Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DC/00090/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 July 2021 & 17 January 2022	**On 9 February 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SHPRESIM RADA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Naik, instructed by Oliver & Hasani Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

2. This is the re-making of the appellant's appeal against the Secretary of State's decision of 19 August 2019 to deprive him of his British nationality under section 40(3) of the British Nationality Act 1981, the previous decision of the First-tier Tribunal allowing the appeal on 5 February 2020 having been set aside.

3. The appellant is a national of Albania, born on 3 November 1987. He arrived in the UK in July 2003, aged 15 years, and claimed asylum on the grounds of being at risk on return to Kosovo from the Kosovo Liberation Army (KLA) who had killed both his parents. He stated that he came from Gjakove, Kosovo, and gave a different name and date of birth, namely Nikolin Kera born on 3 June 1988. He was interviewed about his claim on 19 December 2003.

4. The appellant's asylum claim was refused on 19 March 2004, but he was granted discretionary leave, valid until 19 March 2005, as an unaccompanied asylum-seeking child. Following an application made on 8 March 2005 his leave was extended until 3 March 2006. On 19 May 2006 he applied on Form HPDL for settlement in the UK and he was granted indefinite leave to remain on 13 May 2010, outside the immigration rules. The grant of indefinite leave, as with the previous applications, was made in the appellant's false identity and was granted on the basis of his strength of connections and length of residence in the UK (as confirmed in the document at K1 of the respondent's appeal bundle), under the "Legacy Programme". The appellant was issued with a Home Office Travel Document on 28 September 2010 and on 20 September 2011 he was granted British Citizenship following an application for naturalisation made on 2 May 2011 in his false identity.

5. It appears that the appellant's false identity came to light as a result of his own admission and on his own initiative. Indeed, his statement dated 26 June 2018 at Annex P of the respondent's appeal bundle sets out the reasons for using the false identity and it seems that that statement was sent to the Home Office accompanied by written representations from his former solicitors.

6. In that statement, the appellant explained how he had grown up in impoverished circumstances in Albania, in a household where money was scarce and where his father could not afford to pay for him to study further as he wished. He therefore decided to come to the UK and an agent was arranged to bring him here. The appellant explained how the agent took his passport from him, how he and the other boys with whom he was travelling were passed from one agent to another, how arduous the journey was through several countries, how he was sexually abused by a man in Paris and how he was given papers in a false identity and a concocted asylum claim by an agent in Belgium before being brought in a lorry to the UK. On arrival in the UK he told the story he was given, in his false identity. His claim was refused but he was eventually granted indefinite leave to remain due to the strength of his connections, and his length of residence, in the UK. He had studied hard in the UK, achieving a BA degree in Accounting in 2011 and an MBA in 2014. He was hoping to qualify as an accountant. The appellant explained that he had considered telling the truth about his identity when he applied for indefinite leave to remain but was too scared to do so. After being granted British citizenship in September 2011 he was issued with a passport in October 2011 and then in July 2012 he changed his name by deed poll and gave his true town of birth. He obtained a new passport in that identity on 31 July 2012. He felt terrible about having lied and did not want to have to return to Albania.

7. It is apparent from the letter from the appellant's current solicitors of 14 November 2018, at Annex O of the respondent's bundle, that the Home Office then wrote to the appellant on 26 October 2018 advising him that consideration was being given to depriving him of his British citizenship pursuant to section 40(3) of the British Nationality Act 1981. The appellant's solicitors responded in the letter of 14 November 2018, providing mitigating circumstances for the false details having been given, setting out the appellant's Article 8 claim and requesting that he not be deprived of his British citizenship. It was submitted in that letter that the grant of ILR under the legacy programme was a "concession" on the part of the Secretary of State. Reliance was placed on the Home Office Deprivation and Nullity of British Citizenship Guidance, Chapter 55, which stated that it was not appropriate to pursue deprivation action where the fraud or false representation did not have a direct bearing on the grant of citizenship such as where ILR was acquired under a concession.

8. The respondent, however, in a decision dated 19 August 2019, did not accept the appellant's explanation as a justification for the deception and concluded that his British citizenship had been obtained fraudulently and that he should be deprived of his British citizenship under section 40(3) of the British Nationality Act 1981. The respondent rejected the argument made on behalf of the appellant that his circumstances fell within the terms of Chapter 55 of the Deprivation & Nullity of British Citizenship guidance. The respondent did not accept that the basis for the grant of ILR to the appellant, under the ILR legacy programme, was a "concession". The respondent also rejected the explanation given that the appellant was a minor when he claimed asylum under the false identity and was thus not responsible for the deception, noting that he was an adult by the time he made his application for further leave in March 2006 and for British citizenship. The respondent noted that the appellant, when applying for British citizenship, had signed a declaration confirming that the information he had provided was correct and would have been aware from the application form that steps would be taken to deprive him of his British citizenship if evidence was later presented showing that his grant of citizenship had been obtained as a result of fraud. The respondent, in referring to Article 8, advised the appellant that deprivation of citizenship did not of itself preclude a person from remaining in the UK and, as such, it was not necessary to consider the impact of removal at this stage.

9. The appellant appealed against that decision under section 40A(1) of the British Nationality Act 1981. His appeal was heard on 13 January 2020 by First-tier Tribunal Judge Herbert. The judge was satisfied that the grant of ILR to the appellant was not as a result of his asylum claim or his claimed nationality as a Kosovan, and that he would have been granted ILR in any event because of the basis for the grant, namely his connections to the UK and his length of residence here. The judge accepted that, as a minor, the appellant had no choice but to accept the false details given to him by the agent who brought him to the UK. He did not accept that the deception which continued after the appellant turned 18 motivated the grant of ILR or naturalisation and he relied upon the case of Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367

in that respect. The judge considered the appellant to be a man of good character who offered to regularise his position in 2018, and who had previously, once an adult, feared making his true identity known due to the significant consequences that would have had on his future life in the UK. He allowed the appeal.

10. Permission to appeal was sought by the respondent and granted on 14 April 2020. Directions were issued for the appeal hearing, including directions as to the impact, if any, of the recent case of Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 128 and the appellant filed a Rule 24 response.

11. Following a hearing on 13 October 2020 in which the Secretary of State was represented by Mr Clarke and the appellant by Ms Foot, I set aside Judge Herbert's decision in a decision promulgated on 22 October 2020 as follows:

> **"Discussion and conclusions**
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> 13. It is agreed by all parties that, whilst reference was made in Upper Tribunal Judge Norton-Taylor's directions to the most recent case of Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 128, that case was not relevant to the issues in this case. In that case, as in the many previous cases such as Deliallisi (British citizen: deprivation appeal: Scope) [2013] UKUT 439, there was no question but that the grant of ILR to the applicant was directly linked to the deception as to nationality and the grounds of the asylum claim, on the basis that those led to the applicant being granted refugee status. There was therefore a direction causation established, which is not the case for this appellant, who was granted ILR under the legacy programme owing to his strength of connections and length of residence in the UK. It is accepted that this appellant's case is rather the "but for" type of case that was considered by the Upper Tribunal in Sleiman.
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> 14. It is the respondent's case that the issues in the appellant's case were not, however, identical to those in Sleiman and that the judge had erred by simply relying on that case without considering the main issue in the refusal decision at [23] to [25], namely the appellant's continued deception in his ILR application and, in particular, his false declaration in his application for naturalisation. Mr Clarke submitted that the impact of the deception in the application for ILR and for naturalisation as a British citizen was not expressly considered in Sleiman and the judge had therefore erred by failing to consider what was the crux of this case, namely if the fraud committed by the appellant was sufficient for ILR to have been refused and/or for his naturalisation application to have been refused owing to a false declaration as to his character. I have to agree with Mr Clarke that the judge simply failed to engage with the matter, but proceeded on the basis that the considerations and findings in Sleiman were identical to those for the appellant, without considering that UTJ Kopieczek, in Sleiman at [62] to [65], observed that that was not a matter advanced by the respondent in that case.
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> 15. Ms Foot made submissions as to why Sleiman was nevertheless applicable to the appellant's case and, in response to Mr Clarke's assertion that the judge had failed to grapple with the relevant issues, submitted that the judge would have been bound in any event to find that the appellant's previous deception did not warrant revocation of his citizenship, under the terms of the Home Office 'Good Character' policy guidance at Annex D to Chapter 18. She submitted that, in relation to applications for naturalisation as a British citizen, paragraph 9.5

expressly enabled a person who had committed deception in an immigration application to be of good character and that if the judge had referred to the guidance, he would still have found that the appellant's previous deception did not count.

16. Mr Clarke, in response, made submissions as to why the policy did not apply, but his main point was that these were new matters being presented by Ms Foot which were not put to the judge and were not considered by him. Although Ms Foot's case was that the matters were relevant to this hearing in so far as they showed that any errors the judge may have made by failing to consider all relevant matters were immaterial as he would have been bound to reach the same decision in any event, it seems to me that it is not as straightforward as that. There is clearly an argument to be made by both parties which require full and proper consideration in accordance with relevant caselaw as well as the Home Office policy guidance. It is clearly the case that Judge Herbert did not fully engage with the impact of the appellant's deception in making his ILR application and whether such an application could have failed on the basis of his conduct, and, more importantly, the impact of the appellant's false declaration in his naturalisation application. It is not for me, at the error of law stage, to consider arguments which were not considered by Judge Herbert, in deciding whether he would have reached the same decision had he considered these matters. The fact that there is no straightforward answer, and that further engagement with the issues is necessary, is sufficient in itself to conclude that the judge materially erred in law in his decision by failing to address the matter. Both parties agreed that the issues are complex and that the decision in the appeal could not simply be re-made without another hearing. As such, I set aside Judge Herbert's decision and will have the matter listed for a resumed hearing to re-decide the matter on the basis of full submissions.

DECISION

17. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside. "

Hearing and Submissions

12. The matter then came before me on 23 July 2021 for the decision to be re-made in the appeal. There had, by that time, been changes in the law in relation to the Tribunal's role and jurisdiction in deprivation appeals, following the judgment of the Supreme Court in Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7, according to which the scope of an appeal under section 40A of the 1981 Act was limited to a review of the Secretary of State's decision rather than a full merits-based reconsideration. Submissions were made by both parties on the state of the law as well on the appellant's own case, with the view taken by Ms Naik on behalf of the appellant that the findings in Begum applied only in appeals concerning decisions made under section 40(2) of the BNA 1981 and not those made under section 40(3).

13. In any event, the matter had to be adjourned part-heard, as a result of the limited time available due to Ms Cunha being delayed by another case in which

she was appearing, and the parties were directed to make written submissions in advance of the resumed hearing. Ms Cunha's submissions were to include, if appropriate, any written confirmation of a period of leave to be offered to the appellant if he were to be deprived of his British citizenship, as discussed at the hearing.

14. The matter then came before me again on 17 January 2022, by which time full written submissions had been filed and served. The respondent had not provided an indication of whether the appellant would be offered a period of leave upon deprivation of his British citizenship but had maintained a position that it was for him to make a relevant application upon which a decision would be made within eight weeks of a deprivation order. Ms Cunha confirmed that the decision would be made within that time-frame. There had also been a further development in the law in that there had since been a decision made by a presidential panel of the Upper Tribunal in the case of Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 in which it was held that the jurisdictional points made in Begum applied equally to section 40(3) cases and guidance was given to the consideration of such appeals.

15. Ms Naik and Ms Cunha then made further oral submissions. It was agreed by all parties that, aside from the Upper Tribunal's decision in Ciceri, there had been no further decisions of the higher courts clarifying the remit of the findings in Begum and whether they extended to section 40(3) cases. Ms Naik pointed out that, whilst the handing down of the judgment in Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 post-dated Begum and the issue was discussed before the hand-down, the Court of Appeal decided not to express a view on the matter as it had not formed part of the arguments before it.

16. The parties therefore agreed that the appeal should proceed on the basis that Ciceri was to be followed, although each party held different views to the Upper Tribunal on particular issues. Ms Naik's view was that an appeal under section 40A ought to be a full merits-based consideration of the condition precedent issue rather than a review of the Secretary of State's decision and of her subsequent exercise of discretion and that the findings in Begum in relation to the restricted jurisdiction of the courts only extended to decisions made under section 40(2). She relied upon the Court of Appeal's judgment in KV, R (On the Application Of) v Secretary of State for the Home Department [2018] EWCA Civ 2483 in that respect, pointing out that the Supreme Court in Begum had not been referred to or considered KV. Ms Cunha submitted that the Secretary of State's position had always been that the court's approach to the exercise of discretion should be that of a review, as properly found in Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 and it was considered that that included the consideration of the condition precedent issue in section 40(3) cases. Her view was that, following the judgment in Begum, the court's jurisdiction in a deprivation case when considering all matters, namely the condition precedent, the exercise of discretion and also Article 8, was limited to a review, both in section 40(2) and (3) decisions and

that KV was not considered by the Supreme Court in Begum because it involved different issues.

17. Ms Naik's submission, as presented at the first hearing, was that the appellant would have been granted indefinite leave to remain irrespective of his false asylum claim, as the grant was on the basis of his long residence and had nothing to do with his nationality. She relied on the cases of Hakemi & Ors v Secretary of State for the Home Department [2012] EWHC 1967 and Geraldo & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 2763, both of which concerned the legacy programme, and which confirmed that indefinite leave was granted under that programme irrespective of any false claim. Therefore, the chain of causation between the fact of using a false nationality and the grant of indefinite leave to remain and British citizenship had been broken and it could not be said that the grant of naturalisation as a British citizen was obtained by means of fraud or false representations. In terms of the Home Office policy, in the "Nationality: Good Character Guidance", the deception was not material to the acquisition of the citizenship and the appellant could not, therefore, be considered to be of bad character.

18. In her further submissions which followed the approach in Ciceri, Ms Naik submitted that the first point was that the Secretary of State had failed to consider material matters when concluding that the appellant had obtained his citizenship through fraud and when concluding that the condition precedent was met. The Secretary of State had failed to consider the chronology of the appellant's applications and the fact that he made his application for indefinite leave to remain when he was just over 18 years of age, she had failed to take account of the four-year delay in granting indefinite leave after the application was made, and had failed to consider the fact that the appellant had brought himself to the attention of the Home Office by his own admission, the fact that he had suffered a lot during his journey to the UK as a child and the fact that she ought to have known the appellant's true circumstances when considering applications for visitor visas for his relatives from Albania in 2013. She had also conflated the issues of fraud and good character. Secondly, if the Secretary of State could reasonably be satisfied that citizenship had been obtained by deception, she had unlawfully exercised her discretion to deprive the appellant of his citizenship. Contrary to the circumstances in a decision made under section 40(2), caselaw recognised that there was a flexible standard to be applied in cases such as the appellant's. Ms Naik relied upon the case of Pham v Secretary of State for the Home Department [2015] UKSC 19 in that regard. The appellant's individual circumstances ought to have been taken into account. He had made his application when he had only just turned 18 and was in the care system which did not consider him to be a fully responsible adult until the age of 21. A different standard of review ought therefore to have been applied to him. The Secretary of State had failed to consider the delay in making the deprivation decision, as in the case of Laci. The consequences of deprivation had not been shown to be necessary and proportionate, considering the impact upon him of a deprivation order, namely having no legal status and no right to work for two months whilst a decision was awaited in

regard to an application for leave to remain and also having to then wait ten years for a grant of indefinite leave to remain. Ms Naik relied upon the case of Usmanov v Russia - 43936/18 (Judgment : Remainder inadmissible : Third Section) [2020] ECHR 923 in regard to the arbitrariness of requiring the appellant to make a paid application for leave on Article 8 grounds rather than granting leave simultaneously with the deprivation order or granting a period of interim leave pending consideration of his human rights claim.

19. Ms Cunha submitted that, whilst the appellant had made his false claim when he was a child, he had continued the deception as to his nationality as an adult. Further, he had not been granted discretionary leave simply because he was a child, but because he was an irremovable child, having claimed to have no living relatives in his home country. He had signed the HPDL form applying for indefinite leave to remain after stating (J3 of the respondent's bundle) that he had "nothing and nobody to return to" in Serbia, yet his parents remained in his country and had subsequently applied to come to the UK as visitors, so he had lied as an adult. It could not be said that the appellant would have been granted indefinite leave to remain under the legacy programme regardless of the false claim as to his nationality, as seen in the case of Hakemi and in AD (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 849 where AD was denied indefinite leave to remain after almost 14 years of residence in the UK owing to his use of false documentation. She submitted that the appellant may well have been refused indefinite leave to remain if his false claim was known at that time and the chain of causation was therefore not broken. The condition precedent was established. The Secretary of State had followed the correct procedure of providing the appellant with a notice of liability to deprivation and had given him an opportunity to respond. The fact that deprivation action was not pursued after the appellants' parents had been refused entry clearance in 2013 was insufficient to show that there was a delay which meant that the Secretary of State's discretion was exercised unlawfully. The delay in making a deprivation decision in the case of Laci was different to the appellant's situation, as in that case the relevant delay was between notifying the appellant of an intention to deprive him of his citizenship and then acting on that intention, which was considered to be sufficient to give rise to a legitimate expectation of the appellant not being deprived of his citizenship. There was also a justifiable delay owing to the litigation in Hysaj at that time. The Secretary of State's decision was not arbitrary and all relevant matters had been considered. That was sufficient to meet the relevant, stricter test as applied in the case of K2 (Deprivation of Citizenship : Substantive) [2015] UKSIAC SC_96_2010 with respect to the Article 8 consideration. Ms Cunha submitted that the appellant would most likely be granted a period of leave to remain once a deprivation order was made. As for the period before leave was granted, that would be only eight weeks and the appellant would have the benefit of safeguards as referred to in Hysaj (Deprivation of Citizenship:Delay) Albania [2020] UKUT 128. The time in limbo would not be disproportionate or arbitrary.

The Law relating to Deprivation

20. Section 40 of the British Nationality Act provides as follows:

“40 Deprivation of citizenship.

(1) In this section a reference to a person’s “citizenship status” is a reference to his status as—

(a) a British citizen,
(b) a British overseas territories citizen,
(c) a British Overseas citizen,
(d) a British National (Overseas),
(e) a British protected person, or
(f) a British subject.

(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.

(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a) fraud,
(b) false representation, or
(c) concealment of a material fact.”

The relevant policy guidance

21. Chapter 55 of the Nationality Instructions is headed "Deprivation and Nullity of British citizenship". Paragraph 55.7 states as follows:

"55.7 Material to the Acquisition of Citizenship

55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.

55.7.2 This will include but is not limited to:

- Undisclosed convictions or other information which would have affected a person's ability to meet the good character requirement

- A marriage/civil partnership which is found to be invalid or void, and so would have affected a person's ability to meet the requirements for section 6(2)

- False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration

55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action.

55.7.4 For example, where a person acquires ILR under a concession (e.g. the family ILR concession) the fact that we could show the person had previously lied about their asylum claim may be irrelevant. Similarly, a person may use a different name if they wish (see NAMES in the General Information section of Volume 2 of the Staff Instructions): unless it conceals criminality, or other information relevant to an assessment of their good character, or immigration history in another identity it is not material to the acquisition of ILR or citizenship. However, before making a decision not to deprive, the caseworker should ensure that relevant character checks are undertaken in relation to the subject's true identity to ensure that the false information provided to the Home Office was not used to conceal criminality or other information relevant to an assessment of their character."

22. The Nationality: Good Character guidance at Annex D to Chapter 18, at Annex T of the respondent's appeal bundle, which was in force at the time of the appellant's grant of citizenship, states as follows:

"9.5 Evidence of fraud in the immigration and nationality process

9.5.1 Where there is evidence to suggest that an applicant has employed fraud either:

- during the citizenship application process or
- in previous immigration application processes and
- in both cases the fraud was directly material to the acquisition of immigration leave or to the application for citizenship caseworkers should refuse the application unless the circumstances in 9.5.2 apply…

9.5.2Where deception has been employed on a previous immigration application and was identified and dismissed by UKBA or was factually immaterial to the grant of leave, caseworkers should not use that deception as a reason by itself to refuse the application under section 9.5.1"

Caselaw

23. KV, R (On the Application Of) v Secretary of State for the Home Department [2018] EWCA Civ 2483

"6. Pursuant to section 40A(1), a person who is given such a notice may appeal against the decision to the First-tier Tribunal. The task of the tribunal on such an appeal has been considered by the Upper Tribunal (Immigration and Asylum Chamber) in a number of cases including *Deliallisi (British Citizen: deprivation appeal; Scope)* [2013] UKUT 439 (IAC) and, more recently, *BA (deprivation of citizenship: Appeals)* [2018] UKUT 85 (IAC). I would endorse the following principles which are articulated in those decisions and which I did not understand to be in dispute on this appeal:

(1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.

(2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.

(3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) 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.

(4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.

(5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently."

24. Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7

"69… So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are

incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29.

71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

25. Laci v Secretary of State for the Home Department [2021] EWCA Civ 769

"40. Postscript. When this judgment was circulated to counsel in draft, Mr Malik drew our attention to the decision of the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 WLR 556, which was handed down subsequent to the argument before us. *Begum* concerns a decision taken by the Secretary of State to deprive the appellant of her nationality under section 40 (2) of the 1981 Act. At paras. 32-81 of his judgment, with which the other Justices agreed, Lord Reed discusses the nature of an appeal to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997, which is the equivalent of section 40A; and in that connection he discusses both *Deliallisi* and *BA* (though not *KV*, to which the Court does not appear to have referred). His conclusion is that while section 2B provides for an appeal rather than a review SIAC should approach its task on (to paraphrase) essentially *Wednesbury* principles, save that it was obliged to determine for itself whether the decision was compatible with the obligations of the decision-maker under the Human Rights Act 1998 (see para. 68). It may be that that reasoning is not confined to section 2B or to cases falling under section 40 (2), in which case some of statements quoted above about the correct approach to appeals under section 40A in the case of decisions under section 40 (3) will require qualification. But I do not think that that is something on which I should express a view here. *Begum* does not bear directly on the actual grounds of appeal before us, and Mr Malik made it plain that he did not wish to advance any fresh ground

based on it. Rather, he was rightly concerned that we should be aware of it in the context of the more general review of the law in the preceding paragraphs. I confine myself to saying that anything said in the authorities reviewed above about the scope of an appeal under section 40A should be read subject to the decision in *Begum*."

26. Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238

"29. Before returning to the present case, we shall attempt to reformulate the principles articulated by Leggatt LJ in KV (Sri Lanka) in a way which takes account of Aziz, R (Begum), Hysaj (deprivation of citizenship: delay) and Laci. In the light of Lord Reed's judgment in Begum, the reformulation needs to highlight the fact that, in practice, where there is no issue regarding the conditions precedent mentioned in Leggatt LJ's original principle (3), the Tribunal's starting point is highly likely to be the ECHR and the compatibility of the Secretary of State's deprivation decision with her obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with a Convention right. If that issue is determined in favour of the appellant, then the appeal must be allowed. Otherwise, the Tribunal will consider whether to allow the appeal, according to the principles set out in paragraphs 68 to 71 of the judgment of Lord Reed in Begum.

30. Our reformulation is as follows.

(1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the 1981 Act 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 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). 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 EB (Kosovo) (see paragraph 20 above).

(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."

Discussion and conclusions

27. The first matter to determine is the condition precedent question, namely whether the appellant's British citizenship was obtained by reason of fraud, false representation, or concealment of a material fact.

28. In accordance with the guidance in Ciceri: "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."

29. Ms Naik's own view was that the condition precedent question was a factual one and could only be determined by considering and assessing the facts and that was the basis upon which she made her submissions at the first hearing, although her submissions at the second hearing were modified in response to the guidance on the relevant approach in Ciceri. For the sake of

completeness, I have considered the arguments as initially put as well as those subsequently made, post-Ciceri, as it seems to me that the outcome is the same in the appellant's case, whichever approach is followed.

30. It is the appellant's case that, as in the case of Sleiman, his nationality was not an issue in the decision-making process in relation to his application for naturalisation as a British citizen and that his application would have been granted in any event, as the previous grant of indefinite leave to remain had been made on the basis of his length of residence in the UK and not his nationality. However, I do not agree. First of all, I accept the point made by Ms Cunha that the initial grant of discretionary leave made to the appellant was not simply because he was a minor but because he was an irremovable minor, having claimed that his parents were dead and that he had no remaining family in his claimed country of origin of Serbia, whereas that of course was not true. That was the starting point and the basis of the further grants of leave leading to settlement and citizenship.

31. Secondly, even putting aside that deception and the basis for the grant of that initial period of leave owing to the appellant being only a child at the time, his application for further leave/settlement which ultimately led to the grant of indefinite leave to remain was made at a time when he was an adult. That application contained, at J3 of the respondent's appeal bundle, the false statement from the appellant that he had nothing and nobody to return to in Serbia. Ms Naik submitted that the appellant, being a child in care who had just turned 18 when the application was made, and being considered as such until the age of 21, was not considered to be a responsible adult at that time. However, that does not detract from the fact that he maintained the deception when making his application for naturalisation several years later in May 2011 in his false identity, in which aside from providing false details for his own identity and his parents, he confirmed at section 3.12 that he had never engaged in activities which may indicate he was not a person of good character, despite having given false details in his application for indefinite leave to remain.

32. Neither does it assist the appellant that his grant of indefinite leave to remain was made under the legacy programme. I reject the suggestion that the appellant would have been granted indefinite leave to remain under the legacy programme regardless of the false claim as to his nationality and accept Ms Cunha's submission, based on the judgment in Hakemi, that his conduct would have formed part of the assessment of whether he should be granted settlement (see [12] of the deprivation decision of 19 August 2019). As she submitted, the appellant may well have been refused indefinite leave to remain if his false claim was known at that time and the chain of causation was therefore not broken. That was indeed the point made in Sleiman at [62] when the Upper Tribunal observed that there was a counter argument which could have been put by the respondent, but which was not advanced, and which thus, in addition to various other points including the observations at [64], distinguished the appellant's case from Sleiman. In addition, I do not see how the appellant is assisted by the Home Office Good Character policy at Annex T

of the respondent's bundle. I reject the suggestion that he fell within the remit of example B in relation to a grant of indefinite leave under a concession, since the grant of indefinite leave was under the legacy programme and was not under a concession, the point made by the respondent at [12] of the deprivation decision. The appellant plainly did not qualify for the exception at section 9.5.2 of the policy and the deception was not factually immaterial to the grant of leave.

33. Accordingly on the wider approach to the consideration of the matter, on a factual assessment and merits-based approach, it seems to me without a doubt that the appellant's British citizenship was obtained by means of the fraud and that the condition precedent was established.

34. On the narrower, 'review-based' approach as set out in Ciceri, I do not consider there to have been anything unlawful or unreasonable in the respondent's conclusion that the condition precedent was met. Ms Naik submitted that the respondent had conflated the good character issue with the issue of fraud and had failed to take into account material matters such as the appellant's age and vulnerability, the terrible journey he had experienced when coming to the UK and the fact that he brought himself to the attention of the authorities voluntarily. However, these were matters considered by the respondent, as is apparent from the deprivation decision, and I refer in particular to [13], [19] to [22] of that decision letter. At [22] the respondent specifically considered the appellant's background and circumstances as distinct from the issue of his character but declined to accept those circumstances as a reasonable excuse for failing to admit the fraud until 2018 and for making the declaration set out at [23] in his application for naturalisation. There is no merit in the assertion that the respondent acted unlawfully or unreasonably in so doing. In terms of the approach set out in Ciceri at (1) of the head-note, with reference to [71] of Begum, there is, in my view, no basis for the assertion that the respondent made findings of fact which were unsupported by the evidence or were based on a view of the evidence that could not reasonably be held. The condition precedent was accordingly properly and lawfully established.

35. Turning to the respondent's exercise of discretion against the appellant in making the decision to deprive him of his citizenship, it is clear that the respondent did conduct a relevant assessment, referring to her discretion at [26] and continuing at [27] to [35] to consider factors relevant to proportionality under Article 8. The Supreme Court in Begum made it clear that the exercise of discretion was a matter for the Secretary of State and that it was not for the courts to step "in the shoes" of the decision-maker. The role of the courts was set out in Begum at [68] as being "*in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law*".

36. Ms Naik's submission was that even on the approach taken in Begum, a flexible approach had to be applied to the *Wednesbury* test, as acknowledged in the case of Pham, and that following such an approach it could not be said that the exercise of discretion was reasonable and proportionate. That was, she submitted, because of the respondent's failure to take account of various factors including the appellant's circumstances and the delay in making the deprivation decision. She referred again to the circumstances previously relied upon in her arguments on the condition precedent, namely the appellant's age when he came to the UK, his vulnerability and his experience of sexual abuse during his journey to the UK, his experience of being a child in care and in foster care, and the timing of his application for indefinite leave to remain at an age when, although over 18, he was not yet considered within the care system as a responsible adult. I make the same observations as I did above when considering those matters and reject the assertion that the appellant's circumstances and relevant factors were not considered and properly addressed by the respondent when exercising her discretion. Likewise, I find no merit in Ms Naik's reliance upon the delay by the respondent in pursuing deprivation after 2013 when, it is asserted, she ought to have known of the appellant's true circumstances as a result of the visit visa applications made by his parents. I cannot agree that the Secretary of State should reasonably be expected to have linked the visit visa applications to the appellant's own circumstances, and note that the application details produced within the respondent's appeal bundle at Annex N do not indicate that it was the appellant who sponsored his parents' visits but rather another son, Zamir Rada.

37. The question of delay also formed part of Ms Naik's arguments under Article 8 which, likewise, involved the consideration of proportionality in the respondent's decision-making, when assessing the reasonably foreseeable consequences of deprivation. Ms Naik relied upon the decision in Laci in which the respondent's delay in making a deprivation decision in a case which was very similar on its facts to this appellant's was considered to have rendered disproportionate the decision to deprive. In that case, however, it was not simply a case of inaction by the Secretary of State which was the particularly weighty matter leading to the breach of Article 8. It was the fact that the Secretary of State had started to consider taking deprivation action against the appellant and had invited representations, but had then done nothing for nine years, even renewing the appellant's British passport during that period of time. It was for that reason, and on the basis of that particular additional element, that the appellant succeeded in Laci, whereas that was not the case with this appellant. The matters relied upon by Ms Naik in this case, such as the fact that it was the appellant himself who provided the Secretary of State with the information that enabled her to conclude that he lied and to then commence deprivation action, the appellant's length of residence in the UK, the period of "limbo" in between the making of a deprivation order and a subsequent grant of leave, the impact of that period on the appellant's status and ability to work and access services and the amount of time he would have to wait until a subsequent grant of indefinite leave to remain, although relevant factors, were not considered by the court in Laci to be sufficiently strong or material points in the appellant's favour without that additional element.

Indeed, the court was at pains to emphasise the impact of that additional element by adding at [83]:

> "I should emphasise that this decision should not be interpreted as meaning that an indulgent view can be taken towards migrants who obtain British citizenship on the basis of a lie. On the contrary, in all ordinary circumstances they can expect to have it withdrawn. It is only because of the exceptional combination of circumstances in the present case that the FTT was entitled to come to the decision that it did."

38. Despite the findings in Laci, Ms Naik relied heavily on the impact upon the appellant of the period of limbo following the making of a deprivation order and the granting of a period of leave, submitting that the respondent's decision to require the appellant to make a separate human rights claim and await the outcome of that claim subsequent to the deprivation order rather than making a decision on a grant of leave contemporaneously with the deprivation order or granting a period of interim leave, was arbitrary and thus constituted a disproportionate interference with his private life, in the terms set out in Usmanov. However, I reject such an assertion and follow the Court of Appeal's conclusions in Laci, reflecting the Upper Tribunal's view in Hysaj at [102] to [110] as relied upon by Ms Cunha:

> "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."

39. Accordingly, for all of these reasons, it seems to me that, in terms of the considerations set out in Ciceri, the reasonably foreseeable consequences of deprivation are not such as to constitute a violation of the appellant's rights under Article 8 of the ECHR. The respondent's exercise of discretion in seeking to deprive the appellant of his British citizenship was a reasonable and proportionate response to his deception and the impact upon the appellant of such deprivation is not such as to outweigh the strong public interest in depriving him of a status and citizenship to which he was not entitled. The Secretary of State, in reaching her decision, had regard to all relevant matters and was entitled to conclude as she did.

40. As for Ms Naik's indication at the commencement of the hearing that the appellant reserved his position that Begum did not apply to section 40(3) cases and that the relevant guidance was that set out in KV (Sri Lanka), it seems to me that the appellant's appeal could not succeed either on the narrower approach in Ciceri or the wider, merits-based approach in KV (Sri Lanka), for the reasons I have set out above. The appellant's appeal is accordingly dismissed.

DECISION

41. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by dismissing the appellant's appeal on all grounds.

Anonymity Order

Further to the Note and Directions of Upper Tribunal Judge Norton-Taylor, the anonymity order previously made by the First-tier Tribunal is hereby discharged.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 25 January 2022