IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004795
First-tier Tribunal No:
[DC/50250/2021]
DC/00020/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2023

Before

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

Between

ARDIAN LIKA
(ALSO KNOWN AS ARDIAN BRAHELIKA)
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Wilding, instructed by Marsh & Partners Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 21 February 2023

DECISION AND REASONS

1. This is an appeal against the decision of Judge G J Ferguson ('the FtT'), dated 5th August 2022, by which he dismissed the appellant's appeal against the respondent's decision dated 21st September 2021 to deprive him of his British citizenship, pursuant to Section 40(3) of the British Nationality Act 1981.

Background

2. At the core of the appeal is the appellant's use of a false identity. He is an Albanian national, but claimed to be Kosovan, in his dealings with the respondent. His real name is Ardian Braehelika. He used a false name, Ardian Lika, and a false date of birth, on entering the UK clandestinely on 24th November 1998, aged 25. He also provided false details about his parents. The

respondent only discovered his deception on 14th June 2021, and not because the appellant volunteered it. At all stages prior to that discovery, the appellant maintained his deception in his dealings with the respondent, and earlier Tribunals.

3. In terms of those dealings, the appellant claimed asylum on entry to the UK. The respondent refused his asylum application on 7th July 2000. He appealed to the First-tier Tribunal, which dismissed his appeal on 14th February 2003. He submitted a fresh claim based on his relationship with his partner, now wife, under Article 8 ECHR. Before any decision was made, he applied for ILR through a family concession, on 26th February 2005, giving the details of his wife and a daughter. The respondent rejected this application and his earlier human rights application, on 26th July 2007. The appellant applied again on 26th July 2007 for ILR under the so-called "legacy scheme", referring to the legacy criteria. This included that the appellant had always been honest in his asylum applications and had not committed any immigration offences. The respondent granted the appellant ILR on 20th February 2009. The respondent referred in that decision to the appellant's character and good conduct. On 14th April 2009, the appellant then applied for a Home Office Travel document, which the respondent issued on 14th May 2009. He applied for naturalisation as a British citizen on 26th February 2010. He did so making various declarations, with which we deal later in these reasons. He was granted British citizenship on 13th July 2010. He then applied for two British passports, issued in 2010 and 2020.

The deprivation decision

4. The respondent issued a deprivation decision on 21st September 2021. A copy is at page [188] of the main bundle before us. There are multiple versions of bundles, so the page references are to the main bundle, unless otherwise indicated.

5. In her deprivation decision, at §17, p. [192], the respondent noted that the appellant's ILR application under the legacy scheme had been on the basis that he had always been honest in his asylum applications and had not committed any immigration offences. At §19, p. [193], the respondent noted that in his application for naturalisation, the appellant had ticked 'no' to various questions, including that he had not engaged in any activities which might indicate that he may not be considered a person of good character.

6. On discovering the appellant's true identity, on 27th July 2021, the respondent wrote to the appellant, indicating that she was considering making a deprivation decision. The appellant resisted this, on the basis that he was a victim of trafficking by criminal gangs, was young at the time, and had feared persecution in Albania (§§26 to 27, p. [195]). The appellant's representatives pointed to his family and private life in the UK (§31, p. [196]). He claimed that his use of deception was an isolated incident and out of character.

7. The respondent considered the fact of the appellant's two British children, then aged 17 and 14, for the purposes of section 55 of the Borders, Citizenship and Immigration Act 2009, but concluded that deprivation of citizenship, as distinct from the appellant's removal or deportation, would not have a significant effect on the best interest of those children.

8. The appellant appealed against the deportation decision, admitting his deception, but blamed the poor advice of others and claimed that he would still

have been granted asylum in his true identity. He also relied on the right to respect for his private and family life in the UK.

The FtT's decision

9. In his decision, the FtT reminded himself of section 40(3) of the British Nationality Act 1981 and the well known authorities of Begum v SIAC [2021] UKSC 7 and Ciceri [2021] UKUT 00238. The FtT also noted the appellant's reliance on the case of Sleiman (deprivation of citizenship; conduct) [2017] UKUT 00367 (IAC) for the proposition that the impugned behaviour must be directly material to the decision to grant citizenship. The FtT also considered the case of Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 00196 (IAC), in relation to the same proposition.

10. The FtT's decision is not in our main bundle, so we refer to its internal paragraph numbers. At §17, the FtT considered the appellant's submission that the respondent had not demonstrated that his nationality was obtained by means of deception. He argued that the respondent had granted him ILR for reasons unrelated to his nationality, as this would have made no difference under the legacy scheme criteria. However, at §19, the FtT considered that the criteria included honesty in earlier applications. The appellant had specifically relied on that criterion when making his application. The respondent had specifically referred in her grant of ILR to the criteria including the appellant's "character and good conduct."

11. At §20, the FtT considered Sleiman. While not doubting the general proposition, the FtT noted that in Sleiman the respondent had expressly conceded that the deception about age was not relevant to the grant of leave, let alone directly material. In this case, the opposite was the case. The respondent repeatedly took issue with the appellant's deception, in the deprivation decision. The respondent expressly granted ILR and the appellant was naturalised on the basis of his positive assertion to be of good character. At §22, the FtT concluded that it was not necessary for the respondent to have to produce "minutes of a good character check." Adopting the Begum analysis, the respondent had not reached a decision unsupported by evidence, i.e. effectively a public law test. The FtT concluded that the respondent had shown the appellant's accepted deception was directly material to her decision to grant citizenship, so that the condition precedent was established.

12. The FtT went on to consider the consequences of deprivation for the purposes of Article 8 ECHR. The FtT did not regard the appellant's removal as reasonably foreseeable. What was reasonably foreseeable was a period of time between deprivation and a further decision to remove or, more likely, a grant of some form of leave. The FtT was conscious that during this 'limbo' period, the appellant would be unable to work. The FtT assessed the timescale of that period as being "up to three months" (§27). The FtT considered the effect of the limbo period as analysed in Hysaj (Deprivation of citizenship: delay) [2020] UKUT 00128 (IAC). Those circumstances were similar to the appellant's. During the period, Mr Hysaj's wife could work, and if the family's finances deteriorated, they could seek support. In the appellant's case, the family was in no worse a situation than Mr Hysaj (§29). There were 'safety nets' and the evidence about the appellant's family's finances and his children was 'thin.' The children would continue to attend school without disruption to their education, and the appellant's daughter

would not be prevented from attending university. The FtT made a proportionality assessment and concluded that the balance lay in favour of deprivation (§§33 to 34). The FtT dismissed the appellant's appeal.

The grounds of appeal and grant of permission

13. The appellant appealed on two grounds.

14. Ground (1) was that the FtT had failed to identify evidence capable of showing that the appellant's deception made a material difference to the grant of ILR or British citizenship. The FtT had erred in simply relying on an assertion as to what had motivated the grant, in the deprivation decision. The decision did not amount to evidence for why the respondent granted the appellant citizenship. The authorities of Begum and Ciceri did not remove the requirement for evidence, with the burden of proof lying on the respondent. There was no evidence, for example, that "good character" included a requirement to have told the truth in an asylum claim. Indeed, the respondent's own guidance (as to which we say more later) suggested that someone may not tell the truth, for a variety of reasons in an asylum claim.

15. Ground (2) was that the FtT had erred in placing significant reliance on the limbo period being only three months, at most. Unknown to both representatives and the FtT at the time, the respondent had responded to a Freedom of Information Act request, which suggested that the average time between a deprivation decision and a decision on whether to grant temporary leave was between 257 and 303 calendar days. The respondent ought to have brought this to the attention of the FtT but had failed to do so. This length of delay would have an impact on the appellant's family's ability to support itself, which could have resulted in a different conclusion on Article 8 proportionality.

16. While permission was initially refused, Upper Tribunal Judge Kebede granted permission on 11th November 2022. The grant of permission was not limited in its scope.

The Hearing before us

17. We do not recite all of the parties' submissions. Instead, we only refer to them where it is necessary to explain our decision.

Ground (1)

18. Mr Wilding reiterates that not every error, deliberate or otherwise, was necessarily material to a grant of ILR or British citizenship. In the Sleiman case, the respondent had accepted that the deception was not material. Pirzada made clear at §§9(c) and (d) that deception was not sufficient, and that the respondent needed to show that the deception motivated her grant:

> "9(c) The power under [Section 40(3)] only arises if the Secretary of State is satisfied that registration or naturalisation was obtained by fraud, false representation or concealment of a material fact. The deception referred to must have motivated the grant of (in the present case) citizenship, and therefore necessarily preceded that grant.
>
> (d) The separation of sub sections (2) and (3) makes it clear that obtaining naturalisation by one of the means of deception set out in sub section (3)

> cannot of itself amount to a reason enabling the Secretary of State to be satisfied that deprivation is conducive to the public good; but in an appropriate case, there would appear to be no reason why the Secretary of State should not be satisfied that the conditions under both sections exist."

19. While not bound by it, we accept the principle in Pirzada, from which there is no reason to depart. The appellant accepts his deception. The sole issue, on ground (1), is whether the FtT erred in concluding that the respondent had not acted in a way that no reasonable Secretary of State could have acted. Mr Wilding reiterates the absence of a "good character check minute", and criticises the wording in the deprivation decision, which having cited relevant guidance to case workers, stated, at §34, p.[197]:

> "It is believed that your application for naturalisation would have been refused … had the case worker known at the time that you had practised deception throughout your dealings with the Home Office, and that you had continued to be dishonest in your Form AN [the application form for naturalisation]. It is considered that you would not have met the good character requirement."

20. When we asked him, Mr Wilding clarified that he does not take issue with the reference to the word 'would' in §34, acknowledging that this reflects that the respondent has to take a decision with the benefit of hindsight. The lack of evidence was, he submitted, illustrated in the words, "It is believed" which amount to supposition.

21. Mr Wilding also points to the respondent's own guidance and examples. In the "Good Character Requirement" Annex D to Chapter 18 (§9.5, p. [179]), the guidance reflects Pirzada:

> "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….
>
> 9.5.2 Where deception has been employed on a previous immigration application and was identified and dismissed by [the respondent] or was factually immaterial to the grant of leave, case workers should not use that deception as a reason by itself to refuse the application under section 9.5.1.
>
> Examples
>
> ……
>
> B. Mr B. Applied for asylum on the same grounds as Mr. A. However, he was not granted ILR on the basis of a successful refugee claim. He was

> instead granted ILR under a Family Concession to which a consideration of nationality was not the primary factor. The deception was not therefore material to the grant of ILR as regardless of that fact that he had claimed to be Kosovan on entry to the UK Mr B would in any case have been granted ILR under the Concession as a result of his family arrangements. In this scenario [the respondent] has already disregarded the claimed nationality of the individual as being immaterial to the grant of ILR under the Concession. It would therefore be perverse to assert that a previously disregarded fact could be relevant at a later date to a consideration of good character. Nationality on the date of application is, in any case, irrelevant to the naturalisation consideration."

22. Mr Wilding argues that the appellant's circumstances were analogous to 'example B.'

23. Mr Wilding further submitted that 'Guide AN', which the appellant had confirmed that he had read when applying for naturalisation, takes matters no further. Section 3, 'Good Character' set out various warnings about the need to disclose criminal convictions and tax affairs, but merely begs the question, at p. [81], where it stated:

> "If you are not honest about the information you provide and you are naturalised on the basis of incorrect or fraudulent information you will be liable to have British citizenship taken away (deprivation) and be prosecuted."

24. The appellant's case was that he was not naturalised on the basis of fraudulent information. Mr Wilding adds that the respondent's guidance to decision makers, 'Chapter 55, Deprivation and Nullity of British citizenship', at §55.7, p. [149], emphasises that not all deception may have a direct bearing on a grant 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: …
>
> - False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not have otherwise 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 a material fact did not have a direct bearing on the grant of citizenship, it would 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 that the person had previously lied about their asylum claim may be irrelevant. …"

25. In summary, Mr Wilding argues that the deprivation decision was based on supposition, was contrary to the respondent's own guidance, and ignored the Pirzada/Sleiman principle. The FtT had failed to appreciate this.

26. We bear in mind that as an appellate court, we must not substitute our view for what we would have decided. The question is whether the FtT erred in law. Moreover, in considering this question we remind ourselves of the relevant legal framework. The Secretary of State may 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 fraud; false representation, or concealment of a material fact (Section 40(3) of the British Nationality Act ('the Act')). Whilst section 40A of the Act provides for an appeal to the Tribunal rather than a review, the Tribunal should approach its task on (to paraphrase) essentially *Wednesbury* principles save that it is obliged to determine for itself whether the decision was compatible with the obligations of the decision-maker under the Human Rights Act 1998 (Begum and Ciceri) (emphasis added).

27. We conclude that the appellant's challenge that the FtT had erred in failing to appreciate that the respondent's conclusion was not open to her because it was based on supposition, is answered by the detail of the respondent's deprivation decision, which the FtT considered.

28. The respondent's conclusion at §34, p. [197], that she believed that she would have refused the naturalisation application, had she known of the deception, is based on her analysis of the appellant's actions. He had confirmed on numerous occasions to the respondent that the information he had provided, at relevant stages, was correct and that he understood that if he gave false information, he might be liable to prosecution (for example, §15, p.[192]). When applying for ILR, his lawyers had specifically claimed that he was honest in his asylum application.

29. The respondent also considered the appellant's application for naturalisation, 'Form AN', which dealt with good character requirements. In that form, the appellant made a series of declarations, in section 6 (p.[125]). At box [6.1], he declared that to the best of his knowledge and belief, the information he had given was correct and that he knew of no reason why he should not be granted British citizenship. At box [6.2], he declared that he had read and understood the guide, 'Naturalisation as a British citizen' and at box [6.5], that he understood that a certificate of citizenship may be withdrawn if it were found that it had been obtained by fraud, false representation or concealment of any material fact, or if on the basis of his conduct, the respondent considered it conducive to the public good.

30. We pause to refer to the guide, 'Naturalisation as a British citizen.' This includes a section, at p. [84], 'What if you haven't been convicted but your character is in doubt,' which contains the following passage:

> "You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago this was. … If you are in any doubt about whether you have done something or that it has been alleged that you've done something that might lead us to think you are not of good character you should say so."

31. We cite the Form AN and guidance, not because we seek to form a view on whether the appellant's deception was material, but because the respondent had expressly considered them (§19, p. [193]) and the FtT had considered the deprivation decision. In that same decision, the FtT went on to consider the lengths to which the appellant had deceived the respondent. He had not only adopted a false identity himself, but had provided false names and places of birth for his parents (§25, p. [194]. The respondent concluded that the appellant had used the false identity:

> "to increase the chances of a successful grant of asylum and British citizenship" and had provided false information "to conceal [his] genuine identity further, and to reduce the risk of [his] genuine identity being discovered."

32. We do not accept that the FtT had erred in failing to appreciate that the respondent had based her conclusion on supposition. This ignores the respondent's reasons, which considered why the appellant acted in the way he did and his actions were relevant to the grant of citizenship. The FtT had considered the challenge that there was no evidence of a contemporaneous "good character check." That ignores the context of how ILR grants operated and the express reference to character in the grant of ILR. It also ignores the declarations which the appellant made when applying for naturalisation and the guidance about the importance of honesty in those declarations.

33. This leads us to Mr Wilding's point that the respondent had not pointed to any evidence that the deception led to the grant, while ignoring her own guidance that not all deceptions merited deprivation. This is answered in two ways. First, in her deprivation decision, the respondent considered numerous aspects of that guidance. We do not repeat those references again. Second, her decision must be seen in the context of the process by which grants of ILR were made at the time. The respondent did not ignore "good character" when granting ILR, as the FtT appreciated. Mr Wilding accepted this general proposition. The respondent had referred to it in her ILR grant to the appellant, and it is also consistent with the respondent's practices at the time, as is apparent from the references at §§7, 18, 32 and 36 of Hakemi & Ors v SSHD [2012] EWHC 1967 (Admin), which indicate the continuing relevance of personal history, character and conduct, including by reference to Chapter 53 of the respondent's Enforcement Instructions and Guidance. Mr Wilding accepted that in principle, character and good conduct were relevant factors in grants of ILR, but suggested that the reference to them in the appellant's grant letter was immaterial. The implication must be that it was an empty recital, but nowhere do we see that as a challenge in the grounds. It is also not consistent with the respondent's practice at the time.

34. Turning to the third of Mr Wilding's submissions, we accept the Pirzada/Sleiman principle, but we also accept Mr Clarke's submission that how it applies in practice is intensely fact-sensitive. In Sleiman, the appellant had deceived the respondent about his age (he claimed to be younger than he was). The respondent had conceded that it was not relevant to the grant of FLR, where the grant was on the basis of the respondent's delay (§42). The respondent did not contend that, had the false date of birth been known at the time of the citizenship application, she would have rejected the application on grounds of good character (§65). The UT was careful to apply the principle on the evidence "in this case" (§66) and accepted that there might be cases of "obvious fraud, such as in

relation to nationality or identity" (§53), which was the reason why the respondent provided various studies in her guidance. They were not determinative, but indicated the respondent's approach.

35. The facts in Pirzada were also nuanced. Mr Pirzada had pretended to be a qualified doctor, when he had no qualification to practice medicine at any level, for which he was later convicted of fraud and imprisoned. Before his prosecution, he had failed to disclose in his naturalisation application that he was not a qualified doctor. At §16, the UT concluded that evidence of general misconduct was not sufficient, as otherwise, without a specific question, the person could not be regarded as failing to disclose relevant material, if all that could be said was that they may have committed a criminal offence of which they had yet to be convicted. The UT said that there had to be:

> "an identifiable deception that could be shown or properly assumed (our emphasis) to be operational in the grant of deception." (§16).

36. The facts in Sleiman and Pirzada are far from those in the appellant's case. The respondent specifically asserted that had she known of the appellant's false identity, she would not have granted ILR or citizenship. There is no "general misconduct", in the Pirzada sense, or of the respondent taking issue with a previously disregarded factor, in the "Example B" sense. The respondent had considered the complexity of the deception, which extended to the appellant's parents; why the appellant did so (because he knew the risks if the truth were revealed) and why that was material to the grant of citizenship. These were all factors open to the respondent to consider. The FtT had specified engaged with Sleiman and Pirzada in his reasons at §§17 to 22.

37. In summary, we conclude that the FtT did not err in concluding that the respondent has shown that she considered all factors relevant to the issue of whether the admitted deception motivated or was directly material to the grant of British citizenship. The evidence of that motivation was in the wording of the grant of ILR and the applicable criteria at the time; and the detailed reasons about the naturalisation application in the deprivation decision itself, which the FtT considered. The FtT directed himself correctly on the law, and applied it correctly, with a detailed analysis of the respondent's reasons. The respondent had shown that the condition precedent was met. Ground (1) discloses no error of law.

Ground (2)

38. It is necessary at this stage to turn to the issue of whether to admit the new evidence.

39. The evidence is a letter dated 31st August 2021 from UKVI to an unknown addressee, in response to a FOIA question on the time scale between the deprivation decision based on deception and an eventual decision on granting leave on private life, family life or human rights grounds:

> "Our records indicate that on average (mean) it took Status Review Unit 303 days to grant temporary leave following an earlier decision to deprive citizenship on grounds of fraud. This is calculated from Appeal rights were exhausted on the deprivation of appeal.

> For those cases that became appeal rights exhausted and where Status Review Unit subsequently served the order that formally deprives citizenship, our records indicate that on average (mean) it took Status Review Unit 257 days to grant temporary leave, following the service of the order.
>
> The following notes should be taken into account when viewing this data:
>
> 1. These statistics have been taken from a live operational database. As such, numbers may change as information on the system is updated.
>
> 2. Data extracted 30/03/21
>
> 3. Data relates to Main applicants who have been deprived of citizenship on grounds of fraud and have had a subsequent grant of temporary leave decision made by Status Review Unit. This includes all limited leave grants, some of which may not necessarily be on human rights grounds.
>
> 4. If no appeal was lodged against the deprivation decision, then Appeal Rights Exhausted date has been calculated by adding 14 days to the deprivation date…'

40. It is not necessary to recite the remainder of the letter.

Procedural rigour

41. While we do not criticise Mr Wilding, (the issue is more for his instructing solicitors) the challenge we faced was that the appellant had made no reference to Rule 15(2A) in his documents. It was not until we queried with Mr Wilding whether such an application had been made, that he relied on the grounds of appeal (§§12 to 17) and his skeleton argument dated 17th January 2023 (§§17 to 24), both of which indicated the nature of the evidence (the respondent's answer to a FOIA request). We were also not assisted in not initially having a copy of the FOIA response.

42. In this context, we emphasise the importance of procedural rigour. Rule 15(2A) provides:

> "(2A) In an asylum case or an immigration case—
>
> (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—
>
> (i) indicating the nature of the evidence; and
>
> (ii) explaining why it was not submitted to the First-tier Tribunal; and
>
> (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence."

43. §4 of the Senior President's Practice Directions of the Immigration and Asylum Chambers emphasises the importance of complying with Rule 15(2A).

Applications made by way of references in grounds and skeleton arguments risk the adjournments of, or delays in hearings.

The merits of the application

44. Mr Clarke objected to the introduction of the evidence. He accepts that the appellant cannot be criticised for not having discovered the evidence earlier. Mr Wilding, whom we had no reason to doubt, discovered the existence of the FOIA response recently (but not the response itself), by happenstance, in an unreported decision of this Tribunal promulgated only a week before the FtT hearing. Mr Clarke seeks to criticise whether it would resolve a factual issue in the appellant's favour, as the FOIA response was of some age (31st August 2021); related to an even earlier period (twelve months to 31st March 2021); related to average ('mean') periods which could be skewed by outliers, and was not material, bearing in mind the important qualifications in the deprivation decision, which we will come on to discuss. We are grateful that Mr Clarke was able to address us on the new evidence, without the need for an adjournment.

45. Despite our concerns about procedural rigour, we decided to admit the new evidence, pursuant to our discretion to do so. The evidence is credible (it is a genuine FOIA response) and the appellant could not have obtained it with reasonable diligence for use at the FtT hearing. Further, we conclude the evidence would probably have had an important influence on the FtT's decision, albeit not necessarily decisive, in relation to the Article 8 proportionality analysis of the limbo period.

46. In considering proportionality, the FtT had cited the Upper Tribunal decision of Hysaj (see earlier). That case in turn had considered the length of the limbo period, in which a person deprived of citizenship could not work, and the impact on him or her and family members. Practical considerations could be whether any loss of work would make a difference, if someone was not working in the first place; the earning capacities of other family members; the family's financial commitments and obligations such as towards children, and access to financial support.

47. The deprivation decision includes a section which we cite in full (given its importance) which we understand from Mr. Clarke is a standard provision:

> "46. In order to provide clarity regarding the period between loss of citizenship via service of a deprivation order and the further decision to remove, deport or grant leave, the Secretary of State notes this period will be relatively short:
>
> - a deprivation order will be made within four weeks of your appeal rights being exhausted, or receipt of written confirmation from you or your representative that you will not appeal this decision, whichever is the sooner.
>
> - within eight weeks from the deprivation order being made, subject to any representations you may make, a further decision will be made either to remove you from the United Kingdom, commence deportation action (only if you have less than 18 months of a custodial sentence to serve or has already been released from prison) or to issue leave." [our emphasis]

48. It is apparent from the FtT decision that the FtT took this to mean 12 weeks:

> "The timescale over which this will happen is set out at paragraph 46 of the respondent's decision. It is recorded that a decision will be made within four weeks of the appellants indicating that they will not appeal or within four weeks of the date by which their right to appeal ends and that a further decision on whether to grant leave will be made within 8 weeks of that, subject to any representations made by the appellants. The timescale during which Mr Lika will therefore be unable to work is *up to 3 months* [emphasis added]."

49. We observe the obvious point that both figures of 257 and 303 days appear substantially longer than a 12 week/3 month period relied on by the FtT and which has a potential corresponding impact on any proportionality for a limbo period. Moreover, even without the FOIA information, it is apparent from Mr. Clarke's explanation to us on enquiry that the FtT erred in considering the relevant timescale to be 12 weeks. Mr Clarke explained that §46 of the deprivation decision contains a caveat, which is that the eight week timetable is subject to the nature of representations received, which may raise more or less complex issues, which may therefore extend the timetable.

50. The FtT noted at §29 that the stated timeframe was similar to that in Hysaj. In fact, having reviewed the wording of the deprivation decision, it is identical to the wording in Hysaj (see §91 of Hysaj). However, in Hysaj, the UT was also informed that:

> "10.2 Mr. Palmer informed the Tribunal that the respondent would seek to minimise any period of disruption by issuing a notice of liability to deportation immediately after the deprivation order is made and that it is anticipated the respondent will be able to make a decision within six weeks from representations being received, assuming a protection claim is not lodged. We were further informed that if, in light of the representations being received, no deportation decision was taken, then it is likely that the appellant would be granted a short period of leave barring any change of circumstances." (§102)

51. The UT continued, at §106:

> "106. We are satisfied in this matter that the short time-period identified by the respondent within which the appellant will be required to make representations and for a decision to deport or a grant of leave to then be made cannot require the grant of leave to remain pending the respondent's ultimate decision as to deportation."

52. In considering how the FtT reached his decision in the present case that the 'limbo' period would be "up to 3 months" we inquired whether there had been any submissions on the point before the FtT e.g. from the respondent along the lines of the submission on behalf of the respondent in Hysaj set out above. However, Mr Wilding, who appeared below, confirmed that there had not been any submissions. He presumed, and we think it is most likely, that the FtT added the four week deprivation decision timeframe, to the eight week period for deciding whether to grant leave, to reach the cap of 12 weeks (or roughly three months). In doing so, it is apparent that despite citing it, the FtT did not appreciate the nature of the caveat, which could extend the limbo period for far longer. Had the FtT been aware, as we now are, of the figures in the FOIA

response, even noting the potential limitations and nuances in that data, as Mr Clarke argued (i.e. the figures are a mean rather than a median and there may be outliers) the evidence would have shone a powerful light on how the caveat operates in practice. In reality, the FtT had not perceived the caveat as operating in the way it did, and had simply assumed a 12 week cap. In doing so, the FtT fell into error, for which he cannot be criticised, as the caveat on timescale in the deprivation decision does not appear to have been drawn to his attention and he did not have the FOIA response data in front of him, which we now have.

53. It may be, in subsequent remaking, that the FtT ultimately concludes that a more extended limbo period would not have an impact in the appellant's circumstances. We are conscious of Mr Clarke's submissions that there was limited evidence in relation to the appellant's finances, but we also accept Mr Wilding's point that the appellant had given oral evidence as to his role in earning money for the family (§§7 and 29) which the FtT assessed under the mistaken impression that the limbo period would be 12 weeks. In the circumstances, the evidence indicating the period may be substantially longer would probably have an important influence on the FtT's decision, as the FtT would have needed to consider the impact of the loss of income over a longer time period.

Conclusion

54. For the reasons we have discussed, we do not regard the FtT as having erred in law with regard to the condition precedent. The FtT was entitled to conclude that the respondent had shown that that the condition precedent had been met.

55. The FtT erred on the limited basis, in his Article 8 ECHR proportionality assessment, in his evaluation of the length of the limbo period (§27 of the FtT's decision). We set aside that specific finding. A judge remaking will need to consider the Article 8 proportionality assessment afresh. Bearing in mind paragraph §7.2(a) and the Senior President's Practice Statement, the effect of the FtT's mistake of fact was to deprive the parties of the opportunity to put their full cases on the duration of the limbo period. We canvassed with the parties that if were to find an error on this second point, we were minded to remit remaking to the original FtT Judge (Judge Ferguson), whose decision was, in all other respects, commendably clear and well-reasoned. Neither party objected.

56. We therefore remit the matter to FtT, ideally before Judge Ferguson if possible, or if not, before any other judge of the FtT. They may decide whether to admit new evidence on the family's circumstances and the typical periods of time between deprivation decisions and any decisions on the further grant of leave.

Notice of decision

57. The FtT did not err on ground (1), in concluding the condition precedent was met.

58. The FtT erred on ground (2), on the basis of a mistake of fact that the timescale in which a limbo period would operate was "up to three months." This was a material error, such that the FtT's decisions in relation to Article 8 ECHR are not safe and cannot stand.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal (ideally, Judge G J Ferguson, or if not practicable, any other FtT Judge), subject to his preserved findings and conclusion that the condition precedent is met.

No anonymity direction is made.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28th March 2023