IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006559

First-tier Tribunal No: DC/50013/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

26th October 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SULEJMAN HIMALLARI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: David Clarke, Senior Presenting Officer
For the Respondent: David Jones, instructed by Oliver & Hasani Solicitors

Heard at Field House on 4 September 2023

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge Pickup against the decision of First-tier Tribunal Judge Saunders. By her decision of 29 November 2022, Judge Saunders ("the judge") allowed the appeal on Article 8 ECHR grounds and 'under s40A(1) of the British Nationality Act 1981'.

2. To avoid confusion, we will refer to the parties as they were before the First-tier Tribunal: Mr Himallari as the appellant and the Secretary of State for the Home Department as the respondent.

BACKGROUND

3. The appellant is an Albanian national who was born on 3 July 1977. He arrived in the United Kingdom on 7 June 1998. He claimed asylum, stating that he was a Kosovan national called Sulejman Duraku who was born in Gjakova on 27 July 1981. The appellant was subsequently granted leave to remain in that identity. On 2 June 2005, he was issued with British citizenship in that identity.

4. On 11 January 2022, the respondent issued a decision to deprive the appellant of his British citizenship because it had been obtained by means of deception (s40(3) of the British Nationality Act 1981 refers). The appellant appealed against that decision to the First-tier Tribunal.

THE APPEAL TO THE FIRST-TIER TRIBUNAL

5. The appeal was heard by the judge, sitting at Taylor House. The appellant was represented by Mr Jones of counsel, as he was before us. The respondent was represented by Ms Afework, a Presenting Officer. The judge heard oral evidence from the appellant and submissions from the representatives before reserving her decision.

6. The judge's reserved decision is lengthy and carefully reasoned. It is neither necessary nor desirable to attempt a full precis of it but what follows is a summary of the judge's main conclusions.

7. It was accepted by the appellant that the 'condition precedent' for deprivation of citizenship was met: [20]. That is to say that the appellant accepted that he had obtained British citizenship by means of deception. It was submitted by Mr Jones, however, that the respondent made a public law error in the consideration of her discretion and that the decision was in breach of Article 8 ECHR.

8. At [21]-[27], the judge analysed and made findings of fact upon what she rightly described as a 'central issue' in the appeal, which was the disclosure made to various Entry Clearance Officers about the appellant's true identity and 'the ECO's ability to communicate' that information to the Secretary of State. After a detailed consideration of the evidence, the judge found at [24] that there could be 'no doubt therefore that as at December 2006 the Appellant had disclosed to the entry clearance officer, via his brother, his past use of a false identity leading to the acquisition of nationality.'

9. At [26], the judge noted that there was a 'period of almost fourteen years during which [the appellant] heard nothing from the respondent'. She rejected the contention in the refusal letter that 'no mechanism' existed for information given to an ECO in 2006 to be passed to the Home Office. She considered that assertion to be 'directly contradicted by the factual matrix of *Laci*.' The judge's reference was to the decision of the Court of Appeal in *Laci v SSHD* [2021] EWCA Civ 769; [2021] 4 WLR 86.

10. At [27], the judge accepted that the appellant had come to believe, as a result of the disclosure and the Home Office's ensuing inaction, that 'no action was to be taken against him' by the respondent. She considered it 'reasonable in all the circumstances that [the appellant] believed this'.

11. At [29], the judge concluded that there had been 'an exceptionally long period of delay' on the part of the Secretary of State. She concluded in the same paragraph that the respondent's decision contained a public law error, in that she had failed to take a material consideration into account. The material consideration in question was that the ECO could have passed the true identity to the Home Office but did not, leading the appellant to believe that no further action was to be taken against him: [28].

12. At [31] *et seq*, the judge considered the appellant's Article 8 ECHR submissions. She took account of the 'heavy weight' which was to be placed on maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. At [33], the judge repeated her rejection of the respondent's contention that there were 'no means' by which the appellant's true identity could have become known to the Home Office after it was disclosed to an entry clearance officer in Tirana. At [34], the judge reminded herself of what had been said by Lord Bingham at [16] of *EB (Kosovo) v SSHD* [2008] UKHL 41; [2009] AC 1159. She considered that this was a case in which a 'dysfunctional system' had yielded an 'unpredictable, inconsistent or unfair outcome'.

13. At [35], the judge analysed the reasonably foreseeable consequences of the respondent's decision. She accepted Mr Jones' argument, which was based on a Freedom of Information response, that the appellant would be subjected to 'a limbo period approaching a year'. At [36], she rejected a submission made by Mr Jones about the operation of a past policy. At [37], she recalled that the appellant had disclosed a minor conviction in his application for naturalisation.

14. At [38], the judge summarised her conclusions in respect of Article 8 ECHR in the following way:

> Ordinarily and as set out above, very significant weight is to be applied in favour of any deprivation decision, as it reflects the importance of protecting the integrity of the immigration system and also maintaining public confidence in it. However, this is, unusually, an exceptional case where the SSHD's own extremely lengthy inaction means that the public interest in taking deprivation action now is materially less than it would have been if more timely action had been taken. Weighing up all of the above, I consider the window for deprivation action to remain proportionate has passed and the decision to deprive him of his citizenship now amounts to a disproportionate interference with his Article 8 rights. As the Court of Appeal notes in *Laci* [83], the fact that some unusual cases may succeed does not detract from the overriding expectation that in protecting the system from abuse, deprivation of citizenship will normally follow deception in its acquisition. Nevertheless this is such an unusual case. It follows that I also find that the discretion to deprive should have been exercised differently for all the reasons given, *Ciceri* [§19] applied.

THE APPEAL TO THE UPPER TRIBUNAL

15. Permission to appeal against the judge's decision was refused by First-tier Tribunal Judge Barker but granted on renewal by Upper Tribunal Judge Pickup. There are five grounds of appeal, all of which Judge Pickup considered to be arguable.

16. The grounds of appeal are significantly longer than the decision under appeal, spanning 17 pages as compared to the judge's decision of 13 pages. Each complaint is identified in bold, above the particulars, but these headings tend to obscure rather than summarise the actual ground of appeal relied upon. The third ground, for example, is 'Inadequate Reasoning/Taking into account irrelevant considerations/Failure to Resolve Conflicts of Fact/Perversity'.

17. Whilst we obviously accept that certain grounds of appeal might properly be presented or argued in one or more ways, we have not been assisted by these grounds of appeal. They are not a concise formulation of the arguments to be advanced and we have been required to 'forage, dig and mine in order to identify the essentials' of the respondent's case. The grounds do not comply with the guidance of the Court of Appeal or Upper Tribunal in cases such as *Harverye v SSHD* [2018] EWCA Civ 2848, *Nixon (permission to appeal: grounds)* [2014] UKUT 368 (IAC) or *R (SN) s SSHD* [2015] UKUT 227 (IAC); [2015] Imm AR 905.

18. As we understood the respondent's case, however, the grounds of appeal might be summarised as follows:

    (1) The judge misdirected herself in failing to have regard to Chapter 55 of the Nationality Instructions and by failing to follow the approach in *R (Begum) v SIAC & Anor* [2021] UKSC 7; [2021] AC 765.

    (2) The judge erred in treating *Laci* v SSHD and/or *Berdica* [2022] UKUT 276 (IAC) as establishing that there was a mechanism by which ECOs could communicate details of suspected fraud to the Home Office.

    (3) The judge gave inadequate reasons for concluding that the appellant had given his consent for the disclosure of his real identity in his relatives' entry clearance applications.

    (4) The judge misdirected herself in law in considering delay and in her application of *EB (Kosovo)* v SSHD to the facts as found.

    (5) The judge failed to take material matters into account in concluding that the limbo period would be in the region of a year.

19. Mr Jones settled a concise response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. He submitted in that document that the judge had not erred in law in allowing the appellant's appeal.

20. We heard relatively lengthy submissions on the grounds of appeal. We will not rehearse those submissions at this point in our decision; we will refer to them where necessary in our resolution of the specific complaints advanced.

ANALYSIS

21. The Secretary of State's appeal will be dismissed for the detailed reasons we give below. We can summarise our overall conclusion quite shortly, however. The decision of the First-tier Tribunal is as clear in its analysis of the facts as it is in its application of the law to those facts. It is replete with citation of authority and demonstrates without any room for proper doubt that the specialist judge understood the law which she was to apply in a case of this nature.

The respondent's grounds provide no proper basis for unseating the judge's decision; she was plainly entitled to allow the appeal for the cogent reasons she gave.

22. We turn to the grounds of appeal. We do not propose to deal with them in the order in which they are pleaded. As we will see, the only complaint which has any merit at all is to be found in the second ground of appeal. It was that ground which occupied most of the oral submissions and we propose to deal with that point at the end of our decision, having considered the other points first.

Ground One

23. It is submitted in the first ground that the judge overlooked the respondent's policy on deprivation of citizenship, which is to be found in Chapter 55 of the Nationality Instructions. The respondent submits in particular that the judge failed to have any regard to paragraph 55.5, which is as follows:

> *55.5 Timing*
> 55.5.1 There is no specific time limit within which deprivation procedures must be initiated. A person to whom s40 of the 1981 Act applies remains indefinitely liable to deprivation on the terms outlined above.

24. Mr Clarke submitted that the judge had erred in attaching weight to the delay in this case when the respondent's policy stated in terms that a person such as the appellant was indefinitely liable to deprivation of citizenship. As Mr Jones submitted, however, this policy was immaterial to the assessment undertaken by the judge. She did not conclude that the respondent had somehow exceeded a specific target duty; her conclusion was instead that delay was a relevant matter in her assessment of the respondent's discretionary decision and in relation to Article 8 ECHR. There is nothing in this ground of appeal; the relevance of delay in a case of this nature is established in the authorities to which the judge referred.

25. The second complaint in ground one is equally unmeritorious. Mr Clarke submitted that the judge had failed to adopt a public law review approach of the kind required by *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 115 (IAC). The judge's decision shows very clearly indeed, however, that she understood the way in which *R (Begum) v SSHD* applied in a case of this nature. She cited *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC); [2021] Imm AR 1909, in which the Supreme Court's approach to s40(2) cases had been adopted in relation to s40(3) cases and she evidently followed what was said in that regard. She accepted that the condition precedent had been satisfied but she found that the respondent had fallen into a public law error in considering the exercise of her discretion. She reached her own decision in relation to Article 8 ECHR, as was required.

26. The respondent submits at [15] of the grounds of appeal that the judge made findings of her own on the evidence, rather than considering whether there was a public law error in the respondent's findings. But to make that submission is to overlook the fact that the findings made by the judge were in relation to matters on which the respondent had made no explicit finding, for example her finding that the appellant's family had disclosed his true identity to the entry clearance officer with his consent. The judge was required to make findings on those matters; there was no relevant finding in the decision letter which she was able to review.

Ground Three

27. The respondent submits in this ground that the judge made an 'unfathomable' finding when she concluded that the appellant had given his consent for the disclosure of his true identity to the entry clearance officers. We accept Mr Jones' answer to this ground of appeal. The judge accepted the evidence before her in relation to the disclosure made by the appellant's brother in the course of his 2006 application for entry clearance. The fact that the appellant's wife failed to reveal his true identity in the course of her own application for entry clearance does not mean that the judge's finding was 'unfathomable' or somehow irreconcilable; the judge noted that the appellant had not explained why he had a 'change of heart'. The judge was clearly entitled to proceed on the basis that there had been a change of heart, and that the appellant had given his brother permission to disclose his true identity in the course of his application.

28. The remaining submissions made within this ground amount to nothing more than a disagreement with the judge's decision.

Ground Four

29. This ground begins inauspiciously by repeating the complaint in relation to Chapter 55 of the Nationality Instructions. For the reasons given above, we do not consider that point to have any merit; delay remained relevant to Article 8 ECHR notwithstanding paragraph 55.5 of the NIs.

30. The second part of this ground of appeal is that the judge is said not to have explained why she concluded that there was a 'dysfunctional system' in this case which had produced unfair or inconsistent results. We will deal with the judge's consideration of the means of communication between entry clearance officers and the Home Office in our consideration of ground two. For the present, it suffices to state that it is clear from the judge's decision why she considered there to be a dysfunctional system at work. She noted that entry clearance officers in some cases had informed the Home Office that an Albanian citizen had lied about his nationality (etc) in order to acquire status and subsequently British citizenship. That had not occurred in this case, and the judge found that the appellant had reasonably come to believe that no action was to be taken against him. The dysfunction and inconsistency could not be clearer, and the judge was entitled in our judgment to attach weight to the same, since to do so was a faithful application of what was said by Lord Bingham in *EB (Kosovo)*.

31. Insofar as it is then contended, at [45] to [50] of the grounds of appeal, that the judge's decision was inadequately reasoned in these respects, we do not accept that contention. Her reasons speak for themselves and she was clearly cognisant of all aspects of the chronology when she reached those findings.

Ground Five

32. This ground contains a discrete point about the judge's treatment of a Freedom of Information response which was relied upon by Mr Jones before her. That showed that the average 'limbo' period (between a final deprivation decision and a decision on whether to grant leave to remain) in a period to December 2020 was 303 days. Mr Clarke submitted

before us that the judge had failed to consider, for example, whether that average was current or whether it had been skewed by more complicated cases.

33. We conclude that there is no merit in this ground of appeal for a simple reason; there is nothing before us to show that the Presenting Officer before the FtT did anything other than accept the FOI response as providing a useful benchmark for the limbo period. There is a summary of her submissions in the judge's decision and she is not recorded as saying anything about this at all. We suspect that she adopted that position because she had nothing by which to gainsay the FOI response but we need not come to a firm conclusion on that. The reality is that the judge was entitled to accept the FOI response as providing an indication of the likely limbo period given that it was not contested.

Ground Two

34. This ground focuses on the judge's consideration of the ability of an entry clearance officer to communicate to the Home Office information received in the course of an entry clearance application about a sponsor's true identity.

35. It was suggested at [41] of the decision letter in this case that there was 'no mechanism in place for the Foreign and Commonwealth Office to refer cases to the Home Office for deprivation action.' The judge engaged with that suggestion. She clearly found it quite surprising, given that this was the route through which the fraud had been detected in both *Laci* and *Berdica*. We were taken to both decisions by Mr Jones. Mr Jones also took us to *Hysaj* [2020] UKUT 128 (IAC).

36. Clearly, in each decision, the Home Office had decided to take action in respect of an individual such as the appellant when their fraud had come to light in the course of a relative's application for entry clearance. There is evidently a mechanism by which such matters have been brought to the attention of the Home Office and it is rather surprising to suggest that there is not. A Foreign Office official working in Tirana might obviously make contact with the Home Office in London to alert them to a historical fraud of this nature. That is exactly what happened in less than a year when Mr Hysaj's wife made her application for entry clearance in September 2007: [4]-[5] of the Upper Tribunal's decision refers.

37. Mr Clarke therefore shifted his focus slightly in his oral submissions. He submitted not that there was 'no mechanism' in place for communication between ECOs and the Home Office but that there was 'no rule' that such referrals took place. We consider that submission to underscore rather than to undermine the analysis of the judge. As we have explained above, her concern was that prompt action had been taken against some individuals in this situation, whereas no action had been taken against the appellant for more than a decade, leading him reasonably to conclude that no action would be taken. The judge's conclusion in that regard is akin to the conclusion reached by the FtT in *Laci*, as is clear from [8] and [51] of Underhill LJ's judgment in that appeal.

38. Mr Clarke also submitted that the case was distinguishable from *Laci*, in which there had been a significant delay after the respondent had written to the appellant to confront him with the allegation of deception. Here, Mr Clarke observed, there had been no referral from the ECO to the Home Office and there had, as he put it, been no delay at all. We consider this to be a distinction which makes no appreciable difference to the way in which this case was resolved in the FtT. The judge was entitled to attach significance to the fact that no

action had been taken by the ECO after the appellant's true identity was disclosed in 2006. She considered that inaction to be inconsistent with the action which had been taken in other such cases. She was entitled to accept and to attach weight to the belief which the appellant formed in light of that inaction. The delay was not between the Home Office becoming aware of the information and the Home Office acting upon it. It was a delay between the point at which the ECO could and should have notified the Home Office of the fraud and the point at which the Home Office took action. This was not a case of delay which was directly comparable to *Laci* but we consider that the judge gave adequate reasons for concluding that there was a delay to which weight could properly be attached.

39. Mr Clarke submitted that it was difficult to discern the public law error in the respondent's decision if she had not known about the appellant's deception shortly before she decided to take action. We disagree. The judge made quite clear what she considered to be the public law errors in the respondent's decision. She had excluded a relevant consideration; the passage of time after deemed disclosure of the deception in this case. And the executive arm of the state had failed to treat like cases alike in failing to act on that disclosure.

40. We record for the sake of completeness that Mr Jones sought to introduce before us additional material which had not been before the FtT. That material was adduced in order to illustrate, firstly, that entry clearance decisions had been made within the Home Office, so that the distinction between the FCO and the Home Office was a false one. Secondly, the material showed that the respondent's Status Review Unit had a very limited number of staff in April 2017, such that it was unlikely to be able to act promptly and reliably on information received from overseas. Mr Clarke had no objection to the admission of that material but we have intentionally not considered it in this decision, since it is clear to us - without reference to it - that the judge's decision contains no error of law.

CONCLUSION

41. The First-tier Tribunal was entitled to conclude that the respondent had fallen into public law error in reaching her decision to deprive the appellant of his citizenship. It was also entitled to conclude that the respondent's decision was in breach of Article 8 ECHR. The decision of the First-tier Tribunal will accordingly stand.

NOTICE OF DECISION

The respondent's appeal is dismissed. The decision of the First-tier Tribunal stands.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 October 2023