Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00054/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 March 2022	**On 29 April 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Martin, Counsel instructed by Connaught Law
For the Respondent/SSHD: Ms A Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a British citizen. His date of birth is 18 August 1977. On 21 May 2019 the SSHD gave notice to the Appellant under s.40(5) of the British Nationality Act 1981 (the 1981 Act) that she had decided to make an order under s.40(3) to deprive him of British citizenship.

2. I set aside the decision of the First-tier Tribunal (Judge Morgan) to allow the Appellant's appeal against the decision of the Secretary of State to deprive him of citizenship. I attach my error of law decision (Appendix A).

3. On 29 March I received Mr Martin's skeleton argument. The Appellant relied on a letter from the Home Office of 31 August 2021 obtained as a result of a Freedom of Information request. The document indicates that following the dismissal of an appeal the average decision-making time is 303 days. The Appellant relies on the case of Secretary of State for the Home Department v P3 [2021] EWCA Civ 1642 and the unreported open judgment of the Special Immigration Appeals Commission (SIAC) appeal number SC/153/2018 and SC/153/2021 dated 4 March 2022, U3 v Secretary of State.

The history

4. The Appellant's background and immigration history is relevant to my decision and I will expand on this in my conclusions. For now it can be summarised as follows. The Appellant arrived in the UK on 10 August 1998. He claimed asylum the following day on the basis that he was fleeing conflict in Kosovo. He gave a false date of birth and nationality. He was granted asylum and indefinite leave to remain (ILR) on 13 April 1999. He was naturalised as a British citizen on 10 December 2003. The Appellant married in Albania in 2008. When his wife, DB, applied for entry clearance to join him the Appellant provided his genuine birth certificate in support of the application. This brought the deception to the attention of the SSHD.

5. The Appellant was issued with a nullity decision on 13 February 2013. The Appellant changed solicitors and on 12 September 2014 they stated that the Appellant had not received the decision of 13 February 2013. In error the SSHD returned the Appellant's passport to him after the refusal of his wife's application for LTR entry clearance. I am not sure of the date of refusal but the application was made on 16 July 2013. The SSHD sent the Appellant's solicitors a copy of the nullity letter on 29 September 2014. The SSHD informed the Appellant through his solicitors on 9 September 2014 that his citizenship had been declared null and void and while he still had ILR this was to be reviewed. On 2 December 2014 the SSHD informed the Appellant that his case (the ILR issue) was under review and that any mitigating evidence should be submitted.

6. On 2 October 2015 and 2 December 2015 the Appellant's solicitors wrote to the SSHD referring to the judgment in Hysaj v SSHD [2015] EWCA Civ 1195 and stating that in view of the judgment of the Court of Appeal, the case should be finally considered. On 8 January 2018, when the SSHD indicated, the decision to declare the Appellant's case a nullity was being reviewed in the light of the Supreme Court judgment in Hysaj (handed down on 21 December 2017).

7. Following the decision of the Supreme Court in Hysaj & Ors [2017] UKSC 82 on 21 December 2017, on 3 February 2018 the SSHD notified the Appellant that the nullity decision had been withdrawn and it was accepted that he is a British citizen. On 17 March 2018 he was invited to respond to the proposed decision to deprive him of British citizenship. The

Appellant replied on 29 March 2018 through his representatives. In a decision of 21 May 2019 the Appellant was notified of the decision to deprive citizenship. The SSHD at para. 24 of the decision letter engages with the issue of delay. It was acknowledged that approximately 10 years had lapsed since the Appellant was first contacted about his status. However, during this period he had remained in the United Kingdom and "evidently the nullity decision had little or no impact on your family life or business interests".

8. The SSHD's case is that the Appellant obtained British citizenship fraudulently. He made a false representation, having given a false name and nationality. It is accepted by the Appellant that he obtained citizenship having made a false representation about his citizenship. He accepts that the condition precedent in s.40(3)(a) is established.

The Law

British Nationality Act 1981

9. Section 40(3) states as follows:

> "**40 Deprivation of citizenship.**
>
> (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 -
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> (a) fraud,
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> (b) false representation, or
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> (c) concealment of a material fact."

10. The jurisdiction of the Tribunal in respect of decisions under s.40(2) and 40(3) has been the subject of recent litigation, of which the most significant is R (Begum) v SIAC [2021] UKSC 7; [2021] Imm AR 879. The ratio of the decision is contained in Lord Reed's judgment at paras. 68-71. In a nutshell, the Tribunal must determine whether the SSHD's discretionary decision to deprive an individual of British citizenship was exercised correctly. The correct approach to this is not a balancing exercise, but rather a review on *Wednesbury* principles. Where Article 8 is engaged the Tribunal must determine for itself whether the decision is compatible with the obligations of the decision–maker under the Human Rights Act 1998, paying due regard to the inherent weight that will normally lie on the SSHD's side of the scales in the Article 8 balancing exercise.

11. Following Begum, the UT reformulated the legal principles regarding appeals against decisions to deprive a person of British citizenship in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 as follows:

"Following KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884, Hysaj (deprivation of citizenship: delay) [2020] UKUT 128 (IAC), R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 and Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 the legal principles regarding appeals under section 40A of the British Nationality Act 1981 against decisions to deprive a person of British citizenship are as follows:

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

(2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged (usually ECHR Article 8). If they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights, contrary to the obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR.

(3) In so doing:

(a) the Tribunal must determine the reasonably foreseeable consequences of deprivation; but it will not be necessary or appropriate for the Tribunal (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom; and

(b) any relevant assessment of proportionality is for the Tribunal to make, on the evidence before it (which may not be the same as the evidence considered by the Secretary of State).

(4) In determining proportionality, the Tribunal must pay due regard to the inherent weight that will normally lie on the Secretary of State's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

(5) 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 **[1]***.*

(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; has disregarded something which should have been given weight; has been guilty of some procedural impropriety; or has not complied with section 40(4) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3) and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good.

Footnotes

[1] *(2) The more time goes by without any steps being taken to remove an applicant, the more the sense of impermanence which will imbue relationships formed earlier in the period will fade 'and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so', which may affect the proportionality of removal.*

(3) Delay may 'reduce 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'.

…"

The Appellant's Evidence

12. The Appellant relies on the evidence before the First-tier Tribunal of 22 October 2020. He submitted a bundle containing a further witness statement of 23 March 2022 and documents in support of his appeal. I will summarise the Appellant's evidence.

13. The Appellant was born in Albania on 18 August 1977. He left Albania as a result of a blood feud that started in 1939. There had been killings in both families until 1945. In 1990 the families reconciled with the help of a third party. However, in March 1998 a member of the other family was killed and the Appellant's family was held responsible. His family arranged for him to flee with the help of an agent.

14. The Appellant's parents are in Albania. They are aged 72 and 71 and both are in ill health. He has not been able to visit his parents since August 2011. The Appellant has always worked whilst he has been in the UK. He is employed by A&S Leisure Ltd in the Napoleons Casino as a receptionist. He has been employed in that capacity since April 2011. He is not able to look for another job because he does not have any ID documents. He is trapped in his current employment with no prospects of training or a career. He has lived in the same small flat since 2014. He cannot seek better accommodation because he cannot produce any identification. The Appellant suffers from depression. He lives in constant fear about what will happen to him. His wife is not happy because their life is not harmonious. If the Appellant is deprived of his British citizenship he will not be able to work and provide for his family.

15. The Appellant's wife has completed some courses and has since November 2021 been working as a teaching assistant. She has leave to remain with a condition attached of "no recourse to public funds". If the Appellant is unable to work his family would be left destitute.

Conclusions

Jurisdictional issue

16. I will deal briefly with the jurisdictional issue raised by Mr Martin which is that Begum applies to appeals against decisions taken on grounds of national security only. The Appellant relies on SSHD v P3 [2021] EWCA Civ 1642 and U3 SC/153/2018 and SC/153/2021, an unreported decision of SIAC. In respect of the lawfulness of the SSHD's decision, it is submitted that the guidance in Ciceri must be considered in the light of the decision of SIAC in U3 where they found that the Supreme Court's decision in Begum concerned decisions taken on conducive grounds based on issues of national security and not decisions under s.40(3).

17. Mr Martin relied on paras. 23-26 of U3. There was no application made in accordance with para. 11.2 of the Practice Direction. However, not only is the case not binding on the UT, it does not support Mr Martin's argument. It is of no material assistance. What is being considered in those paragraphs by SIAC is the reported (and binding on the UT) decision of P3, specifically what is stated by Laing LJ at para. 114 where she engaged with the suggestion made by Mr Blundell QC on behalf of the SSHD that SIAC might now be taking an approach to its role on appeals under s.2B of the 1997 Act.[1] Section 2 of the 1997 Act sets out SIAC's jurisdiction and distinguishes between "review" and "appeal." (As we know from Begum, characterisation of a jurisdiction as appellate does not decide what principles of law should be applied). Laing LJ said that "Begum is authority for the proposition that, broadly, SIAC should take a public law approach to challenges to the SSHD's assessment of national security. It is not authority for any wider proposition". When read with para. 115, it is support that the traditional public law approach advocated in Begum is to be applied on an application for statutory review but not on an appeal in SIAC. Begum applied to the former; however, SIAC can hear evidence on an appeal which was not before the SSHD on issues such as Convention rights and is not restricted to an approach based on public law principles. The Court of Appeal engaged with a submission in respect of the 1997 Act in the context of SIAC's jurisdiction and certified deprivation decisions taken on grounds of national security. The court was not considering the implications of Begum in the context of appeals to the First-tier Tribunal under the 2002 Act.

18. In respect of SIAC's interpretation of paras. 114 and 115 of P3 in U3, the Commission said that in deciding what Begum and P3 require, it is important to consider deprivation and human rights appeals separately. The Commission identified two questions at para. 22 which they described as distinct but inter-related. First, on what grounds can SIAC interfere with a decision under challenge (a decision taken under s40.(2)) and where discretion is exercised for national security reasons. Second, what evidence is relevant and admissible? What follows is the Commission's answers to those questions taking into account what Laing LJ said in P3 in the context of SIAC and national security decisions. It lends no support to

1[] 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) [F2(and section 40A(3)(a) shall have effect in relation to appeals under this section).

Begum applying only to deprivation of citizenship decisions based on national security.

19. Mr Martin argued before me that the Appellant is entitled to a full merits appeal in respect of both aspects of the decision (deprivation and human rights). I reject this argument. Begum applies to decisions under s.40(2) and (3). My attention was drawn to the decision of the Upper Tribunal in Deliallisi (British citizen: deprivation appeal: Scope) [2013] UKUT 439 where the Tribunal considered the assurances given by Lord Filkin to Lord Avery during the passage of the bill for Nationality, Immigration and Asylum Act 2002 which inserted s.40A into the 1981 Act. I accept this could support the intention of parliament was that Appellants appealing against decisions made under s.40 would be entitled to a full merits review, however, Begum is binding precedent.

20. In the alternative, Mr Martin argued that the deprivation decision is irrational applying public law principles and the appeal should be allowed against that decision (the parties agreed that if the decision is found to be unlawful on public law grounds, the UT is not entitled to make its own decision). The parties agreed that in respect of the appeal on human rights grounds the UT has the jurisdiction to consider a full merits appeal and reach its own conclusion.

21. Begum is binding on the UT. The UT has reformulated the approach to cases concerning s.40(3) in the light of Begum in Ciceri. I apply that guidance. I will engage with the 14-year policy, delay and limbo which are the issues on which the Appellant relies. It is the Appellant's case that as a result of these issues the decision of the SSHD breaches his rights under Article 8. It is asserted that the decision is *Wednesbury* unreasonable. I will make findings on these issues, recognising that they are separate issues which are inter-related, engaging with the evidence and the parties' submissions. I remind myself that when considering whether the decision breaches public law principles, I take into account the material that was before the decision maker. When considering whether the decision breaches Article 8, I take into account all the evidence before me.

The 14-year policy, delay and limbo

22. Mr Martin identified the 14-year policy, delay and limbo as reasons why the Appellant's appeal should be allowed. It is not challenged that there was a policy in force until August 2014 that provided that in general the Secretary of State will not normally deprive of British citizenship if a person has been resident in the United Kingdom for more than 14 years unless it is in the public interest to deprive.[2]

2[] Chapter 55 of the Nationality Instructions provided as follows:

55. 7 Caseworker Decisions – Completing the Deprivation Questionnaire

55.7.1 Following receipt of any information requested from the deprivation subject the caseworker, in order to deprive of citizenship, must be satisfied that the fraud, false representation or concealment of material fact was material to the acquisition of citizenship (55.7.2) and that the fraud was deliberate (55.7.3) …

55.7.2.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances: …

23. He relied on a skeleton argument and oral submissions which I summarise as follows. The fraud was disclosed on 11 April 2008. However, the decision was not taken until 21 May 2019. The delay was not caused by the Appellant's actions. Mr Martin submits that in the context of delay, "it is not sufficient to conclude that Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 is authority for saying that a nullity decision cannot be taken into account". This is because the decision in Hysaj was an error of law decision where no error was found; the facts in that case can be distinguished because the Appellant in Hysaj was sentenced to 5 years' imprisonment and that the third para. of the headnote does not apply where it can be "shown that a decision would have been taken at the time a certain policy applied". In Hysaj there was no point in time when a decision could have been made when the Appellant could have benefited from the policy. In this case there is historic injustice. It is not speculative to suggest that a deprivation decision would have been taken but for the SSHD's misunderstanding of the law. For the policy not to have applied in the Appellant's case the SSHD would have to give reasons referring to some aggravating factor , as to why the normal course would not be followed.

24. The Appellant relies on two periods of delay; from 2008-2013 and 2015–2019. The Appellant provided his genuine birth certificate in 2008 with his wife's application for entry clearance. He was notified that information had been received that British citizenship was obtained by fraud on 18 May 2009 and 25 June 2009 and that the SSHD was considering depriving him of citizenship. A response was received from the Appellant's solicitors on 14 July 2009 admitting deception and advancing mitigating circumstances. Nothing further was done by the SSHD with the Appellant's case until 13 February 2013 when he was informed that a decision had been taken to declare his British citizenship a nullity. There was a delay until 13 February 2013 when a nullity decision was made. The Appellant's case is that it was apparent to the SSHD in 2015 that the nullity decision was not lawful because his solicitors sent the SSHD a letter in December 2015 asking for the nullity decision to be withdrawn. However, despite this there was a further second period of delay from 2015 until 2019. During the delay the Appellant had lost his passport and ability to travel. He was unable to change jobs. He was disadvantaged and already in a state of limbo. While the facts are not the same as those in Laci, there was still a delay during which time the Appellant conscientiously kept in touch with the SSHD. The facts in this case are different to those in Hysaj. In this case the Appellant could have benefited from the 14-year policy. The discretionary policy is heavily weighted in the Appellant's favour and this impacts on the rationality of the decision.

- If a person has been resident in the United Kingdom for more than 14 years we will not normally deprive of citizenship

…

However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation.

25. I reject Mr Martin's argument about Hysaj. Paras. 2 and 3 of the headnote in Hysaj concern the application of the 14-year policy in the context of legitimate expectation and historic injustice. What the UT stated is relevant in a case where it is being argued that, but for the delay, a decision should have been taken at a specific time during which the policy would have applied. This is the argument made for the Appellant. Historic injustice and or legitimate expectation in the context of the 14-year policy have no relevance if an Appellant does not have 14-years' residence at any material time because the policy would have no application. As it happened in Hysaj, the Appellant's continuous residence was broken by imprisonment so even if the arguments he advanced relating to legitimate expectation and historic injustice had been accepted by the UT, they would not have had any application in his case. I do not accept Mr Martin's submissions that "more weight should be given to this Appellant's arguments than in the case of Hysaj, given that the Appellant in Hysaj had been convicted of a criminal offence and could not take advantage of the 14-year policy owing to the fact that he had spent time in prison". There is no connection between what the UT said in the headnote at paras. 2 and 3 about historic injustice and legitimate expectation (in connection with the 14-year policy) and an Appellant's criminality. The relevance of criminality and imprisonment in Hysaj was that it broke continuous residence so the Appellant could never have benefited from the policy.

26. Criminal convictions and imprisonment (or lack of) may be a relevant factor when assessing proportionality. However, it is not material to the issues of legitimate expectation and historic injustice in this context in the way in which Mr Martin asserts.

27. Hysaj is a reported decision of the UT. There is no reason for me to depart from it. Moreover, Mr Martin seeks to re-run the arguments which were unequivocally rejected by the UT in Hysaj.

28. The Appellant came here on 10 August 1998. By 11 August 2012, he had been here for 14 years. At the time of the nullity decision on 13 February 2013, he would have been here for 14 years. However, the 14-year policy was withdrawn on 20 August 2014. Any delay between 2008 and 11 August 2012 is immaterial in respect of the 14-year policy. There is no properly identified loss of opportunity. Had the SSHD's misunderstanding of the law not arisen and a decision to deprive as opposed to a nullity decision had been made between 11 August 2012 – 20 August 2014 the 14-year policy would have applied because by then the Appellant would been here for 14 years. However, this is a relatively small window of opportunity. Moreover, until the outcome of the litigation in the Supreme Court, the SSHD was under no obligation to make such a decision. Her reliance on the nullity decision was not unlawful. The uncertainty in respect of the law was not properly resolved until the Supreme Court handed down its judgment in Hysaj. I do not accept any second period of delay from 2015 as argued by Mr Martin. Once the judgment was handed down by the Supreme Court, a decision was made

on 21 May 2019 following representation made by the Appellant on 29 March 2018. Furthermore, any delay after 20 August 2014 could not arguably have led to a loss of opportunity in respect of the policy. In respect of the loss of opportunity it is unarguable, properly applying the guidance given by the UT in Hysaj, that the SSHD was under an obligation to make a deprivation decision within the limited window of opportunity between 11 August 2012 and 20 August 2014 when the 14-year policy was in existence.

29. The following paragraphs of the UT decision in Hysaj are of relevance:

> 74. The appellant seeks the intervention of the Tribunal to disapply the policy existing at the date of the decision and to require the respondent to exercise her discretion in accordance with an earlier policy. He seeks to disabuse the usual rule that immigration and nationality decisions are made according to the law and policy in force at the time the decision is taken. We have explained above that the respondent did not unlawfully delay in making her decision and that though in hindsight she erred in relying upon the nullity doctrine she was entitled to rely upon legal advice. She could reasonably, and therefore lawfully, rely upon the High Court judgment in *Kadria*, as well as previous Court of Appeal precedent as generally understood. Reliance upon existing case-law cannot be categorised as illegality in this matter. The respondent was under no obligation to make a decision between 7 July 2012 and 20 August 2014, when the policy was withdrawn, and if there was an obligation to make a deprivation decision within a reasonable period of time, the failure to do so does not establish an illegal abuse of discretion. Even at their highest, and being mindful of the significant public interest in deprivation where citizenship has been obtained by fraud, the circumstances arising in this matter are not such that illegality was so obvious, and the remedy so plain, that there was only one way in which the respondent could have reasonably exercised her discretion when considering deprivation.
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> 30. Though the respondent erred in law by initially deciding that the grant of citizenship to the appellant was a nullity, the appellant cannot establish that a decision to deprive under section 40(3) should have been taken under a specific policy within a certain period of time. He is therefore unable to substantiate the alleged prejudice. Rather, he has benefited from the delay, being able to continue to enjoy the benefits of his fraudulently obtained British citizenship from 2007 to the present time, including his present ability to work in this country. We are satisfied that no historic injustice arises in this matter and this ground of appeal must fail.

30. In respect of the 14-year policy, it is not an issue which was raised by the Appellant's solicitors in the letter of 29 March 2018. The significance of this is that when considering whether there is public law error in the decision of the SSHD, broadly speaking I must consider the material that was before the decision maker.[3] While I reject that the SSHD was under any obligation to give reasons why a policy which had been withdrawn at the time of the decision could not benefit the Appellant. Moreover it was not raised by the Appellant in representations. It was not a matter before the decision maker.

31. Mr Martin's reference to exceptionality is misconceived because it is a reference to the test to apply when considering whether discretion should

3[] In P3 Laing LJ at para. 115 gave examples of when SIAC could consider material that was not before the decision maker when considering the decision on judicial review principles.

have been exercised differently when the Tribunal is conducting a full merits review of a decision under s.40(2) and s.40(3), which the Supreme Court in Begum has decided the Tribunal has no jurisdiction to conduct (see the guidance of the UT in BA (deprivation of citizenship: appeals) [2018] UKUT 00085.[4]

32. Mr Martin conceded that the delay in this case is not such that it would render the decision unlawful on public law grounds, but that it is a material factor to the assessment of proportionality. In the case of Laci v SSHD [2021] EWCA Civ 769, Underhill LJ emphasised that there was not "mere" delay during which the Appellant in that case was left in uncertainty. He identified that "the strength of the Appellant's case is that he was entitled to, and did, believe that no further action would be taken and got on with his life on the basis that his British citizenship was no longer in question" (see para.77). Underhill LJ found that the First-tier Tribunal in that case was entitled to regard the change in the SSHD's position as unfair. In Laci the Appellant had been informed on 17 February 2009 that the UKBA had reason to believe that he had obtained his status as a British citizen by fraud and that she was considering whether he should be deprived of his nationality. The Appellant in Laci was responsible for supplying the UKBA with the correct details in support of an application for entry clearance relating to his mother. His solicitors replied to UKBA on 17 March 2009. The Appellant admitted the deception but advanced mitigating circumstances. The Appellant did not hear anything from the Home Office for nine years. Underhill LJ said at para. 51 that it is important to appreciate that "this is not simply a case where the Secretary of State could have taken action but did not do so….it goes beyond mere inaction". There was no reason for the Appellant in this case to believe that his British citizenship was no longer in question at any time throughout the relevant period.

33. Delay may be relevant to the Appellant's Article 8 claim in three ways identified by Lord Bingham in EB (Kosovo) v SSHD [2008] UKHL 41 at paras 14-16;

> 14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.
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> 15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it

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was noted that “It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court’s listing of factors relevant to the proportionality of removing an immigrant convicted of crime: “whether the spouse knew about the offence at the time when he or she entered into a family relationship” see *Boultif v Switzerland* (2001) 33 EHRR 1179, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. 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 the present case the appellant’s cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant’s application on grounds of non-compliance. In the case of *JL (Sierra Leone)*, heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant’s case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be “predictable, consistent and fair as between one applicant and another” or as yielding “consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v Secretary of State for the Home Department* [2005] EWCA Civ 947, [2005] INLR 575, para 25:

> “Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal”.

34. In respect of the first category, the Appellant has benefited from closer ties during the period. However, it is not suggested that there will be a breach of family life insofar as there is no intention by the SSHD to deport the Appellant and following deprivation of citizenship and a decision to remove is remote. In terms of any expectation that he would be retaining British citizenship, unlike the case of Laci there is nothing to support that this Appellant has at any time understood that the SSHD would not be pursuing any further action after the withdrawal of the nullity decision. It is unarguable that there is any delay that could be described as prolonged or inexcusable or so egregious to fall into the third category identified by Lord Bingham in EB (Kosovo). It has not been shown that the delay “is as a result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes”.

35. Mr Martin relied on the "limbo" argument. The UT rejected a similar argument in Hysaj. I take into account the following paragraphs:

> 107. The appellant's articulated concern is that deprivation will adversely impact upon not only his life, but also that of his wife and children. He contends that the expected 'upheaval' in their lives will be accompanied by financial and emotional concerns. Such upheaval is a consequence of the appellant losing rights and entitlements from his British citizenship that he should never have enjoyed.
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> 108. The Court of Appeal has confirmed that article 8 does not impose any obligation upon the State to provide financial support for family life. The ECHR is not aimed at securing social and economic rights, with the rights defined being predominantly civil and political in nature: *R. (on the application of SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615; [2019] 1 W.L.R. 5687, at [28]-[38]. The State is not required to grant leave to an individual so that they can work and provide their family with material support.
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> 109. The time period between deprivation and the issuing of a decision is identified by the respondent as being between six to eight weeks. During such time the appellant's wife is permitted to work. She accepted before us that she could seek employment. She expressed concern as to the impact her limited English language skills may have on securing employment but confirmed that she could secure unskilled employment. She confirmed that her husband could remain at home and look after their children. The appellant accepted that his wife is named on the joint tenancy and will continue to be able to lawfully rent their home upon his loss of citizenship and status. In addition, the children can access certain benefits through their citizenship. Two safety nets exist for the family. If there is an immediate and significant downturn in the family's finances such as to impact upon the health and development of the children, they can seek support under section 17 of the Children Act 1989. If the family become destitute, or there are particularly compelling reasons relating to the welfare of the children on account of very low income, the appellant's wife may apply for a change to her No Recourse to Public Funds (NRPF) condition.
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> 110. There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured. That is the essence of what the appellant seeks through securing limited leave pending consideration by the respondent as to whether he should be deported. Although the appellant's family members are not culpable, their interests are not such, either individually or cumulatively, as to outweigh the strong public interest in this case.

36. In order to engage with the limbo argument, I must consider what will happen to the Appellant and his family should his citizenship be deprived. While Ms Ahmed suggested that the Appellant's evidence about his income and expenditure was not credible, there was no reason in my view not to accept his evidence which is broadly speaking supported by documentary evidence. Where I found that the Appellant's evidence was problematic because it lacked clarity concerned the availability of family support wider family support. The Appellant has managed to work, albeit he has been restricted in employment opportunities. He has not been able to seek better accommodation for his family. Going forward there is no

reason to doubt that the Appellant and his family have endured a degree of hardship as a result of his fraud.

37. I have taken into account that the Appellant's wife's income is at present insufficient to cover their outgoings. I take into account that the Appellant has two children who are British citizens. His wife has limited leave to remain with a condition of no recourse to public funds. If the Appellant is unable to work he will not be able to support his family and at present they would not be entitled to public funds. I accept his evidence about his income. He earns £1,540 per month. His wife's income is £850 per month. In order to make ends meet the family relies on housing benefit. They pay £1,646 per month in rent. Deprivation and the limbo period that will ensue will inevitably result in hardship for this family. I take into account the general economic circumstances and what Mr Martin described as the "cost of living crisis". However, I also note that the Appellant's wife's payslips indicate that she works between 6-13 hours a week. I reasonably infer that there is scope for her to increase hours of work or to find new employment while the Appellant is in limbo and unable to work.

38. I attach weight to the information obtained following a Freedom of Information request by the Appellant. It discloses that on average it took 303 days to grant temporary leave following a decision to deprive citizenship on grounds of fraud. The time period is significantly longer than that of six to eight weeks envisaged in Hysaj . It is, however, an average figure. There is no way of knowing the circumstances and complexities that may have arisen in some cases throughout the relevant period. This Appellant's case is relatively straight forward. There is no issue as to his family life here and the status of his wife and children. The evidence relied on by the Appellant does not support that it will take the SSHD 303 days in his case to grant him temporary leave. Moreover, it can be reasonably inferred that the period of time of 303 days includes consideration of representations by Appellants. The Appellant has control over the timing of any representations that he seeks to make.

39. In Hysaj, the SSHD was considering making a deportation order against the Appellant. In this case, the limbo period is likely to result in a period of leave. The period of limbo will adversely impact upon the Appellant's life and that of his family. However, I take into account what the UT said in Hysaj at paras. 108-109 in respect of the limbo period and options available to the family in the event of a downturn in the family's finances.

40. The Appellant's evidence is that he and his wife have family in Albania. His wife has a brother in the Netherlands. It has not been established that family members would not be able to assist them during a period of limbo. The reasonable foreseeable consequences of deprivation are that the family will experience a period of limbo. This Appellant will not be deported. He has two British citizen children and a wife with limited leave to remain. It is reasonably likely that he will be granted status to enable

him to remain here. Ms Ahmed in submissions stated,"[The Appellant] is long way off showing removal reasonably foreseeable".

41. I take into account that the decision will have an adverse impact on not only the Appellant but his wife and children, properly applying the ratio Beoku- Betts v SSHD [2008] UKHL 39. I accept that the limbo period will adversely impact on his children. The children are not at risk of being separated from their parents. Their lives will not be turned upside down by the inevitable limbo period. It is reasonably likely that life will go on as before; however, I do not underestimate the stress that will be felt by their parents and how this might in turn impact on them. It is likely to be in their best interest for their father to remain a British citizen, but this is not as clear cut as in a decision where the family would be separated and which involves the loss of a parent. Moreover, the assessment of their best interests, although a primary consideration, is not paramount. However, I take it into account when assessing proportionality.

42. When considering proportionality in the context of a decision under s.40(3) where an applicant has fraudulently secured citizenship, "that deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured": Hysaj para. 110. I remind myself of the heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of citizenship. I pay due regard to "the inherent weight that will normally lie on SSHD's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct": Ciceri para. 38(4).

43. The public interest argument is strong is this case. It outweighs any breach to the Appellant's Article 8 rights. The Appellant relied on delay, limbo and the 14-year policy all of which are matters that may be capable of tipping the balance in favour of an Appellant; however for the reasons I have given, when considered separately and cumulatively these factors in this Appellant's case are nowhere near as weighty as advanced by Mr Martin. I have taken into account the length of time that the Appellant has been here. I have also attached weight to the fact that he came here in 1998 when he was a young man. While the application for entry clearance made by his mother brought the deception to the attention of the SSHD, I do not find that this weighs heavily in the balance in favour of the Appellant. After the deception was uncovered the Appellant raised the issue of a blood feud in Albania preventing his safe return; however, this is not credible as it begs the question why he gave false details in the first place and made a false asylum claim saying that he was at risk of return to Kosovo. The claim to be at risk in Albania is also undermined by him having returned there on a number of occasions, as found by the judge who determined the Appellant's wife's appeal in 2009.

44. The reasonably foreseeable consequences of deprivation do not violate the obligations of the United Kingdom government under the Human Rights Act 1998.

45. The Appellant has failed to establish public law error in the decision of the SSHD.

46. The appeal is dismissed.

Notice of Decision

The appeal is dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity**.** No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 26 April 2022

Upper Tribunal Judge McWilliam