IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000706

First-tier Tribunal No: DC/50094/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 10th of January 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Vladimir Bisha
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr D. Jones, Counsel instructed by Oliver and Hasani Solicitors
For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

Heard at Field House on 6 November 2023

DECISION AND REASONS

1. By a decision dated 5 May 2022, the Secretary of State gave notice to the appellant of a decision to deprive him of his British citizenship under section 40(3) of the British Nationality Act 1981 ("the 1981 Act"). This is the appellant's appeal against that decision, under section 40A of the 1981 Act.

2. The appeal is being heard in this tribunal because, by a decision dated 25 July 2023, I allowed an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge Brannan dated 18 January 2023 which allowed the appellant's appeal against the Secretary of State's decision. I directed that the appeal be reheard in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

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3. My decision finding that the decision of Judge Brannan involved the making of an error of law may be found in the **Annex** to this decision.

4. The resumed hearing took place before me on a face to face basis at Field House on 6 November 2023. The appellant gave evidence and was cross-examined. I reserved my decision, which I now give.

Factual background

5. I summarised the essential factual background at paras 3 to 5 of my decision of 25 July 2023:

> "3. The appellant was born on 12 April 1981 in Albania. Between 8 and 12 September 1998, he arrived in the United Kingdom. He was 17 and a half years old at the time. Shortly afterwards, he claimed asylum on the basis that he was from Kosovo, and that he was at a real risk of being persecuted on account of his ethnicity. He provided a detailed account of the reasons he claimed to be at risk.
>
> 4. On 14 May 1999, the appellant was granted indefinite leave to remain ("ILR") as a refugee. On 26 April 2004, he applied for British citizenship in his false Kosovan identity. The application was granted on 20 February 2005.
>
> 5. The appellant left the United Kingdom in 2007 and returned to Albania, where he has remained ever since. On 9 March 2020, the appellant disclosed his true identity to the Secretary of State, along with representations as to why, in his opinion, he should not be deprived of his British citizenship. An exchange of correspondence followed, leading to the Secretary of State taking the decision to deprive the appellant of his British citizenship on 5 June 2022; it was that decision that was under appeal before the judge below."

Principal controversial issues

6. In his helpful skeleton argument dated 5 November 2023, Mr Jones confirmed that the appellant accepts that he committed deception against the Secretary of State, and that the deprivation was material to his acquisition of British citizenship (para. 3). The appellant also accepts that for the purposes of the present appeal the deprivation of his British citizenship would not disproportionately interfere with his rights to private and family life under Article 8 of the European Convention on Human Rights ("the ECHR").

7. The principal issue for my consideration is whether the Secretary of State's decision of 5 May 2022 ("the deprivation decision") was a lawful and rational use of the discretionary power contained in section 40(3) of the 1981 Act. The parties have identified the following factors which go to my assessment of that issue:

   a. First issue: whether the deprivation decision properly took account of the fact the appellant was a child at the time of his "operative deception" against the Secretary of State, namely his application for indefinite leave to remain, which was made when he was still a child;

   b. Second issue: the passage of time since the appellant last relied on his deception to the Secretary of State, namely in 2004, and whether the current approach of the Good Character Guidance to disregard deception that took place over ten years ago, should apply by analogy to deprivation decisions;

c. Third issue: the impact of the appellant having disclosed his true identity to the Secretary of State in 2006 when his parents applied for entry clearance to the United Kingdom, and the Secretary of State's subsequent inaction. The appellant relies on an unreported decision of this tribunal, *Himallari v Secretary of State for the Home Department* UI-2022-006559, to support the proposition that the Secretary of State had constructive knowledge of the appellant's true identity in 2006, yet had not acted; and

d. Fourth issue: the fact that it was the *appellant* who ultimately followed up the issue with the Secretary of State, on 9 March 2020, and whether the Secretary of State adequately addressed that issue.

The law

8. A person may acquire naturalisation as a British citizen in accordance with section 6(1) of the 1981 Act:

> "6.- Acquisition by naturalisation.
>
> (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."
>
> Schedule 1 to the 1981 Act sets out the requirements for naturalisation as a British citizen. This includes at para. 1(1)(b) "that he is of good character".

Good character is not defined by the 1981 Act. The Secretary of State has adopted guidance from time to time on the meaning of the term. It may be found in the Nationality Instructions.

9. Section 40 of the 1981 Act empowers the Secretary of State to deprive a person of their British citizenship in certain circumstances:

> "(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of-
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact."

10. The criteria in section 40(2) and (3) operate as a condition precedent to the Secretary of State's exercise of her power to deprive a person of their citizenship. The power to deprive is discretionary ("the Secretary of State *may*"), with the consequence that the Secretary of State must decide whether to exercise the

power to deprive, even if she is satisfied that a statutory condition precedent to doing so is met. The Secretary of State has published operational guidance to caseworkers addressing the exercise of this discretion, contained in Chapter 55 of the Nationality Instructions.

11. There is a right of appeal to the First-tier Tribunal against the Secretary of State's decision of her intention to exercise the power under section 40, rather than the deprivation order itself: see section 40A(1). It follows that, during the currency of any pending proceedings challenging a decision to make a deprivation order, the individual concerned will remain a British citizen.

12. Two significant cases on the deprivation of citizenship in the Immigration and Asylum Chamber are *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC) and *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 115 (IAC). In light of the issues as focussed by the parties, paras (5) and (6) of the headnote in *Ciceri* are relevant to my analysis:

> "(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159. Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of *EB (Kosovo)*.
>
> (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)."

13. The above guidance encapsulates the analysis to be performed in accordance with para. (1)(b) of the headnote in *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."

Oral evidence

14. The appellant adopted his witness statement dated 27 July 2022 and was cross-examined. Mr Clarke questioned the appellant about his understanding of what he was disclosing to the Secretary of State when, in 2006, he facilitated an application for entry clearance by his Albanian parents, providing a copy of his Albanian birth certificate which disclosed his true identity. I will set out the appellant's oral evidence on this issue where relevant in the course of my discussion, below.

Submissions

15. As to the first issue (the age of the appellant at the material times), Mr Jones submitted that I had recognised at para. 29 of the error of law decision that the appellant's age at the relevant times was a material consideration to the exercise of the Secretary of State's discretion. Against the background of the other deficiencies in the decision, it acquired a new significance. The appellant was young and vulnerable when he arrived. He was under the guidance of others. He had been put into the care of social services. It was unreasonable to expect him to have acted as the Secretary of State now contends that he should have done upon turning 18.

16. Concerning the second issue (passage of time since operative deception), Mr Jones relied on the Secretary of State's Good Character Guidance in the *Nationality Instructions* (version 2.0, 30 September 2020). The guidance stated that an application for naturalisation will normally be refused where there is evidence that a person has deployed deception during the citizenship application process, or in a previous immigration application in the last ten years. By analogy, a similar ten year rule should apply to deprivation decisions, submitted Mr Jones. The appellant's deception took place as a long ago as 2004, and should no longer be held against him.

17. As to the third issue (disclosure to the Secretary of State in 2006), Mr Jones placed considerable reliance on *Himallari,* and submitted that it was commendable that the appellant had been honest with the Entry Clearance Officer in 2006. In light of the panel's findings in *Himallari*, it was not rationally open to the Secretary of State to submit that the Home Office did not have constructive knowledge of the appellant's 2006 disclosure. Action could and should have been taken against the appellant at that stage, and the Secretary of State failed to take sufficient account of that factor in her decision of 5 May 2022. The Secretary of State's position on that issue, at para. 30 of the decision of 5 May 2022, was that it was not reasonable to expect the Entry Clearance Officer to inform the Home Office of that development. That was not a tenable position, Mr Jones submitted. It had been rejected by this tribunal in the unreported panel decision of Upper Tribunal Judge Blundell and Deputy Upper Tribunal Judge Davey, *Himallari v Secretary of State for the Home Department* UI-2022-006559, at paras 34 to 40. This tribunal should do likewise. The delay in the Secretary of State acting went to the lawfulness of the decision, as held in *Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769.

18. As to the fourth issue (concerning the appellant's disclosure to the Secretary of State in March 2020), Mr Jones highlighted chronology of this disclosure and contrasted it with his earlier, 2006, disclosure to the Secretary of State. He submitted that the appellant's 2006 disclosure to the Secretary of State was

commendable. The appellant accepted under cross-examination that he made the disclosure in order to facilitate his parents' application for entry clearance.

19. Mr Clarke submitted that the Secretary of State's decision dealt with all matters covered by Mr Jones' in a manner lawfully open to the Secretary of State.

20. Mr Clarke explained that the letter incorrectly referred to the wrong version of the Good Character guidance in force at the time of the appellant's application for naturalisation but submitted that the version that *was* in force (which he served on the appellant and the Upper Tribunal ahead of the resumed hearing on 6 November 2023) was identical in all material respects. The appellant was not a person who sensibly could be described as being of good character at the time he made his application for naturalisation, since he did not disclose to the Secretary of State the very deception he now accepts he engaged in.

21. As to the third issue, Mr Clarke submitted that the appellant's 2006 disclosure to the Secretary of State was not full and frank, and, as the appellant's oral evidence had confirmed, had not been made with the intention of regularising his identity and nationality status. The Secretary of State's decision was entirely consistent with Chapter 55 of the Nationality Instructions. *Himallari* was of little assistance, since the Upper Tribunal was addressing the First-tier Tribunal's analysis of Article 8(2) ECHR proportionality, and it is conceded that Article 8 will not be breached by the deprivation decision. The observations concerning delay in *Laci*, submitted Mr Clarke, were reached on the express basis that the Court of Appeal had not heard argument on the point (para. 77), and had not addressed part 55.5.1 of the Nationality Instructions, which states:

> "There is no specific time limit within which deprivation procedures must be initiated."

Lawful exercise of discretion by the Secretary of State

22. I have reached the following conclusions, which I explain below:

    a. First issue: the Secretary of State's decision lawfully addressed the significance of the appellant's age at the relevant times;

    b. Second issue: nothing in the relevant Nationality Instructions' Good Character guidance concerning the treatment of past deception in applications for naturalisation renders the Secretary of State's approach to the appellant's past deception unlawful in the context of taking the quite separate decision to deprive the appellant of his British citizenship, once obtained;

    c. Third issue: the Secretary of State adequately dealt with the appellant's 'disclosure' in 2006;

    d. Fourth issue: nothing about the appellant's self-disclosure to the Secretary of State in March 2020 rendered the subsequent deprivation decision unlawful.

First issue: lawful treatment of the appellant's age at material times

23. In my judgment, the Secretary of State lawfully addressed the appellant's age at all material times. He was 17 when he applied for indefinite leave to remain, was 18 when he was granted indefinite leave to remain and was 23 when he naturalised as a British citizen. The focus of Mr Jones' submissions on this issue is the fact the appellant crossed the threshold of majority while his application for indefinite leave to remain was pending. Had he been granted indefinite leave to

remain before he was 18, he would not have met the criteria for deprivation, under the Chapter 55 guidance in force at the relevant time.

24. As I set out in the error of law decision at para. 29, the appellant's age at the relevant times was a material factor. The error the First-tier Tribunal judge fell into when considering this point previously was to blur the distinction between public law errors and disagreements with the merits of the decision. It was against that background that I held at para. 29, with emphasis added:

> "Mr Jones submitted that, although he would not have used the language of morality in the decision, the underlying concern manifested by the judge, namely the age of the appellant at the relevant time, was a relevant consideration. While **I agree that the age of the appellant at the relevant time was a material consideration for the judge to determine whether the Secretary of State had considered**, the operative reasoning of the judge here demonstrates that he descended into an assessment of the merits of the decision in a manner which transcended the boundaries of a public law review."

25. As I went on to hold at para. 30 and following of the error of law decision, the Secretary of State *had* addressed the distinction between deception as a minor and deception as an adult, in general terms (at para. 55.7.5 of the Nationality Instructions), and in terms specific to this appellant, at multiple points in the deprivation decision of 5 May 2022.

26. The third bullet point of para. 55.7.5 of the Nationality Instructions states that:

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

27. This extract demonstrates that, at a general level, the Secretary of State has chosen to define, and thereby limit, the circumstances in which deprivation action will be pursued in cases where the operative deception was conducted by a child. The guidance draws the line in favour of those *granted* indefinite leave to remain as a child. It draws a distinction between those who applied for and received indefinite leave to remain before attaining the age of majority, and those who applied as a minor and were granted status as an adult. Even where a person is granted indefinite leave to remain as a child, that does not confer immunity from deprivation action, for it still may be pursued "where it is in the public interest…"

28. The Secretary of State's 5 May 2022 decision was entirely consistent with para. 55.7.5. The appellant was a child when he applied for indefinite leave to remain and was an adult when he was granted indefinite leave to remain. To the extent that the appellant contends that the Secretary of State's decision was inconsistent with para. 55.7.5 of the Nationality Instructions, his challenge to the decision must fail. The decision was entirely consistent with the guidance. Mr Jones has not sought to demonstrate that this aspect of the Nationality

Instructions was irrational or infected by some other public law error. No error arises from the Secretary of State's application of para. 55.7.5, therefore.

29. A further facet of the appellant's challenge on this basis is that his personal circumstances, insofar as they related to his age, were not sufficiently addressed by the Secretary of State's decision of 5 May 2022, when considered in the round with all other factors militating in his favour. I respectfully consider that this aspect of his challenge lacks merit; indeed, it is a merits-based disagreement with the Secretary of State's decision, rather than a proper public law challenge to it. As I observed at para. 31 of the error of law decision, the Secretary of State *did* consider the appellant's age at the relevant times. The decision was replete with references to, and consideration of, his age at the relevant times. The Secretary of State considered the appellant's age at para. 12 ("In your false identity and as an adult (aged 18 years, 1 month) you were granted Indefinite Leave to Remain (ILR) as a refugee on 14 May 1999…"). The decision noted the following additional steps taken by the appellant, as an adult, which were consequential to his deception: para. 13, application for a Home Office Travel Document on 25 June 1999, aged 18; para. 14, application for naturalisation as a British citizen on 26 April 2004, aged 23; and para. 19, applications for a British passport, in 2005 and 2013, in his false identity.

30. Further, by their letter dated 9 March 2020 the appellant's solicitors had expressly invited the Secretary of State to consider the impact of the appellant's age at the time of his arrival, his vulnerability to advice and pressure from other Albanians in a similar position, and his lack of knowledge or understanding of the immigration system. The solicitors' letter relied on para. 55.7.8 of the Nationality Instructions, concerning when an individual is to be regarded as "complicit" in the deception. Para. 55.7.8.1 states:

> "If the person was a child at the time the fraud, false representation or concealment of material fact was perpetrated, the caseworker should assume that they were not complicit in any deception by their parent or guardian."

31. The Secretary of State considered these representations, reasoning in response, at para. 22, that "this argument fails to show regard for the important fact that the material fraud occurred when you were an adult and after you acquired ILR but before you attended the citizenship ceremony and became a British citizen." I noted at para. 31 of the error of law decision that the Secretary of State expressly addressed the appellant's age at the time of his operative deception, at para. 26, and in doing so acknowledged the appellant's age at the time of his arrival and claim for asylum:

> "Whilst it is accepted that you were genuinely a minor upon arrival into the UK and thus at the time of your asylum claim, you were an adult when you chose to continue with the deception at the time of your application for naturalisation, as such, you are solely responsible for the information given in your subsequent applications submitted to the Home Office."

32. I accept that at the part of the letter in which the Secretary of State addressed whether to invoke the discretionary section 40 deprivation power, there was no additional consideration of the age-based factors now relied upon by the appellant. No material public law error arises on account of this factor, for the following reasons.

33. First, the decision must be read as a whole. As set out above, the decision addressed the age-based submissions in the context of addressing the appellant's representations concerning "complicity" under para. 55.7.8.1 (which goes to the circumstances in which the Secretary of State will regard the statutory condition precedent as being met; the appellant, of course, concedes that it is met) and also in the context of the para. 55.7.5 factors (which go to the exercise of discretion: "…the Secretary of State *will not* deprive British citizenship in the following circumstances…").

34. Secondly, had the Secretary of State repeated the age-based analysis under the specific heading of the exercise of discretion, the result would have inevitably been the same. I put it in these terms at para. 33 of the error of law decision:

> "33. While I do not consider the Secretary of State's decision to have featured any error, to the extent it was a public law error for the Secretary of State not to re-address, or otherwise repeat her para. 26 reasoning under the "discretion" part of the decision, any error was immaterial. The approach she took at para. 26 was entirely consistent with the Nationality Instructions' approach to the personal responsibility of adults: see, for example paras 55.7.8.5 and 55.7.11.2. Had she repeated her analysis in that part of the document, the outcome would have been the same, and that would be a public law error of a species which a tribunal or court should be slow to grant relief, since it would be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (section 31(2A), Senior Courts Act 1981)."

35. Of course, Mr Jones' submissions do not rely on the age issue in isolation. The submission is that, when considered with the remaining factors, the appellant's age at the material times was a relevant factor which the Secretary of State failed properly to consider. For that reason, I will revisit this issue cumulatively, in light of my overall analysis, following my consideration of the remaining submissions.

Second issue: good character guidance approach to past deception does not apply by analogy to deprivation decisions

36. Annex D to Chapter 18 of the Nationality Instructions contains guidance on the statutory good character requirement for British citizenship. Mr Jones relies on the 30 September 2020 version (version 2.0) at para. 15 of his skeleton argument; a version of the guidance was also at Annex M1 to the Secretary of State's bundle before the First-tier Tribunal. While there are some minor differences between the wording of both versions, for present purposes their effect appears to be substantively identical. The version quoted by Mr Jones states, where relevant:

> "**Deception in previous applications**
>
> An application will normally be refused where there is evidence that a person has employed deception either:
>
> - during the citizenship application process
> - in a previous immigration application in the previous 10 years
>
> It is irrelevant whether the deception was material to the grant of leave or not.
>
> An application will normally be refused if there has been any deception in the 10 years prior to the application for citizenship. For these

> purposes, the deception is regarded as continuing until the date on which it is discovered or admitted. For example, if a person used deception in an application in 2008, but that was discovered or admitted to in 2010, the 10-year period would start in 2010."

37. Properly understood, Mr Jones' submission is that there should be symmetry between the approach of the good character guidance to past deception and the Secretary of State's approach to deprivation of citizenship based on past deception. With respect, I consider this submission to be without merit, for the following reasons.

38. First, the good character guidance and the deprivation guidance deal with entirely different situations. The purpose of the good character guidance is to prevent an applicant for British citizenship who could not sensibly be regarded as satisfying the statutory good character requirement contained in section 6(1) of the 1981 Act from being able to meet that requirement. By contrast, chapter 55 of the Nationality Instructions addresses the situation where a naturalised British citizen – such as this appellant – had through his or her deception purported to satisfy the good character requirement, notwithstanding the fraud, false representation or the concealment of a material fact which, if discovered, would have prevented the applicant from satisfying the good character requirement at the time of the application.

39. Secondly, this submission is a disagreement of substance with the contents of the Secretary of State's operational guidance and does not demonstrate the presence of a public law error. Simply because the Secretary of State has focussed the good character guidance on discovered or admitted deception in the ten years preceding an application for British citizenship does not mean that the circumstances in which deprivation of citizenship will be pursued must correspond. As Mr Clarke submits, para. 55.5.1 of the Nationality Instructions states that there is no outer time limit for the pursuit of deprivation action.

40. Thirdly, even if there were a requirement for symmetry between the good character guidance and the deprivation guidance, that would not benefit this appellant. The guidance relied upon by Mr Jones requires the operative deception to have been discovered or admitted in order for the ten year period to start. I will return to the impact of the appellant's parents' 2006 application for entry clearance below, but it was not until 9 March 2020 that the appellant sought expressly to draw his prior deception to the attention of the Secretary of State. The good character guidance is not engaged where past deception is concealed or otherwise not discovered. If the appellant's March 2020 disclosure to the Secretary of State is taken as the starting point for the ten year period, there remains a considerable period to go before he would be able to benefit from the application of a ten year limitation period by analogy.

41. For those reasons, I reject the submission that the good character guidance should inform consideration of deprivation action by analogy.

Third issue: no unlawfulness arising from the appellant's parents 2006 "disclosure" to the Entry Clearance Officer

42. Neither party has provided a copy of the appellant's parents' 2006 application for entry clearance, but it is common ground that they applied, and that the appellant was their "sponsor". In his statement dated 27 July 2022, the appellant said at para. 24 that he was "almost certain" that in support of the application, he provided a copy of his genuine Albanian birth certificate. Under cross-examination, he said he did not have a copy of the application. He said that in

sponsoring the application, he did not do so with the intention of disclosing his true identity to the Secretary of State, and added that "it was just a thing that I did". He said that he made a separate decision to disclose his true identity to the Secretary of State, which culminated in the 9 March 2020 letter sent by his solicitors.

43. I will assume for present purposes that the appellant's parents *did* provide a copy of his Albanian birth certificate to the Entry Clearance Officer. If that is so, I will assume that its provenance as an Albanian document could have been apparent to the Entry Clearance Officer. Moreover, the applications for entry clearance were submitted by Albanian citizens. I accept that there would have been a disconnect between the appellant's purported history as a naturalised British citizen of Kosovan heritage and his parents' supporting documentation, which would have revealed his true identity.

44. However, the appellant's Kosovan identity and date of birth were identical to his Albanian identity: the Kosovan Vladimir Bisha was born on 12 April 1981, just as the Albanian Vladimir Bisha was born on 12 April 1981. There was plainly a degree of similarity between the two. There is no suggestion that the applications for entry clearance sought expressly to disclose the appellant's true identity; the appellant's evidence was that that was *not* his intention. It is more likely than not that the Entry Clearance Officer simply did not notice the significance of the appellant's Albanian birth certificate. That in itself is, on one view, hardly surprising. The Entry Clearance Officer would have known that the sponsor of the applications, the appellant, would have had to have made multiple declarations to the Secretary of State concerning the truthfulness of his own applications, and honesty. I have not been shown any evidence that the entry clearance applications drew the appellant's past deception to the attention of the Secretary of State. The focus of the Entry Clearance Officer when assessing his parents' applications was not the *appellant's* honesty or the circumstances which led to him acquiring British citizenship, but rather the circumstances of *his parents*, whose applications were then under active consideration.

45. Against that background, the question for my consideration is whether the above disclosure, in 2006, was such that it was unlawful for the Secretary of State to give notice of his intention to deprive the appellant of his British citizenship in 2022, sixteen years later. I find that it was not, for the following reasons.

46. First, the circumstances did not give rise to any form of expectation on the part of the appellant, still less a *legitimate* expectation. The appellant's evidence was that he did not view his parents' entry clearance applications as being of any broader significance. He did not say that he was operating under the assumption that the disclosure, in 2006, meant that the Secretary of State would not act against him later. As Mr Clarke submitted, if that is what the appellant thought, it is difficult to see why his solicitors wrote in the terms they did in March 2020. While the March 2020 letter referred to the "delay" following the appellant's 2006 disclosure, read as a whole, the letter plus the stated enclosures were plainly intended to settle the matter of the appellant's citizenship status once and for all. There is no sense in which the 2006 disclosure came remotely close to the comprehensive nature of the self-disclosure in March 2020.

47. Even if the appellant *had* thought that the 2006 disclosure was sufficient to reveal his true identity to the Secretary of State at the time, his subsequent interactions with the Secretary of State, and his application for a passport in 2013 in his Kosovan-British identity, were such that it was clear that the appellant was not operating under that assumption for any period of significance.

48. Secondly, this is not a case where there is delay of the sort at play in *Laci*. The Secretary of State had informed the appellant in *Laci* in February 2009 that his British citizenship was to be reviewed with a view to deprivation under section 40(3) of the 1981 Act. In March 2009, Mr Laci's solicitors responded to the Secretary of State, setting out a range of mitigating factors. "Remarkably", as the Court of Appeal put it at para. 8, Mr Laci was then to hear nothing more from the Secretary of State for nine years. In that time, he continued to put down private and family life roots in the UK, married and renewed his British passport. In February 2018, the Secretary of State wrote to the appellant, seemingly out of the blue, notifying him that his citizenship was to be reviewed with a view to possible deprivation under section 40(3). The Secretary of State later informed Mr Laci that he was to be deprived of his British citizenship, and he appealed to the First-tier Tribunal. It was against that background that the First-tier Tribunal found that the Secretary of State's delay meant that the public interest in the deprivation of citizenship counted for less when determining the proportionality of the decision under Article 8(2) of the ECHR. Underhill LJ concluded at para. 81 "not without hesitation" that the First-tier Tribunal had been entitled to approach the matter in that way, adding:

> "It may well be that not every tribunal would have reached the same conclusion as the FTT in this case. However, that is not the test. We are concerned here with the exercise of a judicial discretion, and it is inevitable that different judges will sometimes reach different conclusions on similar facts."

49. Thus, *Laci* may be distinguished on at least the following bases:

a. In *Laci*, there was no ambiguity concerning the Secretary of State's understanding of the circumstances of Mr Laci's acquisition of British citizenship, in contrast to the indirect revelation of this appellant's true identity to the Entry Clearance Officer in 2006 by his parents;

b. The discussion of the impact of delay in *Laci* was in the context of Article 8(2) of the ECHR. The appellant rightly accepts that there is no disproportionate breach of Article 8 in these proceedings;

c. *Laci* establishes no general proposition; as Underhill LJ noted at para. 81, not every tribunal would have reached that conclusion, but it was within the range of rational conclusions open to the judge in those proceedings, on the materials before him;

d. Mr Laci believed that no further action would be taken against him as a result of the Secretary of State's inaction, whereas the appellant in these proceedings accepted under cross-examination that his parents' application for entry clearance did not hold that level of significance for him. His main motivation, he said, was to secure his parents' attendance at his graduation ceremony, and he was at no stage operating under any expectation that his affairs were in order.

50. Thirdly, the appellant is not assisted by *Himallari*, for similar reasons to the lack of assistance he derives from *Laci*. I accept that *Himallari* involved a similar chronology to the present proceedings: Mr Himallari was a naturalised British citizen of Albanian heritage, who had falsely maintained to the Secretary of State that he was Kosovan. The deception was material to his naturalisation. His brother applied for entry clearance in 2006, disclosing his true identity in doing so. The First-tier Tribunal held that the Secretary of State should have been informed of his true identity by the Entry Clearance Officer, and accepted that Mr

Himallari believed that, as a result of the Secretary of State's subsequent inaction, he would not be the subject of deprivation action. Those findings formed the basis of the First-tier Tribunal's analysis of Article 8 ECHR, leading to the conclusion that the Secretary of State's inaction was such that deprivation would be disproportionate under Article 8(2) ECHR. The reasons these findings do not assist the appellant are as follows:

a. There were findings of fact in *Himallari* that the appellant was under the impression that the 2006 disclosure to the Entry Clearance Officer had informed the Secretary of State of his true identity, whereas my findings in these proceedings are that that was *not* what the appellant thought;

b. The impact of the delay in *Himallari* was analysed in the context of the engagement of Article 8 ECHR, whereas the appellant in these proceedings has conceded that for the purposes of the present appeal, a case cannot be made out that deprivation would disproportionately interfere with his Article 8 private and family life rights.

c. The panel in *Himallari* did not purport to establish a general proposition concerning the impact of historic disclosures to the Entry Clearance Officer, but rather concluded that, for reasons connected to the facts of those proceedings, the First-tier Tribunal judge had been entitled to conclude that the delay was disproportionate in Article 8 ECHR terms.

51. For these reasons, I conclude that there was no public law error in the Secretary of State's treatment of the appellant's 2006 disclosure. As the decision dated 5 May 2022 states at para. 30, the onus was on the appellant expressly to disclose his true identity to the Home Office, or otherwise report any change in his circumstances. There was no public law error in the treatment by the decision of 5 May 2022 of the appellant's parents' 2006 disclosure to the Entry Clearance Officer of his true birth certificate.

Fourth issue: self-disclosure on 9 March 2020 did not render the decision unlawful

52. I do not consider that the Secretary of State's decision is infected by any public law error on account of its treatment of the significance of the appellant's self-disclosure in March 2020. It addresses this factor at para. 32:

> "It is considered that you only admitted to the deception 15 years after you arrived in the UK and for the purposes of acquiring British passports for your children."

53. That was a conclusion rationally open to the Secretary of State, in particular since – as the 9 March 2020 representations made clear (see page 5, under "Current circumstances") – the appellant and his family were seeking to relocate to the UK. The appellant plainly wanted the uncertainty of his false identity brought to an end and had hoped that he could regularise his identity while maintaining his British citizenship, since doing so would make the family's move to the United Kingdom much easier.

54. Nothing in the Nationality Instructions requires the Secretary of State to ascribe significance to self-disclosure. It is not capable of being a factor of determinative significance. To the extent the appellant considers that the Secretary of State should have approached the significance of his self-disclosure differently, I

consider that to be a disagreement of weight, and not demonstrative of a public law error.

Conclusion: no cumulative unlawfulness

55. Taking a step back and considering the above analysis in the round, I do not consider that the Secretary of State's decision of 5 May 2022 is infected by any error(s) of public law. It considered all relevant factors, reaching conclusions that were rationally open to it, on the basis of the materials before the Secretary of State at the time. Nothing about the appellant's age at the relevant time calls that conclusion into question, even when viewed cumulatively. It was open to the appellant to withdraw his application for indefinite leave to remain upon turning 18; he did not. It was further open to him not to apply to naturalise as a British citizen some years later; he pursued the application. Nothing in the Secretary of State's decision addresses the significance of the appellant's age unlawfully, and nothing about his age at the relevant times renders the Secretary of State's decision so unlawful that no rational Secretary of State could have reached it.

56. The appellant concedes that his deception was material to the acquisition of his British citizenship. He further concedes that there will be no disproportionate inference with Article 8 by the Secretary of State's decision (that is plainly a correct concession; the appellant and his family live outside the UK's territorial jurisdiction under the ECHR). There being no public law unlawfulness in the Secretary of State's decision, it follows that this appeal must be dismissed.

57. The appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
I remake the decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, dismissing the appeal.

Stephen H Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
29 December 2023

Annex – Error of Law decision

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000706

First-tier Tribunal No: DC/50094/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Appellant

and

Vladimir Bisha
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the Respondent: Mr D. Jones, Counsel, instructed by Oliver and Hasani Solicitors

Heard at Field House on 25 May 2023

DECISION AND REASONS

1. By a decision promulgated on 18 January 2023, First-tier Tribunal Brannan ("the judge") allowed an appeal brought by the appellant, a naturalised British citizen of Albanian descent, against a decision of the Secretary of State dated 5 June 2022 to deprive him of his British citizenship under section 40(3) British Nationality Act 1981 ("the 1981 Act"). The judge heard the appeal under section 40A of the 1981 Act.

2. The Secretary of State now appeals against the decision of the judge with the permission of Upper Tribunal Judge Norton Taylor. **F**or ease of reference, I will refer to the appellant before the First-tier Tribunal as "the appellant".

Factual background

3. The appellant was born on 12 April 1981 in Albania. Between 8 and 12 September 1998, he arrived in the United Kingdom. He was 17 and a half years old at the time. Shortly afterwards, he claimed asylum on the basis that he was from Kosovo, and that he was at a real risk of being persecuted on account of his ethnicity. He provided a detailed account of the reasons he claimed to be at risk.

4. On 14 May 1999, the appellant was granted indefinite leave to remain ("ILR") as a refugee. On 26 April 2004, he applied for British citizenship in his false Kosovan identity. The application was granted on 20 February 2005.

5. The appellant left the United Kingdom in 2007 and returned to Albania, where he has remained ever since. On 9 March 2020, the appellant disclosed his true identity to the Secretary of State, along with representations as to why, in his opinion, he should not be deprived of his British citizenship. An exchange of correspondence followed, leading to the Secretary of State taking the decision to deprive the appellant of his British citizenship on 5 June 2022; it was that decision that was under appeal before the judge below.

6. Early in his decision (para. 4), the judge identified the disputed issues which he had agreed with the parties were central to the case:

> "(a) Is the decision of the Respondent in line with Chapter 55: Deprivation and Nullity of British citizenship given the Appellant was a child when he claimed asylum in a false identity and made no subsequent application for leave to remain? (the 'Policy Issue')
>
> (b) If so, was the false representation material to the grant of citizenship?
>
> (c)If so, did the Respondent act lawfully and reasonably in the exercise of her discretion to deprive the Appellant of his citizenship? (the 'Discretion Issue')
>
> (d) If so, is the Respondent's decision disproportionate under Article 8 of the European Convention on Human Rights ('ECHR')."

7. Mr Jones, who also appeared on behalf of the appellant before the judge, had conceded that the appellant's fraud had been material to the acquisition of his British citizenship, so the judge said that he would not consider point (b). In light of the length of the appellant's absence, he would not consider point (d). The focus, the judge said, of his decision was to be issues (a) and (c): the 'policy' and 'discretion' issues, as the judge put it.

8. The judge set out some extracts from Chapter 55 of the Secretary of State's *Nationality Instructions*, entitled *Deprivation and Nullity of British citizenship*. He said that the relevant paragraphs included the following (quoted as set out in the judge's decision):

> "55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:
>
> …
>
> [third bullet point] • If a person was a minor on the date at which they acquired indefinite leave to remain and the false representation, concealment of material fact or fraud arose at that stage and the leave to remain led to the subsequent acquisition of citizenship we will not deprive of citizenship

> However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation.
>
> …
>
> **55.7.8 Complicit**
>
> 55.7.8.1 If the person was a child at the time the fraud, false representation or concealment of material fact was perpetrated, the caseworker should assume that they were not complicit in any deception by their parent or guardian.
>
> 55.7.8.1 This includes individuals who were granted discretionary leave until their 18th birthday having entered the UK as a sole minor who can not be returned because of a lack of reception arrangements. Such a minor may be granted ILR after they reach the age of 18 without need to succeed under the Refugee Convention or make a further application but the fraud was perpetrated when the individual was a minor.
>
> 55.7.8.2 However, where a minor on reaching the age of 18 does not acquire ILR or other leave automatically and submits an application for asylum or other form of leave which maintains a fraud, false representation or concealment of material fact which they adopted whilst a minor, they should be treated as complicit."

9. At para. 14, the judge said that the appellant's situation did not "fall squarely within the policy at all." He was not caught by para. 55.7.5 because he was granted ILR *after* (albeit by only 32 days) he turned 18. He did not fall within 55.7.8.2 because, in contrast to the individual in that example, he *was* recognised as a refugee, and granted leave on that basis. That meant that the Secretary of State must have exercised her discretion outside the policy to decide how to treat the appellant.

10. From para. 16, the judge considered what he termed "the discretion issue", identifying the central issue as:

> "…has the respondent acted in a way that is reasonable and lawful in the exercise of her discretion given her policy on minors and fraud?"

11. The appellant had submitted that there was no "temporal bright line" separating the appellant's conduct before and after his 18th birthday, relying on *KA (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1014 at para. 7. The judge was persuaded by that submission. He found that the approach taken by the *Nationality Instructions* to those (such as this appellant) who had claimed asylum as a child but were not recognised as a refugee or granted indefinite leave to remain until they were an adult was inconsistent and unfair. Paragraphs 55.7.5 and 55.7.8.2 of the *Nationality Instructions* disregarded deception initiated by an applicant as a child, even if it was carried on and perpetuated in adulthood. The judge continued, at para. 21 (with emphasis added):

> "A person in either situation could have continued the deception in the naturalisation application and face no sanction. The Respondent has not applied her mind to the difference in treatment. Particularly in light

> of the guidance in *KA (Afghanistan)*, no obvious reason is apparent to me. **What is the moral difference between the Appellant's situation and his situation if the Respondent had granted ILR 32 days earlier?** In either case his actions are identical, but the Respondent treats them differently without explaining why and without acknowledging that the only difference is the timing of her own decision. I find the lack of explanation is unreasonable and therefore unlawful. To look at it within the language of para. 6 of the headnote of *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC), the Respondent has acted in a way in which no reasonable Secretary of State could have acted and has disregarded something which should have been given weight."

12. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

13. On a fair reading of the Secretary of State's grounds of appeal, as developed by Mr Avery, there are essentially three material criticisms of the judge's decision, which I shall address in the course of the analysis that follows:

    a. The judge misunderstood the role of the Secretary of State's guidance generally, and the relevant extracts and structure of Chapter 55 of the Nationality Instructions specifically. Guidance is only guidance and does not create a hard and fast rule;

    b. The Secretary of State's exercise of discretion to deprive the appellant of his British citizenship was not infected by any public law error. The judge disagreed with the decision because he considered the Nationality Instructions to be unfair, but the role of the judge on this section 40A appeal was not to substitute his own merits-based assessment for that of the Secretary of State, but to assess whether her decision was infected by a public law error. It was a material misdirection in law to find, on the basis of the reasons given by the judge, that there was a public law error; and

    c. The judge erred by adopting a "near miss" approach to the appellant's age, and the impact of ILR being granted 32 days *after* the appellant's 18th birthday.

14. The grounds of appeal also contend that the judge erred in relation to the good character requirement.

15. Mr Jones relied on his helpful rule 24 response dated 22 May 2023. He submitted that neither the grounds of appeal nor Mr Avery's submissions failed to identify any perversity or other error of law in the judge's reasoning. The Secretary of State had not at any stage in her reasoning considered the actual circumstances of the appellant at the time of the original deception, namely that he was a child. The appellant had expressly flagged the issue of his age at the relevant time was a factor going to the exercise of the Secretary of State's discretion, and the judge was entitled to conclude that that issue had not been grappled with. It was rationally open to the judge to conclude that there is no distinction between the appellant's culpability before and after his eighteenth birthday, and, as such, there is no reason for the appellant not to benefit from the generous approach that those who had acquired ILR before they turned 18 would have benefited from.

The law

16. A person may acquire naturalisation as a British citizen in accordance with section 6(1) of the 1981 Act:

> "6.- Acquisition by naturalisation.
>
> (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."
>
> Schedule 1 to the 1981 Act sets out the requirements for naturalisation as a British citizen. This includes at para. 1(1)(b) "that he is of good character".

Good character is not defined under the 1981 Act. The Secretary of State has adopted guidance from time to time on the meaning of the term.

17. Section 40 of the 1981 Act empowers the Secretary of State to deprive a person of their British citizenship in certain circumstances:

> “(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of-
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.”

18. The criteria in section 40(2) and (3) operate as a condition precedent to the Secretary of State's exercise of her power to deprive a person of their citizenship. The power to deprive is discretionary ("the Secretary of State may"), with the consequence that the Secretary of State must decide whether to exercise the power to deprive, even if she is satisfied that a statutory condition precedent to doing so is met.

19. There is a right of appeal to the First-tier Tribunal against the Secretary of State's decision of her intention to exercise the power under section 40, rather than the deprivation order itself: see section 40A(1). It follows that, during the currency of any pending proceedings challenging a decision to make a deprivation order, the individual concerned will remain a British citizen.

20. The leading cases on deprivation of citizenship in the Immigration and Asylum Chamber are currently *Ciceri* (which was referred to by the judge in his para. 21) and *Chimi (deprivation appeals; scope and evidence)* Cameroon [2023] UKUT 115 (IAC).

Summary of conclusions

21. For the reasons set out below, I have concluded:

    a. The judge's operative reasoning was based on several misunderstandings of the Nationality Instructions. The judge erroneously treated the Nationality Instructions as though they drew a hard and fast line. He impermissibly expected them expressly to cater for all eventualities, and disregarded the flexibility inherent to their approach in any event (c.f. "in general…");

    b. It was not the judge's role to assess whether the Nationality Instructions, or the decision of the Secretary of State, correctly reflected what he regarded to be "the moral difference" (para. 21) between different factual scenarios founded upon immigration fraud committed by children or during childhood. The reasons given by the judge at para. 21 for concluding that the Secretary of State had acted as no reasonable Secretary of State could have acted were, properly understood, an impermissible merits-based disagreement with her decision, rather than legitimate public law criticisms of her decision;

    c. Contrary to the judge's criticism of the Secretary of State's decision, it *did* address the appellant's age at the time of his claim for asylum, at para. 26. Her decision must be read and construed in its entirety;

    d. *KA (Afghanistan)* was not authority for the proposition for which the judge relied on it;

    e. The decision of the judge must be set aside and remade in the Upper Tribunal.

Erroneous approach to the Nationality Instructions

22. The core of the judge's operative reasoning lay in his concerns that the Nationality Instructions appeared to disregard certain false representations, concealment of material facts, or fraud committed by some children, even if perpetuated in adulthood, without making adequate provision for an individual in the position of this appellant. The judge's primary criticism lay in the fact that, had the appellant's ILR been granted just over a month earlier, the Nationality Instructions would not have required the Secretary of State to exercise her discretion to make an order under section 40(3).

23. That reasoning involved the following misdirections in law.

24. First, I respectfully consider that the judge misread the Nationality Instructions, treating them as though they drew a hard and fast line, automatically benefitting some prospective subjects of deprivation orders, and irrationally not benefitting others. Properly understood, para. 55.7.5 only applied "in general", and permitted the Secretary of State to pursue deprivation action, stating:

> "…where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation."

This means that there is no hard and fast rule that the cohort of individuals captured by some of the apparent leniency, including under the third bullet point in para. 55.7.5, automatically enjoy the immunity from deprivation upon which the judge's comparison was premised. They, too, may be the subject of deprivation action where the Secretary of State considers that the public interest

requires that approach. The Nationality Instructions feature an inherent flexibility which the judge assumed they lack.

25. The approach of the judge appears to have been based on the expectation that the Nationality Instructions should make express provision for each and every factual eventuality, and that, by not doing so, cases which were not expressly catered for by the Nationality Instructions entailed an exercise of discretion "outside the policy" (para. 15). Yet there is no requirement for a policy to cater for every possible eventuality. As this tribunal put it at para. A50 of the Annex to *Muslija (deprivation: reasonably foreseeable consequences)* [2022] UKUT 337 (IAC):

> "A50. The judge erroneously approached the Secretary of State's exercise of discretion as though it were itself subject to a condition precent of being fully articulated in a policy, and thereby impermissibly minimised the public interest in the deprivation of the appellant's citizenship. As this was a statutory appeal, and not a judicial review of the Secretary of State's policy, the judge should have approached this issue on the basis of what was set out in the decision, in the context of the relevant authorities and the policy, rather than by criticising the Nationality Instructions. In any event, there is no obligation on decision makers to have a policy in every case where statute creates a discretionary power (see *R (oao A) v Secretary of State for the Home Department* [2021] UKSC 37 at [53])."

26. It follows that the Secretary of State's decision in these proceedings was not an exercise of discretion "outside the policy". Rather it was simply the case that the Secretary of State, when formulating the Nationality Instructions (a task which she alone is institutionally competent to perform, subject to the oversight of the courts on one of the bases enunciated in *R (oao A) v Secretary of State for the Home Department*), had chosen not to adopt the same approach to those such as this appellant to that which, "in general", she adopted to those falling within the third bullet point in para. 55.7.5 who acquire ILR while still a minor. Far from failing to make provision for those in the position of this appellant, the Secretary of State defined – and thereby limited – those in relation to whom, in general, she would not pursue deprivation action. It was not a case of falling within or without the policy. The appellant fell squarely within it, albeit not within the part the judge thought he should have fallen with in, which leads to the next part of my analysis.

Public law error

27. Secondly, the judge impermissibly reviewed the substance of the Nationality Instructions, and therefore the merits of the deprivation decision, by reference to what he considered was the right "moral" outcome: see the emphasis added to the extract from para. 21 of the judge's decision, quoted at para. 11, above. That was not a public law review of the sort envisaged by Lord Reed at para. 71 of *Begum*; it was a merits-based assessment undertaken by standing in the shoes of the Secretary of State. In *Begum* at para. 71, Lord Reed said that the Special Immigration Appeals Commission ("SIAC"):

> "…can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the

> serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision."

28. At the hearing I invited submissions from Mr Jones on the following extract from *Chimi*, at para. 59, with emphasis added:

> "…this part of the Tribunal's enquiry must also be undertaken in accordance with what was said by Lord Reed in *Begum*. The Tribunal must therefore consider whether the respondent erred in law when deciding in the exercise of her discretion under s40(2) or 40(3) to deprive the individual of their citizenship**. It is not therefore for the Tribunal to consider whether, on the merits, deprivation is the correct course.** It must instead consider whether, in deciding that deprivation was the proper course, the respondent materially erred in law."

29. Mr Jones submitted that, although he would not have used the language of morality in the decision, the underlying concern manifested by the judge, namely the age of the appellant at the relevant time, was a relevant consideration. While I agree that the age of the appellant at the relevant time was a material consideration for the judge to determine whether the Secretary of State had considered, the operative reasoning of the judge here demonstrates that he descended into an assessment of the merits of the decision in a manner which transcended the boundaries of a public law review.

30. Contrary to what the judge held, the Secretary of State *had* addressed her mind to the difference in treatment between minors who engage in fraud who acquire ILR before turning 18, and those such as this appellant who acquire it only after attaining the age of majority. The Secretary of State addressed precisely that distinction when formulating the Nationality Instructions at para. 55.7.5, by deciding that children who become settled while still children, will, in general, not subsequently face deprivation action. The fact that the judge disagreed with the Secretary of State having chosen to draw the line at the age of eighteen was nothing to the point.

Age considered by the deprivation decision

31. Thirdly, the judge's criticism of the Secretary of State's failure to consider the appellant's age when he claimed asylum was misplaced. The Secretary of State did, in fact, consider that issue. See para. 26 of the deprivation decision:

> "Whilst it is accepted that you were genuinely a minor upon arrival into the UK and thus at the time of your asylum claim, you were an adult when you chose to continue with the deception at the time of your application for naturalisation, as such, you are solely responsible for the information given in your subsequent applications submitted to the Home Office."

32. It may be that the concern of the judge was that the part of the deprivation decision expressly addressing the exercise of discretion did not re-address this issue in that context. It did not have to. The Secretary of State's decision must be read as a whole, and it was not necessary for the Secretary of State to repeat herself later in the same document. She had already addressed the issue by stating that the appellant should have revealed his true identity to the Secretary of State upon turning eighteen. Alternatively, if the judge's concerns lay in the fact that the Secretary of State had not expressly addressed the concern he

identified at para. 21, namely his concern about the "moral" difference between this appellant and a hypothetical parallel reality whereby he was granted ILR while still a child, that is nothing to the point. The Secretary of State addressed the appellant's age in a manner consistent with her guidance, and did so by concluding that, once he was an adult, he was responsible for being honest with the Secretary of State. The fact that the judge disagreed with that assessment is irrelevant; it was an assessment for the Secretary of State, not the judge, to make.

33. While I do not consider the Secretary of State's decision to have featured any error, to the extent it was a public law error for the Secretary of State not to re-address, or otherwise repeat her para. 26 reasoning under the "discretion" part of the decision, any error was immaterial. The approach she took at para. 26 was entirely consistent with the Nationality Instructions' approach to the personal responsibility of adults: see, for example paras 55.7.8.5 and 55.7.11.2. Had she repeated her analysis in that part of the document, the outcome would have been the same, and that would be a public law error of a species which a tribunal or court should be slow to grant relief, since it would be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (section 31(2A), Senior Courts Act 1981).

KA (Afghanistan)

34. Fourthly, I consider that the judge's reliance on *KA (Afghanistan)* was misplaced. Para. 7 of the judgment in *KA* recorded the submissions of the appellants in those proceedings. It featured ahead of the Court of Appeal's operative analysis. It was not a finding or conclusion, nor was it an authoritative proposition of the law, still less did it establish any new principle. In any event, the case concerned the duty of the Secretary of State to endeavour to trace members of the family of an unaccompanied asylum-seeking minor, so as to protect the unaccompanied minor's best interests. The issue concerned the impact of delay by the Secretary of State until *after* former unaccompanied minors' eighteen birthdays, which was held to be potentially relevant to judicial consideration of an asylum or humanitarian protection claim (para. 24(2)), and past breaches of the section 55 duty (para. 24(3)). *KA (Afghanistan)* was not authority for the proposition that there could be "no obvious reason" to distinguish between children and adults upon the former attaining the age of eighteen in any comparable sense to the issues raised in these proceedings.

35. Of course, in Article 8 ECHR cases, it is well established that the bright line of an individual's eighteenth birthday is not necessarily determinative of whether a former child does or does not continue to enjoy family life with their parents for the purpose of engaging Article 8(1) on a family life basis. But that is an entirely different matter from whether the Secretary of State's policy may legitimately distinguish between adults and children in this context of deprivation of citizenship.

36. Finally, I also consider that the judge failed to address the impact of the appellant's failure to declare his prior false representations to the Secretary of State for the purposes of the statutory "good character" requirement for applicants to naturalise as British citizens.

Setting the decision aside

37. Drawing the above analysis together, I find that the decision of the judge involved the making of an error of law for the reasons set out above and set it aside.

38. Although the appellant appears to have been cross-examined before the judge, the decision records no findings of fact. Indeed, the agreed issues upon which it focussed did not involve evidential analysis, but questions of law, and the appellant conceded that the statutory condition precedent was met. That means this is not a case where the nature or extent of any judicial fact finding is such that, having regard to the overriding objective, the appeal should be remitted to the First-tier Tribunal. The appellant has not applied to withdraw his concession that his false representation was material, nor his non-reliance on Article 8 ECHR. Having regard to the overriding objective to decide cases fairly and justly, it will be appropriate to remake this decision in the Upper Tribunal.

39. Of course, the appellant's circumstances may change, particularly insofar as Article 8 ECHR is concerned (for example, by returning to the UK's territorial jurisdiction under the Convention), or on another basis. If that is so, he will be able to apply to rely on any updating evidence at the resumed hearing as necessary.

40. I therefore direct that the decision will be remade in the Upper Tribunal, in accordance with the directions set out below.

Notice of Decision

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

The decision will be remade in the Upper Tribunal, in accordance with the following directions:

[directions omitted]

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2023