IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005460
First-tier Tribunal No: DC-50281 2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th February 2024

Before

UPPER TRIBUNAL JUDGE L. SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Ilir CINARJA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Patyna of Counsel instructed by AJ Jones, Solicitors
For the Respondent: Mr E Tufan, Senior Presenting Officer

Heard at Field House on 26 January 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Shakespeare signed on 9 June 2023 dismissing the Appellant's appeal against a decision of the Respondent dated 1 November 2021 to deprive him of British citizenship pursuant to section 40(3) of the British Nationality Act 1981.

2. It was the Respondent's contention that the Appellant had employed fraud in obtaining his British citizenship: that the Appellant had provided fraudulent details throughout his dealings with the Respondent beginning with falsely claiming to be a Kosovan national in the context of a claim for protection in circumstances where he was Albanian, and essentially persisting in that lie up to and including his application for citizenship. Although the key facts in this regard were accepted by the Appellant, it was argued before the First Tier Tribunal that the fraud had not been material in that he would have been granted refugee status if he had applied for asylum as an Albanian. This argument was rejected. Adopting the structure set out in **Chimi (deprivation appeals, scope and evidence) [2023] UKUT 00115 (IAC)**, the Judge concluded that the 'condition precedent' had been met and was not vitiated by error of law This aspect of the decision of the First-tier Tribunal is not the subject of challenge before us.

3. Challenge is, however, made to what the Judge characterised as the Second and Third **Chimi** questions of 'lawfulness' and 'proportionality'.

4. The Grounds of Appeal summarise the challenge in these terms:

> "*The appellant submits that the Judge has materially erred in her consideration and determination of:*
>
> > *a. The lawfulness of the decision, on public law grounds, to deprive the appellant of his nationality; and*
> >
> > *b. The reasonably foreseeable consequences and proportionality of depriving him of this nationality.*"
>
> (The Grounds (drafted by Counsel who had appeared before the First-tier Tribunal) and the Appellant's Skeleton Argument before us (drafted by Ms Patyna) both employ the headings: "*Ground one: material error in considering whether the respondent's decision was infected with a public law error*", and "*Ground two: inadequate and irrational assessment on Article 8 grounds*".)

5. The Grounds of legal challenge are rooted in two particular aspects of the appeal:

   (i) The time taken between the Respondent becoming aware of the Appellant's deception and the decision to deprive him of citizenship – (the 'delay' point);

   (ii) The Respondent's evaluation of the so-called 'limbo period' between the making of a deprivation order and a subsequent decision on the Appellant's immigration status – ('the 'limbo' point).

6. It was argued before the First Tier Tribunal that both the 'delay' point and the 'limbo point' were relevant to both the second **Chimi** question of lawfulness (e.g. see Decision at paragraph 19), and the third **Chimi** question of proportionality (e.g. see Decision at paragraphs 29 and 33 *et seq.*).

7. The First-tier Tribunal rejected the substance of the Appellant's case in all material respects for reasons set out in the Decision signed on 9 June 2023.

8. The Appellant applied for permission to appeal which was granted on 15 December 2023 by First-tier Tribunal Judge Hughes,

9. The Respondent has filed a Rule 24 response dated 24 January 2024, resisting the appeal.

10. It is unnecessary to set out the full background facts here: we address the relevant facts in the context of considering the grounds of challenge below.

Discussion

11. The factual premises of the legal challenges may be summarised in the following terms.

The 'delay' point

12. The Appellant obtained British citizenship by naturalisation on 21 July 2004. In 2010 he was arrested at the Albanian border and accused of having a false British passport. Following his release he visited the British Embassy in Tirana and reported that the Albanian police had taken his passport. It was his seemingly undisputed evidence that the Embassy was informed that he was Albanian, and told him that they could not help him in Albania and he would need to resolve matters in the UK. It appears that the Albanian authorities subsequently returned the Appellant's British passport to him, and he returned to the UK.

13. The Respondent's GCID records contain a 'Minute / Case note' dated 11 November 2010 stating "*Deprivation case created, pro-forma link to file, file to EO New Work shelf*" (UT Bundle, page 80).

14. However, it was not until June 2021 that the Respondent contacted the Appellant requesting representations in respect of his nationality.

15. The First-tier Tribunal identified such circumstances at paragraph 20, and made reference to relevant documentation at paragraph 21. The following findings at paragraph 22 are pertinent:

> "*Looking at the evidence in the round I accept that the encounter with the British Embassy in Tirana in 2010 triggered the respondent's consideration into the appellant's nationality in November 2010.... [A]s at November 2010 the respondent was aware of the appellant's name, date of birth and Albanian nationality*".

16. The Appellant places very particular reliance on the following, also at paragraph 22:

> "*Although I accept in principle that the respondent may have needed to undertake 'further checks' to verify the appellant's nationality the respondent has not explained what these might be or how long they might take, and has not explained why no action was taken between November 2010 and April 2021. Taking all these factors into account, including the wording of the decision letter, I accept that the respondent was aware of the appellant's deception and would therefore have had knowledge, or at least a very solid indication of, his true identity as at November 2010 and has not explained the delay in taking action until April 2021.*"
>
> (The reference to April 2021 is seemingly based on the first 'Minute/Case note' after November 2010 in the Respondent's records being dated 27 April 2021.)

<u>The 'limbo' point</u>

17. The 'limbo' point is concerned with the period between the making of a deprivation of citizenship order and any subsequent decision on the Appellant's immigration status. Paragraph 56 of the Respondent's decision letter includes the following:

> "*within eight weeks from the deprivation order being made, subject to any representations you may make, a further decision will be made either to remove you from the United Kingdom, commence deportation action (only if you have less than 18 months of a custodial sentence to serve or has already been released from prison), or issue leave*".

18. Before the First Tier Tribunal the Appellant filed evidence obtained in a different case pursuant to a Freedom of Information request. The Respondent's 'FOI' response dated 31 August 2021 is filed at page 84 of the UT Bundle. The key contents relied upon are these:

> *"Our records indicate that on average (mean) it took Status Review Unit 303 days to grant temporary leave following an earlier decision to deprive citizenship on grounds of fraud. This average is calculated from Appeal rights were exhausted on the deprivation appeal.*
>
> *For those cases that became appeal rights exhausted and where Status Review Unit subsequently served the order that formally deprives citizenship, our records indicate that on average (mean) it took Status Review Unit 257 days to grant temporary leave, following the service of the order."*

19. Pursuant to the evidence of the response to the FOI request, it was argued before the First Tier Tribunal on behalf of the Appellant that the Respondent's reference to "*eight weeks*" was incorrect (e.g. see paragraph 24).

Our consideration: the 'delay' point

20. The Judge addressed the delay point in the context of the public law challenge under the second **Chimi** question at paragraphs 20-23.

21. Further to the references to, and quotations from, these paragraphs above, and the First-tier Tribunal Judge's express finding of unexplained delay, the Judge found on this issue as follows, at paragraph 23:

> "*However, I do not accept that in making the deprivation decision the respondent has failed to have regard to this delay to such an extent that she has failed to have regard to relevant considerations or acted in a way that no reasonable Secretary of State could have done. That is, in my view, a high test. In the case of Laci v Secretary of State [2021] EWCA Civ 769 the respondent had been aware of the fraud in 2007 and had written to the appellant in 2009 indicating that she was considering deprivation. The appellant in that case had responded to that letter accepting the fraud. Nothing then happened for another nine years. That is not the position in this case. In my view, the failure to explain why no action was taken in the appellant's case between 2010 and 2021 is not sufficient, in and of itself, to establish that the respondent acted unlawfully.*"

22. The Judge gave further consideration to **Laci** at paragraphs 33-37 in the context of the third **Chimi** question.

23. In the premises it is to be noted that the rehearsal of the facts set out in the Respondent's decision letter includes express reference to the incident of November 2010 (decision letter at paragraph 19), and the next follow-up action in 2021 (paragraph 20 *et seq.*). Express reference to this passage of time is also made at paragraph 51. Reference is also made to the representations submitted on behalf of the Appellant - which included representations on the relevance of when the Respondent came into possession of information about identity ("*If you have held that information for a significant period of time before taking deprivation action, that diminishes the public interest...*" - letter 28 June 2021), and in respect of the case of **Laci**, which was concerned with a 'delay' issue (paragraph 22). (We pause to note that paragraph 22 identifies a distinction in the facts of the Appellant's case from the facts in **Laci** – a distinction which in due course the First-tier Tribunal Judge further articulated.) Paragraph 48 of the decision letter repeats – expressly in the context of the exercise of the Respondent's discretion – that reference was made to the Appellant's representations which were "*taken into account*".

24. The exact formulation of the public law ground in this context is not clearly identified in the Skeleton Argument before the First Tier Tribunal: e.g. see paragraph 41(b), UT Bundle page 35.

25. Ms Patyna's Skeleton Argument identifies the fact of the Appellant's reliance before the First Tier Tribunal upon 'delay' (e.g. see paragraph 15), but does not otherwise expressly identify the mechanism, or legal formulation, of such reliance in the context of the second **Chimi** question.

26. In the circumstances the best articulation of the point is the Judge's summary at paragraph 19 of Counsel's submission:

> "*[Counsel] argued in his submissions that the respondent has not been consistent in her position about events in 2010. He invited me to find that the respondent became aware of the deception, and therefore the appellant's true identity, in 2010 but had failed to take this into account when deciding to deprive the appellant of his citizenship. Hence, he argued, the decision was unlawful because it failed to take into account a relevant consideration, namely the respondent's delay.*"

27. The Judge's conclusion, as quoted above, was in two constituent parts: the Respondent had had regard to the delay; failure to explain inaction between 2010 2021 did not make the decision unlawful.

28. We do not accept that there is any substance in the Grounds of appeal insofar as they plead that the Respondent had not considered delay. In our judgement it is manifestly the case that the Respondent's decision-

maker had regard to the full history of the case including the period of inactivity between 2010 and 2021. More particularly, the Judge in substance found as a question of fact that the Respondent gave consideration to the issue of delay. That finding of fact is not the subject of express challenge on any identifiable error of law basis so much as a straightforward dispute is asserted in the Grounds.

29. The Grounds otherwise raise an argument premised on the absence of any explanation for delay, and an argument that the Judge erred in distinguishing the present case from **Laci**.

30. In the former regard, it does seem to us that ultimately the real complaint here is not that the Respondent had failed to take into account delay at all, but that the Respondent had not explained the delay. The First-tier Tribunal Judge expressly concluded that the failure to explain the delay did not render the decision unlawful.

31. In our judgement that was an entirely sustainable conclusion. The Respondent did not attempt to excuse – or explain away - the delay between November 2010 and April 2021. Had the Respondent offered some spurious excuse for the delay, then that might have been an impugnable matter. The absence of any explanation or 'excuse' implies that there may very well not have been any proper explanation or excuse. We do not think that there is any material difference between a decision which is silent on attempting to explain a delay and one that openly declares that there is no explanation. Be that as it may, we do not accept, as was pleaded in the Grounds (paragraph 5), that in order to reach a lawful decision on deprivation, the Respondent was obliged to explain the delay.

32. The relevant consideration was that there had been delay; this had been considered by the Respondent – and, as the Judge found, the absence of any articulation of an explanation for the delay did not render unlawful a decision that took into account the fact of the delay. This is not to deny that where there is an explanation proffered for the delay that such an explanation might inform a consideration of either or both the second and third **Chimi** questions: rather it is a realistic recognition that an unexplained or inexcusable delay does not in itself render a deprivation decision unlawful and thereby negate the whole process.

33. Indeed, in the course of submissions during her reply Ms Patyna accepted that absence of reason for delay would not in itself inevitably be an error of law, but that an unexplained delay might have more weight for an appellant than an explained delay in the context of a proportionality assessment.

34. For completeness we do not accept, as was contended by Ms Patyna, that the Judge's reference at paragraph 23 to "*a high test*" is an indicator that the Judge may have considered that there were gradations of public law illegality. It seems to us in context that it is adequately clear that this is a reference to the final clause of the previous sentence – "*acted in a way that no reasonable Secretary of State could have done*": the irrationality or perversity test is indeed a high test, and it is to this, we think, the Judge was referring.

35. Indeed, in circumstances where the Respondent clearly had had regard to the passage of time in the decision letter, and ultimately therefore it could not seriously be contended that the Respondent had failed to have regard to delay at all - and to that extent have failed to have regard to a relevant consideration - in essence the Appellant's case would have had to rest on a submission to the effect that the decision ran contrary to the approach in **Laci** and/or was otherwise irrational. As such the 'high test' reference was apposite.

36. As regards **Laci**, it is to be acknowledged that the Grounds recognise that the context of consideration was primarily in respect of the issue of proportionality under Article 8 (i.e. the third **Chimi** question), albeit that there may also be some relevance to the issue of lawfulness: see Grounds at paragraph 8. The complaint made in the Grounds is that the Judge was "*incorrect*" (paragraph 18) to distinguish the current case from **Laci**: see Grounds at paragraphs 17-19. (See similarly Ms Patyna's Skeleton Argument at paragraphs 34-37.)

37. We do not accept that the Judge fell into error in this regard.

38. The Judge was entirely correct to identify that in **Laci** the circumstances of a potential fraud come to light in 2007, an enquiry had been raised with the appellant in that case in 2009 - at which point the appellant had responded in terms accepting the fraud; there had then been a delay of 9 years before a decision on deprivation was made. In the instant case the circumstances of potential fraud came to light in 2010, but an enquiry was not raised with the Appellant until 2021. When the enquiry was raised with the Appellant he did not initially accept the fraud, and indeed made two responses claiming 'good faith'. As the Judge identified in findings that are unchallenged - "*he did not come clean about the deception to the respondent until the final response from his solicitors on 30 September 2021*" (paragraph 37). (It is to be noted that the Judge did not accept the Appellant's attempt to shift the blame in this regard on to his previous legal representatives – see also paragraph 37.)

39. It may be seen that the very real and very clear distinction between **Laci** and the instant case is that in **Laci** the Respondent delayed for a

substantial period of time after the fraud was admitted (i.e. from the point at which the Respondent had all the necessary information to make a deprivation decision), whereas in the instant case once the fraud was admitted (in the letter dated 30 September 2021) there was no particular delay in making the deprivation decision (1 November 2021). The Respondent's state of knowledge as of November 2010, with no express admission of deception on the part of the Appellant, would not have been sufficient to make a deprivation decision without more. In the instant case the delay was in making the enquiries, it was not in making a decision once the enquiries had been completed.

40. Moreover and in any event, in the context of considering the third **Chimi** question – in which the Tribunal had jurisdiction to make its own Article 8 assessment and was not confined to a review of the Respondent's decision on public law grounds – it is manifestly the case that the Judge had regard to the overall period of delay between 2010 and 2021 because she expressly stated as much at paragraph 33, and further stated "*I place considerable weight on it*". In this context it is also to be noted that the Judge made plain her awareness that the overall period of delay was longer than in **Laci** – see paragraph 35.

41. In all such circumstances we reject the Appellant's challenge in respect of the 'delay' point.

Our consideration: the 'limbo' point

42. For the reasons explained below we find nothing objectionable in the First-tier Tribunal's approach to the 'limbo' issue as a matter of fact, and in such circumstances we do not consider that there was a public law error that could have impugned the Respondent's decision in respect of the second **Chimi** question of lawfulness, or would have rendered the First-tier Tribunal's evaluation of 'proportionality' in the context of the third **Chimi** question in error of law.

43. The key passages in the First-tier Tribunal's reasoning on this issue are these:

> "*… I am not persuaded that the FoI response establishes what the appellant says it does. The letter states that on average (mean) the relevant Home Office team took 303 days to grant temporary leave "following an earlier decision to deprive citizenship on grounds of fraud" and 257 days where the team "subsequently served the order that formally deprives citizenship". On the face of it these figures are much longer than the eight week period cited in the decision letter. However, the letter does not state how many cases this relates to - the data set relates to applicants who have been deprived of citizenship as a result of fraud and have then been given a temporary grant of leave.*

Given that the respondent does not provide figures for deprivation decisions, nor figures for those deprived of citizenship and then subsequently granted leave, there is nothing to indicate the sort of numbers involved, and if the data set is small the figures may be easily skewed by one or two outlying cases. In my view, that casts serious doubt on the reliability of the figures. Furthermore, the data only goes up to 31 December 2020, ten months before the deprivation decision was taken. It is therefore not a contemporaneous record. In light of this, I place little weight on the FoI response, and consider that it is not sufficient evidence to establish that the reference in the decision letter to the eight week 'limbo period' is inaccurate to the extent claimed. It follows that the appellant cannot succeed in his argument that the decision was made on an erroneous basis and was therefore unlawful." (Paragraph 24)

44. Paragraph 24 represents a consideration of the 'limbo' point in respect of the second **Chimi** question. The analysis is carried forward to a consideration of the third **Chimi** question at paragraph 29.

45. We do not find there to be any error of law disclosed in the way in which the Appellant's challenge in this regard is pleaded in either the Grounds of Appeal or the Skelton Argument before us. In our judgement in substance we are being asked to reconsider the available evidence and reach a different conclusion on it.

46. We can identify nothing erroneous in the Judge's approach.

47. We do not accept the submission that the Judge's analysis was unreasoned, or unfairly reasoned, and not based on evidence. The Judge took a reasonable and entirely appropriate approach to the limitation of the raw data presenting the "*average (mean)*" periods for making decisions on status following deprivation orders. The Judge was entitled to consider that the provision of an average figure was of limited value in evaluating how long it typically took to make a status decision because of the potential for outliers to skew the average. We observe that a better measure would have been the mode or median, but the Appellant had not sought any further detail or clarification further to the information provided in the Respondent's FOI letter of 31 August 2021, or otherwise advanced any such evidence.

48. It is to be recalled that it was the Appellant who was seeking to impugn the Respondent's reference to 8 weeks, in express reliance upon the contents of the letter of 31 August 2021. The reality is, as the Judge sustainably concluded, the raw statistics of average times did not "*establish what the appellant says it does*".

49. The fact that the data originated with the Respondent, and the Respondent expressed no qualification on the data, and had not otherwise provided any update or clarification or qualification in the course of the instant proceedings, does not, in our judgement, in any way invalidate the analysis conducted by the First-tier Tribunal Judge. Nor do we consider the Appellant's submission to the effect that the Respondent should have provided more data is a possible foundation for impugning the Judge's approach as being somehow in error of law (*vide* paragraph 13 of the Grounds). There was no request made by the Appellant at any point either before or after the Respondent's decision for the Respondent to provide further data in this regard, and there was no application at any stage of the appeal proceedings for the Tribunal to issue Directions in this context. The Judge appropriately determined the issue on the available evidence. We do not understand it to be contended that the Judge should have adjourned and issued Directions of her own motion: if that is a suggestion, we can see no substance for concluding that the Judge erred in law in proceeding to determine the appeal on the evidence provided by the parties.

50. In all such circumstances we conclude that there was no error on the part of the First-tier Tribunal in concluding that the Appellant had not shown that the Respondent's decision was unlawful because it was based on a fundamental error of fact.

51. In any event, for completeness we note that even if the Judge's analysis of the facts with regard to the 'limbo' period were in error it would not make a material difference to the lawfulness of the consideration of proportionality pursuant to the third **Chimi** question. This is for two reasons: it was incumbent upon the Judge to avoid engagement in a proleptic assessment; in any event the Judge appropriately had regard to, and placed reliance upon, case law to the effect that exposure to the 'limbo' period without more would not be favourably determinative of the proportionality balance (**Muslija (deprivation – reasonable foreseeable consequences) [2022] UKUT 337 (IAC)**). The Judge appropriately had regard to such matters: see paragraph 27 and 29.

52. In all such circumstances we reject the Appellant's challenge in respect of the 'limbo' point.

Finally…

53. We note the suggestion in the grant of permission to appeal dated 15 December 2023 that the case of **Kolicaj [2023] UKUT 00294 (IAC)** "*recently identified*" a public law error. We do not consider – and it was common ground between the representatives before us – that the decision of **Kolicaj** added anything of principle to the guidance in **Chimi** (which is cited with approval at paragraph 3 of the headnote and at

paragraph 30 of the body of the decision in **Kolicaj**). For the avoidance of any doubt, there is no suggestion made by either party before us that the First-tier Tribunal was in error in adopting the structure set out in **Chimi**, or that the Judge had in any way misstated or manifestly misunderstood such guidance. The challenge is very much focused on the facts of the particular case, and the analysis of the First-tier Tribunal of such facts, within such a framework and with reference to public law principles. In this context it is not submitted that the Judge manifestly misunderstood or misstated the public law principles identified at paragraph 18 of the Decision.

Conclusions

54. We conclude:

(i) The structured approach in accordance with the case of **Chimi** adopted by the First-tier Tribunal was appropriate. There is no challenge to the adoption of such an approach.

(ii) The First-tier Tribunal's conclusions in respect of the 'condition precedent' was sustainable and is not challenged before us.

(iii) The Respondent recognised that pursuant to the 'condition precedent' there remained a discretion as to whether or not to make a decision to deprive the Appellant of his citizenship. The Respondent exercised such a discretion.

(iv) The First-tier Tribunal engaged with the "*two public law errors*" (paragraph 19) contended on behalf of the Appellant in challenging the lawfulness of the deprivation decision. The Tribunal did so appropriately within the public law framework of review rather than on the basis of an appeal on the merits.

(v) The First-tier Tribunal sustainably concluded that the Respondent had had regard to delay, and that the absence of explanation for delay did not render the decision unlawful.

(vi) The First-tier Tribunal sustainably concluded that there was no unlawfulness in the Respondent's reference to 8 weeks in the context of the 'limbo' period.

(vii) In such circumstances there is no error of law in the First-tier Tribunal's decision in respect of the lawfulness of the Respondent's deprivation decision.

(viii) In making its own evaluation in respect of proportionality under Article 8 (the third **Chimi** question) the Tribunal had due regard to the issue of delay. Its decision is unimpugnable in this regard.

(ix) In the same context the Tribunal also had due regard to the 'limbo' period. Its finding that the average figures did not undermine the 8 week period specified by the Respondent was sustainable on the available evidence. In any event, the Tribunal appropriately recognised that further consideration of the possible length of the 'limbo' period would trespass into a proleptic assessment, and that exposure to a 'limbo' period in itself would not tip the proportionality balance in favour of the Appellant.

(x) In such circumstances there was no error of law in the First-tier Tribunal's decision in respect of proportionality.

Notice of Decision

55. The decision of the First-tier Tribunal contains no material error of law and stands.

56. The Appellant's appeal remains dismissed.

I Lewis
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 February 2024