**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: DC/00071/2019**

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 12 November 2021** | **On 23 November 2021** |

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**
**DEPUTY UPPER TRIBUNAL JUDGE G. BLACK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**GENTIAN HOTI**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation**
For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Jones, Counsel instructed by Oliver & Hasani Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State. However, we will refer to the parties as they were designated in the First-tier Tribunal.

2. The respondent is appealing against a decision of Judge of the First-tier Tribunal Swaney ("the judge") dated 4 August 2020 allowing the appellant's appeal against a decision of the respondent dated 6 June 2019 to deprive the appellant of his

British citizenship under section 40(3) of the British nationality Act 1981 ("the BNA Act").

## Adjournment

3. The respondent's application for permission to appeal (to both the First-tier Tribunal and Upper Tribunal) was significantly out of time. The Upper Tribunal extended time and granted the respondent permission to appeal. The appellant has applied to the High Court to judicially review the Upper Tribunal's decision to extend time.

4. Mr Jones sought an adjournment of these proceedings pending determination of the judicial review claim. He argued that (a) the judicial review claim has considerable merit; (b) if the extension of time/grant of permission by the Upper Tribunal is unlawful the Upper Tribunal does not have jurisdiction to decide this appeal; (c) it is of little relevance to the judicial review proceedings whether the respondent has a strong prospect of success in the underlying case and therefore deciding this appeal would not be relevant to the judicial review case; and (d) adjourning this case is consistent with the overriding objective expressed in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as it is not proportionate to proceed when a meritorious High Court application is pending the outcome of which may render this hearing irrelevant.

5. Mr Clarke made several arguments, but it is only necessary to consider one of them, which we accept. This is that the appellant is not prejudiced by these proceedings continuing because (a) he is a still able to pursue, and raise the same arguments in, the judicial review proceedings; and (b) if the appellant succeeds in the High Court, our decision will be nullified as we would not have had jurisdiction, and therefore the appellant will be in no worse position than if we had acceded to the adjournment application. In our view, none of Mr Jones's arguments undermine Mr Clarke's submissions about lack of prejudice. Accordingly, we refused the adjournment application and proceeded with the hearing.

## Decision of the First-tier Tribunal

6. It was common ground before the First-tier Tribunal that the appellant lied about his nationality (claiming to be a Kosovan when he was Albanian) when he entered the UK 1999, when he applied for ILR in 2003 and when he applied for naturalisation as a British citizen in 2005.

7. The judge directed herself that, in order for the appellant to be deprived of citizenship under section 40(3) of the BNA Act, it was necessary for the false representation about his nationality to be directly material to the grant of citizenship. The judge allowed the appeal because she was satisfied that the evidence before her did

not establish that the appellant's misrepresentations about his nationality were in fact directly material to the decision to grant him citizenship.

## Grounds of Appeal

8. The grounds make several arguments but it is only necessary to consider one, which is that the judge's approach to section 40(3) of the BNA Act was inconsistent with the judgment of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7. The arguability of this point was referred to by Upper Tribunal Judge Rimington when granting permission.

## Analysis

9. Section 40(3) of the BNA Act provides:

> The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
> (a)fraud,
> (b)false representation, or
> (c)concealment of a material fact.

10. Prior to *Begum*, it was generally understood that the role of the First-tier Tribunal, when considering section 40(3), was to undertake for itself a full reconsideration of the question of whether a person's registration or naturalisation as a British citizen was obtained by means of fraud, false representation or concealment of a material fact. See *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483 at [6].

11. However, following the decision of the Supreme Court in *Begum*, it is now clear that this is not the correct approach. The correct approach is succinctly summarised in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC), an Upper Tribunal decision which was promulgated after *Begum*. The Upper Tribunal explained:

> The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in *Begum*, ***which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held***. [emphasis added].

12. It is plain that the judge decided for herself, based on the evidence before her, whether the appellant's citizenship was obtained by means of fraud, false representation or concealment of a material fact. It is unsurprising that she did so given that *Begum* had not been published at the time of her decision. Indeed, to have done otherwise would have been, at the time of her decision, erroneous in law as it would have been inconsistent with binding authorities such as *KV*. However, even though the judge cannot be faulted, the approach she adopted was legally erroneous because it is inconsistent with *Begum*.

13. Mr Jones acknowledged that the judge's approach was inconsistent with *Begum*, but argued that any error was immaterial because the judge's findings unequivocally established that the appellant's misrepresentations were not material to the grant of citizenship. He pointed to several paragraphs in the decision where the judge made firm findings to support her conclusion.

14. We do not accept that the judge's error in approach was immaterial. There is a fundamental difference between, on the one hand, a judge deciding for herself, based on the evidence before her, whether or not a false representation was directly material to a grant of citizenship (which is what the judge did); and, on the other hand, a judge considering whether the Secretary of State made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held. It cannot be inferred from the judge's findings of fact that she also was satisfied that the respondent's position, as set out in the decision of 6 June 2019, was based on a view of the evidence that could not reasonably be held.

15. Mr Jones made a further argument that the decision of the respondent in 2017 to grant the appellant ILR is inconsistent with the respondent seeking to deprive the appellant of citizenship. We do not need to decide this point because even if Mr Jones is correct it does not undermine our conclusion that it cannot be inferred from the findings of fact that if the judge had followed the approach required by *Begum* she would have reached the same conclusion.

16. We reserved the decision but invited Mr Jones and Mr Clarke to express a view on disposal in the event that we found there to be a material error of law. Both favoured remittal to the First-tier Tribunal. We agree, for two reasons. First, as the judge found that conditions of section 40(3) were not met she did not proceed to consider whether depriving the appellant of British citizenship would violate article 8 ECHR. As no findings of fact were made on this issue, extensive further fact-finding may be necessary.

Second, *Begum* requires a fundamentally different approach to that taken, as explained above. It is, therefore, in accordance with Section 7 of the Practice Statements of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal to remit the case to the First-tier Tribunal.

**Notice of decision**

17. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

18. The appeal is remitted to the First-tier Tribunal to be made afresh by a different judge.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 18 November 2021