Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DC/00048/2020**

THE IMMIGRATION ACTS

Heard at Manchester (via Microsoft Teams) **Decision & Reasons Promulgated**
On 12 July 2021 **On 05 August 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUSA ISMALAJ
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Tan, a Senior Home Office Presenting Officer.
For the Respondent: Mr Sellwood instructed by Oliver & Hassani Solicitors.

DECISION AND REASONS

1. The background is set out by First-tier Tribunal Judge Swaney (the Judge) at paragraphs [1 – 9] which I repeat as its sets out the framework against which this appeal is being considered:

> "1. The appellant is a citizen of the United Kingdom born on 28 December 1973 in Tropoje, Albania. He appeals the decision made on 9 March 2020 to deprive him of his British citizenship.

2. The appellant arrived in the United Kingdom on 23 November 1998. He claimed asylum two days later giving his true first name and date of birth, but stated that he was born in Gjakove, Kosovo and gave a different spelling of his surname.

3. The appellant's asylum claim was refused on 5 April 2001. He lodged an appeal against that decision. His appeal was dismissed on 17 September 2001.

4. The appellant was asked to complete a questionnaire issued by the Case Resolution Directorate on 17 September 2009. On 21 October 2010 the appellant was granted indefinite leave to remain outside the Immigration Rules.

5. On 27 January 2011 the appellant made an application for a travel document. He maintained that he was born in Kosovo. His application was refused on 19 April 2011 on the basis that he had failed to approach the Kosovan authorities to apply for a passport. The appellant was advised that in the event he was able to provide evidence from the Kosovan embassy that they would not issue him with a passport, consideration would be given to issuing him with a travel document valid for one year. The appellant provided a letter dated 13 May 2011 from the Kosovan embassy stating that he had been refused a passport because he did not have the required birth certificate, certificate of citizenship or certificate of residence.

6. On 23 August 2012 the appellant applied for naturalisation as a British citizen. He maintained that he was born in Kosovo. His application was successful, and he was naturalised on 18 February 2013. He was issued with a British passport on 2 May 2013.

7. The respondent carried out checks on the appellant's identity and on 20 September 2019. The British Embassy in Tirana confirmed the appellant's place of birth was Tropoje, Albania.

8. On 28 November 2019 the respondent wrote to the appellant advising him that she was considering depriving him of his British citizenship and provided him with an opportunity to give reasons why she should not do so. The appellant responded via his representatives on 19 December 2019.

9. Having considered his representations, the respondent made a decision to deprive the appellant of his British citizenship on 9 March 2020. It is that decision which is the subject of this appeal."

2. Mr Ismalaj argued before the First-tier Tribunal that his misrepresentation was not material to the decision to grant his application for naturalisation as a British citizen, and that in the event the misrepresentation was material, that the Secretary of State ought to have exercised discretion differently and that the decision to deprive him of his British citizenship is a disproportionate interference with his article 8 rights.

3. The Judge sets out findings in relation to whether the relevant condition precedent relating to a deprivation of citizenship was made out between [33 – 34] in the following terms:

"33. The appellant accepts that he provided an incorrect place of birth when he claimed asylum in the United Kingdom. He claims that it was on the advice

> of agents who facilitated his entry into the country. He claims that he was told to change his date of birth and his surname. The appellant maintained the use of the false details throughout his stay in the United Kingdom using them in applications for a travel document, under the legacy scheme, and in his application for naturalisation.
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> 34. I find the appellant made a false representation in his application for naturalisation as a British citizen. The appellant knew the details were not correct throughout his stay in the United Kingdom and initially provided them in order to avoid being returned to Albania. I am satisfied that his false representation was deliberate. However, in order for section 40(3) to bite, in addition to being deliberate, the false representation must also be material to the decision to grant citizenship."

4. For the reasons set out between [35 – 42] the Judge concludes that Mr Ismalaj's deception as to his true nationality was not material to the grant of IRL.
5. For the reasons set out between [43 - 55] the Judge finds that that even had the Secretary of State known about Mr Ismalaj's false representation it was not accepted she would have refused the application for naturalisation on character grounds, meaning the false representation was not material to the decision to grant citizenship. The Judge concluded, therefore, that the conditions in section 40(3) were not satisfied and accordingly allowed the appeal.
6. The Secretary of State sought permission to appeal on four grounds. Permission to appeal was granted on a renewed application by a judge of the Upper Tribunal on 1 February 2021, the operative part of the grant being in the following terms:

> "2. I deal ground three first as this is, in my view, the strongest ground. The first question which the Judge had to ask herself was whether the deception was material to the grant of ILR without which the application for citizenship could not have been made in the first place. The Judge arguably erred in her reliance on the case of Sleiman at [47] of the Decision, as in Sleiman, the Respondent had conceded that the appellant would have obtained ILR under the legacy programme even if he had not obtained DLR previously. It is difficult to see why the absence of an earlier grant of DLR makes this case stronger in circumstances where, if the Appellant had declared his true nationality prior to consideration of his case by the Casework Resolution Directorate, the deception would have at least been a factor in that consideration and where he had no right to remain during the period of his residence.
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> 3. Further, the Judge's reasons for finding that the Appellant would have been granted ILR even if the Respondent had known of the deception (at [35] to [47] of the Decision) are arguably flawed for the reasons set out in ground one. It is arguable that the Judge has failed to take into account what is said about the relevance of delay in the consideration of "legacy" cases and has failed to take into account the impact of deception had that been known at the time. I note, for example, one of the four claimants in Hakimi (to which the Judge refers at [38] and [39] of the Decision) had a not dissimilar immigration background and chronology to the present case but was refused ILR and that refusal was upheld by the Court for reasons which appear at [41] of the judgement.

4. Having accepted at [52] of the Decision that false representation is a "weighty consideration" in a naturalisation application, the Judge arguably fails to explain why it is not so in this case. Her reasons in that regard are arguably inadequate. In any event, they are arguably infected by the error in ground one which I have found to be arguable.

5. Ground four taken alone is weaker, but given the potential overlap with, in particular, ground two, I do not restrict the grant of permission."

7. A Rule 24 Notice filed on Mr Ismalaj's behalf asserts the determination contains no errors of law and should be upheld. It is said in response to the grounds of appeal that they represent an overall disagreement with the outcome of the appeal and do not meet the threshold for establishing a material error of law, such that the First-tier Tribunal decision should be set aside and remade. It is argued that the decision of the Upper Tribunal in Sleiman (deprivation of citizenship; conduct) [2017] UKUT 00367 (IAC) and relevant policy 'parks' the Secretary of State's challenge. It is argued on the basis of the same that Mr Ismalaj's deception as to his nationality was not directly material either to his grant of ILR under the legacy scheme or citizenship by naturalisation. It is argued, the First-tier Tribunal was therefore correct in its findings.

8. In Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367 (IAC) the tribunal considered the question of how directly causative past deception must be of a subsequent grant of British citizenship in order for a person to be deprived of that citizenship on the basis of deception.

The official headnote reads:

"In an appeal against a decision to deprive a person of a citizenship status, in assessing whether the appellant obtained registration or naturalisation "by means of" fraud, false representation, or concealment of a material fact, the impugned behaviour must be directly material to the decision to grant citizenship."

9. The deception in Sleiman was to mislead the authorities about age on arrival in the UK. The appellant claimed to be younger than he was and this caused him a direct benefit because he was granted a short period of limited leave to remain on this basis even though his asylum claim was refused. He therefore had lawful leave to stay in the UK. As his limited leave came to an end, he applied to extend it. This application was in time so, due to the application of section 3C of the Immigration Act 1971, his lawful stay was extended while the Home Office processed his application.

10. The processing took the Home Office over five years. Mr Sleiman's case became part of what became known as the "Legacy backlog". By the time the Home Office looked at his case such a long time had passed that they decided to grant Indefinite Leave to Remain (ILR). A year or so later he qualified for, applied for, and was granted British citizenship.

11. It came to light later that Mr Sleiman had lied about his age and so the Home Office decided to deprive him of his citizenship on the basis that "but for" his initial deception about his age, he would not have had lawful stay and would therefore not eventually have qualified for citizenship.

12. The statutory power of deprivation on the basis of deception is set out in section 40(3) British Nationality Act 1981, which permits deprivation where 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 most relevant part of the Home Office policy, previously Chapter 55 of the Nationality Instructions but republished as "Nationality Policy Guidance: Deprivation and nullity of British citizenship", reads as follows:

    '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.

    55.7.4 For example, where a person acquires ILR under a concession (e.g. the family ILR concession) the fact that we could show the person had previously lied about their asylum claim may be irrelevant. Similarly, a person may use a different name if they wish (see NAMES in the General Information section of Volume 2 of the Staff Instructions): unless it conceals criminality, or other information relevant to an assessment of their good character, or immigration history in another identity it is not material to the acquisition of ILR or citizenship. However, before making a decision not to deprive, the caseworker should ensure that relevant character checks are undertaken in relation to the subject's true identity to ensure that the false information provided to the Home Office was not used to conceal criminality or other information relevant to an assessment of their character'

14. On the facts of Sleiman, he was able to show that the Home Office file notes showed that his age was irrelevant to the grant of ILR. The tribunal therefore held that the deception must have a direct bearing on the grant of citizenship: the phrase "direct bearing" suggests that in cases where the fraud etc. only has an indirect bearing on the grant of citizenship, deprivation action would not be appropriate.

15. The original deception on date of birth was found to be not directly material to the decision to grant citizenship. The tribunal noted that:

    • other reported deception and nullification cases showed a far more direct link between the deception and the deprivation or nullification

    • the Home Office file note in the case stating age to be irrelevant to ILR

    • there had been no suggestion that had the false date of birth been disclosed at the time of the application for naturalisation that the Appellant would have been refused on good character grounds.

    The appeal was therefore allowed.

16. Following the original Initial hearing of this matter being adjourned for reasons outside the control of any party, directions were given for the provision of submissions relating to matters they believe should be further considered in light of the decision of the Supreme Court in R (on the application of Begum) [2021] UKSC 7.

17. In [71] of the judgment Lord Reed (with whom the other members of the Court agreed) writes:

> "71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). 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. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. 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, as Lord Hoffmann explained in Rehman and Lord Page 26 Bingham reiterated in A. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

18. And at [119]:

> "119. The scope of SIAC's jurisdiction in an appeal against a decision taken under section 40(2) was summarised in para 71 above: first, to determine 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; secondly, to determine whether he has erred in law, for example by making findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held; thirdly, to determine whether he has complied with section 40(4); and fourthly, to determine whether he has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act."

19. In his response dated 13 May 2021 Mr Tan, referring specifically to [66 – 71] of Begum and writes:

"This is relevant to the findings set out by the FTTJ who found at [34] that the appellant made a deliberate false representation in his application for naturalisation. The SSHD was satisfied for the reasons set out in the decision letter of 9 March 2020 having considered the relevant policies, that the false representation was material to the decision to grant citizenship, and second, that had the SSHD known about the false representation at the time the appellant would have been refused on character grounds. The reasons set out in the decision letter are neither irrational, or based on irrelevant matters.

It is submitted that in light of Begum, the FTTJ's decision contains material errors in addition to the points raised in the grounds lodged in the application for permission to appeal."

20. On behalf of Mr Ismalaj, Mr Sellwood takes a different approach, arguing the Secretary of State's approach to Begum misconstrues the principles enunciated in this case for three key reasons being:

'First, in *Begum,* the Supreme Court was concerned with a different subject matter to that currently before this Tribunal, i.e. one of national security, rather than fraud. The Court held, *inter-alia*, that in a deprivation appeal against a decision under s40(2) of the British Nationality to Act 1981, *concerning issues of national security,* the Special Immigration Appeals Commission is not entitled to re-exercise A's discretion for itself, as to whether an individual should be deprived of their citizenship. Rather, unless there is an issue as to whether A is acted in breach of her obligations under the Human Rights Act 1998, SIAC is to consider A's deprivation decision *in general* by applying essentially the same principles that apply in administrative law (as per Lord Reed at [66]-[71], [118]-[119]). Specifically, did the decision maker act in a way that no decision-maker could have acted; did they take into account an irrelevant matter or disregard something that ought to have been given weight; or did they err on a point of law: an issue which encompasses the consideration of factual questions (see [68]).

Second, following on from the first point, the *ratio* in *Begum* concerns the scope of appeals against decisions under s 40(2) of the 1981 Act before SIAC, *not* s 40(3) appeals before the First tier or Upper Tribunal (IAC). While the same wording applies to both provisions (i.e. "*… the Secretary of State is satisfied…"),* the context in which the Court in *Begum* construed s 40(2) appeals was plainly critical to its assessment. The deference shown to A's view of what is conducive to the public good, in the context of national security, relates to very specific public interest, in which she has particular expertise and knowledge.

The degree of deference, the Courts and Tribunals afford to A's view varies, depending on the context and public interest in play, especially where fundamental rights are at stake: *Pham v. Secretary of State for the Home Department* [2015] UKSC 19 (see [106], [114]). In an appeal concerning s 40(3) of the 1981 Act, the public interest is different, namely the integrity of the citizenship application process. This is a matter Courts and Tribunal's are well suited to consider, and well used to considering, for example, whether or not deception has taken place, and whether or not such deception is material. Hence *KV (Sri Lanka)* [2018] EWCA Civ 2483 (a judgement that was not directly considered in *Begum)* remains good law as to the general scope of the tribunal's jurisdiction in an appeal of this nature.

Third, even if *Begum* means s 40(3) appeals to the First tier and Upper Tribunal (IAC) are generally limited to administrative law challenges (which R does not concede), that would not assist A showing Judge Swaney's decision contains material errors of law.

As is clear from the grounds of appeal, A's contentions lie with the Judge's interpretation and application of those policies, facts, and the applicable legal principles. All of those subjects sit within the administrative law jurisdiction identified by the Court in *Begum (*see [68] in particular*).'*

21. It is not disputed that similar wording appears in s 40(2) and s 40(3) of the British Nationality Act. Subsection (2) reading "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good" and subsection (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.

22. Nothing has been identified within the judgement of *Begum* to support Mr Sellwood's submission that notwithstanding the identical use of the English language the approach to determining such issues must be different in relation to the context i.e. whether the context of which the matter is being considered is under the heading of whether deprivation is conducive to the public good or whether his registration or naturalisation was obtained by any of the three specified means. The context in which such matters are being considered if fact specific but both sections provide a discretionary power to the Secretary of State to undertake a course of action against which the challenge is now limited to public law grounds as clearly indicated above. Context does not in this case undermine the same application the identified legal principles in both section 40(2) and (3) cases.

23. Mr Sellwood's third argument is that even if this is found to be the case it makes no material difference as even on public law grounds the Secretary of State will fail.

24. At [56] of the decision under challenge the Judge writes:

> "56. For these reasons, and in light of my finding that the appellant's nationality were not material to the grant of indefinite leave. I do not accept that even had the respondent known about the appellant's false representation, she would have refused his application for naturalisation on character grounds. I find the appellant's false representation was not material to the decision to grant citizenship."

25. In relation to the reference by Mr Sellwood to KV (Sri Lanka) this was a decision clearly based upon two earlier decisions of the Upper Tribunal, being Deliallisi (British Citizen: deprivation appeal; Scope) [2013] UKUT 439 (IAC) and BA (deprivation of citizenship: Appeals) [2018] UKUT 85 (IAC), which are at odds with the decision of the Supreme Court in Begum as the correct approach and are decisions which now must be read in light of the guidance provided in Begum as to the correct test that must be applied.

26. The Judge's finding at [56] clearly shows that the Judge reconsidered the matter fresh which is an erroneous approach in light of Begum.

27. In relation to the other matters on which permission to appeal was granted, the Secretary of State asserts the Judge undertook an erroneous approach when considering the grant of ILR in finding at [43] that the deception as to the appellant's true identity, based upon his failing to disclose his correct nationality, was not material to the grant of ILR. At [37 – 43] the Judge writes:

> "37. It was not disputed that the grant of indefinite leave to remain was made under the legacy exercise and I find that it was based on the questionnaire he completed and the letter granting leave. The legacy exercise was the respondent's solution to a large backlog of human rights and asylum cases identified by the end of 2006. The backlog consisted of initial claims that had not been considered as well as a large number of cases where the claims had been considered and refused, but the applicant had remained in the United Kingdom.
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> 38. There was discussion in Hakemi & Ors v SSHD [2012] EWHC 1967 (Admin) about the criteria for a grant of leave to remain under the legacy exercise. It was not disputed that Chapter 53 of the Enforcement Instructions and Guidance (EIG) provided guidance to caseworkers on how legacy cases were to be considered. A person's nationality had no bearing on consideration of legacy cases. The Case Resolution Directorate was a team of caseworkers specifically constituted to consider legacy cases (see paragraph 1 of Hakemi). The letter, granting the appellant indefinite leave to remain originated from CRT Legacy South 14, which I understand to be a team within the Case Resolution Directorate.
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> 39. As was seen in Hakimi caseworkers were instructed to place weight on the delay in cases where delay by UKBA has contributed to a significant period of residence. Following an individual assessment of the prospect of enforcing removal, and where other relevant factors applied, 4-6 years may be considered significant, but a more usual example would be a period of residence of 6-8 years. In the appellant's case, there was some delay in the consideration of his asylum claim. He claimed asylum in November 1998 and did not receive a decision until April 2001, some two and a half years later. His appeal took approximately six months to be determined.
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> 40. There was no evidence before me that the appellant was responsible for the time it took for his asylum claim to be considered. At the time his case was considered under the legacy exercise. The appellant had been present in the United Kingdom for just short of twelve years. Although it does not appear that he made any application to regularise his status, there was no evidence before me that the appellant deliberately evaded immigration control during this period.
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> 41. While I accept that had the respondent known that the appellant was from Albania she may well have considered his asylum claim or promptly, and he would have been liable to be removed, there is no guarantee that the respondent would have in fact removed him either then or at any point up until she granted him indefinite leave to remain. As I have found, there is no evidence she attempted to remove him to Kosovo, the country of which

she believed he was a national despite the fact that the situation there had changed for the better.

42. That there is no guarantee the appellant could or would have been removed even had his true nationality been known from the outset is supported by the existence of the legacy exercise. The need for this arose directly as a result of the large number of unresolved cases/large number of people whose initial claims had been refused, but who remained in the United Kingdom.

43. These reasons, I do not accept the respondent's submission that the appellant's nationality was material to the grant of indefinite leave to remain."

28. Any suggestion or inference by the Judge that the Legacy programme was an amnesty and that anybody who entered the United Kingdom at the relevant time, even if they provided a false identity, was entitled to ILR under such a scheme, is legally flawed. It was specifically found in Hakemi at [4] that the Legacy programme was not an amnesty and that grants under the Legacy scheme were made by reference to paragraph 395C of the Immigration Rules, which at that time was in force, even though it was deleted on 12 February 2012.

29. Paragraph 395C set out certain factors the UK Border Agency was required to consider before making a decision to remove someone from the UK. Those factors were:

- the person's age
- how long he or she has been living in the UK
- any ties he or she may have to the UK (e.g. family, work and other associations)
- his or her personal history (including character, conduct and employment record)
- his or her domestic circumstances
- any criminal record
- any compassionate circumstances
- any representations made to the UK Border Agency on the person's behalf.

30. Although Mr Sellwood argued that reference to the Rules was not relevant as status was granted outside the Rules, whether such status would have been granted had the truth been known to the decision maker was doubted by the Judge contrary to the Secretary of States assertion in the refusal letter that she would have refused had she known. As part of the Legacy programme an individual's character, including conduct would be taken into account. Had the Secretary of State's representative been aware at that point in time that Mr Ismalaj had lied about his nationality for the purposes of deliberately obtaining an immigration advantage it cannot be said that he would have succeeded with a grant under the Legacy programme of ILR.

31. There does not appear to be any consideration by the Judge when examining the Legacy grant of ILR that it was likely to have failed if the Secretary of State was aware of either the fraud contained within the Legacy questionnaire or Mr Ismalaj's previous asylum application. The Secretary of State in her grounds refers to [36] of Hakemi where an extract of Chapter 53 of the Policy Guidance confirms that "case owners must also take account of any evidence of deception practised at any stage of the process..."
32. It must also be remembered in this, as in most similar cases, whilst ILR was granted under the Legacy scheme on the basis of the content of Mr Ismalaj's Legacy questionnaire, knowledge of his fraud did not come to light until nine years after Mr Ismalaj was granted ILR, and it cannot be argued on his behalf that the grant was a holistic assessment of all the relevant facts appertaining to Mr Ismalaj when the fraud was not known to the decision maker and could not be taken into account.
33. In relation to the delay issue, the Judge fails to provide adequate reasons in support of her finding at [40] that the delay of 2 ½ years, whilst the appellant was waiting for his asylum decision, was not his fault. There is merit in the Secretary States submission that had the appellant told the truth about his nationality when he entered the United Kingdom, he would have been unable to make an asylum application upon the basis of his false claim to be a national of Kosovo in the first place. It is also the case that the Judge's finding there was no evidence that the appellant deliberately evaded immigration control during the relevant period in the same paragraph is perverse. Not only did the appellant enter the United Kingdom unlawfully without seeking leave to do so, but also failed to approach the Secretary of State to disclose his true identity and nationality, continually seeking status and leave to remain on the basis of a false premise in his deliberate deception.
34. I find there is merit in the Secretary of State's argument that the Judge's finding that Mr Ismalaj's fraud was immaterial to the grant of ILR is unsustainable and that the finding at [43] that nationality was not material to the grant of ILR is unsafe as it is a finding that conflating fraud with nationality.
35. The finding at [56] set out above, is also infected by material legal error in relation to the finding fraud was immaterial to the grant of citizenship.
36. When considering the Judges reliance upon the decision in Sleiman the particular issues arising from that case, identified above, must be taken into account. It is an important factor that in that case the Secretary of State's representative did not submit that deception was relevant to the grant of ILR, whereas in this current case she has in the depravation decision letter and in the appeal. It is central to the Secretary of State's case in relation to both the grant of ILR and citizenship. This is clear from [28] of the decision letter. The 'bad character' argument is at the forefront, whereas it was not in Sleiman. The chain of causation identified by the Upper Tribunal in Sleiman was recognised as being broken by a concession by the Secretary of State and not the grant of leave under the Legacy Programme. The Judge fails to adequately reason within the decision as to how such a proposition is applicable on the facts of this appeal.

37. Reference by the Judge to Chapter 55, with specific reference to 55.7.3 and 55.7.4 at [49] and [50] in addition to chapter 18.at [51] and [52] is flawed, as 55.7.4 focuses upon previous fraud in the context where a grant is given under a concessionary policy, not in relation to fraud within an application notice itself, as is present within this appeal. The decision is also undermined by the Secretary of State's argument that concessionary policies are not amnesties, and neither was the Legacy programme, nor the family ILR concessionary policy referred to in 55.7.4/deception/character and conduct at the time and consideration. There is merit in the argument that as that key element was missing the reference by the Judge in the application of such material is infected by material legal error.
38. Chapter 18 of the Good Character Policy relied on by the Judge at [51] refers to caseworkers counting heavily against an applicant any attempt to conceal the truth about any matter in their application for naturalisation. There is merit in the Secretary of States argument that had Judge appropriate considered matters properly, the application under the Legacy programme would have been refused on account of the fraud relied upon in support of Ground 1, and it would not have been open to the Judge to find that the deception was immaterial.
39. Whilst Mr Sellwood argued that the deception was not material to the grant of citizenship as the grant of settlement was the springboard to citizenship, this does not assist where the grant of settlement (ILR) is infected by an incorrect interpretation and application of the principles under Legacy programme 'policy' in light of the fact the decision-maker being unaware of the deliberate deception and concealment by Mr Ismalaj.
40. The Secretary States decision, which was challenged in the appeal took all these matters into account as they were now known and it has not been made out the conclusion contained therein, the decision to deprive, is irrational, unlawful, reached without considering all the material with the required degree of anxious scrutiny, perverse, or outside the range of findings reasonably open to the decision-maker.
41. As in all cases of this nature, there is a chain of events, the chain of causation, and it is clear that at the material stage within the chain of causation, namely when ILR was granted, Mr Ismalaj's active deceit was a material factor which, had the truth been known at the time, is likely to have led to a refusal of the application under the Legacy programme pursuant to paragraph 353C character/conduct element.
42. Mr Sellwood's submissions do not overcome the concerns regarding the findings that delay strengthened the argument for the grant under the Legacy programme when such a fundamental aspect of Mr Ismalaj's true identity was not known to the decision-maker.
43. It is not disputed the Judge looked at the issues that are recorded in the determination but even before Begum confirmed the correct approach there is arguable merit in the Secretary of State's grounds that warrants a finding the Judge has erred in law in a manner material to the decision to allow the appeal. Applying the principles set out in Begum a further error is identified in the

approach taken by the Judge in remaking the decision for herself. I find the Secretary of State has established that the deception exercised by Mr Ismalaj had a material impact upon the grant of ILR and the resultant grant of citizenship.

44. No exceptional circumstances are made out such as to warrant the decision being permitted to stand in any event.

45. The Secretary of State in the decision letter of 9 March 2020, considered the deprivation decision, but not Article 8 ECHR. In relation to Article 8 ECHR the Upper Tribunal found in Hysaj (UT):

> "117. Significant weight is to be placed upon the public interest in a person who has obtained British citizenship through fraud, false representation or concealment of a material fact being deprived of that status and the Tribunal is to be mindful that it is the respondent who is primarily responsible for determining and safeguarding the public interest in maintaining the integrity of the rights flowing from British citizenship.
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> 118. The exercise of discretion is to be approached on the basis that deprivation of citizenship involves interference with a right and that any such interference should be no greater than is necessary to achieve the legitimate aim of the interference. In this matter, the issue is as to deprivation, and whether the appellant will be deported or removed is not determined by the deprivation appeal. Upon the conclusion of the appeal process, he will remain in this country and continue to reside with his family. The appellant will await a further decision as to whether he is to be deported or be permitted to remain in this country, and he will enjoy a further right of appeal to the First-tier Tribunal against a decision to refuse a human rights or protection claim. The children's best interests are in staying in a family unit with their parents, which they will continue to do upon deprivation. That the family unit may have to move accommodation or enjoy more limited financial resources is not such as to come close to defeating the significant public interest in the appellant being deprived of his British citizenship. The Tribunal held in *BA* that consequent to such weight, where statelessness is not in issue it is likely to be only in a rare case that the ECHR or some very compelling feature will require an appeal to be allowed. The circumstances in such a case would normally be exceptional in nature. We find that the Judge did not apply the wrong test when considering proportionality and article 8. She was employing exceptionality as a predictive device, rather than a threshold test."

46. The issue of statelessness has not been raised in this appeal and as with the appellant in Hysaj (UT), there is no suggestion that the consequence of the deprivation decision will be other than that Mr Ismalaj remaining in the United Kingdom with his family awaiting a further decision from the Secretary of State.

47. It is noted that it was also found in Hysaj (UT) that upon deprivation of British citizenship there is no automatic revival of previously held indefinite leave to remain status which is determinative of this issue too.

48. I find in addition to finding that the First-tier Tribunal has erred in law I find it has not been established on the evidence that there is legal error in the decision of the Secretary of States to deprive Mr Ismalaj of his British citizenship on the facts as found. The Article 8 issue will have to be considered by the Secretary of State at the earliest opportunity which has not happened to date. On the basis of

the matters relevant to the challenge at this point in time the only decision reasonably open to a Tribunal is for the appeal against the Secretary of State's deprivation of citizenship decision to be dismissed. The decision is not irrational or outside the range of those reasonably open to the decision maker on the facts or in law or can be impugned on public law grounds or otherwise. I therefore substitute a decision to dismiss the appeal.

Decision

49. The Judge materially erred in law. I set the decision aside. I substitute a decision to dismiss the appeal.

Anonymity.

50. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 22 July 2021