Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00065/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th April 2022	**On 22nd June 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ARBEN CERRI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Hodgetts, instructed by OTB Legal
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Albania born on 12 August 1975. He appeals against the decision of First-tier Tribunal Judge A M Black, promulgated on 6 June 2019, dismissing his appeal against the respondent's decision, dated 23 October 2018, depriving him of British citizenship ('the deprivation decision').

2. On 12 August 2021, I found there was an error of law in the First-tier Tribunal decision and set it aside. The judge's findings at [17] to [29(iii)] and [29(vi)] were preserved. The appellant accepted he had obtained British citizenship by deception and therefore the condition precedent in

section 40(3) was satisfied. The appellant had maintained a false identity and false account of persecution by the authorities in Kosovo for five years and he applied for British citizenship using that false identity.

3. The appeal was adjourned to be re-heard by the Upper Tribunal ('UT') on the following issues:

   (i) whether the deprivation decision breached the appellant's rights under Article 8 ECHR; and

   (ii) whether the discretion under section 40(3) should have been exercised differently.

Relevant facts

4. The appellant entered the UK in 1999 and claimed asylum in the name of Arben Suli, a Kosovan national born on 15 April 1981. His application was refused and his appeal dismissed. The appellant's case was reconsidered by the UT and his appeal reheard. His appeal was allowed and he was granted indefinite leave to remain ('ILR') as a refugee on 26 February 2004.

5. The appellant was naturalised as a British citizen on 22 July 2005 and obtained travel documents using the false identity. In May 2007 the appellant's wife ('JC') applied for entry clearance and, in response to enquiries from the respondent, the appellant disclosed his true identity on 10 March 2009.

6. On 14 May 2013, the respondent decided the appellant's British citizenship was a nullity ('the nullity decision'). This decision was challenged by judicial review and the proceedings were stayed by consent behind Hysaj and others [2017] UKSC 82. In December 2017, following the decision of the Supreme Court in Hysaj and others, the respondent accepted the appellant's citizenship was not a nullity and he remained a British citizen. On 23 October 2018, the respondent decided to deprive the appellant of his British citizenship.

7. The appellant's wife, JC, entered the UK illegally in July 2010 and applied for leave to remain as a spouse. She was granted leave to remain in October 2014 and her leave was extended thereafter. The appellant and his wife have two British citizen children born in 2011 and 2018.

8. Whilst the judicial review proceedings were outstanding, the respondent's advised the appellant that he still held ILR. On 25 October 2017, the appellant submitted an application to the Home Office ('HO') to obtain proof of his ILR status ('NTL application') and submissions were made as to why revocation of ILR would not be in accordance with the respondent's policy. The appellant's driving licence was withdrawn in 2014.

Relevant law

9. The following cases were relied on by the parties and I have considered the relevant paragraphs in coming to my decision:

   (a) Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC);

   (b) Laci v SSHD [2021] EWCA Civ 769;

   (c) Hysaj (deprivation of citizenship: delay) v SSHD [2020] UKUT 128 (IAC).

Documentation

10. The appellant relied on the bundle of documents before the First-tier Tribunal and the supplementary bundle dated 19 April 2022. Mr Hodgetts relied on the skeleton argument by David Jones dated 3 September 2020 and his supplementary skeleton argument dated 19 April 2022. The respondent relied on her bundle before the First-tier Tribunal and the rule 24 submissions which were undated.

11. On 3 May 2022, Mr Hodgetts provided a post-hearing note submitting the respondent retains a discretion to revoke the appellant's driving licence on deprivation and the appellant would retain his licence until it was revoked. Further, the appellant would be committing a criminal offence under section 24B Immigration Act 1971 if he worked as a gas engineer without leave to remain. It was not reasonable to expect the appellant to undertake a criminal act even if prosecution was unlikely in these circumstances.

Appellant's evidence

12. The appellant relied on his statements dated 21 April 2019 and 19 April 2022 as evidence-in-chief. He confirmed he had not received a letter from the HO explaining the delay. His state of mind when he received the nullity decision was horrible. He was surprised because more than four years had passed and he thought the respondent would not proceed with the deprivation proceedings.

13. In cross-examination, the appellant confirmed he has recently applied to the HO to amend his details to reflect his correct date and place of birth. He did not contact the HO in 2009 or 2013 at all. He was in contact with his MP about his wife's entry clearance case not about the delay in deprivation proceedings and he was not issued with a new passport during that time. He was not issued with a letter stating that he was not going to be deprived of citizenship.

14. The appellant confirmed he judicially reviewed the nullity decision and accepted there was a consent order in 2014 when he was informed his case was stopped due to outstanding litigation. He was asked whether his solicitors indicated he would not be deprived of citizenship and he replied that they were doing their best. To his knowledge the HO did not say they would not deprive him of citizenship. All he knew was that he could stay in the UK fighting for citizenship, but he did not know if he would be successful. He continued to work and study and his wife came to the UK and they continued their family life.

15. The appellant stated he was not able to get a travel document since 2012. He applied for a British passport a few months ago. In 2017 his solicitor had applied for 'NTL – no time limit'. He had an Albanian passport, which he used as an identity document, but he had not travelled on it because he did not have a visa. He had no issues with the bank and no problems paying his rent. He had not moved house. He made National Insurance payments and had no problems with HMRC or paying utility bills.

16. The appellant has two children aged 11 and 4 years old. They had no issues getting to school. His son was unable to play in football tournaments abroad. His wife had a visa but she did not want to travel without the appellant. The appellant had not used the NHS since 2013, although he had been sick a few times. He could not be vaccinated against Covid-19 because his correct details were not accepted. His wife was vaccinated but not his children. He did not go to the pharmacy because they would ask for an NHS number. He had not needed to go to A&E but he had been stressed.

17. The appellant stated he paid council tax and had a TV licence. He was not on the electoral role because he could not prove his correct details. He took out a loan for a car in 2011 and had not taken one since then. He had a credit card.

18. Ms Cunha asked, "Save for the delay and uncertainty is there any other reason why deprivation of citizenship would impact on your life?" The appellant replied, "I have been self-employed since 2013 and I had quite a successful start. I was ready to get more people on board but when I was notified of nullity in 2014 my driving licence was revoked. I had no choice but to stop supporting my business." The appellant had applied for a mortgage in 2014, but he could not go through with it because he was not 'in a right state of mind'. He stayed as a sole trader and got a new driving licence in 2017. His wife drove in the meantime. She got her licence in 2016.

19. The appellant confirmed he had no medical problems or learning difficulties. He kept in contact with family members in Albania by Skype and WhatsApp. He would love to go and visit them but he did not have any documents. He had applied for a British passport a few months ago and asked for his correct details for his naturalisation. He had no response to his application for right of abode in 2020/2021.

20. In response to a question from me, the appellant confirmed he did not travel on his Albanian passport because he was not sure he could re-enter the UK and he did not want to be separated from his wife and children. His wife had not visited Albania for six years because she did not want to go without him.

Appellant's wife's evidence

21. The appellant's wife, JC, gave evidence relying on her statement dated 30 April 2019 as evidence-in-chief. In cross-examination, she stated she stopped work six or seven years ago because she was helping her husband; driving him around. She was a make-up artist and had lost her contacts. She did not work again when her husband was able to drive because she had a baby in 2018. She had no problems obtaining health care and was able to access the NHS and attend medical appointments. She had been in hospital for breathing and heart problems. She was not diagnosed with any medical illness.

22. JC stated she had returned to Albania twice with her oldest child who did not understand why the appellant could not come with them. She did not want to stress him and tell him what was happening so it was best not to visit. She had not taken him abroad for football tournaments because he needed to be with his dad. Her mother had visited the UK when JC had an operation on her gall bladder three years ago. Her mother helped with her daughter who was a baby at that time.

23. JC came to the UK illegally in 2010 and was granted a visa in 2014. She could not remember when she started studying. She had completed a course in film and theatre and had started work. She had not stopped work for lack of status and her children had no problem accessing education.

Respondent's submissions

24. Ms Cunha relied on Laci and Ciceri in respect of the delay and submitted it could only outweigh the public interest in exceptional circumstances. This case was factually different from Laci. The delay was not problematic because the respondent was entitled to rely on advice given and wait for clarification on the issue of nullity. The appellant had not been issued with a British passport during this time and had no legitimate expectation he would not be deprived of citizenship. The delay before the nullity decision in 2013 was not unreasonable, but in any event the appellant remained in the UK and continued his family life. There was no negative impact on the appellant who did not contact the HO and merely hoped the respondent had forgotten about it.

25. Ms Cunha submitted the deprivation decision was not arbitrary or disproportionate. It did not trigger removal. She relied on [101] of Hysaj in

relation to factors which did not have an impact on 'foreseeable consequences.' It was the respondent's position the appellant could carry on working and living as normal during the eight-week period of 'limbo'. The appellant could apply for leave and have an outstanding application. The HO could give permission to work and the appellant's wife had access to benefits or could return to work. There was no detrimental impact. The appellant would be deprived of something he was never entitled to and the respondent had no intention to remove him. The decision was lawful, rational and proportionate in all the circumstances.

Appellant's submissions

26. Mr Hodgetts relied on [23] and [24] of Ciceri, [37] and [80] of Laci and [110] of Hysaj. He submitted there was 'something more' in this case. The appellant had lost the opportunity of relying on the 14-year policy, he had resided in the UK for 23 years, there was an unexplained delay of six years and an overall delay of more that ten years. In addition, there was the impact on the appellant's employment and the practical consequences of remaining in the UK without leave. He could not legally hold a driving licence and was not entitled to free NHS treatment.

27. Mr Hodgetts submitted that Hysaj could be distinguished because the appellant in that case did not have 14-years' residence and could not qualify under the previous policy in force in 2013. The refusal of permission to appeal by the Court of Appeal was not relevant.

28. Mr Hodgetts relied on the skeleton argument dated 3 September 2020 ('SA') explaining why Hysaj was wrong: The UT erred in law at [61] to [63] in failing to apply retrospectivity ([47] SA). Further, the UT was wrong to say there was no causal nexus between illegality and the prejudice suffered. The prejudice to the appellant was the loss of opportunity under the 14-year policy and the causal nexus is that the respondent was aware of the fraud in 2007. There was a clear intention in February 2009 to make a decision on deprivation. The respondent set aside the notice of intention to deprive made in 2009 on the basis she could rely on nullity in 2013**.** There was a clear causal connection between the nullity decision and prejudice. If not for this decision the respondent would have made a deprivation decision in 2013 and the appellant could have benefitted from the policy: Laci at [20].

29. Mr Hodgetts submitted the UT in Hysaj was wrong to say at [74] there was no illegality and in this case there was a causal connection to the loss of opportunity. This is a factor which should be considered in the overall balance and demonstrated the decision to deprive was not in accordance with the law because it was relevant to the exercise of discretion. There was no consideration of the historic injustice in the deprivation decision.

30. Mr Hodgetts relied on [81] of Laci and submitted there was an unreasonable delay after 2007. The respondent's letters in the bundle demonstrated she was aware of the fraud on 29 June 2007, but she took until 10 February 2009 to contact the appellant who confessed on 10 March 2009. There was no communication from the respondent after 9 October 2009 (the letter to the appellant's MP). There was a delay of four years after communication the decision of intention to deprive and no explanation for why a decision was not made during that time.

31. Mr Hodgetts relied on [49] and [51] of Laci and submitted the appellant was offered no explanation for the respondent's delay prior to the nullity decision in 2013. The respondent invited representations but did nothing for four years, notwithstanding her letter to the appellant's MP indicating she would make a decision by the end of 2009.

32. Mr Hodgetts referred me to [3] of the deprivation decision of 23 October 2018 and submitted it was irrational and disingenuous. There was unfairness in pursuing deprivation in some cases and nullity in others. The UT in Hysaj erred in not taking this into account. Delay was different to historic injustice and both were weighty factors.

33. In addition, the appellant had not enjoyed the benefits of British citizenship because he could not travel freely and visit his parents with his family. Financial stress had prevented him from applying for a mortgage. There had been a negative practical impact as a result of the unlawful nullity decision and, but for that decision, the appellant had every chance of succeeding in the deprivation proceedings.

34. There was also a negative impact from the 'hostile environment' of remaining without leave and it was not standard practice to make a provisional decision. There were no practical or legal obstacles to this so that the appellant could immediately be granted leave. There was no reason why the respondent could not consider the appellant's submissions on granting leave before making a deprivation decision. During the period without leave the appellant could not work lawfully and lack of a driving licence had a significant impact on the appellant. The best interests of the children were a primary consideration which were not taken into account.

35. Ms Cunha submitted there was no legitimate expectation the appellant could have been successful under the policy and the respondent was entitled to refuse citizenship on the basis of the appellant's deception and lack of good character. Mr Hodgetts submitted that legitimate expectation was not relevant. It was the appellant's case that, as a result of the unlawful nullity decision, he had lost the opportunity to benefit from the presumption in the policy. There was a causal nexus to this historic injustice.

Conclusions and reasons

36. Mr Hodgetts accepted in his skeleton argument that the headnote in Ciceri sets out the correct approach. Given it is accepted the condition precedent is satisfied, I consider the following issues:

    (i) The reasonably foreseeable consequences of deprivation;

    (ii) Whether the rights of the appellant or his family would breach Article 8 on the evidence before me, giving due regard to the weight to be attached to the public interest;

    (iii) If deprivation will not breach Article 8, the appeal can only be allowed if the respondent has acted in a way which is *Wednesbury* unreasonable, unlawful or procedurally improper, having regard to the discretionary power in section 40(3) and the respondent's responsibility for deciding whether deprivation of citizenship is conducive to the public good.

37. Delay by the respondent may be relevant to the assessment of proportionality, 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).

Reasonably foreseeable consequences

38. There was no suggestion that deprivation of citizenship will lead to the appellant's removal from the UK. The appellant's children are British citizens and it was not suggested JC's leave to remain would not continue. The family will remain together in the UK. For the reasons given below, I find that depriving the appellant of citizenship will not have a sufficiently detrimental impact on the day to day life of the appellant and his family.

39. When the appellant was challenging the nullity decision made in 2013, he was still able to study and work as a self-employed gas engineer and continue his family life. He had some difficulties when his driving licence was revoked and JC had to drive him to work. JC had given up her career as a make-up artist in part to assist the appellant, but also to bring up their two children. The appellant was unable to travel on his Albanian passport because he did not have a visa. This prevented his son from attending football tournaments abroad. There were no other problems with his son's education.

40. The appellant had no problems with the bank or paying rent, but he was not in the right frame of mind to proceed with a mortgage. He had a credit card and had applied for a loan in 2011 to buy a car. He was in a position to expand his business but he did not do so after receiving the nullity decision. The appellant and his family had no medical needs and had not

been denied medical treatment. They kept in touch with family in Albania by Skype and WhatsApp.

41. The appellant will be in a similar position during the period between the deprivation of citizenship and the grant of leave ('the limbo period'). I accept that if he continues to work without leave he will be committing a criminal offence. There was no evidence before me to show that JC could not work. Alternatively, there is no reason to believe the respondent will revoke his driving licence or seek to prosecute the appellant.

42. The appellant's children can continue to attend school or nursey. JC stated in evidence that she may return to work when the youngest child is in school. The family will remain together and can continue as they have before. The impact of deprivation on the family as a whole would not cause significant disruption nor would it be detrimental to the best interests of the children.

Article 8

43. The appellant has resided in the UK for 23 years and has established family and private life. However, there will be no interference with his Article 8 rights for the reasons given above. The consequences are not of such gravity so as to engage Article 8, notwithstanding the appellant will be subject to 'the hostile environment' set out in Balajigari v SSHD [2019] EWCA Civ 673 at [81] in relation to working without leave.

44. In the alternative, the appellant accepts he fraudulently acquired British citizenship. The decision to deprive was 'in accordance with the law' (see below) and the remaining issue is proportionality. I attach significant weight to the public interest, given the importance of maintaining the integrity of British nationality law in the face of the appellant's fraudulent conduct. The factors below are relevant to the proportionality assessment.

Delay

45. The appellant's false identity was first raised when JC submitted his birth certificate in her application for entry clearance made in May 2007. In February 2009, the respondent wrote to the appellant to explain the discrepancies in the details he provided to the HO and informed him the respondent was considering deprivation of citizenship. The appellant admitted his deception in March 2009. Thereafter, there was no contact between the appellant and the respondent (save for a letter to the appellant's MP stating the respondent's intention to make a decision by the end of 2009) until the nullity decision in May 2013.

46. It is apparent from the appellant's evidence that he was not under the impression that he would not be deprived of citizenship. He was not issued with a new passport and he accepted he had obtained British citizenship by fraud. He did not contact the HO between 2009 and 2013 and the HO

did not contact him. He was legally represented at the time and accepted he was aware of continuing litigation from the consent order in 2014. The appellant stated that at this time he was fighting for citizenship and did not know if he would be successful. The case of Laci can be distinguished on its facts.

47. I find the delay prior to the nullity decision was reasonable in the circumstances. It was not prolonged or unexplained. The appellant was aware the appellant was considering deprivation of citizenship from February 2009 and there was no action on the part of the respondent to indicate a change in that position. The delay after the nullity decision was not a result of a dysfunctional system and the appellant was under no misapprehension that deprivation action would not be taken, given he was aware of the Hysaj and others litigation from 2014.

48. There was no copy of the consent order before the First-tier Tribunal and I was not referred to it. The deprivation decision stated it was dated 29 March 2016. In any event, it is apparent from the appellant's evidence that he was aware in 2014 that his case was awaiting the decision in Hysaj and others. I agree with the UT in Ciceri at [30(5)] set out at [37] above. I am not persuaded there has been 'gross delay' as submitted by the appellant. The delay was not unreasonable or unlawful.

Historic Injustice

49. Mr Hodgetts submitted that Hysaj was distinguishable on its facts because the appellant in that case had not accrued 14-years' residence. However, he accepted that it could not be said the appellant in the present case would succeed under the previous 14-year policy. Mr Hodgetts submitted the respondent had failed to take into account the loss of opportunity to rely on the presumption in the previous policy in assessing proportionality and the discretion to deprive. Therefore, the decision of October 2018 was 'not in accordance with the law'. This argument cannot succeed for the reasons given at [68] to [75] of Hysaj.

50. I am not persuaded that Hysaj was wrongly decided. Mr Hodgetts relied on the SA dated 3 September 2020. The principle of retrospectivity was not argued before the UT in Hysaj. The principle in Re Spectrum Plus [2005] UKHL 41 at [38] does not assist the appellant on the facts of his case, particularly when read in conjunction with [40]. The House of Lords endorsed prospective overruling in cases where it "would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law." There was no misinterpretation of a statutory provision in this case. The respondent's reliance on the nullity doctrine did not deprive the appellant of Parliament's intention to curtail his citizenship obtained by deception. I am not satisfied the UT erred in law in failing to consider retrospectivity.

51. Further and alternatively, in issuing the nullity decision in 2013, the respondent relied on the rules and policy at that time. She was permitted

to rely on legal advice and Court of Appeal authority. The law was definitively settled by the Supreme Court in Hysaj and others in 2017 declaring the nullity decision unlawful. The nullity decision was not illegal at the time it was made. The principle of retrospectivity does not apply in this case.

52. The UT in Hysaj at [74] found that "illegality was not so obvious, and the remedy so plain, that there was only one way in which the respondent could reasonably have exercised her discretion. Further, at [75] the UT concluded the appellant could not establish that a decision to deprive under section 40(3) should have taken under a specific policy within a certain period of time. The appellant in that case was therefore unable to substantiate prejudice. Mr Hodgetts does not suggest that the appellant would have satisfied the previous policy, but that he had lost the opportunity to rely on it. I find no error of law in the UT decision at [74] and [75].

53. Even if, the appellant's argument on retrospectivity succeeded and he established prior illegality, he cannot establish prejudice because loss of opportunity to rely on the presumption in the previous policy is insufficient. The appellant cannot show he would benefit from the policy and the respondent is under no obligation to make a decision within a specified time. The appellant cannot show that, but for the nullity decision, the respondent would not deprive him of citizenship. His position is no different to the appellant in Hysaj. Any distinction on the facts is not material.

54. The appellant has enjoyed the benefits of British citizenship, to which he was not lawfully entitled. There is no historic injustice in the case. The decision of 23 October 2018 was 'in accordance with the law'.

Proportionality

55. I am not persuaded by the submissions at [25] and [26] of Mr Hodgetts's skeleton argument dated 19 April 2022: The adoption of a procedure in which a decision on deprivation of citizenship is taken in advance of a decision on removal, in and of itself, constitutes a disproportionate interference with the appellant's Article 8 rights. There was no authority before me to indicate that the respondent is obliged to make a removal decision.

56. For the reasons given above, I attach little weight to the respondent's delay in pursing deprivation proceedings. I am not persuaded by Mr Hodgetts submission that there is 'something more' when all matters are considered cumulatively. On the appellant's own evidence, the deprivation decision will not impact significantly on his family and private life or the best interests of his children. Any disruption is a consequence of his own actions and does not tip the proportionality balance in his favour. I find the deprivation decision does not breach Article 8.

Discretion

57. Having found there was no historic injustice in this case, there was no public law error on the part of the respondent in failing to take it into account. There were no reasons for departing from Hysaj in respect of the findings at [77] to [80] on substantive unfairness.

58. I am not persuaded the reasoning in respect of delay is irrational. The respondent properly considered the best interests of the children and took into account all relevant matters. I find the respondent's deprivation decision dated 23 October 2018 was one which was reasonably open to her on the evidence before her.

Summary

59. The reasonably foreseeable consequences of the deprivation decision do not engage Article 8. Alternatively, the deprivation decision is proportionate in the circumstances. There is no breach of Article 8. The decision of 23 October 2018 was not unlawful or irrational. I dismiss the appellant's appeal.

60. On a practical note, it seems to me that the 'limbo period' could be avoided by granting a period of leave pending consideration of an ILR application where removal is not a reasonably foreseeable consequence.

Notice of decision

Appeal dismissed

J Frances

Signed Date: 8 June 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.**