealment of a material fact are met) must be determined applying public law principles, where the task of the First-tier Tribunal is not to decide for itself if the appellant engaged in fraud, false representation, or concealment of a material fact but rather to determine whether the respondent has made findings of fact on this issue that are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held. See the first paragraph of the

headnote to *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC).

Decision of the First-tier Tribunal

9. The judge's "findings and conclusions" are set out in paragraphs 41– 80. After setting out the relevant legislation, the judge referred to, and quoted from, *Begum*. In paragraph 45 the judge stated that the approach she was required to take in determining whether the appellant engaged in fraud was "a review on Wednesbury principles and [ ] not a balancing exercise". The judge then set out the headnote to *Ciceri*. The judge concluded her assessment by referring again (in paragraphs 77-79) to the "public law" standard. In paragraph 79 the judge stated that:

> "the respondent's discretion will only be interfered with where the Tribunal concludes that no reasonable decision-making would have acted in the same way as the respondent".

10. However, in other parts of the decision the judge referred to the burden of proof being on the respondent and the respondent not discharging that burden. In paragraph 47 the judge stated:

> "The first question for me to address is whether the appellant obtained his British citizenship by fraud or false representation or concealment of a material fact. I remind myself that the standard of proof is the balance of probabilities and that the burden of proof is on the Secretary of State"

11. In paragraph 68 the judge stated:

> "The burden of proof is on the respondent to prove the allegations against the appellant. I accept the appellant's denials of what he clearly said in his HMPO interview undermine his credibility but the respondent has failed to attach sufficient weight to the fact that the appellant has never used [the false passport] to obtain his British nationality."

12. In paragraph 74 the judge stated:

> "On the evidence before me, I find that the respondent has failed to prove that it is more likely than not that the appellant applied for [the false passport].

13. In paragraph 80 the judge stated:

> "For the reasons given, I find that the respondent has failed to prove the condition precedent on the balance of probabilities. The respondent has failed to prove that the appellant obtained his British citizenship by fraud or false representation or concealment of a material fact"

Grounds of Appeal

14. The respondent submits that although the judge set out the correct public law approach, the judge in fact decided for herself whether the appellant engaged in fraud, which is contrary to *Begum* and *Ciceri*.

15. There are further arguments made in the grounds but it has not been necessary for me to consider these.

Error of Law: failing to follow the public law approach in accordance with *Begum* and *Ciceri*.

16. Mr Raza argued that the judge made several findings as to there being a "public law error" by the respondent. This included the respondent's reliance on the views of an interviewing officer about photographs and handwriting (paragraphs 56 – 58) and the respondent failing to take into account that the appellant has always used his true identity when making applications to the Home Office (paragraph 59). Mr Raza submitted that the respondent was "cherry picking" when pointing to parts of the decision which indicate that the judge took the wrong approach.

17. He submitted that the decision must be read as a whole and that the references in the decision to the burden being on the respondent concern the burden on the respondent when making the decision, not the judicial decision-making. He highlighted that the judge correctly directed herself to the public law approach set out in *Begum* and *Ciceri*.

18. Mr Basra's argument was that the approach taken by the judge appears to be inconsistent. In parts of the decision the judge appears to adopt a public law approach whereas in others she appears to be deciding for herself whether or not the appellant engaged in fraud.

19. I agree with Mr Basra. On the one hand, the judge accurately directed herself as to the required public law approach both at the start of her analysis (paragraphs 44 – 46) and towards the end (paragraphs 77-79), and she identified (in paragraphs 56-59) aspects of the appellant's decision making which she characterised as involving public law errors. However, on the other hand, the judge made several references to the burden being on the respondent and the respondent not discharging that burden. The judge's concluding paragraph (paragraph 80) states that the respondent failed to prove that the appellant obtained his British citizenship by fraud, false representation, or concealment of material fact. This language is impossible to reconcile with the judge deciding the case on public law grounds; i.e. finding that the respondent's decision was not reasonably open to her or was not supported by the evidence.

20. It is, in my view, unclear whether the judge decided for herself that the appellant did not commit fraud (as indicated by paragraph 80) or decided that it was not reasonably open to the respondent to reach this conclusion (as indicated by the self-direction and references to *Begum* and *Ciceri*). In the light of this uncertainty, I cannot be confident that the judge approached the condition precedent question using the correct legal framework, and therefore the decision cannot stand.

21. As the judge found that the condition precedent in section 40(3) was not established, she did not proceeded to consider article 8 ECHR. There has therefore be no judicial consideration of this question.

22. Both Mr Basra and Mr Raza expressed the view that the appeal should be remade in the Upper Tribunal even though the article 8 aspect of the claim has not yet been considered by a judge.

23. Having considered *AEB v SSHD* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 IAC, I am in agreement with the parties as:

(a) The parties have not been deprived of a fair hearing or of an opportunity to advance their case; and

(b) The extent of further fact-finding for the decision to be remade is likely to be limited as the scope of the article 8 assessment is unlikely to be extensive.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

25. The decision will be remade at a resumed hearing in the Upper Tribunal .

Directions

26. The parties have permission to rely on evidence that was not before the First-tier Tribunal. Any such evidence must be filed with the Upper Tribunal and served on the other party at least fourteen days before the resumed hearing.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9.5.2023