



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DC/00115/2019  
(V)

**THE IMMIGRATION ACTS**

Heard remotely by Skype for Business from Field House  
On 15 February 2021

Decision & Reasons Promulgated  
On 19 March 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A S  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Mr S Kerr, Counsel, instructed by Karis Law  
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is the re-making of the decision in this case. Whilst it was the Secretary of State who brought the appeal to the Upper Tribunal against the decision of the First-tier Tribunal, now that I have set that decision aside the parties are as they originally

were. Thus, Mr Selmani is once more the appellant and the Secretary of State is the respondent.

2. The full error of law decision, promulgated on 17 December 2020, is appended to this re-making decision.
3. The appellant is, as matters stand, a British citizen. He appeals against the respondent's decision, made on 25 October 2019, to deprive him of that citizenship on the basis that the naturalisation as a British citizen was obtained by means of fraud or false representation pursuant to section 40(3) of the British Nationality Act 1981. This provides as follows:

“40 Deprivation of citizenship.

(1) In this section a reference to a person's “citizenship status ” is a reference to his status as –

(a) a British citizen

...

(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.”

4. The appellant arrived in the United Kingdom on 5 September 2002 and claimed asylum soon thereafter. In doing so he gave his correct name, but stated his date of birth to be 10 March 1987 and his nationality to be Serbian. In fact, his correct date of birth was 10 September 1987 and he was an Albanian citizen. These two falsehoods constituted the basis of what is accepted to have been deception employed over the course of time.
5. The appellant's asylum claim was refused on 10 October 2002. However, by virtue of his age he was granted what was then termed exceptional leave to enter (“ELE”) as an unaccompanied asylum-seeking child. This ELE was due to expire on 9 March 2005, a day before he turned 18.
6. By an extension application made on 25 February 2005, the appellant sought further leave to remain. On 28 March 2007 he made an application for indefinite leave to remain (“ILR”), again using the false information provided to the respondent upon entry to this country. As a result of the outstanding extension application made in February 2005, the appellant was brought into the ambit of the legacy programme and on 13 March 2008 he completed a questionnaire to assist with that process. He

again used the false date of birth and nationality. By this time, the appellant was an adult.

7. On 15 February 2013 the appellant was granted ILR. Later that year he made an initial application to naturalise as a British citizen, using the false information. This was refused on good character grounds due to previous criminal convictions. On 28 April 2014 a second naturalisation application was made, using the same false information. That application was granted and the appellant was issued with a certificate of naturalisation on 5 June 2014. It was only sometime afterwards and following investigation that the respondent was presented with information indicating that the appellant had provided false personal details in 2002 and had continued to put these forward at all stages.

### **The respondent's decision**

8. On 25 October 2019 the respondent made the decision to deprive the appellant of his British citizenship. A detailed immigration history is set out in the decision letter with reference to the various applications made over time. The relevant parts of paragraphs 20, 21, and 23 of the letter read as follows:

“20. If your true Albanian identity was known at the (sic) you submitted an application for Indefinite Leave to Remain it is likely that you (sic) have been refused and therefore not have met the mandatory requirement for naturalisation. Your false place of birth, Serbia was material to you being granted ILR (sic) you persisted with the deception in your naturalisation application and ticked the box to indicate you had not done anything to suggest you was (sic) not of good character.

21. ...It is clear that you would have been refused British citizenship under S.9.3 and 9.4 [of the Nationality Instructions] had the nationality caseworker been aware that you had presented a false identity to the Home Office and continued to use that identity throughout your immigration history.

...

23....Had your true details and information relating to your deception been known, Indefinite Leave to Remain would not have been granted. Thus he would not have met the residence requirements needed to naturalise and deprivation is therefore applicable.”

9. It can be seen that the respondent's decision not only linked the deception to the grant of ILR, but also to the good character requirement applicable in naturalisation applications.
10. Having concluded that the appellant would not have been granted either ILR or naturalisation as a British citizenship if the false information had been known about at the relevant time, the respondent went on to decline to exercise discretion in his favour. In respect of Article 8 ECHR (“Article 8”), it was recognised that the appellant was married, had spent a lengthy time in this country and that he had a

British child. However, in all the circumstances it was concluded that the deprivation of citizenship would not constitute a violation of protected Article 8 rights.

### **The evidence**

11. When re-making the decision in this appeal, I have had regard to the following evidence:
  - a) the respondent's appeal bundle, under cover of letter dated 27 November 2019;
  - b) the original appellant's bundle, indexed and paginated 1-45;
  - c) a copy of the most recent tenancy agreement for the appellant, a payslip from his employer, dated 12 February 2021, and the residence permit for his wife confirming that she has leave to remain in the United Kingdom until 24 December 2021.
12. The appellant attended the remote hearing and gave oral evidence in English. I summarise that evidence here.
13. In evidence-in-chief, the appellant adopted his witness statement dated 31 January 2020. This set out his history in the United Kingdom, including his acceptance of the use of deception. He provided details of his family circumstances, his employment, and general living arrangements in this country.
14. The appellant told me that he now earns approximately £2000 a month and that his wife is not working as she looks after the couple's two-year-old daughter. The appellant has been 'furloughed' due to the Covid pandemic and the family was now struggling a bit. The rent had gone up. If he was unable to work, the appellant told me that he thought that they would become homeless. They have no savings. He believed that his wife could work but any job would need to pay above the minimum wage. Her English was not particularly strong. The appellant explained that he had borrowed money from relatives and friends before and he was not sure if he could do so again.
15. In cross-examination, the appellant confirmed that his wife received Child Benefit for their daughter. His wife had not worked in United Kingdom, but has done so in Albania.
16. There was no re-examination.

### **Submissions**

17. Ms Cunha relied on the respondent's decision letter. She emphasised the appellant's continuous use of deception throughout the process of obtaining ELE, ILR, and then

British citizenship. In respect of the requisite causative link between the deception and the obtaining leave and then citizenship, she relied on paragraphs 60-64 of Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367 (IAC). In the present case, there had been no concession by the respondent as to the absence of a causative link. She relied on the fact that the appellant had stated in his naturalisation application that he was of good character when this was not in fact the case. In respect of his ILR application, the appellant had stated that he had a fear of return to Serbia. This was untrue and if the deception had been known he would not have been granted that status.

18. On the issue of discretion, Ms Cunha submitted that the appellant had practised deception whilst an adult. There was nothing in the case to warrant the exercise of discretion in his favour.
19. Finally, in respect of Article 8, Ms Cunha relied on Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 128 (IAC) and submitted that the public interest outweighed any protected rights.
20. Mr Kerr relied on his skeleton argument, dated 14 February 2021. He submitted that the appellant would have been granted ELE by virtue of his age, notwithstanding the false date of birth and nationality. The appellant would also have been granted ILR under the legacy programme notwithstanding the provision of false information. Any claimed risk on return to Serbia was immaterial to that grant of leave. Reliance was placed on paragraphs 55.7.3 and 55.7.4 of Chapter 55 of the Nationality Instructions.
21. Mr Kerr referred to Annex D of Chapter 18 of the Nationality Instructions at Annex T of the respondent's bundle. He submitted that if all naturalisation applications were to be refused pursuant to this guidance, there would be no point in what is said in Chapter 55.
22. As to discretion, Mr Kerr submitted that the appellant has provided true information when confronted by the respondent and noted that the deception had started when the appellant was still a minor.
23. In respect of Article 8, Mr Kerr acknowledged what is said in Hysaj, but urged me to take account of the timeframe stated by the respondent in her decision letter, together with all other relevant factors which included: the appellant's long residence in the United Kingdom; the presence of his wife and British child; their current living arrangements; the absence of a decision by the respondent on whether to grant another form of leave or to remove the appellant from the United Kingdom. All-told, Mr Kerr submitted that the decision was disproportionate and therefore unlawful.

### **Findings of fact**

24. There are few, if any, material dispute as to the facts in this case.

25. The appellant's immigration history is as set out in paragraphs 4-7, above.
26. For the avoidance of any doubt, I find that the appellant did dishonestly provide false information throughout his dealings with the respondent until he was confronted with the allegation of deception, at which point he made a full and frank admission.
27. I find that the appellant is married and has a genuine and subsisting relationship with his wife, who is an Albanian citizen with leave to remain in the United Kingdom until 24 December 2021. I accept that she has not worked whilst in this country, although I do find that she has some experience of employment whilst back in Albania. The evidence about her English language ability is somewhat vague, but I will accept that it is not particularly good. Having said that, I find that she would be willing and able to find work in this country if the need arose. I note that she is permitted to work. There is no evidence to suggest that the appellant would not be able to look after the couple's daughter himself whilst his wife worked.
28. The appellant's daughter is a British citizen.
29. I accept that the family unit's financial circumstances will have become more difficult over the last year or so in light of the Covid pandemic. This is true of a very large number of families in the United Kingdom (and indeed around the world). I accept the appellant's evidence that he has borrowed some money from relatives and friends. Whilst he has raised a concern that he would not be able to procure any more financial support, there is no clear evidence to that effect. For example, there is no evidence from relatives or friends stating that they would not be prepared to help if the appellant was unable to work. It is more likely than not that some form of financial support would be forthcoming.
30. Overall, the appellant cannot show that it is more likely than not that he and his family would become homeless if he were precluded from working as a consequence of the deprivation of his British citizenship.
31. I find that the appellant, his wife, and their daughter are healthy.
32. There has been no suggestion that the appellant would not be entitled to Albanian citizenship, and I find that he is so entitled.

## **Conclusions**

### **The first issue: causative links**

33. In considering this issue I have directed myself to relevant case-law, as referred to by the parties in their written and oral submissions. I bear in mind that the respondent bears the burden of showing that the naturalisation as a British citizenship was obtained "by means of" fraud or false representations.

34. As I stated in my error of law decision, the appellant would have been granted the initial period of ELE whatever his true nationality was. On any view, he was a minor at the time and the respondent's policy at the relevant time indicated that a grant of leave was highly likely to have been made even if it had been known that he was Albanian and not Serbian.
35. Therefore, no causative link between the deception and grant of ELE existed.
36. The position is different, however, in respect of the grant of ILR.
37. In my judgment, it is relevant that, prior to the decision to grant ILR, the appellant had practised the deception in respect of his age and nationality on at least three further occasions: in the application for ILR on 28 March 2007; in the legacy questionnaire completed on 13 March 2008; and in the letter of 24 March 2009, in which his previous solicitors chased up the legacy issue, again stating the false information and expressly confirming that the Appellant was "a person of good character".
38. Also of relevance is the point set out in the respondent's grounds of appeal to the Upper Tribunal relating to factors set out in Chapter 53 of the guidance applicable to the question of whether "exceptional circumstances" existed in cases being considered under the legacy programme. The first of the factors listed at paragraph 53.1.1 of that guidance (current at the date of ILR decision) was whether there was "evidence of deception practised at any stage in the process." If the respondent had been aware of the full facts at the time, it is plain that there would have been such "evidence", and it is difficult to see how it would have been "inevitable" (or even very likely) that the grant of leave would have occurred notwithstanding this evidence.
39. Although I take account of Mr Kerr's description of the legacy programme as constituting something of a "mopping up" route to settled status, it is incorrect to regard it as a wholesale amnesty in respect of which no factors relating to deception would have been likely to bear material relevance to the outcome. In other words, knowledge of deception practised by an individual within the programme would have been, in my judgment, a material consideration in the respondent's decision-making process.
40. The absence of a minute note from the respondent as to the precise basis for the grant of ILR in 2013 does not take the appellant's case any further. It is an inescapable fact that the respondent was unaware of the deception at the time she made that decision.
41. In all the circumstances, I am satisfied that the appellant's deception would have had a material bearing on the decision to grant ILR.
42. Having said that, I acknowledge that the legacy programme did not in the usual course of events involve the making of an application for ILR. Thus, it may be said that the grant of status to the appellant did not follow from an application in respect

of which he had practised deception. The reason why I have set out my conclusions on the appellant's conduct in the foregoing paragraphs is that he did in fact make an application for ILR, albeit that it was not, strictly speaking, and necessary course of action.

43. For reasons which follow, these conclusions, whether right or wrong, stand alone from what I say about the causative link between the deception and the decision to naturalise the appellant as a British citizen. The establishment of a causative link for the purposes of section 40(3) of the 1981 Act relates not to the grant of ILR, but to the obtaining of British citizenship through naturalisation.
44. Somewhat unusually, the specific requirements for naturalisation as a British citizen are set out in the primary legislation itself. Schedule 1 to the 1981 Act provides for a residence criterion (paragraph 1(1)(a)); the need to show good character (paragraph 1(1)(b)); knowledge of the relevant language and life in the United Kingdom (paragraph 1(1)(c) and (ca)); and an intention to reside in this country or engage in the Crown service or other relevant position (paragraph 1(1)(d)).
45. The "good character" criterion is thus plainly integral to the decision-making process. As a matter of logic, it falls to be considered not simply in light of an individual's past history, but also in respect of what they have stated *in that application itself*.
46. In the present case, the decision letter clearly makes reference to the good character criterion and there has been no subsequent concession by the respondent. In this way, this case can be distinguished from the situation in Sleiman.
47. Annex D of Chapter 18 of the Nationality Instructions has been referred to previously. Section 8.2 includes examples where dishonesty would "normally" lead to a naturalisation application being refused. The last of these states:
 

"providing false or deliberately misleading information at earlier stages of the immigration application process (e.g. providing false bio-data, claiming to be a nationality they were not or concealing conviction data). Where this applies, a refusal on the deception ground may also be merited."
48. At Section 9.3 it is stated that applications will "normally" be refused where:
 

"...there is evidence that a person has employed deception either:

during the citizenship application process; or

in a previous immigration application."
49. It can be seen from this guidance that deception practised in respect of previous immigration applications will be relevant, but that this is not a condition precedent for an application for naturalisation to be refused on good character grounds: deception in respect of the naturalisation application itself can be sufficient.



50. I see no contradiction or tension between Annex D of Chapter 18 and Chapter 55 of the Nationality Instructions. The former give guidance specifically on the issue of good character, the latter (insofar as it has been relied on before me) relates in the main to previous immigration history.
51. Turning to the present case, the previous use of deception by the appellant, if known about at the time of the decision to grant the naturalisation application, would in my judgment have been a material consideration and would have been likely to have altered the outcome of that application.
52. Even if the previous deception were left out of account, the fact remains that the appellant continued with the deception when making both of his naturalisation applications. If the respondent had been aware of that deception at the time of the decision, it is at the very least more likely than not that this consideration would have had a material impact on the decision to grant the naturalisation application.
53. That he failed to admit the dishonesty when the first of the two applications was rejected only adds to the overall significance of his conduct on the good character requirement.
54. In all the circumstances, I am satisfied that the respondent has shown a causative link between the appellant's deception and the decision to naturalise him as a British citizen. Indeed, in my judgment the link is plain.

**The second issue: discretion**

55. In exercising my own discretion, I have regard to the reasonably foreseeable consequences of deprivation, whilst at the same time not engaging in a proleptic analysis (see Hysaj, at paragraph 35-37).
56. I have taken the following factors into account on the appellant's side of the equation:
  - a) he was a minor when he arrived in United Kingdom and made his asylum claim in 2002;
  - b) he has been in the United Kingdom for a considerable period of time;
  - c) when confronted with his dishonesty, he admitted to this;
  - d) he has a settled private and family life in this country, including his British citizen child;
57. In the respondent's favour, I take account of the following:

- a) the importance of the public interest and the respondent's primary responsibility for ensuring that this is maintained;
- b) that the appellant perpetuated dishonesty on several occasions when an adult;
- c) the appellant's dishonesty was only admitted when confronted by the respondent;
- d) that no material delay or "historic injustice" has occurred in this case;
- e) the appellant has not shown that the consequences of deprivation would give rise to compelling features which, taken in isolation or together with all other factors, warrant an exercise of discretion in his favour.

58. Having considered all relevant matters, I conclude that discretion should not be exercised in the appellant's favour. I appreciate that the deprivation of his British citizenship will cause disruption and lead to anxiety, but in all the circumstances of this case the strong public interest clearly emerges from the analysis as the dominant factor.

### **The third issue: Article 8**

59. The appellant has a private and family life in the United Kingdom and the respondent's decision interferes with those protected rights.

60. In my judgment, the decision is proportionate. In saying this I rely on the factors set out and considered under the second issue, above. In addition, I take into account what is said in Hysaj, at paragraphs 117 and 118. In the present case, the appellant will continue to live with his wife and child. The child will be entitled to relevant support by virtue of his British citizenship. The appellant's wife is able to work. A reduction in the family unit's financial resources and overall circumstances will not, in isolation or on a cumulative basis, go to outweigh the strong public interest in cases such as the present.

61. In short, the appellant is unable to show a sufficiently strong Article 8 claim such as to permit him to succeed on this basis.

### **Additional observation**

62. In this case, as in many others that I have come across, the respondent has set out a timeframe in her decision letter 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.” That timeframe is said to involve the making of a deprivation order within 4 weeks of the appellant becoming appeal rights exhausted, with a decision on whether to grant leave or remove him to follow within 8 weeks of the deprivation order being made. Mr Kerr expressed some concern at the hearing that in his experience these timeframes are not being complied with. Whilst that is not a matter for me, I would emphasise the importance of expeditious decision-making in cases such as these. Although it may be said that the appellant has brought the difficulties he faces upon himself, there are other family members to be considered, in particular a British citizen child.

### Anonymity

63. No anonymity direction has been made thus far, and I see no reason to make one at this stage. The public interest in open justice is an extremely important principle. In this case, identification of the appellant and/or family members would not give rise to risk of harm.

### Notice of Decision

64. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**
65. **I re-make the decision by dismissing the appeal.**

Signed: *H Norton-Taylor*

Date: 16 March 2021

Upper Tribunal Judge Norton-Taylor

### TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: *H Norton-Taylor*

Date: 16 March 2021

Upper Tribunal Judge Norton-Taylor

**APPENDIX: ERROR OF LAW DECISION**



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DC/00115/2019

**THE IMMIGRATION ACTS**

**Heard remotely  
On 27 November 2020**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

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

**Appellant**

**and**

**A S**

**(ANONYMITY DIRECTION NOT MADE)**

**Respondent**

**The hearing of this appeal was conducted remotely by Skype for Business and was recorded by the Upper Tribunal**

**Representation:**

For the Appellant: Ms S Cunha, Senior Presenting Officer

For the Respondent: Mr S Kerr, Counsel, instructed by Karis Law

**DECISION AND REASONS**

1. For ease of reference I shall refer to the parties as they were before the First-tier Tribunal; the Secretary of State is therefore once more the Respondent and Mr Selmani is the Appellant.

### **Introduction**

2. This is an appeal by the Respondent, with permission, against the decision of First-tier Tribunal Judge McKinney (“the judge”), promulgated on 17 February 2020, by which she allowed the Appellant’s appeal against the Respondent’s decision to deprive him of his British citizenship pursuant to section 40(3) of the British Nationality Act 1981, as amended (“the 1981 Act”). This provides as follows:

“40 Deprivation of citizenship.

(1) In this section a reference to a person’s “citizenship status” is a reference to his status as –

(a) a British citizen

...

(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.”

3. The Appellant arrived in the United Kingdom on 5 September 2002 and claimed asylum very soon thereafter. In doing so he gave his correct name, but stated his date of birth to be 10 March 1987 and his nationality to be Serbian. In fact, his correct date of birth is 10 September 1987 and he is an Albanian citizen. These two falsehoods constitute the basis of what is accepted to be deception employed over the course of time.
4. The Appellant’s asylum claim was refused on 10 October 2002. However, by virtue of his age he was granted what was then termed exceptional leave to enter (“ELE”) as an unaccompanied asylum-seeking child. This ELE was due to expire on 9 March 2005, a day before he turned 18.
5. By an extension application made on 25 February 2005, the Appellant sought further leave to remain. On 28 March 2007 he made an application for indefinite leave to remain (“ILR”), again using the false information provided to the Respondent upon entry to this country. As a result of the outstanding extension application made in February 2005, the Appellant was brought into the ambit of the legacy programme and on 13 March 2008 he completed a questionnaire to assist with that process. He

again used the false date of birth and nationality. By this time, the Appellant was an adult.

6. On 15 February 2013 the Appellant was granted ILR in the United Kingdom. Later that year he made an initial application to naturalise as a British citizen. This was refused on good character grounds due to previous criminal convictions. Once again, false information was used in that application. On 28 April 2014 a second naturalisation application was made, using the same false information. That application was granted and the Appellant was issued with a certificate of naturalisation on 5 June 2014. It was only sometime afterwards and following investigation that the Respondent was presented with information indicating that the Appellant had provided false personal details in 2002 and had continued to put these forward at all stages.

### **The Respondent's decision**

7. On 25 October 2019 the Respondent made a decision to deprive the Appellant of his British citizenship under section 40(3) of the 1981 Act. A detailed immigration history is set out in the decision letter with reference to the various applications made over time. The relevant parts of paragraphs 20, 21, and 23 of the letter read as follows:

“20. If your true Albanian identity was known at the (sic) you submitted an application for Indefinite Leave to Remain it is likely that you (sic) have been refused and therefore not have met the mandatory requirement for naturalisation. Your false place of birth, Serbia was material to you being granted ILR (sic) you persisted with the deception in your naturalisation application and ticked the box to indicate you had not done anything to suggest you was (sic) not of good character.

21. ...It is clear that you would have been refused British citizenship under S.9.3 and 9.4 [of the Nationality Instructions] had the nationality caseworker been aware that you had presented a false identity to the Home Office and continued to use that identity throughout your immigration history.

...

23....Had your true details and information relating to your deception been known, Indefinite Leave to Remain would not have been granted. Thus he would not have met the residence requirements needed to naturalise and deprivation is therefore applicable.”

8. It can be seen that the Respondent's decision not only linked the deception to the grant of ILR, but also to the good character requirement applicable in naturalisation applications.
9. Having concluded that the Appellant would not have been granted either ILR or naturalisation as a British citizenship if the false information had been known about

at the relevant time, the Respondent went on to decline to exercise discretion in his favour. In respect of Article 8 ECHR ("Article 8"), it was recognised that the Appellant was married, had spent a lengthy time in this country and that he had a British child. However, in all the circumstances it was concluded that the deprivation of citizenship would not constitute a violation of protected Article 8 rights.

### **Decision of the First-tier Tribunal**

10. The Appellant appealed and the case came before the judge on 31 January 2020. The judge referred herself to the 1981 Act and a number of authorities relevant to the issues which fell to be addressed in the appeal. The essential self-directions are set out at [9] - [12] and can be summarised thus: first, it was for the Respondent to establish the condition precedent under section 40(3) of the 1981 Act; second, that if that condition existed, it was for the First-tier Tribunal to decide whether discretion should be exercised in the Appellant's favour in any event; third, if this did not assist the Appellant, Article 8 should be addressed.
11. The judge summarised the submissions made by both representatives (Mr Kerr appeared for the Appellant). The Presenting Officer relied on the decision letter and had emphasised the use of deception by the Appellant once he had become an adult. The Presenting Officer had been unable to provide a minute relating to the decision granting the Appellant ILR in 2013.
12. Mr Kerr relied on a skeleton argument and submitted that the incorrect date of birth relied on by the Appellant had made no difference to the grant of either ELE or ILR. The case was properly dealt with under the legacy programme and the Respondent had failed to establish the causative link between the deception and the grant of ILR. In addition, the Respondent had failed to establish a causative link between the deception and the naturalisation decision. Mr Kerr submitted that even if a link had been established, the Respondent should have exercised her discretion in the Appellant's favour and/or concluded that deprivation would violate Article 8. The judge was asked to so conclude.
13. At [23] the judge noted that the acceptance on the Appellant's part that he had perpetuated deception in respect of his reliance on false information in his dealings with the Respondent. She stated (correctly) that there must be a causative link between the deception and the acquisition of British citizenship.
14. At [24] the judge then concluded that the Respondent had failed to prove the causative link between the use of the false representations and the acquisition of British citizenship. In all the circumstances, she found that the Appellant would have been granted ELE as a minor whatever his nationality and noted that the false date of birth in fact made him older than he was.
15. She moved on to consider the grant of ILR with reference to the legacy programme. She acknowledges that that programme was never intended to be an "amnesty". She clearly placed a good deal of reliance upon a report by the independent Chief

Inspector of Borders and Immigration, John Vine, OBE, dated March – July 2012 (“the Vine report”), in which the Respondent’s handling of legacy cases had been examined. With particular reference to paragraph 5.88 of that report, the judge considered that the “main criteria” used in the decision-making process under the programme did not expressly include the use of deception or false representations. In her view, this indicated that the Respondent did not at that time consider that the use of deception would have carried “much weight” when considering whether to grant an individual ILR. Thus, the judge concluded that the Respondent had failed to show a causative link between the Appellant’s deception and the grant of that leave. At [28] she stated as follows:

“... I find the accuracy of his date of birth and nationality had no bearing on his grant of citizenship, as he fulfilled the criteria for being able to naturalise. I do not find the respondent has shown, on balance, a causative link to prove the deception used by the appellant was material to the acquisition of his naturalisation.”

16. In the next section of her decision, the judge considered discretionary considerations. She makes particular reference to paragraphs 55.7.3 and 55.7.4 of Chapter 55 of the Respondent’s policy guidance on the deprivation of British citizenship. The judge referred at [30] to her previous conclusion that there was no nexus between the deception and grant of citizenship. In the same paragraph she referred to the delay in the Respondent considering the Appellant’s 2005 extension application and draws an analogy (using the term “similar”) between the legacy programme and the historical family ILR concession. In light of this, the judge concluded that the Respondent should have afforded the Appellant the benefit of the Nationality Instructions when considering whether or not to deprive him of his British citizenship.

17. A reference to “good character grounds” is made in [32], which reads:

“The respondent states that because the appellant provided false information, then he would not have been granted ILR and would have been refused naturalisation on good character grounds. I have already found that the causative link is not been made out above, further I find the respondent’s submission is misconceived. Clearly according to her policy she envisages circumstances where applicants can retain their citizenship despite their previous deception, otherwise a policy is rendered meaningless.”

18. Having then made a passing reference to the case of Sleiman (deprivation of citizenship; conduct) [2017] UKUT 36 (IAC), the judge goes in [34] to state as follows:

“Having regard to the respondent’s policy, I do not find the mitigating features of the appellant’s case to be particular weighty, justifying an exceptional circumstance mandating the respondent to exercise her discretion differently. I do however find that she should have exercised her discretion differently in accordance with paragraphs 55.7.3 and 55.7.4 for the reasons I set out above. I do not find the false representations the appellant made had a direct bearing on the grant of his citizenship. I do find the ILR he was granted, was on a basis similar to a concession. Hence the respondent should have applied the discretion in a policy and found the fact he previously lied about his asylum claim irrelevant, because having regard to her



decision-making criteria under the Legacy it would not have made a material difference.”.

19. Finally, the judge turned to consider the consequences of the deprivation order. She concluded that deprivation would leave the Appellant in a worse position than he found himself prior to that; in other words, deprivation of citizenship would not revive ILR. He would be in the United Kingdom unlawfully.
20. Drawing these threads together, the judge allowed the Appellant’s appeal on three bases: first, that the condition precedent set out in section 40(3) of the 1981 Act had not been satisfied because there was no causative link between the deception and the acquisition of citizenship; second, that discretion should be exercised in the Appellant’s favour; and third, that the consequences of deprivation would violate Article 8.

### **The Respondent’s challenge**

21. The Respondent’s grounds of appeal primarily attack the judge’s assessment of the legacy programme and associated matters. In essence, they assert as follows:
  - (i) the judge had erroneously conflated the legacy programme with an amnesty;
  - (ii) the judge had failed to take all relevant matters into account when considering whether the deception would have been a relevant consideration to the Respondent’s decision-maker when granting ILR. In particular, she failed to take into account the fact that the Appellant had put forward his deception even after becoming an adult;
  - (iii) the judge was not rationally entitled to rely on paragraph 5.88 of the Vine report to conclude that the Appellant’s accepted deception had no material bearing on the decision to grant ILR;
  - (iv) the judge’s assessment of the discretion and Article 8 issues was flawed.
22. Permission was granted by First-tier Tribunal Haria on 17 April 2020.
23. In advance of the hearing Mr Kerr provided a rule 24 response which can be summarised as follows. In seeking to challenge the judge’s decision, the Respondent was effectively disagreeing with a factual assessment and that no error of law has been identified. The judge directed herself correctly in law and did not in fact treat the legacy programme as an “amnesty”. The judge had properly considered the Respondent’s Nationality Instructions as regards decisions to deprive an individual of their British citizenship. In respect of Article 8, Mr Kerr (realistically in my view) accepted that in light of Hysaj (Deprivation of Citizenship: Delay) Albania [2020] UKUT 128 (IAC) the judge did err in her assessment, but it is said that this is immaterial given the sustainability of her findings on the causal nexus and discretion issues.

## The hearing

24. At the outset of the hearing I raised a matter with the representatives which in my view was obvious on the face of the judge's decision and highly pertinent to the question of whether she erred in law.
25. The good character requirement is a crucial element of all naturalisation applications. A failure to satisfy this criterion will result in an application being refused (see section 6 of the 1981 Act and paragraph 1 of schedule 1 thereto). There was on my part a real concern that the judge had failed to address, adequately or at all, the question of whether the deception perpetrated by the applicant *in the naturalisation application itself* would have had a material bearing on the grant of citizenship. Ms Cunha and Mr Kerr provided me with helpful submissions on this issue, in addition to all others.
26. Ms Cunha relied on the grounds of appeal and emphasised certain aspects. She submitted that the grant of ILR was not simply based on the appellant's age, but also his falsely claimed country of nationality. In respect of the Vine report, she referred me to additional passages following that relied on by the judge. On the good character issue, she submitted that the judge had failed to consider evidence of deception by the appellant when he was an adult and how this related to that requirement.
27. Mr Kerr relied on his rule 24 response. He submitted that if the true facts had been known to at the time of the ILR decision and the grant of naturalisation, it was not "inevitable" that the respective applications would have been refused. Alternatively, the deception may not have played a "pivotal role" in those decisions. The absence of a minute note relating to the grant of ILR, there was no evidence from the respondent to indicate whether the deception would have had a material effect.
28. As to the good character issue, Mr Kerr relied on what the judge said at [32]. Whilst this passage might have been better placed in an earlier part of her decision, the judge had taken this matter into account. The respondent's policy had an element of discretion built in so knowledge of the deception could not "inevitably" have led to a refusal of the naturalisation application.
29. Mr Kerr submitted that even if the judge had gone wrong on the causal nexus issue relating to the condition precedent, a decision on the exercise of discretion was sound.
30. Finally, he reiterated his acceptance that the judge had erred in respect of her assessment of Article 8 in light of the conclusions in Hysaj.
31. Ms Cunha provided a brief reply.

32. At the end of the hearing I informed the parties that if I were to find that the judge had erred in law and that her decision must be set aside, the remaking of the decision in this case would be undertaken following a resumed hearing, conducted remotely.

### **Decision on error of law**

33. After much thought I have concluded that the judge has materially erred in law, albeit not in respect of all the assertions put forward by the Respondent and in part based on the good character issue which was only tangentially raised in the grounds of appeal by reference to the deception practised once the Appellant became an adult.
34. The judge was entitled to have concluded that the Appellant would have been granted the initial period of ELE whatever his true nationality was. On any view, he was a minor at the time and the evidence before the judge indicated that even if it had been known that he was Albanian and not Serbian, the Respondent's policy of granting limited leave to unaccompanied asylum-seeking children would have applied (see [24] of the judge's decision).
35. Having said that, the assessment of the grant of ILR is erroneous for the following reasons.
36. First, the judge failed to take a highly relevant matter into account, namely the fact that even after the Appellant had turned 18, he perpetuated the deception in respect of his age and nationality on at least three further occasions prior to the ILR decision being made: in the application for ILR on 28 March 2007; the legacy questionnaire completed on 13 March 2008; and in the letter of 24 March 2009, in which his previous solicitors chased up the legacy issue, again stating the false information and expressly confirming that the Appellant was "a person of good character".
37. Second, the Respondent is right to point out in her grounds that relevant factors were set out in Chapter 53 of the guidance applicable to the question of whether "exceptional circumstances" existed in cases being considered under the legacy programme. This was made clear by Ouseley J in Jaku and Others [2014] EWHC 605 (Admin).
38. The first of the factors listed at paragraph 53.1.1 of that guidance (current at the date of ILR decision) was whether there was "evidence of deception practised at any stage in the process." If the Respondent had been aware of the full facts at the time, it is plain that there would have been such "evidence", and it is very difficult to see how it would have been "inevitable" (or even very likely) that the grant of leave would have occurred notwithstanding this evidence. The point here is that the judge failed to take this aspect of the matrix into account.
39. Thus, whilst the judge stated that the legacy programme was "never intended to be an amnesty", the failure to have regard to the relevant consideration of casework

guidance applicable to cases within that cohort (including that of the appellant) had the effect of coming close to treating it as such. In any event, the failure is an error.

40. Second, the judge erred when placing considerable reliance on paragraph 5.88 of the Vine report. Weight is of course a matter for the First-tier Tribunal. However, the evidence upon which it is placed must be assessed in its proper context. Here, the judge in my view failed to do this in three respects: first, she has effectively treated the report as something akin to a casework guidance document, being reflective of the respondent's approach to legacy cases: it plainly was not; second, as stated previously, she failed to have regard to Chapter 53 when considering the report; third, she failed to make clear that the section of the report relied on related to an analysis of only 24 cases identified for inspection.
41. The impact of these errors is that the judge's conclusion that the "main criteria" referred to in the Vine report meant that the respondent did not view deception or false representations as a carrying "much weight" in the decision-making process under the legacy programme, is unsustainable.
42. The absence of a minute from the Respondent's file as to the precise basis for the grant of ILR in 2013 does not save this aspect of the judge's analysis. It is an inescapable fact that the Respondent was unaware of the deception at the time she made that decision. In seeking to establish the causative link between the deception and the grant of ILR the Respondent only needed to show that it was more likely than not that the dishonesty would have had a direct bearing on the decision in question.
43. In light of the foregoing, the judge's overall conclusion that there was no causative link between the deception and the grant of ILR is flawed and cannot stand.
44. I turn now to the issue which I highlighted at the outset of the hearing, namely the significance of the "good character" criterion in respect of applications for naturalisation as a British citizen.
45. It is plainly integral to the decision-making process. As a matter of logic, it falls to be considered not simply in light of an individual's past history, but also in respect of what they have stated *in that application itself*. The criterion is in addition to the residence criterion, which all applicants must satisfy. In the present case, the decision letter clearly made reference to good character and, in the absence of any concession by the Respondent, it was a live issue in the appeal. It is apparent from the judge's decision that she did not grapple with this important issue, at least in the section dealing with the causative link (it is referred to later on and I shall turn to this in due course).
46. It seems to me that when addressing the good character criterion, a judge must attempt to put themselves in the shoes of the decision-maker at the time the application is decided and consider the import of relevant guidance applicable to the application.

47. The relevant Nationality Instructions on the good character requirement in place at the time are dated 2 October 2013 and appear in the Respondent's bundle at Annex T (the full title is Nationality Policy Guidance and Casework Instruction, Chapter 18, Annex D: The Good Character Requirement). Section 8.2 includes examples where dishonesty would "normally" lead to an application being refused, the last of these states:

"providing false or deliberately misleading information at earlier stages of the immigration application process (e.g. providing false bio-data, claiming to be a nationality they were not or concealing conviction data). Where this applies, a refusal on the deception ground may also be merited."

48. At Section 9.3 it is stated that applications will "normally" be refused where:

"...there is evidence that a person has employed deception either:

- a. during the citizenship application process; or
- b. in a previous immigration application."

49. The judge failed to have regard to this important guidance. This in itself must be an obvious error of law. Beyond that, the essential question which the judge failed to ask herself was: would knowledge of the Appellant's deception at the time his application was decided to have made a material difference to the Respondent's assessment of whether he was a person of good character? That did not involve simply a consideration of the residence criterion or indeed of the circumstances in which he was granted ELE, or even ILR. It had to incorporate the perpetuation of the dishonest conduct by the Appellant when he was an adult; his assertion in the naturalisation application itself of the false information; and that he was a person of good character. Without answering that question for myself, it is clear that in light of the Respondent's guidance, the judge's failure to address this matter constituted a clear and obvious error of law.

50. I turn to what is said in [32] of the decision, in which reference is made to "good character grounds". I take account of Mr Kerr's submission that this passage would have sat better within the section on causative links and I appreciate that the structure of the decision is not as important as its content. However, the judge's consideration is nonetheless flawed.

51. What she says in [32] is, on a proper reading, predicated upon her prior finding that there was no causative link between the deception and the acquisition of citizenship. If, as I have already found, that conclusion was marred by error, then the premise upon which the judge considers good character in that paragraph is itself flawed.

52. Further, the last sentence of [32] does not cure the error. It is of course the case that the Nationality Instructions contained a discretionary element. However, by its nature this goes to the issue of whether discretion should be exercised in an individual's favour, *notwithstanding* the establishment of the causative link between

perception and the acquisition of citizenship. I shall consider the discretion issue shortly.

53. Bringing all of the above together, the judge's assessment of the causation issue is flawed.
54. I now turn to the judge's consideration of the issue of discretion. The mere existence of a discretion is not the same as it being exercised in light of the full facts. At the time of the naturalisation decision the Respondent was manifestly not in possession of the full facts.
55. Mr Kerr's alternative submission is that the judge's conclusions are sound. I disagree. On a fair reading of [30] – [34] of her decision, it is apparent that her finding that there was no causative link between the deception and the grant of ILR and then the acquisition of citizenship played a significant (if not crucial) role in her assessment that discretion should be exercised in the appellant's favour. For the reasons set out above, that finding is flawed and this has the effect of undermining the conclusion on discretion. In addition (and connected to what I have said previously), the judge failed to take into account the instances of the appellant having practised deception when an adult. The significance of such actions is reflected in paragraph 55.7.11.2 of the relevant guidance:

“All adults are expected to take responsibility for the information they provided on acquisition of ILR and/or citizenship...”

[Examples of situations not deemed to provide mitigation are set out, none of which are relevant to the appellant's case]

56. At paragraph 55.7.3 it is confirmed that deprivation action “will not be appropriate if the fraud, false representation or concealment of a material fact did not have a direct bearing on the grant of citizenship.” Here, I have concluded that the judge's assessment of that issue is erroneous. Paragraph 55.7.4 does not assist the appellant's case. There it is stated that the fact a person may have previously lied about their asylum claim “may” be irrelevant. That does not, however, deal with the fact that the appellant had perpetuated his original lies after he became an adult and in the naturalisation application itself.
57. Taking all matters into account, the judge's conclusion on the discretion issue is unsustainable. In saying this, I am not simply disagreeing with her factual findings. The errors arise from a failure to take relevant matters into account in respect of both the causative link issue and that of discretion.
58. In respect of the Article 8 issue, as mentioned previously, Mr Kerr has realistically accepted that the judge did err in light of what is said in Hysaj. For the reasons set out in that decision, I agree.
59. Therefore, the judge's decision must be set aside.

## **Disposal**

60. In terms of disposal, I propose to direct the parties to submit further written submissions and for a resumed hearing to be listed remotely in due course. The issues to be considered in the submissions and at the hearing will be:
- i. the causative link between the admitted deception and the grant of ILR and/or the acquisition of British citizenship;
  - ii. if a causative link is established between the deception and acquisition of citizenship, whether discretion should be exercised in the appellant's favour in any event;
  - iii. alternatively, whether Article 8 can assist the appellant, based on the current case-law.

## **Notice of Decision**

**The decision of the First-tier Tribunal contains an error of law and is set aside.**

**This appeal shall be retained in the Upper Tribunal and set down for a resumed hearing, to be conducted remotely**

**No anonymity direction is made.**

## **Directions to the parties**

- 1) No later than 10 days from the date this decision is sent out, the appellant shall inform the Tribunal and the Respondent whether it is intended to call the Appellant (or anyone else) at the resumed hearing, and if so, whether an interpreter will be required;**
- 2) No later than 28 days after this decision is sent out, the Appellant shall file and serve in electronic and physical form a consolidated bundle of all evidence relied on;**
- 3) No later than 28 days after this decision sent out, the Respondent shall (if applicable) file and serve in electronic and physical form any additional evidence relied on;**
- 4) No later than 10 days before the resumed hearing, the Appellant shall file and serve in electronic and physical form a skeleton argument addressing all relevant matters;**
- 5) No later than 5 days before the resumed hearing, the Respondent shall file and serve in electronic and physical form a skeleton argument addressing all relevant matters;**

**6) With liberty to apply.**

Signed *H Norton-Taylor*

Date: 14 December 2020

Upper Tribunal Judge Norton-Taylor