Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00038/2019 [V]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 September 2020	**On 11 November 2020**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

M G (ALBANIA)
[ANONYMITY ORDER MADE]

Respondent

Representation:
For the appellant: Mr David Clarke, Senior Home Office Presenting Officer
For the respondent: Mr Jonathan Martin, Counsel instructed by Connaught Law

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of M G who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 18 April 2019, pursuant to section 40 of the British Nationality Act 1981, to deprive him of his British citizenship status, following his naturalisation as a British citizen in 2004 in the identity of a Kosovan citizen, to which he was not entitled. The claimant is a citizen of Albania and has never been a citizen of Kosovo.

2. The claimant has not been prosecuted for his fraudulent claim between 1998 and 2010 that he was a Kosovan citizen. His wife and daughters are British citizens. Their nationality acquired while the claimant was a British citizen, before the deprivation order, is unaffected by the claimant's fraud.

3. There is at present no deportation order or removal direction seeking to remove the claimant to Albania. His wife and two young daughters have the right of abode in the United Kingdom.

4. The First-tier Judge allowed the claimant's appeal against deprivation, on human rights grounds. On 21 October 2019, I found a material error of law in the decision of the First-tier Judge and set aside the decision for remaking in the Upper Tribunal.

5. The substantive remaking of the decision in this appeal was adjourned by consent of all parties, to await the decision of the Upper Tribunal in *Hysaj (*Deprivation of Citizenship: Delay) Albania [2020] UKUT 128 (IAC) (*Hysaj* [2020]) which applied the judgment of the Supreme Court in *Hysaj & Ors, R (on the application of) v Secretary of State for the Home Department* [2017] UKSC 82 (*Hysaj* [2017]) and considered the circumstances in which delay can be relevant to the Secretary of State's discretion to deprive a person of fraudulently acquired British citizenship.

Remote hearing

6. This was a remote hearing, conducted by Skype for Business with the agreement of all parties. A face to face hearing was not held because it was not practicable and all relevant questions for this adjourned hearing could be decided in a remote hearing. The claimant was present remotely, as were both Counsel.

7. There was one technical issue: Mr Martin, who appeared for the claimant, was unable to get his computer video camera working, although he confirmed that he could see and hear me and also Mr Clarke who represented the Secretary of State. Mr Martin said that he did not consider that he had been materially disadvantaged by the failure of his computer camera and was content to proceed on that basis.

8. The Upper Tribunal recorded the proceedings. I remind the parties that pursuant to sections 85B and 85C of the Courts Act 2003, as amended by the Coronavirus Act 2020, it is a criminal offence to make any unauthorised recording of the proceedings, either through Skype or using any other equipment.

9. I am satisfied that this hearing was completed fairly, with the cooperation of the parties.

Background

10. The claimant was born in Albania in February 1979. He came to the United Kingdom, in 1998, aged 19, posing as an unaccompanied asylum-seeking child from Kosovo. The claimant was a single man with no dependants. He was neither a child nor a Kosovan citizen.

11. On 8 May 1999, he was granted asylum and indefinite leave to remain in his Kosovan identity, on political grounds. It is important to note that the claimant did not use the identity of a genuine Kosovan citizen: the Kosovan nationality which qualified him for refugee status was entirely fictitious.

12. On 29 June 2004, the claimant was naturalised in his false Kosovan identity, which made him both a British citizen and an EEA national. That ended the claimant's refugee status because he had acquired a new nationality, and thereafter enjoyed the protection of the United Kingdom (see Article 1C(3) of the Refugee Convention and paragraph 339A(ii) of the Immigration Rules HC 395 (as amended)). Any child born to him while he was a British citizen acquired British citizenship by birth.

13. In November 2006, the claimant met an Albanian woman in London and in January 2007, he began a relationship with her. In 2008, she returned to live with her parents in Albania but the relationship continued by visits.

14. In 2009, they became engaged to be married, and in June 2010, the claimant's partner applied for entry clearance to join him here for settlement. She was then pregnant with their older daughter, who was born in September 2010 and is now 10 years old.

15. As part of the entry clearance application, the claimant's partner disclosed the claimant's genuine Albanian birth certificate and he admitted that his Kosovan identity was fictitious and that he had acquired British citizenship by fraud. Entry clearance was refused on 4 October 2012, but allowed on appeal on 22 August 2013. On 24 September 2013, the couple's second daughter was born. She is now 7 years old. A fiancée visa was granted, but the claimant's partner was able to make only a brief two day visit to the United Kingdom as their daughters were still in Albania with her parents and did not yet have British passports on which to travel.

16. On 7 January 2014, the claimant was informed that, in the light of his fraud, his naturalisation was a nullity. In December 2017, the Secretary of State conceded in the Supreme Court that British citizenship granted by naturalisation on fraudulent grounds in a fictitious identity (rather than in the identity of a real person with the relevant citizenship qualifications) was not properly characterised as a nullity. In such circumstances, a decision under section 40 of the British Nationality Act 1981 was required to deprive him formally of his citizenship.

17. The claimant in his witness statement for his wife's entry clearance appeal stated that he was granted a biometric residence permit indicating that he was settled in the United Kingdom, valid from 13 December 2017 to 5 December 2019, and was able to travel to Albania and visit his partner and daughters, who were still living with his partner's parents. On 19 January 2018, he married his partner and she is now his wife.

18. The Secretary of State's 2014 nullity decision was withdrawn on 3 February 2018. On 10 February 2018, just a week later, the Secretary of State gave notice of her intention to make a deprivation order under section 40(3) of the 1981 Act. In April 2018, the claimant applied for his daughters to be registered as British citizens and on 14 November 2018, they were issued with British passports which would allow them to join him in the United Kingdom.

19. On 19 January 2019, the claimant's wife had applied again for entry clearance to join him in the United Kingdom with their daughters, who do not need entry clearance as they are British citizens. The Secretary of State refused entry clearance but the claimant's wife succeeded on appeal, and during the summer of 2019, first the elder daughter, and then the younger daughter and the claimant's wife, joined him here. The claimant's wife is now a British citizen.

20. The claimant and his solicitors were given an opportunity to make representations about the proposed deprivation order, which Connaughts solicitors did. On 27 February 2018, Connaughts wrote to the Secretary of State, expressing the claimant's regret for the deception. They accepted that he was the author of his own misfortunes but asked whether he had not been sufficiently punished. The claimant was still waiting to begin his family life in the United Kingdom, as his wife and two daughters had not been permitted to join him. For most of the time he had been in the United Kingdom, it was as a single man.

21. Connaughts argued that the period of citizenship limbo from 2010 to 2018 was excessive, particularly as between January 2014 and December 2017, the claimant had been unable to leave the United Kingdom because his British citizenship had been declared a nullity.

22. On 18 April 2019, the Secretary of State made a deprivation order pursuant to section 40(3) of the British Nationality Act 1981. The Secretary of State's deprivation order relates only to the claimant himself: there has been no proposal to deprive his wife and daughters of their British citizen status.

23. The arguments in mitigation raised in Connaughts' submissions were considered in the Secretary of State's deprivation decision. The Secretary of State did not consider that the claimant's loss of his British citizenship and the associated rights, including loss of European Union citizenship, were sufficient reason to exercise discretion in his favour and not deprive him of his citizenship. The Secretary of State considered that the claimant could return to live and work in Albania, as he was an Albanian

citizen, and any interference with European Union citizenship rights was proportionate, given the gravity of the fraud.

24. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

25. The claimant argued that the Secretary of State had failed to exercise her discretion not to deprive the claimant of his British citizenship: see *Deprivation and nullity of British citizenship: nationality policy guidance*, published on 27 July 2018, and in particular Chapter 55.7 of the Guidance. The claimant argued that the Guidance said that deprivation would not normally be appropriate where a person had been in the United Kingdom for more than 14 years.

26. On 31 July 2019, First-tier Judge Baldwin allowed the claimant's appeal, principally because of the Secretary of State's delay in dealing with his citizenship issue, and his Article 8 ECHR private life human rights (excluding family life).

27. The First-tier Judge noted that the claimant's two daughters, as British citizens, had the right to grow up in the United Kingdom, and that at the date of hearing, the elder was already with her father in the United Kingdom. It would be in their section 55 best interests to have both parents around and to live together in their country of nationality.

28. The claimant would be able to provide well for his family in the United Kingdom, as he had a good job, earning about £40,000 a year, and his own house, with a mortgage, since 2007. His wife was an experienced hairdresser and would have no difficulty finding work in the United Kingdom if she wanted or needed it.

29. The judge allowed the linked human rights appeal of the claimant's wife against her continued exclusion from the United Kingdom, on human rights grounds (see HU/08358/2019). The family finally united in the United Kingdom in the summer of 2019 and family life has existed for just over a year now. The wife's appeal against the refusal of entry clearance is no longer before this Tribunal.

30. The First-tier Judge allowed the claimant's appeal against deprivation of citizenship, considering that the Secretary of State's discretion had not been correctly exercised, given her initial (now erroneous) decision that his citizenship was a nullity, and her delay in making the deprivation decision. He also allowed the claimant's appeal on human rights grounds: that was erroneous, as there was no human rights appeal by the claimant before the First-tier Tribunal.

31. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

32. The grounds of appeal challenged the First-tier Judge's decision that the deprivation of citizenship was unlawful. The Secretary of State argued that the First-tier Judge

had erred in equating a deprivation of citizenship decision to a removal or deportation decision.

33. The Secretary of State contended that deprivation of citizenship would not prevent the claimant from being with, and caring for his children, if permitted to do so and that if the Upper Tribunal were to substitute a decision dismissing the citizenship appeal, the claimant could apply for leave to remain on human rights grounds by reference to Article 8 ECHR.

34. On 5 September 2019, First-tier Judge Povey granted permission to appeal on the basis that the First-tier Tribunal's decision failed to reason adequately why the Secretary of State's decision to deprive breached the claimant's Article 8 ECHR private life rights, given that no removal directions had yet been set; that the First-tier Judge had failed to give appropriate and significant weight to the public interest (see *BA (deprivation of citizenship; appeals)* [2018] UKUT 00085); and in particular, that the First-tier Tribunal placed too much weight on the Secretary of State's delay and too little weight on her decision to exercise discretion under section 40(3) of the 1981 Act.

Upper Tribunal proceedings

35. At a hearing on 21 October 2019 I found an error of law and set aside the decision of the First-tier Tribunal for remaking in the Upper Tribunal. The Upper Tribunal decision in *Hysaj* [2020] was awaited.

36. Following the *Hysaj* decision, the Secretary of State confirmed that she maintained her challenge to the decision of the First-tier Tribunal in these proceedings. A substantive hearing listed for April 2020 was vacated during the COVID-19 pandemic. There followed triage directions on 24 May 2020 and the appeal was then listed for substantive remaking.

37. That is the basis on which the appeal comes before the Upper Tribunal today.

Claimant's submissions

38. For the claimant, Mr Martin acknowledged that when the claimant revealed his fraud in 2010, he had not accrued 14 years' residence in the United Kingdom, but relied on the length of residence in January 2014, when the Secretary of State's nullity decision was made.

39. Mr Martin also accepted that no family life issue arose when the deprivation decision was taken in January 2019, because the claimant was then in the United Kingdom without his wife and children. The provisions of part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) did not apply to this appeal to discount the claimant's private life established during that period.

40. Mr Martin conceded that in 2014, the Secretary of State was entitled to rely on the legal advice she would then have been given, and that her decision that the

claimant's acquired British citizenship was a nullity was lawful at the time. However, Mr Martin argued that, had the Secretary of State applied what she later acknowledged in the Supreme Court to be the proper approach, the claimant would have been granted indefinite leave in her letter of January 2014, on the basis of his long residence. The Secretary of State's decision was retrospectively erroneous, and she ought in January 2014 to have decided not to deprive the claimant of his British citizenship.

41. Mr Martin submitted that more than just nationality fraud was required for the 2019 deprivation order to have been lawfully made: there was no other adverse conduct, the claimant having worked continuously while in the United Kingdom, paid his mortgage and his taxes, and stayed out of trouble with the police. The claimant had a legitimate expectation to be allowed to remain in the United Kingdom, and his right to private life in the United Kingdom under Article 8 ECHR was breached for that reason.

42. Mr Martin sought to argue that in the light of the interruption of Mr Hysaj's residence by a 5-year sentence of imprisonment, for serious offences, his case should be distinguished from that of this claimant. The balancing act carried out in relation to Mr Hysaj was based on the particular facts of his appeal.

43. Under Article 8 ECHR, the claimant would rely on the limbo in which he had found himself between 2010 and 2019, and on *EB (Kosovo)* at [14]-[15]. The effect on his family members of the claimant's loss of status as a British citizen should be taken into account. He was of otherwise good character and his wife and two British citizen daughters, now aged 10 and 7, were in the United Kingdom with him, having arrived in the United Kingdom in the summer of 2019.

44. The claimant provided for all his family members. If he left the United Kingdom, there would be a lack of financial stability for the rest of the family and his daughters might have to move schools or have difficulty in affording the social activities they enjoyed, preventing them from taking a full part in school or community life. Mr Martin did not suggest that this on its own was a winning point, but that it should be weighed in the overall balance.

45. The claimant had now been in the United Kingdom for 22 years and had established his private life here, and weight should also be given to that. Mr Martin accepted that the deprivation of citizenship would not require him to leave the United Kingdom, but his British citizenship would be lost.

46. Mr Martin asked me to uphold the decision of the First-tier Judge and find that the Secretary of State's deprivation of citizenship decision in January 2019 was unlawful.

Secretary of State's submissions

47. For the Secretary of State, Mr Clarke argued that the Secretary of State's decision was lawful, given the claimant's admittedly fraudulent acquisition of British nationality. She had made to this claimant no clear unambiguous promise of the type

contemplated in *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61. Applying *EB (Kosovo)* at [13]-[16], there was no specified period within which, or at which, an immigration decision must be made: the duty of the decision maker is to have regard to the facts, and any policy in force, when the decision is made.

48. The Secretary of State's decision not to prosecute the claimant for his deception should not be given any significant weight; the public interest was in maintaining the integrity of British citizenship and the rights which attached thereto (see *Hysaj* [2020] at [117]). Mr Clarke submitted that the public interest clearly outweighed that of the claimant and his family.

49. There was no exceptionality here of the type contemplated in *BA* (deprivation of citizenship: appeals) Ghana [2018] UKUT 85 (IAC). The sole exceptionality relied upon was the alleged delay by the Secretary of State in making her deprivation decision, but she was entitled to rely on the legal advice given to her, such that time only began to run from December 2017, when the Secretary of State acknowledged in the Supreme Court that nullity was not the correct analysis of this type of fraudulent acquisition of British citizenship.

50. Beyond a bare assertion in his witness statement, the claimant had produced no evidence which could support a finding of exceptional circumstances. Nor had the claimant demonstrated the existence of any illegality, inconsistency, or pre-existing historic injustice in the Secretary of State's decision: see *Mousasaoui v Secretary of State for the Home Department* [2016] EWCA Civ 50 at [27].

51. As to the interference with family life, Mr Clarke reminded the Tribunal that no Article 8 ECHR decision on an application for leave to enter or remain by this claimant had yet been made; the Article 8 consideration in the present appeal was restricted to 'limbo', that is to say, to the effect of the claimant of the delay between the withdrawal of the nullity decision in February 2018 before the deprivation of citizenship decision was made. The claimant could make an Article 8 ECHR claim for leave to remain even if the deprivation of citizenship were maintained, and a negative decision would generate a new right of appeal on human rights grounds.

52. Mr Clarke asked me to allow the Secretary of State's appeal and uphold her decision to deprive the claimant of his fraudulently acquired British citizenship.

53. I reserved my decision, and explained to the claimant that I would deliver it in writing as soon as possible, having regard to the evidence and arguments advanced by both representatives.

Legal framework

54. Deprivation of citizenship was added to the 1981 Act by the Nationality, Immigration and Asylum Act 2002 (as amended), and so far as relevant provides as follows:

> "**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 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. …
>
> (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) ..."

55. In *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, the House of Lords considered the effect of delay, in particular at [14]-[16] in the opinion of Lord Bingham, with whom Lord Hope, Lord Scott and Baroness Hale agreed, with Lord Brown dissenting in part. They all agreed that the duty of a decision maker was to have regard to the facts, and any policy in force, when the decision was made.

56. Lord Bingham identified three ways in which any delay to an immigration decision might be relevant:

(i) Where the claimant had developed closer personal and social ties and established deeper roots in the community over time.

(ii) The effect of strain on a personal relationship and the fading of a sense of impermanence over time; and

(iii) The effect of 'a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes', reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control,

57. Lord Brown's partial dissent at [40]-[42] is illuminating in that it presages the *Hysaj* analysis:

> "42. I accept, as stated, that the longer the passage of time before the decision is taken, the more likely it is that the strength of the article 8 claim will be affected: family or private life ties may be created, lost, strengthened or weakened and it will become increasingly difficult for the Secretary of State to rely upon the precariousness of the applicant's immigration status when bonds are formed and relationships entrenched to discount their strength. … These matters should not be relevant to the striking of the proportionality balance. Article 8 claimants ought not to be advantaged merely because of deficiencies in the control system. *If the public interest otherwise requires that a claim fails, it should not succeed merely because it might have been stronger had it been determined earlier or because the control system should have been better administered*." [*Emphasis added*]

58. The Secretary of State's *Deprivation and Nullity of British citizenship* guidance for caseworkers, published on 27 July 2017, is relied upon by the claimant, in particular sub-paragraphs 55.7.2-55.7.5:

> "**55.7 Material to the Acquisition of Citizenship**
>
> 55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.
>
> 55.7.2 This will include but is not limited to: …
>
> • False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration
>
> 55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action.
>
> 55.7.4 … a person may use a different name if they wish (see NAMES in the General Information section of Volume 2 of the Staff Instructions): unless it conceals … immigration history in another identity it is not material to the acquisition of ILR or citizenship. However, before making a decision not to deprive, the caseworker should ensure that relevant character checks are undertaken in relation to the subject's true identity to ensure that the false information provided to the Home Office was not used to conceal criminality or other information relevant to an assessment of their character.
>
> 55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:
>
> • Where fraud postdates the application for British citizenship it will not be appropriate to pursue deprivation action.
>
> • If a person was a minor on the date at which they applied for citizenship we will not deprive of citizenship
>
> • 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.
>
> 55.7.6 Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship."

Hysaj [2017] – the Supreme Court decision

59. In *R (Hysaj) v. Secretary of State for the Home Department* [2017] UKSC 82 ('*Hysaj* [2017]'), the Supreme Court held, following a concession by the Secretary of State, that where there was nationality fraud, there were two possible analyses, in only one of which the grant of British citizenship could properly be considered a nullity:

(i) **'Double identity' nationality fraud.** Where a claimant used a qualifying national identity which belonged to another person, the subsequent grant of citizenship was a nullity because it was not clear to whom it had been granted, or indeed, whether the real person to whom the qualifying identity belonged had any knowledge of the application for naturalisation, or was even still alive; but

(ii) **'Single identity' nationality fraud.** Where a claimant invented fraudulent qualifying nationality details, not belonging to any real person, then there was no doubt about the person to whom naturalisation was granted (albeit by another name and with different qualifying nationality details). In that case, the naturalisation remained valid until the Secretary of State made a deprivation decision under section 40 of the 1981 Act.

60. The Secretary of State withdrew her nullity decision in *Hysaj* in February 2018 and made a section 40(3) decision in July 2018. Mr Hysaj appealed to the First-tier Tribunal.

***Hysaj* [2020] – the Upper Tribunal guidance**

61. In due course, the second *Hysaj* appeal reached the Upper Tribunal. The Presidential guidance, summarised in the judicial headnote, was as follows:

> *"1. The starting point in any consideration undertaken by the Secretary of State ("the respondent") as to whether to deprive a person of British citizenship must be made by reference to the rules and policy in force at the time the decision is made. Rule of law values indicate that the respondent is entitled to take advice and act in light of the state of law and the circumstances known to her. The benefit of hindsight, post the Supreme Court judgment in R (Hysaj) v. Secretary of State for the Home Department [2017] UKSC 82, does not lessen the significant public interest in the deprivation of British citizenship acquired through fraud or deception.*
>
> *2. No legitimate expectation arises that consideration as to whether or not to deprive citizenship is to be undertaken by the application of a historic policy that was in place prior to the judgment of the Supreme Court in Hysaj.*
>
> *3. No historic injustice is capable of arising in circumstances where the respondent erroneously declared British citizenship to be a nullity, rather than seek to deprive under section 40(3) of the British Nationality Act 1981, as no prejudice arises because it is not possible to establish that a decision to deprive should have been taken under a specific policy within a specific period of time.*
>
> *4. The respondent's 14-year policy under her deprivation of citizenship policy, which was withdrawn on 20 August 2014, applied a continuous residence requirement that was broken by the imposition of a custodial sentence.*
>
> *5. A refugee is to meet the requirement of article 1A(2) of the 1951 UN Refugee Convention and a person cannot have enjoyed Convention status if recognition was consequent to an entirely false presentation as to a well-founded fear of persecution.*
>
> *6. Upon deprivation of British citizenship, there is no automatic revival of previously held indefinite leave to remain status.*

> *7. There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. Any effect on day-to-day life that may result from a person being deprived of British citizenship is a consequence of the that person's fraud or deception and, without more, cannot tip the proportionality balance, so as to compel the respondent to grant a period of leave, whether short or otherwise*."

62. Both *Bancoult* and *Mousasaoui* are taken into account in the guidance given in *Hysaj* [2020]. The *ratio decidendi* of the decision of the House of Lords in *R (Bancoult) v Secretary of State for the Home Department* [2008] UKHL 61, [2009] 1 AC 453, at [67], is summarised at [67] in the Upper Tribunal decision:

> "67. … *The only legitimate expectation enjoyed by the appellant is that his case would be treated in accordance with the law and policy in place at the time the relevant decision was made.* Consequently, the appellant's submission that he enjoyed a legitimate expectation to be treated in a particular way under an earlier policy must fail."
>
> [*Emphasis added*]

63. The Tribunal also had regard to the judgment of the Court of Appeal in *Mousasaoui v Secretary of State for the Home Department* [2016] EWCA Civ 50 at [72]:

> "72. … the establishment of historic injustice requires prior illegality and there is a significant distinction between illegality and maladministration."

Analysis

64. The first point to note is that the right of appeal before the Tribunal today arises from to the Secretary of State's deprivation decision made in April 2019, rather than the nullity decision made in 2014 which was withdrawn in February 2018 and which is now academic.

65. The following points were not disputed, or were conceded, by Mr Martin on behalf of the claimant:

    (a) That in 2010, when the claimant's fraud was revealed, he had less than 14 years' residence in the United Kingdom;

    (b) That in 2014, when the Secretary of State made her nullity decision, she was entitled to rely on the legal advice she would then have been given, and that her decision that the claimant's citizenship status was a nullity was then a lawful decision;

    (c) That in April 2019, when the deprivation decision was taken, no Article 8 ECHR family life issue arose because the claimant's wife and daughters were in Albania;

    (d) That the citizenship status of the claimant's wife and daughters are unaffected by the deprivation decision in relation to the claimant's citizenship status; and

    (e) That the deprivation decision in April 2019 did not require the claimant to leave the United Kingdom.

66. Mr Martin's principal arguments were as follows:

(a) That the Secretary of State's 2014 nullity decision was retrospectively erroneous, even if lawful at the time, such that she ought not to have decided in 2014 to deprive the claimant of his citizenship status;

(b) That the claimant had a legitimate expectation to be allowed to remain in the United Kingdom;

(c) That Mr Hysaj was not an appropriate comparator, as his residence had been interrupted by imprisonment, which the claimant's had not;

(d) That the deprivation decision breached the claimant's right to private life because of:

(i) The uncertainty created by the limbo in his citizenship status between 2010 and 2019;

(ii) The lack of financial stability for his wife and daughters, if the claimant had to leave the United Kingdom, which might result in the daughters having to change school, or have difficulty in affording the social activities they enjoyed, preventing them from taking a full part in school or community life; and that

(iii) despite his deception, the claimant had been an otherwise law-abiding resident of the United Kingdom, as a single man, working hard, paying taxes and a mortgage, and investing in property here, such that the Secretary of State's discretion to deprive him of citizenship status should not have been exercised.

67. The first argument cannot succeed. The current appeal is against the 2019 deprivation decision, the 2014 nullity decision having been withdrawn in 2018. Mr Martin conceded that when taken, the nullity decision would have been lawful. It cannot therefore be retrospectively unlawful, despite Mr Martin's eloquence.

68. The 2014 decision was made by reference to the Rules and policy in force at the time the decision was made and could not be made retrospectively unlawful by the Secretary of State's later concession in *Hysaj* [2017]. The Secretary of State could not be expected to have predicted the concession she made in the Supreme Court in December 2017, that nullity was not the correct response for 'single identity' nationality fraud.

69. The second argument also falls, when the *Hysaj* [2020] guidance is considered. The Upper Tribunal expressly found that a claimant who had committed 'single identity' nationality fraud could not have any legitimate expectation that the Secretary of State would apply a historic policy, or any historic injustice in the withdrawn nullity decision (see *Hysaj* [2020] guidance, at (1) and (3)).

70. The claimant asserted that the Secretary of State's guidance indicated that normally, a deprivation decision should not be made where the person had been resident in the United Kingdom for 14 years. The version of the Secretary of State's guidance which appears in the bundle is the July 2017 version, which would have been the guidance in force when the April 2019 deprivation decision was made. There is no reference to

any such favourable presumption in the 2017 guidance. The true facts, if known when he made the application, would have affected the Secretary of State's decision to grant naturalisation (see 55.7.1) and the claimant does not fall within any of the cited exceptions: the falsehood preceded the application for naturalisation, nor was the claimant at any relevant time a minor (see 55.7.5).

71. It is right that the facts in *Hysaj* are different from those in this appeal. Mr Hysaj could not show an uninterrupted period of residence because of his criminality. Each case is to be decided on its own facts. The delay in this case was mainly of the claimant's making: he did not disclose his fraud for 12 years after his arrival in the United Kingdom, as an adult, in 1998, and then only because he had an Albanian fiancée and wanted her to join him in the United Kingdom. The claimant has apologised for that, but as noted at [7] in the *Hysaj* [2020] guidance:

> *"7. There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. Any effect on day-to-day life that may result from a person being deprived of British citizenship is a consequence of that person's fraud or deception and, without more, cannot tip the proportionality balance, so as to compel the respondent to grant a period of leave, whether short or otherwise."*

72. As regards the period of 'limbo' between 2010 and 2019, there was no real disadvantage to this claimant. He continued living in the United Kingdom. There was no strengthening of private and family life ties in the United Kingdom. The claimant's wife and daughters lived with her parents in Albania at all material times. Thereafter, the claimant's British citizenship remained valid until the Secretary of State's decision in April 2019.

73. Further, when considering the period of limbo, the delay between 2010 and 2019 is not, in my opinion, the relevant period: from the date of disclosure in 2010 until the Supreme Court hearing in December 2017, the Secretary of State was entitled to rely on the legal position that both 'single identity' and 'double identity' nationality fraud led to the grant of citizenship being a nullity.

74. That changed with her concession on 'single identity' nationality fraud in December 2017 and subsequent prompt withdrawal of the nullity decision in February 2018. Also in December 2017, the Secretary of State issued the claimant with a biometric residence permit indicating that he was settled in the United Kingdom, valid from 13 December 2017 to 5 December 2019, which permitted him to travel to visit his wife and daughters in Albania (see the claimant's witness statement in his wife's entry clearance appeal, which was linked to this appeal).

75. The claimant was able to visit and receive visits from his partner in Albania, at least until the nullity decision in 2014, and again between 2017 and 2019, when he had discretionary leave. His partner was able to make a short visit to the United Kingdom to see him. The claimant was able to work as a dry liner, to continue paying his mortgage and to accumulate equity in his United Kingdom property. The evidence of any relevant private life in the United Kingdom at the date of decision in April 2019 was scant, and limited to the claimant's work and some friendships.

76. The question whether if the claimant left the United Kingdom, his wife and daughters would lack financial stability, and the possibility that his daughters might have to change school after one year in a British school (much of it presumably studying at home because of the COVID-19 pandemic), or might have difficulty affording enjoyable social activities and participating in school and community life as they would wish, are all matters which arise only if the Secretary of State seeks to remove the claimant from the United Kingdom, which she has not yet sought to do.

77. On the contrary, the Secretary of State has not challenged the decision of the First-tier Judge in the wife's appeal which allowed her, and the younger daughter, to rejoin the claimant and the older daughter so that they could begin to live together as a family here. The girls have now completed a whole year of school in the United Kingdom and family life has been established. It remains open to the claimant to make an Article 8 ECHR application for leave to remain on human rights grounds.

78. There is therefore no proposed interference with the claimant's Article 8 ECHR rights at present. Even if they were relevant to this appeal, which they are not, the claimant's human rights do not outweigh the United Kingdom's right to maintain the integrity of the system by which foreign nationals such as this claimant are naturalised and permitted to enjoy the benefits of British citizenship.

79. I have set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the decision to deprive him of his British citizen status.

DECISION

80. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Signed *Judith AJC Gleeson* Date: 24 September 2020
Upper Tribunal Judge Gleeson