Neutral Citation Number: [2025] EWCA Civ 16

Case No: CA-2024-000057

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM CHAMBER)
Upper Tribunal Judge Sheridan
Case No. UI-2023-000215

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DINGEMANS
and
LORD JUSTICE EDIS

- -

Between :

AMJAD ALI CHAUDHRY	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik KC and **Zeeshan Raza** (instructed by **Marks and Marks Solicitors**) for the **Appellant**
David Blundell KC, Julia Smyth and Harriet Wakeman (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date : 3 December 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 17.1.25 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans:

Introduction

1. This is an appeal about deprivation of citizenship. In particular this appeal raises the issue about the test to be applied by the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) when hearing an appeal from a decision of the respondent Secretary of State for the Home Department, made pursuant to section 40(3) of the British Nationality Act 1981 (the BNA 1981), to deprive a person of British citizenship.

2. This appeal was heard by the same constitution of the Court of Appeal who heard the appeals of *Daci v Secretary of State for the Home Department* [2025] EWCA Civ 18 (*Daci*) and *Kolicaj v Secretary of State for the Home Department* [2025] EWCA Civ 10 (*Kolicaj*) in the weeks of 2 and 9 December 2024. *Daci* was another appeal following a decision of the Secretary of State made pursuant to section 40(3) of the BNA 1981 and the parties in this appeal and in *Daci* helpfully produced a joint bundle of authorities and co-ordinated submissions on matters of principle. *Kolicaj* was an appeal following a decision of the Secretary of State made pursuant to section 40(2) of the BNA 1981.

3. The issue about the test to be applied by the FTT when hearing an appeal from a decision of the Secretary of State made pursuant to section 40(3) of the BNA 1981 involves consideration of the judgment of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765 (*Begum (No.1)*) and the judgments of Upper Tribunal (Immigration and Asylum Chamber) (UT) in *Ciceri (deprivation of citizenship appeals: principles) v Secretary of State for the Home Department* [2021] UKUT 238 (IAC); [2021] Imm AR 1909 (*Ciceri*) and *Chimi v Secretary of State for the Home Department (deprivation appeals; scope and evidence)* [2023] UKUT 115 (IAC); [2023] Imm AR 1071 (*Chimi*). It is apparent that the Secretary of State's case on the appropriate test to be applied by the FTT on an appeal from a decision made pursuant to section 40(3) of the BNA 1981 has changed during the course of the proceedings below and on the appeal to this court.

4. This appeal is from the decision of the Upper Tribunal (Immigration and Asylum Chamber) (UT) dated 2 November 2023 restoring the decision of the Secretary of State dated 23 December 2021 depriving the appellant Mr Amjad Ali Chaudhry, who is a national of Pakistan, of his British citizenship on the basis that he had fraudulently obtained a genuine British passport using the identifying particulars of a deceased child. The FTT had, by a decision dated 9 November 2022, allowed Mr Chaudhry's appeal from a decision of the Secretary of State. The decision of the FTT had been set aside by the UT in a decision dated 17 September 2023.

Factual background

5. Mr Chaudhry was born in 1963 in Pakistan. He arrived in the UK in 1990 on a single visit entry clearance for a six-month period on a Pakistani passport. Once in the UK, Mr Chaudhry claimed asylum using his name. That claim was unsuccessful, and an appeal was subsequently refused by the FTT.

6. On 12 August 2000 Mr Chaudhry was granted indefinite leave to remain in the UK. He then applied for naturalisation as a British citizen on two further occasions. These

applications were unsuccessful because he had not lived in the UK for the required 5 year period without being in breach of immigration law.

7. Mr Chaudhry was naturalised as a British citizen on 9 December 2005 following a successful third application. This application was again made in his name. On the relevant form Mr Chaudhry had ticked "No" to the question: "Have you engaged in any other activities which might be relevant to the question of whether you are a person of good character?"

8. Information subsequently came to light which the Secretary of State alleges shows that in November 1998, at a time when his immigration status was uncertain, Mr Chaudhry had fraudulently obtained a British passport using details of a deceased child, Atiq Ur Rehman Akram, who had been born on 24 May 1967. The emergency contact details provided in the passport were of Mr Chaudhry's then (and now former) partner. The Secretary of State alleged that the photograph on the passport was a photograph of Mr Chaudhry, and that the handwriting was strikingly similar to Mr Chaudhry's writing on the forms he had submitted. Mr Chaudhry denied that he had any involvement with the obtaining of that false passport.

9. The passport in the name of Akram had been used to attempt to obtain a driving licence on 20 August 2010. The address given on the driving licence application was Mr Chaudhry's address.

10. Mr Chaudhry was interviewed under caution by HM Passport Office in July 2017. In interview Mr Chaudhry was asked about the name on the passport, and he had said that the name was that of his cousin, who had lived with him in either 1994 or 1995, and had left the UK a long time ago. When shown the passport photograph Mr Chaudhry confirmed that it showed his cousin, and that the emergency contact details on the passport were those of his former spouse. Later in the interview he suggested that "I know my cousin pays some money to get the passport that's it and I haven't seen the passport before". Mr Chaudhry denied any involvement with the use of the passport to obtain a driving licence, and was unable to explain why his address had been used on the driving licence application. In later representations and evidence Mr Chaudhry suggested that his cousin left the UK in 2001 and is now deceased.

11. The Secretary of State then made a decision, by letter dated 23 December 2021, to make an order to deprive Mr Chaudhry of British citizenship. The Secretary of State said that Mr Chaudhry's answer of "no" to the question on the application form "have you engaged in any other activities which might indicate that you may not be considered a person of good character" meant that he had obtained his British citizenship by false representation, because he should have declared that he had obtained a British passport by using the particulars of a deceased child.

Mr Chaudhry's appeal to the FTT

12. Mr Chaudhry appealed to the FTT against the Secretary of State's decision to deprive him of British citizenship. Following a hearing on 9 November 2022 at which Mr Chaudhry gave evidence, the FTT allowed the appeal, in a decision on 4 January 2023. The FTT held that the correct approach to take was a public law review on Wednesbury principles as to whether the Secretary of State's discretionary decision to deprive an individual of British citizenship was exercised correctly. The FTT found that there was

public law error: first, in the reliance on the view of the interviewing officer as to photographic similarity; secondly, in the reliance on the view of the interviewing officer's view of the handwriting; and finally in the failure to take account that Mr Chaudhry had used his true identity when making his applications to the Home Office.

13. In the course of its review of the evidence, the FTT found that some of Mr Chaudhry's evidence was not credible, but it was on the Secretary of State to discharge the burden of proof as to the allegations against Mr Chaudhry and the Respondent did not do so. The Secretary of State had failed to prove that it was more likely than not that it was Mr Chaudhry that applied for the British passport or the driving licence, and the appeal was therefore allowed. This meant that issues involving section 6 of the Human Rights Act 1998 (the 1998 Act) in the light of Mr Chaudhry's rights under article 8 of the European Convention on Human Rights (ECHR) did not arise.

The Secretary of State's appeal to the UT

14. The Secretary of State appealed to the UT from the FTT's decision on the basis that the FTT had wrongly taken for itself the decision which was for the Secretary of State to make, and also had made findings of fact which were unsustainable or irrational in paragraphs 63 and 68 of the FTT decision, when attaching significance to the finding that Mr Chaudhry had never used the driving licence or the passport to obtain British nationality.

15. The UT in this appeal, in its decision dated 17 September 2023, applied the approach to appeals to the FTT set out in *Ciceri*, and found that the FTT had failed to apply that approach when referring to the burden of proof being on the Secretary of State to prove to the FTT the fraud, false representation or concealment of material fact. The UT therefore set aside the decision of the FTT. The UT later remade the decision, applying the approach to appeals from the Secretary of State's decision made pursuant to section 40(2) of the BNA 1981, explained in *Chimi*, being a public law review of the Secretary of State's decision. The UT held that the Secretary of State's decision to find that Mr Chaudhry's citizenship was obtained by means of false representation was lawful. There was no infringement of Mr Chaudhry's rights under article 8 of the ECHR and so the decision was lawful under section 6 of the Human Rights Act.

The respective cases and issues on this appeal

16. Mr Chaudhry appealed against the decision of the UT to this court. In the grounds of appeal Mr Chaudhry contended that the FTT had taken the correct approach to an appeal from a decision made pursuant to section 40(3) of the BNA 1981. Instead it was the UT which had erred in law in proceeding on the basis that the appeal to the FTT was merely a public law review of the Secretary of State's decision and not a merits based appeal.

17. The Secretary of State originally resisted the appeal on the basis that the UT had taken a proper approach to the scope of the appeal from a decision made pursuant to section 40(3) of the BNA 1981. We were told that the Secretary of State then undertook a detailed review of the approach to be taken to appeals to the FTT from decisions made pursuant to section 40(3) of the BNA 1981. Following that review, the Secretary of State changed submissions on the approach taken to such appeals. It was then submitted on behalf of the Secretary of State that: "… SSHD's position is that the correct approach

to an appeal against a s.40(3) decision is as follows: (i) The first question is whether, as a matter of past fact, there has been fraud, false representation, or concealment of a material fact. The tribunal has a fact finding function in that respect. (ii) If such fraud etc., is established, there is a second question as to whether citizenship was obtained by means of that fraud. Under s.40(3), it is SSHD who needs to be satisfied as to that matter. Therefore, SSHD's conclusion in that respect is subject to challenge on public law grounds only. (iii) There is a third question, namely whether the discretion to deprive should be exercised. SSHD's decision in that respect is also challengeable only on public law grounds".

18. In the light of the Secretary of State's altered submissions and position on the approach to an appeal to the FTT from a decision made pursuant to section 40(3) of the BNA 1981, a supplementary Skeleton Argument was served on behalf of Mr Chaudhry. It was submitted on behalf of Mr Chaudhry that the Secretary of State's position on the approach to appeals had been wrong in the FTT and UT below, and that the acceptance that the FTT had a fact-finding function in relation to the issue of fact as to whether there was fraud, false representation or concealment of a material fact was correct, but the Secretary of State's submission as to the second aspect of the test was disputed.

19. In oral submissions Mr Malik KC and Mr Raza, on behalf of Mr Chaudhry, submitted that the appeal ought to be allowed. The Secretary of State had now changed submissions on the approach to the way in which appeals to the FTT from decisions made under section 40(3) of the BNA 1981 should be heard. These submissions changed from the hearing before the FTT, to the hearing before the UT, and now to the hearing before the Court of Appeal. It was now common ground that the UT had applied the wrong approach to an appeal from a decision under section 40(3) of the BNA 1981. The decision of the FTT to allow the appeal from the Secretary of State ought to be restored, because the Secretary of State had not clearly identified any errors in the FTT's approach to its fact finding functions, and there were errors of law in the decision made by the Secretary of State. If the decision of the FTT was not restored, then the matter ought to be remitted to the FTT so that Mr Chaudhry could appeal from the decision of the Secretary of State, with the benefit of the FTT knowing the correct test to apply.

20. Mr Blundell KC, Ms Smyth and Ms Wakeman, on behalf of the Secretary of State, submitted that the judgment in *Begum (No.1)* had not ruled on the approach to appeals from decisions made under section 40(3) of the BNA 1981, that Lord Reed had contemplated different approaches to different provisions in paragraphs 68 and 69 of the judgment, and that the FTT should decide on the factual questions of fraud, false representation or concealment of a material fact. In the circumstances where it was now common ground that the UT had applied the wrong test, and in circumstances where the FTT had made irrational findings of fact about the false representation, the appeal should be allowed and the matter remitted to the UT for remaking the decision.

21. I am very grateful to Mr Malik, Mr Blundell and their respective legal teams for their helpful submissions. It is apparent that the following matters are in issue: (1) what should be the approach to appeals under section 40A of the BNA 1981 from decisions of the Secretary of State made pursuant to section 40(3) of the BNA 1981; (2) whether the decision of the FTT allowing Mr Chaudhry's appeal against the Secretary of State's decision dated 23 December 2021 to deprive Mr Chaudhry of British citizenship should

be restored; and (3) if not, whether the matter should be remitted to the FTT to hear again the appeal against the decision dated 23 December 2021.

The provisions of section 40 of the BNA 1981

22. Section 40 of the BNA 1981, so far as is material, provides:

> "Deprivation of citizenship
>
> (1) In this section a reference to a person's "citizenship status" is a reference to his status as—
>
> (a) a British citizen,
>
> …
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may 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.
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
>
> (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
>
> (a) the citizenship status results from the person's naturalisation,
>
> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

> (5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> (a) that the Secretary of State has decided to make an order,
>
> (b) the reasons for the order, and
>
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997."

23. The right of appeal from a decision to deprive a person of British citizenship is provided for by section 40A of the BNA 1981. That provides:

> "Deprivation of citizenship: appeal
>
> (1) A person—
>
> (a) who is given notice under section 40(5) of a decision to make an order in respect of the person under section 40, or
>
> (b) in respect of whom an order under section 40 is made without the person having been given notice under section 40(5) of the decision to make the order,
>
> may appeal against the decision to the First-tier Tribunal."
>
> (underlining added).

The previous approach to appeals from decisions made by the Secretary of State pursuant to section 40(3) of the BNA 1981

24. In the course of his review of the previous approach to appeals under section 40(2) of the BNA 1981, Lord Reed in *Begum (No.1)* referred to *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 439 (IAC) (*Deliallisi*). In *Deliallisi* the UT held that section 40A was, in effect, a full merits based appeal. In *Pirzada v Secretary of State for the Home Department* [2017] UKUT 196 (IAC); [2017] Imm AR 1257 the UT proposed a different approach to that in *Deliallisi*, and held that any ground of appeal was available to the appellant, but that "the grounds of appeal are … limited by the formulation of s.40 and must be directed to whether the Secretary of State's decision was in fact empowered by that section." That approach was rejected by another constitution of the UT in *BA v Secretary of State for the Home Department* [2018] UKUT 85 (IAC); [2018] Imm AR 807 (*BA)* which held that the FTT "must first establish whether the relevant condition precedent exists for the exercise of the Secretary of State's discretion", while noting that in a section 40(2) case "the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue".

25. In *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483; [2018] 4 WLR 166 (*KV (Sri Lanka)*) the Court addressed appeals against

decisions made under section 40 of the BNA 1981 at paragraph 6 saying "an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship". This meant that the FTT would find the relevant facts on the basis of evidence adduced to the FTT, whether or not that evidence was before the Secretary of State. It does not appear that the decision in *KV (Sri Lanka)* was cited to the Supreme Court in *Begum (No.1)*.

The decisions in *Begum (No.1)*, *Ciceri* and *Chimi*

26. In *Begum (No.1)* the issue on the appeal involved applications made in the course of an appeal by Ms Begum against a decision by the Secretary of State, pursuant to section 40(2) of the BNA 1981, depriving Ms Begum of British citizenship on the basis that it was conducive to the public good on the grounds of national security. Ms Begum had travelled to Syria and had married an ISIL fighter, living in Raqqah, which was the then capital of ISIL's self-declared caliphate. The Secretary of State had certified that the deprivation decision had been made on the basis of information that should not be made public, and so the appeal was brought to the Special Immigration Appeals Commission (SIAC). Lord Reed, giving the judgment of the Supreme Court, held that the Court of Appeal had misunderstood the role of SIAC and the courts on an appeal under section 40(2) of the BNA 1981. Having regard to the statutory wording in section 40(2) ("… if the Secretary of State is satisfied …") the principles to be applied by SIAC in reviewing the Secretary of State's exercise of discretion were largely the same as those applied in administrative law.

27. In paragraph 71 Lord Reed identified the functions of SIAC, which, apart from the national security considerations mirror the functions of the FTT, on an appeal under section 40(2) saying:

> "First, it 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. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act".

28. As appears from the fourth point in that passage, Lord Reed confirmed that if an issue arose as to whether the Secretary of State had acted incompatibly with the appellant's

rights under section 6 of the 1998 Act then SIAC, or the FTT, had to determine the matter on the basis of its own assessment.

29. Lord Reed identified in *Begum (No.1)* at paragraph 38 that appeals against deprivation decisions had an entirely separate history from appeals against immigration decisions. It was apparent, from the helpful analysis undertaken by counsel on both sides in the appeal of *Daci*, that there were rights to have a decision of the Secretary of State to revoke a certificate of naturalisation referred to an inquiry chaired by a High Court Judge or above as provided for by section 7 of the British Nationality and Status of Aliens Act 1914. The reference to an inquiry had been retained in section 20 of the British Nationality Act 1948 and in the BNA 1981 as originally enacted. It is apparent from regulation 4 of the British Citizenship (Deprivation) Rules 1982, which were made in exercise of powers provided under section 40(8) of the BNA 1981, that the parties to the inquiry could call evidence and make representations on the evidence and subject matter of the inquiry. There was power to request the Secretary of State to provide an explanation of the grounds on which the order was proposed to be made. The fact that the inquiry could call for evidence, and could call for an explanation from the Secretary of State, rather than start with the decision of the Secretary of State, suggested that the inquiry had, at that time, a de novo fact finding function, and was not restricted to a review only of the Secretary of State's decision. Further amendments were made to the rights to challenge a proposed order of deprivation leading up to the rights of appeal set out in section 40A of the BNA 1981.

The test adopted in the FTT and UT after *Begum (No.1)*

30. Following the judgment in *Begum (No.1)* the UT reconsidered its approach to appeals from decisions of the Secretary of State made pursuant to both section 40(2) and section 40(3) of the BNA 1981. In *Ciceri* the UT considered the judgment in *Begum (No.1)* and held that the FTT must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the BNA 1981 existed for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this required the FTT to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the UT held that the FTT must adopt the approach set out in paragraph 71 of the judgment in *Begum (No.1)*, and therefore undertake a review of the Secretary of State's decision.

31. There were further UT decisions about the scope of appeals from decisions made by the Secretary of State pursuant to section 40 of the BNA 1981, and the issue of the scope of the appeal was revisited in *Chimi.* It was held in *Chimi* that the questions for the FTT to consider were whether the Secretary of State materially erred in law when she decided that the condition precedent in s40(2) or s40(3) of the BNA 1981 was satisfied, and whether the Secretary of State materially erred in law when she decided to exercise her discretion to deprive the appellant of British citizenship. In considering this the FTT must only consider evidence before the Secretary of State. The FTT should then consider issues under section 6 of the 1998 Act.

32. After the judgment of the Supreme Court in *Begum (No.1)* the Court of Appeal, which had heard argument but not yet delivered judgment in *Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769; [2021] 4 WLR 86 was referred to the judgment in *Begum (No.1)*, see paragraph 40, but the Court of Appeal did not address

the effect of the issue. The issue of the proper test to be applied on appeals from decisions made pursuant to section 40(3) BNA 1981 was raised in appeals before the Court of Appeal in *Shyti v Secretary of State for the Home Department* [2023] EWCA Civ 770; [2023] Imm AR 5 (*Shyti)* and *Ahmed v Secretary of State for the Home Department* [2023] EWCA Civ 1087; [2023] Imm AR 6 (*Ahmed)* heard in the summer of 2024, but it was not necessary to decide the issue of the test to be applied by the FTT on an appeal from a decision of the Secretary of State made pursuant to section 40 of the BNA 1981 in order to decide either of those appeals. In a further appeal in the Court of Appeal, *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201; [2024] 1 WLR 4055 at paragraphs 21 to 23 the approach to appeals from decisions of the Secretary of State made pursuant to section 40 of the BNA 1981 before *Begum (No.1)* was referred to, but there was no detailed consideration of the effect of *Begum (No.1)* on the test to be applied. Again this was because it was not necessary to do so in order to decide the appeal.

33. The issue about the proper test to be applied on appeals from decisions of the Secretary of State made pursuant to section 40(2) of the BNA 1981 was considered in *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811; [2024] KB 433 (*U3*); *Begum v Secretary of State for the Home Department* [2024] EWCA Civ 152; [2024] 1 WLR 4269 (*Begum (No.2)*) and *B4 v Secretary of State for the Home Department* [2024] EWCA Civ 900; [2024] 1 WLR 5342. The decision in *U3* has been appealed to the Supreme Court and the hearing has now taken place. At the current time judgment is awaited. As *U3* related to appeals from a decision made pursuant to section 40(2) BNA 1981 appeals, and this appeal relates to section 40(3) BNA 1981, neither party submitted that this appeal should await the outcome of the Supreme Court judgment in *U3*.

The proper approach to appeals under section 40A of the BNA 1981 from decisions of the Secretary of State made pursuant to section 40(3) of the BNA 1981 – issue one

34. Although it might be thought that every appeal is the same, the form that an appeal takes can vary. At one end of the spectrum an appeal can take the form of a complete rehearing, as if the hearing before the lower tribunal had not taken place at all. An example of this is on an appeal against a conviction in the Magistrates' Court to the Crown Court, see section 79(3) of the Senior Courts Act 1981.

35. At the other extreme is an appeal on a point of law only, as is the case with an appeal from the FTT to the UT. In such appeals there is considerable overlap with claims for judicial review, because public law decision makers do not have power to make material errors of law in their decision making. What might be considered to be a form of appeal nearer the middle of the spectrum is an appeal by way of review of the decision of the lower court. This is the form of an appeal from the High Court to the Court of Appeal, unless the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing, see the Civil Procedure Rules at 52.21.

36. The grounds on which a court may allow an appeal, which will influence and may determine the form an appeal will take, are sometimes set out in the statute providing for the appeal. So far as immigration and asylum is concerned the grounds of appeal are set out in section 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002

Act). Following amendments in the Immigration Act 2014 (the 2014 Act) these are now restricted to showing that removal or revocation of a person's status breaches UK obligations under the Refugee Convention or in relation to persons eligible for a grant of humanitarian protection or is unlawful under section 6 of the 1998 Act. Before the amendments made by the 2014 Act, the grounds of appeal in section 84 of the 2002 Act included grounds that "the decision is not in accordance with immigration rules" and that "the person taking the decision should have exercised differently a discretion conferred by immigration rules". This meant that the FTT stepped into the shoes of the Secretary of State to exercise itself a discretion given to the Secretary of State. That formulation of the grounds on which appeals could be entertained dated back to the time when the tribunal hearing appeals from decisions made by the Home Department had not achieved the structural separation from that Department which is now apparent from the Tribunal, Courts and Enforcement Act 2007.

37. As appears from paragraphs 16 to 21 above and the respective cases on appeal, there was therefore much common ground between the parties about the test to be applied by the FTT on an appeal from a decision of the Secretary of State made pursuant to section 40(2) of the BNA 1981. As to the first part of the test, it was agreed that on an appeal it was for the FTT to find as a fact whether there was fraud, false representation or concealment of a material fact. It was noted in submissions that very often there was no material dispute that there had been a fraud, false representation or concealment of a material fact. This appears in part from the appeal in the case of *Daci* where it was common ground that Mr Daci, a national of Albania, had applied for naturalisation as a British citizen using a false name and claiming to be a citizen of Kosovo.

38. As to the second part of the test, there was a dispute about whether it was for the Secretary of State to determine whether that person's registration or naturalisation was obtained *by means of* fraud, false representation or concealment of a material fact (if such fraud, false representation or concealment of a material fact had been proved) which would be subject to review on public law grounds, or whether that was a matter for the FTT to find as a fact. This was termed the "causation issue".

39. As to the third part of the test, it was common ground that the discretion ("the Secretary of State may by order deprive a person …") was to be exercised by the Secretary of State in accordance with the statutory language and was reviewable on public law grounds.

40. It was also common ground that the FTT could consider whether the Secretary of State had acted in breach of other relevant legal obligations, including those arising under section 6 of the 1998 Act. That might involve the consideration of relevant evidence.

41. Even where the parties were agreed on the test to be applied to the appeal from the decision of the Secretary of State to the FTT, this court is not bound to accept the joint submissions of the parties. This is because those submissions engage an issue of law which will affect others who are not parties to this appeal, and because those submissions relate to the interpretation of a decision of the Supreme Court in *Begum (No.1)* where the UT has in *Chimi* taken an approach to the judgment of *Begum (No.1)* which is different from that taken by the parties.

42. This means that this court is required to make up its own mind about the test to be applied by the FTT when hearing an appeal from a decision of the Secretary of State

made pursuant to section 40(3) of the BNA 1981. The joint submissions of counsel are, however, a proper starting point, particularly given the expertise of respective counsel in this field of law. In support of their joint submissions on the first part of the test the parties emphasised aspects of Lord Reed's judgment in *Begum (No 1)* at paragraph 68 where Lord Reed had stated that tribunals were "in general" restricted to a public law review, and paragraph 69 where Lord Reed recorded that different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable.

43. In my judgment, in order to determine the proper approach on the appeal to the FTT from a decision of the Secretary of State to deprive a person of British citizenship pursuant to section 40(3) of the BNA 1981 it is necessary to examine closely both the terms of section 40(3) of the BNA 1981, together with the provisions for an appeal to the FTT set out in section 40A of the BNA 1981.

44. As appears from the statutory provisions set out above, section 40(3) of the BNA 1981 provides that "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" the fraud, false representation or concealment of a material fact. It was common ground between the parties that any such fraud, false representation or concealment of a material fact needed to be dishonest. As Lord Reed pointed out in *Begum (No.1)* the section is directed to the Secretary of State's discretion (the Secretary of State may) and the Secretary of State's conclusions (if the Secretary of State is satisfied).

45. The provisions of section 40A do not, however, provide much assistance to the court in determining the test to be applied by the FTT on an appeal from a decision of the Secretary of State made pursuant to section 40(3) of the BNA 1981, because the provisions indicate only that the person about whom a decision has been made by the Secretary of State pursuant to section 40(3) of the BNA 1981 "may appeal against the decisions" to the FTT. The section does not identify any grounds on which such an appeal may be brought. The section does not, for example, identify whether the FTT can set aside the decision of the Secretary of State if the Secretary of State was wrong to find fraud, false representation or concealment of a material fact, or whether the FTT could only set aside the decision of the Secretary of State if the Secretary of State had come to an irrational conclusion on the evidence before the Secretary of State. The history of the appeal rights leading up to section 40A of the BNA 1981 from section 7 of the British Nationality and Status of Aliens Act 1914 onwards, see paragraph 29 above, was interesting but it was, in my judgment, an uncertain guide to the proper approach to be taken now on appeals against deprivation of citizenship. That is because of all the changes that have been made by the legislature to appeal rights, such as between the 2002 and 2014 Act, which means that it is not possible to assume that a past approach to appeals was intended to be carried forward.

46. In my judgment, on the first part of the test, it is for the FTT to find, in the event of a dispute, as a fact whether there was fraud, false representation or concealment of a material fact for the purposes of section 40(3) of the BNA 1981. This is for a number of reasons. First, it is apparent that the existence of the fraud, false representation or concealment of a material fact is, under section 40(3), the statutory precondition for the Secretary of State making the order. The FTT has, as the parties both accepted,

institutional competence to make a fair determination of whether there was fraud, false representation or concealment of a material fact.

47. Secondly, it is apparent that the Secretary of State might make reasonable judgments on the materials available at the time of the decision, which are later shown to be wrong by further evidence adduced and tested before the FTT. It would be a very unusual type of appeal where the FTT had to accept a judgment on a matter of precedent fact, which was reasonably made but was in fact wrong. If that were the right analysis appellants would then be driven to attempt to show, when relying on article 8 of the ECHR and section 6 of the Human Rights Act, that the decision about fraud was as a matter of fact wrong, meaning that the decision to deprive a person of citizenship status was more likely to be an infringement of rights protected by article 8 of the ECHR. This would not be a sensible interpretation of the rights of appeal.

48. Thirdly there is nothing in the judgment of the Supreme Court in *Begum (No.1)* which prevents such a conclusion. *Begum (No.1)* was concerned with section 40(2) of the BNA 1981 and the statements about the appropriate test cannot be read over to section 40(3) without appropriate qualification.

49. I should record that there was some discussion about the burden of proving the statutory preconditions. It is unlikely that much will turn on who has the burden of proof, but I would accept that it is for the Secretary of State, who is asserting that there was fraud, false representation or concealment of a material fact, to prove that on the balance of probabilities.

50. As to the second part of the test, I accept the submissions of the Secretary of State that the causation issue, namely whether the registration or naturalisation was obtained by the impermissible means, is a decision of the Secretary of State to be reviewed on appeal by the FTT on public law grounds, in accordance with the principles referred to by Lord Reed in paragraph 71 of *Begum (No.1).* This is because the decision on causation is a matter critically dependent on the Secretary of State's previous decision making about which the Secretary of State is in a better position than the FTT to make the primary evaluation. Mr Malik's contrary submissions on this second part of the test were very much informed by the suggested difficulties for the FTT in applying the test. I do not consider that to be an answer. This is because this court must attempt to interpret and apply the provisions of section 40(3) and 40A. In any event it is unlikely that there will be many appeals which will be determined on the causation issue.

51. As to the third part of the test I agree that the exercise of the Secretary of State's discretion to make an order is to be reviewed on appeal by the FTT on public law grounds in accordance with the principles referred to by Lord Reed in paragraph 71 of *Begum (No.1).* This is because the wording of the section 40(3) which identifies that the discretion is to be exercised by the Secretary of State and because the grounds of appeal in section 40A of the BNA 1981 do not put the FTT into the shoes of the Secretary of State to exercise the discretion for itself.

52. Finally, I also agree that it is for the FTT to consider whether the Secretary of State had acted in breach of other relevant legal obligations, including those arising under section 6 of the 1998 Act. That might involve the consideration of relevant evidence. Although due weight would need to be given to the findings, evaluations and policies of the Secretary of State, the decision was for the FTT, see generally the discussion in

paragraphs 11 to 21 of *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327.

53. This means that the tests proposed by the UT for the approach of the FTT hearing an appeal from a decision of the Secretary of State made pursuant to section 40(3) of the BNA 1981 in *Ciceri* and *Chimi* need to be reformulated in accordance with the test set out above. It means that an appellant will be able to adduce evidence (if so advised) on both the precedent facts of fraud, false representation and concealment of a material fact, and on matters relevant to section 6 of the 1998 Act. The evidence can be adduced and examined in one go, and it will be for the FTT to apply the relevant evidence to the separate legal tests.

54. For these reasons in my judgment the proper approach to an appeal under section 40A of the BNA 1981 from decisions of the Secretary of State made pursuant to section 40(3) of the BNA 1981 is: (i) it is for the FTT to find, in the event of a dispute, as a fact whether there was fraud, false representation or concealment of a material fact for the purposes of section 40(3) of the BNA 1981; (ii) the decision of the Secretary of State on the causation issue whether the registration or naturalisation was obtained by the impermissible means is to be reviewed on appeal by the FTT on public law grounds, in accordance with the principles referred to by Lord Reed in paragraph 71 of *Begum (No.1)*; (iii) the exercise of the Secretary of State's discretion to make an order depriving a person of citizenship status is to be reviewed on appeal by the FTT on public law grounds in accordance with the principles referred to by Lord Reed in paragraph 71 of *Begum (No.1);* and (iv) it is for the FTT to consider whether the Secretary of State had acted in breach of other relevant legal obligations, including those arising under section 6 of the Human Rights Act. Although due weight would need to be given to the findings, evaluations and policies of the Secretary of State, the decision was for the FTT.

Whether the decision of the FTT allowing Mr Chaudhry's appeal against the Secretary of State's decision dated 23 December 2021 to deprive Mr Chaudhry of British citizenship should be restored – issue two

55. It is apparent that the FTT in its decision placed particular weight on the fact that the passport had not been used by Mr Chaudhry to obtain his British citizenship, and found that the Secretary of State had failed to attach sufficient weight to that fact in decision-making. In my judgment the flaws with that reasoning on the part of the FTT are that the reasoning does not deal with: the Secretary of State's case that Mr Chaudhry was alleged to have obtained the false passport at a time when his immigration status was uncertain, which meant that there was an advantage to be had from obtaining the passport; and the facts that the application for the driving licence was made in 2010 for a person living at Mr Chaudhry's address when, according to Mr Chaudhry, his cousin who had obtained the passport had only lived with him in 1994 or 1995 and had left the UK in 2001 or 2002. The FTT did not confront the Secretary of State's case that a person with a lawful driving licence (as Mr Chaudhry had) may benefit from having a driving licence in a false name.

56. As this matter will be returning to the FTT (see below) it is sufficient to say that in my judgment the findings of fact made by the FTT were not adequately reasoned because the FTT did not deal with the uncontroverted facts that the application for the driving

licence used Mr Chaudhry's address, with a passport apparently obtained by his cousin who had left the UK in 2001 or 2002.

Remitting to the FTT to hear again the appeal against the decision dated 23 December 2021 – issue three

57. In the circumstances set out above, the decision of the UT must be set aside because the UT did not apply the correct test to appeals under section 40A of the BNA 1981 from decisions of the Secretary of State made pursuant to section 40(3) of the BNA 1981. This is because it set aside the decision of the FTT on the basis that the FTT had erred in making the decision as to precedent fact of false representation for itself and then remade the decision as if it were the FTT by applying public law review grounds to the decision about whether the precedent fact had been established. The UT was right, however, to set aside the decision of the FTT. This is because the FTT made a finding of fact which was not reasonably made because it failed to deal with uncontroverted facts.

Conclusion

58. For the detailed reasons set out above I would answer the issues as follows: (1) the proper approach to appeals under section 40A of the BNA 1981 from decisions of the Secretary of State made pursuant to section 40(3) of the BNA 1981 is: (i) it is for the FTT to find, in the event of a dispute, as a fact whether there was fraud, false representation or concealment of a material fact for the purposes of section 40(3) of the BNA 1981; (ii) the decision of the Secretary of State on the causation issue whether the registration or naturalisation was obtained by the impermissible means is to be reviewed on appeal by the FTT on public law grounds, in accordance with the principles referred to by Lord Reed in paragraph 71 of *Begum (No.1)*; (iii) the exercise of the Secretary of State's discretion to make an order depriving a person of citizenship status is to be reviewed on appeal by the FTT on public law grounds in accordance with the principles referred to by Lord Reed in paragraph 71 of *Begum (No.1);* and (iv) it is for the FTT to consider whether the Secretary of State had acted in breach of other relevant legal obligations, including those arising under section 6 of the Human Rights Act. Although due weight would need to be given to the findings, evaluations and policies of the Secretary of State, the decision was for the FTT; (2) there was an error in the decision of the FTT allowing Mr Chaudhry's appeal against the Secretary of State's decision dated 23 December 2021 to deprive Mr Chaudhry of British citizenship; and (3) Mr Chaudhry's appeal against the decision dated 23 December 2021 should be remitted to the FTT to be reheard.

Lord Justice Edis:

59. I agree with both judgments.

Lord Justice Underhill:

60. I agree with Dingemans LJ that the role of the First-tier Tribunal on an appeal under section 40 (3) of the British Nationality Act 1981 is as he summarises it at para. 58 above, for the reasons that he gives at paras. 46-52, and accordingly that the approach endorsed by the Upper Tribunal in *Ciceri* and *Chimi* should no longer be followed. It follows that it was wrong of the Upper Tribunal in the present case to overturn the

decision of the First-tier Tribunal on the basis that it did. As Dingemans LJ points out at para. 48, this conclusion is specific to appeals against decisions made under section 40 (3) of the 1981 Act and is for that reason not inconsistent with the decision of the Supreme Court in *Begum (no. 1)*, which was concerned with a decision made under section 40 (2).

61. I also agree with him, however, that the reasoning of the First-tier Tribunal on the factual issue which it determined was inadequate and therefore that the appeal must be remitted to that Tribunal for a fresh hearing before a different Judge. This Court should not be thought to have formed even a provisional opinion about the strength of the case against Mr Chaudhry: there appear, both from the Reasons and from the submissions made to us, to be points that can be made both ways, and it will be for the Tribunal to decide on the basis of the evidence and submissions before it whether the Secretary of State has proved her case on the factual issue.