IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006516

First-tier Tribunal No:
DC/00071/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GENTIAN MAKSIM HOTI
aka
FLORIAN MAKSIM HOTI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr David Clarke, a Senior Home Office Presenting Officer
For the Respondent: Mr David Jones of Counsel, appearing by Direct Access

Heard at Field House on 28 November 2023

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 6 June 2019, pursuant to section 40 of the British Nationality Act 1981, to deprive him of his British citizen status obtained in a Kosovan nationality to which he was not entitled. The claimant is a citizen of Albania.

2. **Mode of hearing.** The hearing today took place face to face.

3. For the reasons set out in this decision, I have come to the conclusion that the decision of the First-tier Tribunal should be set aside and remade by dismissing the claimant's appeal.

Background

4. The claimant came to the UK on 30 September 1999. He gave a false Kosovan nationality, place and date of birth: his actual date of birth was 17 June 1984, so he was a minor on arrival and it is common ground that he should not be held responsible for any deception which took place before he reached the age of majority on 17 June 2002. The claimant asserts that his family members moved to Italy soon after he left Albania

5. The Secretary of State refused the claimant's application for international protection, made in the Kosovan identity. Instead, he gave discretionary leave to remain. The claimant maintained his false identity over the years, across a number of applications and firms of solicitors representing him. He must have repeatedly given false instructions to those representing him, as well as misleading the Secretary of State.

6. Exceptional leave to remain (now discretionary leave) was granted to expire on 17 November 2003. Indefinite leave to remain was granted on 2 April 2004. In due course, a certificate of naturalisation was issued to him on 2 August 2005. The claimant accepts that in all of these applications he maintained the incorrect details originally provided.

7. The claimant travelled to Albania after his British citizen status was confirmed, and there he met his now wife, in December 2006. In April 2008 she came to the UK on a visit visa, and on 11 September 2008, they applied successfully for a Certificate of Approval to Marry. The parties married at Ealing Town Hall Registry Office on 29 October 2008.

8. An application by the claimant's wife for further leave to remain in the UK as the claimant's spouse was unsuccessful and she returned to Albania, where she made an entry clearance application on 25 May 2009, disclosing the claimant's genuine Albanian birth certificate, which had a different date and place of birth from that relied upon for the previous 10 years.

9. That disclosure triggered an investigation, and on 2 July 2009, the claimant's uncle changed his first name at the Albanian Civil Registry from Gentian to Florian, allegedly without his knowledge, because of the investigation. The uncle is now said to be deceased.

10. On 12 October 2012, entry clearance for the claimant's wife was refused.

11. On 18 February 2013, the Secretary of State wrote to the claimant stating that his grant of citizenship was a nullity (the nullity decision). On 3 September 2017, the Secretary of State wrote seeking biometric data and stating that he would grant the claimant 2 years' discretionary leave

pending the decision of the Supreme Court on the nullity point (*Hysaj and others* [2017] UKSC 82).

12. In fact, the Secretary of State granted him settlement, for reasons which are not at all clear.

13. Following the Supreme Court guidance in *Hysaj*, on 3 February 2018 the Secretary of State withdrew the nullity decision.

Chronology

14. The claimant is not to be held responsible for deception when he was still a child. The events which took place after the claimant reached the age of majority on 17 June 2002 were:

16 October 2003: Application for indefinite leave to remain, with covering letter asserting past ill-treatment and risk in Kosovo, the application being signed by the claimant, with a declaration of the truth of its contents and awareness of the consequences of deception;

2 April 2004: Grant of indefinite leave to remain;

28 March 2005: Application for naturalisation, in the Kosovan identity, admitting to one journey to Albania in the previous 5 years, and asserting good character, together with a declaration as before;

7 July 2005: Naturalisation ceremony approved;

2 August 2005: Naturalised as British citizen and certificate of naturalisation issued in the Kosovan identity;

11 September 2008: Marriage, stating his age as 23 (in line with the false Kosovan date of birth);

2 July 2009: Claimant's uncle changes his first name at Albanian Civil Registry (from Gentian to Florian).

7 May 2010: Letter from Malik & Malik solicitors confirms Albanian citizen;

18 October 2011: Glazer Delmar Solicitors deny that the claimant ever instructed Malik & Malik to admit that he is Albanian, alternatively state that he was advised to say he was Kosovan by an interpreter. They insist that the claimant had been born and lived in Kosovo exclusively before coming to the UK and that he was in the process of making a complaint to the Legal Ombudsman against Malik & Malik; and

7 February 2012: Glazer Delmar repeated the Kosovan account;

30 July 2012: Seelhoff Solicitors now acting, lodged a new Pre-Action Protocol letter, denying that the claimant had changed his name in Albania from Gentian Hoti to Florian Hoti;

24 September 2012: Seelhoff Solicitors submitted a judicial review application asserting that the claimant was Kosovan and 'demonstrably' not an Albanian citizen; and

18 March 2013: Seelhoff Solicitors submitted a further Pre-Action Protocol letter, conceding that the claimant was indeed an Albanian citizen and relying on the claimant's having been a minor when he made the original false assertion.

2 October 2015: Elder daughter's birth. When registered, claimant gives his place of birth as Albania; and

5 November 2018: Younger daughter's birth. When registered, claimant gives his place of birth as Albania.

Deprivation decision

15. On 6 June 2019, the Secretary of State made a fresh deprivation decision. That is the decision under challenge in these proceedings. The relevant immigration history was set out at [9]-[16] of his decision letter. In the light of all the evidence, the Secretary of State considered that:

> "17. On the basis of all of the above, it is evident that deception was employed at the time of your initial arrival and then maintained throughout all subsequent dealings with the Home Office. Whilst it is accepted that you were a minor upon arrival and thus cannot be held accountable for the information submitted at the time of your asylum claim, you were an adult when you applied for both ILR and naturalisation and are therefore responsible for the information you declared on these applications. …
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> 20. It is also noteworthy that you have lied on numerous occasions throughout your immigration history; you initially admitted your Albanian heritage via your legal representatives, then withdrew this admission and claimed you did not instruct them to declare the same. You then proceeded to maintain your fabricated, Kosovan identity throughout JR proceedings; not only have you provided false and misleading information to the Home Office, but also an immigration Judge, which severely damages your credibility and calls into question his good character. … you were given ample opportunity to inform the Home Office of your true details, for example at the time of all subsequent applications and following our investigation letter in 2010. Although your legal representatives did initially confirm your true heritage, you subsequently withdrew this admission and maintained that you were Kosovan. Our investigation letters, the first being issued in 2010, informed of the severity of this situation and the consequences it could cause, yet you chose to maintain your deception. As such, your claim that you were not given the opportunity to amend your details and were not aware of the immense damage this would cause is simply not accepted."

16. The Secretary of State considered the fraud/good character preconditions to be met and concluded that:

> "20. For the reasons given above it is not accepted there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is

> considered that you provided information with the intention of obtaining a grant of status and/or citizenship In circumstances where your application(s) would have been unsuccessful if you had told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship."

17. Neither Article 8 ECHR, nor section 55, nor statelessness provisions availed the claimant. The Secretary of State therefore gave notice in accordance with section 40(5) of the 1981 Act of her decision to deprive the claimant of his acquired British citizen status pursuant to section 40 of that Act (as amended).

18. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

19. The First-tier Judge directed himself at [61] by reference to the test in *Ciceri* and *Begum*:

> "61. At paragraph 19 of *Ciceri* the Upper Tribunal cited in full paragraphs 68-71 of the judgment in *R (Begum)*. The Tribunal when considering the SSHD's exercise of her discretion to deprive the Appellant of his citizenship must do so by reference to what are essentially "*Wednesbury*" principles. The Tribunal has to consider whether the SSHD has:
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> > acted in a way in which no reasonable decision-makers could have acted or has taken into account some irrelevant matter or has disregarded something to which weight should have been given or has erred on the point of law.
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> The Tribunal has also to determine for itself the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act 1998 where such a question arises and the Tribunal has to make that determination objectively on the basis of its own assessment, having regard to the SSHD's discretionary powers and statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good."

20. First-tier Judge Shaerf noted the claimant's account that his uncle in Albania, when learning that the claimant's nationality was the subject of enquiries there, 'unilaterally arranged for a change of [first] name to Florian, to hide [the claimant's] true identity'.

21. The claimant when applying for indefinite leave to remain in 2004 (age 20), in anticipation of expiry of his grant of exceptional leave to remain, 'knew that his application was based on the previous claim that he was Kosovan' but 'did not think it important'. He told the First-tier Judge that he 'knew it was wrong and regretted it'. The claimant was aware that rather than seek naturalisation, he could have applied for an Albanian passport: however, 'he had not seen why his birth nationality was of any relevance'.

22. In relation to the acceptance by Malik & Malik in May 2010 that he was Albanian, he accepted that he had given them instructions as to his real identity and that the letter was written in response to a first stage deprivation letter from the Secretary of State. He was 26 years old then.

23. The claimant seems to have expected his solicitors to continue to mislead the Secretary of State on his behalf: 'he had been concerned that in their letter Malik & Malik had stated he had been born in Albania, and he decided to instruct another firm of solicitors. He had never requested a letter of explanation from Malik & Malik'.

24. When instructing Glazer Delmar to withdraw his statement of being born in Albania, the claimant had 'not been mentally stable and had taken bad advice from friends'. Glazer Delmar had been acting on his instructions that he was a Kosovan citizen. It was a further three years until in 2013, in the judicial review proceedings, he admitted his real nationality. He was 29 years old then.

25. The Judge allowed the appeal on the basis that:

> "83. I find the decision under appeal engages the State's obligations under Article 8. I then ask whether the interference is proportionate to the need to maintain proper immigration control. The assessment of the proportionality of removal or exclusion must depend upon the particular set of circumstances which will need to be considered in the light of the parameters established in *R (Agyarko) v SSHD [2017]* UKSC 11.
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> 84. *R (Agyarko)* describes the context for the judicial consideration of claims seeking to engage Article 8 outside the Immigration Rules. At paragraph 45 the Supreme Court adopted the view that that outside the Rules leave to remain may be granted in "exceptional circumstances" and adopted the SSHD's view in its then current Instructions that these were "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal….. would not be proportionate". …
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> 85. …The SSHD had much, if not nearly all, of the information about the Appellant's private and family life before her as a result of the Appellant's response to her decision to annul his citizenship. This has not been reflected in the decision under appeal to deprive him of his citizenship. Failure to do so together with the other matters which I have found renders the decision inadequate for "*Wednesbury*" reasons as identified in paragraph 61 of this decision and so disproportionate to any legitimate public objective identified in Article 8(2) of the European Convention.
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> 86. For the other reasons already given I find that that in exercising her discretion to deprive the Appellant of his British citizenship the SSHD has acted in a "*Wednesbury*" unreasonable way identified in paragraph 61 of this decision. Therefore, the appeal is allowed."

26. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

27. Permission to appeal to the Upper Tribunal was granted by Resident Judge Davidge, on the following basis:

> "… Whilst the grounds are not without difficulty and intemperately expressed, it is arguable that the judge may have misunderstood the arguments presented and relevance of matters relied upon by the parties, and did not correctly approach the guidance in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC). Arguably this has led to some conflation of the relevant tests, an absence of an explicit finding in respect of the satisfaction of the condition precedent, and weight being attached to irrelevant matters. "

Rule 24 Reply

28. In a Rule 24 Reply of some length, the claimant's solicitors argued that there was no material error of law and that the decision made by the First-tier Judge was open to him, having regard to *all* the facts, including those overlooked by the Secretary of State in his decision.

29. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

30. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

31. For the Secretary of State, Mr Clarke reminded me of the *Ciceri/Chimi* guidance, as summarised in *Kolicaj (Deprivation: procedure and discretion) Albania* [2023] UKUT 294 (IAC)) (13 November 2023). He summarised the Secretary of State's grounds as follows: in ground 1, he criticised the First-tier Judge's failure to consider the Secretary of State's policy or make a clear finding on materiality; at ground 2, the Judge had failed to consider the Secretary of State's policy for indefinite leave to remain or the exercise of his discretion, and the Judge's erroneous self-direction that mere residence was sufficient to entitle the claimant to British citizen status; at ground 3, no finding was made as to whether the condition precedent was made out; at ground 4, there were no clear Article 8 findings in relation to the condition precedent; and there was no adequate reasoning on the delay issue.

32. The Secretary of State had been unaware of the fraud when indefinite leave to remain was granted. The claimant had accepted, since the judicial review in 2013, that he had indeed made a fraudulent declaration regarding his nationality. The earlier concession in 2010 had been withdrawn by his next firm of solicitors, but remade in 2013.

33. The First-tier Judge should have conducted a public law review of the decision, not of post-decision evidence which was not before the Secretary of State when he made his decision: see *Begum* at [124]. Instead, the First-tier Judge had erroneously conducted a merits-based review of the Secretary of State's decision, importing into it a finding that the claimant's family were in Italy, whereas the claimant's application to the Secretary of State had been made on the basis that they were still in Albania.

34. Overall, there was a paucity of reasoning within the decision, with no findings on the materiality of the fraud or on the condition precedent. The Judge had failed to give himself a proper self-direction: see *Chimi.* There were no Article 8 ECHR reasons within the decision.

35. For the claimant, Mr Jones reminded me that the Judge had found the claimant's evidence broadly credible and there was no determined challenge to his history over time. Nothing in the grounds of appeal attacked the findings of fact. The law was clearly articulated, and the correct threshold and tests set out in the First-tier Tribunal decision.

36. Mr Jones relied on the guidance to the Secretary of State's caseworkers at Chapter 55.7.4: where indefinite leave to remain was acquired by concession, not deception, it may not be appropriate to withdraw nationality granted.

37. The Secretary of State's exercise of discretion had further erred in reaching the conclusion, progressively, that the degree of culpability of the claimant was such as to bear on the exercise of discretion. The Judge had found as a fact that the claimant had no knowledge of the contents of the asylum witness statement and did not sign it. When depriving him of nationality in 2013 by the nullity decision, the Secretary of State had stated that she would grant 2 years' discretionary leave but actually gave the claimant settlement. Her latest decision entirely failed to engage with that error: the grant of settlement required good character and it was not open to the Secretary of State to resile from it thereafter.

38. The nullity decision had caused the family to be in limbo from 2013 to 2017 when it was withdrawn. The claimant's wife had not been able to work and her status was not regularised. There had been a delay in withdrawal of the decision, following *Hysaj* of a further 18 months which was unexplained. During that period, the claimant lost his job and his home, and was separated from his wife, who had entered and left the UK lawfully.

39. Following the 2019 deprivation, there had been a further 18 month delay which affected the claimant, his wife and their three children. The wife could not work and their mortgage was affected. Over time, there had been a great deal of prejudice to the claimant, his wife and his family. The litigation had now lasted for 4 years. The First-tier Judge had been entitled to allow the appeal, for the reasons given. His decision should be upheld.

40. I reserved my decision, which I now give.

Conclusions

41. The First-tier Judge's decision found the claimant's account at the hearing to be broadly credible, but accepted that the claimant in 2010 had told Malik & Malik his real nationality, then changed solicitors and instructed Glazer Delmar, again asserting his false Kosovan nationality. He then

maintained the false identity until 2013, when he finally admitted to being Albanian.

42. I remind myself of the test which the First-tier Judge was required to apply, as set out by the Supreme Court in *Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7 (26 February 2021),* and on which further assistance was given in *Ciceri (deprivation of citizenship appeals: principles) Albania (Rev1)* [2021] UKUT 238 (IAC) (8 September 2021), *Berdica (Deprivation of citizenship: consideration)* [2022] UKUT 276 (IAC) [5 April 2022], *Chimi (deprivation appeals; scope and evidence)* [2023] UKUT 115 (IAC) (19 April 2023) and *Kolicaj (Deprivation: procedure and discretion) Albania* [2023] UKUT 294 (IAC)) (13 November 2023)

43. The First-tier Judge in the present appeal did not have the benefit of the reasoning in *Chimi* or *Kolicaj,* as the decision was heard in October 2022 and promulgated in November 2022.

44. The role of a Judge in deprivation cases is to undertake a public law review of the Secretary of State's decision, and to interfere only if it is perverse and/or *Wednesbury* unreasonable. The Tribunal is also required to consider whether the decision breaches the human rights of the claimant or his family members, but without making a proleptic assessment of what the position would be in future, once the Secretary of State had decided whether to grant further leave on another basis.

45. At [75] in *Chimi,* and in its judicial headnote the Upper Tribunal summarised the correct approach to such cases:

> "(1) A Tribunal determining an appeal against a decision taken by the respondent under s40(2) or s40(3) of the British Nationality Act 1981 should consider the following questions:
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> (a) Did the Secretary of State materially err in law when she decided that the condition precedent in s40(2) or s40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not,
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> (b) Did the Secretary of State materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,
>
> (c) Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed.
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> (2) In considering questions (1)(a) and (b), the Tribunal must only consider evidence which was before the Secretary of State or which is otherwise relevant to establishing a pleaded error of law in the decision under challenge.

> (3) In considering question (c), the Tribunal may consider evidence which was not before the Secretary of State but, in doing so, it may not revisit the conclusions it reached in respect of questions (1)(a) and (b). ”

46. The First-tier Judge in the present appeal set out the 2021 *Ciceri* test, which is similar but less concise. At [43], the First-tier Judge appears to have accepted that the ‘limbo period’ between the confirmation of a deprivation decision on appeal, or if not challenged, and any appeal against the subsequent decision whether to grant further leave on another basis, anecdotally reached 18 months in some cases known to the Presenting Officer appearing on the day. At [66]-[67] he set out what is the core deception evidence, that the claimant instructed Malik & Malik that he was from Albania, but when they conceded that in a letter to the Secretary of State, he changed solicitors and gave deceptive instructions to Glazer Delmar, based on which, they resiled from that position. The letter dated 18 October 2011 from Glazer Delmar making that retraction referred to proceedings against Malik & Malik which do not seem ever to have been launched.

47. The First-tier Judge placed no weight on that, or on the claimant’s assertion that he thought his nationality did not matter. His finding, at [71[and [75] that the basic requirements for indefinite leave to remain and naturalisation flow from length of residence overlooks both the good character requirements and the claimant’s acceptance, on all the relevant applications, of a duty to inform the Secretary of State of any change in circumstances and to be truthful in the statements made.

48. On the contrary, the claimant deliberately changed solicitors when he learned that Malik & Malik had told the Secretary of State what he told them about his nationality, and his uncle in Albania arranged a name change for him, when it became known that the Secretary of State was investigating his nationality. That was more than sufficient to discharge the Secretary of State’s burden of proof in relation to fraud and/or deception.

49. It is difficult to see how the First-tier Judge arrived at the conclusion that the Secretary of State had erred in law in exercising her discretion to deprive on the basis of the facts set out above. The claimant had repeatedly maintained his false identity, long after the end of his minority, disclosing the truth only when his wife needed to rejoin him from Albania.

50. I turn next to the Judge’s assessment of whether the reasonably foreseeable consequences for the claimant and/or his family members are such as to engage his Article 8 ECHR rights, or theirs. The First-tier Tribunal does not seem to have received any reliable evidence about this. It is not suggested that the deprivation of citizenship would affect the claimant’s wife or his daughters. No evidence was adduced to indicate how long the Secretary of State would take to make a decision about his status once the deprivation decision was no longer in issue.

51. I remind myself of the guidance in *Kolicaj* at [3] of the judicial headnote:

> "*3. The power to deprive a person of their citizenship under section 40 of the 1981 Act and the jurisdiction on appeal under section 40A were explained in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 235 and Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 115 (IAC). Where the Secretary of State determines that the condition precedent for exercising that power is made out, she must then exercise her discretion as to whether to deprive that person of their British citizenship in the light of all the circumstances of the case. It follows that even if the decision of the Secretary of State in relation to the condition precedent is free of public law error, the decision might nevertheless be unlawful where she fails to exercise her discretion, or where the exercise of that discretion is itself tainted by public law error.*"

52. In the present case, the section 40 condition precedent was met and the Secretary of State did exercise her discretion. The First-tier Judge's reasons for finding that her exercise of discretion was perverse and/or *Wednesbury* unreasonable are unsound and unsustainable.

53. The conclusions reached by the Secretary of State, both in relation to the existence of a relevant pre-condition and the exercise of his discretion to deprive, were open to him on the evidence before him.

54. The evidence that the claimant's family had moved to Italy was not before the Secretary of State and still consists only of the evidence of the claimant himself. The claimant, on the evidence before the Secretary of State, would not have been treated as an Albanian minor with no family in Albania, in 1999 when he arrived: the grant of discretionary leave was plainly related to his Kosovan origin.

55. The deception was unarguably material to the series of events which led to the claimant's naturalisation. The claimant had several opportunities to be truthful, but did not take them. He instructed three different firms of solicitors during that period but maintained the falsehood, except in his initial instructions to Malik & Malik. He has not complained of their conduct in writing the letter they did, based on those instructions: on the contrary, he changed solicitors and changed his account.

56. The Secretary of State's decision was unarguably open to him and there is no public law error therein.

57. I therefore set aside the decision of the First-tier Judge and substitute a decision dismissing the claimant's appeal.

Notice of Decision

58. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by dismissing the appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 8 January 2024