IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005327
First-tier Tribunal No:
DC/50103/2022
LD/00047/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 September 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL
UPPER TRIBUNAL JUDGE PINDER

Between

SINAN RRUSHKU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Theo Lester, instructed by A J Jones Solicitors
For the Respondent: Steve Walker, Senior Presenting Officer

Heard at Field House on 19 September 2024

DECISION AND REASONS

1. The appellant appeals with the permission of Deputy Upper Tribunal Judge Metzer KC against the decision of First-tier Tribunal Judge Wilson. By his decision of 2 October 2023, Judge Wilson ("the judge") dismissed the appellant's appeal against the respondent's decision to deprive him of his British citizenship under section 40(3) of the British Nationality Act 1981.

Background

2. The full history was set out by the First-tier Tribunal and need not be rehearsed in our decision. The following suffices for the purposes of this appeal.

3. The appellant is an Albanian national who was born on 14 April 1986. When he arrived in the United Kingdom and claimed asylum in March 2004, however, he held himself out to be a national of Macedonia who was born on 14 April 1987.

He used that nationality and date of birth throughout his dealings with the respondent up to and including his application for naturalisation. He secured limited and then indefinite leave to remain before being naturalised in that identity on 22 November 2011.

4. The respondent subsequently learned of the appellant's true identity and notified him of her intention to deprive him of his British citizenship. Having received representations from the appellant against that course of action, the respondent made the decision to deprive on 6 May 2022. She concluded that the applicant had obtained British citizenship by means of fraud, false representation or concealment of material facts and that deprivation action under section 40(3) was warranted, and that it was lawful under section 6 of the Human Rights Act 1998.

5. The appellant appealed to the First-tier Tribunal. He was represented at his appeal hearing by Ms Harvey of counsel. The respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant and his wife and submissions from the advocates before reserving his decision.

The Decision of the First-tier Tribunal Judge

6. In his reserved decision, at [11]-[14], the judge directed himself in accordance with a range of authority including *R (Begum) v SSHD* [2021] UKSC 7, [2021] AC 765, *Chimi (deprivation appeals; scope and evidence)* [2023] UKUT 115 (IAC), [2023] Imm AR 1071 and *Muslija (deprivation; reasonably foreseeable consequences) Albania* [2022] UKUT 337 (IAC).

7. At [17]-[32], under the sub-heading "The precedent facts", the judge set out what he described as "the history of the appellant's deception" before evaluating the appellant's submission that the deception was not material to the naturalisation decision. The judge rejected that submission. He held that the appellant had been granted discretionary leave because he was a minor, whereas he would not have been granted leave if he had been an adult: [25]. In the same paragraph, the judge concluded that "the deception which secured the appellant's initial leave as an unaccompanied minor is material to the grant of citizenship." He concluded, applying *R (Hakemi) v SSHD* [2012] EWHC 1967 (Admin), that the deception would also have been material to the grant of ILR under the Legacy programme, which had required "a holistic approach in which positive and negative factors were balanced when making a decision pursuant to the legacy scheme". The judge concluded that "deception was a relevant consideration" in the exercise and that it could not be said to be immaterial: [26].

8. The judge concluded that the focus of the appeal must in any event be "upon the declarations that were made in the application for naturalisation … [including] declarations concerning statutory good character requirements": [28]. He recalled the statutory good character requirement in s6(1) of the 1981 Act and concluded that "instances of dishonesty necessarily go to the question of good character": [29]-[31]. At [32], the judge reached the following conclusion:

> "In this appeal the Appellant established his good character, a precondition to the grant of naturalisation, by failing to disclose his true identity and the deception that he had undertaken for a period of over 14 years whilst an adult and during numerous interactions with

> the Home Office. Accordingly, on this alternative analysis I again find that the Respondent's decision that citizenship was by one or more of the means specified in section 40(3) is lawful. The Respondent has reached conclusions about the precedent facts that are supported by evidence and are based upon a view of the evidence that could reasonably be held by her. The Respondent was entitled to assess the deception as material and in this case determinative of the condition precent having been met. In coming to this conclusion my assessment is limited to the evidence that was before the Respondent when she made the decision under appeal, or, which is otherwise relevant to establishing the specific error of law relied upon by the Appellant."

9. Section B of the judge's decision concerned the exercise of discretion. He focused within that analysis on the submission made by the appellant's counsel that the respondent had erred in her treatment of the question of delay. At [34], he set out the relevant aspects of the chronology, noting that the respondent had first been provided with the appellant's correct nationality and date of birth in 2015 and had sent an investigation letter in June 2018, whereas it was only in May 2022 that the decision to deprive was actually taken.

10. At [35], the judge found that the respondent's delay could not be explained by the *R (Hysaj) v SSHD* [2017] UKSC 82, [2018] 1 WLR 221 litigation and that "little weight can be placed on the period between 2015 and 2018 because during this period the appellant maintained his deception".

11. At [36], the judge concluded that the circumstances in *Laci v SSHD* [2021] EWCA Civ 769, [2021] 4 WLR 86 could be distinguished from the appellant's because the appellant in the former case "could justifiably have concluded that the matter was resolved in his favour", whereas in this case the respondent had informed the appellant in 2018 and 2019 that deprivation action was still in contemplation. The judge concluded that the appellant could not have formed the view between 2019 and 2022 that the issue had been resolved in his favour, and he accepted that the pandemic would inevitably have delayed matters as well: [37]. As such, the judge concluded that the respondent's stance on delay had not resulted in a public law error in the decision under challenge: [38].

12. For reasons he gave at [39], the judge concluded that the fact that the appellant was issued with a British passport in 2023 was irrelevant in light of *R (Gjini) v SSHD* [2021] EWHC 1677 (Admin), [2021] 1 WLR 5336 (in which Morris J held that the mere commencement of deprivation proceedings could not provide a lawful basis for the refusal of a passport to a British citizen).

13. The judge therefore held at [40] that the respondent's discretion had been lawfully exercised.

14. In section C of his decision, the judge analysed the appellant's Article 8 ECHR claim. Having accepted that Article 8 ECHR was engaged in its family and private life aspect, the judge focused from [44] onwards on the question of proportionality in light of the guidance given in *Muslija*. He took account of what was said about the family's circumstances in the "limbo" period (between the final deprivation order and any decision on whether to grant leave to remain) and he also took account of the respondent's delay: [47]-[48]. Having weighed those consequences against the public interest in depriving the appellant of that to

which he was not entitled, the judge concluded that the decision was a proportionate one: [49].

15. The judge drew the threads of his analysis together at [50]-[53], and dismissed the appeal.

The Appeal to the Upper Tribunal

16. Permission was refused at first instance by First-tier Tribunal Judge Pickering. DUTJ Metzer KC was however persuaded on renewal that each of the appellant's four grounds of appeal were arguable. The Deputy Judge summarised the grounds in the following helpful way, (which we have reproduced verbatim from his decision):

    (i) Wrongly concluded that the Appellant would not have been granted leave under the legacy had his deception been known and that the deception was therefore material;
    (ii) Took into account an irrelevant matter, deprivation on the grounds of character, in concluding that the Appellant's deception was material;
    (iii) Failing to properly analyse Ciceri (2021) UK 238 and Chimi (2023) UKUT and their application to the appeal
    (iv) Failing to allow the Appellant's Article 8 ECHR claim primarily not properly taking into account delay in assessing proportionality.

17. The Deputy Judge considered the first and second grounds to be stronger than the third and fourth but he granted permission on each.

18. There is no response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. There is a skeleton argument and bundle of authorities from Mr Lester, however, and we are grateful to him for his assistance in those regards.

Submissions

19. For the appellant, Mr Lester submitted that the judge had erred in failing to consider whether, in light of *Sleiman (deprivation of citizenship; conduct)* [2017] UKU 367 (IAC), the appellant's deception had been "directly material" to the grant of ILR and the naturalisation decision. He submitted that *Sleiman* remained persuasive despite the more recent decision in *Onuzi (good character requirement: Sleiman considered)* [2024] UKUT 144 (IAC). Had the judge directed himself properly, according to Chapter 55 of the Nationality Instructions and the decision in *Hakemi*, he could not properly have concluded as he did. There was no operative concealment in this case. The case was on all fours with *Sleiman*, Mr Lester submitted.

20. In relation to ground two, Mr Lester submitted that the judge had erred in taking into account the good character requirement, which was irrelevant to the question posed by s40(3) of the 1981 Act.

21. In relation to ground three, Mr Lester submitted that *Ciceri* and *Chimi* were wrongly decided and that the entire approach adopted by the FtT had been wrong as a result. The judge had failed to engage with and resolve arguments which had been made in the skeleton argument before the FtT in this respect.

The authorities of the Supreme Court and the Court of Appeal suggested an approach which was at odds with that of the Upper Tribunal. The proper approach was for the respondent to bear the burden of proof in relation to the condition precedent, and she was unable on her own evidence to show that any deception had been directly material to the grant of ILR or naturalisation.

22. In relation to ground four, Mr Lester submitted that the judge had improperly marginalised the respondent's delay in taking the deprivation decision. *Laci* could not be distinguished in the way that the judge thought and the judge's conclusion that the appellant and his family would not be destitute during the limbo period was insufficient; what was required was a consideration of proportionality in the round. On any proper view, the four year delay from 2018 to 2022 was an "inordinate delay" which must on any rational view carry significant weight. The judge had also overlooked the appellant's length of residence and the appellant's extensive family and private life in the UK.

23. Mr Lester invited us to allow the appeal and to remit it to the FtT for hearing afresh by a different judge.

24. Mr Walker opposed the appeal. He submitted that the judge had plainly reached the correct conclusion in relation to the appellant's ability to secure ILR under the Legacy programme. The appellant's attempt to submit that his persistent deception was immaterial to the grant of ILR or the naturalisation consideration was unmeritorious. All relevant matters had been considered by the judge.

25. In reply, Mr Lester noted that the extent of the appellant's deception was as to his nationality and date of birth; he had not also given a false name.

26. We reserved our decision at the conclusion of the submissions.

Analysis

27. The logical starting point for our analysis is the third of Mr Lester's grounds of appeal, since that ground attacks the entire basis upon which the judge considered this appeal. By that ground, Mr Lester submits that the approach adopted by the reported decisions of the Upper Tribunal in appeals against decisions taken under s40(3) of the 1981 Act is wrong, and that the proper approach remains that in the authorities decided prior to *R (Begum) v SSHD*.

28. We do not accept that submission. Mr Lester relied on a number of authorities in his attempt to criticise the decision of Upper Tribunal in *Ciceri* but the import of those authorities was considered by the Upper Tribunal in *Chimi*. We note that submissions were made about the correctness of *Chimi* at [12]-[14] of the grounds of appeal in this case but nothing in those submissions persuades us that what was said in *R (Begum) v SSHD* is not equally applicable to an appeal under s40(3). There is no good reason to depart from that recent Presidential decision.

29. It is in any event quite clear to us that the adoption of the merits-based approach in authorities such as *KV (Sri Lanka) v SSHD* [2018] EWCA Civ 2483; [2018] 4 WLR 166 would have made no difference to the judge's analysis. We can state the basis for that conclusion quite shortly. Our reasons accord with

those of the Upper Tribunal in *Onuzi (good character requirement: Sleiman considered)* [2024] UKUT 144 (IAC).

30. As we have recorded above, this was a case in which the appellant accepted not merely that he had misrepresented his date of birth and his nationality in his immigration applications; he had persisted in those lies in his application for naturalisation (Form AN). There can be no doubt, therefore, that the appellant made material misrepresentations and withheld material facts in his application for naturalisation. It is fallacious, with respect to Mr Lester, to suggest that those misrepresentations were not directly material to the respondent's decision to naturalise him as a British citizen.

31. As the judge found, the misrepresentations in Form AN were material to the statutory question of whether the appellant was a person of good character at the time that he applied for British citizenship. He was asked in his application whether there was anything which might cast doubt on his character. He ticked the box to confirm that there was not. Had he ticked the box to confirm that there was something which cast doubt on his good character, and then indicated that the relevant matter was that he had lied about his nationality and his age *in his application for naturalisation*, that would obviously have been material to the respondent's analysis. The respondent's guidance is clear, after all, that deception in the application for naturalisation should 'count heavily against an applicant' and that fraud in the citizenship application process should result in the refusal of the application.

32. Mr Lester submitted that this case was on all fours with those considered by UTJ Kopieczek in *Sleiman*. It is not. As UTJ Kopieczek made clear in *Sleiman*, that was not a case in which the respondent had submitted that the appellant's application for naturalisation would have been refused on character grounds if his deception had been known: [65] of *Sleiman* refers. In this case, however, the respondent's stance throughout has been that she would have refused the naturalisation application on grounds of character if she had known that the appellant had lied about his nationality and his date of birth in that application: [43]-[44] of the respondent's decision refers.

33. Whether the judge considered the condition precedent question for himself, or whether he adopted a public law review of that question in accordance with the preponderance of Upper Tribunal authority, there was only one rational answer to that question: the appellant deceived the respondent in his application for naturalisation and that deception was necessarily material to the satisfaction of the good character requirement and therefore to the application as a whole. The judge's analysis of that question contains no error of law. Nor did it represent a conflation of the grounds for deprivation in s40(2) and 40(3) of the 1981 Act; instead, it represented a proper understanding on the part of the judge of the role played by good character in the naturalisation process, and the consequences of false representations as to character in Form AN. These conclusions are determinative of the appellant's first three grounds of appeal.

34. We do not consider it necessary to undertake the sort of analysis which was undertaken in *Sleiman*, of assessing whether the judge was wrong in law to conclude that the appellant's deception was material to the acquisition of limited and indefinite leave to remain. It is not necessary because the conclusion he

reached about the deception in the application for naturalisation resolved the real issue in the case.

35. Lest we are wrong in that, and it was necessary for the judge to consider whether the appellant's deception in the immigration applications was material, we conclude as follows.

36. It is clear to us, firstly, that the judge did not err in considering the effect of the appellant's deception on the original decision to grant him limited leave to remain. The judge was entitled to find that the appellant was granted limited leave to remain as an Unaccompanied Asylum-Seeking Child, and that he would not have been granted that status if his true age had been known. He was granted limited leave to remain on 5 May 2004, at which point the respondent thought that he was a sixteen year old child. Had it been known that he was a few days short of his eighteenth birthday at that point, he would not have been granted limited leave to remain and there is every likelihood that he would have been removed to Albania, thereby rendering him ineligible for subsequent consideration under the Legacy programme.

37. Secondly, and in any event, it is clear that the Legacy programme was not an amnesty and, as the judge concluded, it was necessary for a decision maker who was considering a case under that programme to assess such a case holistically: *R (Matusha) v SSHD (revocation of ILR policy)* [2021] UKUT 175 (IAC); [2021] Imm AR 1452 refers, at [26]-[27]. Matters such as deception were necessarily relevant and material, therefore, and it is not possible to state, whether by reference to published policies or otherwise, that a decision maker who had discovered the appellant's long-standing deception would nevertheless have proceeded to grant the appellant ILR.

38. We summarise our conclusions on the appellant's first three grounds of appeal as follows. The submissions made orally and in writing provide no good reason for departing from *Ciceri* and *Chimi* but this is not a case in which the pre-*Begum* approach could conceivably have yielded a different result for the appellant. As the judge found, his deception was obviously material to the grant of ILR but the operative deception was that which was practised in the application for naturalisation, and it is fallacious to suggest that a person who was known to have lied in that application could have satisfied the statutory good character requirement. The respondent relied on the appellant's ability to satisfy that requirement by false representation in this case, whereas she did not do so in *Sleiman*. The judge's consideration of that submission was lawful, and did not involve any conflation between the statutory grounds of deprivation in s40(2) and s40(3) of the 1981 Act.

39. We turn to the judge's analysis of the appellant's claim under Article 8 ECHR. We consider that the submissions made by the appellant in this respect amount to nothing more than a disagreement with the judge's analysis. The judge was aware that his focus was on the reasonably foreseeable consequences of deprivation, and he directed himself in accordance with *Muslija*. He took account of those consequences, and he also factored into his analysis the lengthy delay in the respondent taking a deprivation decision. The judge was entitled to conclude that the real delay was between 2018 and 2022; he gave adequate reasons for concluding that the earlier period was of no real consequence, essentially because the facts had not crystallised at that stage.

40. The judge was also entitled to conclude that the delay between 2018 and 2022 carried less weight than it had in *Laci*. As the judge noted, the distinguishing feature was the finding in *Laci* that the appellant had come to believe (after nine years of inaction) that the respondent would not be taking action against him: [51] of Underhill LJ's judgment refers. Having reviewed the evidence as a whole, the judge was certainly entitled to conclude that the circumstances in this case were not comparable. That is not to say that the judge discounted the period of delay, however; he clearly attached some weight to it in his assessment of proportionality. He also analysed the extent of the difficulties to which the family would be exposed during the "limbo" period. Having done so, he nevertheless concluded that the scales still came down in favour of the respondent.

41. Given that matters of weight are pre-eminently for the trial judge (*Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 WLR 636, at [60]), and given the restraint which we are obliged to exercise in our appellate jurisdiction (*Lowe v SSHD* [2021] EWCA Civ 62, [2021] 2 FLR 1403, at [29] *et seq*), we see no proper basis for interfering with the judge's analysis. It was a balanced and holistic exercise and the outcome of it could not properly be categorised as irrational.

42. In the circumstances, we dismiss the appellant's appeal and order that the decision of the judge shall stand.

Notice of Decision

The appellant's appeal is dismissed. The judge's decision to dismiss the appellant's appeal stands.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 September 2024