Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00023/2021 (V)
UI-2022-000779

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 19 July 2022	**On 2 September 2022**

Before

THE HON. MR JUSTICE LANE
UPPER TRIBUNAL JUDGE MACLEMAN
UPPER TRIBUNAL JUDGE FRANCES

Between

KABEER HASSAN
(LIMITED ANONYMITY DIRECTION MADE IN RESPECT OF APPELLANT'S CHILDREN)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr D Chirico, instructed by Duncan Lewis Solicitors
For the respondent: Ms C McGahey Q.C., instructed by Government Legal Department

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. The appellant is a British citizen born in 1986. He appeals against the decision of Designated First-tier Tribunal Judge McClure and First-tier Tribunal Judge Handler ('the panel'), promulgated on 14 January 2022, dismissing his appeal against the respondent's decision of 20 January 2021 depriving him of British citizenship pursuant to section 40(2) of the British Nationality Act 1981 ('the 1981 Act').

2. The appellant appealed to the Upper Tribunal on six grounds and submitted that, if he succeeded on ground 2 in combination with grounds 1 or 3, the panel's decision must be set aside. The grounds submit:

   (1) The panel erred in law in finding the delay in making the deprivation decision was immaterial.

   (2) The panel erred in law in finding the decision was not procedurally unfair because, despite the fact that the appellant was not given the opportunity to make representations to the respondent before the decision was made, it was inevitable the respondent would have come to the same decision even if the appellant had been given the opportunity to make representations.

   (3) The panel's conclusion that the respondent had considered all relevant matters was perverse.

   (4) The panel misdirected itself in relation to Article 8 in that it failed to consider the delay and the arbitrary nature of the respondent's procedure.

   (5) The panel wrongly rejected the appellant's argument on Article 14, relying on irrelevant considerations and making irrational findings.

   (6) The panel erred in law or acted unfairly in refusing the appellant's application for disclosure and/or by holding against the appellant the absence of evidence which the respondent could have disclosed.

3. Permission to appeal was granted by Upper Tribunal Judge Macleman on 27 April 2022 on the basis that grounds 1 and 2 were arguable. The grant of permission was not however restricted.

The factual background

4. The appellant is 35 years old and has lived in the UK all his life. He holds dual British and Pakistani citizenship. His siblings, mother, estranged wife and two children are also British citizens. He has visited Pakistan on no more than five occasions for up to a month at a time.

5. On 4 May 2012, the appellant was convicted of rape and conspiracy to engage in sexual activity with a minor. He was sentenced concurrently to nine years' imprisonment for rape and three years' imprisonment for conspiracy. The appellant was part of a group of nine men convicted of sexual offences against young vulnerable females.

6. Seven of these nine men held British citizenship. In 2014 and 2015, three of them were deprived on British citizenship. Unlike the appellant, who was a British citizen by birth in the United Kingdom (section 1(1) of the British Nationality Act 1981), these men had acquired British citizenship by naturalisation. Their appeals were dismissed by the Tribunals and by the Court of Appeal: Aziz and others v SSHD [2019] 1 WLR 266. At [36], Sales LJ found that the respondent and the First-tier Tribunal were entitled to reach the evaluative assessment that the offending amounted to participation in serious organised crime, within the meaning of paragraph 55.4.4 of the respondent's Nationality Instructions (see below).

7. When the status of the appellant's British co-defendants was reviewed in 2014 and 2015, the respondent was under the mistaken belief that she could not deprive the appellant of British citizenship. According to the witness statement dated 8 October 2021 of Neil Forhaw, Senior Civil Servant within the respondent's Immigration and Protection Directorate,

> "when [the appellant's] status was reviewed at this time, it was identified that he was a British national from birth. At this point, a finding was made that it would not be possible to take deprivation action under Section 40(2) of the BNA because he did not hold any other nationality and, therefore, was not a dual national".

8. The respondent's GCID Case Record Sheet for 17 December 2015 records, however, that "Mr Hassan is British born and is a British citizen. For this reason we can't deprive his citizenship. We can therefore concede his case". This suggests the respondent considered it was the nature of the appellant's British citizenship (ie by birth) that meant he could not be deprived of it. Whilst wrong in law at the time it was formed, such a view might be explained by the fact that section 40 of the 1981 Act, as originally enacted, did not enable the respondent to deprive a British citizen by birth of his or her citizenship. Be that as it may, paragraph 16 of Mr Forhaw's statement is categoric that:

> "Further checks into the appellant's status in 2020 identified for the first time that he was understood to be a dual national, with him also holding Pakistani citizenship through his parents. Identifying this fact meant that, were the Secretary of State to proceed to make a decision to deprive the appellant of his British nationality, it would not (as had previously thought to have been the case in 2014 and 2015) make him stateless".

9. The notice of intention to deprive was served on the appellant on 18 January 2021 ('the deprivation decision') and on 20 January 2021 the respondent made a deprivation of citizenship order. It is not in dispute the appellant was not given an opportunity to make representations before the deprivation order was made.

The deprivation decision

10. The notice of intention to make a deprivation order relied on the appellant's conviction and sentence and stated: "These are serious and organised offences, including collusion with others. In light of these convictions, I am satisfied that deprivation of citizenship is conducive to the public good."

11. In considering the exercise of her discretion the respondent also considered section 55 of the Borders, Citizenship and Immigration Act 2009 ('section 55') and concluded the best interests of the appellant's children could not outweigh the public interest in depriving him of his British citizenship.

The legal framework

12. Section 40 of the 1981 Act provides as follows in material part:

> "(2) The Secretary of State may by order deprive a person of citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of-
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
>
> (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
>
> (a) the citizenship status results from the person's naturalisation,
>
> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—

(a) that the Secretary of State has decided to make an order,

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68)."

13. Chapter 55 of the respondent's policy 'Deprivation and nullity of British citizenship' provides at paragraph 55.4.4: "Conducive to the public good means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours."

14. In Ciceri v SSHD [2021] UKUT 00238 (IAC), the Upper Tribunal sought to summarise the law on deprivation, in the light of the judgments of higher courts, including the Supreme Court in R (Begum) v SIAC [2021] UKSC 7 and the Court of Appeal in Laci v SSHD [2021] EWCA Civ 769. In Laci, the key issue was the delay in making a deprivation decision. The Court (per Underhill LJ) drew a distinction between delay occasioned by the respondent's "wrong-headed pursuit of the nullity option" (where the respondent wrongly considered that the individual's fraud in seeking British citizenship meant they had never, in fact, acquired it) and prolonged and unexplained delay/inaction. In the former case, the individual could not be heard to say they were unaware of the respondent's opposition to them enjoying the status of British citizen; whereas in the latter case they could well have been unaware that their status was under threat. Paragraph 35(5) of Ciceri accordingly states:

> "Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159. Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of EB (Kosovo)."

The panel's decision

15. The panel made the following relevant findings:

> "49. Lord Bingham said in EB Kosovo, "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields

unpredictable, inconsistent and unfair outcomes." In our opinion, the appellant has not shown this. The evidence in the SAR indicates that the matter of potential deprivation action was referred to the appropriate department, "nationality" for a consideration of deprivation of citizenship. That department checked the position and reached an erroneous conclusion. They reported that back to the referring department who acted on that erroneous conclusion. The evidence before us, in Mr Forshaw's statement and the SAR file is supportive of the respondent making a mistake in concluding that the appellant was a British citizen and for that reason could not be deprived. There is no reference to whether any consideration was given to whether he was a dual national. This is indicative of a significant mistake on the part of the respondent. However, it remains a mistake within a system and it is not indicative of a dysfunctional system. Once the respondent realised the mistake, she acted swiftly which is indicative of a system which is not dysfunctional.

50. The facts on this appeal are significantly different to those on Laci. That was a decision with reference to s40(3). Mr Laci was successful on his article 8 claim because of the respondent's delay. The significant difference is that the respondent told Mr Laci that she was considering taking deprivation action but then did not do anything for 9 years. Within that time, Mr Laci's passport was renewed. In respect of this appellant, the respondent did not indicate anything to him. Therefore the appellant had not been led to believe something by actions of the respondent. The respondent's inaction raised obvious questions. The appellant could have asked the respondent if he had wanted to and that would have alerted the respondent to her error. We have taken into account all of Mr Chirico's submissions in respect of Laci but we find that none of them address satisfactorily the core distinction between the facts on the appellant's appeal and those on Mr Laci's appeal.

51. In particular, we note that the "windfall" argument does not appear to have featured in Laci. This argument is one made by Ms McGahey in her submissions: the consequence of the respondent's mistake has been a windfall of six extra years as a British citizen for the appellant. He should not gain a further windfall through being able to rely on that mistake to avoid deprivation altogether. Mr Chirico says that in Mr Laci's case he got that windfall and he was even less entitled to it because he obtained his citizenship by fraud. However, as noted above, there are material differences in the factual background on the Laci appeal. As Underhill LJ's judgment emphasizes, each appeal turns on its own facts. The facts on this appeal are materially different because here the basis for the deprivation is s40(2) not s40(3), the underlying reason for the deprivation is very materially different and the respondent took no positive action which could indicate to the appellant that she was not pursuing a deprivation against him.

52. It follows from our reasoning above that we do not find merit in Mr Chirico's submissions that the decision in Ciceri adds to his submissions on delay because those submissions are based on

delay reducing the public interest where delay shows a dysfunctional system. We find merit in Ms McGahey's submission that paragraph 30(5) of Ciceri which is reflected in headnote (5) is relevant. This includes "Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 – 16 of EB (Kosovo)." We find this relevant because it is consistent with our consideration of delay and our reasoning as set out above.

53. In terms of the public law arguments regarding the significance of the delay, we find merit in Ms McGahey's submission regarding consistency. The respondent has acted to deport two of the appellant's co-defendants and to deprive a further four that she knew were dual nationals of their citizenship and make deportation orders in respect of them. As Ms McGahey submitted and as can be seen from what we have set out above, the appellant's convictions are commensurate with the co-defendants who were the appellants in Aziz. It is consistent with that for the respondent to seek to deprive the appellant of his citizenship and take deportation action against him. The delay caused by the mistake is something that the respondent has had to react to in taking these actions. We do not accept that her failing to take these actions sooner can found a public law argument that she has acted inconsistently in taking action against other co-defendants significantly before taking that action against the appellant because the reason for that delay is a mistake. That is a matter of fact and the respondent has acted swiftly on discovery of that mistake and in a matter which increases consistency in her treatment of the co- defendants.

54. It follows from what we have said above that we do not accept Mr Chirico's submission that the respondent failed to act diligently and swiftly. The respondent did act diligently and swiftly once she had realised her mistake. She also acted diligently and swiftly in respect of the deprivations of the four co-defendants that she realised were dual nationals. We do not accept that making a mistake amounts to a failure to act diligently and swiftly, even where the appellant had the information before her to make her aware that the appellant was a dual national. We have further considered delay in the context of the article 8 assessment below.

55. For the above reasons, we do not accept that delay is material in respect of the public law grounds."

…

"58. It is not in dispute that the appellant was not given any opportunity to make representations before the Decision was taken."

…

"70. Therefore, the respondent can be taken to have considered the following in making the Decision.

a. The nature and seriousness of the offending.

b. The nature and source of the appellant's citizenship.

c. The time which has elapsed since the events giving rise to a decision to deprive on conducive grounds; if there is any material delay, the nature of any reasons for that.

d. The length of time the appellant has been a citizen (and particularly whether the appellant was a UK citizen for most or all of his childhood).

e. The length of time the appellant has lived in the UK as a citizen (and again particularly whether the appellant lived in the UK for most or all of his childhood).

f. The strength of the appellant's family and other ties in the UK (including, particularly, whether other members of the family are living in the UK as British citizens or as settled people).

g. The impact of a deprivation of the appellant's citizenship on other family members and, in particular, the impact on the best interests of children.

71. It is not apparent that the respondent considered the risk of the appellant re-offending and causing harm in the UK. Both representatives made submissions in this respect. However, in our opinion, it is not necessary for us to consider these in detail in the context of the public law grounds because the respondent has not made her decision with reference to any future risk. Her decision has been made on the basis of the appellant's convictions and of those convictions being for serious organised crime.

72. It is not apparent that the respondent considered the strength of the appellant's ties to Pakistan. However, it is clear from the evidence that the respondent knew that the appellant was British by birth and that his wife and children live in the UK. In those circumstances, we consider that there is no possibility that the nature of any ties to Pakistan could have had any material effect on the Decision.

73. We find merit in Ms McGahey's emphasis on the wide discretion of the respondent with reference in particular to paragraph 70 of the judgment in Begum. We bear in mind that s40(2) requires the respondent to be satisfied that the deprivation is conducive to the public good and to exercise her discretion to order the deprivation. It is possible that the respondent may consider that a person who had been involved in serious organised crime and yet decide not to make a deprivation order.

74. The Decision is the exercise of discretion which is vested in the respondent and that discretion has been exercised by the respondent in circumstances where that exercise of discretion is consistent with her policy: it is accepted that the appellant was involved in serious organised crime. We have taken into account Mr Chirico's submission with reference to paragraph 71 of Begum and we do "bear in mind the serious nature of a deprivation of

citizenship, and the severity of the consequences which can flow from such a decision."

75. We do not consider that the lack of a statutory framework equivalent to s117 of the Nationality, Immigration and Asylum Act 2002 and/or the lack of more detailed policy or applicable immigration rules bears significantly on the public law grounds, because of the facts underlying the Decision and the nature of the discretion that is vested in the respondent.

76. In considering procedural fairness, we have taken into account our reasoning on the other public law grounds set out below because there is a significant degree of overlap. We consider that it would have made no difference if the appellant was given the opportunity to make representations: all relevant matters were considered by the respondent and any that were not could not have led to a different decision. Therefore in our judgment, this is a case where it is inevitable that the respondent would have made the Decision in the terms that she made it, even if the appellant had been given the opportunity to make representations before the Decision was made (or after the Decision was made but before the Deprivation Order was made). Therefore the respondent not having given the appellant the opportunity to make representations was immaterial and not a public law error."

…

"80. Taking into account the basis on which the respondent made her decision and the position we have reached regarding inevitability set out above, we do not accept that the respondent, in exercising her discretion under s40(2) of the 1981 Act, in the particular circumstances of this appeal, failed to make any enquiries that she should have made. In particular, it is for the respondent to decide on the manner an intensity of enquiry subject to a Wednesbury challenge. We do not accept that no reasonable respondent could have acted as the respondent did or that no reasonable respondent could have been satisfied that it had the information required for the decision because of the underlying offences of the appellant and the history of what had happened in respect of the co-defendants together with the information that the respondent had regard to."

…

"89. We find the argument that the respondent's exercise of discretion in favour of deportation not to have been open to her not to be made out. It is quite clear from the wording of the statute and from the judgment in Begum that the discretion is vested in the respondent and it is a wide discretion. Ms McGahey made the point in her submissions that when considering reasonableness the threshold is very high and was only met if no reasonable respondent could have made the decision. We find merit in Ms McGahey's submission that whilst this decision was not about national security, where the respondent is depriving a person of their citizenship because of serious organised crime, the deference is in whether there has been serious organised crime and that is conceded here. We consider that to suggest that the

respondent's decision was not open to her, taking into account the offences that the appellant was convicted of is not in line with either the statute or the case law."

...

"105. For the same reasons that we have not accepted that the appellant can succeed on public law grounds, we do not accept that the Decision is arbitrary with reference to procedural safeguards. For the reasons set out above, we do not accept that there were procedural irregularities which where (sic) material. In terms of the article 8 procedural safeguards, the appellant of course has his right of appeal under s40A which has led to this appeal.

106. We have set out our reasoning on delay above. For those reasons, the Decision is not arbitrary because of any delay. Indeed, we find merit in particular in Ms McGahey's submission that the respondent's actions once she realised the mistake that had been made regarding the appellant's dual nationality are supportive of the Decision not being arbitrary. The respondent acted swiftly once she had realised the mistake and made a decision which was consistent with decisions made in respect of the appellant's co-defendants."

...

"119. We find nothing in the evidence that makes the Decision disproportionate for the following reasons. The fact that the appellant was born in the UK and has always lived in the UK and that his family live in the UK are factors weighing in his favour. We consider the re-offending risk. This is not something that the respondent has based the Decision on. It has been raised by the appellant with a view to him showing that he has carried out a lot of work to address his offending behaviour. Ms McGahey raised a number of points against the appellant's risk of re-offending being low in her oral submissions which the appellant had not been on notice of before but we consider that he has set out his position clearly in his written evidence and taking into account the oral submissions of Mr Chirico. In circumstances where risk of re-offending was not a reason for making the Decision, we do not hold a risk of re-offending against the appellant in the balance. Likewise, a low risk of re-offending does not count significantly in his favour because this is a deprivation decision based on his past offending, not a deportation decision.

Matters not in dispute

16. The following facts and matters are not in dispute:

(a) The appellant is a British citizen by birth.

(b) He also has Pakistani nationality.

(c) The appellant was involved in serious organised crime.

(d) There has been a delay of more than eight years between his conviction and the deprivation decision.

(e) There has been a five year delay caused by the respondent's mistake.

(f) The respondent did not deprive the appellant of British citizenship in 2014/2015 because she was unaware he was a dual national and/or was under the mistaken belief that she could not deprive a British born national of citizenship. The reason for the mistake is immaterial in the context of this appeal.

(g) The respondent did not refer to the delay in deciding how to exercise her discretion under section 40(2).

(h) In respect of ground (2), the common law threshold of inevitability was the relevant test. Section 31(2A) of the Senior Courts Act 1981 did not apply (section 31(2A) requires a court to refuse relief on judicial review "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.").

Conclusions and reasons

17. The appellant relied on the skeleton argument dated 18 July 2022, the skeleton argument before the First-tier Tribunal dated 31 July 2021 and his further submissions dated 19 November 2021. The respondent relied on the skeleton argument dated 6 June 2022. The appellant's and respondent's oral submissions are summarised below.

Ground 1

18. The appellant submitted the delay was a material consideration and the panel erred in finding otherwise at [55]. It was relevant to the exercise of discretion under section 40(2) and Article 8. The panel's finding that the respondent acted 'diligently and swiftly' was irrational. The respondent made a mistake in deciding not to deprive the appellant of British citizenship in 2015 and she did not review this erroneous decision for five years. The panel erred in law in finding the delay was not significant and the appellant had benefitted from it. Laci and Ciceri could be distinguished on their facts. The appellant was not benefitting from citizenship he was not entitled to and he was not responsible for the respondent's mistake.

19. In relation to Article 8, the appellant submitted the delay was a relevant consideration capable of tipping the balance in the proportionality assessment. The panel erred in law in finding the delay was immaterial and the respondent's decision to deprive was unlawful for failing to consider that delay.

20. The respondent submitted she acted diligently and swiftly in correcting a mistake she made in good faith. There was no delay prior to 2015 and she acted swiftly in 2020 and 2021. The reason for the delay was given in Neil Forshaw's statement. There was nothing in the chronology which

rendered the delay unlawful. The respondent was not suggesting the appellant benefitted from his own wrongdoing, but he should not take advantage of the respondent's mistake in law. That would be a 'windfall' benefit.

21. The respondent submitted the delay was not arbitrary and acting 'diligently and swiftly' was only one factor for consideration. The deprivation decision restored consistency between the appellant and his co-defendants. It was wrong for the appellant to benefit from the respondent's error because the respondent took five years to correct it. Had the respondent known the truth in 2015 she would have deprived the appellant of citizenship. The deprivation decision restored consistency and fairness.

22. Delay was a question of fact and law and the panel was entitled to reach the conclusion it did. There was no public law error in relation to delay and it was clear the panel had carried over their reasoning into the Article 8 assessment.

Ground 1: discussion

23. We find the panel's conclusion that the respondent acted 'diligently and swiftly' was irrational in the circumstances. The delay was caused by the respondent's mistaken belief that she could not deprive the appellant of British citizenship in 2015 when she deprived other dual national co-defendants of citizenship. We are persuaded by the appellant's submissions. The respondent's mis-interpretation or misunderstanding in relation to section 40 and her failure to conduct enquiries for five years could not rationally be considered 'diligent and swift' in all the circumstances.

24. The appellant is a British citizen from birth. He has not obtained nationality by fraud and his case can be distinguished from Laci and Ciceri. Both of those cases were concerned with section 40(3) of the 1981 Act. As we have explained at paragraph 14 above, the potential insignificance of delay occasioned by the respondent's ultimately unsuccessful attempt to treat fraudulently-obtained citizenship as a nullity has no material bearing on a case of the kind with which we are concerned. Accordingly, the panel erred in law in relying on paragraph 30(5) of Ciceri.

25. We are also not persuaded by the respondent's argument that the delay in this case merely falls to be regarded as a 'windfall' benefit to the appellant. He had not obtained his citizenship by fraud and so the delay in making a decision to deprive him of British citizenship cannot be viewed as giving him longer enjoyment of something to which he had never had any right. The fact that the respondent took five years to realise she could deprive the appellant cannot render irrelevant any consideration of the effect of the passage of that time.

26. The fact that the respondent acted swiftly once she discovered her mistake does not reduce the significance of the five year delay between

2015 and 2020. For all these reasons, the panel erred in law in concluding the delay was immaterial.

Ground 2

27. The appellant submitted the panel accepted he had no opportunity to make representations before the deprivation decision was taken at [58]. On the facts, it could not rationally be concluded that the respondent would inevitably reach the same decision if representations had been made.

28. The appellant submitted the panel did not appreciate the significance of the respondent's discretion and speculated as to the weight the respondent would attach to matters of which she was unaware. In addition, the panel imported reasoning into the respondent's decision making in relation to factors not in evidence. The decision to deprive was not 'inevitable' unless it was perverse to conclude otherwise. The panel failed to take into account the discretion referred to at [73] in coming to their conclusions at [76].

29. The appellant submitted the decision to deprive was not inevitable because the respondent's reasoning only relied on the appellant's offence and the generic paragraph on section 55 and the best interests of the children. The respondent had failed to consider the delay, ties to the UK, length of residence in the UK, family members, source of citizenship, length of time in Pakistan, risk of re-offending and risk to national security. The evidence of Neil Forshaw did not demonstrate these factors were considered notwithstanding they were not referred to in the decision.

30. The appellant submitted the panel reached a conclusion which was not open to it given the broad discretion under section 40(2). The respondent's decision should in effect be quashed and the appellant should be allowed to make representations, before any fresh deprivation decision is taken

31. The respondent submitted the panel adopted the correct approach in addressing what difference additional factors would make to the decision, had the respondent been aware of them. The additional factors did not assist the appellant and made his position worse. The test was what did the decision maker not know and would that information have made a difference.

32. The respondent submitted the inevitability test was met and the decision was open to the panel when read in its entirety. The appellant accepted he was involved in serious organised crime in the context of child sexual exploitation by a group of men. The background to the decision was a relevant consideration and the respondent took deprivation action against the appellant's co-defendants who were dual nationals.

33. The respondent submitted it was not appropriate to make a list of irrelevant considerations and complain that the respondent had failed to take them into account. The fact that the appellant was born a British

citizen, rather than naturalised, was irrelevant; ass was the fact he was not a threat to national security.

34. The respondent knew the appellant was a British citizen from birth and she considered the best interests of his children. The status of his wife and child would not be affected. The respondent did not make the decision on the basis the appellant was at high risk of re-offending or that he had strong ties to Pakistan. The fact the appellant was at low risk of re-offending and had limited ties to Pakistan would not have made a difference. The conclusion was inevitable and there was no error of law in the panel's decision.

Ground 2: discussion

35. We are not persuaded by the respondent's argument that there was no procedural unfairness because the decision to deprive would inevitably have been the same had the appellant been given the opportunity to make representations. The discretion to deprive the appellant of citizenship is a broad one. It does not automatically follow that the appellant should be deprived of citizenship because he has been involved in serious organised crime. The only other reason given by the respondent in the deprivation decision is that the status of the appellant's wife and children would be unaffected.

36. As we have explained in relation to ground 1, the five year delay in this case cannot be brushed aside by equating this section 40(2) case with a section 40(3) case; nor by invoking a 'windfall' argument. During those years, the appellant had no apprehension that the respondent was anxious to deprive him of citizenship but that she wrongly thought (through nothing the appellant had said or done) she had no power to do so. Although citizens by birth may be deprived of British citizenship, the fact that someone obtained their citizenship in that manner, as opposed to registration or naturalisation, can be a relevant factor in considering whether to exercise the power in section 40(2). Furthermore, the mere passage of time meant that there was a need to see what the appellant had or had not done in that time.

37. None of these considerations means that the respondent *would* have decided differently, had she had regard to any representations that prayed them in aid. But they *might* have done. Given the impact of deprivation can have far reaching consequences, it is essential the process is conducted fairly and it is incumbent on the respondent to consider all relevant circumstances. This is why the threshold is inevitability and why a court or tribunal should guard against any dilution of that test. In all the circumstances, the panel's conclusion that the decision to deprive was inevitable was not reasonably open to the panel on the evidence before them.

Ground 3: discussion

38. Grounds 2 and 3 overlap. Whether the decision is inevitable involves a consideration of whether relevant factors were taken into account. The

appellant relied on the submission already made and the respondent relied on the written submissions in the skeleton argument.

39. We find the panel erred in law in concluding the respondent had regard to all material considerations and/or this conclusion was perverse for the following reasons.

40. At [70], the panel listed seven factors which the respondent "can be taken to have considered in making the decision." Only two of these factors are relied on in the respondent's deprivation decision. The panel accepted the respondent failed to consider the risk of re-offending and the appellant's ties to Pakistan and concluded these factors would have no material effect on the decision.

41. We find the panel's conclusion that the respondent had considered all relevant matters is not borne out by the deprivation decision and was not supported by the evidence of Neil Forshaw. It was not appropriate to make good the respondent's lack of reasoning by assuming relevant factors were taken into account.

Disposal

42. Having found the appellant succeeds under grounds 1, 2 and 3, it is not necessary to consider the remaining grounds (see paragraph 2 above).

43. We set aside the decision of the First-tier Tribunal promulgated on 14 January 2022. Given the nature of the errors of law in that decision, it is appropriate for the Upper Tribunal to proceed to re-make the decision in the appeal (ie the appellant's appeal under section 40A of the 1981 Act). In the light of our findings, the inevitable conclusion is that the appeal must be allowed.

44. It is, however, important to make the following point clear. As the appellant no doubt appreciates, the consequence of our decision is emphatically not that the appellant cannot be deprived of his British citizenship. It will be for the respondent to decide whether to initiate a fresh deprivation process.

Anonymity

45. The First-tier Tribunal made an anonymity order at the end of its decision. It did so not for the benefit of the appellant, who clearly has no entitlement to anonymity, but for the benefit of the appellant's children, who are innocent of his crimes. We consider the terms of the First-tier Tribunal's order continue to be appropriate and necessary.

46. Accordingly, we make the following order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: No report of these proceedings shall identify the appellant's children by name or contain any specific information about them including particularly their ages, their schools, any information about their contact with the appellant and his

family including any wife or any reference to the fact that they are the subject of ongoing proceedings in the family court. Failure to comply with this order could amount to a contempt of court.

Notice of Decision

The appeal is allowed

J Frances

Signed: Date: 1 September 2022

Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.