Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00082/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2022	**On the 30 March 2022**

Before

UPPER TRIBUNAL JUDGE J K H RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

HAMZA HOXHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Collins of Counsel instructed by Sentinel Solicitors
For the Respondents: Ms Z Young, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against a decision of First-tier Tribunal Judge Jarvis promulgated on 29 April 2021 dismissing the Appellant's appeal against a decision of the Respondent dated 19 July 2019 to deprive him of citizenship pursuant to section 40(3) of the British Nationality Act 1981.

2. The Appellant was born on 14 May 1982 in Albania. He was a citizen of Albania from birth. On 13 August 2001 he arrived in the UK. The following day he claimed asylum: he gave his date of birth as 12 August 1986 - thereby representing himself to be a minor notwithstanding that he was an adult – and falsely claimed to be an asylum seeker from Kosovo. In due course he was granted asylum and subsequently, on 8 November 2001, indefinite leave to remain. On 9 May 2007, still presenting as originating from Kosovo – and thereby implicitly continuing to misrepresent his true identity and nationality – the Appellant was naturalised as a British citizen.

3. The Appellant's origins came to light when he sought to sponsor his wife for entry clearance. An application for entry clearance as a spouse was made by Ms Klara Hoxha (date of birth 10 September 1988) on 9 October 2007. In setting out the Appellant's details in the application form the inaccurate information with regard to date and place of birth was repeated. However supporting documents presented in support of the application did not match this false information, and at an interview conducted with the Appellant's wife on 27 November 2007 she admitted that the Appellant was born in Kukes, Albania.

4. We have not seen a final decision in respect of Ms Hoxha's entry clearance application. It is apparent however that she entered the UK unlawfully in May 2012 with her and the Appellant's British citizen son (who is presently 11 years old). The First-tier Tribunal Judge makes the following observation in this regard: "*… by reference to the Appellant's wife's witness statement… [her] Entry Clearance application was never determined by the ECO and instead the Appellant's wife entered the UK illegally in May 2012 with her son*" (paragraph 15).

5. Following the entry clearance interview the Respondent obtained confirmation through the British Embassy in Tirana of the Appellant's Albanian nationality. On 14 May 2009 the Respondent wrote to the Appellant indicating that consideration was being given to the issue of deprivation of British citizenship. The Appellant responded by way of letter from his solicitors dated 8 June 2009 in which, amongst other things, he acknowledged his true date of birth and Albanian citizenship.

6. The Respondent did not make a decision in the Appellant's case until 22 February 2013. There are on file three letters from the Respondent to the Appellant's representatives (who changed from time to time) in the intervening period dated 3 February 2010, 11 June 2010, and 14 October 2010: (see Respondent's bundle before the First-tier Tribunal at Annexes Y, Z and AA). It is apparent on the face of each such letter that it is a response to correspondence from the Appellant's representative; further, each letter seeks to explain why no decision has yet been made in the

Appellant's case – essentially that a number of similar cases were being progressed through the appellate system, the outcome of which would likely inform the resolution of the Appellant's case.

7. By decision letter dated 22 February 2013 the Respondent decided to treat the Appellant's British citizenship as a nullity. This was a decision made in error of law. Subsequent to the decision of the Supreme Court in Hysaj and others [2017] UKSC 82 the Respondent acknowledged as much in a letter dated 7 February 2018, also indicating that the Appellant remained a British citizen but that consideration was again being given to deprivation. In consequence, the Appellant made further representations to the Respondent in respect of his circumstances and those of his wife and their child (who were now present in the UK).

8. The Respondent's considerations concluded with a decision to deprive the Appellant of British citizenship, communicated by a decision letter dated 19 July 2019.

9. The Appellant appealed to the IAC.

10. The appeal was dismissed by First-tier Tribunal Judge Jarvis for reasons set out in a written Decision and Reasons promulgated on 29 April 2021.

11. The Appellant sought permission to appeal to the Upper Tribunal which was refused in the first instance by First-tier Tribunal Judge Easterman on 16 June 2021, but granted on renewed application by Upper Tribunal Judge Kamara on 13 September 2021.

Decision of the First-tier Tribunal

12. The Decision of the First-tier Tribunal is a matter of record on file; it is unnecessary to reproduce its contents – which are known to the parties – in full here. It contains a rehearsal of the relevant history with references to the available documents; a detailed summary of the Appellant's submissions with reference both to the written arguments (a Skeleton Argument settled by the Appellant's solicitors and a supplementary Skeleton Argument settled by Mr Collins who also appeared before the First-tier Tribunal) and Mr Collins' oral amplification of the written arguments; and – in our judgement – a careful and detailed analysis of those arguments. It has not been suggested to us that there is anything in the Decision that indicates the Judge overlooked any material facts, or misunderstood or failed to engage with the Appellant's submissions. The matters set out below are not intended to be a comprehensive summary,

but expediently seek to focus on those issues relevant to the arguments before us.

13. As is evident from the Appellant's written Skeleton Argument before the First-tier Tribunal settled by his solicitors, it was not disputed that the Appellant's conduct fell within the ambit of section 40(3) of the British Nationality Act 1981 and that there was a causative or direct link between his actions and omissions and the obtaining of British citizenship. Further, it was accepted that there was nothing to indicate that the Respondent intended to deport the Appellant and as such "*a proleptic, or anticipatory, analysis of whether the appellant would be likely to be deported at a later stage*" was not necessary (cf Hysaj at paragraph 35). Nor did any issue of resulting statelessness arise because the Appellant retained his citizenship of Albania. What was primarily argued on the Appellant's behalf was 'delay'.

14. Further to this the First-tier Tribunal Judge recorded that in his submissions Mr Collins expressly indicated that he did not rely on Article 8 grounds, and further acknowledged the basis of appeal to be restricted to 'public law grounds' – or "*general administrative principles of law*" – as explained in Begum [2021] UKSC 7: see First-tier Tribunal decision at paragraphs 22–24. "*Precise reliance*" was placed upon the delay between the Respondent first becoming aware of the Appellant's true origins (27 November 2007) and the initial decision of the Respondent based (erroneously) on nullity (22 February 2013): see paragraphs 25-26.

15. The Appellant had raised the issue of delay during the course of his representations to the Respondent. The Respondent made the following observations in the decision letter of 19 July 2019 at paragraphs 28 and 30:

> "*28. Your representations of 11 April 2018 also claim that it would be unfair and unreasonable to deprive you of your British citizenship as a consequence of the time that has elapsed awaiting judgements in the deprivation test cases and legal challenges on nullity grounds between 2009-2017. However... the SSHD was bound by Court of Appeal authority and based on the case law at that time, the nullity decision had to be issued, with no discretion to ignore your use of a false identity to naturalise or to proceed with deprivation action instead. Your claim that the SSHD has been aware of your deception since 2007 and has only now opted to act is an egregious misrepresentation.*"
>
> "*30. As noted previously, you were served with a nullity decision in February 2013, four years after we first contacted you in May 2009, before the SSHD awaited the outcome of the Hysaj judgement in the*

Supreme Court to clarify the law. It should be noted that if the Status Review Unit could have taken deprivation action sooner, we would have done so. It is important to acknowledge that you have perpetrated a deliberate fraud against the United Kingdom's immigration system, where you employed deception to obtain status that would not have been granted to you if the truth had be known. Parliament has provided the power to deprive British citizenship status if the SSHD is satisfied that naturalisation was obtained by means of fraud, false representation, or concealment of a material fact, which is clearly the case here, and it is a balanced and proportionate step to take."

16. In his submissions before the First-tier Tribunal Mr Collins characterised the Respondent's conduct between 2007 and 2013 as being one of "*inactivity*" (paragraph 26). He also noted that it was apparent from the decision of Hysaj when before the Upper Tribunal that there had been a number of cases based on 'deprivation' (rather than 'nullity') which had progressed to appeal in the period 2010–2011; he argued that the Respondent's "*litigation strategy… did not mean that the Secretary of State was entitled to make no decision at all in the Appellant's case and that the delay here had nothing to do with the implications of legal advice or the learning in respect of nullity issues within the decisions of the High Court and higher*" (paragraph 27). Further submissions critical of the Respondent's 'litigation strategy' and supposed inactivity are recorded at paragraph 29, leading to a submission "*that the delay in this case between 2007 and 2013 was objectionable in public law terms on the basis that such delay was evidence of a system which is not predictable or fair between one applicant and another; it was evidence of a dysfunctional system*" (paragraph 32).

17. The First-tier Tribunal Judge rejected the Appellant's submissions, specifically finding that the delay between November 2007 and February 2013 did not constitute unlawfulness (paragraph 33). The Judge gave reasons in the ensuing paragraphs. The Judge referred, amongst other things, to the following:

(i) With reference to FH v. SSHD [2007] EWHC 1571 – "*delay and maladministration are not to be equated, without more, with unlawfulness*", and that a decision "*can only be regarded as unlawful if it fails the Wednesbury test and is shown to result from actions or inactions which can be regarded as irrational*" (paragraph 35 and 36).

(ii) There was a similarity in the facts of the Appellant's case to the facts in Hysaj (paragraph 43), the relevance of which was that many of the issues relating to litigation strategy and changes in the understanding of the law and procedures to be applied had been "*the subject of careful scrutiny and assessment by the UT*" (paragraph 44).

(iii) In this latter context the Judge commented in respect of the Upper Tribunal's decision in Hysaj, "*that decision is binding upon me*" (paragraph 44

(iv) Further aspects of the Upper Tribunal's consideration of the impact of delay in Hysaj are made at paragraph 45.

(v) The Respondent's letter to the Appellant's representative dated 14 October 2010 (paragraph 46), which referred to the 'litigation strategy' in these terms:

> "*Very careful consideration is given as to whether it is appropriate to deprive someone of their citizenship and this is a protracted process. We have also released a limited number of decisions to deprive which have led to appeals being heard before the Asylum and Immigration Tribunal. The outcome of these appeals will be an important factor in finalising our decision on those cases like Mr Hoxha's that will follow.*
>
> *As a result of this I am unable to advise a time-scale as to when a decision may be made on Mr Hoxha's case. In the meantime he does remain a British citizen…*"

(vi) "*the Appellant has… failed to establish that there was the kind of dysfunctionality in the decision-making system during the period relied upon to render the delay as being unlawful for being irrational*" (paragraph 47).

(vii) Mr Collins' reliance – (indeed seemingly exclusive emphasis, *vide* per Judge Jarvis, "*Mr Collins' argument about this was merely to point out…*") – on the fact that some 'deprivation' decisions had seemingly been made in this period was "*simply not strong enough evidence to show that the administrative process or the specific way that the Appellant was treated amounted to unlawfulness*" (paragraphs 48 and 49).

(viii) Treating similar cases differently was not inevitably evidence of dysfunctionality or irrationality (paragraph 49(a) and (b)); the Appellant had not produced any wider evidence of dysfunctionality in the system (paragraph 49(c)).

(ix) The Respondent had provided the Appellant with updates explaining the Respondent's position on why the process was taking time, which the Judge considered to be "*evidence of a system of decision-making which was functional, albeit cautious and working over a very long timescale*", in contrast to the processes criticised in cases such as EB (Kosovo) [2008] UKHL 41 (paragraph 49(j)).

Consideration of 'Error of Law' challenge

18. The Appellant raised two grounds of appeal in the initial application for permission to appeal submitted to the First-tier Tribunal: the Judge erred in referring to Hysaj [2020] UKUT 00128 (IAC) as binding on him; and the Judge erred in consideration of 'delay'. In the renewed application for permission to appeal submitted to the Upper Tribunal it was additionally argued, as a third ground of appeal, that the contended errors concerning delay were "*underscored by further development in the learning since the date of the instant hearing and application to the FTT for permission*", with reference to the decision in Laci v SSHD [2021] EWCA Civ 769.

19. We do not accept that the Judge's reference at paragraph 44 to the Upper Tribunal decision in Hysaj as being binding on him amounts to a material error of law. We accept that outside country guidance cases or 'starred' cases any findings of fact or explorations of evidential matters by the Upper Tribunal do not 'bind' a First-tier Tribunal. This does not mean that such matters could not be considered to be 'persuasive' by the inferior tribunal; indeed absent further contradictory evidence there may be no good reason not to follow such matters. Indeed it is clear that Mr Collins himself placed reliance upon certain factual matters referenced by the Upper Tribunal in Hysaj – e.g. see at paragraph 27 in respect of the source of Mr Collins' argument that there had been test case 'deprivation' appeals before the First-tier Tribunal.

20. We note that the Judge observed – sustainably, and it seems to us uncontroversially – that the discussions in Hysaj were "*highly relevant*" to an understanding of the law and the Respondent's understanding of it (paragraph 45). Further in this regard the Judge noted specific material in the instant case – "*There is more detail of this…*" (paragraph 46). Perhaps yet more crucially, in stating his conclusion in respect of the absence of dysfunctionality the Judge was express in stating that it was "*In my view*" (paragraph 47). Moreover the reasons for this view were amplified over the following two pages with significant cogency. We have no doubt that the Judge reached an independent conclusion on the facts of the instant case – for example making specific reference to the correspondence between the Respondent and the Appellant's advisers – and in doing so set out reasons that indicated an essential agreement with aspects of the discussion in Hysaj.

21. Yet further we can see nothing that suggests it was ever argued before the First-tier Tribunal that there was anything in Hysaj that was in error. Whilst it was the case that Mr Collins sought to advance submissions that were different from those considered in Hysaj and to distinguish the instant case on the facts - circumstances which Judge Jarvis expressly acknowledged and engaged with - it is not apparent that Mr Collins ever contended that Hysaj was wrongly decided or contained any factual errors – either before the First-tier Tribunal or before us. To that extent it seems that there can be no real complaint if the Judge followed its 'learning'. Indeed in fairness to Mr Collins, we note that he did not seek to pursue this aspect of the Grounds of Appeal with any vigour before us.

22. We do not accept that the First-tier Tribunal Judge erred in his consideration of the Appellant's primary submission in respect of delay.

23. Contrary to the way in which the matter was put before the First-tier Tribunal – and indeed contrary to the way in which the matter was raised in the Grounds before us – in the course of submissions Mr Collins acknowledged that the correspondence from the Respondent by way of updates demonstrated that the Appellant's case was 'live'. In our judgement this concession, properly made, makes it unsustainable for the Appellant to continue to rely on a submission premised on the Respondent's supposed 'inactivity'. The Respondent was active in communicating to the Appellant the manner in which his case was being managed.

24. It seems to us that Mr Collins' submissions otherwise sought to reargue the case put before the First-tier Tribunal to the effect that the delay between November 2007 and February 2013 arose from a litigation strategy that was evidence of a dysfunctional system. We have set out above the manner in which the Judge engaged with and answered this submission. We consider that he did so rationally. Moreover, it seems to us that the existence of a litigation strategy argues against dysfunctionality absent evidence supporting a conclusion that such a strategy was perverse. It is also to be noted, as Judge Jarvis found, the correspondence from the Respondent was "*evidence of a system of decision-making which was functional*", and went "*to reduce the adverse impact of long administrative delay*" (paragraph 49(j) and (k)). The fact that the Appellant, as Mr Collins reminded us, did not acquiesce in the delay, is hardly evidence of a dysfunctional system.

25. It is adequately apparent that the Respondent engaged with the issue of delay in the decision letter: see in particular paragraphs 28 and 30 (quoted

above). The First-tier Tribunal Judge had to consider any challenge in this regard on public law grounds, and did not have a discretion at large to reconsider the decision. The Appellant's case before the First-tier Tribunal was that the Respondent's inactivity and delay evidenced dysfunctionality to an extent that was unlawful.

26. In our judgement it is clear that the First-tier Tribunal Judge engaged with, and gave cogent and sustainable reasons for rejecting, the two central premises of the Appellant's submissions. In substance the Judge found that the Respondent had not been 'inactive' in the period between November 2007 and February 2013 but had engaged with correspondence and provided updates to the Appellant in respect of the 'litigation strategy' and the reasons for delay. Moreover, the Judge was not satisfied that the Appellant had demonstrated a dysfunctionality in the system amounting to unlawfulness by reference to the 'litigation strategy' adopted or otherwise. The Judge's findings in this regard meant that the Appellant could not succeed in overturning the Respondent's decision on public law grounds: the appeal was accordingly appropriately dismissed.

27. The renewed Grounds of Appeal to the Upper Tribunal included an additional 'Ground 3' referencing the recently decided Laci v SSHD [2021] EWCA Civ 769. It seems to us that this was not strictly speaking a third ground of appeal: indeed it was expressly represented as something that underscored the already pleaded error in respect of 'delay', and otherwise sought to draw factual parallels and thereby advocate a parallel outcome.

28. In any event, and for the avoidance of any doubt, we do not accept Mr Collins' submission that the decision in Laci provides a material 'development in the learning' to support a conclusion that Judge Jarvis erred in law. We do not consider that Laci represents a change in the law; however, it does provide a useful reminder that cases turn on their own facts. The specific paragraph in Laci relied upon – paragraph 81 – makes it plain that a superior court should be slow in interfering with findings of fact and/or evaluative judgements by a first instance Tribunal, and also that the weight to be given to any delay is a matter for the Tribunal. Further, and in any event, it seems to us that there is a distinction in that Judge Jarvis did not conclude that there was inaction on the part of the Respondent or that the delay was wholly unexplained. The fact that the outcome in Laci was favourable to the migrant does not demonstrate error of law in Judge Jarvis's outcome being unfavourable to the Appellant.

29. Accordingly we find no substance to the grounds of appeal and reject the challenge to the decision of the First-tier Tribunal.

Notice of Decision

30. The decision of the First-tier Tribunal contained no material error of law and accordingly stands.

31. Mr Hamza Hoxha's appeal remains dismissed.

32. No anonymity direction is sought or made.

Signed: Date: **10 March 2022**

I.A. Lewis
Deputy Upper Tribunal Judge I A Lewis