**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: DC/00060/2020**
**[UI-2021-000735]**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On the 22 February 2022** | **On the 12 April 2022** |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**
**DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

**Between**

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

Appellant

**and**

**ELVIS REXHMATI**

Respondent

**Representation:**
For the appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the respondent: Ms A. Smith, instructed by Oliver Hasani Solicitors

**DECISION AND REASONS**

1. For the sake of continuity we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. Rule 40 of The Tribunal Procedure (Upper Tribunal) Rules 2008 allows the Upper Tribunal to give a decision orally at a hearing. Rule 40(3) states that the Upper Tribunal must provide written reasons with a decision notice to

each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings. Rule 40(3) provides exceptions to the rule if the decision is made with the consent of the parties or the parties have consented to the Upper Tribunal not giving written reasons. In this case both parties consented to the decision at the hearing so it is not necessary to give detailed reasons.

3. The original appellant appealed the respondent's decision dated 23 March 2020 to deprive him of British Citizenship with reference to section 40(3) of the British Nationality Act 1981 (BNA 1981) on the ground that the Secretary of State was satisfied that naturalisation was obtained by means of fraud. The decision attracted a right of appeal under section 40A of the same Act.

4. First-tier Tribunal Judge L.K. Gibbs ('the judge') allowed the appeal in a decision promulgated on 11 August 2021. It is not necessary to set out the reasons given for the decision in any detail because the parties agreed that it involved the making of an error of law and it must be set aside. Despite the obvious nature of the error, it was not identified by the respondent in the grounds of appeal to the Upper Tribunal.

5. Ms Smith was eminently professional in acknowledging that it was an error that could not be ignored and eminently pragmatic in advising her client that it would only prolong the proceedings, most likely at his cost, to seek to argue that the issue should not be considered by the Upper Tribunal.

6. The judge referred to the Supreme Court decision in *R (on the application of Begum) v Special Immigration Appeals Commission and Others* [2021] UKSC 7; [2021] 2 WLR 556 [19]. She appeared to make a distinction between a decision made under section 40(2) and section 40(3) BNA 1981, but failed to consider the fact that both decisions have the same appeal right of appeal originating in section 40A. The fact that *Begum* was heard in the context of special procedures relating to national security does not change the fact that the right of appeal against a deprivation decision under section 40A is the same whether it is heard in the Special Immigration Appeals Commission or the First-tier Tribunal (Immigration and Asylum) Chamber. Having considered paragraphs 68 and 69 of the decision in *Begum* the judge concluded that she had jurisdiction to evaluate whether the condition precedent was satisfied as if a primary decision-maker exercising a fact finding role. She concluded that it was only if she was satisfied that the appellant obtained naturalisation by fraud that her role would become 'supervisory' [20].

7. We acknowledge that, at the date of the First-tier Tribunal hearing, the decision in *Begum* was being considered on a case by case basis in the First-tier Tribunal and that the import might not have been fully appreciated. However, had the judge considered paragraph 71 of the decision in *Begum* it may have become clear that the assessment of the condition precedent contained in section 40(3) was also within the realm

of the principles of administrative review. The Upper Tribunal clarified the position in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC) shortly after the First-tier Tribunal decision.

8. So despite the fact that this error was not identified by the Secretary of State, and no application was made to amend the grounds, there was agreement between the parties that the decision involved the making of an error of law and that it would be appropriate to remit the case to the First-tier Tribunal for a fresh hearing given that the judge, having taken a wrong turn, failed to make findings in relation to other arguments put forward by the appellant.

9. We agree that an error going to the jurisdiction of the First-tier Tribunal is of a fundamental nature and cannot be ignored. For these reasons, we conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside. The case will be remitted to the First-tier Tribunal for a fresh hearing.

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and will be remitted for a fresh hearing in the First-tier Tribunal

Signed M. Canavan Date 23 February 2022
Upper Tribunal Judge Canavan

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**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**