Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: DC/00091/2019
DC/00127/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 23 November 2020 and 14 July 2021
Written submissions received on 22 and 30 March 2021

Decision & Reasons Promulgated
On 11 October 2021

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

ZA AND BA
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For BA and ZA: Ms S. Naik, QC, and Ms M. Sardar (23 November 2021) and Mr P. Saini (14 July 2021), counsel, instructed by Oliver & Hasani
For the Secretary of State: Ms S. Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These proceedings concern the scope of a tribunal's jurisdiction in an appeal under section 40A of the British Nationality Act 1981 ("the 1981 Act") against a decision to make an order depriving a person of their British citizenship under section 40(3) of that Act, in light of the Supreme Court's judgment in R (oao Begum) v Secretary of State for the Home Department [2021] UKSC 7.

Procedural background

2. ZA and BA are joint Albanian-British citizens. They are wife and husband respectively. They naturalised as British citizens on 18 December 2009 and 10 August 2012 respectively. On 22 August 2019 and 14 November 2019, the Secretary of State notified ZA and BA of her decision to deprive each of them of their British citizenship pursuant to section 40(3) of the 1981 Act. They each appealed to the First-tier Tribunal. Their appeals were heard separately, for reasons that are not clear.

3. In a decision promulgated on 7 January 2020 following a hearing on 24 October 2019, Tribunal Judge Chohan dismissed ZA's appeal. In a decision promulgated on 29 January 2020, following a hearing on 15 January 2020, Tribunal Judge Howorth allowed BA's appeal. ZA appealed against the decision of Judge Chohan. The Secretary of State appealed against Judge Howorth's decision. Permission to appeal was granted in respect of both sets of proceedings.

4. The appeals were linked in this tribunal by the order of Upper Tribunal Judge Rintoul. We heard the linked appeals on 23 November 2020 (error of law hearing) and on 14 July 2021 (resumed hearing). On 23 November 2020, ZA and BA were represented by Ms S. Naik, QC, and on 14 July 2021 they were represented by Mr P. Saini, counsel. The Secretary of State was represented by Ms S. Cunha, Senior Home Office Presenting Officer, throughout.

5. On 26 February 2021, shortly before we were due to promulgate our "error of law" decision, the Supreme Court handed down its judgment in Begum, concerning the role of the Special Immigration Appeals Commission ("SIAC") in an appeal against a decision to deprive a person of their British citizenship under section 40(2) of the 1981 Act. We permitted the parties to make post-hearing submissions in writing on the impact, if any, of the judgment on the role of a tribunal in this jurisdiction during an appeal under section 40A of the 1981 Act. We are grateful for Ms Naik's additional written submissions on behalf of ZA and BA, received on 22 March 2021, and those of Ms Cunha, on behalf of the Secretary of State, received on 30 March 2021. In addition, Mr Saini and Ms Cunha provided skeleton arguments ahead of the hearing on 14 July 2021 addressing the issue further, for which we are also grateful.

6. In our "error of law" decision promulgated on 30 April 2021, we found that, on both the pre- and post-Begum understanding of the role of a tribunal on an appeal under section 40A of the 1981 Act, the decisions of Judge Chohan and Judge Howorth involved the making of an error of law, and set the decisions aide, preserving Judge Chohan's findings of fact. We summarise our reasons for doing so at paragraphs 88 and 89, below.

7. We directed that the appeals be reheard in this tribunal and set out our reasons for dismissing both appeals in this decision, following the resumed hearing on 14 July 2021.

Factual background

8. ZA and BA arrived in this country in 2000. BA claimed asylum on the basis that he was a Macedonian citizen of Albanian ethnicity who was at risk of being persecuted as a result of the conflict in the former Yugoslavia. ZA was listed as a dependent to the claim, on the basis that she, too, was a citizen of Macedonia.

9. The claim to be Macedonian was false, and had been made, as BA and ZA now accept, in order to deceive the Secretary of State into recognising the family as refugees, with BA as the

lead claimant. In this decision, we refer to the false claim by ZA and BA to be Macedonian as "*the Macedonian deception*".

10. The Secretary of State initially incorrectly treated BA's asylum claim as having been withdrawn, but later rectified the position, and informed BA that the claim remained pending. On 28 June 2007, the Secretary of State wrote to BA highlighting a statement made to Parliament in July 2006 by the then Home Secretary concerning the backlog of "unresolved asylum cases", stating that Home Department had commenced "a programme to deal with the legacy cases such as yours". The letter invited BA to complete a Legacy Casework questionnaire. This BA did on 3 July 2007, again stating that his nationality, and that of ZA and their two children, each of whom had been born in this country in February 2001 and June 2002, was "Macedonian".

11. BA's questionnaire response highlighted the length of time BA and the family had been waiting for his asylum claim to be determined, contending that the delay had breached their rights under Article 8 of the European Convention on Human Rights ("the ECHR"). BA also highlighted how his asylum application had been "wrongly refused and later withdrawn", referring to the Secretary of State's earlier mistaken assertion that the claim had been withdrawn as outlined above.

12. On 7 March 2008, the Secretary of State informed BA that he, ZA, and their two children, were each being granted indefinite leave to remain. The letter stated:

> "Your case has been reviewed. Having fully considered the information you have provided, and because of the individual circumstances of your case, it has been decided to grant you indefinite leave to remain in the United Kingdom. This leave has been granted exceptionally, outside the immigration rules. This is due to your length of residence in the United Kingdom.
>
> Your dependents listed below have been granted leave in line…"

The letter proceeded to list ZA, and the couple's two children, as dependents. It specified each of their nationalities as "*Macedonian (Former Yugoslav Republic of)*".

13. On 12 October 2009, ZA applied to naturalise as a British citizen. She was granted British citizenship on 18 December 2009, in her identity as ZA, with her given date of birth, on the basis she had been born in Gradec, Macedonia (Former Yugoslav Republic of).

14. On 13 April 2012, BA applied to naturalise as a British citizen, and was granted British citizenship on 10 August 2012, in the identity he provided which purported that he had also been born in Gradec. An earlier application for naturalisation, dated 22 September 2009, had been refused, as BA had an unspent conviction, so his successful citizenship application was his second application.

15. In her decision letters dated 22 August and 14 November 2019, the Secretary of State informed ZA and BA that as a result of investigations which revealed their true (Albanian) identities, she considered that they had engaged in fraud that was material to their acquisition of British citizenship. She considered that it would be appropriate to exercise her discretion to deprive ZA and BA of their citizenship, that to do so would not breach their rights under Article 8 of the ECHR, would be compatible with the best interests of their minor children, and would not render them stateless.

16. In ZA's decision, having set out the facts as summarised above, the Secretary of State said the following, at [14]:

> "You made an application to naturalise as a British citizen which was received by the Home Office on 12 October 2009. Within this you gave your details as [ZA] born 2 June 1978 in Gradec, Macedonia. You failed to declare any previous names… Section 3 dealt with the good character requirement. Question 3.12 asked if you had engaged in any other activities which might indicate that you may not be considered a person of good character. You answered 'No' to this. You confirmed you had read the guide *Naturalisation as a British Citizen*. You signed the declaration acknowledging you were aware that to give false information knowingly or recklessly is a criminal offence and declaring that the information in the application was correct. On this basis you were granted British citizenship and naturalised on 18 December 2009 in the identity of [ZA] born 2 June 1978 in Gradec, Macedonia (Former Yugoslav Republic of)."

17. The decision outlined the representations advanced by those representing ZA against deprivation. ZA claimed that her husband was advised by other Albanians that the family would be returned to Albania if their true identities were known. The family had lived in the United Kingdom for over 18 years. Leave was granted under a legacy regime, and the asylum claim was not relevant to that grant, which was based on the length of the family's residence, and was akin to an amnesty. Deprivation would be a disproportionate interference with ZA's ECHR rights due to the impact on the family and children. There had been delay on the part of the Secretary of State.

18. The decision rejected the mitigation proffered. Under chapter 55.7.8.4 of the Nationality Instructions, the fact that an adult was advised by a relative or agent to give false information does not indicate that they were not complicit in the deception. All adults are legally responsible for their own citizenship applications. Under paragraph 55.7.6, length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship. It was accepted that ZA's identity details were not the "deciding factor" in the grant of indefinite leave to remain:

> "However, it is unreasonable to attempt to separate the details provided in the asylum claim from the grant of ILR. The length of your residence would never have been accrued had you been honest about your identity when making your asylum claim as you would almost certainly have been returned to Albania and so this deception can be seen to be material to the subsequent grant or ILR."

19. In relation to the claimed consequences of deprivation, having quoted from Ahmed and Others (deprivation of citizenship) [2017] UKUT 118 (IAC) at [30] to the effect that a deprivation order does not equate to a removal decision, the decision stated:

> "Once deprivation action is taken you will be considered for any relevant leave and at this point Article 8 arguments will be considered. There is no reason to believe deprivation will have any particular effect on your children given this action relates solely to yourself."

20. Then at [24], the decision stated:

> "The deception you have practised also counts against your good character. Question 3.12 in your naturalisation form asked if you had engaged in any other activities which might indicate that you may not be considered a person of good character. You answered 'No' to this. You confirmed you had read the guide *Naturalisation as a British Citizen*. In the guide the following advice is given, "You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was. Checks will be made in all cases and your application may fail and your fee will not fully be refunded if you make an untruthful declaration. If you are in any doubt about whether you have done something or it has been alleged that you have done something which might lead us to think that you are not of good character you should say so." your answer here is further deception as this clearly gives you the opportunity to state your prior deception regarding your identity. Chapter 18, annex D of the nationality instructions in force at the time contained guidance for caseworkers regarding the good character requirement. Section 9.1 advised that any attempt to lie or conceal the truth should count heavily against the applicant. So, had the case worker known of your prior and continued deception your application for citizenship would certainly have been refused on good character grounds."

21. As to the exercise of discretion, the Secretary of State considered that, notwithstanding the representations made on behalf of ZA, deprivation would be both reasonable and proportionate. Upon deprivation, any immigration status held prior to naturalising as a British citizen would not be restored, but the decision itself would not require ZA to leave the country. "Accordingly, although deprivation may culminate in a decision to remove you, it is not necessary to take into account the impact that removal would have on you and your family members." See [28].

22. At [31], in relation to the best interests of the appellant's minor children, the letter states;

> "Deprivation of your citizenship (as distinct from removal or deportation) will not, in itself, have a significant effect on the best interests of your children. It would neither impact on their or your husband's status in the United Kingdom, nor is there any evidence that it will impact on their education, housing, financial support or contact with you. Whilst it is acknowledged that deprivation may have an emotional impact on your children, taking into account the seriousness of the fraud, misrepresentation or concealment of material facts, it is a reasonable and balanced step to take."

23. The letter continued to outline why no issues arose in relation to statelessness, and in relation to the practicalities of the process of deprivation, at [34]:

> "consideration may also be given on whether a limited form of leave can be given. A decision on this matter will follow once the deprivation order is made."

And at [35]:

> "In order to provide clarity regarding the period between loss of citizenship via service of a deprivation order and the further decision to remove, deport or grant leave, the Secretary of State notes this will be relatively short:
>
> - a deprivation order will be made within four weeks of your appeal rights being exhausted, or receipt of written confirmation from you that you will not appeal this decision, whichever is the sooner.
> - within 8 weeks from the deprivation order being made, subject to any representations you make, a further decision will be made either to remove you from United Kingdom, commence deportation action... or issue leave."

24. The decision in relation to BA took a substantially similar form. Similar representations seeking to resist deprivation were made by BA as had been made by ZA, and the Secretary of State responded to like effect. BA had been an adult at the time he made his false representations to the Home Office , and he maintained that deceit for 18 years. In relation to the legacy programme, it would have been possible to have returned him to the relatively safe country of Albania. The grant of indefinite leave to remain was made under false pretences. The length of residence would never have been accrued had BA been honest about his genuine identity when he claimed asylum. The deception was thus material to the subsequent grant of indefinite leave to remain. The legacy regime was not, as had been suggested by BA, an amnesty. Similarly, BA had declared on his application for naturalisation that he was of good character, despite his fabricated identity and history of deception. Had he told the truth, it was highly likely that he would have been refused citizenship on good character grounds. The deception was thus material in two respects. First, it led to the grant of indefinite leave to remain. Secondly, he would never have been deemed to be of good character had the deception been revealed. The remainder of the letter made identical points in relation to Article 8, statelessness, and the possibility of leave to remain being granted in the future as had been made in ZA's letter.

LEGAL FRAMEWORK

25. In light of Begum, it is necessary first to address the role of a tribunal of this jurisdiction in an appeal under section 40A of the 1981 Act.

26. A person may acquire naturalisation as a British citizen in accordance with section 6(1) of the 1981 Act:

> "6. - Acquisition by naturalisation.
>
> (1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen."

27. Schedule 1 to the 1981 Act sets out the requirements for naturalisation as a British citizen. This includes at paragraph 1(1)(b) "that he is of *good character* ". Good character is not defined under the 1981 Act. The Secretary of State has adopted guidance from time to time on the meaning of the term.

28. Section 40 of the 1981 Act empowers the Secretary of State to deprive a person of their British citizenship in certain circumstances:

> "(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact."

The criteria in section 40(2) and (3) operate as a condition precedent to the Secretary of State's exercise of her power to deprive a person of their citizenship. The power to deprive is discretionary ("the Secretary of State *may*"), with the consequence that the Secretary of State must decide whether to exercise the power to deprive, even if she is satisfied that a statutory condition precedent to doing so is met.

29. There is a right of appeal to the First-tier Tribunal against the Secretary of State's decision of her intention to exercise the power under section 40, rather than the deprivation order itself: see section 40A(1). It follows that, during the currency of any pending proceedings challenging a decision to make a deprivation order, the individual concerned will remain a British citizen.

The role of a tribunal in an appeal under section 40A of the 1981 Act

30. The proceedings in Begum concerned a decision of the Secretary of State to deprive a British citizen of her citizenship under section 40(2) of the 1981 Act, on the basis that the Secretary of State was satisfied that deprivation was conducive to the public good on national security grounds. The appeal was originally heard by SIAC (before a constitution which featured a member of the panel in these proceedings), as the Secretary of State had certified that the decision was taken in reliance upon information which, in his opinion, should not be made public in the interests of national security, under section 40A(2) of the 1981 Act.

31. Prior to the Supreme Court's judgment in Begum, it was settled law, as summarised in KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483 at [6], that if on appeal *a tribunal* is satisfied that a condition precedent in section 40(3) is established, it was then necessary to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently.

32. In KV the Court of Appeal outlined the approach taken by this tribunal in Deliallisi (British Citizen: deprivation appeal; Scope) [2013] UKUT 439 (IAC) and BA (deprivation of citizenship: Appeals) [2018] UKUT 85 (IAC) concerning appeals under section 40A. The relevant extract of the Headnote to Deliallisi provides:

> "(1) An appeal under section 40A of the British Nationality Act 1981 against a decision to deprive a person of British citizenship **requires the Tribunal to consider whether the Secretary of State's discretionary decision to deprive should be exercised differently.** This will involve (but not be limited to) ECHR Article 8 issues, as well as the question whether deprivation would be a disproportionate interference with a person's EU rights." (Emphasis added)

33. This approach was reflected in BA, the Headnote to which states:

> "(1) In an appeal under section 40A of the British Nationality Act 1981, the Tribunal must first establish whether the relevant condition precedent in section 40(2) or (3) exists for the exercise of the Secretary of State's discretion to deprive a person (P) of British citizenship.
>
> (2) In a section 40(2) case, the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue.
>
> (3) In a section 40(3) case, the Tribunal must establish whether one or more of the means described in subsection (3)(a), (b) and (c) were used by P in order to obtain British citizenship. As held in Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 (IAC) the deception must have motivated the acquisition of that citizenship.
>
> (4) In both section 40(2) and (3) cases, the fact that the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.
>
> (5) As can be seen from AB (British citizenship: deprivation: Deliallisi considered) (Nigeria) [2016] UKUT 451 (IAC), the stronger P's case appears to the Tribunal to be for resisting any future (post-deprivation) removal on ECHR grounds, the less likely it will be that P's removal from the United Kingdom will be one of the foreseeable consequences of deprivation.
>
> (6) The appeal is to be determined by reference to the evidence adduced to the Tribunal, whether or not the same evidence was before the Secretary of State when she made her decision to deprive."

34. It appears that there was no dispute between the parties in those proceedings as to that being the correct approach. See Leggat LJ, at [6], with emphasis added:

> "I would endorse the following principles which are articulated in [Deliallisi and BA] and **which I did not understand to be in dispute on this appeal**".

35. The principles then summarised by Leggat LJ, at [6(1)] and following, were as follows:

> (1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.
>
> (2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.
>
> (3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) 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.
>
> (4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.
>
> (5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently.
>
> (6) As it is the Secretary of State who has been charged by Parliament with responsibility for making decisions concerning deprivation of citizenship, insofar as the Secretary of State has considered the relevant facts, the Secretary of State's view and any published policy regarding how the discretion should be exercised should normally be accorded considerable weight (in which regard see Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799).

36. In Begum, the Supreme Court reversed the approach at sub-paragraph (1) in relation to appeals to SIAC, in the context of an appeal under section 2B of the Special Immigration Appeals Act 1997 ("the 1997 Act"), which makes provision for a right of appeal to SIAC in certified national security cases in *lieu* of the right of appeal to the tribunal conferred by section 40A of the 1981 Act in non-certified cases. The court held that the appellate role of SIAC in an appeal against a decision under section 40(2) of the 1981 Act is confined to one which more readily correlates with a conventional public law review standard.

37. In our judgment, the Begum approach extends to an appeal under section 40A to the First-tier Tribunal and the Upper Tribunal against decisions taken under section 40(2) and (3). We

reject the submissions that this aspect of Begum was confined to SIAC appeals, or conduciveness appeals under section 40(2), for the following reasons.

38. First, at [40] the Supreme Court prefaced its discussion of the statutory framework governing appeals against deprivation of citizenship decisions to SIAC with the observation that there is no statutory provision governing the grounds of appeal on which an appeal under section 2B may be brought, the matters to be considered, or how the appeal should be determined. It added:

> "The same appears to be true of an appeal to the Tribunal under section 40A of the 1981 Act."

The starting point is that there is no express statutory provision governing the role of the First-tier Tribunal or the Upper Tribunal in an appeal under section 40A, just as there is no corresponding provision governing the same process in SIAC. Many of the general principles set out by the Supreme Court when discerning the role of SIAC on an appeal against a section 40(2) decision will, therefore, be relevant to an appeal to the tribunal under section 40A.

39. Secondly, at [43] and following the court was critical of the reasoning of this tribunal in Deliallisi and BA, in particular the following extract taken from [31] of Deliallisi:

> "If 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."

(In this decision, we use the term "full-merits" in the context of a deprivation of citizenship appeal to encapsulate the Deliallisi and BA standards of review.)

40. The Supreme Court's criticism of Deliallisi's full-merits approach was multi-faceted, at [43]:

a. Whereas the tribunal in Deliallisi had purported to find support for the full-merits approach in Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC), it had:

> "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)."

b. The tribunal had mistakenly treated a ministerial statement made to Parliament during the passage of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") concerning the scope of the rights of appeal under section 40A and 2B as revealing the parliamentary intention behind the legislation, in a manner disapproved by the House of Lords in Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816 at [58]. There, Lord Nicholls of Birkenhead said:

> "A clear and unambiguous ministerial statement is part of the background to the legislation. In the words of Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 635, such statements

> 'are as much background to the enactment of legislation as white papers and Parliamentary reports'. But they are no more than part of the background. As I emphasised in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 399, however such statements are made and however explicit they may be, they cannot control the meaning of an Act of Parliament."

c. The tribunal had conflated the apparently justiciable nature of decisions under section 40 with the entitlement of a tribunal to conduct a full-merits review, relying upon *Jacobs, Tribunal Practice and Procedure* (2nd Edition). The Supreme Court held:

> "[T]he [tribunal's] 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."

41. In BA, this tribunal considered that it had found support for the full-merits approach to the determination of a deprivation appeal in Ali v Secretary of State for the Home Department [2016] UKSC 60. "However," noted Lord Reed at [45], "that decision was not concerned with an appeal under section 40A, but with an immigration appeal subject to the pre-[Immigration Act 2014] version of section 84 of the 2002 Act… and was therefore not in point."

42. The Supreme Court's criticism of Deliallisi and BA was significant because they were cases concerning appeals against section 40(3) decisions. That disposes of the argument that Begum is confined to section 40(2) national security cases, although we will consider the additional arguments in any event.

43. The court observed at [46] that the approach of the authorities concerning appellate tribunals or courts when considering discretionary decisions by administrative decision makers varied, reflecting the decision appealed against and the relevant statutory provisions. See the discussion of 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 at [47] and [48] respectively.

44. In Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd [1981] AC 22 at 60, it was significant that the governing legislation required the VAT Tribunal to, "consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight." The principle was not confined to the tax context, "but turned on the nature of the discretion and the fact that it had been confided to the primary decision maker" [48].

45. Significantly for present purposes, at [66] the court analysed the wording of section 40(2), which 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."

Lord Reed continued:

> "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."

46. In her written submissions, despite accepting the existence of an apparent tension between KV (Sri Lanka) and Begum (see paragraph 9), Ms Naik contends that a different approach is required in section 40(3) cases, thereby distinguishing Begum, and preserving KV's endorsement of Deliallisi and BA. Decisions as to what is "conducive to the public good" in the national security context are, she submits, the paradigm example of decisions which may properly be said to be the preserve of the Secretary of State. The public interest in section 40(3) deprivations differs from that at play in national security section 40(2) cases. By contrast, the expertise to determine section 40(3) matters is not the preserve of the Secretary of State, and a tribunal will not be subject to the same institutional and competence-based constraints as SIAC would be in an appeal against a section 40(2) decision. The public interest underpinning section 40(3), submits Ms Naik, is the integrity of the citizenship process. That is a matter that a tribunal "is better suited to consider" and is "well-used to considering, for example, whether or not deception has taken place, and whether or not such deception is material" (see paragraph 13). Mr Saini advanced essentially the same point in his own written and oral submissions: see paragraph 17 and following.

47. Mr Saini also relied on R (oao Steinfield and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) [2018] UKSC 32 as authority for the proposition that "the concept of giving deference [to questions of special weight relating to matters primarily within the institutional competence of the executive] accorded to state's [sic] in interfering with fundamental rights" at [28] and [29]: see paragraph 18 of his skeleton argument. Steinfield's case concerned the claimed justification for the exclusion of heterosexual couples from civil partnerships under Article 14 ECHR and is of no assistance to ZA and BA. The extract relied upon by Mr Saini concerned whether the margin of appreciation enjoyed by states parties to the ECHR in proceedings before the European Court of Human Rights ("the ECtHR") extended to national authorities resisting challenges brought on ECHR grounds before domestic courts. As held by Lord Kerr at [28]:

> "…the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified."

48. We accept that the Supreme Court in Steinfield touched upon the need for appropriate judicial deference towards certain decisions taken by the executive, with the effect that "a measure of latitude should be permitted in appropriate cases" (see [29]). While we agree that national security decisions are the paradigm example of situations attracting "a measure of latitude" on the part of the courts, it does not follow that decisions taken by the executive which do not fall into that category are without more subject to a full merits-based review on appeal.

49. We accept the that the institutional competence of the Secretary of State in national security matters will necessarily require any court or tribunal to adopt a deferential approach to the Secretary of State's assessments of such matters in any statutory appeal. Non-national security decisions taken on conduciveness grounds under section 40(2) will require a similarly deferential approach. Determining whether something is "conducive to the public good" falls squarely within the Secretary of State's institutional competence. See paragraph (2) of the Headnote to BA, concerning, by definition, non-national security matters:

> "In a section 40(2) case, the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue."

50. However, we reject the premise of Ms Naik's submission, and that advanced by Mr Saini to the same effect, that decisions under section 40(3) are entirely within the competence of a court or tribunal such that the KV (Sri Lanka) full merits approach remains good law:

    a. First, the primary decision maker under section 40(3) is the Secretary of State, not a tribunal: "the *Secretary of State* may…" The wording in section 40(3) is identical to the operative wording in section 40(2) which was instrumental in the Supreme Court holding that SIAC is not entitled to step into the shoes of the Secretary of State. As the court noted at [67] of Begum:

    > "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."

    By the same token, that approach must apply to appeals against section 40(3) decisions before the tribunal.

    b. Secondly, the operative decision to be taken is whether the *Secretary of State* is satisfied that the registration or naturalisation was obtained by means of fraud, false representation, or concealment of a material fact, not whether a *tribunal* is satisfied. Ms Naik's submissions, and the parallel submissions of Mr Saini, conflate the justiciability of the underlying subject matter with the standard of review, which is precisely the "fallacious" approach adopted in Deliallisi deprecated by the Supreme Court at [43]: see paragraph [40], above. The fact that this tribunal and the First-tier Tribunal have substantial experience in determining the presence of dishonesty, fraud or misrepresentations in some (usually human rights) contexts, or even ascribing weight to the public interest in the maintenance of effective immigration

controls (see section 117B(1) of the 2002 Act), does not entitle it to re-take a decision which Parliament has confided in the Secretary of State.

c. Thirdly, given it is the Secretary of State who grants certificates of naturalisation or causes persons to be registered as British citizens, the Secretary of State is as well placed, if not better placed, to determine whether fraud, false representation or the concealment of some material fact was an operative factor in causing her to do so. The Secretary of State has both the institutional competence and the public interest obligation to act as guardian of the integrity of the citizenship process, rendering her the pre-eminent authority on section 40(3) matters. We reject Ms Naik's submission that the tribunal is "better suited" to consider these matters. It is not. See, for example, Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 128 (IAC) at [31]: "It is the respondent, rather than the Tribunal, who is primarily responsible for determining and safeguarding the public interest in maintaining the integrity of the rights flowing from British citizenship."

d. Finally, this was precisely the argument rejected by the Supreme Court at [43] of Begum, as outlined at paragraph 40.c, above

51. Drawing this aspect of our analysis together, the operative criteria to which the Secretary of State is subject are identical in subsections (2) and (3), such that the reasoning of the Supreme Court must read across to appeals to the tribunal. In both provisions, the role of the Secretary of State is the same: "the Secretary of State *may by order…* if *the Secretary of State is satisfied* that…" Precisely the same discretion is confided to the Secretary of State as with a decision under section 40(2). There is nothing to suggest that, notwithstanding the identical wording in section 40(3), a tribunal must stray into full merits territory. Both provisions reflect the institutional competence and obligations of the Secretary of State in relation to citizenship matters.

52. Before we conclude on this point, we must address a submission made by Ms Naik and Mr Saini that KV (Sri Lanka) was not citied in argument before the Supreme Court in Begum. Underhill LJ made similar observations in Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 at [40] in a *Postscript* addressing the import of Begum in a deprivation appeal, in circumstances when Begum had been handed down after the Court of Appeal's hearing on 21 January 2021, but before the judgment was handed down, on 20 May 2021.

53. In Laci, the Albanian appellant had arrived in the UK aged 16, but purported to be a 14 year old Yugoslav national from Kosovo, providing false details as to his parents' nationalities to support the deception. He claimed asylum on that basis. The claim was refused, but he was granted exceptional leave to remain, and later indefinite leave to remain, subsequently naturalising as a British citizen, all in his false Yugoslav identity. The appellant's mother later applied for entry clearance to visit him using her true identity, leading in 2009 to the Secretary of State informing the appellant that she had reason to believe that he had obtained his citizenship by deception, seeking representations in response, which he provided. After a nine year delay, the Secretary of State decided to deprive the appellant of his British citizenship. In the lengthy interim period, the appellant had renewed his British passport in his assumed identity, without difficulty, and had assumed no further action would be taken. The First-tier Tribunal allowed the appellant's appeal against the deprivation of his citizenship. That decision was overturned by this tribunal, and later restored by the Court of Appeal.

54. The operative reasoning in Laci raised no new issue of principle. The central issue was whether the First-tier Tribunal had been entitled to allow the appeal, on the basis of the law as understood prior to Begum. On any view, the facts were unique, and the delay by the Secretary of State had been "remarkable" (see [8]), as Underhill LJ stressed at [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 of the exceptional combination of circumstances in the present case that the FTT was entitled to come to the decision that it did."

55. For present purposes, further details of the case-specific analysis in Laci are not necessary. What *is* significant, however, is the *Postscript* at [40] of the judgment of Underhill LJ. Having outlined the key authorities concerning the deprivation of citizenship, Underhill LJ said, with emphasis added:

> "*Postscript*. When this judgment was circulated to counsel in draft, [counsel for the Secretary of State] 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 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*.**"

56. Pausing here, in his preceding review of the authorities concerning the deprivation of citizenship, Underhill LJ repeatedly underlined the need to read the existing authorities subject to the discussion of Begum at [40] of his judgment: see [24] and [37] concerning BA;

[27], concerning Leggat LJ's summary of the relevant legal principles at [6] of KV (Sri Lanka); [30], concerning [16] of KV (Sri Lanka) in which Leggat LJ held that, in an appeal under section 40A of the 1981 Act, the tribunal has to decide "…not just whether it would be rational to make [a deprivation] order *but whether it would be right to do so*"; and [32], concerning the scope of the proportionality assessment in a deprivation appeal in light of the *dicta* of Lord Mance, Lord Carnwath and Lord Sumption in Pham v Secretary of State for the Home Department [2015] UKSC 19. It is plain that the Court of Appeal considered that many of the existing authorities may not have survived the Supreme Court's judgment in Begum.

57. Against that background, we return to the submissions of Ms Naik and Mr Saini, and the observation of Underhill LJ at [40] of Laci, that KV (Sri Lanka) does not appear to have been cited to the Supreme Court in Begum. At the hearing on 14 July 2021, Ms Cunha informed us that her instructions were that KV (Sri Lanka) had not been cited by the Secretary of State before the Supreme Court in Begum because it was not relevant to the issues before the court on that occasion; it contained no operative analysis over and above that which featured in Deliallisi and BA, and merely restated the principles enunciated in those cases as common ground.

58. We recall that KV (Sri Lanka) did not concern the role of an appellate court or tribunal in relation to reviewing a decision under section 40(3). Its focus was whether the EU law doctrine of proportionality is engaged by a deprivation decision ([13] to [20]); which party bears the burden of proving stateless ([21] to [27]); the meaning of statelessness ([28] – [30]) and matters relating to the proof of Sri Lankan law specifically and foreign law generally ([31] to [40]). As we have summarised at paragraphs 31 to 35, above, it was common ground in those proceedings that the approach in Deliallisi and BA was correct. There was no dispute in KV as to what were then thought to be the relevant principles governing an appeal against a decision taken pursuant to section 40 of the 1981 Act, which Leggat LJ summarised at [6] of KV. In doing so, Leggat LJ summarised, and adopted wholesale, the conclusions of Deliallisi and BA. Indeed, as Underhill LJ himself observed at [35] of Laci, the summary of what was common ground in KV was not the result of argument.

59. Nothing in the submissions of Ms Naik or Mr Saini demonstrated that the Court of Appeal's analysis in KV (Sri Lanka) added to, or differed from, that which featured in Deliallisi and BA. The reader of KV (Sri Lanka) will search in vain for any analysis additional to that found in those authorities of this tribunal. It follows that the Supreme Court's analysis – and criticism – of Deliallisi and BA applies with equal force to KV (Sri Lanka)'s endorsement of those authorities, and its ensuing summary of the applicable principles on an appeal under section 40A. It follows that nothing turns on the fact that KV (Sri Lanka) does not appear to have been cited in argument before the Supreme Court in Begum.

60. Mr Saini additionally submits that, if Begum necessitated a departure from the full merits approach, the Court of Appeal in Laci would have considered itself bound to resolve the appeal before it through the lens of Begum. By virtue of the fact it did not, submits Mr Saini, it demonstrates that the KV (Sri Lanka) full merits approach remains good law which binds this tribunal. We disagree. It appears that the Court of Appeal in Laci did not hear argument on the Begum point (see [40]: Begum "was handed down subsequent to the argument before us"). Significantly, the court in Laci *did* underline – on five occasions (see [56], above) – the need to read the existing authorities concerning the deprivation of citizenship as subject to Begum. In addition, at [40] the court observed that the reasoning in Begum may not be confined to appeals under section 2B of the 1997 Act, or to appeals under

section 40(2) of the 1981 Act, thereby indicating that the earlier authorities may need to be revisited. In our judgment, there is nothing in Laci that requires us to continue to treat the full merits approach as binding; it does not survive the Supreme Court's judgment in Begum, which does bind us. In any event, in Laci the Secretary of State chose not to advance a fresh ground based upon Begum, which was only drawn to the Court of Appeal's attention at a relatively late stage in the chronology of the proceedings, namely when a draft judgment was circulated under embargo terms. On any view, that would be a very late stage at which to seek to advance a significantly different case. The Secretary of State did not proactively draw the Court of Appeal's attention to Begum despite the fact it was handed down shortly after the hearing in Laci, so it would be surprising if, having waited until a draft judgment was circulated, the Secretary of State then sought to adopt a completely different approach in light of Begum, especially given the court's own repeated exhortations to procedural rigour.

61. Mr Saini also submits that the position of the Secretary of State in these proceedings is inconsistent with that which she took before the Court of Appeal in Laci. Whereas Ms Cunha's written and oral submissions invited us to depart from the full merits approach in light of Begum, leading counsel for the Secretary of State in Laci did not. Further, submits Mr Saini, the Court of Appeal in Laci highlighted what it considered to be the inconsistent or incomplete citation of authorities by the parties to deprivation of citizenship appeals, in particular the Secretary of State: see [85]. In our judgment, the claimed "inconsistency" does not tie our hands. In any event, the two situations may readily be distinguished; whereas in Laci the Secretary of State drew the Court of Appeal's attention to Begum at a relatively late stage in the proceedings, in these proceedings this tribunal drew the attention of the parties to Begum, specifically inviting further submissions on the import of the case, at a stage in the appeal process where it was clear that the decision of the First-tier Tribunal would have to be remade (in our analysis of the decisions of the FTT, below, we set out why, even in the absence of Begum, we would have allowed both appeals). For the reasons set out below, even on the pre-Begum understanding of the law, we would have allowed each appeal, and directed that the decisions be remade in this tribunal, albeit for different reasons. It is necessary for this tribunal to determine the import of Begum, regardless of the position the Secretary of State has taken in these – or other – proceedings.

62. A further argument advanced by Mr Saini in favour of retaining the full merits approach notwithstanding Begum was that a "review only" approach to the role of a tribunal would have corresponding, and disadvantageous, consequences for other appeals. Mr Saini cites the Secretary of State's discretion-based decision making in Part 9 of the Immigration Rules, the General Grounds for Refusal. See paragraph 24 of his skeleton argument, stating that this approach:

> "…would mean that appeals challenging discretion exercised on general grounds in respect of appeals concerning falsity in a previous application i.e. in ETS TOEIC cases such as *SM & Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC), or where discretion has been exercised to refuse on the basis that the migrant's character, conduct and associations are undesirable as in *Balajigari & Ors v Secretary of State for the Home Department* [2019] EWCA Civ 673 would not permit the Tribunal to consider the exercise of discretion for itself (or take into account new evidence) and would be left with a review-only approach. This would follow because these appeals fall into the same bracket as section 40(3) appeals because they also concern the same subject matter of allegations of falsity and also fall into the category of

> cases identified by Lord Reed at [68]: '*…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…*'"

63. We disagree. The examples cited by Mr Saini relate to situations where the Secretary of State's reliance on the *general grounds for refusal* in the Immigration Rules engages the Article 8 rights of the individual concerned, principally on account of the risk of removal which flowed from the curtailment or refusal decisions in those cases: see Balajigari at [91]. Where the prospect of removal so engages Article 8, even in the context of judicial review, a court or tribunal must decide for itself where the relevant criteria are met by conducting a full merits review of that aspect of the decision, including through the admission of post-decision evidence: see Balajigari at [92] and [104]. As we set out in further depth below, there is no dispute that where a deprivation decision engages Article 8 of the ECHR, a tribunal must engage in a full merits-review of that aspect of the decision, and decide for itself the proportionality of the proposed course of action.

64. The authorities cited by Mr Saini do not demonstrate that it is the character of the allegation (namely dishonesty) that engages Article 8, but rather, in the context of those authorities, the prospect of removal consequential to a decision taken under the general grounds for refusal. In our judgment, that a decision taken to make an order under section 40(3) is based on allegations of fraud, false representations or the concealment of a material fact cannot, without more, entitle appellate tribunals or courts to adopt an expansive approach to their statutory jurisdiction "in the absence of any statutory provision authorising them to do so", to adopt Lord Reed's terminology at [68] of Begum, as quoted by Mr Saini.

65. In a deprivation of citizenship appeal, it is not necessary to engage in a full proleptic assessment of the Article 8 compatibility of removal: see Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884 at [26], per Sales LJ, as he then was. While the ECHR may be engaged in relation to some aspects of a decision to deprive a person of their British citizenship, as we address below, the deprivation order does not engage Article 8 in the terms required to engage a full merits review on all issues, as would be the case in a Balajigari situation.

66. Mr Saini also submits that if section 40A appeals were confined to the narrow Begum approach, that would not admit the possibility of the appellant being able to rely on post-decision material, for the appellate review would be restricted to assessment of the material that was before the Secretary of State at the time of the decision, consistent with judicial review principles. Further, it would place the tribunal in an artificial position, of not being able to consider post-decision material to the extent it concerned non-ECHR matters, but to the extent (and only to the extent) that the decision engaged Article 8, the tribunal *could* consider those matters. Thus, submits Mr Saini, a tribunal would have to "turn a blind eye" to certain evidential matters of which it was seized for certain purposes, while considering those same materials for other, limited ECHR purposes.

67. While we initially considered this to be a superficially attractive submission, we do not consider that there is anything to the point.

68. Proceedings under section 40A have appellate characteristics and are not subject to the formal procedural constraints that feature in pure judicial review proceedings, such as the

deprecation of rolling review. Mr Saini's submissions concerning the difficulties presented by post-decision material are founded on the premise that anything other than a full merits review renders section 40A appeals to be nothing other than a supervisory jurisdiction. As Lord Reed held in Begum at [69], the jurisdiction of SIAC "is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion." The same is true of appeals under section 40A to the tribunal.

69. In practical terms, if an appellant in a section 40A appeal seeks to rely on post-decision material, such as a broader explanation of their actions leading to the alleged deception, or seeks to dispute the materiality of the deception, or to highlight additional matters relating to the consequences of deprivation, those materials may be considered by the Secretary of State ahead of an appeal before the tribunal in any event, thereby preserving the Secretary of State's role as the primary decision maker. In practical terms, while an appellant will have been presented with the opportunity to address all such matters *before* the Secretary of State's decision, we accept that an appeal is likely to generate further material by way of explanation or refutation, as typically takes place in most appeals in this Chamber. We do not consider that to present a difficulty. As a public authority, the Secretary of State is under a public law duty to keep her decisions under review by reference to any additional relevant materials placed before her. Any post-decision materials relied upon by an appellant in proceedings before the First-tier Tribunal will be provided to the Secretary of State as part of the appellate process, enabling her to review or maintain her decision in the light of those materials. Good practice in litigation before the Immigration and Asylum Chamber requires the Secretary of State to review decisions in light of the prospect of litigation in any event.

70. It would not be necessary for a further, formal written decision to be taken; all that is necessary is for the Secretary of State to continue to be "satisfied" that the relevant criteria in section 40(3) continue to be met and that the exercise of the power remains appropriate. The review process may continue even once appeal proceedings are active. Two scenarios are readily apparent. The Secretary of State's representative before the tribunal, in practice a presenting officer, will have the opportunity to consider any material provided by an appellant in order to inform the Secretary of State's position at the hearing. Alternatively, an adjournment may be sought by the Secretary of State to enable proper consideration by the relevant case working team of the additional materials, particularly where the tribunal is satisfied that there is good reason to admit late materials that the Secretary of State has not already had a reasonable opportunity to consider. Such a process is largely on a statutory footing in relation to appeals under section 82 of the 2002 Act by virtue of the Secretary of State's consent being required in relation to "new matters" under section 85(5). While the "new matter" regime does not apply to appeals under section 40A of the 1981 Act (section 85 of the 2002 Act is not a provision that is applied to section 40A appeals by section 40A(3) of the 1981 Act), it demonstrates that, even in full merits human rights appeals, provision is made for the Secretary of State to be the primary decision maker when considering a new matter upon which an appellant seeks to rely for the first time. Of course, there are many points in relation to which the "new matter" regime and other features of appeals under the 2002 Act may be distinguished from appeals under section 40A of the 1981 Act, and a degree of caution is required when comparing two very different appellate regimes, but for present purposes this feature of 2002 Act appeals demonstrates that there can be no objection in principle or practice to ensuring that the Secretary of State remains the primary decision maker in appeals before the tribunal.

71. Mr Saini made the bold submission that [35] of the Supreme Court's judgment in Begum was decided *per incuriam*, for it failed to recognise that the amendments made to the 2002 Act's

appellate regime by the Immigration Act 2014 were made "under the mistaken impression that appeals against deprivation [decisions] are to be considered as human rights claims…" (skeleton argument, paragraph 27). At [35], Lord Reid said:

> "The parties are however in agreement that section 2(2) of the 1997 Act should be understood as applying to an appeal which lies to SIAC in circumstances where an appeal would otherwise lie to the Tribunal under section 82(1) of the 2002 Act; and that is how I also construe the provision."

72. We can deal with this point shortly. At [32] to [37] of Begum Lord Reed was not addressing the appellate regime for deprivation decisions; he was addressing Ms Begum's appeal against the refusal of her human rights claim made as part of her application for leave to enter, which was another of the decisions under challenge in those proceedings. Section 2(2) of the 1997 Act applies certain provisions of the 2002 Act to appeals to SIAC that would ordinarily be brought before the tribunal under section 82 of that Act. See the final sentence of [35]: "On that basis, the provisions of the 2002 Act which are listed in section 2(2) of the 1997 Act apply to Ms Begum's appeal against the refusal of her human rights claim as part of the [leave to enter] decision."

73. Lord Reed prefaced his subsequent discussion of deprivation appeals in these terms, at [38]:

> "Appeals against deprivation decisions have an entirely separate history, such decisions not being 'immigration decisions' as that expression was understood prior to the [Immigration Act 2014]. Rights of appeal were first introduced by section 4(1) of the 2002 Act, which substituted a new section 40 and section 40A for the original section 40 of the 1981 Act with effect from 1 April 2003."

Section 2(2) appeals correspond to the appeals regime under section 82 of the 2002 Act, and the legislative history to those provisions is not relevant to the jurisdiction of SIAC or a tribunal on an appeal under section 40A of the 1981 Act.

74. Finally, Mr Saini submitted that because the power in section 40(3) is only engaged on a precedent fact basis, a tribunal must decide for itself whether the relevant criteria are met. See paragraph 32 of his skeleton argument: the engagement of section 40(3) is "a question of precedent fact going to jurisdiction and so to be decided by the court…" Mr Saini relied on a series of authorities concerning precedent facts involving public law challenges to executive decisions in circumstances where the decision had grave consequences for the individual concerned. In Khawaja v Secretary of State for the Home Department [1984] AC 74, the precedent fact decision related to the exercise of detention powers; as noted by Sir Clive Lewis in *Judicial Remedies in Public Law, 6th Ed,* at [13-006], "*dicta* in Khawaja suggest that the presumption should be that facts are jurisdictional in cases involving interference with liberty, unless Parliament has made it clear that review should be supervisory and residual only." In Khawaja, the House of Lords departed from one of its earlier decisions in which it read and applied the statutory power to detain an "illegal entrant" as though it were exercisable where an immigration officer *had reasonable grounds to believe* that the individual concerned was an "illegal entrant", reviewable only on *Wednesbury* grounds. The relevant legislation featured no such proviso: the legislation required the individual to *be* an "illegal entrant". The former approach, held Lord Scarman at page 109E:

> "deprives those subjected to the power [to detain] of that degree of judicial protection which I think can be shown to have been the policy of our law to afford to persons with whose liberty the executive is seeking to interfere."

And at 111F:

> "If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear."

75. It was thus in that context that the House in Khawaja held that a precedent fact jurisdiction existed.

76. In R. v Secretary of State for the Home Department Ex p. Onibiyo [1996] QB 768, also relied upon by Mr Saini, at 784 Sir Thomas Bingham, MR, was concerned with the exercise of an administrative immigration power ungoverned by a statutory right of appeal, and specifically prefaced his analysis with the observation that, "the role of the court in the immigration field varies, depending on the legislative and administrative context". The legislative and administrative context to appeals under section 40A is very different, as we set out above.

77. In the precedent fact authorities relied upon by Mr Saini, the availability of the power in question was anchored to the objective existence of a factual state of affairs, such as, in Khawaja, whether the individual concerned *was* an illegal entrant, which the court had to determine in accordance with the principles set out above. Mr Saini's submission conflates those cases with a proper understanding of the present scenario, where the section 40(3) power is exercisable where "the Secretary of State is satisfied" that certain factual criteria have been met. As such, Mr Saini's submission seeks to omit the requirement that the Secretary of State must be satisfied of the presence of fraud, false representations or concealment of a material fact, and give effect to section 40(3) as though that requirement were not present.

78. Parliament has provided that, if the Secretary of State is satisfied that one of the criteria in section 40(3) is met, she may exercise the power to deprive a person of their British citizenship. The 1981 Act provides for a right of appeal. The logical conclusion of Mr Saini's submissions is that any power exercisable by reference to factual criteria being met is automatically, and without more, a precedent fact of the sort that entitles a court or tribunal to stand in the shoes of the decision maker and assess for itself whether the factual criteria are met. That cannot be right; a tribunal must determine whether the Secretary of State was entitled to conclude that any of the section 40(3) criteria were met, but may not assume the primary decision making role itself simply because the assessment of the Secretary of State entails factual considerations.

Conclusion on the role of a tribunal in proceedings brought under section 40A of the 1981 Act

79. In our judgment, pursuant to the Supreme Court's judgment in Begum, we respectfully consider KV (Sri Lanka) and the preceding authorities to have been wrongly decided, insofar as the full merits approach summarised at [6] by Leggat LJ are inconsistent with Begum.

80. It follows that the judgment of the Supreme Court in Begum marks a return to the approach adopted by the Vice President of this tribunal in Pirzada (Deprivation of citizenship: general

principles) [2017] UKUT 196 (IAC) at [9], quoted at [44]. In Pirzada, the Vice President held that:

> "There is no suggestion that a Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-ss (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State's discretion."

81. In conclusion, therefore, we consider the following extract from Begum to underline the applicability of the court's approach to section 40(2) to section 40(3) appeals. Lord Reed held at [68]:

> "…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."

82. As to the specific task to be performed by the tribunal, [71] of Begum applies with equal force to appeals in this jurisdiction:

> "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."

83. The general nature of the language adopted by His Lordship leads us to conclude that he was making points of general application, and did not seek to confine his analysis to appeals against section 40(3) decisions before SIAC. The role of a tribunal in an appeal against a decision under section 40(2) or (3) of the 1981 Act is that summarised at [71] of Begum. There can be no suggestion that the Deliallisi or BA approaches survive.

Statutory condition precedent

84. Sleiman is a leading, pre-Begum Upper Tribunal authority on the satisfaction of a statutory condition precedent in section 40(3). This tribunal held that there must be a causal link between the fraud, false representation, or concealment of a material fact and the decision to grant citizenship, when section 40(3) is relied upon by the Secretary of State. The Headnote to the decision reads:

> "In an appeal against a decision to deprive a person of a citizenship status, in assessing whether the appellant obtained registration or naturalisation 'by means of' fraud, false representation, or concealment of a material fact, the impugned behaviour must be directly material to the decision to grant citizenship."

We consider the principle enunciated in the Headnote should be read with the following modifications, to underline the departure from the full merits approach in light of Begum:

> In an appeal against a decision to deprive a person of a citizenship status, in assessing **whether there were grounds which rationally entitled the Secretary of State to be satisfied** that the appellant obtained registration or naturalisation "by means of" fraud, false representation, or concealment of a material fact, **a Tribunal** must consider whether **the Secretary of State was entitled to conclude** that the impugned behaviour was directly material to the decision to grant citizenship. **The considerations relevant to that assessment are restricted to considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or whether the Secretary of State has taken into account some irrelevant matter or has disregarded something to which the Secretary of State should have given weight, or has erred on a point of law, including making an error of law when arriving at a finding of fact.**

Deprivation of citizenship and the ECHR

85. As the Supreme Court held in Begum, the Strasbourg court's jurisprudence concerning the deprivation of citizenship was "limited". See [64]:

> "A more limited approach has been adopted in cases concerned with deprivation of citizenship. The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under article 8. In determining whether there is a breach of that article, the Court has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant. In determining arbitrariness, the Court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE18, paras 49-50 and 54-61."

Reasonably foreseeable consequences of deprivation

86. Pursuant to the KV(Sri Lanka) understanding of the legal framework, it was also necessary for the tribunal to determine for itself the reasonably foreseeable consequences of deprivation, when determining, again for itself, whether the Secretary of State's discretion should be exercised differently. That includes consideration of issues under Article 8 of the ECHR, although, pursuant to Aziz and Others v Secretary of State for the Home Department [2018] EWCA Civ 1884 at [29] and following, it is not necessary to conduct a full proleptic assessment of whether deportation, or by analogy removal, will take place. There will be other, more immediate, consequences of the deprivation of citizenship, which a tribunal should be satisfied that the Secretary of State has properly taken into account.

87. There is no dispute that, where the Convention is engaged as set out above, a tribunal must decide for itself the compatibility of the decision with the United Kingdom's ECHR obligations.

DECISIONS OF THE FIRST-TIER TRIBUNAL

88. We explained in our error of law decision promulgated on 30 April 2021 that, even on the pre-Begum understanding of the law, we would have found that both judges erred. In ZA's case, we rejected ZA's challenge to Judge Chohan's findings of fact that her deception was directly linked to the acquisition of her British citizenship on the basis of the well-established jurisprudence concerning the approach of appellate courts and tribunals to findings of fact reached by first instance judges (see, for example, Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62]). On the evidence before Judge Chohan, he was entitled to conclude that ZA's deception was directly material to the acquisition of her citizenship. By her role in the *Macedonian deception*, ZA rendered herself irremovable, until the Secretary of State had considered the asylum claim to which she was a dependent. As a result of rendering herself irremovable, ZA was able to accrue residence that led to her being granted indefinite leave to remain, itself a prerequisite to a grant of British citizenship. Those findings were entirely within the range of findings properly open to Judge Chohan, and we preserved them. However, the judge failed properly to consider the impact of ZA being deprived of her citizenship, and to that extent his decision involved the making of a material error of law.

89. We found that Judge Howorth reached contradictory findings. On the one hand, he found that BA's deception was not directly material to his acquisition of British citizenship. On the

other, he found that had the Secretary of State known of the BA's history of deception, she would have refused his citizenship application on good character grounds. The two findings could not be reconciled and, moreover, made it impossible to preserve any of the judge's findings of fact. We set the decision aside in its entirety.

90. Begum, of course, declared the law as it has always been. Neither judge adopted a Begum-compliant approach, for entirely understandable reasons. The judgment in Begum did not save either decision of the First-tier Tribunal; in respect of Judge Chohan, the consideration of the Secretary of State's exercise of discretion was cursory. Judge Howorth's contradictory findings of fact by definition failed to address whether the Secretary of State had been entitled to conclude that a section 40(3) condition precedent was met.

Postscript

91. Following the preparation of this judgment in draft but before its promulgation, Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC) was reported. We are fortified that the approach taken by the Presidential panel in that matter is entirely consistent with that we have adopted here.

REMAKING THE DECISIONS OF THE FIRST TIER TRIBUNAL

92. We heard the resumed hearings in both appeals on 14 July 2021. The hearings proceeded on submissions alone; none of the parties sought to adduce new evidence, or rely on any oral testimony.

Submissions on behalf of ZA and BA

93. Mr Saini submitted that the condition precedent in section 40(3) had not been met; the Secretary of State had not established that the appellants' deception was material to the decision to grant citizenship, and so could not meet the Sleiman requirement that there must be a direct link between the deception and the grant of British citizenship. The false representations concerned BA's name, date of birth, and nationality, which were factors that were not directly material to the decision to grant citizenship. As in Sleiman, where the Secretary of State's delay "broke the chain of causation", the fraud of these appellants was not directly material to the decision to grant citizenship to them, the appellants in these proceedings were only granted indefinite leave to remain as a result of the Secretary of State's legacy programme, as a result of the length of their residence, rather than their earlier deception. It cannot be said that the appellants rendered themselves irremovable; that approach presumes the appellants were aware that they could not be removed while their claim was pending, that they were responsible for the inordinate delay in their claim being decided, and that their removal would have taken place in the interim. To that end, Mr Saini relied on [63] of Sleiman where Judge Kopieczek held:

> "…there is some validity to the argument on behalf of the appellant to the effect that grants of leave under Legacy were made in cases where individuals had no right (otherwise) to be in the UK, and no doubt included many whose asylum claims were false."

The appellants were granted indefinite leave to remain first and foremost due to their length of residence, and their "irremovability" was immaterial because, had they made a genuine human rights or any other claim, those claims would have been unresolved, and subject to the legacy scheme in precisely the same way.

94. Mr Saini also submits that under paragraph 9.5.2 of the 2012 Nationality Instructions, BA's application for citizenship would not have been refused, as the deception was not directly material to the grant of indefinite leave to remain, as confirmed by Example B. The 2012 instructions provided:

> "**9.5 Evidence of fraud in the immigration and nationality process**
>
> 9.5.1 Where there is evidence to suggest that an applicant has employed fraud either:
>
> • during the citizenship application process or
>
> • in previous immigration application processes and
>
> • in both cases the fraud was directly material to the acquisition of immigration leave or to the application for citizenship
>
> caseworkers should refuse the application unless the circumstances in 9.5.2 apply. In such cases, the applicant should be advised that an application for citizenship made within 10 years from the date of refusal on these grounds would be unlikely to be successful.
>
> 9.5.2 Where deception has been employed on a previous immigration application and was identified and dismissed by UKBA or was factually immaterial to the grant of leave, caseworkers should not use that deception as a reason by itself to refuse the application under section 9.5.1.
>
> Examples:
>
> […]
>
> B. Mr B applied for asylum on the same grounds as Mr A. However, he was not granted ILR on the basis of a successful refugee claim. He was instead granted ILR under a Family Concession to which a consideration of nationality was not the primary factor. The deception was not therefore material to the grant of ILR as regardless of that fact that he claimed to be Kosovan on entry to the UK Mr B would in any case have been granted ILR under the Concession as a result of his family arrangements. **In this scenario UKBA has already disregarded the claimed nationality of the individual as being immaterial to the grant of ILR under the Concession. It would therefore be perverse to assert that a previously disregarded fact could be relevant at a later date to a consideration of good character. Nationality on the date of application is, in any case, irrelevant to the naturalisation consideration."** (emphasis added)

95. Mr Saini submits that, not only are the appellants' cases are on all fours with 'Example B', but that the *Nationality Instructions*' emphasis on the irrelevancy of citizenship at the date of naturalisation further strengthens the appellants' cases before this tribunal.

96. For those reasons, submits Mr Saini, the condition precedent in section 40(3) has not been met in relation to either appellant, and the question of whether the Secretary of State was entitled to exercise her discretion to invoke the paragraph simply does not arise.

97. Even on the more restrictive, post-Begum approach, Mr Saini submits that the Secretary of State was not entitled to be satisfied that section 40(3) was engaged. The Secretary of State did not grant indefinite leave to remain to the appellants on the basis of their false nationality claim, the truth of which was never addressed by the Secretary of State at the time. The feigned Macedonian nationality did not result in a grant of leave. It was not connected at the time, and the Secretary of State cannot rationally treat it as though it is connected now.

98. Mr Saini submits that the exposure of the appellants to the "hostile environment" in the period following the deprivation of their citizenship before they are granted some form of leave to remain engages Article 8 and would be a disproportionate breach of it. During that period, it would be a criminal offence for the appellants to work. They would be prohibited from securing a residential tenancy agreement, and subject to a range of other measures. The appellants would be "reduced" to relying on a ten year path to settlement. The best interests of their minor children would be adversely impacted. The appellants' length of residence, 21 years, is clearly a factor of some relevance. Prior to a change in 2014, the Secretary of State's policy was that she would not normally deprive someone of their British citizenship where they had resided in the UK for more than 14 years (see Hysaj at [82] for a summary of the policy). These appellants have suffered at the hands of the Secretary of State's inaction and delay. Deprivation of their citizenship would be disproportionate.

99. For the Secretary of State, Ms Cunha submits that the appellants have "continuously employed dishonesty in their interactions with the [Secretary of State's] officials." The appellants' submissions misunderstand the nature of the 2007 legacy concession, which was not a general amnesty, as outlined in R (oao Geraldo) v Secretary of State for the Home Department [2013] EWHC 2763 (Admin) at [40].

100. Ms Cunha submits that by declaring to the Secretary of State that they were of good character in their indefinite leave to remain and British citizenship applications, the appellants each concealed a fact that was clearly material to the grant of citizenship. Nor can it be said that the Secretary of State's approach was characterised by the delay that has featured in some deprivation cases, such as that in Laci. The appellants were informed of the possibility of their status being reviewed in January 2019, ahead of formal decisions taken on 22 August 2019 and 14 November 2019 respectively. They do not enjoy a legitimate expectation to be treated in any other way; the only such expectation they enjoy is that they "would be treated in accordance with the law and policy in place at the time the relevant decision was made" (Hysaj at [65]). Ms Cunha recalls that at the hearing on 23 November 2020, she confirmed that ZA would be granted some form of leave to remain, and it would be open to BA to apply for leave, too.

Discussion

101. We have no hesitation in concluding that the Secretary of State was entitled to be satisfied that each appellant had obtained their naturalisation as British citizens by means of fraud, false representation or the concealment of a material fact, for the following reasons.

102. By way of a preliminary observation, in relation to ZA, we have already preserved Judge Chohan's findings that the deception was material, for the reasons we summarise at [88], above. However, in light of the extensive submissions made by Mr Saini concerning both ZA and BA (in relation to whom no findings of fact from the First-tier Tribunal have been preserved), we will consider the full spectrum of Mr Saini's submissions in any event.

103. We reject Mr Saini's submissions that the legacy scheme "broke the chain of causation" between the grant of ZA and BA's citizenship. It amount to a disagreement with the Secretary of State's conclusions, and do not demonstrate that no reasonable Secretary of State could have arrived at that decision, nor that it was infected by some other form of error.

104. For the same reasons we rejected ZA's challenge to Judge Chohan's findings that her deception was directly material to the grant of her citizenship, the Secretary of State was entitled to conclude that BA's citizenship was obtained by means of fraud, false representation or the concealment of a material fact. The appellants' length of residence, which led to their grants of indefinite leave to remain, itself a condition precedent for the acquisition of British citizenship, could not have been accrued had they been honest about their identity at the time they made their asylum claims. Deception of the sort that features in this case often began some time ago, and took the form of an initial act (here, the *Macedonian deception*) which provided the foundation for a series of other events taking place.

105. Contrary to Mr Saini's submissions that there is no evidence that the appellants knew that making a false asylum claim would have rendered themselves irremovable, the appellants' own representations to the Secretary of State in response to her "minded to" letters do not support that contention. In ZA's representations dated 6 June 2019, it was said on her behalf at page 2:

> "Our client's instructions are that her husband, [BA] was advised by other Albanians to claim asylum under false **details as otherwise he would have been returned to his country of origin**." (emphasis added)

See paragraph 7 of ZA's statement to similar effect.

106. Similarly, on behalf of BA it was said in his representations to the Secretary of State dated 11 February 2019, at page 3:

> "Our client's instructions are that when he arrived in the UK, he was advised by other Albanians to claim asylum under false details**, as otherwise he would be removed to his country of origin**." (emphasis added)

See paragraph 7 of BA's statement dated 15 January 2020 to similar effect.

107. It simply cannot be said that neither appellant knew that by making a false claim they would render themselves irremovable. On their own cases, that is precisely why they did so. It achieved the desired effect: they were not removed. The Secretary of State was entitled to ascribe significance to the appellants' false asylum claims rendering them irremovable as being material to their eventual acquisition of citizenship.

108. We consider Mr Saini's additional submission on the "irremovability" point to be speculation; it is nothing to the point that the appellants did not know how long it would

take for their (false) claim to be processed. The point is that they made a false claim precisely in order to render themselves irremovable, and the plan worked to their advantage. That it took the Secretary of State a considerable period of time to deal with them under the legacy scheme, rather than by engaging with the facts of their claims, does not undermine the Secretary of State's ability to be satisfied as to the materiality of their deception to the acquisition of their citizenship.

109. Nor does [63] of Sleiman assist the appellants, contrary to Mr Saini's submissions. There, Judge Kopieczek merely stated that there was "some validity" to the argument that grants of leave were made under the legacy scheme to people including those who had made false claims. The mere fact that there may be "some validity" to that argument does not demonstrate that, in reaching the conclusion she did, the Secretary of State arrived at a view that no reasonable Secretary of State could have reached. This extract from Sleiman merely provides some support for a contrary view, which, properly understood, would be a disagreement with the Secretary of State's position in these appeals, rather than demonstrating that the Secretary of State's view was irrational.

110. Mr Saini's reliance on paragraph 9.5.2. of the 2012 Nationality Instructions (see paragraph 94, above) is misplaced. Putting to one side the fact that the 2012 version of the guidance could be relevant only to the decision to grant nationality to BA, the example relied upon in that paragraph concerns the impact of previously disregarded deception. By contrast, the deception in the present matter was not previously disregarded. It was never disclosed to the Secretary of State such that she had the option to consider whether to disregard it at an earlier stage. It is in that context that the guidance states that "nationality on the date of application is, in any case, irrelevant…", and the guidance is clearly of no assistance to BA's attempt to demonstrate that the Secretary of State reached a view no reasonable Secretary of State could have arrived at, or that she disregarded some relevant matter.

111. There is a further, and very significant, reason why the Secretary of State was entitled to conclude that the appellants' citizenship was acquired by means of the concealment of a material fact. Had either appellant revealed to the Secretary of State at the time of their citizenship applications their earlier and persistent deception, the Secretary of State would plainly have been entitled to refuse the applications on good character grounds. Each appellant failed to disclose their earlier dishonesty to the Secretary of State, and declared when applying for naturalisation that they had disclosed all relevant information. They each declared in their citizenship applications that they had not engaged in any activities that may indicate that they were not persons of good character (question 3.12 on each form, in the *Good character* section). In light of their deception concerning their true identities, the answers to those questions were plainly false.

112. We reject Mr Saini's submission that paragraph 9.5.2 of the 2012 Nationality Instructions (referred to at paragraph 94, above) assists BA's case.

113. First, the guidance is intended to aid the Secretary of State's officials with their application of the statutory good character requirement. As Stanley Burnton LJ held in Secretary of State for the Home Department v SK (Sri Lanka) [2012] EWCA Civ 16 at [36], there is no power for the Secretary of State to waive the statutory good character requirement. The Nationality Instructions cannot require the Secretary of State to accept the good character of an applicant who could not sensibly be regarded as such. The Instructions should be read, interpreted and applied against that background.

114. Secondly, Example B in the 2012 instructions concerned leave granted pursuant to a "family concession". BA was not granted leave under the family concession, but rather due to his outstanding, false asylum claim. His false asylum claim rendered him irremovable, until it was finally determined. The grant of leave was nothing to do with BA's family circumstances.

115. Thirdly, properly understood, the paragraph 9.5.2 exceptions contained in the 2012 instructions concerned *previously disregarded* deception. Example B amplifies the meaning of paragraph 9.5.2; so much is clear where the example refers to "the UKBA" (the UK Borders Agency, formerly part of the Secretary of State's department) having "*already disregarded* the claimed nationality." The subsequent reference to the perversity of seeking to revive the significance of a "previously disregarded fact" underlines the need for such deception to have been identified and dealt with at a prior point.

116. This extract from the 2012 guidance was considered in R (oao Ylian Rushiti and Adriatik Laci) v Secretary of State for the Home Department [2014] EWHC 3931 by Popplewell J, as he then was, in the following terms, at [47]:

> "The example given in that subparagraph can only sensibly be understood as assuming that when the ILR application is made by Mr B, the deception is known to the immigration authorities and disregarded as immaterial to the decision based on the family concession. The reasoning set out is that because the deception has been consciously disregarded in granting ILR, it would be 'perverse' to take it into account when considering good character upon the subsequent naturalisation application… But on any view it could not be said to be perverse to take into account a deception when considering good character if in an earlier application for ILR the deception was unknown, even if the deception were immaterial. If the paragraph were to be interpreted as effectively wiping the slate clean once the ILR decision had been made it would be an unlawful fetter on the Secretary of State's discretion: it would be perverse NOT to take into account a prior deception of which the immigration authorities became aware for the first time only when considering good character under a naturalisation application." (emphasis original).

117. Of course, when responding to that questionnaire, BA did not reveal his prior deception to the Secretary of State. Instead, he maintained the deception, highlighting the continuing delay in the consideration of his asylum claim.

118. It follows that we reject Mr Saini's submissions that, even on the narrow post-Begum approach, the Secretary of State was not entitled to regard section 40(3) as having been met in the case of each appellant. She was. Each appellant deceived the Secretary of State into treating them as though they were subject to outstanding asylum claims, thereby rendering themselves irremovable. The Secretary of State was entitled to conclude that that was material to each being granted indefinite leave to remain and subsequently British citizenship. The appellants' every engagement with the Secretary of State for over 18 years was based on the dishonest premise of the Macedonian deception. Each appellant plainly knew what they were doing, as their solicitors' representations to the Secretary of State made clear: the false claims were made to render them irremovable and avoid return to Albania. The Secretary of State was plainly entitled to conclude that their citizenship was obtained by

means of fraud or false representation. Further, the Secretary of State was also entitled to conclude that their citizenship was obtained by virtue of the concealment of material facts, namely the non-disclosure, by each appellant, of their earlier deception at the point of their applications for British citizenship. Had they disclosed their past deception to the Secretary of State, she would have been entitled to refuse the applications on good character grounds. The Secretary of State was plainly entitled to be satisfied that their citizenship was obtained by means of the concealment of a material fact, namely the fact of their prior deception.

119. The question then arises as to whether the Secretary of State was entitled to exercise her discretion to decide to invoke the power contained in section 40(3), in relation to each appellant.

120. We conclude that she was. There is a strong public interest in ensuring that those who obtain British citizenship by dishonest means; only exceptionally will it be right for a person who has obtained British citizenship by deception to be allowed to retain it (see Laci at [37]). Nothing has been advanced to the Secretary of State in the case of either appellant which demonstrates that there were exceptional circumstances such that it was irrational, unlawful or *Wednesbury* unreasonable for her to decide to exercise the powers under section 40(3) in these cases.

Best interests of AA

121. Only one of the appellants' children is still a minor, AA, born in May 2012. We accept that there will be a process of adjustment and difficulty upon the deprivation of AA's parents' citizenship. AA's best interests would be for the status quo to be maintained, and for her parents to retain their British nationality.

Article 8 ECHR

122. A striking feature of these proceedings is that the appellants have not sought to adduce additional, contemporary evidence of the claimed Article 8 impact of the deprivation decisions. The materials we have are those prepared for the proceedings before the First-tier Tribunal in late 2019 (ZA) and early 2020 (BA). We therefore base our Article 8 analysis, which we must conduct for ourselves, on the materials already provided.

123. We accept that Article 8 private life rights of the appellants will be engaged by their exposure to the so-called "hostile environment", in the period between the deprivation orders being made, and a decision on subsequent leave to remain, or (if leave is not granted) during the period for which any in-country appeal is pending. The deprivation orders will place the appellants in a worse position than they were in had they never naturalised as British in the first place, and remained as holders of indefinite leave to remain. However, such an interference will only be limited. We recall that Ms Cunha indicated that it would be likely that ZA would be granted some form of leave, if she were to make an application to the Secretary of State. BA's decision letter provides that he, too, will be able to apply for leave, although if that application is unsuccessful, he may face removal proceedings. At that stage, of course, a full Article 8 assessment of BA's removal may take place. Thus there will only be a limited period during which both ZA and BA will be without leave, following which ZA, at least, will be granted some form of discretionary leave outside the rules. If ZA chooses to make an application for leave, the leave that will later be granted to her will mitigate the otherwise harsh impact on BA of the hostile environment. ZA will be able to access many of the services that may become inaccessible to BA during the period before he is granted leave,

or made subject to removal proceedings. For example, if BA's and ZA's banking services are withdrawn, ZA will be able to resume access to such services upon being granted leave. ZA will then resume the ability to, for example, secure a residential tenancy or obtain a driving licence, should the need to do so arise. This will mitigate much of the otherwise harsh impact that the hostile environment would entail if the family were exposed to it for an indefinite period.

124. We do not accept that the ECHR is engaged in relation to the remaining aspects of the deprivation decision. There can be no suggestion that the decision has been arbitrary, not in accordance with the law, nor not subject to the procedural safeguards required by Article 8. The decisions to deprive each appellant were rationally open to the Secretary of State, were in accordance with the law, and have been subject to the appellate scrutiny of these proceedings.

125. It is, of course, common ground that we do not need to conduct a proleptic Article 8 assessment of the appellants' prospective removal. To the limited extent that the deprivation decisions will engage Article 8 of the Convention, we consider the interference with the appellants' private life rights, and those of their children, including their minor child AA, to be a proportionate interference when assessed against the public interest in maintaining the integrity of the conferral of British citizenship. As this tribunal held in Hysaj at [110]:

> "There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship."

126. We consider that the cumulative force of the public interest in maintaining the integrity of the system for the conferral of British citizenship, combined with the dishonesty of these appellants, and its duration, is sufficient to outweigh the best interests of AA. This decision will not require either of her parents to leave the country, and to the extent that their removal becomes a possibility, they will each be able to make human rights claims to resist removal at the time, which will attract the full panoply of procedural protections, including a right of appeal. In relation to ZA, it is unlikely she will be removed in any event, given Ms Cunha's concession that, if she were to apply for leave to remain, it is likely she would be granted such leave.

Conclusion

127. For these reasons, we conclude that the Secretary of State was entitled to be satisfied that ZA and BA's British citizenship had been obtained by means of fraud, false representation or the concealment of a material fact for the purposes of section 40(3) of the 1981 Act. The separate decisions to deprive each of them of their British citizenship do not require them to leave the UK, and to the extent they amount to an interference with their rights under Article 8 of the ECHR, such interferences are proportionate.

128. Both appeals are dismissed.

Notice of Decision

The decision of Judge Chohan involved the making of an error of law. We set aside the decision, subject to the findings of fact preserved as set out in the body of this decision. We remake the decision by dismissing ZA's appeal.

The decision of Judge Howorth involved the making of an error of law. We set the decision aside with no findings of fact preserved. We remake the decision by dismissing BA's appeal.

Signed *Stephen H Smith* Date 23 September 2021

Upper Tribunal Judge Stephen Smith