Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00131/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Tuesday 3 August 2021	**On Tuesday 21 September 2021**

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE OWENS

Between

MR BAKHTIAR HUSSEIN MARIF

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Holmes, Counsel instructed by Parkview solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND AND ISSUES

1. By a decision promulgated on 1 April 2021, Upper Tribunal Judge Smith found an error of law in the decision of First-tier Tribunal Judge Andrew Davies itself promulgated on 4 March 2020, allowing the Appellant's appeal against the Respondent's decision dated 28 November 2019 depriving the Appellant of his British citizenship on the basis that he had obtained it by deception. The error of law decision is appended to this decision for ease of reference.

2. The hearing before us took place remotely via Microsoft Teams. There were no technical difficulties affecting the conduct of the hearing. We had before us the Respondent's core bundle to which we refer below as [RB/[annex]]. We also had the Appellant's bundle before the First-tier Tribunal to which we refer below as [AB/[page]]. In response to the directions made in the error of law decision, both parties filed further documents and skeleton arguments. We will come to those documents relevant to our consideration below.

3. The essential background facts are set out at [2] to [4] of the error of law decision and we do not repeat what is there said. As a result of the way in which the hearing before us proceeded and the narrow issue raised, we will need to say more about the facts in our discussion below.

4. There was no dispute between the parties as to the legal position. The legal approach is set out at [20] to [23] of the error of law decision. Both parties agreed with the analysis there set out. In particular, it was accepted by Mr Holmes that the Supreme Court's judgment in R (oao) Begum v Special Immigration Appeals Commission and Anor [2021] UKSC 7 ("Begum") offers authoritative guidance at least so far as the materiality of deception and exercise of discretion is concerned. We remind ourselves that, on those issues at least, we are conducting a review of the Respondent's position on traditional public law grounds. As we will come to, that does not mean that we do not engage in a fact-finding exercise. However, when considering whether the Secretary of State was entitled to reach the view that deprivation is conducive to the public good, we have to give weight to the Respondent's view and not exercise any discretion for ourselves. The passage from Begum cited at [20] of the error of law decision is particularly instructive in this regard.

5. There was no argument before us in relation to the application of Article 8 ECHR to the facts of this case. Nor was there any argument in relation to the exercise of any residual discretion. The focus of the argument was on the nature of the deception alleged and the materiality of that deception.

DISCUSSION AND CONCLUSIONS

The Respondent's decision

6. Since we are in the position of reviewing the exercise of the Respondent's power to deprive the Appellant of citizenship, we consider that the appropriate starting point is the way in which the Respondent put her case as to the deception in the decision letter under appeal. We set out the relevant parts of the decision letter below:

> "8. You entered the United Kingdom and submitted an asylum form dated 14 February 2002 (Annex A). **You attended an asylum SEF interview on 11 June 2002 in which you stated your identity as Bakhtiar Hussein Marif born 13 March 1978 (Annex B, Page 1, Questions 3-6). You stated that your country of origin as Sulaiman Bage, Tikrit, Iraq**

(Annex B, Page 1, Question 9). You stated that you understood the interpreter (Annex B, Page 1, Question 17)….

9. In a letter from the Home Office dated 10 July 2002 you were informed that your asylum claim had been refused because it was concluded that you had not established a well-founded fear of persecution (Annex C, Page 2, Para 8). You were later informed in a letter from the Home Office dated 15 July 2002 that it had been decided, because of the particular circumstances of your case you were granted Exceptional Leave to Remain in the UK until 10 July 2006 (Annex D, Page 1, Para 1).

10. **You submitted an application for Indefinite Leave to Remain on 31 May 2006 in the identity Bakhtiar Hussein Marif born 13 March 1978 (Annex E, Page 1, Section 1.1-1.4).** You signed the declaration section of the form which clearly states '*I am aware that it is an offence under the Immigration Act 1971, as amended by the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002 to make to a person acting in execution of any of those Acts a statement or representation which I know to be false or do not believe to be true, or obtain to seek to obtain [sic] leave to remain in the United Kingdom by means which include deception*' (Annex E, Page 8, Section 6). You were granted Indefinite Leave to Remain on 30 October 2006.

11. **You submitted an application to naturalise on 6 December 2007 in the identity Bakhtiar Hussein Marif born 13 March 1978 (Annex F, Page 4, Section 1.4-1.10). You claimed your place and country of birth as Slman Bag, Iraq (Annex F, Page 4, Section 1.11-1.12). It is noted you confirmed the same place and country of birth in your asylum SEF interview application (Annex B, Page 1, Question 9). You claimed your father's details as Mr Hussein born Slman Bag, Iraq and your mother's details Ayesha Mohammad born Dosa, Iraq (Annex F, Page 5, Section 1.21-1.28**). You signed the declaration section of the form which clearly states '*To give false information on this form knowing or recklessly is a criminal offence punishable with up to 3 months imprisonment or by a fine not exceeding £5,000 or both (Section 46(1) of the British Nationality Act 1981, as amended).* Annex F, Page 14, Section 6.1). You confirmed that you read and understood the '*guide to naturalisation as a British citizen*' (Annex F, Page 14, Section 6.2). Guide AN (Annex G). You were informed in a letter from the Home Office dated 21 February 2008 that your naturalisation application was successful (Annex H). You attended your naturalisation ceremony on 18 March 2008.

12. HMPO referred your case to the Status Review Unit on 20 June 2018 after you submitted documents in support of your passport application confirming that although you naturalised in the identity Bakhtiar Hussein MARIF – born 13/03/1978, in Slman Bag, Iraq, your genuine identity is Bakhtiar Hussein MARIF – born 13/09/1978, Mawat, Shahrbazar, Sulaymaniyah, Iraq. It is noted that your claimed place of birth, Slman Bag, Iraq was under government control when you entered the UK and claimed asylum, whereas your genuine place of birth Sulaymaniyah, Iraq, was not under government control. You were issued with a Home Office Investigation letter on 30 November 2018 requesting an explanation and further information (Annex I, Page 1, Para 3).

13. In mitigation from your legal representatives, Ashton Solicitors dated 10 December 2018, they claim regarding your date of birth that your levels of English were no good and you could neither read or write properly. They state that previous solicitors had not mentioned this error to you or to the Home Office (Annex J, Page 1, Para 5). In reference (55.4.1 '*False Representation*') They claim that your incorrect date and place of birth is an innocent mistake (Annex J, Page 2, Ref (55.4.1)). They state that you have not concealed any information to acquire British citizenship as your asylum claim has your correct date and place of birth (Annex J, Page 3 (Ref 55.4.2)). **It is noted that in your Asylum SEF interview form in 2002 you stated that your country of origin as Sulaiman Bage, Tikrit, Iraq (Annex B, Page 1, Question 9). You also confirmed in your application to naturalise in 2007 your place and country of birth as Slman Bag, Iraq (Annex F, Page 4, Section 1.11-1.12). It is**

again noted that your claimed place of birth, Slman Bag, Iraq was under government control when you entered the UK and claimed asylum, whereas your genuine place of birth Sulaymaniyah, Iraq, was not under government control. Your legal representatives state that this discrepancy transpired after your father registered you as being born in Mawat but are unclear as to why he did this. They also claim it could be that Slman Bag has since been destroyed due to violence in the city (Annex J, Page 3 (Ref: 55.7.10.2)). They state you show resource about these incorrect details (Annex F, Page 4, Para 1).

14. **In a statement dated 10 December 2018 you claim your identity as Bakhtiar Hussein Marif born 13 September 1978 and your place of birth Slman Bag (government-controlled area of Iraq) (Annex K, Page 1, Para 5). You claim that your late parents used to live in Mawat, Sulaymaneyah where your father registered your birth (Annex K, Page 1, Para 5). It is noted that you claimed your father's place of birth as Slman Bag, Iraq, in your application to naturalise (Annex F, Page 5, 1.22).** You apologise for the error in your date of birth and state you could not read or write English (Annex K, Page 1, Para 8). **The error in your date of birth was not material to your grant of status in the United Kingdom however, your place of birth was material as your claimed place of birth was material as your claimed place of birth, Slman Bag was under Iraq government control. It is noted that paragraph 3.6 of the Iraqi Policy Bulletin 2006 and 2009 states:** ***'Although there was no country specific blanket ELR policy it was accepted practice that all asylum seekers who were accepted ….as being Iraqi nationals, but who were found not to be refugees, from April 1991 to 20 October 2000, would be granted 4 years' ELR arising from factors such as the severe penalties imposed on those who had left Iraq illegally. From 20 October 2000, in light of the improved conditions in KAZ, only claimants who were accepted to come from GCI were granted 4 years' ELR.*** **(Annex L, Page 2, Para 3.6). It is noted that you claimed asylum in February 2002 at that time only claimants from the government-controlled areas of Iraq were granted 4 years ELR, if your genuine place of birth was know [sic] at the time you would not have been granted status in the UK.**

15. Your legal representatives in a letter dated 24 April 2019 submitted further mitigation again stating you wish to explain the discrepancy regarding your place of birth. **They claim that you were born in Slman Bag, but your father was from Mawat, Sulaymaneyah and claim your father registered your birth one year after your birth (Annex M, Page 2, Para 4).** They claim that you never intended to mislead the Home Office and that you entered the UK because of your fear of persecution. (Annex M, Page 3, Para 1). Your legal representatives state that you show remorse about the incorrect date and place of birth (Annex M, Page 6, Para 8). They claim that you should not be deprived of British citizenship because your previous solicitors had not informed you of the errors (Annex M, Page 6, Para 9).

16. **Genuine Iraq documents submitted to Durham Passport Office on 30 May 2018 – 1957 family register with certified translation stating your place of birth as Mawat, Sulaiymaniya (Annex N). Marriage entry, Sulaimaniya with certified translation (Annex O). Iraq national ID card with certified translation, stating your place of birth as Mawat, Sulaimaniya (Annex P). Iraq Passport No A7717538 (Annex Q). All identity documents confirm your place of birth as Mawat, Sulaimaniya.**

17. **Chapter 55 states that the caseworker should be satisfied that there as an intent to deceive. The evidence shows that you perpetrated material fraud claiming to be born in a government-controlled area of Iraq in order to acquire status and British citizenship.** Chapter 55 also states that adults are held responsible for their actions, including representations made under their signature (or on their behalf) and should be held accountable for them as a consequence.

18. Section 9 of the Nationality Staff Instructions in use on the date of the naturalisation application deals with deception and dishonesty. **It is clear that you would have been refused British citizenship under S.9.1 and 9.2 had the nationality caseworker been aware**

that you had presented a false place of birth to the Home Office and continued to use that place of birth throughout your immigration history (Annex S). Your explanations that your father registered your birth a year later in Mawat, Sulaimaniya where he previously resided is not credible.

19. **The fact that you were from liberated and not government controlled Iraq is material fraud, had the nationality caseworker been aware of this fact you would not have been granted Indefinite Leave to Remain and subsequent British citizenship. Your grant of Naturalisation was obtained by means of fraud, false representation and the concealment of the material fact that your place of birth is Mawat, Sulaimaniya and not Slman Bag as claimed which was a government-controlled area of Iraq.** It is a balanced and proportionate step to take to pursue deprivation.

20. For the reasons given above it is not accepted there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, **it is considered that you provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where your application(s) would have been unsuccessful if you had told the truth.** It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship.

21. It is acknowledged that the decision to deprive on grounds of fraud is at the Secretary of State's discretion. In making the decision to deprive you of citizenship, the Secretary of State has taken into account the following factors, which include the representations made by your legal representatives in their letters dated 10 December 2018, 24 April 2019, 18 March 2019, 5 September 2019 and 1 October 2019 and concluded that deprivation would be both reasonable and proportionate."

[our emphasis]

The Deception

7. Perhaps unusually, we were not asked to hear evidence from the Appellant as regards the deception. Mr Holmes indicated that the Appellant did not concede or accept that he had exercised deception but, in accordance with what was said at [32] to [35] of the error of law decision, he considered the crucial issue to be the materiality of the deception.

8. As we will come to, however, in order to consider the materiality of the deception, particularly in light of the way in which the Respondent has framed her case, we do need to make findings as to the deception itself.

9. We do not need to deal with the discrepancy as to the Appellant's date of birth for two reasons. First, we cannot see how the discrepancy which, on the face of the documents, exists between March 1978 and September 1978 could possibly make any difference to the grant of either status or nationality. It is not the case that, on the wrong date given the Appellant would have been a minor but was not if the correct date had been given. Second, and most importantly, the Respondent does not assert that this part of the deception alleged was material (see emboldened passage at [14] of the decision letter set out above).

10. We turn then to the deception on which reliance is placed by the Respondent by reference to the documents cited in the decision letter.

11. We begin with the SEF Interview Form at [RB/B]. At question nine of that interview, the Appellant was asked for his "Last Known Address in Country of Origin". The answer given to that question was "Sulaiman Bage, Duse Khurmatue, Tikrit (Salahadin) Iraq". We emphasise that the Appellant was not asked for his place of birth but rather his last address in Iraq. He was not asked either for his parent's details. We were quite surprised by the lack of any screening interview which would normally ask for details of parents etc but we were assured by Mr Lindsay that the Tribunal had all relevant documents which were in the Respondent's possession.

12. The document at [RB/E] to which reference is made in the Respondent's decision letter and which is said to be the relevant application for indefinite leave to remain ("ILR") contains no assertion about the Appellant's place of birth in Iraq. The only assertion is that the Appellant's nationality is Iraqi. We do not understand it to be suggested that the Appellant is not an Iraqi. It is his place of birth within Iraq which is in issue.

13. We turn then to the application for naturalisation at [RB/F]. In that document, the Appellant asserts his "village, town or city of birth" as being "Slman Bag". At [1.21] of the form, he says that his father was also born in "Slman Bag" and at [1.26] that his mother was born in "Dosa".

14. The documents on which the Respondent places reliance as disclosing the deception are at [RB/N] to [RB/Q] which show the following:

- [RB/N] – extract from general register for the province of Sulaymaniyah: Appellant shown as born on 13 September 1978 in Mawat, having married his wife, born in Bazyan, Sulaymaniyah and two children born to the couple on 24 November 2013 and 22 August 2015. The Appellant's birth was registered in October 1979 and his wife's birth was registered in April 1990 (although that is a little difficult to understand since she was not apparently born until 9 June 1990). The family's personal ID is shown as dated 12 April 2017.
- [RB/O] – marriage entry: Appellant and his wife shown as having their marriage registered in Sulaymaniyah on 28 September 2011.
- [RB/P] – Appellant's identity card registered in Mawat on 12 April 2017.
- [RB/Q] – Appellant's Iraqi passport: no relevant details other than as to date of birth.

15. The Appellant seeks to explain the discrepancy as to his date and place of birth in a statement dated 10 December 2018 ([RB/K] which states as follows so far as relevant:

> "1. Upon arrival in the UK, I had always informed the Home Office that my date of birth was 13/09/1978.
> 2. I am not aware that my date of birth was registered as 13/03/1978. This is the date now on Certificate of Naturalisation and British passport.
> 3. My original Iraqi passport and My original Iraqi ID confirm my correct date of birth.
> 4. When I arrived in UK my level of English was poor. I could not read or write in English. I was not aware that my date of birth has been changed in Home Office documents.

5. I was not born in an Iraqi hospital and I had difficulties in obtaining ..a new version of my birth certificate. My late parents lived in Sulaymaneyah. My parents used to live in Mawat. My father registered my birth after one year at Mawat.
6. I also provide my Copy of General Registry and my family benefit book that confirm correct date of birth as 13 September 1978.
7. After obtaining my Naturalisation as a British Citizen, I applied for my Children's British passport. I gave my British passport and my children's Iraqi passport to the translator to translate the family registration book. The translator followed my date of birth as shown in my British Passport.
8. I apologise for not bringing this error to the attention of the Home Office at an earlier date in subsequent applications for settlement and naturalisation the incorrect date of birth was used. My previous solicitors had not mentioned to me anything about my date of birth. I could not read or write in English then. If I had been advised I would not have kept silent about the error. I would have informed the Home Office.
9. I am now aware that I should not have done so and should rather have made steps to gain additional evidence confirming my true date of birth.
…"

16. This statement was made at the time that the Appellant's deception was discovered by the Respondent. It appears from the statement that, even at this time, the Appellant understood the deception alleged to relate to his date of birth and not his place of birth.

17. The position as to the Appellant's place of birth appears in representations made by previous solicitors dated 24 April 2019 at [RB/M]. The relevant part of the letter reads as follows:

"..**Place of Birth issue and its explanation**
Mr Marif also wishes to explain the discrepancy regarding his place of birth. His naturalisation documents confirm his place of birth as Slman Bag, Iraq. His Iraqi documents confirm his place of birth as Mawat, Iraq. Our client wishes to confirm that he was born in Slman Bag but his father was from Mawat. His late father registered his birth one year after his birth when he was an infant in Mawat. Mr Marif is unable to explain why his father took such action, he also notes that Slman Bag has been destroyed owing to violence in the country and this may be why his father took such action. He is however related to both place in accordance with information he provided to Home Office initially as he was born in Slman Bag and his father is from Mawat. Our client further asserts that the security situation in Iraq at the time of his birth and at the time of his coming in the UK was very bad.
When he came to the UK, he could not have explained his position well as a result he is suffering now. He never intended to mislead the Home Office. He asserts why will he lie about his place of birth and what benefit will he get if he gives incorrect date of birth or place of birth to Home Office. He admits he was careless, negligent, feared and was given ill advised or no advise [sic] at all about amending his record. In no circumstances it was his intension [sic] to mislead the Home Office…"

18. The Appellant provided further witness evidence in the First-tier Tribunal. His statement is at [AB/3-9] and reads as follows so far as relevant:

"1. My date of birth is 13 September 1978. I was born in Slman Bage, Duse, Khurmatue, Tikrit (Sulahadin) Iraq.
..

3. By way of background I was born at home in Slman Bage.
3. When I left Iraq I left my parents in Slman Bage.
..
5. ..My asylum interview took place on 11 June 2002. I provided the Home Office with the correct information detailing my date of birth as 13 September 1978 and the place of my birth.
..
8. I applied for naturalisation as a British Citizen on 6 December 2007 and was granted British Citizenship on 18 March 2008.
9. A year later I decided to return to Iraq to hunt down my parents. I found my parents to be living in Sulaymaniyah. I stayed with them for a whole year. Whilst I was visiting them, I told them that I wished to settle down and in order for me to marry in the UK I had to obtain an Iraqi ID card.
10. My parents told me that before I was born my parents lived in Mawat which is a town north to Sulaymaniyah. My father was born in Mawat and left Mawat because it was not safe at that time and relocated to Sulaiman Bage.
11. My parents told me that I was born in Slman Bage at home however my father did not register my birth in Slman Bage but went to Mawat, his home town to register me there because he was afraid. As my father has his own ID issued in Mawat he returned to Mawat and registered my birth there.
12. My parents also told me that when I left Slman Bage they also left soon after because they were in fear of their lives and the town was destroyed by violence and they returned to Mawat where my father was born.
13. Whilst I was in Iraq I met my wife on 20 March 2010 and we started a relationship.
14. I returned to the UK on 6 May 2010.
15. A year later when I returned to Iraq to marry on 28 September 2011. I required an Iraqi ID. I could not travel to Slman Bage to obtain the ID as my father had registered my birth in Mawat. I travelled to Mawat and went to the Registry Office. I obtained a copy which confirmed that my father has registered my birth a year later, i.e. 25 September 1979. I took a copy and obtained my Iraqi ID. "

The statement goes on to explain how the Appellant also obtained the other documents from the Iraqi authorities on which reliance is placed by the Respondent. All were issued in Sulaymaniyah. It continues as follows:

"..32. In relation to the discrepancy regarding my place of birth, I confirm that I was born in Slman Bag but my father registered my birth in his home town Mawat as the family was all registered there. I was a child at the time and it was outwith my control where my birth was registered.
33. I can confirm that when I reunited with my parents, they told me that my father was actually born in Mawat and therefore they had a connection to the town. I always had thought that my father was born in Slman Bage as I had always lived there since I was born until I left Iraq.
..
35. Despite the information contained on the Iraqi ID and the family registration certificate I can confirm that I was born in Slman Bage."

19. As we have already pointed out, the Appellant did not give details of his place of birth at his asylum interview as the Respondent asserts. He was asked for his last address in Iraq. Whatever the documents now produced show about place of birth, there is no

evidence undermining the Appellant's assertion that he lived in Sulaiman Bage, Tikrit before coming to the UK. There was no question in the application for ILR regarding the Appellant's place of birth.

20. We accept that the position may be different in relation to the application for naturalisation. The deceptions alleged (aside as to date of birth) are that the Appellant lied about his own place of birth and that of his father. In relation to the former, the Appellant's consistent position has been that, although his birth was registered in Sulaymaniyah, he was not born there; rather his father registered his birth there a year after the event.

21. On the face of the document at [RB/N], the Appellant was born in Mawat. That is said to be confirmed not by a birth certificate but by a "birth deed". It also appears, consistently with the Appellant's case, that his birth was not registered until a year after he was born. As such, we consider it plausible that the Appellant was born elsewhere but his birth was registered in Mawat. We do not consider implausible that the Appellant's father would have returned to the place where his own details were registered in order to register the birth of his son, even if he was at that time living elsewhere.

22. At [AB/10-13] there is a letter stated to have been written by the Appellant's wife and thumbprinted by the Appellant's father broadly confirming the Appellant's version of events. It is said to be dated 1 February 2020. Some doubts were expressed about the genuineness of this document by the First-tier Tribunal Judge on the basis that the representations made by Ashwood Solicitors on 10 December 2018 (at [RB/M – see above] referred to the Appellant's father as "late". We accept that this is said but there is no reference to this in the Appellant's own witness statement. The solicitors may well have misunderstood the position.

23. What we find less easy to accept, however, is that the Appellant had no idea of his links to Mawat and Sulaymaniyah generally until after he returned to Iraq following the grant of naturalisation. If he had returned to the area from where he came prior to arriving in the UK (that is to say Tikrit) and found that his parents were no longer there, it is not explained how he would know to look for them in Sulaymaniyah generally and Mawat specifically unless he knew of the family's link to that area. We find therefore that he was aware of his and his father's links to Sulaymaniyah and Mawat before coming to the UK. We find it likely that he knew himself to be registered in Mawat and that his father came from that area. We accept therefore that he did not tell the truth about his father's place of birth even if he himself was not born in Mawat but was only registered there.

Materiality of Deception

24. That is though not the end of the matter. We next need to consider what was the impact of the deception on the grant of naturalisation. It is at this juncture that we must give weight to the Respondent's views. We must approach this issue by

conducting a review of the Respondent's decision stating herself to be satisfied that there was a material deception. We did not understand the Respondent to dispute that she bears the burden of demonstrating that there was deception and the materiality of that deception.

25. We begin by considering Mr Holmes' submissions regarding the policy position. As Mr Holmes submitted and we accept, the letter granting the Appellant four years' exceptional leave to remain ("ELR") is silent as to the reasons for that grant, save that the grant was based on the "particular circumstances" of the Appellant.

26. It was suggested by Mr Holmes that the Respondent had failed in her duty of disclosure. He submitted that there were no documents such as caseworker notes showing the basis on which ELR had been granted. The Respondent had failed to produce those documents or explain why they were not produced. If they were lost or destroyed, the Respondent should have provided that indication. Mr Lindsay assured us that all relevant documents had been produced. We accept that assurance. There would not necessarily be electronic case notes dating back as far as 2002. There was a gap of over ten years between the grant of naturalisation and the Respondent becoming aware of the potential for deprivation. It is quite possible that documents would have been destroyed during that period. We can however consider the issue only on the evidence before us.

27. It is evident that the grant of ELR was one of four years. We are also aware from documents produced by the Respondent in response to the error of law directions, that, in October 2002, there were grants of four years' ELR being made in relation to asylum seekers from certain countries based on country circumstances. A general document dated 7 October 2002 shows that, at that date, there were three country policies in place for Liberia, Libya and Somalia. An ECtHR admissibility decision in F v United Kingdom in relation to Libya records the following extract from a Country Information and Policy Unit Bulletin (1/2002 – 7 October 2002):

> "..2.1 In the past country specific ELR policies have been introduced where the general humanitarian situation would normally preclude removal. What this has meant in practice is that where asylum is refused, ELR has been granted routinely (subject to security/criminal considerations) without the particular circumstances of the individual's case being examined. The Home Secretary has announced an end to these country specific ELR policies and that in future all cases will be decided on an entirely individual basis."

28. That material shows that there were certain country policies in place at least in October 2002 giving rise to grants of ELR where removal to certain countries (or parts thereof) was not possible. In response to questions raised in Parliament in 2004 about the policies which existed historically, a list was produced showing that there was a general policy in relation to Iraq from January 1997 to September 2000 only.

29. The Respondent has produced operational guidance notes ("OGNs") in force in relation to Iraq from October 2000 to October 2002. The OGNs for October 2000 and April 2001 suggest that those from the Kurdish controlled areas of Iraq were unlikely

to be successful in their asylum claims. In relation to ELR, however, only three categories are stated as having a potential claim to ELR. None of those applies to the Appellant in this case. It is not until the OGN "version 2" dated October 2002 that one finds an extended list of categories potentially benefitting from ELR but even that list does not appear to apply to the Appellant.

30. The policy position in relation to Iraq is summarised in a country bulletin entitled "Iraq Policy Bulletin 1/2009" ("the 2009 Bulletin"). The section potentially relevant to our consideration is at [3.6] as follows:

> "Although there was no country specific blanket ELR policy it was accepted practice that all asylum seekers who were accepted as being Iraqi nationals, but who were not found to be refugees, from April 1991 to 20 October 2000, would be granted 4 years' ELR arising from factors such as the severe penalties imposed on those who had left Iraq illegally. From 20 October 2000, in light of the improved conditions in KAZ, only claimants who were accepted to have come from GCI were granted 4 years' ELR. On 20 February 2003, this changed to 6 months' ELR in view of the uncertain situation surrounding Iraq, in particular the prospect of imminent military action against Iraq. On 20 March 2003 initial consideration of all Iraqi asylum applications was suspended following the commencement of military action in Iraq. Decision-making on Iraqi asylum claims resumed on 16 June 2003, since when all Iraqi asylum applications, regardless of where the claimant originated, have been considered on their individual merits."

31. It was suggested by Mr Holmes that we could not place weight on the 2009 Bulletin because it was written some years later and did not reflect the OGNs at that time. We disagree. As is evident from what is said there and in response to the Parliamentary questions asked in 2004, there was no "country specific blanket ELR policy" relating to Iraq after September 2000. It is therefore unsurprising that the OGNs would not reflect a general policy position.

32. Furthermore, the 2009 Bulletin reflects the position as it was stated to be in two judgments of the Court of Appeal and High Court respectively. As the judgment of the Court of Appeal in Secretary of State for the Home Department v Rashid [2005] EWCA Civ 744 ("Rashid") shows, the issue of the destination of return was part of a policy which was not formally set out in any published document and was unknown even to some of the Respondent's caseworkers. That is consistent with the fact that there is no mention of it in any of the OGNs at the relevant time. Unpublished policies were not particularly uncommon at that point in time. It was not until 2004 that Mr Rashid became aware of the fact that he should have been granted asylum as the caseworker in his case had decided that he could internally relocate to the Kurdish controlled part of Iraq. The caseworker should not have relied on internal relocation as Mr Rashid was not from that area. We accept that this is not the factual position in relation to this Appellant. Whether or not he was born in Mawat, his birth was registered within the Kurdish controlled area. However, that there was a general policy in place at the time of returning to the Kurdish area those who were entitled to be admitted is self-evident from what is said about the policy at [4] of the judgment in Rashid. We do not accept that the Respondent would have provided this information

about the practice at the time to the Court of Appeal without checking its veracity and accuracy.

33. Moreover, there is no reason other than country conditions why this Appellant would have been granted ELR as he was. There are no personal circumstances which could have led to that grant.

34. We are prepared for that reason to infer that what is said about the relevant policy in the 2009 Bulletin is correctly stated notwithstanding its omission from the OGNs in 2000 to 2002. We accept therefore that, if the Respondent had realised that the Appellant was from the Kurdish controlled area or was able to be admitted there, she would not have granted ELR as she did.

35. However, we return to our findings about the deception. The Appellant did not lie about his circumstances when he claimed asylum. He answered, we find honestly, that his last address in Iraq was in Tikrit. He was not asked where he was born nor where his parents were born. The issue whether he was born in Mawat or simply registered there and where his father was born might have come to the forefront of our consideration had the Appellant been asked about his or his father's place of birth but, based on the documents we have seen, those were not questions he was asked at that time.

36. For those reasons, we are quite unable to accept the Respondent's assertion in the decision under appeal that the Appellant stated his "country of origin" as Tikrit nor that he confirmed his "place and country of birth" as that place. He did not lie in that regard. Applying the approach which we are required to do following Begum, we find that the Respondent has taken into account irrelevant information or, to put it another way, has misunderstood the underlying factual evidence. It follows that the Respondent was not entitled to conclude that the Appellant had lied about "his claimed place of birth" but for which he would not have been granted ELR. There was no assertion in the application for ILR about the Appellant's place of birth. He was merely asked for his nationality, and he answered that question truthfully. It follows that the Respondent was not entitled to rely on there being any deception which led to the grant of ILR.

37. It was suggested by the Respondent that she did not rely on the chain of causation as reason to conclude that naturalisation had been obtained by deception. We are unable to read the decision in any other way (see in particular [19] of the decision).

38. The Respondent has argued that she had decided in the alternative that the deception in the application for naturalisation was of itself sufficient to refuse the application on good character and conduct grounds. We are quite unable to read the decision in that way. Even if [18] of the decision is intended to convey that position, we find that this paragraph also is flawed in public law terms because of the reference there to the Appellant's "continued ..use [of that] place of birth throughout [his] immigration history". We have found on the facts and evidence that there was only one use of deception and that was in the application for naturalisation itself. The reliance placed

on any earlier deception therefore misunderstands the evidence and fundamentally undermines the reasoning of the decision maker.

39. For those reasons, we conclude that, although the Appellant did exercise deception at the very least in relation to his father's place of birth when applying for naturalisation, the deception has not been shown to be material to the Respondent's decision to deprive. Put another way, having reviewed the Respondent's decision under appeal in accordance with the principles set out in Begum, we are satisfied that the decision is flawed in public law terms. The Respondent was not entitled based on the evidence before her to be satisfied that the grant of naturalisation was obtained by means of fraud, false representation or concealment because that conclusion is based on her misunderstanding of that evidence.

40. We therefore allow the Appellant's appeal.

DECISION

The Appellant's appeal is allowed.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 18 August 2021

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00131/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Wednesday 24 March 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR BAKHTIAR HUSSEIN MARIF

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr C Holmes, Counsel instructed by Parkview solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Andrew Davies promulgated on 4 March 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against

the Respondent's decision dated 28 November 2019 depriving the Appellant of his British citizenship on the basis that he had obtained it by deception.

2. The Appellant is accepted to be a national of Iraq. He came to the UK in February 2002 and claimed asylum. He claimed that he was from Tikrit. He gave his real name and a date of birth of 13 March 1978. His asylum claim was refused but he was granted four years exceptional leave to remain ("ELR") based on his circumstances. It is the Respondent's case that the Appellant would not have been entitled to leave to remain if he had disclosed that, although he had lived in Tikrit at some point prior to leaving Iraq, he was born in Sulaymaniyah (which was not under the control of the Government of Iraq). There is a dispute about that issue.

3. Following the grant of four years' ELR, on 30 October 2006, the Appellant was granted indefinite leave to remain ("ILR"). Having had ILR for over twelve months, the Appellant applied for citizenship and was granted it on 21 February 2018. When he made a passport application in June 2018, the Appellant disclosed his true date of birth (13 September 1978) and enquiries suggested he was born in Sulaymaniyah. The Appellant disputes this and maintains that he was born in Tigrit and lived there immediately before coming to the UK.

4. The Appellant has a wife and two children living in Iraq. According to [64] of the Decision, the Appellant met his wife in Iraq in March 2010. They married there in September 2011. The Appellant's children were born in November 2013 and August 2015. The children are British citizens due to the Appellant's status when they were born. Their status is unaffected by the deprivation decision. The Judge recorded at [64] of the Decision that the Appellant "has spent some lengthy periods in Iraq with his family over a period of years."

5. At [56] of the Decision the Judge reached the conclusion "on the balance of probabilities that there is a material link between the dishonesty and the grant of exceptional leave to remain and, thereafter, indefinite leave and citizenship". The dishonesty was "maintained throughout"

6. At [74] of the Decision, the Judge found the Respondent's decision not to be disproportionate. Deprivation did not therefore breach Article 8 ECHR.

7. However, the Judge, at [75] to [82] of the Decision went on to undertake what he termed a "Further Balancing Exercise" and, having exercised discretion which he understood was for him to exercise, he concluded at [82] of the Decision that "deprivation would not be seen as a balanced and reasonable step to take taking into account the misrepresentation involved and what the misrepresentation was attempting to hide".

8. The Respondent appealed the Decision on the grounds that the Judge had provided inadequate reasons for his conclusion and had materially misdirected himself in

law. I do not need to go into the grounds in more detail as it is now accepted that there is an error in the Decision for other reasons as I come to below.

9. Permission to appeal was said to be granted by First-tier Tribunal Judge Parkes on 11 August 2020 as follows (so far as relevant):

> "... 3. It is arguable that, having found operative deception and that the Appellant clearly retains strong ties to Iraq where his family live, the Judge erred in finding deprivation would be disproportionate. The Judge does not appear to have applied the guidance in the relevant case law, if the decision was proportionate under article 8 it is not at all clear how it could be disproportionate in some other way.
> 4. The grounds disclose no arguable errors of law and permission to appeal is refused."

10. As is evident from the foregoing, the grant of permission is problematic. The permission grant is consistent with what is said at [3] but [4] is consistent with a refusal. What matters though is the decision itself and not the reasons for it. Where, as here, there is a discrepancy between the two the Tribunal has to consider what was meant by the Judge. Given what is said at [3], the Judge clearly intended to grant permission and included paragraph [4] in error. It was not suggested by the Appellant that permission had not been granted. Moreover, that interpretation of the permission to appeal decision was confirmed by Upper Tribunal Judge Frances in a Note and Directions sent on 27 August 2020. She therefore reviewed the decision under rule 31 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

11. Judge Frances also reached the provisional view that the error of law decision could be determined without a hearing on the papers. However, following consideration of the Appellant's Rule 24 reply ("the Rule 24 Notice") dated 19 August 2020, UTJ Mandalia again reviewed the file and listed the error of law issue for determination at a remote hearing.

12. The Appellant in the Rule 24 Notice challenged the Judge's conclusions on the two issues on which he had failed, namely materiality of the deception and the rejection of the human rights grounds. I accept that following the Tribunal's decision in Smith (appealable decisions; PTA requirements; anonymity) Belgium [2019] UKUT 216 (IAC), the Appellant is entitled to cross-appeal in this way without any formal application for permission.

13. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. There were no technical issues affecting the course of the hearing. I had before me a core bundle of documents relating to the appeal, the Appellant's bundle before the First-tier Tribunal and bundles of authorities relied upon by both parties.

14. At the outset of the hearing, following discussions between the parties, I was informed that the Appellant conceded that there was an error of law in the Decision on the discretion issue which was the basis for allowing the appeal. Mr Clarke also agreed that there was an error of law disclosed by the Appellant's Rule 24 Notice. I set out the reasons for those concessions and my acceptance of them below.

15. Following those concessions, I agreed that the appropriate course was to set the Decision aside in its entirety. Mr Holmes asked that the appeal thereafter be remitted. Mr Clarke requested that it be retained in the Upper Tribunal. As I explain below, the issue relating to the exercise of discretion, now has to be resolved in the light of recent case-law of the Supreme Court. The position may be legally complex. The factual issues however are not. Most of the facts, with the exception of the nature and extent of the alleged deception, are undisputed. There are limited factual findings required. Having regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, I have concluded that it is more appropriate to retain the appeal for re-making in this Tribunal. I have given directions at the end of this decision for the re-making.

DISCUSSION AND CONCLUSIONS

The Respondent's Case

16. The Judge's reasons for allowing the appeal are as follows:

> "**Further Balancing Exercise**
> 75. However, notwithstanding my conclusions above, I must consider whether the Secretary of State should have exercised his discretion differently and I must carry out the balancing exercise referred to in **KV**. I remind myself that it is not just a matter of whether the decision was rational, it must also be right.
> 76. The published Nationality Instructions do deal with the matter of whether the deprivation is proportionate. At paragraphs following 55.7.10 under the heading of 'Reasonable/Balanced' the caseworker is advised to consider whether deprivation would be seen to be a balanced and reasonable step to take, taking into account the seriousness of the fraud, misrepresentation or concealment.
> 77. Caseworkers are also advised (paragraph 55.7.11 onwards) to take account of mitigating circumstances. The examples considered there do not assist the Appellant. The guidance emphasises that where advice to provide false details is relied upon or the person claims that someone such as a family member acted on their behalf (thereby exonerating him from responsibility) that is not be regarded as constituting mitigation. On the other hand, the caseworker is exhorted to take account of Article 8 rights and to consider granting leave in accordance with the guidance on family and private life. This does take account of the fact that a person deprived of citizenship does not revert to the stage before citizenship (indefinite leave) but effectively returns to the start point.
> 78. I have taken account of the fact in assessing proportionality that the Respondent has not followed his own guidelines because there is little evidence within the decision letter of any sort of careful balancing exercise in reaching a decision about using his discretion in a different way.

> 79. The Respondent did not deal with whether the deprivation decision would represent a reasonable and balanced approach. At paragraph 55.7.9 of the Nationality Instructions it is stated that the caseworker must consider that issue. There is no evidence in the decision letter of a full evaluation carried out.
> 80. There are practical legal consequences of deprivation of citizenship including the loss of voting rights. The Appellant would be forced to start his applications for leave all over again. While it is likely that the Appellant would be given limited leave to remain and it is highly unlikely that he will be removed from the UK, the process will inevitably cause uncertainty and worry. There may be an impact on the Appellant's position in the labour market. The Appellant will lose the right to a British passport. There may be more travel difficulties. There will be the loss of the opportunity to make a choice (subject to the income and other eligibility matters) about where the family should live.
> 81. Above all, I take account of the fact that the Appellant has lived in the UK for 18 years. While for the purpose of Article 8 his private life was developed while his position in the UK was in effect precarious (because of his deception) nonetheless he has made the UK his home over very long period of time. I also take account of the fact that at the time when the original asylum claim was made and rejected Iraq as a whole was facing a very turbulent future with the likelihood of war. Although the Kurdish areas had the advantage of a no-fly zone enforced by the international community, they had suffered years of difficulties at the hands of the Saddam regime. That is not to excuse the dishonesty involved in the exercise but taken with the longevity of the Appellant's residence in the UK together with the impact of deprivation on other aspects of his life I am satisfied that the Secretary of State should have exercised discretion differently. I have given considerable weight to the public policy issues at large here and in particular the importance of maintaining the integrity of the system in place for granting leave to remain, indefinite leave to remain and citizenship. However, the Secretary of State has not followed his own guidance in considering the balancing exercise.
> 82. For those reasons, to use the words of the Respondent's own guidelines, deprivation would not be seen as a balanced and reasonable step to take taking into account the misrepresentation involved and what the misrepresentation was attempting to hide."

17. Even without the recent case-law which led the Appellant to concede this issue, I would have found an error of law in that passage for the following reasons. First, it is not right to say that the Respondent had not considered the exercise of discretion. That is considered at [21] to [30] of the decision letter. The consideration takes into account Article 8 ECHR, the impact on the children and statelessness. It also covers the next step of considering limited leave.

18. That leads me on to the second difficulty with the Judge's analysis. He appears to have assumed that the Appellant will be permitted to stay. It is not clear why that should be so. As the Judge reminds himself, the Appellant has only been here for eighteen years. He does not even meet the period of residence under paragraph 276ADE of the Immigration Rules. On the Judge's finding concerning deception, it is also unlikely that he could succeed on suitability grounds. Consideration of that issue also needed to take account of the earlier findings in relation to Article 8

ECHR. The Appellant has lived with his family in Iraq for lengthy periods. It is not clear why the Judge thought, in those circumstances, that removal would be disproportionate based on the Appellant's private life alone (particularly given that the Appellant had failed on the Article 8 ground). Admittedly the Appellant has British citizen children, but they live outside the UK and have always done so. They are now aged seven and four years.

19. The reason for the Appellant's concession however concerns the legal approach adopted. In this regard, the Judge cannot be faulted for his self-direction as the law stood at the time of the Decision. The self-direction in relation to the exercise of discretion appears at [26] to [30] of the Decision as follows:

> "26. The Tribunal is in a position to make its own findings as to whether the requirements of subsection (3) are satisfied. The Upper Tribunal in **BA** confirmed this but also added that if the requirements were satisfied then the tribunal would be required to put significant weight on the fact that the Secretary of State had decided, in the public interest, that a person who had employed deception to obtain British citizenship should be deprived of that status. Where statelessness is not in issue, it is likely to be only in a rare case that the ECHR or some very compelling feature will require the Tribunal to allow the appeal.
> 27. Subsequent to **BA** the Court of Appeal gave its decision in **KV [2018] EWCA Civ 2483.** At paragraph 6, the Court endorsed the principles of law set out in **BA** and also in **Deliallisi [2013] UKUT 85 (IAC).** It may be helpful to summarise the main points.
> 28. An appeal under **section 40A** involves a full reconsideration of the decision to deprive a person of citizenship. A tribunal may find relevant facts whether or not the evidence in question was before the Secretary of State. It is necessary to establish whether the condition precedent in **section 40(2)** or **40(3)** is established. If so, the tribunal must ask whether the Secretary of State's discretion should have been exercised differently. For this purpose, it is necessary to determine the reasonably foreseeable consequences of deprivation.
> 29. If a person's rights under Article 8 of the European Convention on Human Rights are engaged, it is necessary to consider the question as to whether deprivation amounts to disproportionate interference in a person's rights under Article 8. However, even if Article 8 is not engaged, the tribunal must still consider whether the discretion should have been exercised differently. As Parliament has charged the Secretary of State with making decisions about deprivation of citizenship, his view and any published policy regarding how the policy should be exercised should be given considerable weight.
> 30. In **KV** the Court of Appeal held at paragraph 16 that the decision maker, whether the Secretary of State or the tribunal, must form a view not just whether it was rational to make such an order but whether it was right to do so. The evaluation should take account of the public interest in deprivation of citizenship as against any competing interests and considerations of the person affected including the impact upon his legal status."

20. The self-direction as there set out is also consistent with the guidance given very recently by this Tribunal in Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC). However, since that decision, the Supreme Court has had occasion to

consider deprivation of citizenship (albeit in the slightly different context of a SIAC appeal) in R (oao Begum) v Special Immigration Appeals Commission and Anor [2021] UKSC 7 ("Begum"). Mr Clarke drew my attention to what is said at [66] to [71] of the judgment which I set out below:

> "66. In relation to the nature of the decision under appeal, section 40(2) provides:
> '(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.'
> The opening words ('The Secretary of State may …') indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.
> 67. The statutory condition which must be satisfied before the discretion can be exercised is that 'the Secretary of State is satisfied that deprivation is conducive to the public good'. The condition is not that 'SIAC is satisfied that deprivation is conducive to the public good'. The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.
> 68. As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.
> 69. For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon

the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29.

71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) 'if he is satisfied that the order would make a person stateless'. Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord

Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

21. The Begum case was, as the extract set out above shows, concerned with a decision under section 40(2) British Nationality Act 1981. I am here concerned with section 40(3) of that Act. However, the principles are the same. The Supreme Court concluded as much at [41] to [46] of the judgment in Begum. That section of the judgment (including the preceding paragraphs to set it in context) reads as follows:

> "39. Section 2B has also undergone amendment, as have the other provisions with which it is interlinked. The version which is currently in force provides:
> 'A person may appeal to the Special Immigration Appeals Commission against a decision to make an order under section 40 of the British Nationality Act 1981 (c 61) (deprivation of citizenship) if he is not entitled to appeal under section 40A(1) of that Act because of a certificate under section 40A(2) (and section 40A(3)(a) shall have effect in relation to appeals under this section).'
> 40. There does not appear ever to have been any statutory provision relating to the grounds on which an appeal under section 2B may be brought, the matters to be considered, or how the appeal is to be determined (as mentioned in para 34 above, section 4 of the 1997 Act was repealed on the same date as section 2B came into force; and sections 84-86 of the 2002 Act were not applied to appeals under section 2B). The same appears to be true of an appeal to the Tribunal under section 40A of the 1981 Act.
> 41. In relation to the scope of the jurisdiction created by section 2B, counsel for Ms Begum and for Liberty referred to some decisions of the Upper Tribunal in which the jurisdiction of the First-tier Tribunal in an appeal under section 40A of the 1981 Act was considered. The earliest of them is *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 439 (IAC) (unreported) given 30 August 2013, which was concerned with deprivation of citizenship under section 40(3) of the 1981 Act. That provision applies where the citizenship results from registration or naturalisation and 'the Secretary of State is satisfied that the registration or naturalisation was obtained by means of - (a) fraud, (b) false representation, or (c) concealment of a material fact'.
> 42. In that case, the First-tier Tribunal concluded that it had no power to exercise the Secretary of State's discretion differently, since such a power could only be conferred by express statutory provision. Subject to compliance with the Human Rights Act, the scope of an appeal under section 40A of the 1981 Act, in the view of the First-tier Tribunal, was to examine the facts on which the Secretary of State made the decision, examine the evidence and determine whether the basis upon which the decision was made was made out.
> 43. The Upper Tribunal, chaired by Upper Tribunal Judge Lane, adopted the opposite approach, holding (para 31) that '[i]f the legislature confers a right of appeal against a decision, then, in the absence of express wording limiting the nature of that appeal, it should be treated as requiring the appellate body to exercise afresh any judgement or discretion employed in reaching the decision against which the appeal is brought'. The judge found support for that position in the earlier judgment of the Upper Tribunal in *Arusha and Demushi (Deprivation of Citizenship)* [2012] UKUT 80 (IAC); [2012] Imm AR 645, another case

concerned with a decision made under section 40(3). However, the judge mistakenly understood the judgment in that case to have 'approved' (para 28) remarks made by the First-tier Tribunal, which the Upper Tribunal had in reality merely recorded (see paras 11 and 14 of its judgment). The judge also found support in remarks made by a minister in the course of a debate during the passage of the 2002 Act through Parliament, which he mistakenly treated (para 34) as revealing Parliament's intention, applying *Pepper v Hart* [1993] AC 593 in a manner which was disapproved in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 58-60. The judge also cited textbook authority that a fresh exercise of judgment was excluded if the decision involved a consideration of matters which were non-justiciable, and stated that that could not possibly be said of a decision under section 40: a questionable proposition so far as some decisions under section 40(2) are concerned, but one which can be accepted in relation to section 40(3). However, the apparent reasoning, that (1) an appellate body's ability to re-take a discretionary decision is excluded if the subject-matter is non-justiciable, and (2) the subject-matter of this decision is not non-justiciable, therefore (3) this decision can be re-taken by the appellate body, is fallacious. It depends on the unstated premise that an appellate body can always re-take a discretionary decision unless the subject-matter is non-justiciable: a premise which, as explained below, is incorrect. The judge also referred in *Deliallisi* to a number of potentially helpful authorities concerned with the scope of appellate jurisdiction, but did not discuss them. It will be necessary to return to some of those authorities.

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

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

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

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

Having reviewed cases in other jurisdictions, the Supreme Court returned to the context of decisions under section 40(2) of the 1981 Act and set out its conclusions at [66] to [71] set out above.

22. Although as Mr Clarke accepted, the Supreme Court did not expressly state that this Tribunal's decisions in Dellialisi and BA are no longer to be followed, that is no doubt because the Court was not concerned in Begum with that type of case. Its comments are merely part of the legal landscape against which the Supreme Court considered the jurisdiction and powers of SIAC. It is clear from what is said by the Supreme Court at [43] and [45] of its judgment, however, that it disapproved the approach taken in Dellialisi and, flowing from that case, in BA on which case the Judge here relied. As Mr Clarke pointed out, the reasoning of the Supreme Court at [66] to [71] of its judgment starts from the premise that the statutory provision requires the Secretary of State "to be satisfied". In Begum, the Secretary of State had to be satisfied that deprivation was conducive to the public good whereas under section 40(3), the Secretary of State has to be satisfied that registration was obtained using fraud or false representation (in broad summary) but both section 40(2) and 40(3) are expressed in permissive terms (indicating an exercise of discretion) and both turn on the matters being established to the satisfaction of the Secretary of State as primary decision maker.

23. I have also considered what is said at [124] to [126] of the judgment concerning the role of the Tribunal or Court where a public authority has failed to follow its policy. I do not need to set out that section of the judgment as, as I have indicated above, the Judge's criticism on this point is not validly made in this case. In any event, if the Secretary of State had failed to follow her policy, the role of the Tribunal is still to review the decision; it is not for the Tribunal to take the decision for itself.

24. For the foregoing reasons, although I accept that Judge Davies was following the case-law as he understood it to be at the time of the Decision, he has nonetheless erred in law as the approach which he took is no longer correct in law. That is particularly the case in relation to the self-direction at [30] of the Decision.

25. For that reason, I am satisfied that the Appellant's concession in relation to the exercise of discretion is rightly made. The Judge has erred in allowing the appeal on the basis he did for the reasons he gave.

The Appellant's Case

26. I turn then to consider the Appellant's grounds of cross-appeal as contained in the Rule 24 Notice.

27. The first ground of challenge is that, when considering the materiality of the deception, at [53] and [56] of the Decision, the Judge has erred in failing to recognise that the burden of proof lies with the Secretary of State and that, although the Respondent had taken issue with the Appellant's place of birth, she had not taken issue with his residence thereafter within the government-controlled part of Iraq. It is said that the focus of the Respondent's policy is on home area and not place of birth. It is asserted that the Respondent had never disputed that the Appellant lived for most of his life in the government-controlled region of Iraq.

28. The Judge considered the Respondent's policy and materiality of the deception at [53] to [56] of the Decision as follows:

> "53. On the face of it there is a direct connection between the dishonest representation and the ultimate acquisition of British citizenship. Mr Holmes however referred me to paragraph 3.6 of the UK Border Agency Country Policy Bulletin for Iraq dated January 2009. Section 3 sets out the background and at 3.6 there is a succinct history of the policy regarding exceptional leave to remain. Mr Holmes submitted that there was a material distinction to be drawn between the place of birth and the home area. The important point concerned whether a claimant came from a government controlled area. The focus in the case (by the Respondent) had been on the place of birth. It was the home area that was important for protection purposes. Effectively, as I understand the point, even if the Appellant had been wrong about his place of birth, it did not really matter because it was his home area that was material. I acknowledge that it is the Appellant's case that he fled Sulaiman Bage because he did not wish to be conscripted into Saddam's personal force albeit that his claim was rejected by the decision maker dealing with his asylum claim.
> 54. I accept that the emphasis in the decision letter is mainly on the place of birth. However, on the basis of the evidence I have reviewed, I am not satisfied that I can make a finding that the Appellant's home area was Sulaiman Bage.
> 55. In his first statement, the Appellant stated that his late parents lived in Sulaymaniyah. In the next sentence he stated that they used to live in Mawat. In the submissions the Appellant's legal advisers referred to the registration of his birth in Mawat while he was an infant in that town. In his 2018 statement that accompanied the submissions he did not mention his parents living in Sulaiman Bage. In the statement purportedly thumb printed by his father it was stated that in 1978 the family were expelled and '*thrown to the middle and south of Iraq areas*' but nonetheless was able to make a flying visit in secret to register his son's birth. That in turn is entirely inconsistent with the statement that the Appellant was registered while an infant in Mawat. Moreover, there are serious concerns about the provenance of the letter allegedly from his late father.
> 56. I am satisfied on the balance of probabilities that there is a material link between the dishonesty and the grant of exceptional leave to remain and, thereafter, indefinite leave and citizenship. The dishonesty was maintained throughout."

29. The Respondent's policy guidance at the time of the grant of ELR to the Appellant is not in evidence. What is in evidence is a document entitled Iraq Policy Bulletin

1/2009 ("the Policy Bulletin"). That summarises the policy said to be in existence at the time as follows:

> "3.6 Although there was no country specific blanket ELR policy it was accepted practice that all asylum seekers who were accepted as being Iraqi nationals, but who were found not to be refugees, from April 1991 to 20 October 2000, would be granted ELR arising from factors such as the severe penalties imposed on those who had left Iraq illegally. From 20 October 2000, in light of the improved conditions in KAZ, only claimants who were accepted to have come from GCI were granted 4 years' ELR. On 20 February 2003 this changed to 6 months' ELR in view of the uncertain situation surrounding Iraq, in particular the prospect of imminent military action against Iraq. On 20 March 2003 initial consideration of all Iraqi asylum applications was suspended following the commencement of military action in Iraq. Decision-making on Iraqi asylum claims resumed on 16 June 2003, since when all Iraqi asylum applications, regardless of where the claimant originated, have been considered on their individual merit."

30. Mr Holmes drew my attention to a country guidance decision issued in 2004 – GH (Former Kaz – Country Conditions – Effect) Iraq CG [2004] UKIAT 00248 ("GH"). At [29] of the decision in GH, reference is made to a submission on behalf of the appellant relying on what was said to be a general policy of granting ELR to Iraqi asylum seekers in March 2000. It was said that if the claim in that case had been dealt with timeously, the appellant in that case would have been granted ELR. At [31] of the decision, on behalf of the Secretary of State it was said that there was no such general policy in March 2000 or subsequently. For that reason, Mr Holmes submitted that the summary as set out in the Policy Bulletin could not be relied upon. Mr Clarke in reply indicated that, although not currently in evidence, the policy documents at the relevant times could in fact be produced.

31. I was not assisted by the decision in GH for two reasons. First, as I pointed out to Mr Holmes, at the time of the policy said to have been in existence and when the decision in GH was issued, policies were often unpublished. As a result, even the Secretary of State's caseworkers were known on occasion to be unaware of individual policies (see for example the Court of Appeal's judgment in R (oao Rashid) v Secretary of State for the Home Department [2005] EWCA Civ 744). Second, whilst it might have been surprising if the Secretary of State had been unaware of her policies when presenting a country guidance case, the policy as summarised in the Policy Bulletin expressly states that it was not a general policy.

32. I accept however that the Decision does contain an error of law on the issue of the materiality of the deception. Mr Clarke conceded as much. He did not specify exactly why he was making that concession. However, in my view, the Judge addressed this issue erroneously for the following reasons.

33. First, while the Judge correctly self-directed himself in relation to the burden of proof at [19] of the Decision, it is not clear that he applied the correct burden when assessing the materiality of the deception and indeed the question whether there

was deception at all. He appears to have considered that it was for the Appellant to show that his home area was Sulaiman Bage ([54] of the Decision) whereas the real issue was whether the Appellant had given correct or misleading or false information and, if so, whether innocently or dishonestly.

34. Second, as the Appellant points out in his grounds, the Respondent's case was that the Appellant was born in the Kurdish area and not that he lived there. That might not make any difference if, as the Policy Bulletin suggests, the question is whether the Appellant "comes from" that area. That however was the crucial question for the Judge (at least on the Respondent's case) and not where was the Appellant's home area. I anticipate that the wording of the policy is premised on an ability to return an individual to that area which might not require a person to have been ordinarily resident in that area in order to qualify for return.

35. Third, the issue for the Judge was the materiality of deception, if it was accepted that there was deception. I accept that the Respondent's case was that the Appellant would not have obtained ELR if he had told the truth about his place of birth, would not then have qualified for ILR and would not then have been able to apply for citizenship. This may be the relevant question on the Respondent's case in this instance and applying the guidance in Sleiman (deprivation of citizenship; conduct) [2017] UKUT 00367 (IAC). However, as is made clear in Pirzada (deprivation of citizenship: general principles) [2017] UKUT 196 (IAC), the central question is whether "[t]he deception referred to … motivated the grant of … citizenship" and not whether it materially affected prior grants of leave to remain.

36. For those reasons, I accept that the Judge has erred in his approach by failing properly to resolve the right questions when determining the materiality of the deception.

37. I am unimpressed by the Appellant's ground relating to Article 8 ECHR. It is submitted that the Judge has erred by failing to consider that if, as he found would be likely to be the case, the Appellant would be permitted to remain in the UK based on his private life, the Appellant would only have limited leave to remain and therefore would be unable to sponsor his wife and children joining him here.

38. As I have already noted at [18] above, it is unclear why the Judge found as he did regarding the Appellant's ability to remain in the UK. The Appellant has been in the UK for less than twenty years. The deception, if accepted to be such, would mean that he would likely fail on suitability grounds. As such, it may be more likely that the Appellant would not be granted leave to remain. His wife and children remain living in Iraq. The Appellant has returned there and spent periods living back in that country.

39. For those reasons, however, and although the errors in the Judge's reasoning in this regard are in the Appellant's favour, given that I consider that the Decision must be set aside and that the Article 8 issue needs to be revisited based on the position at

the time of re-hearing, I do not consider it appropriate to retain the Judge's findings in this regard.

Conclusion

40. For the foregoing reasons, I am satisfied that the Decision contains errors of law. I therefore set aside the Decision and give directions below for the re-making of the Decision.

DECISION AND DIRECTIONS

The Decision of First-tier Tribunal Judge Andrew Davies promulgated on 4 March 2020 involves the making of an error on a point of law. I therefore set aside the Decision and give directions for the re-making of the decision in this Tribunal as follows:

(1) Within 28 days from the date when this decision is sent, the parties shall file with the Tribunal and serve on the other party any further evidence on which they seek to rely at the resumed hearing. In particular, the Respondent should file and serve any evidence within her possession concerning the four years' ELR policy in relation to Iraqi asylum seekers said to have been in existence at times which are relevant to this appeal.

(2) Within 14 days from the filing and service of any evidence in [1] above, the Appellant shall file with the Tribunal and serve on the Respondent a skeleton argument setting out the issues for the Tribunal to determine and any case-law relied upon. The Appellant shall also produce and file and serve an indexed, paginated bundle containing all relevant documents to be referred to at the hearing.

(3) Within 14 days from the filing and service of the Appellant's skeleton argument at [2] above, the Respondent shall file with the Tribunal and serve on the Appellant her written submissions in response.

(4) The appeal will be listed for re-hearing on a face-to-face basis on the first available date after two months from the sending of this decision (time estimate ½ day). No interpreter will be booked unless requested.

(5) Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] **using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents which should continue to be sent by post. It is anticipated that the resumed hearing will be considered by a panel. Accordingly, hard copy documents should be filed in duplicate.**

(6) Service on the Secretary of State may be to [email] **and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of this decision and directions.**

(7) The parties have liberty to apply to the Tribunal for further directions or variation of the above directions, giving reasons if they face significant difficulties in complying.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 30 March 2021