IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002901

First-tier Tribunal No:
DC/00039/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 April 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

KRESHNIK PAJO
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A Papasotiriou, counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 20 March 2023

DECISION AND REASONS

Introduction

1. This is the continuance hearing in the appellant's appeal against the decision made by the Secretary of State on 17 June 2020 to deprive the appellant of his British citizenship.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Factual Background

3. The appellant arrived in the United Kingdom during 1999 and unsuccessfully claimed asylum on the basis he was from Kosovo. The appellant's appeal against that decision was dismissed and his appeal rights were exhausted in March 2003. The appellant completed a Legacy Scheme questionnaire in 2008, citing compassionate and human rights grounds. He was granted indefinite leave to remain on 16 March 2009 on the basis of his long residence and compassionate grounds and was naturalised as a British citizen on 31 March 2011.

4. On 6 March 2020 the respondent's Status Review Unit informed the appellant that consideration was being given to depriving him of his British citizenship for claiming asylum in a false identity and inviting his representations.

5. The Secretary of State decided to deprive the appellant of his citizenship for reasons set out in a decision dated 17 June 2020.

6. Following a hearing before the First-tier Tribunal there were three issues in dispute. Firstly, was the respondent empowered to deprive the appellant of his citizenship. Secondly, would the impact of deprivation on the appellant's private and family life be disproportionate. Lastly, was the respondent's exercise of discretion lawful. The appeal was allowed as the judge did not accept that the appellant's deception as to his nationality was directly material to the decision to grant citizenship and consequently the condition precedent in section 40(3) of the British Nationality Act 1981 was not met.

7. The Secretary of State was granted permission to appeal, and the decision of the First-tier Tribunal was subsequently set aside following an error of law hearing which took place on 16 November 2022. That decision is annexed hereto.

The hearing

8. In advance of the hearing, the appellant's representatives made a Rule 15(2A) application to adduce fresh evidence. That application was granted at the start of the hearing. The appellant attended the hearing and gave evidence with the assistance, from time to time, of an Albanian interpreter whom he confirmed he understood.

9. Both representatives made submissions. Mr Papasotiriou submitted that the condition precedent was not met, that the decision to deprive the appellant of citizenship was disproportionate owing to the appellant's personal circumstances and that discretion ought to have been exercised differently. Mr Papasotiriou also relied upon the skeleton argument he had prepared for the First-tier Tribunal hearing.

10. At the end of the hearing, I reserved my decision.

Discussion

11. In reaching this decision, I have had regard to all the evidence before me and submissions made even if not specifically mentioned.

Legal Framework

12. By virtue of section 40(3) of the British nationality Act 1981:

> "The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of— (a) fraud, (b) false representation, or (c) concealment of a material fact."

13. The Secretary of State's guidance, Deprivation and Nullity of British citizenship, under section 40 of the 1981 Act is set out at Chapter 55 of the Nationality Instructions.

14. I am bound by *Begum* [2021] UKSC 7, which at paragraph 68 said: 'appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so…'.

15. In *KV* [2018] EWCA Civ 2483 the following principles were set out [6] for consideration in an appeal under section 40A of the BNA:

> (1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.
>
> (2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.
>
> (3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection.
>
> (4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.
>
> (5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of

> British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently.
>
> (6) As it is the Secretary of State who has been charged by Parliament with responsibility for making decisions concerning deprivation of citizenship, insofar as the Secretary of State has considered the relevant facts, the Secretary of State's view and any published policy regarding how the discretion should be exercised should normally be accorded considerable weight (in which regard see Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799). 31.

16. Also relevant is the guidance in *Ciceri* (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC), which further clarified the approach that should be adopted in assessing the respondent's exercise of her discretion in deprivation cases and the proportionality determination.

Decision on the relevant condition precedent specified in section 40 (3) of the 1981 Act

17. To be fair to the appellant, when he was informed that deprivation of citizenship was being considered, he expressed regret at 'lying' in his citizenship application about his nationality. The appellant thus accepts that he made false representations in his citizenship application that he was a national of Kosovo and concealed that he was, in fact, a national of Albania. Consequently sections 40(3) (b) and (c) the 1981 Act are engaged. In addition, on 7 October 2010, the appellant replied 'no' to the question '*Have you engaged in any other activities which might indicate that you may not be considered a person of good character'* and signed a declaration that he had given correct information on the form and that he understood that his citizenship may be withdrawn if it was obtained by 'fraud, false representation or concealment of any material (fact).'

18. Mr Papasotiriou argued that the appellant's falsehoods were not material to the decision to grant him citizenship because whether he was Albanian or Kosovan was irrelevant, with reference to paragraph 55.7.4 of the Guidance.

19. I reject that submission. Putting aside the fact that the appellant had, hitherto, been falsely claiming to be a Kosovan throughout his time in the United Kingdom, he was required to be honest when completing his naturalisation form and he was not. Ultimately, the respondent had to decide whether the appellant is of good character, and it cannot seriously be argued that he is. In this, I am guided by the following passages from *SK* (Sri Lanka) [2012] EWCA Civ 16.

> 31. In relation to naturalisation, on the other hand, the test is whether the Secretary of State is satisfied that the applicant is of good character. It is for the applicant to so satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an applicant is

> of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation. For these reasons too a decision in one context is not binding in the other.
>
> 36. I would add two further comments. First, the judge, and indeed counsel, referred to the Nationality Instructions as policy guidance. However, most of them are not guidance as to policy in the sense of a statement as to the Secretary of State's exercise of a discretion or power, of the kind considered in R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12 [2011] 2 WLR 671. They are in the main practical instructions to decision makers as to how they are to go about deciding whether to be satisfied that an applicant for naturalisation has shown that he is of good character. Secondly, since the Secretary of State cannot waive the statutory good character requirement, the Instructions could not require her to accept the good character of an applicant who could not sensibly be regarded as such.

20. There is a direct nexus between the making of false representations and the appellant concealing his identity, and the acquisition of British citizenship. It cannot be said that the respondent made findings of fact which were not supported by the evidence nor that such findings could not reasonably be held.

21. The respondent's view that the appellant was not of good character was a manifestly rational outcome and thus the condition precedent in section 40(3) is satisfied and the respondent had the power to exercise her discretion.

22. I should add that I accept Mr Papasotiriou's submission that the appellant's fraud was not relevant to the grant of indefinite leave under the Legacy scheme. I also accept that it is somewhat irrational for the respondent to say that had it been known that the appellant was Albanian, he would have been removed, given that the appellant was appeal rights exhausted and could have been removed to Kosovo, at any point during the years between 2003 and 2009.

<u>The reasonably foreseeable consequences of deprivation</u>

23. I now consider the rights of the appellant and his family under the ECHR. It is argued on the appellant's behalf that there would be a disproportionate effect on his article 8 ECHR private and family life during the 'limbo period' between the deprivation order being made and a decision by the respondent following further representations.

24. The appellant, during his oral evidence, gave a straightforward account of his employment, that of his wife and their living arrangements. His evidence in relation to the particulars of his finances was somewhat evasive and the material contained in the appellant's bundle relating to his income does not amount to corroboration of his claims, given that the overwhelming majority of it is based on unaudited accounts.

25. The appellant's oral evidence was that deprivation of citizenship would result in harsh financial circumstances for he, his wife and child. The

appellant owns a car wash as a franchisee, his wife works part-time as a cleaner so that she can take to and pick up their child from school. The appellant and his family live with the appellant's brother and family and have done so since 2015. He states that he and his family would not be able to manage financially and suggests that his brother may decide to withdraw the offer of accommodation.

26. There was no documentary evidence to support the appellant's claim that he would be unable to sell the business if he was prevented from working. Indeed, his evidence was that while he had bought the car wash business for £72,000, albeit its value had dropped to around £50,000 following the pandemic. Nonetheless, that would be a sizeable sum to support the family during the limbo period. The appellant claimed to owe money to personal loan companies as well as to the government by way of a pandemic relief loan. There was no evidence to support either contention. Nor was there any evidence to suggest that there would be any deleterious effect on the appellant's employees should he have to give up the business on being deprived of citizenship. According to the appellant's self-assessment, he draws £8,400 per annum from the business. His wife earns around £1,000 per month and the appellant stated that the family's outgoings are £1,500 per month.

27. I conclude that should the appellant have to stop working, it is open to him to ferry his child to and from school while his wife, who has leave to remain as a partner, increases her hours at work.

28. In addition, at the time of the hearing the appellant stated that he had well over £3,000 in his current account which could be used to bolster the family finances.

29. Mr Papasotiriou accepted that the length of the limbo period was unimportant, even if longer than the respondent envisaged. I find that reasonably foreseeable consequences of deprivation will be that the appellant may have to sell the franchise for the car wash and his wife may have to increase her hours of work. There was no evidence to support the claim, made during cross-examination, that the appellant's brother would ask the appellant and his family to leave.

30. The claimant in *Hysaj* (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC) was in a similar position to the appellant in this case. At [107] the Upper Tribunal remarked that the expected upheaval 'is a consequence of the appellant losing rights and entitlements from his British citizenship that he should never have enjoyed.' Also, at [109], reference is made to the availability of support under section 17 of the Children Act 1989 as well as of an application for the removal of a No Recourse to Public Funds condition of leave to remain, which is relevant to the position of the appellant's wife.

31. The financial upheaval which may be experienced by the appellant and his family during the limbo period is the natural consequences of the appellant's fraud and is insufficient to tip the proportionality balance in his

favour given the strong public interest considerations in this case. This is not a case where there is any additional or exceptional feature which justifies the appellant retaining an advantage that he should never had, applying *Laci* [2021] EWCA Civ 769 at [37]. It follows that the decision to deprive would not be contrary to the respondent's obligations under section 6 of the Human Rights Act 1998.

Exercise of discretion

32. Mr Papasotiriou argued that the decision to deprive the appellant of his British citizenship was unlawful solely because the respondent failed to take account of the appellant's Statement of Additional Grounds, which accompanied his notice of appeal against the refusal of his asylum claim in 2000. The relevance of that form is that in it, the appellant claimed that his removal to Albania would be unlawful. Mr Papasotiriou argued that information regarding the appellant's Albanian nationality was before the respondent eleven years before the appellant's grant of ILR in 2009 and his naturalisation in 2011. A cursory glance at that document reveals that in the section titled 'Your nationality,' the response provided is 'Jugoslavia – Kosova.' A passing reference to Albania in the body of the reply does not come close to an admission of having provided a false identity. Furthermore, after the Statement of Additional Grounds was filed, the appellant proceeded to maintain that he was a national of Kosovo for the following eleven years, including during his asylum appeal and naturalisation application. During his oral evidence, the appellant did not deny that he would never have come clean if not caught. His reply to the effect that he had never broken the law in twenty-three years came far from expressing remorse.

33 . I do not, therefore, accept that the respondent failed to take a relevant consideration into account in taking the decision to deprive the Appellant of his citizenship or that she has acted unlawfully or failed to follow her own policy without good reason.

Notice of Decision

The appeal is dismissed.

Signed: T Kamara Date: 21 March 2023

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The

appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002901

THE IMMIGRATION ACTS

Heard at Field House
On 16 November 2022

Decision & Reasons Promulgated
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Before

THE HON. MRS JUSTICE THORNTON DBE
UPPER TRIBUNAL JUDGE KAMARA

Between

MR KRESHNIK PAJO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Presenting Officer for the Home Office
For the Respondent: Mr Papasotiriou, instructed by Richmond Chambers

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of First-tier Tribunal Judge Peer, promulgated on 28 March 2022, upholding the appeal of Mr Pajo under section 40A of the British Nationality Act 1981 ("BNA 1981") against a decision of the respondent, made on 17 June 2020, to deprive him of his British nationality pursuant to section 40 (3) of the Act.

2. For ease of reference, the parties are referred to in this judgment as they were in the First Tier Tribunal.

Background

3. The appellant was born in Albania on 8 April 1979, making him 42 years old. He left Albania for Greece when he was 15 years old, and entered the UK on 27 September 1999, aged 20. He claimed asylum on arrival, on the (false) basis that he was fleeing from Kosovo and feared persecution by the Serbian authorities. His claim was refused in July 2000 and his appeal rights were exhausted in March 2003. He was given temporary admission to the UK and reported to the Home Office thereafter as required. Having discovered his father was critically ill with prostate cancer, he completed a Legacy Questionnaire in 2008, seeking leave on compassionate and human rights grounds. He was granted indefinite leave to remain in the UK on 16 March 2009 and British citizenship on 31 March 2011.

4. The Appellant is married, and his wife has leave to remain in the UK as the partner of a British citizen. The couple have one son, who was born on 21 April 2017.

5. Having become aware that the Appellant is Albanian, the Respondent sent him a notice of her decision to deprive him of British citizenship on 17 June 2020,

The Law

6. The legal framework was common ground. Section 40(3) Of the BNA 1981 provides that:

> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.

7. The Tribunal must first establish whether the relevant condition precedent specified in section 40(3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum v SIAC [2021] UKSC 7 (Ciceri (deprivation of citizenship appeals: principles [2021] UKUT 00238).

8. In paragraph 71 of Begum Lord Reed assesses the role of SIAC on an appeal against a decision under section 40(2) of the Act. He describes SIAC as having a number of important functions to perform. Relevantly he states:

> *"First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held.....In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State....."*

9. Chapter 55 of the Secretary of State's Nationality Instructions is titled: Deprivation and Nullity of British citizenship. It provides guidance to decision makers on deprivation on grounds of fraud, false representation or concealment of material fact. Relevant extracts provide as follows:

> "*55.7 Material to the Acquisition of Citizenship*
>
> *55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.*
>
> *55.7.2 This will include but is not limited to:*
>
> *....*
>
> *False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration.*
>
> *55.7.3 If the fraud, false representation or concealment of material fact did not have a direct bearing on the grant of citizenship, it will not be appropriate to pursue deprivation action.*
>
> *.....*

55.7.6 Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship.

55.7.8 Complicit

…

55.7.8.5 All adults should be held legally responsible for their own citizenship applications, even where this is part of a family application. Complicity should therefore be assumed unless sufficient evidence in mitigation is provided by the individual in question as part of the investigations process."

The Secretary of State's deprivation decision

10. The respondent's decision provides as follows:

"2. You are aware that UK Visas and Immigration has, on behalf of the Secretary of State for the Home Department, been actively investigating the manner in which you obtained your status as a British citizen on the grounds that this may have been obtained fraudulently (this may encompass a false representation or concealment of a material fact).

3. Following our investigations, and on the basis of the evidence presented, the Secretary of State has decided that you did in fact obtain your British citizenship fraudulently. The Secretary of State has decided that you should therefore be deprived of your British citizenship for the reasons outlined below."

11. The letter details the Appellant's immigration history before stating as follows:

"18. Had the Home Office been aware you are in fact a (sic) *Albanian national, it is likely removal would have been purused* (sic) *at asylum state* (sic), *this would not have allowed you to build up your length of residency, which would not have led you to meet the requirements to be granted Indefinite Leave to Remain (ILR). It was this grant of ILR that allowed you to meet the requirements to naturalise.*

19. In light of the documentary evidence and your now admittance that you are actually in fact from Berat, Albania, it follows your asylum claim was a complete fabrication designed to elicit a grant of status to which you would not have been entitled if your true nationality had been known. This was a calculated and deliberate attempt to circumvent the immigration rules. Chapter 55 states had your genuine place of birth been known at the time citizenship was considered, it would have affected the decision to grant citizenship (Annex P6 sec 55.7.1). 55.7.8.4 of chapter 55 also states all adults should be help (sic) *legally responsible for their own citizenship applications (Annex P8 sec 55.7.8.4). Your continued deception*

provided in your form AN subsequently led to your grant of British Citizenship.

20. When you signed your naturalisation application you confirmed you had read and understood the Guide AN (Annex Q). This guide states that in order to qualify for naturalisation you must been (sic) *certain requirements, one of these being that you are of good character (Annex Q19 sec 3). This guide also states '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. It is a criminal offence to make a false declaration knowing it is untrue.' (Annex Q18 para 2).*

21. Further clarification is provided in Chapter 18. Annex D states it should count heavily against an applicant who lies or attempts to conceal the truth about an aspect of the application for naturalisation. Concealment of information or lack of frankness in any matter must raise doubt about an applicant's truthfulness in matters (Annex R18 sec 9.1). Section 9.5.1 also states deprivation should be considered when there is evidence to suggest the application has employed fraud either; during the citizenship application process or, in a previous immigration application process and, in both cases the fraud was directly material to the acquisition of immigration leave or to the application of citizenship (Annex R19 sec 9.5.1)

22. It is therefore believed that you made false representation regarding your place of birth for the sole purpose of obtaining status in the United Kingdom (UK) at any cost. This, concealing a material face (sic) *that would have had a direct bearing on the outcome of the decision to grant your naturalisation application.*

23. It is clear you set-out to deceive the SSHD so you could remain in the UK. You have persisted with the deception that you are a national of Albania. It is reasonable to assume that you would have continued to deceive if you had not been caught. The fraud is a clear attempt to undermine the UK immigration system and obtained status to which you were not entitled and would not have been granted had the truth been known. Given your conduct deprivation is considered to be both a balanced and proportionate response."

The decision of the First Tier Tribunal Judge

12. In a section in his judgment headed "The Condition Precedent Specified in Section 40(3) of the 1981 Act", the judge set out section 40(3) of the 1981 Act, relevant parts of the Secretary of State's Nationality Instruction and the Upper Tribunal decisions of **Matusha v Secretary of State** (2021) UKUT 175 and **Sleimann (deprivation of citizenship)** [2017] UKUT 367.

13. The judge then addresses matters as follows:

> *"Analysis*
>
> *19. The Respondent's 5 July 2000 letter to the Appellant, refusing his asylum claim, states "you left Kosovo because you faced persecution from the Serbian authorities as you are from Albania". In the Appellant's statement of additional grounds dated 30 November 2000 he states "if I am removed to Albania my human rights may be violated." In the Appellant's legacy questionnaire he repeats that he is Kosovan, and asks for leave to remain on human rights and compassionate grounds. In the Respondent's 16 March 2009 letter to the Appellant informing him that he has been granted indefinite leave to remain, it is explained that this grant is "due to your strength of connections in the UK and length of residence." These reasons for the grant of indefinite leave to remain are repeated in the Respondent's notice of intention to deprive dated 17 June 2020.*
>
> *20. The Appellant told a largely untrue story to justify a claim for asylum. That claim was rightly refused but I can see nothing compelling in the evidence before me to satisfy me that the length of his stay in the country thereafter was as a direct result of his being thought Kosovan, rather than Albanian. The Respondent says had the Home Office known his true nationality the Appellant would have been "likely" to be removed at asylum stage. I am sceptical about that, not least because I accept the Appellant's unchallenged evidence that in 2004 when he was still thought Kosovan he was told by an immigration official that he could be removed from the UK by force if he did not consent, he was detained for six to seven hours, and released when an immigration official was informed (possibly wrongly) that he had an outstanding human rights claim. I do not consider it necessary to reach a conclusion on that question either way because in any event the Respondent does not say that the Appellant would definitely have been removed at asylum stage had the Home Office known he was Albanian. This means that even on the Respondent's case, it is possible that had the Respondent known the Appellant's true nationality, he would not have been removed from the country and so would have been able to build up the length of residence he has built up, enabling his grant of indefinite leave to remain and his consequent naturalisation.*
>
> *21. I have taken due account of the Upper Tribunal's decision in Matusha, placing the Appellant's deception at the more serious end of the scale. I have considered that in Matusha the court found the required materiality in circumstances of deception as to the person's age and nationality, and that "But for the continued deception the case would have been assessed with reference to negative factors that may have been properly*

regarded as sufficiently serious to justify refusal." The Respondent did not seek to argue that the facts of the Appellant's case justified the same finding here, and the Appellant argued that Matusha was not an authority for all deception as to nationality being treated as directly material. I agree, and note relatedly that the applicable guidance is that "Where deception has been employed on a previous immigration application …and was factually immaterial to the grant of leave, caseworkers should not use that deception as a reason by itself to refuse the application under section 9.5.1."

22. I have considered whether the Appellant's deception was "directly material to the decision to grant citizenship." The decision to grant citizenship flowed from the decision to grant indefinite leave to remain. The Respondent has twice provided explanations for the decision to grant the indefinite leave to remain, and on both occasions the reasons given were the Appellant's strength of connections with the UK and his length of residence here. These explanations were provided some 11 years apart - once on 16 March 2009 and again on 17 June 2020, and neither make reference to the Appellant's nationality.

Conclusion

23. In these circumstances and considering all of the relevant evidence in the round, I am not satisfied that the Appellant's false claims as to Kosovan nationality were directly material to the decision to grant him British citizenship, not least because clear and consistent reasons for the grant of indefinite leave to remain have been provided by the Respondent over a period of 11 years, and these do not make any reference to the Appellant's nationality. I am similarly persuaded by the arguments made on the Appellant's behalf as to good character requirements.

24. The condition precedent in section 40(3) of the 1981 Act is therefore not present in the Appellant's case, and his appeal is allowed on that basis."

Secretary of State's Grounds of Appeal

14. The Secretary of State contends that the FTT Judge misdirected himself as the proper approach to the materiality of the deception when considering whether the condition precedent under s.40(3) of the BNA 1981 had been met.

15. Ground 1 is said to be a failure to engage with the facts and the law and make findings. There is said to be no finding by the FTT Judge or

engagement with the issue of why the Appellant's grant of leave to remain based on length of residence could discount the Appellant's continuous deception or the implications of his continued for the good character requirements.

16. Ground 2 is said to be a misapplication of the law of **Matusha.** The FTT Judge is said to have applied the law of **Matusha R (on the application of) v SSHD** [2021] UKUT 175 at §§21-22 wrongly to the context of deprivation and failed to distinguish between deception which is ultimately expected as part of one's precarious immigration existence, and deception employed in constant interaction with the SSHD's officials.

Discussion

17. As is apparent from the s40(3) BNA, Parliament has conferred on the Secretary of State the assessment of whether British citizenship has been obtained by means of fraud or deception ('if the Secretary of State is satisfied...''). The function of the FTT (and this Tribunal) is to review the Secretary of State's assessment to consider whether the Secretary of State has erred in law; in particular to assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which she should have given weight, or has been guilty of some procedural impropriety or whether she has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. In coming to any such view, the Tribunal must give due weight to the findings, evaluations and policies of the Secretary of State (Ciceri and Begum).

18. We observe that the judge does not cite Ciceri or Begum in his legal framework. Nor does he direct himself that his approach should be that of a review of the Secretary of State's decision for the purposes of identifying error(s) of law.

19. It is apparent from the Secretary of State's notice of deprivation that she identifies two grounds on which she is satisfied that the Appellant's citizenship was obtained by deception.

20. The first ground is that it is said to be "likely" that the Appellant would have been removed when he claimed asylum in 1999, had it been known at that stage that he was Albanian. This would not have allowed him to build up the length of residency necessary to meet the requirements of ILR, which in turn enabled him to naturalise (paragraph 18 of the decision letter).

21. The judge's response to this ground is as follows:

> "I am sceptical about that not least because I accept the Appellant's unchallenged evidence that in 2004 when he was still

> thought Kosovan he was told by an immigration official that he could be removed by from the UK by force if he did not consent, he was detained for 6 – 7 hours and release when an immigration official was informed (possibly wrongly) that he had an outstanding human rights claim."

22. We are not clear how the Appellant's account of his interaction with an immigration official assists the Judge in the requisite assessment of any error(s) of law in the decision making. Nor, taken by itself, does the judge's scepticism about the respondent's position in this regard reveal an error of law.

23. The second basis on which the Secretary of State considered herself satisfied that citizenship had been obtained by deception is because the Appellant continued to practice his deception and did so on the face of the application form for naturalisation (as expressed in paragraphs 19 – 22 of the decision letter).

24. The judge rejects this ground on the basis that the grant of citizenship flowed directly from the grant of indefinite leave to remain. He emphasises that the respondent has twice explained the decision to grant indefinite leave to remain and, on both occasions, the reasons given are the strength of the Appellant's connections with the UK and his length of residence here, not his nationality. However, we do not consider this point can materially assist the Appellant's case because the explanations were provided when the Respondent was unaware of the deception.

25. The Judge does not engage with the good character basis for the respondent's decision, beyond a reference (without further explanation) in the conclusion of the decision to "I am similarly persuaded by the arguments made on behalf of the Appellant's behalf as to good character requirements.

26. Good character is, however, a material aspect of the Secretary of State's decision making on acquisition of citizenship. Pursuant to section 6(1) of the British Nationality Act 1981, the Secretary of State has a discretionary power to grant certificates of naturalisation:

> "if on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit grant to him a certificate of naturalisation as such a citizen."

27. The relevant requirements, set out in schedule 1, include that the applicant is of good character (Para 1((1)(b)). There is no statutory guidance of what constitutes good character. In the case of **R (on the application of SK) v SSHD** [2012] EWCA Civ 16, LJ Stanley Burton at [30] summarised the SSHD's role when considering good character as follows:

> *"In relation to naturalisation, on the other hand, the test is whether the Secretary of State is satisfied that the applicant is of good character. It is for the applicant to so satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation".*

28. Home Office guidance on good character explains that an applicant will not be considered to have good character if he/she has practiced deceit in his/her dealings with the Home Office.

29. In conclusion, for the reasons given, we are satisfied that the Judge made a material error of law.

The Secretary of State's appeal is allowed.

Decision

The decision of the First Tier Tribunal gives rise to an error on a point of law.

The decision of the First-tier Tribunal is set aside, with no findings preserved.

The decision will be remade in the Upper Tribunal.

No anonymity direction is made.

Signed: MRS JUSTICE THORNTON DBE Date: 30/11/2022

The Hon. Mrs Justice Thornton DBE
Sitting as an Upper Tribunal Judge