IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000170
First-tier Tribunal No: [DC/00019/2019]

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 April 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

YLBER JAKU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr J Collins,* instructed by Marsh and Partners Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 16 February 2023

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's decision on 25th February 2019 to deprive him of his British citizenship. The facts, which are undisputed, are set out at §§6 to 26 of the error-of-law decision annexed to these reasons. I do not repeat them. The issues narrowed further, as explained below.

The issues in this appeal

2. Mr Collins began by confirming that the condition precedent, identified in headnote (1) of the authority of Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC) had been met, namely that the respondent had established that the appellant had obtained his British citizenship by fraud, false representation or concealment of a material

fact. That was adopting the approach set out in §71 of the Supreme Court's judgment in R (on behalf of Begum) v SIAC [2021] UKSC 7, which is to consider whether the respondent had made findings of fact which were supported by the evidence and which could reasonably be made.

3. As the condition precedent was satisfied, the next question was whether the appellant's rights under the ECHR were engaged as a result of the deprivation decision, (in this case, right to respect for his private life under Article 8) and if they were, I must decide for myself whether a deprivation decision would be in breach of those rights.

4. This Tribunal in Ciceri had counselled that I must decide the reasonably foreseeable consequences of deprivation; but it would not be necessary or appropriate for the me (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the UK. I must consider the proportionality of the decision on the evidence before me, noting the inherent weight in the respondent's favour. The respondent's delay in making a deprivation decision might be relevant to proportionality (see EB (Kosovo) v SSHD [2009] AC 1159). Absent any issue of proportionality, I might only allow an appeal if the respondent had acted in a way in which no reasonable Secretary of State could have acted; had taken into account some irrelevant matter; had disregarded something which should have been given weight; or had been guilty of some procedural impropriety.

5. Mr Collins accepted that the appellant no longer had a family life with his wife and child, from whom he was estranged. He did not seek to rely on the right to respect for family life, for the purposes of this appeal. Instead, he relied on his right to respect for his private life, developed since he entered the UK in 2000.

6. I canvassed with Mr Collins whether the issue of the respondent's delay in reaching a deprivation decision or, as set out in the error of law decision annexed to these reasons, the question of earlier representations to the appellant's estranged wife that she had taken the decision not deprive the appellant of his citizenship was relevant to the appellant's private life, or the weight to be attached to the public interest in depriving the appellant of his British citizenship. Mr Collins said that the appellant relied on both consequences of delay, i.e. the effect on the appellant's private life, and the weight of the public interest, but primarily the latter. He accepted that a "proleptic" analysis was unnecessary. All I needed to consider was the impact of the deprivation decision, as opposed to the possibility of later removal. When I canvassed with him the potential relevance of the guidance in Muslija (deprivation: reasonably foreseeable consequences) Albania [2022] UKUT 00337 (IAC), he said that that case was not relevant. The sole issues from his perspective were: (1) the impact of delay on the Article 8 proportionality assessment; and (2) whether, adopting public law principles, the respondent had failed to consider previous representations given to the appellant's estranged wife in 2010 and Upper Tribunal Judge Warr's decision in respect of his wife in 2011.

The hearing before me

7. The appellant adopted his brief witness statement and confirmed his name and address. Neither representative had any questions for him and the facts in this case are undisputed.

8. The representatives relied upon their written and oral submissions, which I summarise and only discuss more fully where it is necessary to do so, for the purposes of explaining my decision.

The appellant's submissions

9. Mr Collins relied upon §68 of R (Begum) and in particular the permissibility of considering whether the respondent had acted in a way in which no reasonable decision maker could have acted; whether she had taken into account some irrelevant matter; or had disregarded something to which she should have given weight.

10. In relation to the effect of the respondent's delay in reaching her decision, he reminded me of §§40; 52 to 57; and 81 of Laci v SSHD [2021] EWCA Civ 769. Mr Laci had lived in the UK for almost twenty years at the date of the FtT's decision. The appellant had lived in the UK for even longer. At §81 of Laci, the Court of Appeal cited the authority of Akaeke v SSHD [2005] EWCA Civ 947 for the proposition that once it was accepted that the respondent's unreasonable delay was capable of being a relevant factor then the weight to be given to it in the particular case was a matter for me. Moreover, the delay could reduce the weigh of the public interest in immigration control, if I were satisfied that that the delay was the result of a dysfunctional system, which yielded unpredictable, inconsistent and unfair outcomes. The evidence of a dysfunctional system was the respondent's decision 2010 in respect of the appellant's wife, when she stated that although the sponsor had obtained his British passport through deception:

> "I accept that the recommendation to the respondent will be that the deprivation action will not be taken against your husband."

11. Whilst the respondent was entitled to rely on incorrect legal advice for the so-called "nullity" doctrine as explaining some delays, (see Hysaj (deprivation of citizenship: delay) [2020] UKUT 00128 (IAC)), that did not explain the circumstances of this case. In this case, the fact of the appellant's deception was revealed shortly after the appellant's estranged wife had been interviewed for the purposes of entry clearance in 2008. The respondent then left it two years to confirm that no deprivation decision would be taken. That was subsequently reinforced, when Upper Tribunal Judge Warr considered the appellant's wife's appeal, in his remaking decision in 2011. All of this was in contrast to the respondent's nullity decisions, which she had later withdrawn. In this case, the

respondent had positively taken a decision not to issue a deprivation decision, even if she did later make a nullity decision in 2013. As this Tribunal had also noted in the error of law decision, the entirety of the period of delay was not explained by any confusion about nullity. The respondent had not referred to Judge Warr's decision, or her earlier statements made to the appellant's wife about the appellant, in her deprivation decision. This was "Wednesbury" unreasonable, separate from the issue of Article 8 proportionality.

The respondent's submissions

12. Mr Melvin argued that Judge Warr's 2011 decision was not relevant to this appeal. It was therefore unsurprising that the respondent's 2019 decision had made no reference to it, or the earlier 2010 statement to the appellant's wife, in her refusal of her application for entry clearance. Judge Warr had considered the appellant's wife's appeal based on claims that she had made false representations, because she relied on his British passport, pursuant to paragraph 320(7A) of the Immigration Rules. Judge Warr concluded that she had not made false representations and that unless and until the respondent made a decision to withdraw the appellant's British passport, it remained valid and the respondent's refusal of his wife's application for entry clearance on that basis was unlawful. She and the couple's daughter were subsequently granted entry clearance. They arrived on 1st July 2012 with valid leave and were subsequently granted leave under the 'Domestic Violence Concession' (the appellant was said to be the perpetrator) until May 2013, when she successfully applied for indefinite leave to remain. Judge Warr did not decide an appeal against a nullity or deprivation decision, or indeed any decision in respect of the appellant. The respondent had never issued the appellant with a decision, or made a statement confirming or guaranteeing that he would not have his citizenship removed or treated as a nullity by some legal means.

13. Another question was whether the respondent's statement to the appellant's wife in her 2010 refusal of entry clearance, was capable of affecting her estranged husband's deprivation decision in 2019. Mr Melvin submitted that it was not. The respondent's policy on nullity versus deprivation had changed over the years and the well-publicised litigation was extremely protracted. The legal uncertainty had caused delays in decision-making. It was clear from the respondent's nullity decision made in March 2013, following the authority of R (Kadria) and R (Krasniqi) v SSHD [2010] EWHC 3405, that the delay was a reflection of this legal uncertainty, leaving the appellant in no doubt that his grant of British citizenship in 2006 was under threat. The delay relied on between the appellant's wife's 2008 entry clearance application and the 2013 nullity decision, as well as the 2010 statement and Judge Warr's 2011 decision in respect of the appellant's wife were all part of that same legal uncertainty. The 2019 decision could not fairly be described as "Wednesbury" unreasonable, or as reflective of a dysfunctional system. As both the Upper Tribunal in Hysaj and as Mr Collins accepted, the respondent had

been entitled to rely upon erroneous legal advice as an explanation for the delay after 2013.

14. In relation to Article 8 private life, which was said to be engaged on account of the appellant's long residence and history of working in the UK, both were built on the deception that the appellant had maintained until at least 2008. The length of the appellant's presence in the UK alone would not normally be a reason not to deprive him of his citizenship, as per the respondent's guidance, "Deprivation and nullity of British citizenship: caseworker guidance", §55.7.6. The respondent accepted that the appellant had not committed any crimes in the UK; and had worked for many years here, setting up his own business, but the deprivation decision was proportionate, taking into account the strong public interest in the integrity of the system by which foreign nationals were naturalised.

Discussion and conclusions

15. The condition precedent has been met. The respondent was entitled to conclude that the appellant had gained his British citizenship through deception. I consider next whether the respondent's deprivation decision engages the appellant's right to respect for his private life. He has been in the UK since 2000. Even bearing in mind that I am only considering deprivation and not removal, the appellant will be unable to work, in circumstances where he has developed his own business over many years. As a matter of common sense, I conclude that the decision will have a sufficiently serious impact to engage the appellant's Article 8 rights.

16. The next question is one of proportionality. I turn to the key issue of delay. As already referred to in the error of law decision, the delay after 2013 (when the respondent first made the nullity decision) is explained by reliance on incorrect legal advice. The relevant period of delay on which the appellant relies is between 2008 and 2013. It was in 2008 that the appellant's wife applied for entry clearance using the appellant's British passport, his Albanian birth certificate and their marriage certificate, and she confirmed in an interview in 2008 his place of birth. It was only in 2013 that the respondent issued a nullity decision. As already recited, the respondent refused the appellant's wife entry clearance in 2010, referring to the recommendation that a deprivation decision would not be taken against the appellant. The respondent also referred, as Judge Warr later noted his decision (§4), to the delay between 2008 and 2010 in reaching a decision in her application, which was in light of the appellant's deception, and that following a decision not to take deprivation action against the appellant, there was a need for more up-to-date evidence in respect of the wife, in light of the two-year delay, which was "justifiable in order to maintain the integrity of immigration control."

17. On further review of Judge Warr's decision in 2011, the respondent did not in fact give further categoric reassurances to either the appellant or his wife. Instead, Judge Warr noted the following:

> "21…The Secretary of State did not take the step of seeking to resolve the sponsor's status as a British citizen. The logical inference

> is that the sponsor was entitled to continue to rely on his passport despite his past behaviour….
>
> 22… In this case the Secretary of State having expressly considered the matter decided not to take such action [deprivation action].
>
> 25. I have no doubt that the Secretary of State gave very careful consideration to the issue of the sponsor's very serious deception in this matter and decided, notwithstanding the deceit practised not to deprive him of his citizenship…
>
> 26….The respondent's notice of refusal is rather curious…[Judge Warr then cites the 2010 decision]
>
> 27… However, the respondent then made no attempt whatsoever to deal with the issues of the relationship and the ability to maintain the [appellant's wife]. It seems to me that once the Secretary of State had decided to permit the sponsor to continue to use his British passport the matter should have been considered substantively."

18. Returning to the proportionality of the later deprivation decision, did the delay between 2008 and 2013 entitle the appellant to expect that his British citizenship would not end, such as would effect the continued development of his private life? As Judge Warr notes, the appellant was able to continue to use his passport. I have not been referred to any other aspect of how the appellant's private life developed in that period. When the appellant's wife revealed the appellant's true place of birth in 2008, the respondent did not immediately respond. It is reasonable to expect that the appellant was aware of his wife's 2008 application and her reliance on his true identity. Once his deception had been revealed in 2008, it is also reasonable to expect that he will have appreciated the risk that his British citizenship would be ended, by one legal route or another. As a consequence, it is also reasonable to expect that at least during the period from 2008 to 2010, the appellant's private life was developed with an awareness of that risk. During the same period, the public interest in the maintenance of an effective naturalisation process was not, in my view, substantially reduced by the fact of the two-year delay. It was clear from the respondent's 2010 decision on the appellant's wife's application that her disclosure had prompted a further review, and resulting delay, which was justified. I conclude that the delay between 2008 to 2010 did not give rise to an legitimate expectation that the appellant's British citizenship would not end, nor did it reduce the public interest in the legitimacy of the naturalisation process.

19. Where the picture is more complex is in relation to the effect of the respondent's 2010 comments. On the one hand, those comments were made to the appellant's wife, rather than the appellant. However, it is reasonable to expect that the appellant would become aware of those comments, and the respondent could not reasonably assume that he would not. The comments go beyond a mere "recommendation" and refer to a past decision not to take deprivation action. From that moment on, if one were to consider the comments out of context, the appellant might

legitimately argue that his expectation was of an unqualified commitment to take no further action, which impacted on his private life and on the public interest in a lawful naturalisation process. On the other hand, the key to this is the context. I accept Mr Melvin's submission that the 2010 comments cannot be taken out of context.

20. The 2010 comments were made in the general context of legal uncertainty, where the doctrine of "nullity", as opposed to a deprivation decision, was to be the advised route to deal with deceptions such as the appellant's. The case of R (Kadria) and R (Krasniqi) is illustrative. While the appellant might not have appreciated the legal distinction between nullity and deprivation in 2010, his wife's legal representatives, including those who represented her at the hearing before Judge Warr in 2011, could. The appellant was involved in that appeal process, giving evidence. While by 2010, the respondent had yet to take action to pursue a nullity decision, I accept Mr Melvin's principal submission that the respondent had never given an unqualified commitment that she would not seek to end the appellant's British citizenship by any legal route. The alleged comment to Judge Warr in the 2011 hearing (see §24 of the error of law decision) does not demonstrate this. Put another way, from 2013 onwards it was clear that any delay could be explained because of the nullity decision in 2013. Before that, the delay between 2010 and 2013 needs to be assessed in the context of the same legal uncertainty.

21. Moreover, there is the additional point that although the appellant has resided in the UK since 2000, it has been clear to him, at least since 2013 (so now a decade ago) that a legal avenue was being pursued to end his British citizenship. In those circumstances, after 2013, any further development of private life will have been in the knowledge that it could end.

22. In summary, the respondent's 2010 comments were consistent with a nullity option remaining as an option, rather than no action being taken at all. The appellant was not guaranteed, nor were there any unambiguous representations to him or via his wife, that legal avenues would not be pursued against him. All of this is unsurprising, given the context of the significant challenges and uncertainty around the legal position at the time. Judge Warr's decision, while raising a concern as to what the appellant's expectations were, ultimately related to the appellant's wife's application for entry clearance, where she had had not engaged in deception. Judge Warr himself described as "curious", the decision not to take deprivation action against the appellant, while refusing entry clearance based on his wife's reliance on his British passport. Judge Warr's concern is answered, because the nullity doctrine, rather than deprivation, was being developed at the time as the appropriate legal avenue of redress. The appellant's wife gained leave, independently of him, as the victim of his domestic violence, around the same time as the 2013 nullity decision.

23. Adopting a balance sheet approach, I start with the weight of the public interest in ensuring that the naturalisation process is not abused. That

has not been lessened to any material extent before 2010, or by the 2010 comments, when considered in the context of the legal uncertainty which preceded the 2013 decision. The appellant's expectation of an ongoing entitlement to British citizenship, because of the delay between 2008 to 2013, does not have significant weight, in that same context. I conclude that the deprivation decision is proportionate, and does not breach the appellant's right to respect for his private life.

24. I turn finally to whether the respondent has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; or has disregarded something which should have been given weight. Mr Collins points out that the deprivation decision made no reference to the 2010 statement to the appellant's wife, or Judge Warr's decision in respect of her appeal. It also follows that she failed to consider them in reaching her decision. I accept that the deprivation decision did not refer to either the 2010 statement or the 2011 decision. However, it does not follow that the respondent failed to consider the appellant's immigration history, again when considered in context. The appellant engaged in deception. The respondent was alerted to this in 2008, and even taking the appellant's case at its highest, decided not to pursue deprivation. Instead, she pursued the 'nullity' doctrine, no doubt based on legal advice, in 2013, which she later withdrew. Just as I have not accepted that the respondent made an unambiguous statement that she would not seek to end the appellant's citizenship by some legal avenue (even if it was not deprivation), I do not accept that the respondent erred in failing to consider her 2010 statement to the appellant's wife, or the fact of the later hearing in 2011. The respondent's decision was, in light of the historical context, explicable and open to her to reach.

25. Accordingly, the appellant's appeal fails and is dismissed.

Note of Decision

The appellant's appeal against the notice of intention to deprive the appellant of his citizenship fails and is dismissed.

The deprivation decision does not breach the appellant's rights under Article 8 ECHR on the basis of the appellant's right to respect for his private life.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **13th March 2023**

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000170

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st June 2022	**On**

Before

THE HON. MRS JUSTICE THORNTON
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEITH

Between

YLBER JAKU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: *Mr J Collins,* instructed by Marsh & Partners Solicitors
For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Cooper (the "FtT"), promulgated on 16th June 2021, by which she dismissed the appellant's appeal against the respondent's decision on 25th February 2019 to deprive him of his British citizenship pursuant to Section 40(3) of the British Nationality Act 1981.

2. In exercising her discretion to deprive the appellant of his British citizenship, the respondent had concluded that the appellant had used an assumed name, date of birth and claimed place of birth of Kosovo, when in fact he was an Albanian national. He had obtained exceptional leave, followed by indefinite leave to remain and later British citizenship, using a false identity. The appellant does not dispute this. The respondent had learnt of the appellant's true identity as a result of an application by his Albanian wife for entry clearance to the UK. She had produced the appellant's Albanian birth certificate and their marriage certificate, in his real identity, in support of her application.

3. The FtT upheld the respondent's decision.

4. The appellant appeals on the basis that having become aware of the appellant's deception in 2008, the respondent made an unambiguous representation in 2010 and again before Upper Tribunal Judge Warr in 2011, that deprivation action would not be taken against the appellant. Despite this, the respondent subsequently issued a decision declaring the Appellant's citizenship certification null and void, followed by the deprivation decision in 2019, which made no reference to either representation. The FtT's decision was tainted by procedural unfairness, by a failure to consider Judge Warr's decision of 2011. Alternatively, the FtT was irrational in concluding that the terms of the 2010 representation were ambiguous and that as a consequence, it was open to the respondent to make the deprivation decision in 2019. The FtT had failed to consider the dysfunctionality of inconsistent decisions in 2010 and 2019.

5. Further, the FtT had erred, when concluding that the reason for the respondent's delay in making decisions about the appellant's citizenship was because of the uncertainty over the correct legal course (nullity or deprivation), as discussed in Hysaj. The delay between 2008, when the respondent became aware of the deception, and 2013, when the respondent made the nullity decision, had nothing to do with the Hysaj confusion. Delay, when combined with other material circumstances, was capable of being relevant to the lawfulness of a deprivation decision, see: Laci v SSHD [2021] EWCA Civ 769.

Factual background

6. Given the issues which arise in this appeal, it is necessary to set out the factual background in some detail.

7. The appellant was born in Albania on 6th January 1984. He entered the UK, concealed in the back of the lorry, on 6th February 2000. He claimed asylum on the following day, 7th February 2000, in a false name, Yelber Mahmuti, and claimed to be a Kosovan national, born on 6th January 1985. His claim for asylum was refused on 8th March 2000, but he was granted Exceptional Leave to Remain ('ELR') on the basis of his age and the lack of reception facilities to which he could be returned in Kosovo.

8. On 25th June 2002, the appellant applied for a Home Office Travel Document ('HOTD') in his false identity. The respondent issued him with an HOTD on 4th September 2002, valid until to 8th March 2004. He applied for a further HOTD, but was issued with a "limited validity document" on 9th January 2003, which was valid for 12 months.

9. On 5th March 2004, the appellant applied for indefinite leave to remain on the basis that he had completed four years' ELR in the UK. Once again, this was in his false identity. His application was approved and the respondent granted the appellant ILR on 21st January 2005.

10. On 8th May 2006, the appellant applied for naturalisation as a British citizen, in his false identity. In doing so, he declared his understanding that he was required to disclose any activities which might be relevant to the question of whether he was a person of good character.

11. On 3rd July 2008, the appellant's wife sought entry clearance, in her true identity, as an Albanian national, sponsored by the appellant. She did so using his true name, but his false date of birth and false place of birth in Kosovo.

12. The ECO refused the appellant's wife's application on the basis that the appellant's British passport, submitted with the application, contained false information. The ECO's decision, dated 23rd July 2010, reads:

> *"You submitted an application as the spouse of Ylber Jaku on 03/0708. You were interviewed in this connection on 11/08/08. In your application you presented your husband's copy British passport ...this lists his place of birth as ..Kosovo. However, you also provided his Albanian birth certificate and marriage certificate, both of which show that he was born in Albania and not Kosovo as shown on his passport.*
>
> *It therefore appears as though your sponsor had obtained his British passport through deception, since you had provided documentary evidence that he was born in Albania. The case was therefore deferred and your husband's case was referred to the Secretary of State for the Home Department ... to consider whether your sponsor should have his British nationality revoked.* ***I accept that the recommendation to the Secretary of State will be that deprivation action will not be taken against your husband.***
>
> ***Following the decision not to take deprivation action against your sponsor*** *this office contacted you to bring up-to-date evidence of your relationship and your sponsor's ability to support you ... since the intervening period was approximately two years it was felt that more current evidence was required".*
>
> ***[Passages in bold are our emphasis].***

13. The appellant's wife appealed against the ECO's decision. Immigration Judge Wellesley-Cole heard her appeal on 4th April 2011, and dismissed her appeal, for reasons that were later set aside by the Upper Tribunal, because Judge Wellesley-Cole had erroneously regarded the burden of proof as being on the appellant's wife. Having set aside the earlier

decision, the Upper Tribunal regarded it as appropriate to remake the decision on the appellant's wife's appeal.

14. By a decision dated 15th September 2011, Upper Tribunal Judge Warr allowed the appellant's wife's appeal against the ECO's refusal of entry clearance.

15. At §4 of his decision, Judge Warr cited parts of the ECO's 2010 decision, which included the passages above. Judge Warr concluded, at §16, that there was no real dispute about the primary facts of the case and there had been no intention to deceive in the appellant's wife's application. Judge Warr went on at §§21 to 25 to state:

> *"21. It appears to me to be of some importance in this case that the Secretary of State did not take the step of seeking to revoke the sponsor's status as a British citizen. The logical inference is that the sponsor was entitled to continue to rely on his passport despite his past behaviour. Information contained in the passport was not used in a deceptive manner by either the sponsor or the appellant. Full disclosure was, as I have said, made. In the case of KB (Albania) the Tribunal did not have the benefit of AA (Nigeria) when reaching its decision and the Secretary of State took the opposite course of action that was taken in this case. Notice was served on the sponsor of a decision under Section 40 of the British Nationality Act depriving the sponsor of his citizenship (see §12 of the Tribunal's decision).*
>
> *22. In this case the Secretary of State having expressly considered the matter decided not to take such action….*
>
> *25. I have no doubt the Secretary of State gave very careful consideration to the issue of the sponsor's very serious deception in this matter and decided, notwithstanding the deceit practised not to deprive him of his citizenship".*

16. On 13th March 2013, the respondent decided to declare the appellant's citizenship certificate null and void (the "nullity decision") and to revoke his previous ILR . The decision noted the appellant's use of a false identity when he claimed asylum. The letter continued:

> *"In addition, we have also reviewed our policy on recognising a grant of citizenship as null and void based on current case law. The outcome of this review is that it is possible that a grant of citizenship may, in some cases, be regarded as null and void if an individual has applied to naturalise using false particulars. In the light of the information now provided, the Secretary of State is satisfied that naturalisation was obtained by means of impersonation.*
>
> *The implication of the Court of Appeal's decision in R (Akhtar) v SSHD [1980] 2 All ER 735, R (Mahmood) v SSHD & Ors [1981] 3 WLR 312, clarified in Kadria & Krasniqi v SSHD [2010] EWHC 3405 (Admin) is that you did not benefit from the issue of that certificate of naturalisation (i.e. you did not become a British citizen on 1st September 2006).*

> *Consequently, you are not and never have been a British citizen. The naturalisation certificate ... is therefore null and void and will be cancelled.*
>
> *This is not an appealable decision but can be challenged by judicial review in accordance with the Civil Procedure Rules. You should note that given the deception previously employed, which you admitted in your wife's entry clearance application, the Secretary of State will robustly defend her position and seek from you her costs of defending a judicial review".*

17. The Appellant appealed unsuccessfully against that decision. A later application for leave to remain was also refused in October 2017.

18. Following the Supreme Court decision of Hysaj & Ors [2017] UKSC 82, the respondent reviewed the nullity decision.

19. On 3rd February 2018, the respondent withdrew her nullity decision.

20. On 10th February 2018, the respondent indicated that she intended to issue a deprivation decision. The respondent considered the appellant's relationship with his daughter, who had leave to remain in the UK, but concluded that deprivation would not, of itself, have a significant effect on the daughter's best interests. The respondent went on to make the deprivation decision, which is the subject of this challenge.

21. On 25th February 2019, the respondent issued the deprivation decision, a copy of which starts at pg. [S23] RB.

22. At §4 onwards of the deprivation decision, the respondent outlined her reasons for the deprivation decision. She cited the relevant provisions of section 40 of the 1981 Act. At §6 of her decision, she cited Chapter 55 of her Nationality Instructions on false representations, including concealment of a material fact. At §7, she reflected that length of residence in the UK alone would not normally be a reason not to deprive a person of their citizenship. The respondent then recited the appellant's immigration history and the repeated use of a false identity. The respondent went on to state at §26:

> *"The representatives state that you regret misleading the Home Office but that you wanted to inform us of your true identity one day and did so through your ex-partner's application for entry clearance. This argument is not accepted. Your deception did not come to light as a result of an admission by you but by the discrepancy highlighted by the Entry Clearance Officer between the details provided for you as a sponsor and the documents presented to support your partner's application, eight years after you were granted ELR, four years after you were granted ILR and two years after you were granted citizenship. The Secretary of State considers that if it really was your intention to disclose your genuine identity to the Home Office you had ample opportunity to do so at any time prior to your citizenship application but did not do so".*

23. Importantly, the deprivation decision made no reference to the ECO's 2010 decision or to the respondent's representations to Judge Warr, or his judgment, which was not the subject of a cross-appeal by the respondent.

24. The FtT hearing was on 30th March 2021. During the course of the hearing, the appellant raised the issue of Judge Warr's hearing about his wife's application and what was said there about deprivation action against him. He said that when asked whether deprivation action was going to take place, the respondent's representative allegedly said, "*nothing at the moment.*" Mr Collins explained to us that this came as a surprise to the appellant's legal team who had not represented the appellant's wife and were unaware of the detail of the hearing in question or the decision.

25. At the end of the hearing, judgment was reserved.

26. A couple of days after the hearing, on 1st April 2021, the appellant's representatives served on the FtT and the respondent's representatives a copy of Judge Warr's decision involving the appellant's wife and an accompanying note. In the note, Mr Collins submitted to the FtT that given the FtT hearing had been by video-conference ('CVP'), it was obviously impossible to provide Judge Warr's decision to the FtT on the day. Moreover, a separate firm of solicitors had acted for the appellant's wife. The appellant had since provided a copy of Judge Warr's decision, which supported one of the appellant's submissions, namely that the respondent had, in her decision of 25th February 2019, overlooked the ECO's previous statement that deprivation action would not be actioned. At the very least, the appellant was entitled to some explanation as to why, having conveyed that representation, the respondent was now deviating from her earlier position. This lack of engagement was directly relevant to the lawfulness of the respondent's decision, see: R (Begum) v SSHD [2021] UKSC 27. The FtT remained seized of the matter until she had formally issued her judgment (see: E&R v SSHD [2004] EWCA Civ 49) and Judge Warr's decision should be taken into account. The appellant did not regard a reconvened hearing as necessary. Counsel emailed a copy of his note and Judge Warr's decision to the respondent's Counsel, asking that if he had any comments or submissions on them, he should forward them to the FtT by 6th April 2021.

27. On 16th June 2021, the FtT reached her decision.

The FtT's decision

28. The FtT considered section 40(3) of the 1981 Act, in the context of the authority of R (Begum) and the correct test for how a court or tribunal should assess a deprivation decision. At §29 of her decision, the FtT noted that the test was whether the respondent had acted in a way in which no reasonable Secretary of State would have acted, or had been guilty of some other procedural impropriety, or had erred in law. An error of law might include making findings of fact unsupported by all of the evidence.

29. At §32, the FtT noted that the appellant did not argue that the deprivation decision alone (as opposed to any future decision on whether to allow leave to remain) breached the appellant's right to respect for his family or private life under Article 8 ECHR. The sole focus was therefore on the deprivation decision, rather than its consequences.

30. At §36, the FtT concluded that at each stage of his various applications, including for leave to remain and later naturalisation to become a British citizen, the appellant had used his false identity. As a consequence, the respondent had a factual basis for deciding to deprive him of his British citizenship, as his application was based on his misrepresentation and concealment of true facts (§37). The FtT found that had the respondent known of the true facts, it was more likely than not that she would have refused the appellant's application.

31. We recite the following relevant passages from the FtT's decision in full:

> *"40. The principal challenge ... is whether the respondent's delay between the discovery of the deception at the time of his wife's entry clearance application in 2008 and the decision in 2019 and the question of whether the decision is irrational given the respondent's confirmation in the entry clearance decision dated 23rd July 2010 that a deprivation decision would not be made in the appellant's case amounts to a case of the respondent acting in a way that no reasonable Secretary of State could act.*
>
> *41. When considering the question of delay, I am satisfied that there was significant delay between the discovery of the deception in August 2008 and the action finally taken by the respondent nearly five years later on 13th May 2013 to declare his British citizenship was null and void. However as ... the Upper Tribunal observed in Hysaj (delay), delay and maladministration without more do not amount to unlawfulness. ... The respondent was entitled to rely on legal advice and follow a particular course of action based on that advice, even if it subsequently turned out to be unlawful. I note also that in Hysaj (delay) the time between deception being disclosed in the wife's application for entry clearance (September 2007) and the decision that his citizenship was a nullity (February 2013) was longer than the delay that occurred in this appeal. On balance I conclude that the delay in this case, when set against the backdrop of the litigation on the issue of deprivation of citizenship, is not sufficient to render the decision unlawful or unreasonable.*
>
> *42. The question then is whether the respondent gave an assurance that deprivation action would not be taken against the appellant. ...*
>
> *43. In this regard I have considered the ECO's refusal decision of 23rd July 2010 ...*
>
> *44.* ***During the course of his oral evidence, the appellant also said that the Upper Tribunal when considering his wife's appeal (in or around 2012) questioned the Home Office as to whether deprivation action was going to take place and the respondent purportedly said 'nothing at the moment from the Secretary of State'. However, although the appellant confirmed that he had a copy of the Upper Tribunal's determination this has not been produced in evidence. I have therefore given this assertion little***

weight although I do consider it plausible that the Upper Tribunal might have addressed this issue

[Passages in bold are our emphasis].

47. I consider the statement made in the decision may have reflected the respondent's approach at that time on the basis of legal advice in and in light of the litigation as it stood, that shortly thereafter action was taken to declare his (and many others) British citizenship a nullity. In any event on the appellant's own evidence the respondent only indicated at his wife's appeal in 2012 that nothing was planned at that time, indicating the respondent's position might change in the future.

48. Whilst it may have provided an indication of the respondent's position at the time, I do not find that the refusal of entry clearance amounted to a promise which was 'clear, unambiguous and devoid of relevant qualification' such that it might have given the appellant a legitimate expectation that he would not be deprived of British citizenship ... this statement was not addressed to the appellant himself, but was made in a decision in respect of his then wife. Whilst I accept that the ECO's decision does indicate that deprivation of citizenship action would not be taken against the appellant, I find that there is some ambiguity in the statements made. The decision initially refers to a recommendation that will be given to the Secretary of State. I find this indicates the respondent had not taken a final decision regarding deprivation. However, in the next paragraph the ECO refers to a decision having been taken not to take deprivation. When looking at these matters in the round, I find that the respondent had not made a final decision, as clearly, in the light of the state of the litigation at that time, she made a decision to declare his citizenship a nullity in 2013 ...

49. When looking at these matters in the round and for the reasons set out above I do not consider the respondent's decision of 16th February 2019 could be conceived as irrational, notwithstanding the delay and the statement in the ECO's refusal".

32. Having considered the evidence as a whole, the FtT dismissed the appellant's appeal.

The grounds of appeal and grant of permission

33. The appellant lodged an appeal on the two grounds set out earlier in these reasons.

34. Upper Tribunal Judge Owens granted permission on 24th February 2022. The grant of permission was not limited in its scope.

The hearing before us

35. We do not recite all of the respective representatives' submissions, except where it is necessary to do so to resolve them. We set out briefly the competing cases.

The appellant's case

36. The appellant's case, before the FtT and us, is that having become aware of the appellant's deception in 2008, when his wife sought entry clearance, the respondent made an unambiguous representation in the 2010 decision and again to Judge Warr in 2011, that deprivation action would not be taken against the appellant. Despite that representation, the respondent nevertheless issued the nullity decision in 2013, followed, in 2019, by the deprivation decision. The 2019 deprivation decision made no reference to the 2010 decision, or the respondent's representations to Judge Warr in 2011. In turn, the FtT's decision was tainted by procedural unfairness, by her failure to consider the post-hearing evidence, namely Judge Warr's decision of 2011. Judge Warr had found that the respondent had made a representation that deprivation action would not be taken against the appellant. This was materially relevant, and the FtT's failure to address Judge Warr's judgment was an error of law.

37. Alternatively, the FtT was irrational in concluding that the terms of the 2010 decision were ambiguous and that as a consequence, it was open to the respondent to make the deprivation decision in 2019. The FtT had failed to consider the dysfunctionality of inconsistent decisions in 2010 and 2019.

38. Finally, the FtT had erred, when concluding that the reason for the respondent's delay in making decisions about the appellant's citizenship was because of the uncertainty over the correct legal course (nullity or deprivation), as discussed in Hysaj. The delay between 2008, when the respondent became aware of the deception, and 2013, when the respondent made the nullity decision, had nothing to do with the Hysaj confusion.

The respondent's case

39. The FtT was entitled to conclude on the evidence before her that the terms of the 2010 decision were ambiguous. She had made a detailed analysis of the wording used in the 2010 decision and had explained her reasons. A perversity challenge to the FtT's decision could not be sustained.

40. The appellant's explanation for why Judge Warr's decision had not been disclosed to the FtT before or at the hearing, with due diligence, was not adequate. Judge Warr's decision would not, in any event, have made an important difference to the FtT's decision, as it did not add any evidence that was not before the FtT. Judge Warr's decision was about the appellant's wife in relation to a different decision, namely the refusal of entry clearance. Judge Warr did not find that there was an unambiguous promise that could be the basis of a legitimate expectation. Whatever Judge Warr may have decided was therefore beside the point. Judge Warr was not aware of, and was not addressed on, the respondent's later doctrine on nullity and her policy on delay.

41. The history of the decisions of 2010, 2013 and 2019, as considered by the FtT, showed no dysfunctionality. On the issue of delay, the respondent's policy was clear that delay alone was not the basis for not issuing a deprivation decision. The 2013 nullity decision was consistent with the 2010 decision, as there was no discretion on the issue of "nullity" – if the respondent regarded the doctrine as applying, then she had no choice other than to make the nullity decision. In contrast, the respondent had a very broad discretion on deprivation, to which substantial deference must be given, particularly where there was such clear and acknowledged deception.

Discussion and conclusions

42. We start by considering whether it is appropriate to consider Judge Warr's decision, on the basis that it was not before the FtT. Mr Collins had referred to E & R as authority for the proposition that it was open to the FtT to have considered additional evidence before reaching her decision. He also cited SD (treatment of post-hearing evidence) Russia [2008] UKAIT 00037 for the proposition that it was an error of law to fail to do so, if the evidence ought to have been admitted on the basis of the criteria set out in Ladd v Marshall [1954] 1 All ER 1489.

43. Judge Warr's judgment was a re-making decision, making findings of fact, and not an error of law judgment. That is relevant because findings of fact in relation to a claim by one party, may be relevant, as a factual starting point, to a claim by a second party, where there is a material overlap in the evidence: see SSHD v Patel [2022] EWCA Civ 36, at §§37 and 38. In fact, the overlap is almost entire.

44. We accept, on the one hand, Mr Collins's submission that the FtT could not have been sent Judge Warr's decision by the Tribunal administrative staff. This was so, notwithstanding the fact that her judgment was promulgated some months after the hearing. It appears that there must have been some administrative mishap.

45. On the other hand, we do not accept that the principles in E & R or Ladd v Marshall strictly apply in this case. Judge Warr's judgment was just that, a judgment, containing findings of fact and recording the parties' submissions. It was not, in itself, evidence.

46. However, Judge Warr's findings were clearly potentially relevant to the FtT's decision. Although the parties were different, as the FtT's case related to the appellant and the case before Judge Warr related to the appellant's wife, they clearly covered the same factual matrix and therefore the principles in SSHD v Patel applied, namely that it was appropriate for the FtT to have taken Judge Warr's decision as her starting point.

47. The existence of Judge Warr's judgment was raised with the FtT at the hearing. It is apparent from her consideration of the issue in her ruling that she recognised its potential relevance but had attached little weight to the appellant's understanding of the judgment. The appellant's

representatives have explained why they had not understood its importance and had not produced it at the hearing. On the basis of how matters transpired at the hearing we accept that the appellant's representative cannot be criticised for not applying to adjourn the hearing or apply at the hearing to produce it after the hearing. Its full significance could not have been appreciated until the appellant's representatives obtained a copy, as they did, shortly after the hearing.

48. Through clerical error, a copy of the judgment was not sent to FtT on receipt by the FtT administrative office.

49. To proceed without sight of Judge Warr's decision risked the FtT's judgment being inconsistent with it. That risk materialised in this case. Moreover, Judge Warr's decision was favourable to the appellant in apparently providing evidence of a further statement by the respondent, who was represented before the judge, that action would not be taken against the appellant despite his deception. Had the decision been made available to the FtT she could have reviewed it; provided the parties with the opportunity to make submissions on the earlier judgment; and resolved any apparent inconsistencies, taking it as her starting point. The effect of the procedural mishap was to deprive the appellant of the opportunity to have his case considered in this regard. We conclude it gives rise to material procedural unfairness amounting to an error of law.

50. We turn next to the second ground in relation to whether the FtT was perverse in her interpretation of the ECO's decision of 2010 in respect of the appellant's wife. It may be that a different judge would take another view from that of Judge Warr, bearing in mind that the principles of Devaseelan (Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702) and Patel do not impose a "straitjacket". The FtT did not have the benefit of Judge Warr's decision and erred because she did not take it as her starting point. We bear in mind that the respondent was represented before Judge Warr and appears to have made a further representation to the effect that action would not be taken against the appellant. However, it is premature, when analysing the issues of delay and representation, without taking Judge Warr's decision as a starting point, to say that no judge could reach a conclusion as the FtT did as to the meaning of the 2010 decision. A judge re-making the decision on appeal will need to consider all of the circumstances of the case.

51. In summary, the first ground is sustained, whilst the second ground (perversity) is not. The subsidiary point in relation to delay will need to be considered as part of all of the circumstances.

Decision on error of law

52. We conclude that the first ground discloses an error of law, such that we must set the FtT's decision aside. We do not accept that the FtT's conclusion that deprivation was lawful was perverse, in the sense that the only conclusion open to the FtT was to conclude that it was unlawful. A conclusion on the appeal against the deprivation decision requires

consideration of all of the evidence and facts, including Judge Warr's decision, which the FtT did not have the benefit of reviewing.

Disposal

53. With reference to paragraph 7.2 of the Senior President's Practice Direction and the limited (albeit important) fact-finding, it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

54. The following directions shall apply to the future conduct of this appeal:

    54.1. The Resumed Hearing will be relisted at Field House on the first available date, time estimate of half a day, with no need for an interpreter, unless requested **no later than 7 days before the hearing**, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

    54.2. The appellant shall **no later than 4 pm, 14 days before the Resumed Hearing**, file with the Upper Tribunal and served upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

    54.3. The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed **no later than 4 pm, 7 days before the Resumed Hearing**.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and we set it aside.

Remaking is retained in the Upper Tribunal.

No anonymity direction is made.

Signed J Keith Date: 8th July 2022

Upper Tribunal Judge Keith