Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00050/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 26 April 2021	**On 27 May 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ADMIR (aka AMIR) SHEEHU (aka LITA)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms H Foot, counsel, instructed by Oliver & Hasani Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held as all issues could be fully and comprehensively determined in a remote hearing.

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Bibi ("the judge") promulgated on 30 January 2020 in which she dismissed the appellant's appeal against a decision of the respondent dated 7 May 2019 to deprive him of his British citizenship pursuant to section 40(3) of the British Nationality Act 1981 ("the 1981 Act").

2. The appellant is Admir Sheehu, a national of Albania whose date of birth is 24 February 1985. He entered the UK on 19 April 2001 claiming to be Amir Lita, a national of Serbia (from the Preshevo region, bordering Kosovo) with a date of birth of 24 February 1988. When he entered the UK the appellant was 16 years old, although he claimed to be 14 years old. An asylum claim made by the appellant in his false identity was refused but, by a decision dated 20 August 2001, the appellant was granted four years Exceptional Leave to Remain ("ELR") until 20 August 2005. The appellant was granted ELR "because of the particular circumstances" of his case, although there was no expansion in the decision as to what those "particular circumstances" were.

3. The appellant turned 18 on 24 February 2003. Sometime in 2005 the appellant made an in-time application for Indefinite Leave to Remain ("ILR"). When he made this application he was an adult. The ILR application was made in the appellant's false identity. After a delay in considering this application the appellant was granted ILR on 3 June 2007 in his false identity.

4. On 19 March 2009 the appellant applied for naturalisation as a British citizen. He did so using his false name, his false age and his false nationality. The application was refused because the appellant had a criminal conviction that was not spent. On 14 April 2014 the appellant made a further application for naturalisation as a British citizen. He again did so using his false identity. Section 3 of the naturalisation application form ("Form AN") required the appellant to provide information and to tick boxes marked "yes" or "no" relevant to the Good Character Requirement. Section 3.18 asked:

> "Have you ever engaged in any other activities which might indicate that you may not be considered a person of good character?"

5. The appellant ticked the box next to section 3.18 marked "no".

6. On 28 May 2015 the appellant was issued a Certificate of naturalisation as a British citizen. The Certificate of naturalisation was issued in the appellant's false name and his false date of birth and stated that his place and country of birth was "Presheve, Kosovo".

7. In July 2015 the respondent became aware of the appellant's true name, date of birth and nationality. On 26 September 2018 the respondent wrote to the

appellant informing him that she was considering depriving him of his British citizen status under s.40(3) of the 1981 Act. Following representations made to the respondent by the appellant's legal representatives, in which it was accepted that the appellant had used a false identity, the respondent made her decision to deprive the appellant of his British citizenship. Pursuant to s.40A of the 1981 Act the appellant appealed the decision to make an order to deprive him of his British citizenship to the First-tier Tribunal (Immigration & Asylum Chamber).

The Decision of the First-tier Tribunal

8. The judge considered, *inter alia*, a bundle of documents provided by the appellant running to 425 pages and which included witness statements from the appellant and his partner (Ms Enida Prenci, an Albanian national with leave to remain in the UK), and a skeleton argument provided by Ms Foot. The judge heard oral evidence from the appellant and his partner and submissions from the representatives.

9. In her decision the judge first summarised the respondent's decision letter. It was the respondent's view that the appellant obtained his ELR, his ILR and his British citizenship by way of fraud or false representation and that, had the respondent been aware of the true facts, the appellant would not have been able to build up the residency status which led to him being able to naturalise as a British citizen. Although the respondent did not hold the appellant accountable for his deception when he was a minor, when he completed his ILR application and then when he completed his naturalisation application he was an adult. It was the respondent's view that, had the appellant revealed his true identity as an Albanian, he would not have been granted ILR. It was also the respondent's view that the appellant's use of fraud to obtain ELR, ILR and then in his naturalisation application fell within the terms of section 3.18 of the Good Character Requirement section of Form AN (although wrongly identified as 3.19). The respondent rejected as incredible the appellant's claim to have witnessed civil unrest in Albania and she did not consider there to be a plausible, innocent explanation for the misleading information given by him which led to the decision to grant him British citizenship. The respondent considered, on the balance of probabilities standard, that the appellant provided the false information with the intention of obtaining a grant of status and/or citizenship in circumstances where his application(s) would have been unsuccessful if he told the truth. The respondent concluded that the fraud/misrepresentation/concealment of a material fact was deliberate and material to the acquisition of British citizenship.

10. The judge then summarised the reasons given by the respondent for exercising her discretion to deprive the appellant of his British citizenship. Reference was made to the fact that, at the date of the respondent's decision, the appellant was residing with his Albanian citizen partner and his British citizen child (born in

December 2017 (a second British citizen child was born in December 2019, and the appellant has a son born from another relationship in 2013, both factors considered by the judge), the respondent's view that the deprivation of citizenship would not in itself have a significant effect on the best interests of the appellant's children, the consequences of the loss to the appellant of the right of abode, and that there would not be a significant impact on his partner's status and entitlement to reside in the UK.

11. The judge then accurately set out the relevant legislative provisions (sections 40 and 40A of the 1981 Act) and the relevant extracts from the Home Office guidance in chapter 55 of the Nationality Instructions entitled 'Deprivation and Nullity of British citizenship'. The judge additionally indicated that she had considered a number of authorities and decisions including **Deliallisi (British Citizen: deprivation appeal; Scope)** [2013] UKUT 439 (IAC) ("**Deliallisi**"), **BA (deprivation of citizenship: Appeals)** [2018] UKUT 85 (IAC) ("**BA**"), **Arusha and Demushi (deprivation of citizenship – delay)** [2012] UKUT 80 (IAC), **Pirzada (Deprivation of citizenship: general principles)** [2017] UKUT 196 (IAC) ("**Pirzada**") and **Sleiman (deprivation of citizenship; conduct)** [2017] UKUT 00367 (IAC) ("**Sleiman**"). The judge properly directed herself that the burden of proof in a deprivation appeal lay on the respondent and that the standard of proof was the balance of probabilities.

12. Under the heading 'Findings' the judge set out the material facts leading to the deprivation decision noting the appellant's remorsefulness and that his partner had been granted leave to remain for 30 months as the mother of a British citizen child and that she was subject to a 'no recourse to public funds' condition. At [34] *et seq* the judge summarised the arguments advanced by Ms Foot (who continues to represent the appellant) that the appellant's deception was not material to the grant of ILR and to his naturalisation as a British citizen because even if his true identity was known the respondent would still have granted him leave to remain as an unaccompanied minor (based on an Operational Guidance Note ("OGN") in 2003 indicating that there were no adequate reception facilities for unaccompanied minors in Albania) and then ILR based on a previous policy relating to individuals who had accumulated 4 years ELR, and the submission that it was unfair and unlawful for the respondent to exercise her discretion to deprive the appellant of his citizenship given that he was a minor when he first claimed asylum (at [35]). Ms Foot also submitted that the deprivation was contrary to the appellant's rights under Article 8 ECHR and those of his partner and children given the impact on them of the appellant being left without any status pending any grant of leave to remain.

13. At [41] the judge found Ms Foot's submission that a similar position to that set out in the 2003 OGN in respect of unaccompanied minors was likely to have been in place in 2001, and that the appellant would therefore have been granted some form of leave, to be "speculative". At [43] the judge recorded Ms Foot's

submission that, had the appellant been granted leave to remain as an unaccompanied minor, he would have then been granted ILR and would have been eligible for naturalisation on the basis of his long residence and he would have met the statutory requirements for naturalisation. Any fraud was therefore immaterial to the grant of citizenship.

14. At [45] the judge rejected Ms Foot's submission that the facts of the instant case had similar features to the facts in **Sleiman** as Mr Sleiman was granted ILR under the Legacy policy and due to delay in the SSHD making a decision, which broke the chain of causation. At [46] the judge noted the Presenting Officer's submission that, had the appellant disclosed his true identity, he would not have been granted ILR.

15. At [48] the judge found that the appellant's false representation when he was a minor did not "lead to" the acquisition of citizenship and again referred to the submission made on behalf of the appellant that he was a vulnerable minor on arrival in the UK.

16. At [49] the judge noted that the appellant was an adult when he applied for ILR and that he made false representations in this application. Then at [50] to [55] the judge noted that the appellant had answered 'no' in respect of the good character requirement section of his naturalisation application form (the judge referred to section 3.12, which was the relevant section of the good character requirement section in the 2009 naturalisation application, but it is clear that she had in mind section 3.18 of the 2014 naturalisation application which is in exactly the same terms; nothing turns on this minor inaccuracy). The judge concluded that the appellant knowingly used his false identity in his naturalisation application which led to the grant of his British citizenship and that sections 40(3)(a), (b) and (c) all applied. The appellant's failure to disclose his true identity in respect of the good character requirement section of the Form AN was dishonest and motivated the grant of naturalisation. The judge concluded, at [56], that the concealment was material. At [58] the judge found that, had the true facts been known to the decision-maker, the respondent would not have been motivated to grant the certificate of naturalisation. Then at [59], with reference to **Sleiman**, the judge found that there was a direct material link between the false representation of a material fact and the decision to grant British citizenship. At [60] the judge was satisfied that the appellant's deception in respect of his ILR application led to the grant of citizenship, and then at [61] the judge stated that "even if that were not the case, the Respondent had clearly identified that concealment was deployed in obtaining the grant and the provisions relating to direct materiality apply equally to concealment." The judge acknowledged that revocation of British citizenship was discretionary but was satisfied that the discretion was properly considered by the respondent.

17. At [62] to [64] the judge considered the submission that the deprivation decision would engage Article 8 EHCR irrespective of any further decision from the

respondent that may grant him leave to remain or direct his removal, but found there was no requirement for her to consider Article 8 as his removal was not reasonably foreseeable given the strength of his private and family life links.

18. At [66] and [67], in the section headed 'Conclusion', the judge found that the respondent had followed her guidance and instructions and that it was not appropriate to exercise the relevant discretion any differently.

19. The judge dismissed the appeal.

The challenge to the judge's decision

20. The appellant initially relied on three grounds of appeal. The 1st ground contended that the judge misdirected herself by failing to consider Article 8 ECHR. In an email sent to the Upper Tribunal on 7 April 2021 the appellant's legal representatives indicated that they were no longer relying on the 1st ground of appeal. This position was confirmed by Ms Foot at the 'error of law' hearing. Ms Foot relied on the 2nd and 3rd grounds of appeal, supplemented by the relevant sections of her skeleton argument dated 24 August 2020 and her oral submissions. Mr Whitwell adopted the respondent's written submissions dated 19 August 2020 written by Mr D Clarke and his own skeleton argument dated 26 April 2021 which dealt extensively with the relevance and application of the Supreme Court decision in **R (oao Begum) v SSHD** [2021] UKSC 7 ("**Begum**").

21. The 2nd ground, as amplified by Ms Foot in her skeleton argument and her oral submissions, contends that the judge erred in concluding that the appellant's case was not analogous with **Sleiman**. As the appellant obtained his ILR as a direct result of accumulating 4 years ELR as an unaccompanied minor (which he was on his arrival in the UK even on his true date of birth) he would have been granted ILR in any event had he put forward his true details on arrival. The appellant's eligibility for ILR having established 4 years ELR broke the chain of causation. The judge's analysis of the issue of causation was said to be unclear and the reasons advanced by the judge for distinguishing **Sleiman** were unsustainable given that in **Sleiman** the application for ILR was a distinct act and the grant of ILR did not depend on the deception as to age. The appellant maintains that, had he disclosed his true details, he was likely to have been granted ELR as there were no adequate reception facilities in Albania at the time since, as a matter of public record, Albania was in a state of civil unrest in the late 1990s and the turn of the century, and he would have subsequently been granted ILR, and that it was unreasonable for the judge to conclude that it was mere "speculation" that the appellant would have been granted some form of leave on arrival. The skeleton argument contends that it was not wholly clear that the grant of ELR was based on the appellant's minority as it was granted for 4 years exactly and the decision did not articulate the specific reasons why it was granted. It was not therefore obvious, as suggested by the respondent, that

the appellant would only have been granted 2 years leave to remain rather than 4 years had he disclosed his true identity. In her oral submissions Ms Foot accepted that there was no detailed information before the First-tier Tribunal as to the duration of leave that could be granted to unaccompanied minors under the ELR policy extant at the material time. The skeleton argument further contends that the judge provided no justification for her conclusion that, had the appellant disclosed his true identity, either on claiming asylum or in his ILR application, he would not have obtained ILR. There was said to be no evidence before the judge as to whether the respondent's policy or practice at the time was such that an application for ILR in 2005 would not have been granted had the applicant disclosed a previous fraud during his minority. The grounds further contend that the judge failed to take account of the respondent's policy on deprivation which indicated that where a person obtained ILR on the basis of a concessionary policy, a previous deception may be irrelevant. In response to Mr Whitwell's submission that the grounds did not challenge the judge's decision relating to the appellant's dishonesty in his naturalisation application vis-à-vis the good character requirements, Ms Foot accepted that the issue of the appellant's character at the time of his naturalisation application was a separate issue, but she submitted that ground 2 should be read in respect of the materiality of any dishonesty overall and that there was no evidence as to the appellant's state of mind when the naturalisation application was completed.

22. The 3rd ground, as amplified by Ms Foot in her skeleton argument and oral submissions, contends that the judge failed to consider whether discretion should have been exercised differently taking particular account of the fact that the appellant was a minor when he entered the UK and when his deceit was set in motion, the length of his residence since he initially gave false particulars (18 years) and the length of time since he last relied on his false particulars (5 years). The skeleton argument additionally mentions, as relevant circumstances, that the appellant was departing unrest and violence in Albania, that he felt compelled to act in accordance with an interpreter's instructions, and that he had no knowledge or understanding of the immigration process. No reasons were said to have been given for the conclusion that the respondent's discretion was properly exercised. This was an error of law as the question of fairness and proportionality of deprivation was a central issue in a deprivation appeal.

23. In granting permission to appeal judge of the First-tier Tribunal M Robertson found the 1st ground reasonably arguable. Judge Robertson considered there was less arguable merit in the 2nd ground. Judge Robertson stated:

> "In Sleiman, the Respondent accepted, on the basis of her own records, that the age point was irrelevant to the grant of ILR. This was not accepted by the Respondent in the Appellant's case; the ILR was granted on the basis of the false details put forward by the Appellant in his ILR application. It was open to the Judge to distinguish the case as she did at para 45. It was also open to the Judge to find that had the Appellant revealed his true identity in his ILR application, he would not have obtained ILR (decision para 48). It was also open to the Judge to

> find, in the absence of evidence as to the policies in place in 2001, that the submission that the Appellant would have been granted 4 years ELR even if he has revealed his true identity was speculative (decision para 41). On the basis of those findings of fact, it was open to the Judge to make the finding she in fact made at para 48 of the decision, and paras 19 and 20 of the ground 1 [*sic*] are not reasonably arguable. However, as permission has been granted on grounds 2 and 3, it is not withheld on ground 2."

24. At the 'error of law' hearing Ms Foot indicated that she was content to respond orally to the respondent's written submissions concerning **Begum**. She noted that **Begum** concerned the Special Immigration Appeal Commission ("SIAC") and the Supreme Court's decision was strictly obiter dicta. Her primary position was that the public interest factors at play in the instant appeal were materially different from those under scrutiny in **Begum**, which concerned issues of national security. The Upper Tribunal (and the First-tier Tribunal) was well positioned to exercise the discretion within s.40(3) of the 1981 Act, unlike that in s.40(2). Ms Foot's alternative argument was that, even taking account of Lord Reed's judgement at [66] and [67] of **Begum**, the Tribunal could still consider whether the respondent made an 'error of law' in reaching her decision, and the determination as to whether the precedent fact had been established was still within the Tribunal's remit.

Discussion

25. The judge's decision was promulgated over a year before the Supreme Court handed down its judgement, on 26 February 2021, in **Begum**. **Begum** concerned an appeal to SIAC under s.40A(2) of the 1981 Act against a decision by the Secretary of State for the Home Department ("SSHD") to deprive Ms Begum of her British citizen status pursuant to s.40(2) of the same Act on the basis that the SSHD was satisfied that deprivation was conducive to the public good on national security grounds. The Supreme Court concluded that the role of SIAC in an appeal against a decision taken under s.40(2) of the 1981 Act was not to determine for itself whether the statutory condition for the exercise of discretion was satisfied (that deprivation is conducive to the public good), or to assess for itself how that discretion should be exercised, but was confined to reviewing the SSHD's decision that the statutory condition was satisfied and the SSHD's exercise of discretion on more conventional public law grounds (although there was no such confinement in respect of issues arising under the Human Rights Act 1998).

26. At [66] to [71] Lord Reed, given the decision of the Court, stated:

> "66. In relation to the nature of the decision under appeal, section 40(2) provides:

'(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.'

The opening words ('The Secretary of State may …') indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.

67. The statutory condition which must be satisfied before the discretion can be exercised is that 'the Secretary of State is satisfied that deprivation is conducive to the public good'. The condition is not that 'SIAC is satisfied that deprivation is conducive to the public good'. The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.

68. As explained at paras 46-50, 54 and 66-67 above, 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 (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

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.

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.

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."

27. Having regard to the above extracts and the decision in **Begum** as a whole I cannot accept Ms Foot's submissions and I find that the principles identified by the Supreme Court as to the correct approach to an appeal against a s.40(2) appeal before SIAC equally applies in an appeal against a s.40(3) appeal before the First-tier Tribunal (IAC). Lord Reed observed, at [40], that the statutory provisions dealing with appeals against deprivation decisions, both in respect of SIAC and the First-tier Tribunal (IAC), did not provide any details as to the grounds upon which an appeal may be brought or the principles by which such an appeal should be undertaken. The positions of SIAC and the First-tier Tribunal (IAC) therefore mirror each other in this respect.

28. From [41] to [46] Lord Reed then heavily criticised the decision in **Deliallisi**, which, as with the instant appeal, concerned an appeal to the First-tier Tribunal (IAC) against a decision taken pursuant to s.40(3) of the 1981 Act. His Lordship stated:

> "41. In relation to the scope of the jurisdiction created by section 2B, counsel for Ms Begum and for Liberty referred to some decisions of the Upper Tribunal in which the jurisdiction of the First-tier Tribunal in an appeal under section 40A of the 1981 Act was considered. The earliest of them is *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 439 (IAC) (unreported) given 30 August 2013, which was concerned with deprivation of citizenship under section 40(3) of the 1981 Act. That provision applies where the citizenship results from registration or naturalisation and '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'.
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> 42. In that case, the First-tier Tribunal concluded that it had no power to exercise the Secretary of State's discretion differently, since such a power could only be conferred by express statutory provision. Subject to compliance with the Human Rights Act, the scope of an appeal under section 40A of the 1981 Act, in the view of the First-tier Tribunal, was to examine the facts on which the Secretary of State made the decision, examine the evidence and determine whether the basis upon which the decision was made was made out.
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> 43. The Upper Tribunal, chaired by Upper Tribunal Judge Lane, adopted the opposite approach, holding (para 31) that '[i]f the legislature confers a right of appeal against a decision, then, in the absence of express wording limiting the nature of that appeal, it should be treated as requiring the appellate body to exercise afresh any judgement or discretion employed in reaching the decision against which the appeal is brought'. The judge found support for that position in the earlier judgment of the Upper Tribunal in *Arusha and Demushi (Deprivation of Citizenship)* [2012] UKUT 80 (IAC); [2012] Imm AR 645, another case concerned with a decision made under section 40(3). However, the judge mistakenly understood the judgment in that case to have 'approved' (para 28) remarks made

by the First-tier Tribunal, which the Upper Tribunal had in reality merely recorded (see paras 11 and 14 of its judgment). The judge also found support in remarks made by a minister in the course of a debate during the passage of the 2002 Act through Parliament, which he mistakenly treated (para 34) as revealing Parliament's intention, applying *Pepper v Hart* [1993] AC 593 in a manner which was disapproved in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 58-60. The judge also cited textbook authority that a fresh exercise of judgment was excluded if the decision involved a consideration of matters which were non-justiciable, and stated that that could not possibly be said of a decision under section 40: a questionable proposition so far as some decisions under section 40(2) are concerned, but one which can be accepted in relation to section 40(3). However, the apparent reasoning, that (1) an appellate body's ability to re-take a discretionary decision is excluded if the subject-matter is non-justiciable, and (2) the subject-matter of this decision is not non-justiciable, therefore (3) this decision can be re-taken by the appellate body, is fallacious. It depends on the unstated premise that an appellate body can always re-take a discretionary decision unless the subject-matter is non-justiciable: a premise which, as explained below, is incorrect. The judge also referred in *Deliallisi* to a number of potentially helpful authorities concerned with the scope of appellate jurisdiction, but did not discuss them. It will be necessary to return to some of those authorities.

44. A different approach was adopted by the Upper Tribunal, chaired by Mr C M G Ockelton, in *Pirzada (Deprivation of Citizenship: General Principles)* [2017] UKUT 196 (IAC); [2017] Imm AR 1257. He stated at para 9 of his judgment that section 84 of the 2002 Act did not apply to appeals under section 40A of the 1981 Act, but added that the grounds of appeal, in appeals under section 40A of the 1981 Act, must be directed to whether the Secretary of State's decision was empowered by section 40, and that '[t]here is no suggestion that a Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-sections (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State's discretion.'

45. In *BA (Deprivation of Citizenship: Appeals)* [2018] UKUT 85 (IAC); [2018] Imm AR 807 the Upper Tribunal, chaired by Lane J, repeated what had been said in *Deliallisi* and stated that the passage just cited from *Pirzada* was accordingly not to be followed. In support of his view of the proper ambit of an appeal under section 40A, Lane J cited the decision of this court in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799. However, that decision was not concerned with an appeal under section 40A, but with an immigration appeal subject to the pre-2014 version of section 84 of the 2002 Act (para 36 above), and was therefore not in point.

46. Before considering the authorities concerned directly with appeals to SIAC, it is worth considering some other authorities concerned with the scope of appellate jurisdiction, most of which were cited in *Deliallisi*. It is apparent from them that the principles to be applied by an appellate body, and the powers available to it, are by no means uniform. At one extreme, some authorities, concerned with licensing appeals to courts of summary jurisdiction, have held that such appeals should proceed as re-hearings, reflecting the terms of the relevant legislation and the procedures followed by such courts. Other authorities, concerned with appeals to the Court of Appeal against discretionary

> decisions by lower courts, have held that the scope of the appellate jurisdiction was much more limited. Modern authorities concerned with the scope of the jurisdiction of tribunals hearing appeals against discretionary decisions by administrative decision-makers have adopted varying approaches, reflecting the nature of the decision appealed against and the relevant statutory provisions. Two examples were mentioned in *Deliallisi*."

29. Lord Reed then considered, at [47] and [48], **John Dee Ltd v Comrs of Customs and Excise** [1995] STC 941 and **Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd** [1981] AC 22 which concerned approaches to appeals against discretionary decisions in other jurisdictions, before returning to the context of decisions under section 40(2) of the 1981 Act and setting out the Court's conclusions at [66] to [71]. It is irresistibly clear from the Supreme Court's judgement that it disapproved of the approach taken in **Dellialisi** and consequently in **BA**.

30. Whilst I accept that the assessment needed in a decision taken under s.40(2) of the 1981 Act is more likely to be within the preserve of the Secretary of State, I note that there is significant and material similarity between the two sections: "the Secretary of State *may by order…* if *the Secretary of State is satisfied* that…", both turning on the matters being established to the satisfaction of the respondent as primary decision maker, and that the language utilised by Lord Reed, particularly at [68], suggests the approach is of general application.

31. For these reasons, and having regard to the Supreme Court's rejection of the approach adopted in **Dellialisi**, I am satisfied that the principles established by the Supreme Court in respect of s.40(2) of the 1981 Act are the same in respect of an appeal under s.40(3).

32. Applying the principles of law declared in **Begum** it is apparent that the judge erred in law, through no fault of her own, by determining for herself whether the condition precedent in s.40(3) was met instead of determining whether the respondent was entitled to conclude that it had been met. This error will not however be material if the judge was entitled to reach the findings she did, thereby determining the question as to whether the respondent had acted in a way no reasonable decision maker could have acted in favour of the respondent. If, upon an erroneous but 'correctly' conducted full-merits review, a judge reaches the same decision as the respondent, by definition there was no material error on the part of the judge in finding that the condition precedent was met. I therefore consider whether the judge was entitled to conclude whether the appellant's deception/false representations motivated the grant of citizenship.

33. The judge found that, had the respondent been aware of the appellant's true identity when his ILR application was determined, the respondent would not have granted him ILR. In reaching this conclusion the judge found, *inter alia*, that Ms Foot's submission that the appellant, who was an unaccompanied

minor when he made his asylum application, was likely to have been granted some form of leave was "speculative." The appellant relied on an Operation Guidance Note from 2003 which indicated that there were no adequate reception facilities in Albania at that time. The relevant time however was 2001 (when the appellant's asylum claim was refused and when he was granted ELR) and there was no evidence before the judge as to whether the Secretary of State considered there were adequate reception facilities in Albania at that time. Ms Foot argues that it was a matter of public record that Albania was in a state of civil unrest in the late 1990s and the turn of the century but this highly generalised assertion does not necessarily have any direct correlation to the existence or adequacy of reception facilities for unaccompanied minors. The judge was entitled to conclude that the basis of Ms Foots submission was speculative.

34. However, even if the judge was not so entitled and Ms Foot's submission that the appellant would have been granted some form of leave to remain in 2001 as an unaccompanied minor from Albania holds true, there was nothing before the judge to indicate that the appellant would still have been granted ELR of 4 years duration if his disclosed his true identity. Although Ms Foot's skeleton argument (but not the grounds) contends that it was unclear whether the appellant was granted ELR for 4 years on the basis of his minority, no issue was previously raised in respect of this point by the appellant before the judge, and it is difficult to see what basis other than the appellant's claimed age (and therefore minority) would have motivated a grant of ELR of 4 years duration. In any event, the respondent clearly indicated in her RFRL that the appellant was granted ELR because of his minority (see para 11). Although the respondent's policy relating to grants of ELR to unaccompanied minors was not before the judge, it is difficult to see why the appellant, had he disclosed his true date of birth, would have been granted ELR of 4 years duration rather than 2 years duration which would more or less coincide with his 18th birthday. If the appellant had given his true details there was nothing before the judge to support his assertion that he would nevertheless have been granted ELR for 4 years. He would not consequently have been entitled to ILR on the basis of what is said to have been the respondent's policy at the time.

35. Neither party placed before the judge any relevant policy issued by the respondent relating to applications for ILR by those who had previously been granted 4 years ELR. I note that the ILR application form completed by the appellant in 2005 asked whether there was "any significant new information" which the applicant wished to be considered in connection with the ILR application which was not considered when the applicant was last granted ELR, to which the appellant ticked "no". No reliance was however placed on this by the respondent and it was not considered by the judge at the hearing or considered at the 'error of law' hearing and I therefore exclude it entirely from my consideration. Although Ms Foot is correct in saying there was no evidence that the previous provision of false information relating to a person's identity

was a factor relevant to the grant of ILR, there was no evidence that it was not a relevant factor. In these circumstances, and given that the appellant's deception related to his entire identity (his name, his age and his nationality), the judge was entitled to conclude that he would not have been granted ILR.

36. The judge distinguished **Sleiman** on the basis that the grant of ILR in that case was a consequence of the Legacy policy and due to significant delay in resolving Mr Sleiman's asylum application. As pointed out by Judge Robertson, the Secretary of State in **Sleiman** specifically accepted, based on her own records, that Mr Sleiman's age was irrelevant to the grant of ILR. There was no such evidence of any such acceptance in the evidence before the judge. In the instant case the judge was rationally entitled to conclude that the appellant's deception/false representation in his ILR application, made when he was an adult, did not break the 'chain of causation'.

37. However, even if I am wrong in my above assessment, the judge alternatively relied on an entirely separate and independent basis for concluding that the appellant obtained his British citizenship by means of deception/false representation. This was based on the false representations made by the appellant in his Form AN naturalisation application in respect of the good character requirement. **Sleiman** did not consider the good character requirements respect of a naturalisation application, and the respondent specifically relied on the appellant's response to the good character requirement questions in her decision letter (paragraphs 14 & 17). At [50] to [53], [55] to [57], and [61] the judge concluded that the appellant's negative reply when asked in the Form AN whether he had ever engaged in any other activities which might indicate that he may not be considered a person of good character was a clear false misrepresentation. The judge rejected the appellant's explanation that he misunderstood the question and found that there was no evidence that the appellant was vulnerable at the time of his naturalisation application and that no complaint had been made in respect of the legal assistance the appellant had when he completed the form. Ms Foot submitted that there was no evidence of the appellant's state of mind when he completed the Form AN, but it was open to the appellant to have adduced such evidence at the First-tier Tribunal hearing and there was no suggestion and no cogent evidence before the judge that the appellant was in any way impaired when he completed the form or that he lacked capacity. The judge found that the appellant had taken the decision to lie in respect of his answers to the good character question. This was a conclusion rationally open to the judge on the evidence before her and for the reasons she gave. On this basis alone the judge was entitled to find that the appellant's deception/false representation was directly material to the grant of citizenship. The 2nd ground of appeal consequently discloses no material error of law.

38. In respect of the 3rd ground, applying the principles flowing from **Begum**, the judge adopted the correct approach in not considering the exercise of discretion

for herself but whether it was properly exercised by the respondent. The judge's conclusions at [61], [66] and [67] are brief, but they must be considered in the context of the decision as a whole. The reasons supporting the judge's conclusions are readily discernible from the body of her decision. The judge summarised the respondent's decision in some detail, including the reasons advanced by the respondent as to why she exercised her discretion to deprive the appellant of his citizenship. The judge referred to factors relevant to the lawful exercise of the respondent's discretion including the appellant's relationship with his partner and children, the best interests of the children and the impact of the deprivation decision on the appellant's family members. The judge specifically referred to the exercise of discretion given that the appellant had been a minor when he first claimed asylum and when the deception commenced (see [35] and [48]). The judge noted the respondent's rejection of the appellant's account of having witnessed civil unrest in Albania and his claimed fear of being returned to such conditions. It has not been suggested that the respondent was not entitled to these findings. Both the respondent and the judge were unarguably aware of the appellant's length of residence in the UK, and that he entered as a minor, and that he could not be held accountable for his deception when a minor (e.g. paragraphs 9, 11, 16 of the deprivation decision, [33], [48] of the judge's decision). In so doing the judge was entitled to find that the respondent had properly applied her guidance relating to deprivation decisions. The 3rd ground is not made out.

Notice of Decision

The appeal is dismissed.

D.Blum 13 May 2021

Signed Date
Upper Tribunal Judge Blum