Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: **LP/00276/2021**
[DC/50072/2021] (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
In person and by Microsoft Teams	
On 20 January 2022	**On 2 February 2022**

Before

THE HON. MRS JUSTICE HEATHER WILLIAMS
(sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE RIMINGTON

Between

(1) SHAQIR CENAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Badar, Counsel, instructed by Oliver & Hasani Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Albania, born on 11 June 1984 appeals from the decision of Judge of the First-tier Tribunal Chamberlain ("the Judge") promulgated in September 2021, following a hearing earlier that month on 9 September 2021, dismissing his appeal against the Respondent's decision of 17 March 2021 to deprive him of his British citizenship under section

40(3) of the British Nationality Act 1981 ("BNA 1981") because he had obtained it fraudulently.

2. In summary, the Judge found that the condition precedent specified in section 40(3) had been met and that the Respondent's decision was not unlawful on traditional public law grounds. She rejected the Appellant's submission that she could reconsider the decision; and she dealt briefly with the contention that the decision interfered with the Appellant's rights under Article 8 of the European Convention on Human Rights ("ECHR") observing that there was "no decision to remove the Appellant such as would interfere with his rights under Article 8".

3. The hearing before us was in hybrid form, with Mr Badar, Counsel for the Appellant appearing remotely and Ms Cunha appearing in person. This was at the request of the respective parties. We were satisfied that all of the issues could be determined by this form of hearing. Neither party complained of any unfairness in the hearing and there were no connectivity problems.

The issues

4. The Appellant's grounds of appeal did not challenge the Judge's conclusion in relation to the existence of the condition precedent and nor did Mr Badar renew his submission below that the Judge could reconsider the Secretary of State's exercise of discretion. In summary, the grounds of appeal were that:

(1) The Judge failed to determine whether the Appellant's Article 8 rights were engaged and, if so, whether the deprivation decision was an unlawful interference with those rights;

(2) The Judge erred in the exercise of her public law review of the Respondent's exercise of discretion in not finding that she had failed to take into account a relevant consideration, namely the Appellant's car wash business that he had established in the United Kingdom ("UK"); and

(3) The Judge erred in failing to apply a "real world" analysis when she proceeded on the basis that there was no evidence before her to indicate that the Appellant would be unable to continue running his car wash business following the deprivation of his British citizenship.

5. The Respondent's Rule 24 Notice dated 14 January 2022 accepted that the Judge "has failed to follow [**Ciceri v SSHD** [2021] UKUT 00238 (IAC) ("**Ciceri**")] and appears to have considered Article 8 solely within the confines of whether or not the decision was reasonable and one that was open to the Secretary of State to make. The Secretary of State therefore accepts that Ground 1 establishes a material error of law and invites the Tribunal to set aside the decision of the First Tier Tribunal". The document went on to take issue with the other grounds of appeal.

6. On the morning of the hearing, Ms Cunha filed a skeleton argument asking for permission to withdraw the Rule 24 Notice. However, she still accepted (at para 22 of her document) that "there may be a material error of law in the way in which the FtTJ approached the question of proportionality…The SSHD also accepts that in doing so, the FtTJ did not factor in the 'limbo period' consideration". Additionally, her skeleton argument appeared to misunderstand the nature of the Appellant's Ground 1, suggesting that it challenged the Judge's conclusion that the statutory condition precedent was met.

7. Given these circumstances, we spent time at the outset of the hearing, clarifying the nature and extent of the grounds of appeal and the scope of what remained in dispute between the parties. Mr Badar confirmed that the grounds of appeal were as we have summarised in para 4 above. In terms of the issues before us, both Mr Badar and Ms Cunha agreed that:

(1) Ground 1 did disclose a material error of law in that the Judge had not undertaken an assessment of the Appellant's contention that the deprivation decision infringed his Article 8 protected rights. In turn, it followed that the appeal should be allowed to this extent and the Article 8 determination re-made;

(2) Ground 2 remained in issue and we needed to determine it in order to decide whether the Judge's conclusion that the deprivation decision was lawful in traditional public law terms, should be preserved or set aside;

(3) Ground 3 did not require determination, as it followed from the agreed error of law in respect of Ground 1 that the passage in the judgment that gave rise to this ground would not be preserved.

8. Ms Cunha also wanted to make submissions to us as to the scope of the outstanding Article 8 assessment. Mr Badar had some limited notice of this as she had raised the topic in her recently served skeleton argument. He did not object to her doing so and he indicated he was in a position to respond on this point. We agreed to hear the submissions, albeit indicating that we would not be in a position to decide whether and to what extent it would be appropriate for us to address this matter in our decision until we had heard the submissions on this point.

Immigration history

9. The Appellant entered the UK illegally and claimed asylum on 20 December 2001. He completed an asylum application dated 10 January 2002. He claimed his identity as Shaqir Cenaj born on 17 May 1987 in Kosovo. He claimed his nationality as Kosovan and declared no previous nationality. This information was false as to his date of birth, place of birth and his nationality. His asylum application was refused but on 20 February 2002 he was notified that he had been granted exceptional leave to remain for four years. He applied for a Home Office Travel Document on 22

November 2002 in which he made similar false representations as to his date and place of birth.

10. On 8 July 2005 the Appellant submitted an application for indefinite leave to remain in which he repeated the false representations as to his date and place of birth. He claimed his nationality was Yugoslavian. He was granted indefinite leave to remain on 3 August 2005.

11. On 14 December 2006 the Appellant submitted an application for naturalisation as a British citizen giving similarly false details as to his date and place of birth. The application was refused as he had not obtained a Life in the UK Test. However, he submitted a further application for naturalisation dated 10 April 2009 in which he continued with the false representations. This was successful and he attended his naturalisation ceremony on 8 July 2009.

The deprivation decision

12. On 8 January 2019, after the Status Review Unit received a referral from the National Crime Agency, the Appellant was issued with an investigation letter.

13. The Appellant's legal representatives sent representations dated 29 January 2019 in response. The letter accepted that the Appellant had submitted incorrect details on the occasions identified. It was stressed that he was young at the time and mentally affected by exposure to events in Albania. A human rights claim was made on the basis that he had been living in the UK for 17 years, that he had established a private life for the purposes of Article 8 ECHR and "has established his roots in the United Kingdom having finished secondary school, worked in the building industry and own[s] a car wash". Enclosed documentation included Profit and Loss records in relation to the car wash and payslips. Later in the letter it was said that the Appellant "has developed and grew up as an individual since having arrived in the United Kingdom to the point that he now has a lease and runs his own car wash which falls within the assertion of the case law cited above as evidence of his strong ties and links" to the UK. The Respondent was asked to take into account the Appellant's rights under Article 8 in considering whether to deprive him of his citizenship.

14. The deprivation decision letter dated 17 March 2021 indicated the Respondent had decided that the Appellant had obtained his British citizenship fraudulently and that his actions came within the meaning of "fraud" in section 40(3) of the BNA 1981. The letter said that if the relevant facts had been known at the time when his application for citizenship was considered, it would have been refused. The letter went on to note that although he was still a child when the initial false representations were made, the Appellant was an adult by the time he made his application for leave to remain and his applications for naturalisation; and it was apparent that he would have continued with the deception had he not been caught. It was not accepted that there was an innocent explanation for his conduct

and the letter indicated that the Secretary of State was satisfied that the Appellant had provided the information with the intention of obtaining a grant of status and/or citizenship.

15. Under a heading "Article 8 ECHR" the letter pointed out that a deprivation decision does not itself preclude an individual from remaining in the UK and that it did not equate to removal or deportation. It was accepted that deprivation of citizenship would mean that the Appellant would lose the benefits associated with being a British citizen, including a British passport and the right to vote; and that the loss of citizenship would have an impact on the Appellant's identity. The letter also said that the Secretary of State would have acted earlier if the misrepresentation had come to the attention of the authorities. Reference was also made to the submission of the Appellant's representatives that he had established a strong private life in the UK. The letter did not mention the Appellant's car wash business specifically.

16. The letter said that once deprived of his citizenship, the Appellant would become subject to immigration control and so could be removed from the UK. However, consideration might also be given to the grant of a limited form of leave; and a decision on that would follow once the deprivation order was made. The letter indicated the conclusion that it was reasonable and proportionate to deprive the Appellant of his British citizenship.

The Judge's decision

17. The Judge's decision is a little confused as to the nature and scope of her jurisdiction in respect of this appeal, albeit it seems she did not have the benefit of **Ciceri** which was promulgated one day before the hearing in the FtT. Her reasoning indicates that she considered her role was limited to a review of the Secretary of State's decision on traditional public law grounds, but at the same time she referred to a burden of proof lying on the Appellant to show that the Respondent "should have exercised her discretion differently" (para 19). Further, although she regarded the fact that no removal decision had been made as a complete answer to the Article 8 issue, nonetheless paras 37 – 42 of her decision appear to conflate her review of the Respondent's exercise of discretion with points relevant to the proportionality of the decision. Having made those overarching observations, we turn to the key parts of her reasoning.

18. In her para 19 under the heading "Burden of proof" the Judge observed: "In relation to Article 8, there has been no decision to remove the Appellant".

19. Having set out the parties' submissions as to whether she could reconsider the Respondent's decision or only review it, she said that she found in light of **R (Begum) v SSHD** [2021] UKSC 7 that it "was clear that Tribunals are limited to a consideration of the Respondent's exercise of discretion and cannot exercise this discretion themselves" (para 27). As we

have already indicated, Mr Badar does not challenge the latter part of this proposition. She went on to observe:

> "29. I find, as is the Respondent's practice, and as she made clear in her decision letter, that she has not made a decision whether to remove the Appellant or whether to grant a period of leave. There is therefore no decision to remove the Appellant such as would interfere with his rights under Article 8. I am therefore restricted to considering the three factors set out above [the first three factors identified in para 71 of Lord Reed's speech in **Begum**] when considering the Respondent's exercise of discretion."

20. The Judge then set out her conclusion that the Judge had not acted in a way which no reasonable decision-maker could have acted at paras 30 – 33. There is no challenge to this part of her decision.

21. At para 34 the Judge turned to whether the Secretary of State had taken into account an irrelevant matter or disregarded something to which she should have given weight. She noted that the Respondent had taken into account the three separate occasions when the Appellant had repeated the false representations as an adult; and that the Appellant had accepted that he made the false representations. She did not specially note that the Appellant's car wash business was not mentioned in the decision letter.

22. Next the Judge concluded that the Respondent had not erred on a point of law. In this context she referred to the material relied upon by the Secretary of State as indicating that the Appellant's conduct was fraudulent (para 35).

23. It is necessary to set out in full some of the Judge's reasoning that then followed:

> "36. I have found above that Begum restricts the Tribunal to consideration of the Respondent's exercise of discretion, rather than a full reconsideration of the facts with a view to exercising its own discretion. I have considered the factors set out by Mr Badar in submissions and in his skeleton argument…Several of these issues are more relevant to an Article 8 consideration, but there is no decision to remove the Appellant.
>
> 37. In relation to the length of residence, the Appellant would not have had any right to remain had he told the Respondent the truth. He would have been returned to Albania. Any ties he would have formed would have been made when he had no entitlement to be here…
>
> 38. Mr Badar submitted that the 'exceptional factor' in the Appellant's case was his business. It was submitted at the hearing that the Appellant would will [sic] be prevented from running his business as he will no longer have British citizenship. In the skeleton argument it was not put in these terms, but rather that there was no public interest in 'depriving and hence removing' a business owner. There is no decision to remove the Appellant. I was not provided with any evidence to corroborate the submission that foreign nationals cannot run businesses in the United Kingdom. I find that there is nothing exceptional in the fact that the Appellant runs a small car wash business in the United Kingdom which employs four other people. I do not find that this is something which the Respondent has disregarded and to which she should have given weight.

39. In relation to the limbo point, the Respondent has stated that a decision will be made pending the decision of the Tribunal…

40. I find that none of the issues set out in the skeleton argument indicate that the Respondent has acted unreasonably in her exercise of discretion, nor are they issues which should have been given weight or have been given undue weight. They do not point to an error of law.

41. …

42. Taking all of the above into account, I find that the Respondent has not acted in a way that is unreasonable. I find that she has exercised her discretion with regard to the relevant factors, and I find that her decision to deprive the Appellant of his citizenship is reasonable and proportionate. It is a lawful decision."

The legal framework

24. Section 40A(1) of the BNA 1981 gives a right of appeal against decisions made by the Secretary of State under section 40 to deprive a British citizen of their citizenship or status. The power is exercisable where the Secretary of State is satisfied that it would be conducive to the public good to deprive a person of his or her British nationality (section 40(2) and (4)) or where she is satisfied that the person acquired their citizenship or status as a result of registration or naturalisation obtained by means of fraud, false representation or the concealment of any material fact (section 40(3)).

25. In **Ciceri** the Upper Tribunal reformulated the legal principles applicable to appeals brought under section 40A of the BNA 1981 against decisions to deprive a person of their British citizenship in light of the recent judgments in **KV (Sri Lanka) v Secretary of State for the Home Department** [2018] EWCA Civ 2483 ("**KV (Sri Lanka)**)"; **Aziz v Secretary of State for the_Home Department** [2018] EWCA Civ 1884 ("**Aziz**"); **Hysaj (deprivation of citizenship: delay)** [2020] UKUT 00128 (IAC) ("**Hysaj**"); **Begum**; and **Laci v Secretary of State for the Home Department** [2021] EWCA Civ 769 ("**Laci**").

26. In **Begum** Lord Reed PSC (with whom the other Justices agreed) rejected the proposition that a section 40A appeal extended to considering whether the Respondent's discretion should have been exercised differently. His description of the role of the tribunal hearing the appeal included the following:

"68. They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law… They must also determine for themselves the compatibility of the

decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

69. … So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

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…In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

27. The reformulated principles identified in **Ciceri** were crafted in light of that analysis. They were explained at para 30 as follows:

"(1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the 1981 Act exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

(2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged (usually Article 8). If they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights, contrary to the obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR.

(3) In so doing:

(a) the Tribunal must determine the reasonably foreseeable consequences of deprivation; but it will not be necessary or appropriate for the Tribunal (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom; and

(b) any relevant assessment of proportionality is for the Tribunal to make, on the evidence before it (which may not be the same as the evidence considered by the Secretary of State).

(4) In determining proportionality, the Tribunal must pay due regard to the inherent weight that will normally lie on the Secretary of State's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in EB (Kosovo). Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in EB (Kosovo)…

(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; has disregarded something which should have been given weight; has been guilty of some procedural impropriety; or has not complied with section 40(4) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3) and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good."

28. The need for reformulation of the principles, in particular stemmed from the rejection by the Supreme Court in **Begum** of the approach identified in **Deliallisi v Secretary of State for the Home Department** [2013] UKUT 439 (IAC), para 31 (and followed in some of the subsequent authorities), that the section 40A appeal required the appellate body to exercise afresh any judgment or discretion employed in reaching the decision under appeal. As we indicated earlier, Mr Badar accepts this.

29. In light of Ms Cunha's submissions as to scope of the appeal, it is relevant to note that it is clear from the case law, that when considering an Article 8 ECHR issue, the tribunal should not conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the UK but focus on the consequences of the deprivation decision itself. For example, this is apparent from: **Aziz** at paras 26 – 30; **Hysaj** at paras 35 – 36; and **Laci** at para 38. It is confirmed at para 3(a) of the **Ciceri** re-formulated guidance and Mr Badar does not take issue with this (which we stress because some of Ms Cunha's submissions appeared to assume that this

was in issue and that Mr Badar was seeking a wider proportionality assessment that looked to the likelihood and consequences of removal).

The grounds of appeal and the submissions

30. We have explained earlier that Grounds 1 and 3 are no longer in issue. We address the consequences when setting out our conclusions below.

31. In relation to Ground 2, Mr Badar submitted that it was clear that the Appellant's ownership of his car wash business was relevant to his Article 8 claim to having established a private life in the UK and also to the exercise of the Secretary of State's discretion. Further, that it was equally clear from the absence of any mention of this in the decision letter that it had not been taken into account. Whilst accepting that a decision-maker did not have to mention every matter that they had taken into account, Mr Badar submitted that this was a crucial feature of the Appellant's representations ("a huge factor") which the Secretary of State needed to address in terms. When asked to clarify the basis of his appeal below, Mr Badar frankly accepted that his grounds of appeal, skeleton argument and oral submissions before the First-tier Tribunal had not asserted that the Respondent had made a public law error in failing to take into account as a relevant consideration, namely the Appellant's business activities.

32. Ms Cunha accepted that the decision letter did not mention the car wash business in terms, but she said that, read as a whole, it showed that the Secretary of State had given careful consideration to the representations made in the 29 January 2019 letter. She also said that this aspect was not such a weighty factor as to require explicit mention in the decision letter.

33. After we spent some time clarifying the point being raised and disentangling it from matters that were not in fact in dispute (see paras 28 and 29 above), it emerged that the crux of Ms Cunha's submission as to the scope of the Article 8 assessment in relation to an appealed deprivation decision was based on para 64 of Lord Reed's judgment in **Begum**. Therein he said:

> "64. It is necessary to bear in mind that the appellate process must enable the procedural requirements of the ECHR to be satisfied, since many appeals will raise issues under the Human Rights Act. Those requirements will vary, depending on the context of the case in question. In the context of immigration control…the case law of the European Court of Human Rights establishes that they generally include, in particular, that the appellant must be able to challenge the legality of the measure taken against him…and the proportionality of any interference with qualified rights such as those arising under article 8…A more limited approach has been adopted in cases concerned with deprivation of citizenship. The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under article 8. In determining whether there is a breach of that article, the court has addressed wither the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant. In determining arbitrariness, the court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly and whether

> the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE 18, paras 49 – 50 and 54 – 61."

34. Ms Cunha said it followed from this that subparagraphs (3) and (4) in the **Ciceri** reformulated principles were wrong; it was unnecessary to assess the reasonably foreseeable consequences of deprivation as there was no proportionality assessment to be conducted and the Article 8 assessment (where Article 8 was engaged) should be confined to the question of arbitrariness, as identified by Lord Reed.

35. Mr Badar disagreed with Ms Cunha's submission. He said that arbitrariness was an *additional* aspect of the Article 8 assessment and that the passages from Lord Reed's judgment in paras 69, 70 and 71 which we have set out earlier referred to the tribunal making its own assessment of the evidence and did not suggest that an Article 8 assessment should be restricted in the way suggested. Mr Badar pointed out that Lord Reed did not indicate that he disagreed with the proposition that the tribunal should determine the reasonably foreseeable consequences of deprivation and make an assessment of the proportionality of that decision. He also noted that **Begum** had been given careful consideration by the Upper Tribunal when re-formulating the legal principles in **Ciceri**.

Discussion and conclusions

Grounds 1 and 3

36. We agree that the Respondent's concession in relation to Ground 1 is well-founded. It appears from paras 19, 29 and 36 of her decision (which we have set out above) that the Judge was under the impression that the fact that the Respondent had yet to decide whether the Appellant was to be removed was a complete answer to his Article 8 contentions. This was misconceived. As the reformulated principles in **Ciceri** identify, once the Judge was satisfied that the relevant condition precedent existed pursuant to section 40(3), she needed to consider whether the Appellant's Article 8 right to private life was engaged on the particular facts and, if so, whether the deprivation decision constituted an unlawful interference with this right.

37. For the avoidance of doubt, we do not consider that the references in the Judge's paras 37 and 38 to some factors that could be relevant to a proportionality analysis saves her decision in this respect and nor does her reference to the decision being proportionate in her para 42. She had earlier dismissed the Appellant's reliance on Article 8, and we have set out the material parts of paras 37 – 42 to show that there was an unsatisfactory conflation of the Judge's task in relation to section 6 of the Human Rights Act 1998, in so far as it was embarked upon, with her review on traditional '*Wednesbury*' principles. The Respondent does not suggest otherwise. Accordingly, it is accepted that this part of the assessment must be conducted *de novo* and that none of the findings in paras 37 and 38, in so far as there are findings, can stand.

38. It is for this reason that Ground 3 no longer remains a live issue, as it arose from the text of para 38.

Ground 2

39. We do not accept Ground 2 discloses an error of law. Mr Badar frankly acknowledged that it was not submitted to the Judge that the Respondent had made a public law error in failing to take into account a relevant consideration, namely the Appellant's car wash business. In these circumstances, the Judge cannot be fairly criticised for not addressing the point directly in her decision (although para 38 appears to touch on this issue). Furthermore, we do not accept that this is a **Robinson** obvious point, as Mr Badar suggested as a fallback position. We do not consider that an error of law is disclosed in the Secretary of State's decision letter in this respect, let alone an obvious one.

40. As Mr Badar accepted, a decision-maker is not bound to set out every factor that they have taken into account. The 29 January 2019 representations letter was nine pages long. We have already quoted the entirety of the two brief references to the Appellant's car wash business. Although the grounds of appeal refer to the benefits to the economy and the jobs that the Appellant had created, Mr Badar accepted that these were not mentioned in terms in the January 2019 letter. The decision letter indicated that the Appellant's representations regarding his private life in the UK had been taken into account (for example at paras 14 and 20). In the circumstances we do not consider that it was incumbent on the Secretary of State to specifically address the brief references to the car wash business and we do not consider that the lack of specific reference to this indicates that it was not taken into account. Furthermore, para 22 of the decision letter specifically addressed the Appellant's long residence in the UK (which was raised in the Appellant's letter in the same passages that referred to his car wash business), pointing out that this only arose from his sustained deception.

Scope of the Article 8 assessment

41. We propose to remit the questions of whether Article 8 is engaged and, if so whether the deprivation decision has unlawful interfered with the Appellant's Article 8 rights to the First-tier Tribunal, primarily because, thus far there has been no assessment of these matters.

42. The First-tier Tribunal will be bound to apply the approach identified in the current appellate case law, including in **Ciceri**, where, as we have noted, **Begum** and other recent decisions were reviewed. The proposition that to be lawful, the deprivation decision must be a proportionate interference with the Article 8 rights of its subject is supported by a number of earlier authorities, including judgments of the Court of Appeal that are binding on us and upon the First-tier Tribunal, for example: **KV** at para 20; **Hysaj** at paras 30 and 32 – 33 and in relation to the 'limbo period' at paras 110 and 118; and **Laci** at para 38.

43. The Supreme Court in **Begum** had to address (amongst other issues) whether an appeal under section 40A of the BNA 1981 involved a re-consideration of the Secretary of State's decision, but the issues before the Court did not require it to address the scope of a challenge that a deprivation decision infringed Article 8. Unsurprisingly in those circumstances, it does not appear that **Aziz**, **KV** or **Hysaj** were cited to the Supreme Court. Whilst we appreciate why Ms Cunha drew our attention to para 64 of Lord Reed's judgment, he does not indicate anywhere in his judgment that these domestic authorities were incorrect in terms of the description of the Article 8 assessment or that they should not be followed in that respect. Furthermore, as Mr Badar pointed out, his articulation of the tribunal's jurisdiction in paras 69 – 71 is at least consistent with a proportionality assessment being conducted by the tribunal where Article 8 is raised and engaged (albeit he does not address the point directly). It may be that the Respondent will pursue the submission to a higher appellate level following the remitted Article 8 assessment in this case or in another appeal (she told us that it was not raised before the Upper Tribunal in **Ciceri**). However, in our judgment, the current position in domestic law is clear and the First-tier Tribunal should follow the **Ciceri** reformulated guidance.

Disposal

44. Accordingly, for the reasons given above, the decision of the First-tier Tribunal involved the making of an error of law in terms of failing to make a lawful determination of whether the deprivation decision interfered with the Appellant's rights under Article 8.

45. We propose to remit this appeal to the First-tier Tribunal as we indicated at para 41 above. The Judge's findings that the condition precedent specified in section 40(3) of the BNA 1981 existed; and that the Respondent did not act in a way that no reasonable decision-maker could have acted; and did not take into account irrelevant considerations or fail to take into account matters to which she should have given some weight, will be preserved.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law.

(2) The decision of the First-tier Tribunal is set aside, apart from the following preserved findings: that the condition precedent specified in section 40(3) of the BNA 1981 existed; and that the Respondent did not act in a way that no reasonable decision-maker could have acted; and did not take into account irrelevant considerations or fail to take into account matters to which she should have given some weight.

(3) The appeal is remitted to be re-heard by a Judge of the First-tier Tribunal.

Signed:

Mrs Justice Heather Williams Date 25 January 2022

The Hon. Mrs Justice Heather Williams
sitting as an Upper Tribunal Judge