Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001344**

DC/00026/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 29 November 2022	**On 12 February 2023**

Before

Upper Tribunal Judge McWILLIAM
Deputy Upper Tribunal Judge MANUELL

Between

Mr ILIRIJAN ZEQUIRAJ
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Lams, Counsel
(instructed by Oaks Solicitors)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of the Appellant's deprivation of citizenship appeal, pursuant to the order of Upper Tribunal (Mrs Justice Hill and Upper Tribunal Judge McWilliam) dated 18 May 2022. A copy of the error of law finding is set out as an annex to the present decision. This sets out the legal framework in detail, as well as the facts and the history of the proceedings, and which it is unnecessary to repeat here.

2. The Appellant appealed against the Respondent's decision dated 27 February 2020 to deprive him of British Citizenship pursuant to section 40(3) of the British Nationality Act 1981 (as amended by the Nationality, Immigration and Asylum Act 2002) ("the 1981 Act").

Evidence

3. No additional evidence was called as the facts were not in dispute. The Tribunal's attention was drawn in particular to the Freedom of Information Request, dated 31 August 2021 ("the FOIA request"), which was a redacted response to a generic enquiry, published on the internet. We were not given details of the person or organisation who made the enquiry. The enquiry was as follows: -

   "What we are looking for is the timescale for the Status Review Unit specifically to consider granting leave on private life, family life or Human Rights grounds following the cancellation of citizenship. We are not interested in cases subsequently determined by other departments or following further applications … If it helps the status review unit writes in its decision letters that consideration will take place within 8 weeks of the tribunal decision. In our experience the time period is considerable longer and we wish to have the date necessary to assess that assertion." The response stated that " 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."

Submissions

4. Mr Lams relied on his Rule 24 response to the application to appeal the decision of the First-tier Tribunal, now set aside. Paragraph 24 of the Rule 24

response raised the sequencing issue, i.e., whether the Respondent was entitled to make the further immigration decision required *after* the deprivation of citizenship order had been made, or whether fairness to the Appellant demanded that *simultaneous* decisions should be made. Mr Lams contended that there was no prohibition on simultaneous decision-making, which was the proper course.

5. Mr Lams submitted that notwithstanding the view of the policy which had been taken at the error of law hearing, of which the panel reminded him, the decision to deprive and the grant of leave should have been made sequentially. He relied on judicial comment in Ahmed and Other (deprivation of citizenship) [2017] UKUT 00118 (IAC) and more recently in Laci v SSHD [2021] EWCA Civ 918 (footnote 3).

6. As to the period of limbo between decisions (if/when not made sequentially), Mr Lams submitted that this was relevant to the challenge on public law grounds and that under Article 8. The submission relied on the sequencing issue causing a period of limbo. The decisions should be made in tandem which would avoid the limbo period, with all its negative effects placing the Appellant into a hostile environment. He contended that the SSHD had not been straightforward about the period of limbo (a submission which relied on the response to a FOIA request) and that, when considering proportionality, what was said in Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC), should be considered in the light of this. It was a public law error not to make simultaneous decisions. The Appellant's appeal should be allowed.

7. Mr Clarke for the Respondent submitted that the discretion had been lawfully exercised and that the deprivation decision was reasonable and proportionate. The three stage approach mandated in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC) had been followed. The FOIR was of no assistance to the Appellant, as the period of the data collected was not clear, the results given were averages which did not necessarily indicate how individual cases were determined. There was nothing to suggest that the targets indicated in the decision letter by the SSHD were misleading.

8. The Appellant's situation was in fact far better than that of the appellant in Hysaj. The Appellant's wife was a co-

tenant and there was no reason why she could not work. The Appellant was simply being returned by the deprivation decision to his original position. He had committed fraud and had no entitlement to have his position improved. He could not show that his or his family's private interest outweighed the public interest, which was strong, namely maintaining the integrity of British Nationality law. There was no exceptionality or any rare or compelling factor. The appeal should be dismissed.

9. Mr Lams addressed the Tribunal in reply, reiterating his sequencing argument and submitting that the Appellant would be subjected to an excessively delayed limbo period which outweighed the public interest.

Remaking the decision – discussion

10. The Tribunal considers that the arguments advanced by Mr Lams at some length were the same for all practical purposes as the arguments he had advanced before panel at the error of law hearing. In so far as the Home Office policy (para 55.7.11.6) is concerned, the Upper Tribunal identified in the error of law determination that the decision of the SSHD disclosed evidence that the sequencing issue had been considered and that the Appellant's case was not in the "some cases" category. The error of law panel found that it was arguable that there was no exercise of discretion not to grant immigration status at the same time as deprivation under the policy, because in the view of the decision maker the deprivation decision would not breach the Appellant's rights under Article 8. We are accordingly satisfied that the policy was properly applied and that discretion had been properly exercised by the SSHD.

11. In our view, it is clear that the policy does not require sequential decisions to be made as a matter of course. At the same time, we agree that there could sometimes be merit in simultaneous decisions; however, the SSHD's policy in this respect is plainly a matter for her and not the Tribunal. We find that the decision not to make simultaneous decisions in this instance does not give rise to a public law error.

12. The decision letter states as follows:-

"32. 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 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 issue leave."

13. The Appellant relied on the response to a FOIA request , asserting that it disclosed very significant delays in the decision making progress. The SSHD has chosen not to produce any evidence to undermine the FOIR. Mr Clarke stated that the Respondent's position remains that the time estimate given in the decision letter is accurate.

14. As Mr Clarke submitted, there are obvious problems arising from the weight which the Appellant seeks to place on the FOIR. The first problem is that while the FOIR was dated 31 August 2021 and stated that the data was extracted on 30 March 2021, it is not clear to what period of time the figures provided relate. Point 6 of the response states: " the data goes up to 31 December 2020 which was the last reportable period in line with the published statistics". The SSHD's decision was dated 20 February 2020. As was noted by the error of law panel, the FOIA request/response was not before the original decision maker.

15. We do not accept that the Respondent's Review (prepared in accordance with directions for the First-tier Tribunal) and which post-dated the decision of the SSHD is the decision under review. The decision on which the SSHD relies is that of 27 February 2020. In any event, the FOIA request and response lack clarity. Looking at the request made which is set out in the response, we understand the reference to "cancellation of citizenship" is to the deprivation decision and that, in the absence in the request to the making of representations /submissions, it is likely that the author of the request intended to include the making of representations/submissions within the timescale sought. While it might be the case that the SSHD has stated at other times that consideration will take place within eight weeks of a tribunal decision, she did not do so in this case. Moreover, the request concerns not only

Article 8 ECHR cases but human rights generally which could include Article 2 and 3 ECHR cases.

16. Another obvious problem with the response to the FOIA request is that it gives a mean average figure. There is likely to be variation in the types of applications for further leave to remain made. The request would suggest that the figure sought includes, say, cases made on medical grounds under Article 3 ECHR or cases where an applicant is relying on risk on return or issues generally outside of Article 8 ECHR and those involving issues not previously raised.

17. Furthermore, the response to the FOIA request at point 3 clearly states that there are matters that should be taken into account when viewing the data, including that the figure includes all limited leave grants, some of which may not be on human rights grounds. Points 4 and 5 muddy the waters concerning the calculation of the figure. At point 5 it is stated that the period is counted from when an appellant become appeal rights exhausted to the grant of leave. This would include the initial four weeks period after a person becomes appeal rights exhausted within which the SSHD, according to the decision, would make a deprivation order.

18. Thus neither the request made nor the response given under the FOIA is of any assistance to the Appellant either in the context of public law argument or Article 8. While the SSHD has not provided any further clarification on the FOIA response, Mr Clarke made it clear that the position of the SSHD is as set out in the decision letter. We find that the FOIA response does not undermine the position of the SSHD. There is nothing that would support that the timeline relied on by the SSHD is inconsistent with the information contained in the FOIA response. What is clear is that the decision letter does not purport to set out a clear timeline. The decision discloses that the eight week period is subject to representations made by the Appellant. The timing and the nature of the representations will as a matter of commonsense vary from case to case, which is probably why the decision maker does not indicate a fixed period following further submissions.

19. When reaching our decision we have taken into account that in this case the Appellant is likely to make representations and/or further representations and therefore the limbo period for him might well be in excess of eight weeks.

20. In respect of Article 8 ECHR, our assessment is limited, in accordance with Aziz v SSHD [2018] EWCA Civ 1884. In so far as the Appellant relies on the limbo period, we reject the submission that the limbo period is in this case likely to be longer than that in Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC). The SSHD confirmed in Hysaj that within eight weeks of the deprivation order being made, subject to any representations received, a decision will be made as to whether to commence deportation, seek to remove or grant limited leave to remain. This is the same position that the SSHD has taken in this case.

21. The Appellant's solicitors wrote to the SSHD on 25 November 2022, seeking further clarification about the limbo period. It is unclear why the enquiry was left so late, but the request does not add anything to the Appellant's case. In any event, the SSHD has not been given the opportunity to respond.

22. Accordingly, we must consider what will happen in the period of limbo. The Appellant did not submit any further evidence, relying on the evidence which was before the First-tier Tribunal. Obviously the Appellant will be unable to work, but his wife is working and they own their home and have savings. The children's education will continue.

23. As Mr Clarke submitted, that evidence showed that the limbo period would not produce any consequences of special difficulty for the Appellant and/or his family, let alone consequences sufficient to outweigh on the public interest. That public interest, the integrity of British Nationality law and the naturalization process is powerful. We find the public interest outweighs the Appellant's private interest by a significant margin. It follows that the Appellant's appeal is dismissed.

24. We conclude that there is no public law error properly identified in the decision of the SSHD. The SSHD properly applied the relevant policy and reached a decision that was open to her and

25. We conclude that the decision is proportionate and we dismiss the appeal under Article 8 ECHR.

DECISION

The appeal as remade is dismissed

FEE AWARD

There can be no fee award.

Signed **Dated** 7 December 2022

R J Manuell

Deputy Upper Tribunal Judge Manuell

APPENDIX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
UI/2021/001344

DC/00026/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House
in hybrid hearing format
On 11 May 2022

Decision & Reasons
Promulgated

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Before

THE HON. MRS JUSTICE HILL (sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ILIRIJAN ZEQIRAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr P Nathan, Counsel instructed by Oaks Solicitors

DECISION AND REASONS

Introduction

1. We refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He was born in Albania on 18 November 1973. By this appeal the Secretary of State for the Home Department ("the SSHD") appeals against a Decision of Judge Colvin of the First-tier Tribunal ("the Judge") promulgated on 8 November 2021 after a hearing on 12 October 2021. By that Decision, the Judge allowed the Appellant's appeal against the SSHD's decision dated 27 February 2020 to deprive him of British citizenship pursuant to section 40(3) of the British Nationality Act 1981 (as amended by the Nationality, Immigration and Asylum Act 2002) ("the 1981 Act"). Permission to appeal was granted by First-tier Tribunal Judge Parkes on 29 December 2021.

The factual background

2. On 4 December 2001 the Appellant arrived in the UK. He applied for asylum in the name of Ilirijan Bejkollari as a Serbian national. On 8 July 2002 he was granted refugee status and indefinite leave to remain in this identity, on the basis that he was a citizen of Serbia and had a well-founded fear of return to that country. On 28 February 2007 the Appellant made an application for naturalisation in the same identity. On 10 May 2007 he was granted British citizenship.

3. Following an application in 2019 by the Appellant for a passport on behalf of a child, investigations revealed that his true identity was Ilirijan Zequiraj, an Albanian national. By letter dated 27 February 2020 the SSHD gave the Appellant notice of a decision to make an order to deprive him of his citizenship. The SSHD was directed to review the decision by the First-tier Tribunal. By a supplementary letter dated 12 July 2021 the SSHD confirmed her decision.

4. The SSHD indicated to the Appellant in correspondence that within four weeks of the Appellant's appeal rights being exhausted, the deprivation order would be made, and within eight weeks of the order being made, the SSHD would decide whether to remove him, commence deportation action or grant him leave to remain.

5. By letter dated 31 August 2021 the Home Office provided the Appellant with data under the Freedom of Information Act 2000 ("FOIA"), indicating that the average time between service of a deprivation order and a grant of temporary leave was in fact 256 days (36-37 weeks).

The hearing before the First-tier Tribunal

6. The Appellant accepted that he had used deception in his asylum claim and subsequent applications. However he argued that deprivation of his citizenship was a disproportionate exercise of the SSHD's discretion and/or disproportionately breached his private and family life under Article 8 of the European Convention of Human Rights. He has now resided in the UK for over 20 years and has been in employment and paid taxes throughout that time. He has three British citizen children then aged 13, 12 and 5 who have lived here all their lives and are doing well in school. He argued that the deprivation of citizenship would have a very detrimental effect on the best interests of his children as it will mean he can no longer work and support his family.

7. The Appellant argued that paragraph 55.7.11.6 of the SSHD's policy guidance on deprivation and nullity of British citizenship (July 2017) made clear that Article 8 considerations were relevant at the deprivation stage, subject to the general warning against 'proleptic' analysis in this regard (see Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC), at [37]-[38]). In this case, there was no real prospect of his removal from the UK following a deprivation decision given that he has three British citizen children. However, according to the FOIA data, the limbo period was significantly longer than the target figures provided to the Appellant and during this period he would be seriously prejudiced in his ability to support his family and enjoy family life as he would no longer be able to work. Accordingly this was a case where the deprivation and immigration status decisions should have been taken at the same time, so as to avoid creating a 'limbo' period between the two decisions.

8. The SSHD referred to the Appellant's "calculated fraud and deliberate attempt to circumvent the immigration rules" and argued that it was reasonable to assume that he would have continued with the deception as to his identity if he had not been caught. She had acted in accordance with her policy. Her decision had considered the impact of deprivation on the Appellant's Article 8 rights: see paragraphs 25-27 of the 27 February 2020 letter and the review document.

9. Further, she argued that a deprivation decision would not, in itself, preclude the Appellant from remaining in the UK or have a significant impact on the interests of his children. There was "absolutely no possibility" that the Appellant's children would be removed as they were British citizens. While deprivation would have the necessary consequence that the Appellant would lose his entitlements and benefits, these were things to

which he has no proper entitlement due to the fraud which has inevitably led to the situation he and his family are facing. She relied on Hysaj at [110] as support for a limbo period of the kind that had been intimated to the Appellant as being proportionate. Overall, therefore, the decision to deprive the Appellant of citizenship was proportionate.

The Judge's Decision

10. The Judge identified the two issues for determination as (i) whether the SSHD's decision breached paragraph 55.7.11.6 of her policy guidance; and (ii) whether it was a disproportionate exercise of her discretion, resulting in a breach of Article 8: see paragraph [23].

11. The Judge concluded that the wording of paragraph 55.7.11.6 meant that the decision-maker had to consider the impact of deprivation on the Appellant's Article 8 rights and if there was an impact, whether deprivation action was proportionate. Further, the policy guidance and statutory framework permitted the making of the deprivation and immigration status decisions at the same time so as to ensure that deprivation action is proportionate: [24]-[25].

12. Having reviewed the wording used in the original deprivation letter and the review document, the Judge concluded that there was a "strong argument" for saying that the reasonably foreseeable consequences of deprivation the Appellant's citizenship had been "too narrowly considered" by the decision-maker and "important aspects, particularly…the impact on the family and the best interests of the children" had been disregarded. Further, the Judge held that a broader assessment would not have involved a "proleptic" assessment as it would have been readily apparent from the facts and the applicable law that there was no real prospect of the Appellant being removed from the UK: [26]-[28].

13. The Judge also found that the decision-maker had given "no apparent consideration" to the impact of the limbo period created by the sequencing of the decisions other than the setting out of the targeted timescale for the immigration detention decision. Further, the FOIA data made clear that the target times set out by the SSHD were "significantly misleading": [29].

14. The Judge noted that during the limbo period the Appellant would have no legal status and thus face restrictions on the right to work, to rent accommodation, to have a bank account and to hold a driving licence. The Judge continued: "It is submitted that particularly in the present exceptional period

of the Covid pandemic the loss of security of the right to reside and the loss of any ability to work in the UK and earn money in order to provide for the children during a lengthy limbo period would be disproportionate in terms of Article 8. It is further said that the uncertainty and stress that this may well cause the children would not be in their best interests. Whilst it can be said that the [A]ppellant has brought this state of affairs on himself that is not the same for the children who should not be blamed for the misdeeds of their father": [30].

15. The Judge concluded that the "narrow decision making approach" meant that the SSHD had "failed to follow her own policy guidance by not making the two decisions of deprivation and immigration status at the same time thereby resulting in an unlawful error". Further, the Judge was satisfied that "by failing to consider the reasonably foreseeable consequences that were readily available from the facts of the case the [SSHD] has erred in making a decision that would disproportionately interfere with the Article 8 rights of the appellant and his family members during a lengthy limbo period. I consider that both matters taken together mean that the [SSHD]'s decision was a disproportionate exercise of her discretion". On this basis, the Appellant's appeal was allowed: [31].

The appeal in overview

16. The appeal hearing on 11 May 2022 took place in hybrid format. Mr Clarke joined the hearing remotely. All other parties were in court in person.

17. The SSHD advanced four grounds of appeal arising from the Judge's approach to (1) the sequencing issue in the policy guidance; (2) the decision-maker's consideration of the limbo period; (3) the FOIA data and the legal approach to the impact of the limbo period; and (4) Article 8.

18. The Appellant resisted the appeal on all four grounds, in summary on the basis that all the Judge's conclusions were ones they were entitled to reach.

19. The appeal hearing was a hybrid one in that Mr Clarke appeared by video link, but everyone else was in person.

Analysis

Ground (1): The sequencing issue

20. The SSHD argued that the Judge failed to follow Begum v SSHD [2021] EWCA Civ 918 at [124] which limited the First-

tier Tribunal's role on the application of policy pertinent to the section 40(3) discretion to that of a judicial review approach.

21. The Appellant submitted that the policy was to the effect that in all cases where human rights are engaged, the decision-maker should consider whether to grant permission to stay or remove at the same time as the deprivation decision. The Judge was right to accept the submission that on the facts of this case, the failure to take simultaneous decisions on deprivation and immigration status was contrary to policy and thus unlawful and/or a disproportionate breach of Article 8.

22. Reliance was placed on Lumba v SSHD [2011] UKSC 12 at [26] to the effect that the SSHD must follow her published policy unless there is good reason not to do so. There has also been judicial comment supportive of the taking of simultaneous decisions: Ahmed and Others (deprivation of citizenship) [2017] UKUT 118 (IAC) at 77, per McCloskey J, President of the Upper Tribunal and Laci v SSHD [2021] EWCA Civ 918 at footnote 3.

23. On balance, we prefer that the SSHD's arguments on this issue.

24. Paragraph 55.7.11.6 of the SSHD's policy reads as follows:

> "The caseworker should consider the impact of the deprivation [of citizenship] on the individual's rights under the European Convention on Human Rights (ECHR). In particular you should consider whether the deprivation would interfere with the person's private and family life and if so, whether such action would nevertheless be proportionate. In some cases it might be appropriate to remove citizenship but allow a person to remain in the UK. In such cases you should consider granting leave in accordance with the guidance on family and private life" [emphasis added].

25. The policy therefore makes clear that whether to make a decision to deprive someone of citizenship but grant them leave to remain at the same time as the deprivation decision, or whether to allow for those decisions to be made sequentially in the usual way, is a matter for the caseworker's discretion.

26. When considering the exercise of the SSHD's discretion under section 40(3) by reference to policy guidance, the role

of the First-tier Tribunal is limited to an irrationality test. This much is clear from Begum at [124]:

> "…the question how the policy applies to the facts of a particular case is generally treated as a matter for the authority, subject to the Wednesbury requirement of reasonableness. That is most obviously the correct approach where…the application of the policy expressly depends upon the primary decision-maker's exercise of judgment…"

27. The First-tier Tribunal Judge in this case cited Begum at [18] of the Decision, but for a different purpose. The Judge did not refer to or quote [124] of Begum or give any clear indication that they were applying a judicial review test to the policy issue inherent in this ground.

28. There was evidence at paragraph 24 of the decision letter that the decision-maker had considered the sequencing issue and concluded that the deprivation decision was still reasonable and proportionate, without granting leave. The discretion (whether to grant immigration status at the same time as a deprivation decision) applies in a case where the SSHD decides that a decision to deprive without an immigration decision would breach a person's rights under Article 8. The decision-maker considered that a decision to deprive without an immigration decision would not breach the Appellant's rights under Article 8. Therefore the Appellant's case was not in the "some cases" category (see the policy). The Judge did not identify a public law error in the SSHD's decision. The Judge's finding that the decision of the SSHD was a "disproportionate exercise of her discretion" discloses a wrongful approach because the issue before the Judge (with reference to the exercise of discretion under the policy) was whether the decision is Wednesbury unreasonable which does not call for a proportionality assessment.

29. It is arguable that there was no exercise of discretion by the SSHD (not to grant immigration status at the same time as deprivation) under the policy because in the view of the decision maker the deprivation decision would not breach the Appellant's rights under Article 8. In any event, it is clear from [27]-[31] of the Decision that the Judge reached their own decision to the effect that the deprivation and immigration status decisions in this case should have been reached sequentially. This was a material error of law following Begum and the reformulated guidance in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC).

30. By the use of the word ‘disproportionate’, if the judge was intending to address proportionality under Article 8, the assessment is flawed because of, amongst other things, the wrongful approach to the exercise of the SSHD’s discretion (see Ground (4)).

Grounds (2) and (3): The limbo issues

31. By Ground 2, the SSHD argued that the Judge’s finding that the limbo period had not been considered by the decision-maker beyond the setting out of the targeted timescales at [29] was mistaken in fact and perverse, as paragraph 28 of the decision letter made it clear that the limbo issues had been considered more widely.

32. By Ground 3, the SSHD submitted that the Judge had given inadequate reasons for taking the FOIA data figures as determination of the length of the limbo period and had failed to balance the limbo period against the public interest, or identify any rare or exceptional features to outweigh the public interest, as required by KV (Sri Lanka) v SSHD [2018] EWCA Civ 2483 and Hysaj at [105]-[110] and [118].

33. In response, the Appellant argued that the FOIA data showed that there had been very significant delays in Home Office decision-making, to which the Judge was entitled to have regard as this extended the limbo period to which the Appellant would be subjected, when he could not work. Given that the SSHD could make simultaneous decisions, thus avoiding the limbo period, the decision was disproportionate as the interference with Article 8 occasioned by the limbo period was wholly unnecessary.

34. We consider that the Judge erred by finding that the decision-maker had only given the limited consideration to the limbo issue set out at [29] of the Decision. Paragraph 28 of the deprivation letter refers to the SSHD’s consideration of the issues under section 55 of the Borders, Citizenship and Immigration Act 2009. This requires the Home Office to carry out its functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. The factors referred to in paragraph 28 in the context of section 55 related directly to the impact of the limbo period on the Appellant and his family. We therefore consider that there is force in Ground (2).

35. As to Ground (3), we have several reservations about the FOIA issues.

36. Insofar as the elements of the Judge's analysis which were to be conducted applying judicial review principles, the FOIA material was not before the original decision-maker. It is not apparent that it reflects the position as at the date of the original decision. We are also unclear how this matter was canvassed before the Judge.

37. Further, albeit that the Judge was entitled to attach some weight to the FOIA material in the Article 8 analysis, we consider that the Judge fell into error by failing to apply the legal framework pertinent to the limbo issue derived from KV and Hysaj. The Judge failed to balance the findings about the limbo period against the public interest, or identify whether there were "rare", "very compelling" or "exceptional" features such as to outweigh the public interest, as these cases indicate is required.

Ground (4): Article 8

38. Alternatively, the SSHD submitted that, if the Judge had in fact carried out an Article 8 assessment (which was not accepted), the assessment was flawed for the reasons covered in the previous grounds and because of the failure to have regard to the Chapter 18 policy considerations set out in the decision letter.

39. The Appellant argued that given that the limbo period was disproportionate and in breach of Article 8, the Judge was entitled to reach the conclusions they did on this aspect. Reliance was placed on Aziz v SSHD [2018] EWCA Civ 1884 at [30] for the proposition that there could be circumstances, albeit uncommon, in which the Article 8 considerations were sufficiently strong to be relevant at the deprivation stage. This was such a case given the SSHD's view that the Appellant's three children were not removable. The Judge was entitled to accept the submission to this effect.

40. The Judge's reasoning at [23]-[30] considerably elided the findings in respect of the policy with the findings on Article 8 (perhaps understandably, given that Article 8 issues were integral to the policy issue about the sequencing of the decisions). However the consequence of this is that the decision in respect of Article 8 was, in our view, vitiated by the Judge's errors of law with respect to the policy issue under Ground (1) and the limbo issue under Grounds (2)-(3).

41. For these reasons we agree with the SSHD that the findings on Article 8 are not sustainable. The judge materially erred. We set aside the decision of the First-tier Tribunal

(pursuant to s.12(2)(b) of the Tribunals, Courts and Enforcement Act 2007) to allow the Appellant's appeal.

Conclusion

42. We therefore allow the SSHD's appeal on all four grounds.

43. As to disposal, our provisional view taking into account the Practice Statement of the Senior President of Tribunals is that this appeal should be remade in the UT.[1] The parties would be expected to address the limbo period at the time of any such hearing.

Directions

44. The parties are directed to submit written submissions in respect of venue **within 14** days from the sending of the decision, in default of which the matter will be re-heard afresh in the UT.

Notice of Decision

The appeal is allowed.

Signed **Mrs Justice Hill**
Date 18 May 2022

The Hon. Mrs Justice Hill

[1]1. The Practice Statement of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal on or after 25 September 2012 (amended March 2018) reads as follows:

Disposal of appeals in Upper Tribunal

7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.