Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00021/2019**
(V)

THE IMMIGRATION ACTS

Heard at Field House by video conference on 01 June 2021	**Decision Promulgated On 22nd September 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

JETMIR CANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J. Greer, instructed by MyUKVisas
For the respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 08 March 2019 to deprive him of British citizenship under section 40(3) of the British Nationality Act 1981 ('BNA 1981').

2. First-tier Tribunal Judge T. Jones allowed the appeal in a decision promulgated on 03 September 2019 for the reasons summarised by the Upper Tribunal at [3] in the error of law decision promulgated on 15 March 2021 (annexed). The respondent applied for and was granted permission

to appeal to the Upper Tribunal on the grounds summarised at [4] of the error of law decision.

3. The appellant applied to delay the error of law decision to await the outcome of an application for permission to appeal to the Court of Appeal against the Upper Tribunal's decision in *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 000128 (IAC). The Upper Tribunal refused the application for a stay for the reasons given in the error of law decision at [7]. In any event, the Court of Appeal subsequently refused permission to appeal in the case of *Hysaj (2020)*.

4. The Supreme Court handed down the judgment in *R (on the application of Begum) v Special Immigration Appeals Commission and Others* [2021] UKSC 7, [2021] 2 WLR 556 on 26 February 2021. Although the judgment was published before the Upper Tribunal hearing on 09 March 2021, less than two weeks later, neither party referred to the decision at the hearing. At the time, neither the parties nor the Upper Tribunal appreciated the potential impact it might have on appeals involving deprivation of citizenship outside the context of the Special Immigration Appeals Commission (SIAC).

5. The Upper Tribunal set aside the First-tier Tribunal decision for the reasons given at [13] of the error of law decision. The case was listed for a resumed hearing on 01 June 2021 to remake the decision. Both parties were now aware of the decision in *Begum*, but there was no application for any of the error of law findings made by the Upper Tribunal to be set aside.

6. I have considered of my own motion whether any of the findings relating to error of law might need to be set aside following *Begum*. The Upper Tribunal summarised the main findings in *Hysaj (2020)*. The errors of law identified by the Upper Tribunal related to a factual error in the First-tier Tribunal judge's assessment of the respondent's 14-year policy [13(ii)], which appeared to be given weight by the judge in assessing proportionality. The Upper Tribunal also found that the First-tier Tribunal findings were not sufficiently clear to understand whether the judge conducted a proportionality assessment with reference to the Article 8 balance sheet approach normally undertaken when considering the potential impact of removal, as opposed the proportionality of deprivation, and without sufficiently clear reference to the approach outlined in *BA (Deprivation of citizenship: appeals)* [2018] UKUT 85 (IAC). Having read the Court of Appeal decision in *Aziz & Ors v SSHD* [2018] EWCA Civ 1884 again, the Upper Tribunal's reference to *BA* needs be modified in light of the guidance to fact finding tribunals not to conduct too much of a 'proleptic assessment' beyond the initial decision to deprive a person of citizenship. Having modified that reference, I conclude that the findings in the last two sentences of [13(v)] in the error of law decision are consistent with the approach urged in *Aziz*. I am still of the view that the First-tier Tribunal findings were not sufficiently clear to identify whether the judge was considering the proportionality of the deprivation decision itself or was

conducting a wider ranging and 'proleptic assessment' of the kind cautioned against in *Aziz*.

7. The parties agreed that the consequence of the decision in *Begum* is that the Tribunal is unable to consider the exercise of discretion to deprive a person of citizenship itself and should normally consider the exercise of discretion with reference to general public law principles. Given that the Upper Tribunal concluded that the reasoning in the First-tier decision was not sufficiently clear to establish whether the assessment was made with reference to the proportionality of the deprivation decision itself or was an impermissibly proleptic assessment, I find that the decision in *Begum* would have made no material difference to my findings relating to errors of law. I conclude that it is still appropriate for the First-tier Tribunal decision to have been set aside with reference to section 12 of the Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007'). However, both parties agree that the principles outlined in *Begum* are applicable to remaking.

8. Due to the continued need to take precautions to prevent the spread of Covid 19 the hearing took place in a court room at Field House with the legal representatives appearing by video conference and with the facility for others to attend remotely. I was satisfied that this was consistent with the open justice principle, that the parties could make their submissions clearly, and that the case could be heard fairly by this mode of hearing.

Legal framework

9. Section 40(3) BNA 1981 sets out the respondent's power to deprive a person of citizenship status if the Secretary of State is satisfied that the registration or naturalisation was obtained by (a) fraud; (b) false representation; or (c) concealment of a material fact and it is appropriate to exercise discretion to deprive the person of citizenship in all the circumstances of the case. The provision has a rational objective, which is to instil public confidence in the nationality system by ensuring any abuse is tackled and dealt with accordingly. The objective is sufficiently important to justify limitation of fundamental rights in appropriate cases.

10. A decision to deprive a person of British citizenship has a right of appeal under section 40A(1) BNA 1981. Unlike appeals against other types of immigration decision, which are governed by Part 5 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'), the BNA 1981 does not specify the grounds upon which the appeal can be brought.

11. In the common law sphere the exercise of discretion by the Secretary of State has traditionally been subject to review on a limited number of administrative law grounds, and is most commonly challenged with reference to the rationality of the decision. The Human Rights Act 1998 ('HRA 1998') sparked debate over the intensity of review in cases involving fundamental rights. The development of the principle of proportionality in common law as an element of rationality, and the differing emphasis in cases involving fundamental rights engaged by the

HRA 1998, as well as consideration of the principle of proportionality under European law, were discussed in detail by the Supreme Court in cases such as *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39, [2013] HRLR 30 and *Pham v SSHD* [2015] UKSC 19, [2015] Imm AR 950.

12. Other cases have discussed the scope of an appeal brought under section 40A(1) BNA 1981, notably the Upper Tribunal decisions in *Deliallisi (British Citizen: deprivation appeal: Scope)* [2013] UKUT 00439 (IAC), *BA (Deprivation of citizenship: appeals)* [2018] UKUT 85 (IAC), and *Hysaj (2020)*. In these cases, it was suggested that there was a role for a fact-finding tribunal to make its own assessment of whether discretion ought to have been exercised to deprive the person of citizenship, and that the assessment might to some extent involve consideration of human rights issues.

13. The Court of Appeal in *R (KV)(Sri Lanka) v SSHD* [2018] EWCA Civ 2483 approved the approach taken in *BA*. It noted that deprivation may result in interference with Article 8 rights, but the right to a nationality is not itself a right protected by the European Convention of Human Rights. The Court went on to find that where deception was used in an application for naturalisation it would be an unusual case in which an appellant could legitimately complain of the withdrawal of rights arising from naturalisation when the decision would only put him in the position he would have been in had he not been fraudulent and had acted honestly in making the application. The Court of Appeal recognised that there might be some cases where the applicant will be placed in a worse position, for example, if he lost a previous nationality having been granted British citizenship. In such cases the decision-maker will need to consider whether deprivation of citizenship is justified having regard to the consequences of deprivation. A balancing exercise will need to be carried out to assess whether in all the circumstances deprivation of citizenship is proportionate.

14. I have already touched on the decision in *Aziz & Ors v SSHD* [2018] EWCA Civ 1884, in which the Court of Appeal emphasised that the scope of an appeal under section 40A(1) BNA 1981 must focus on the fact that deprivation is only a first step in the process. The assessment must consider the proportionality of the deprivation decision itself and should avoid straying into a 'proleptic assessment' of separate issues relating to the possibility of future removal from the UK.

15. The Supreme Court in *R (on the application of Begum) v Special Immigration Appeals Commission and Others* [2021] UKSC 7, [2021] 2 WLR 556 conducted a detailed review of the case law and made findings relating to the scope of an appeal brought in a slightly different context against a decision made under section 40(2) BNA 1981 (conducive to the public good). The decision was certified under section 40A(2) BNA 1981 (national security). The consequence of the certificate diverted the case to the Special Immigration Appeals Commission (SIAC), where the appeal was then brought under section 2B of the Special Immigration Appeals

Commission Act 1997 ('SIACA 1997') rather than section 40A(1) BNA 1981. However, the underlying decisions appealed under BNA 1971 or SIACA 1997 are still rooted in section 40 BNA 1981, albeit different procedures and considerations apply in cases involving national security issues.

16. The Supreme Court found that the wording of section 40 BNA 1981 plainly brought the decision within the realms of the discretion of the Secretary of State. The Court found that appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so. In general, they are restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether they have taken into account some irrelevant matter or has disregarded something to which should have been given weight or has erred on a point of law [68]. The Supreme Court went on to make the following findings:

> '69. For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. 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. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.
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> 70. In considering 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, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many

> if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29.'

17. Having recognised that there was a distinction between an appellate jurisdiction and a supervisory jurisdiction the Supreme Court outlined the following scope of decision-making in an appeal brought against a decision made under section 40 BNA 1981:

> '71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). 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. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment.'

18. I can see no reason why these general principles are not equally applicable to an appeal brought under section 40A(1) BNA 1981 against a decision made under section 40(3) in the context of the immigration tribunals rather than SIAC. The same considerations are equally applicable to the different precedent facts involved in a decision taken under section 40(3). The weight to the public interest considerations might vary between appeals brought in SIAC and the immigration tribunals but will still form part of the overall assessment.

19. In my assessment *Begum* simply takes a further step along the path trodden in *Aziz*. In making clear that it is not for the court or tribunal to make its own decision on whether discretion should have been exercised (to this extent overtaking aspects of previous decisions of the Upper Tribunal) in an appeal brought under section 40A(1) the Supreme Court continues to focus the scope of an appeal on the effects of the deprivation decision itself and narrows the potential for wider arguments relating to the prospects of removal.

20. The court retains a role in evaluating the legality of the exercise of discretion with broad reference to common law principles, which in most cases are likely to be the same as the principles applicable in administrative law [69]. To this extent proportionality as a public law principle is still likely to play a role in so far as it might be relevant to the assessment of rationality. I do not read what is said by the Supreme Court as altering the more intense consideration of any issues that might engage the operation of the HRA 1998. Indeed, it made clear that if a question arises as to whether the decision is unlawful with reference to the HRA 1998, that is still a matter for the court to make its own assessment [69].

21. However, the Supreme Court emphasised that the extent to which human rights issues might be engaged will vary depending on the context of the case in question [64]. So, in a case where the deprivation decision itself, as a first step, does not engage clear human rights issues, the assessment is more likely to be within the realms of traditional public law principles. In a case where the deprivation decision more strongly engages issues relating to fundamental rights, the assessment is more likely to fall into the realm of an objective assessment by the court. In this way there is likely to be a 'sliding scale' in the approach to decision making in an appeal brought under section 40A(1) BNA 1981 of the kind discussed in *Pham* ([105]-[106] and [113]) and *Begum* ([69]-[71]), whilst bearing in mind that the Supreme Court authorities are consistent in stating that in most cases the test of 'reasonableness' and 'proportionality' are likely to yield the same outcome.

22. In the recent decision of the Court of Appeal in *Laci v SSHD* [2021] EWCA Civ 769 the Court considered the line of decisions from *Deliallisi* to *Hysaj (2020)* set out above. It concluded that the six-point approach in *BA*, which was approved in *KV (Sri Lanka)* should be taken as the starting point [35]. It made clear that point (5) in *BA* was now subject to what was said in *Aziz* and observed that the tribunal 'ought not, at least normally, undertake any "proleptic assessment" of the likelihood of removal. Loss of British citizenship and loss of leave to remain are different things, appealable by different processes.'

23. The Court went on to find that the reasoning in *KV (Sri Lanka)* did not extend to other adverse consequences of a deprivation decision e.g. statelessness or consideration of a 'limbo period' [38] and went on to make the following observations about the First-tier Tribunal decision in that case:

> ‘46. It will be noted that the Judge conducted his analysis entirely by reference to the Appellant’s article 8 rights. It follows from what I have said above that the appeal primarily involves the exercise of a common law discretion, even where article 8 may be engaged; but as I have also observed, the essential questions may not be very different whether the issue is address as one of proportionality or as the exercise of a common law discretion. In either case a balance was required between the obvious strong public interest in depriving the Appellant of a benefit that he should never have received and the countervailing factors on which he relied.’

24. Having reviewed relevant factors considered by the First-tier Tribunal, and noted some shortcomings in the decision, the Court concluded that the findings were open to the First-tier Tribunal to make in ‘the exercise of judicial discretion’ [81]. The Court went on:

> ’83. I should emphasise that this decision should not be interpreted as meaning that an indulgent view can be taken towards migrants who obtain British citizenship on the basis of a lie. On the contrary, in all ordinary circumstances they can expect to have it withdrawn. It is only because to the exceptional combination of circumstances in the present case that the FTT was entitled to come to the decision that it did.’

25. After it had reserved its decision, but before it was handed down, attention was drawn to the decision in *Begum*. A post-script was added in the following terms:

> ’40. *Postscript*. When this judgment was circulated to counsel in draft, Mr Malik drew our attention to the decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 WLR 556, which was handed down subsequent to the argument before us. *Begum* concerns a decision taken by the Secretary of State to deprive the appellant of her nationality under section 40 (2) of the 1981 Act. At paras. 32-81 of his judgment, with which the other Justices agreed, Lord Reed discusses the nature of an appeal to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997, which is the equivalent of section 40A; and in that connection he discusses both *Deliallisi* and *BA* (though not *KV*, to which the Court does not appear to have referred). His conclusion is that while section 2B provides for an appeal rather than a review SIAC should approach its task on (to paraphrase) essentially *Wednesbury* principles, save that it was obliged to determine for itself whether the decision was compatible with the obligations of the decision-maker under the Human Rights Act 1998 (see para. 68). It may be that that reasoning is not confined to section 2B or to cases falling under section 40 (2), in which case some of the statements quoted above about the correct approach to appeals under section 40A in the case of decisions under section 40 (3) will require qualification. But I do not think that that is something on which I should express a view here. *Begum* does not bear directly on the actual grounds of appeal before us, and Mr Malik made it plain that he did not wish to advance any fresh ground based on it. Rather, he was rightly concerned that we should be aware of it in the context of the more general review of the law in the preceding paragraphs. I confine myself to saying that anything said in

> the authorities reviewed above about the scope of an appeal under section 40A should be read subject to the decision in *Begum*.'

26. The Court of Appeal considered the decision in *Begum* and concluded that it did not impact on the grounds in that case. However, it did not invite further submissions from the parties as to whether the principles were equally applicable to an appeal brought under section 40A(1) BNA 1981 as they were to an appeal brought under section 2B SIACA 1997.

27. For the reasons given above, I conclude that the guidance in *Begum* is equally applicable because the underlying decisions in both types of appeal emanate from section 40 BNA 1981. While it is true that the Supreme Court did not specifically consider whether the same principles applied to an appeal brought under section 40A(1), its reasoning is rooted in common law principles, refers to cases involving appeals under section 40A(1), and does not appear to rely on any distinction relating to cases involving national security issues. The Court of Appeal in *Laci* proceeded on the basis that the approach taken in *BA*, endorsed in *KV (Sri Lanka)*, should be the starting point. *KV (Sri Lanka)* proceeded on the basis that an appeal under section 40A(1) involved a 'full reconsideration of the decision whether the deprive the appellant of British citizenship', and if the condition precedent is established, also involved consideration of whether discretion should have been exercised differently [6]. The Supreme Court has expressly departed from that approach. I acknowledge that the Court in *Laci* qualified its findings by reference to the post-script, but I conclude that I am bound to follow the Supreme Court decision in *Begum* as higher court authority.

28. At this point I must add my own post-script. After having drafted this decision, but just before promulgation, the Upper Tribunal published the decision in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC) which gives guidance on the approach to deprivation appeals following the Supreme Court decision in *Begum*. Although some of my analysis has a slightly different emphasis, we reach broadly the same conclusions as to the proper approach to determining an appeal under section 40A(1) BNA 1981. The cases considered in *Ciceri* were the same as those argued by the parties at the hearing in this case. For this reason, I do not consider it necessary to invite any further submissions.

29. A senior panel of the Upper Tribunal including the President and the Vice-President reviewed the same authorities and concluded that a court or tribunal should:

    (i) establish whether the relevant condition precedent in section 40(2) or (3) exists for the exercise of discretion, and if it does then;

    (ii) should consider whether human rights are engaged by the deprivation decision, and if they are, the tribunal can decide for itself whether the decision is unlawful under section 6 HRA 1998; and

(iii) in considering human rights the tribunal may determine the reasonably foreseeable consequences of deprivation but should not conduct a proleptic assessment of the likelihood of removal; and

(iv) in considering human rights the assessment of proportionality is for the tribunal to decide on the evidence before it (which might not be the same as the evidence considered by the Secretary of State); and

(v) in considering human rights the tribunal must pay due regard to the inherent weight that must be given to the public interest in maintaining the integrity of the system of nationality law; and

(vi) in considering human rights delay may be relevant although any period during which the Secretary of State was adopting the mistaken stance that citizenship was a nullity will not normally be given weight; and

(vii) if the decision is not unlawful under section 6 HRA 1998 the tribunal may only allow the appeal on administrative law principles and must have regard to the nature of the discretionary power under section 40(2) or (3) BNA 1981.

Decision and reasons

30. The appellant is a citizen of Albania born on 04 June 1983. He entered the UK on 30 November 1999. On 01 December 1999 he applied for asylum using his real name but falsely claimed to be a Kosovan national and gave a false date of birth of 04 June 1984 i.e. claiming to be 15 years old on arrival. He put forward what he knew to be an entirely false claim for asylum. The most likely motivation for the first deception was to exploit the fact that many genuine Kosovar Albanians fleeing conflict were recognised as refugees or were granted Exceptional Leave to Remain (ELR) at the time. The most likely motivation for the second deception was either to obscure checks on his real identity and/or to take advantage of more generous care provisions for unaccompanied asylum seeking children who are under 16 years old. Nevertheless, I recognise that he was a minor aged 16 years old on arrival in the UK.

31. In March 2000 (the exact date is unclear), the respondent refused the asylum application but granted four years ELR according to the policy at the time. At the end of the period of ELR the appellant applied for Indefinite Leave to Remain (ILR) in the same false identity. By the time he applied for ILR he was an adult of at least 19-20 years old. On an unknown date he applied to naturalise as a British Citizen. He did so in the same false identity because the naturalisation certificate dated 13 July 2006 gives the false details relating to place and date of birth. By the time the appellant was naturalised as a British citizen he was 22 years old.

32. The appellant accepts that he lied about his nationality (and by implication the whole of his asylum claim) and age on arrival in the UK. If the situation in Albania at the time was as serious as the appellant suggests, he should have made an asylum claim in his real identity. While acknowledging that a minor may have been more easily swayed by the advice of others on

arrival in the UK, by the time he came to apply for ILR, and then naturalisation, the appellant was an adult who was prepared to maintain the deception in both applications. But for this repeated deception the appellant would not be a British citizen. Had the respondent been aware of such a serious deception it is highly unlikely that he would have been granted leave to remain for four years (although he may have been granted a short period of leave until he reached his majority, which would not have attracted a right to apply for settlement on expiry) and the respondent would have been entitled to consider whether such conduct justified refusal of ILR or naturalisation on 'character' grounds.

33. Having obtained British citizenship by fraud the appellant continued his life in the UK. Despite suggesting that he left Albania in fear of violence, the appellant accepts that he returned there regularly to visit family members. It was only after the false details on his British passport caused problems in arranging for his wife to come to the UK that he was advised to apply to have the details on his naturalisation certificate changed. It is unclear from the evidence whether the problems occurred in registering the marriage in Albania or during the course of an application for entry clearance for his wife. In February 2013 the appellant disclosed his true identity to the respondent with a request to amend the details. The appellant included a copy of his Albanian ID card and birth certificate.

34. In the same month the appellant's wife applied for entry clearance to join him in the UK. The detail of the subsequent course of events relating to that application is unclear from the evidence. The application was refused, but it is unclear whether the decision was made before or after the respondent's decision to nullify the appellant's nationality (see below). The date of the First-tier Tribunal decision is also unclear. There is insufficient evidence to ascertain whether the Tribunal was made aware of the fact that the appellant's British nationality was treated as a nullity. No copy of the First-tier Tribunal decision has been provided to understand what information was before the Tribunal at the time. I am told that the appeal was allowed.

35. On 09 September 2013 the respondent notified the appellant that he obtained British nationality by fraud and that nationality was nullified. The appellant sought to challenge the decision to nullify nationality by way of judicial review. It is said that his claim was stayed behind, what turned out to be long running litigation, which culminated in the Supreme Court decision in *R (Hysaj) v SSHD* [2018] INLR 279. The Supreme Court clarified that the correct procedure should be to decide to deprive a person of citizenship under section 40 of the British Nationality Act 1981 rather than treat naturalisation as a nullity.

36. The appellant's wife entered the UK in November 2014 at a time when he would have been under no illusion that his status was under review and his position in the UK was uncertain. I am told that his wife applied for further leave to remain in March 2015. There was a delay in deciding the application. The chronology indicates that this was likely to be because of

the ongoing litigation in *Hysaj*. The Supreme Court did not give judgment until 21 December 2017, at which point it became clear that the respondent's previous policy would need to change to making decisions to deprive citizenship instead of treating naturalisation as a nullity.

37. Having stayed many cases to await the outcome of the Supreme Court decision in *Hysaj (2017)* the respondent had to make fresh decisions. On 03 February 2018 the respondent notified the appellant that the decision dated 09 February 2013 to treat naturalisation as a nullity was withdrawn. The effect was that the appellant continued to have British citizenship. The decision letter that is the subject of this appeal states that a further letter was sent to the appellant a few days later, on the 10 February 2018, in which he was invited to respond to the proposed intention to deprive him of British citizenship. The appellant's legal representatives made further representations on 22 February 2018.

38. In December 2018 a decision was made to grant the appellant's wife 30 months leave to remain. The law having been clarified, at the time the appellant continued to have British citizenship. No doubt the respondent was conscious of the fact that the application for further leave had been delayed pending the outcome of the decision in *Hysaj (2017)* and it may not have been clear when the respondent would make a decision relating to deprivation. In the event, the decision to deprive the appellant of British citizenship was made a few months later, on 08 March 2019.

39. Having given a false identity in his initial asylum claim and maintained the deception in the subsequent applications for ILR and naturalisation, the appellant can have been under no illusion that any status was gained on a false premise. It was only when it was in his interest to admit the lies that the deception came to light. Since 2013 he was aware that his status was under review. The delay between the decision to nullify in 2013 and the decision to deprive in 2019 is adequately explained by the course of the *Hysaj* litigation whereby the correct legal approach was clarified. The respondent acted promptly following the Supreme Court decision and notified the appellant within a couple of months of her intention to deprive him of citizenship and invited submissions. In the meantime, it seems that a pragmatic decision was made to grant his wife limited leave to remain pending a decision on whether it was appropriate to deprive him of citizenship or not.

40. The Upper Tribunal in *Hysaj (2020)* considered the course of the Supreme Court litigation and concluded that it was unsustainable to rely on the delay between decisions as a matter that might reduce the public interest in deprivation [61]. The Court of Appeal in *Laci* noted this but concluded that the facts relating to delay in that case were exceptional because following an initial notification from the Secretary of State that she was considering whether to deprive citizenship, he heard nothing further for a period of nine years and reasonably assumed that no further action was being taken. The facts in this case fall squarely within the kind of delay considered in *Hysaj (2020)*. The appellant was served with a decision to

nullify nationality and his case was stayed pending the outcome of judicial review proceedings and the ongoing litigation which culminated in the Supreme Court decision in *Hysaj (2017)*.

41. The decision that is the subject of this appeal is dated 08 March 2019. The respondent explained why the decision to treat naturalisation as a nullity was withdrawn, and instead, a decision had been taken to deprive him of citizenship with reference to section 40(3) BNA 1981. The respondent set out the relevant sections of the BNA 1981 and Chapter 55 of the Nationality Instructions. The decision summarised the appellant's immigration history and the false details given at each stage of the process. It acknowledged that he was a minor on arrival in the UK but noted that he was an adult by the time he applied for ILR and naturalisation. The respondent concluded that the appellant should take full responsibility for his actions by the time he was an adult. The respondent concluded that he only succeeded in those applications because false representations continued to be made about his nationality and date of birth.

42. The decision letter went on to consider the course of events leading up to the letter dated 10 February 2018, which notified the intention to deprive him of citizenship. She took into account the content of the representations made by the appellant's representatives in a letter dated 22 February 2018. Those representations accepted that the appellant used deception by falsely claiming to be from Kosovo. They sought to explain that there was significant upheaval in Albania at the time. The appellant left his country in fear of violence and at the time was scared that he would be 'returned to his country of nationality without consideration of his circumstances'. The representations said that the appellant had lived in the UK for a period of 19 years and now lived here with his spouse. It was asserted, without reference to any evidence, that in that time he had developed a substantial private and family life in the UK. The representations went on to argue that 'any decision to remove him from the United Kingdom, subsequent to deprivation of a (sic) citizenship' [my emphasis] would breach his rights under Article 8 of the European Convention. He apologised for his past actions. It was said that he was otherwise of good character. The representations asked for this to be considered 'when determining whether he should be allowed to keep his British citizenship'.

43. Having consider these representations the respondent found that if he was genuinely in fear for his safety he should have told the truth about his nationality so that his true circumstances could be considered. The respondent considered that this was an attempt to 'deflect blame for the fraud and avoid the consequences of your actions'. The respondent said that she had considered the representations made by the appellant, acknowledged that the decision to deprive on grounds of fraud was discretionary, but concluded that deprivation would be both 'reasonable and proportionate' in this case. The respondent accepted that the appellant and his wife had lived in the UK for a considerable time. Full

consideration would be given to the right to family or private life should he choose not to appeal the decision or if the appeal was dismissed.

44. Under a separate heading of 'Article 8 ECHR' the decision went on to explain that any settled status he had prior to naturalisation would be lost. However, a deprivation decision 'does not itself preclude an individual from remaining in the UK'. The decision went on to make clear that although deprivation may culminate in a decision to remove, it was not necessary to take into account the impact that removal would have on the appellant and his family members. Whilst acknowledging that deprivation would involve the loss of benefits and entitlements, it was noted that the appellant was not entitled to them in the first place. The decision considered the issues of statelessness, which is not applicable on the facts of this case and advised the appellant of his appeal rights.

45. To provide clarity to the appellant the decision letter undertook to make a deprivation order within four weeks of his appeal rights becoming exhausted, or receipt of confirmation that he will not appeal the decision, whichever was sooner. Within eight weeks from the deprivation order being made, and subject to any representations, a decision would be made on whether to remove or grant leave to remain.

46. The appellant accepts that he lied about his nationality and date of birth when he first applied for asylum in the UK. But for that deception he would not have been granted ELR for four years and been eligible to apply for ILR at the end of that period. But for the fact that, as an adult, he repeated the deception it is highly unlikely that he would have been granted ILR. But for the fact that he repeated the deception in the application for naturalisation, it is highly unlikely that he would be a British citizen. There is a direct connection between the serious and repeated deception and the decision to naturalise him as a British citizen.

47. In most cases where a person has obtained British citizenship by fraud or false representations, the starting point is that deprivation will be a reasonable and proportionate response. Save in unusual circumstances, deprivation will place the person in the same position that they were before the deception. They were never entitled to the benefits arising from citizenship in the first place.

48. In this case the respondent considered the appellant's history, including his age on arrival in the UK. It was open to her to place more weight on the fact that the appellant repeated the deception as an adult in the applications for ILR and naturalisation. The appellant's representatives accepted that he used deception. There was a direct link between the serious and repeated deception and the eventual grant of naturalisation. It was within a range of reasonable responses to the evidence for the respondent to be satisfied that the condition precedent for the exercise of her power under section 40(3) BNA 1981 was made out.

49. The serious and repeated nature of the appellant's lies in the initial application for asylum, but more culpably, in the subsequent applications

he made as an adult, demonstrate that it was open to the respondent to place weight on the public interest in preventing fraud in the nationality system.

50. It is not argued that the appellant would be made stateless by the decision. There is no evidence to suggest that he lost his Albanian citizenship by the act of naturalising him as a British citizen.

51. The representations put forward by the appellant's legal representative only highlighted private life issues that were relevant to the effect of removal from the UK and did not touch on the effect of deprivation of citizenship as a first step. The appellant's skeleton argument asserts that there is 'no reasoned consideration of the matters that might weigh against a decision to deprive the Appellant of his British Citizenship' and argues that the decision is unlawful on public law grounds for this reason. Several factors are identified, which I will deal with in turn.

52. It is argued that the appellant would be without leave to remain while waiting for a decision on whether to grant him leave although it is accepted that he is likely to meet the 20-year private life requirement of the immigration rules. It is said that this would also place his wife's immigration status under some uncertainty at a time when they are expecting their first child.

53. I find that little weight can be placed on this issue. The respondent considered the appellant's length of residence and made clear that a decision would be made relating to leave to remain or removal within a reasonable timescale of three months from the completion of these proceedings. The timescale could be shortened if the appellant notifies the respondent that he does not seek to appeal this decision.

54. The respondent made clear that full consideration would be given to the appellant's right to private and family life following deprivation. The appellant is likely to have a strong case to be granted leave to remain on grounds of long residence. He meets the 20-year residence requirement of paragraph 276ADE(1)(iii) of the immigration rules. Aside from the deception in previous applications that has resulted in the decision to deprive him of citizenship, there is no evidence of any other serious behaviour that might preclude him from being granted leave to remain. There is no evidence to indicate that the appellant has been convicted of any criminal offences. The evidence indicates that he is likely to have worked hard to support himself and his family. He and his wife started their own restaurant last year. His wife was granted 30 months leave to remain in December 2018. It is reasonable to infer that she has made an application to extend that leave, and she will remain in the UK lawfully while the application is being considered. If a decision has not been made on her application, the position of the appellant, his wife, and their child (which was due to be born shortly after the hearing) can be considered as part of the second stage process of considering whether they should be granted leave to remain on human rights grounds. In doing so the respondent would be bound to take into account the best interests of the

child and the fact that the appellant's wife and child are innocent bystanders.

55. The suggestion that the decision engages human rights because the appellant might face hardship because of the 'hostile environment' policy within the relatively short period of three months is not persuasive on the facts of this case. Although the appellant told me, in general terms, that it has been difficult in the last few years without evidence of his nationality since his passport was retained, it seems that the couple have been able to continue working to support themselves. His wife has had leave to remain and is able to work lawfully pending the outcome of any application to extend her leave that is likely to have been made. The appellant has been unable to point to any actual hardship that might occur let alone one that might be sufficient to outweigh, either alone or taken with other factors, the public interest in tackling fraud in the nationality system.

56. The delay between the nullity decision in 2013 and the decision to inviting submissions on the proposed intention to deprive him of citizenship in March February 2018 is not relied upon. In any event that delay is adequately explained by the course of the litigation culminating in *Hysaj (2017)*. In contrast to *Laci*, the appellant was fully aware of the respondent's intention to nullify nationality. Instead, the appellant's skeleton argument relies on the relatively brief period between February 2018, when he was invited to make submissions on the respondent's intention to deprive him of nationality, and March 2019, when the decision that is the subject of this appeal was taken.

57. It is difficult to see how this could be considered a compelling factor that might outweigh the public interest in deprivation. The chronology set out above makes clear that the respondent acted promptly following the hand down of the Supreme Court decision in *Hysaj* in December 2017. The appellant was on notice during that period that the respondent now intended to deprive him of citizenship. The delay was not unduly long given that his case was among many that the respondent had to review following *Hysaj (2017)*. I cannot see how the fact that the respondent made a pragmatic decision to grant his wife 30 months leave to remain, having placed her application on hold pending the decision in *Hysaj*, makes any material difference to the separate decision to deprive the appellant of citizenship. Whether the appellant and his wife should both be granted leave to remain on human rights grounds will be considered as a second step following the issuing of a deprivation order.

58. The final points made in the skeleton argument are particularly weak and are relevant to a more proleptic assessment of the proportionality of removal rather than the deprivation decision itself. The fact that the appellant has lived in the UK for more than 20 years is immaterial to the deprivation decision and material to whether he should now be granted leave to remain under paragraph 276ADE(1)(iii). The rule reflects the strength of a person's private life during that time. The respondent would

consider the fact that the couple were expecting their first child in July 2021. The assertion that the appellant's belated admission of his true identity is a mitigating circumstance is without substance. The fact that the appellant told the truth about his identity only when it was in his interest to do so when he wanted to apply for his wife to join him in the UK is hardly a matter that might reduce the weight to be given to the public interest in depriving him of citizenship. It only puts him back in the position he would have been had he not told such a serious and repeated lie to obtain status to which he was never entitled.

59. The last point made in the skeleton argument is that the deprivation decision 'would be a disproportionate breach of his convention rights' but is unparticularised beyond that bare assertion.

60. I conclude that most of the points made on behalf of the appellant engage issues that are primarily relevant to the question of whether removal from the UK would amount to a disproportionate interference with the appellant's right to private and family life given his length of residence. Apart from the continued uncertainty for a few more weeks while the respondent considers that issue, nothing in the arguments engage human rights issues relating to the effect of the deprivation decision itself. There is nothing to suggest that the appellant and his wife could not continue running their business during this period of uncertainty, and even if the appellant is technically not permitted to do so, it is likely that his wife is if she has made an application to extend her leave to remain. It is understandable that the appellant is concerned about this period of uncertainty. However, there is an absence of evidence to show that there would be any meaningful consequences, at the stage of deprivation, that might engage human rights issues.

61. I conclude that this case is at the end of the scale where administrative law principles apply rather than biting in any significant way of issues relating to fundamental rights. It was within a range of reasonable responses to the evidence for the respondent to conclude that the condition precedent for section 40(3) BNA 1981 applied given the appellant accepted that he made false representations in previous applications for leave to remain. The respondent made clear that the decision was an exercise of discretion, considered relevant matters, and did not consider irrelevant matters, before concluding that the public interest in preventing fraud in the nationality system justified deprivation. She was fully aware of the appellant's length of residence and family circumstances but was entitled to conclude that those were matters that were relevant to a subsequent assessment of whether it will be appropriate to grant him leave to remain on human rights grounds.

62. Until now, the appellant has faced no meaningful consequences for the lies that he told. But for those lies he would not have been granted ELR, ILR or have been naturalised as a British citizen. The evidence indicates that, aside from this serious deception, which is addressed by the decision to deprive him of citizenship, he is likely to be a hard-working and otherwise

law-abiding person who has strong connections to the UK because of his long residence since he was a child. He and his wife are now well settled and are starting a family.

63. Whether the power to deprive him of citizenship is exercised in a rational and proportionate way will depend on the context and the facts in each case. A decision maker should consider whether, having regard to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. Having weighed the circumstances in this case I conclude that it was reasonable for the respondent to place significant weight on the public interest in deprivation, which will be the usual consequence in a case of this kind. No meaningful factors have been identified that might weigh in the appellant's favour. The human rights arguments put forward on behalf of the appellant throughout the process are more relevant to the proportionality of removal rather than deprivation.

64. For these reasons it was reasonable and proportionate for the respondent to conclude that the appellant obtained citizenship by fraud or false representations and that it is in the public interest to deprive him of a status to which he was never entitled. It is proportionate to deprive the appellant of citizenship because of the public interest in tackling abuse of the nationality system.

65. Whether it is proportionate to remove the appellant from the UK is the next step for the respondent to consider given that he would appear to meet the private life requirements of paragraph 276ADE(1)(iii) of the immigration rules. The immigration rules are said to reflect where the respondent considers a fair balance should be struck for the purpose of assessing private and family life under Article 8 of the European Convention. The situation of the whole family, including a young child, will need to be given careful consideration within the timeframe set out in the decision letter.

DECISION

The appeal brought under section 40A(1) BNA 1981 is DISMISSED

Signed M. Canavan Date 21 September 2021
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application.

The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00021/2019

THE IMMIGRATION ACTS

Heard at Field House by video conference on 09 March 2021 (V)

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JETMIR CANI

Respondent

Representation:
For the appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the respondent: Mr J. Greer, instructed by MyUKVisas

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant (Mr Cani) appealed the respondent's (Secretary of State) decision dated 08 March 2019 to deprive him of British citizenship under section 40 of the British Nationality Act 1981 ('BNA 1981').

3. First-tier Tribunal Judge T. Jones ('the judge') allowed the appeal in a decision promulgated on 03 September 2019. The appellant accepted that there had been deception. When he arrived in the United Kingdom on 30 November 1999 he falsely claimed that he was Kosovan when he is in fact Albanian. He was 16 years old on arrival in the UK. The judge noted the submissions made on behalf of the appellant about his age on arrival and whether the deception was material to the eventual grant of citizenship. He concluded that the appellant continued the deception when he applied for Indefinite Leave to Remain, by which point he was an adult, and when he later applied to naturalise as a British citizen. Had the respondent known about the deception the decisions may well have been different [51]. The judge went on to make the following findings:

> "53. The Appellant has come forward, albeit for reasons of his own, in 2013. The respondent thereafter pursues a course of action, which as Mrs Fell said was under the wrong provisions. This was only recognised latterly in February 2019 when the Respondent withdrew the [earlier] decision to treat the Appellant's decision as a nullity and issued the present notice of decision to deprive him of British citizenship on 8th March 2019.
>
> 54. In that time whilst it could be said the Appellant has benefited from the same – he has also been somewhat uncertain as to his position and perhaps imperilled by it.
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> 55. The Respondent has further compounded that by delaying a decision concerning his wife's application for further leave to remain.
>
> 56. In the meanwhile, the Appellant has on the face of it, blamelessly, having taken the advice of his lawyers pursued his life in the United Kingdom working, integrating in British society, paying taxes and committing no offences.
>
> 57. It is plain to me in the circumstances; and as argued by Mr Greer, that following research into the matters irrespective of the position that the Appellant was in once he had accrued fourteen years' residence in the United Kingdom – the provisions of chapter 55 then in force in September 2013 were indubitably in his favour.
>
> 58. Certainly, from all that I can see, there is nothing to suggest that there was any criminality or other blameworthy behaviour on the part of the Appellant, that should have led the Secretary of state to make an adverse decision against the Appellant at that time.
>
> 59. There is no doubt that the Appellant and his wife enjoy a private and family life in the United Kingdom. This is not disputed. They have set out several difficulties with that being maintained in their home country which has some resonance. Delay has been a significant factor in this matter in terms of the Secretary of State's handling of the Appellant's claim; and, to some extent that of his wife. The Appellant has been in the United Kingdom for nearly twenty years, his wife not far off approaching five.
>
> 60. In my proportionality assessment I have borne in mind fully that the Appellant's removal is not reasonably foreseeable; but there will be an interference with his family and private life as identified. I would also note over and above that at paragraph 28 of Mr Greer's

skeleton argument that the Appellant may be unable to work and that there is a significant impact for the Appellant and his wife as a result.

61. I must bear in mind in this balance that significant weight is to be attached to the public interest. I bear in mind as Mrs Fell submitted at the hearing that there are impacts that follow from such deceit in terms of the effects of decisions makers, policy and public opinion – but it is also of vital importance that the public interest is served – in that applicants do not benefit from their fraud. The Appellant has secured a benefit which is undisputed; but I must also bear in mind that Parliament has charged the Secretary of State and not the judiciary with the responsibility of making decisions, with regards deprivation of citizenship.

62. Case law explains that it can only be in rare cases that appeals would be allowed (BA). However, in this appeal, for the reasons I have stated the Appellant has been under the shadow of a long delay and I have considered EB (Kosovo). Delay is a factor that I can consider in assessing proportionality. The Respondent's own policy was on the face of it with the Appellant in 2013 (see above, at paragraph 46 of this decision); but seemingly, this has not been taken account of by the respondent in the current decision.

63. In these circumstances looking at the public interest, it could be said that these interests are reduced by the length of delay and the development of the Appellant's family life during that period of delay. In all the circumstances in seeking to achieve a balance sheet approach whilst finely balanced I find for the Appellant. The decision to deprive the Appellant of his citizenship does have consequences that flow from it; and these have been fairly described by Mr Greer in his skeleton argument at paragraph 28 thereof.

64. I find in all of the circumstances that such a course, though there is no suggestion the Appellant will be compelled to leave the United Kingdom now; but it is the effect that this decision would then have a disproportionate effect upon the Appellant and his wife. It is all these particular circumstances and for these reasons I find that the respondent's decision interfering with their private and family life is disproportionate. I find for the Appellant."

4. The Secretary of State appealed the First-tier Tribunal decision on the following grounds:

(i) The judge erred in finding that the appellant would have benefited from 14 year policy, which was withdrawn. First, the appellant had not accrued 14 years residence at the date the decision to treat the grant of citizenship as a nullity was served on 09 September 2013. Second, nothing required the Secretary of State to serve a decision within a particular time frame. Third, the judge failed to give any reasons as to why the Secretary of State should have taken into account a policy that was withdrawn in 2014 at the date she made the decision to deprive the appellant of citizenship in 2019.

(ii) The judge erred in his assessment of the weight to be given to the delay in decision making with reference to *EB (Kosovo) v SSHD* [2008] UKHL 41.

5. A previous hearing listed on 11 November 2020 was adjourned due to lack of court time because the relevant Senior Home Office Presenting Officer was unavailable due to the overrunning of another case. Mr Greer indicated that he wanted to make an application for a stay on proceedings pending the outcome of an application for permission to appeal made to the Court of Appeal against the decision of the Upper Tribunal in *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 000128 (IAC). In the absence of the respondent's representative the application was 'parked'.

6. Mr Greer renewed the application at the hearing on 09 March 2021. The most he could say was that an application for permission had been made to the Court of Appeal in *Hysaj*, and that the solicitors dealing with the case were granted funding to file skeleton arguments. I noted that the Court of Appeal case tracker stated that the application for permission had only just been allocated to a judge. At the date of the hearing, there was still no decision on permission.

7. I refused the application to stay the proceedings because (i) it is not an effective use of court time to stay cases pending decisions of the Court of Appeal unless there is an indication that a relevant decision might be imminent; (ii) there has already been a significant delay in deciding the permission application since *Hysaj* was decided in the Upper Tribunal; (iii) it is still not clear when the Court of Appeal might decide the permission application; and (iv) even if permission were granted it may take some time to determine the appeal. In the circumstances, I concluded that a stay in these proceedings was not justified.

Decision and reasons

8. Since the First-tier Tribunal promulgated the decision in this case, the Upper Tribunal published the decision in *Hysaj*. Mr Greer was not instructed to concede the point but accepted that the decision made the case difficult for the appellant. He accepted that a reported decision of a Presidential panel of the Upper Tribunal was persuasive. He acknowledged that there was some force in my observation that the First-tier Tribunal may have conflated the proportionality assessment in a deprivation case with the usual balance sheet approach taken in Article 8 removal cases, but argued that the judge's reasons were tolerably clear for the parties to understand the decision.

9. In *Hysaj* the Upper Tribunal reviewed the case law relating to deprivation of citizenship. The Court of Appeal in *R (KV)(Sri Lanka) v SSHD* [2018] EWCA Civ 2483 noted that deprivation may result in interference with Article 8 rights, but the right to a nationality is not itself a right protected by the European Convention of Human Rights [17]. The Court of Appeal went on to find that where deception was used in an application for naturalisation it would be an unusual case in which the appellant could legitimately complain of the withdrawal of rights arising from naturalisation when the decision would only put him in the position he would have been had he not been fraudulent and had acted honestly in

making the application [19]. The Court of Appeal recognised that there might be some cases where the applicant will be placed in a worse position, for example, if he lost a previous nationality having been granted British citizenship [19]. In such cases the decision-maker will need to consider whether deprivation of citizenship is justified having regard to the consequences of deprivation. A balancing exercise will need to be carried out to assess whether in all the circumstances deprivation of citizenship is proportionate [20].

10. The Upper Tribunal in *Hysaj* went on to make the following findings relating to the scope of an appeal under section 40A BNA 1981:

> "35. The focus of a section 40A appeal is to ascertain the reasonably foreseeable consequences of deprivation, which may involve removal. The Tribunal confirmed in *Deliallisi*, at [56], that even if removal is too uncertain to feature directly as a consequence, the possibility of removal and any period of uncertainty following deprivation may be required to be taken into account in assessing the effect that deprivation would have, not only on the appellant but also on members of his family. While it is necessary for the Tribunal to have regard to the reasonably foreseeable consequences of deprivation when determining whether the making of the deprivation order itself is lawful, it is not necessary for it to go further and conduct a proleptic, or anticipatory, analysis of whether the appellant would be likely to be deported at a later stage: *Aziz*, at [21]-[32].
>
> 36. Sales LJ (as he then was) held in *Aziz*, at [26], that whilst regard is to be had to the reasonably foreseeable consequences of deprivation, an examination of such consequences is only required in so far as it is necessary to make an assessment in relation to them in order to rule upon whether the making of the deprivation order itself will be lawful and compatible with Convention rights, in particular article 8 and section 55 of the Borders, Citizenship and Immigration Act 2009 ('section 55'). This is a fact specific assessment."

11. The Upper Tribunal concluded that the Secretary of State was entitled to rely on the legal position as it stood when, as in this case, an initial decision was made to treat the decision to naturalise as a British citizen as a nullity rather than to deprive the person of citizenship. During the course of various cases it became apparent that a category of cases were suitable for deprivation rather than to be treated as a nullity. There were delays in cases where the Secretary of State had previously treated decisions as a nullity, but following the Supreme Court decision in *R (Hysaj) v SSHD* [2018] INLR 279, made decisions to deprive the person of nationality under section 40 BNA 1981 instead. The Upper Tribunal in *Hysaj* concluded that it was unsustainable to rely on the delay between decisions to reduce the public interest in deprivation [61].

12. The Upper Tribunal went on to reject the contention that the respondent's policy contained in Chapter 55 of the Nationality Instructions involved the exercise of discretion and did not establish a clear and unambiguous

promise that a person will not be deprived of citizenship if they have lived in the United Kingdom for 14 years [67]. The policy was withdrawn on 20 August 2014. The Upper Tribunal concluded that there was no historic injustice because of the lost opportunity to engage the policy arising from the delay. It was open to the Secretary of State to apply the relevant law and policy at the date of the decision [74]. On the facts of the case, the Upper Tribunal rejected the argument that the period of 'limbo' that the appellant would face following deprivation would lead to disproportionate consequences for him and his family. The Upper Tribunal concluded that he would be placed in the same position that he would have been had he not lied about is personal history and identity as an Albanian national [105]. The period of uncertainty was a consequence of the appellant losing rights and entitlements from his British citizenship that he should never have enjoyed [107]. Significant weight must be placed on the public interest in maintaining the integrity of the system by which foreign nationals are naturalised as British citizens. The fact that deprivation would cause disruption to the appellant's life was a consequence of his own actions and without more could not tip the proportionality balance in favour of him retaining the benefits of citizenship, which were fraudulently obtained [110].

13. The facts of this case are similar to those in *Hysaj*. The judge did not have the benefit of the Upper Tribunal decision, but in light of what is said in *Hysaj*, it becomes clear that the First-tier Tribunal's findings involved the making of errors of law.

    (i) The Secretary of State was entitled to rely on the legal position as it stood on 24 July 2013 when she made a decision to treat naturalisation as a nullity.

    (ii) Even if the Secretary of State had made a decision to deprive instead, the judge erroneously concluded the appellant would have met the requirements of Chapter 55 for 14 years residence, when in fact he would have only lived in the UK for a period of 13 years and 8 months at the date of the decision or 13 years and 10 months at the date of service.

    (iii) The judge failed to give adequate consideration to the discretionary nature of the policy, which did not establish a clear and unambiguous promise that citizenship would not be deprived if a person had lived in the UK for more than 14 years.

    (iv) The delay between the nullity decision and the subsequent deprivation decision was given undue weight by the judge in circumstances where the Secretary of State was entitled to rely on the legal position as it stood in 2013 and to apply the relevant law and policy relating to deprivation as it stood in 2019 (well after the 14 year policy had been withdrawn).

    (v) Although the judge's findings between [59-64] seek to conduct a balancing exercise, at times, the focus appeared to be more on the prospect of removal and whether family life could be continued in

Albania [59] rather than the proportionality of depriving him of citizenship, which is a different emphasis to the balance sheet approach usually taken in a human rights appeal. Having found that removal was not reasonably foreseeable, it is arguable that the judge misapplied the principles outlined by the Upper Tribunal in *BA (Deprivation of citizenship: appeals)* [2018] UKUT 85 (IAC). The stronger a person's case for resisting removal the less likely it will be that removal is one of the foreseeable consequences of deprivation and that deprivation would therefore engage the operation of Article 8. The judge placed weight on the practical consequences that deprivation would have on the family in terms of the loss of rights arising from citizenship, but failed to consider whether a period of uncertainty nevertheless was proportionate given that the appellant would be returned to the position he would have been in had he not committed the fraud. This is not a case where any additional factors were raised such as a loss of previous legitimate status or nationality as highlighted in *KV (Sri Lanka)*. Any status the appellant obtained prior to naturalisation was based on the same fraud.

14. For these reasons I conclude that the First-tier Tribunal decision involved the making of errors of law and must be set aside. The findings relating to fraud for the purpose of section 40(3)(a) BNA 1981 were not challenged and are preserved.

15. It is appropriate for the decision to be made in the Upper Tribunal. The appellant did not attend the hearing for the decision to be remade thereby forcing an adjournment. I was informed that there may be developments in his personal circumstances that will also need to be evidenced. The decision will be remade at a resumed hearing in the Upper Tribunal. The outstanding issues for determination will include (i) the exercise of discretion; (ii) whether Article 8 is engaged; and if so (iii) proportionality.

DIRECTIONS

16. The parties agreed with the Upper Tribunal's provisional view that the decision could be remade fairly by way of a remote video hearing, but Mr Greer indicated that further instructions might need to be taken in relation to what witnesses might be called at the resumed hearing. Subject to any further representations that might be made in relation to mode of hearing, the appeal will be listed for a remote hearing.

17. **The appellant** must notify the Upper Tribunal within 7 days of the date of the error of law hearing (i) what witnesses will be called; (ii) if they need the assistance of an interpreter, and if so, in what language; and (iii) any representations on mode of hearing bearing in mind that if it is thought necessary to have a face to face hearing the case may need to be transferred to the Bradford hearing centre.

18. **The parties** shall file and serve any up to date evidence relied upon at least 14 days before the next hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

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

Signed M. Canavan Date 11 March 2021
Upper Tribunal Judge Canavan