Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001457**

DC/50020/2020; IA/00541/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 29 November 2022	**On 12 February 2023**

Before

Upper Tribunal Judge McWILLIAM
Deputy Upper Tribunal Judge MANUELL

Between

Mr BARELIAN BAZE
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Gunn, Counsel
(instructed by Oliver and Hasani)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer,

DECISION AND REASONS

Introduction

1. This is the remaking of the Appellant's deprivation of citizenship appeal, pursuant to the order of Upper Tribunal (Mrs Justice Hill and Upper Tribunal Judge McWilliam) dated 25 May 2022. A copy of the error of law finding is set out as an appendix to the present decision. The history of these proceedings and the relevant law is set out in detail in the error of law decision and so it is unnecessary to recite those matters again here at any length. The Tribunal has applied the law as set out in the error of law decision .

2. The Appellant appealed against the Respondent's decision dated 24 December 2020 to deprive him of British Citizenship pursuant to section 40(3) of the British Nationality Act 1981 (as amended by the Nationality, Immigration and Asylum Act 2002) ("the BNA 1981"). The only issue for us to determine is whether the decision of the SSHD breaches the Appellant's rights under Article 8 ECHR. Our consideration of this is limited; see Aziz v SSHD [2018] EWCA Civ 1884.

Evidence

3. The Appellant gave evidence in English in accordance with his witness statement dated 20 May 2021. (This was the same witness statement as had been produced for the First-tier Tribunal hearing.) There in summary he said that he was born on 6 June 1980 in Albania. He came to the United Kingdom in 1998, fearing disorder in Albania. He was advised by an interpreter to claim asylum as a Kosovan, which the Appellant did, stating his date of birth as 6 June 1972 and birthplace as Lukov, Kosovo. He was granted asylum and given Indefinite Leave to Remain as a refugee on 22 May 1999.

4. On 22 April 2002 he married Ms Anduela Nebiu. Their daughter, M, was born on 3 November 2004. The Appellant was naturalised as a British Citizen in his false identity on 15 December 2004.

5. In 2005 the Appellant sponsored his mother to visit the United Kingdom. His identity was stated as Albanian in his mother's application.

6. The Appellant's son B was born on 12 December 2007. Both the Appellant's children were in full time education.

7. The Appellant said that he had always been afraid to reveal his true identity for fear of being returned to Albania. He regretted the situation and apologised. He had now lived in the United Kingdom for 23 years [now 24 years], more than half his life. All his family and private life was in the United Kingdom. He had started his own business and provided for his family.

8. Removal of his British Citizenship would have a negative impact, not only for him but for his wife and their two children. He would be in limbo and a state of uncertainty. He would be unable to work. He was in a difficult situation.

9. In supplementary questions, the Appellant said that his children remained in full time education.

10. Under cross examination, the Appellant accepted that he had been scared to reveal his true identity. He had not known that his Albanian nationality had been revealed in his mother's visa application in 2005. One of his companies was being wound up, the other was still trading. He estimated his annual income as £12,000-13,000. His wife worked and earned £22,000 per year. They owned their home, subject to mortgage. He was unsure of the value. They had savings of about £15,000. There were no health issues or assets outside the United Kingdom.

Submissions

11. Mr Clarke for the Respondent relied on the decision letter dated 24 December 2020. It had been accepted on the Appellant's behalf that Section 40(3) of the BNA 1981 applied. The Respondent accepted that the decision to deprive engaged Article 8 ECHR, for the obvious reason of the Appellant's British Citizen wife and British Citizen children. The central issue was thus the "limbo" or delay or proportionality arguments after the Appellant had become subject to immigration control on ceasing to hold British nationality. The Respondent had no knowledge of any disclosure in 2005, and the Appellant had agreed in cross examination that he had not known of any such disclosure. The Appellant had not shown that the Home Office had delayed in making the deprivation decision once it was aware of the fraud.

12. As to the "limbo" question, the Home Office policy set targets which did not amount to undertakings. During any limbo period the Appellant was in no worse state than he had been in 2004. The waiting time would have little impact on the facts, as the Appellant had a home and savings. It was unlikely that he would face detention pending a fresh immigration decision given the fact that he had a home and family. There was nothing exceptional about the Appellant's case, and nothing sufficient to outweigh the substantial public interest in maintaining the integrity of the British nationality naturalisation system. The appeal should be dismissed.

13. Ms Gunn for the Appellant relied on her skeleton argument. In summary counsel accepted that the Appellant had obtained his British Citizenship in a false identity. Article 8 ECHR was engaged as the Appellant had lived in the United Kingdom for 24 years, more than half his life. He was married to a British Citizen and had two British Citizen children aged 18 and 14. The Appellant owned two businesses. If his British Citizenship were lost, the Appellant would become subject to immigration control and would face an uncertain future with a potentially protracted timescale, at best several months. He would be in limbo and face various restrictions. That delay would be disproportionate.

14. There had been delay on the part of the Secretary of State. The Appellant had sponsored his mother for a visit visa to the United Kingdom in 2005, when his true nationality was disclosed. The Respondent had delayed 20 years before taking action. That was disproportionate when seen against the other Article 8 ECHR factors. The appeal should be allowed.

Remaking the decision

15. This is a sad case, like other similar appeals which have come before the Tribunal, where thoughtlessness or opportunism and then subsequent prolonged inaction have resulted in a difficult situation affecting the lives of the people of the greatest importance to the Appellant. The essential facts of the appeal were not in dispute. The legal argument followed the same ground as was closely examined in the error of law decision. It is accepted by the Appellant that he obtained his British Citizenship by fraud in 2004. The Appellant further

accepted under cross examination that he was unaware that his true identity had been stated in 2005 by his mother when she applied for a visit visa to the United Kingdom, by which stage the Appellant had already become a British Citizen.

16. While it is possible that Secretary of State might have noticed the discrepancy in the Appellant's mother's visa application 2005, it would have required close scrutiny and liaison between departments. This was some distance from a situation where the Appellant himself had made a full disclosure or confession, seeking to put matters right. The facts provide no assistance to the Appellant in demonstrating any relevant delay on the Respondent's part which amounts to disproportionality. This is not a case where it can said that the Respondent took no action for 15 years after acquiring sufficient knowledge to act or at least to seek further information. The Tribunal so finds. We have to say that we find that it is surprising that the deception was not detected earlier and communicated to the relevant department; however, we do not accept the Appellant's argument about the length of the delay. The disclosure of the deception was made accidentally and not directly by the Appellant. It is reasonable that there would be a period of delay in detection and informing the relevant department.

17. A second form of delay or "limbo" was also submitted as being relevant, namely the period which would be likely to elapse between deprivation of the Appellant's British Citizenship and a further immigration decision. While the Appellant remains a British Citizen, he is not subject to immigration control. Neither removal directions nor any form of limited leave to remain can be made until he has lost his British Citizenship. Therefore there will be a period when the Appellant will not have any form of leave and this has been described as a period of "limbo." The Appellant will have the opportunity of making representations before any further decision is made if he chooses to seek to remain in the United Kingdom. It is likely that this Appellant will make an application in the light of his British citizen wife and children.

18. At para.46 of the decision letter the SSHD indicates that a deprivation order will be made within four weeks of the Appellant becoming appeal rights exhausted and a decision whether to grant leave within eight weeks thereafter subject to representations by the Appellant.

It was not suggested that the timeframe given by the SSHD in the decision (or in any Home Office policy) are undertakings. It was submitted on behalf of the Appellant that in practice the timeframe is not a realistic estimate, and left out of account appeal periods and the possibility of judicial review proceedings. However, we note that the SSHD has not suggested that the timeframe of eight weeks includes consideration of representations, forward appeals and or judicial review proceedings. This is not surprising as such an estimate would be highly speculative so as to be meaningless. We find that individual cases will vary and there could be a number of good reasons why the target period could reasonably be longer than eight weeks following the making of representations by an appellant. There was no evidence before us that should this Appellant make representations the period of time it will take to determine the application will amount to an unreasonable delay.

19. A reasonable period of limbo following deprivation is primarily a foreseeable consequence of the Appellant's fraud, his own actions: see Hysaj (Deprivation of Citizenship; Delay) [2020] UKUT 00128. Once his British Citizenship is revoked he will be in the same position as prior to the fraud, i.e., a national of Albania free to return there or to seek leave to remain in the United Kingdom on any basis open to him.

20. We have considered what the limbo period will entail for this Appellant. The evidence before the Tribunal showed that the Appellant had accommodation, savings and that his wife worked. No reason was given why a manager could not run his business or the Appellant could sell it. Neither he nor his children would be destitute. Their British Citizenship would not be affected. We accept that the Appellant has been here for twenty four years and that it is surprising that his deception was not identified earlier by the SSHD. However, we have rejected the Appellant's submissions in respect of the extent of the delay and the reasonableness of any likely period of limbo. We have taken into account that he did not knowingly disclose deception to the SSHD. We remind ourselves of what the UT said in Hysaj at [110]: -

> "There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption

> in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured. That is the essence of what the appellant seeks through securing limited leave pending consideration by the respondent as to whether he should be deported. Although the appellant's family members are not culpable, their interests are not such, either individually or cumulatively, as to outweigh the strong public interest in this case."

21. The Tribunal finds that the revocation decision was a reasonable decision, with no error of fact, no breach of published policy, no irrelevant matters taken into account and no relevant matters ignored. The decision does not breach the Appellant's rights under Article 8 ECHR.

22. The decision does not disclose public law error.

23. The appeal is dismissed under Article 8 ECHR.

DECISION

The appeal is dismissed

FEE AWARD

There can be no fee award.

Signed **R J Manuell** **Dated** 7 December 2022

Deputy Upper Tribunal Judge Manuell

APPENDIX

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Nos: UI-2021-001457**
DC/50020/2020(V); IA/00541/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 May 2022	**29/05/2022**

Before

THE HONOURABLE MRS JUSTICE HILL
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Appellant

and

BARELIAN BAZE
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant/SSHD: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Ms E Gunn, Counsel instructed by Oliver & Hasani Solicitors

DECISION AND REASONS

1. We will refer to the Respondent as the Appellant as he was before the First-tier Tribunal. Appeal Numbers: UI-2021-001457 DC/50020/2020 2

2. The Appellant is a British citizen. He was born in Albania on 6 June 1980.

3. In a decision dated 21 January 2020 the First-tier Tribunal (Judge Komorowski) granted the Secretary of State for the Home Department (SSHD) permission to appeal against the decision of the First-tier Tribunal (Judge Bird) to allow the Appellant's appeal against the decision of the SSHD on 24 September 2020 to give the Appellant notice pursuant to s.40(5) of the British Nationality Act 1981 (the 1981 Act) of her decision to make an order to deprive the Appellant of British citizenship under s.40(3).

4. The decision came before us to determine whether the First-tier Tribunal made an error of law. Mr Clarke attended the hearing remotely and Ms Gunn and the Appellant attended in person. The hearing had been listed for a face to face hearing. Mr Clarke was unable to attend in person. The parties agreed to the matter proceeding by way of a hybrid hearing.

5. The Appellant came to the UK on 28 June 1988. He gave his details as Berelian Baze, born on 6 June 1972 in Kosovo. On 22 May 1999 he was granted asylum. The SSHD accepted the Appellant's account that he would be at risk on return to Kosovo. On 9 January 2004 he applied to be naturalised as a British citizen. On 15 December 2004 he was naturalised as a British citizen.

6. On 9 February 2005 the Appellant sponsored his mother's application (made at the British Embassy in Tirana) for a visit visa. She said her Sponsor was her son, Bareljan Baze, a national of Albania. On 9 February 2005 she was issued with a visa. On 8 January 2020 a referral was received by the Status Review Unit (SRU) from Her Majesty's Passport Office (HMPO) with information that the Appellant had falsified his identity in his dealings with the Home Office. The SSHD considered the Appellant's representations, but decided to make an order to deprive him of British citizenship.

7. The Appellant appealed against the decision of the SSHD. The Appellant admits using deception. It was accepted by the Appellant in this case that the condition precedent had been established. The Appellant

accepted that he acquired asylum in 1998 by giving a false date of birth and a false nationality and that naturalisation was granted on the basis of this false information. Judge Bird allowed the appeal on Article 8 grounds.

The Law

The British Nationality Act 1981

8. S.40(3) states as follows:- "(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".

9. The jurisdiction of the Tribunal in respect of decisions under s.40(2) and 40(3) has been the subject of recent litigation of which the most significant is R (Begum) v SIAC [2021] UKSC 7; [2021] Imm AR 879. The ratio of the decision is contained in Lord Reed's judgment at paragraphs 68–71. In a nutshell, the Tribunal must determine whether the SSHD's discretionary decision to deprive an individual of British citizenship was exercised correctly. The correct approach to this is not a balancing exercise, but rather a review on Wednesbury principles. However, where Article 8 is concerned the Tribunal must determine for itself whether the decision is compatible with the obligations of the decision maker under the Human Rights Act 1988, paying due regard to the inherent weight that will normally lie on the SSHD's side of the scales in the Article 8 balancing exercise.

10. Following Begum, the UT reformulated the legal principles regarding appeals against decisions to deprive a person of British citizenship in Ciceri (deprivation of citizenship appeals; principles) [2021] UKUT 00238 as follows:- "Following KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884, Hysaj (deprivation of citizenship: delay) [2020] UKUT 128 (IAC), R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 and Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 the legal principles regarding appeals under section 40A of the British Nationality Act 1981 against decisions to deprive a person of British citizenship are as follows: (1) The Tribunal must first establish whether the relevant

condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 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 ECHR 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) v Secretary of State for the Home Department [2009] AC 1159. 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 paragraphs 13 to 16 of 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".

11. The parties relied on Hysaj (Deprivation of Citizenship; Delay) [2020] UKUT 00128 and Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884; [2009] 1 WLR 266.

12. We heard oral submissions from the parties. Mr Clarke relied on the SSHD's grounds of appeal. Ms Gunn relied on her response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Grounds 1 and 2

13. In ground 1 the SSHD asserted that the judge erred in respect of her approach to delay. Ground 2 asserted that the judge erred in finding that there was legitimate expectation. We will engage with these grounds together.

14. The Appellant's case before the First-tier Tribunal was that the SSHD was made aware of the deception on 9 February 2005 when his mother applied for entry clearance. During the process he disclosed his genuine identity to the British Embassy in Tirana. It was not until some fifteen years later, on 8 January 2020, that a referral was received by the SRU from HMPO. The SSHD's position was that the British Embassy in Tirana were not part of the Home Office and "as such it cannot be expected that the information would be directly relayed to the Home Office by the embassy".

15. The SSHD's submission was that the decision of Judge Bird is inconsistent with what was stated by the Upper Tribunal in Ciceri. It was asserted that the First-tier Tribunal presumed that the British Embassy in Tirana is part of the Home Office and that the judge expressed an

expectation, at para 43, which is perverse. The SSHD relied on the following paragraphs of the decision of the First-tier Tribunal:-

"40. Shortly after naturalisation in December 2004, the Appellant sponsored his mother to come to the United Kingdom as a visitor. It is not in dispute that at the time of the application in 2005 the Appellant's true identity was disclosed to the British Embassy in Tirana. The Appellant's mother was granted an entry clearance as a visitor for six months. The Respondent's argument is that although the identity was disclosed to the embassy, the embassy did not form part of the Home Office and therefore there was no disclosure to the relevant department of the Home Office.

41. I can understand that an embassy or High Commission would come under the auspices of the Foreign Office but there are sections of it which act as agents for the Home Office particularly in the exercise of functions that involve considering applications for entry to the UK. It is a function very similar to that performed by Immigration Officers when someone seeks entry to the UK at the border. These functions are performed by Entry Clearance Officers abroad – one presumes on behalf of the Home Office.

42. The Respondent's review at paragraph 8 states that in 2005 the British Embassy in Tirana was not part of the Home Office and therefore the Respondent was not informed of the Appellant's true identity and nationality at the time of his mother's visa application. I have been provided with a copy of the Visa Application Form which appears at Annex H1 of the Respondent's bundle. The heading shows that the document is a Home Office document and then the agency to which the information was given was a UK Border Agency. Although the application was made in Tirana it was an application for entry to the Home Office and the UK Border Agency. The Appellant name (sic) was given and his nationality was shown as Albanian. On the basis of this information the Appellant's mother was granted an entry clearance (sic) in 2005.

43. It is surprising that the Entry Clearance Officer (ECO) did not initiate any checks to see if the Appellant was in the UK and what his circumstances were. I would have expected the ECO to check the information provided with the HO. No enquiries were initiated as to the consequences of the information and the Appellant continued to remain in the United Kingdom. He married in 2002 and two children were born to him and his wife, one in 2004 and the second child in 2007. The Appellant has established his own business in 2015 and opened a new company in 2018.

44. The only reason the Respondent gives for not taking any action until 2020 was that although this information was supplied when the Appellant's mother was granted an entry clearance, it was only supplied to the British Embassy in Tirana which was not part of the Home Office. The Visa

> Application Form has a heading which shows that it was filled in on behalf of the Home Office/UK Border Agency and not just the British Embassy in Tirana.
>
> 45. In support of this application the Appellant's mother would have been required to produce details of her Sponsor with identity documents. This is likely to be a passport or the Appellant's refugee status document. This would have alerted the ECO that the information given to the Home Office was that of a Kosovan citizen and not an Albanian citizen. 46. The Appellant was allowed to continue to remain in the United Kingdom on the information that he had provided which in 2020 the Respondent found to be false (see paragraph 14 of the Reasons for Refusal Letter). The fact remains that the Appellant did acquire his British citizenship on a basis of his false nationality and other details. However he did reveal his true identity in 2005 but nothing was done at that time. The Respondent, nonetheless was entitled to take the action that she did in 2020".

16. The SSHD asserted that inadequate reasons have been given for treating the British Embassy as part of the Home Office. It was submitted that the finding of the judge that the SSHD knew about the fraud in 2005 was unsafe.

17. We agree with Ms Gunn that Ciceri is not authority for the proposition that there is no line of communication between the British Embassy in Tirana and the Home Office, nor that continuing to rely on deception impacts on the delay. In Ciceri the appellant submitted a birth certificate disclosing his true identity in support of his wife's application for ILR. In respect of the period of delay from this to the SSHD making a decision to deprive, the UT found that the First-tier Tribunal was entitled to attach no weight to it in the light of the appellant continuing to materially obscure the true facts. What was said by the Tribunal in Ciceri is obiter. Nevertheless we find them to be of assistance when assessing delay. However, we find that the expectation expressed by the judge is not perverse because she was entitled to expect communication between government departments; however, for the reasons we will explain, the judge's decision that the SSHD knew about the fraud in 2005 is irrational.

18. Ground 2 asserted that the judge erred in finding that the Appellant had a legitimate expectation that the SSHD would take no action after the 2005 disclosure. Ms Gunn submitted that the judge's reference to legitimate expectation was the judge identifying the nature of the delay within the context of Lord Bingham's judgment in

EB (Kosovo) [2008] UKHL 41 (rather than referring to the doctrine of legitimate expectation). The judge at para. 50 stated:- "Did this failure to act create a legitimate expectation in the appellant's mind that the Secretary of State had decided to take no action to deprive him of status? It is reasonable to assume but (sic) that such an expectation may have arisen as time passed"

19. While we accept that the judge's reference to legitimate expectation is more likely than not a reference to the second of Lord Bingham's points, and not a reference to the doctrine of legitimate expectation, we are satisfied that the approach of the judge to delay is problematic. While the judge was entitled to attach some weight to an expectation that may have arisen as time passed which may have given the Appellant the impression that he was not to be deprived of citizenship, she did not take into account material matters. This was not a case where the Appellant was waiting for a decision to be made to regularise his stay in the United Kingdom in contrast to the cases which Lord Bingham was addressing in EB Kosovo. We take into account Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 where EB Kosovo was discussed with reference to deprivation. The appellant in Laci was responsible for supplying UKBA with his correct identity in support of an application for entry clearance relating to his mother. He was informed by the UKBA on 17 February 2009 that UKBA had reason to believe that he had obtained his status as a British citizen by fraud and that they were considering whether he should be deprived of his nationality. His solicitors replied to UKBA on 17 March 2009. In the reply the appellant admitted the deception but advanced mitigating circumstances. In EB (Kosovo) 2008 UKHL, Lord Bingham identified three ways in which delay may be relevant to proportionality as follows:-

"14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any

relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that 'It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status'. This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: 'whether the spouse knew about the offence at the time when he or she entered into a family relationship' see Boultif v Switzerland (2001) 33 EHRR 50, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone), heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be 'predictable, consistent and fair as between one applicant and another' or as yielding 'consistency of treatment between one aspiring immigrant and another'. To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25: 'Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant

factor, then the weight to be given to it in the particular case was a matter for the tribunal'". The appellant did not hear anything from the Home Office for nine years. Underhill LJ said at paragraph 51 that it is important to appreciate that "this is not simply a case where the Secretary of State could have taken action but did not do so ... it goes beyond mere inaction". He identified that "the strength of the Appellant's case is that he was entitled to, and did, believe that no further action would be taken and got on with his life on the basis that his British citizenship was no longer in question" (see paragraph 77).

20. While it was open to the judge to expect more effective communication between government departments, she did not take into account material matters when concluding that the SSHD knew about the fraud in 2005 and that the Appellant may have formed an expectation that no decision to deprive would be made. There was in this case no period of delay from the notice of intention to deprive to a decision to deprive. The delay relied on by this Appellant was the period from the disclosure of a genuine birth certificate in support of an application to the SSHD made in 2005 and the decision of the SSHD in 2020 indicating an intention the deprive. However, the Appellant did not disclose to the Home Office in 2005 that he had acquired citizenship through fraud. An application to the embassy in Tirana which disclosed his genuine birth certificate cannot rationally be categorised as an admission or disclosure of wrong doing to the Home Office so as it can be reasonably inferred that they became aware of the fraud. This is more so because the despite the disclosure of a genuine birth certificate in 2005 the Appellant continued to live in the United Kingdom using a false identity. He made an application using false details in 2014. The Appellant perpetuated the lie which was a relevant consideration raised by the SSHD.

21. It is difficult to understand how the Appellant could have reasonably assumed that the fraud had come to the attention of the SSHD and that she was not intending to deprive him. It could equally be said that the Appellant did not believe that the application to the British Embassy would be disclosed to the Home Office and the deception come to light. He may have believed that delay indicated that he had got away with it. He was not waiting for the SSHD to make a decision. We accept that when assessing the impact of delay and the weight to attach to it, in the context of EB (Kosovo), the judge did not take into account material matters and her decision is inadequately reasoned. Furthermore, the judge did

not identify anything capable of going beyond mere inaction by the SSHD.

Ground 3

22. The SSHD asserted that the judge erroneously conducted a proleptic assessment when considering the appeal under Article 8 of ECHR. In support of the submission Mr Clarke relied on the following paragraphs of the decision of the judge:-

> "53. The Appellant has two British citizen children and both have been living in the United Kingdom since their birth in 2004 add (sic) 2007. The Appellant may well be able to rely on the provisions of paragraph 276ADE of the Immigration Rules in due course. The children have never lived in Albania and in the circumstances it is unduly harsh to expect them to move to that country where the Appellant will have no employment and the family will therefore have no financial support or accommodation.
>
> 54. The Appellant left Albania in 1998 and has lived in this country ever since. He has therefore lived in this country for over twenty years. He will find it difficult at this age to find employment. In the event he is returned there, no meaningful exercise of family life with his wife and children can continue in the circumstances. I find that there will be an interference to the rights that he has established".

23. The SSHD in her grounds relied on what the UT said at paragraph 16 of Ciceri with reference to the case of Aziz:- "16. As Underhill LJ observed in Laci v Secretary of State for the Home Department [2021] EWCA Civ 769, the second sentence in sub-paragraph (4) of paragraph 6 of KV must be read as subject to the judgment of the Court of Appeal in Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884; [2019] Imm AR 264. In Aziz, Sales LJ held that 'at least in the usual case' it was 'neither necessary nor appropriate for a tribunal considering the deprivation question to conduct a 'proleptic assessment' of the likelihood of a lawful removal' (paragraph 26). To this extent, therefore, the determination of the reasonably foreseeable consequences of deprivation must, usually, exclude the issue of removal".

24. Ms Gunn did not suggest before the First-tier Tribunal or before us that this was not a case where a proleptic assessment would not be appropriate. She also accepted that the judge made certain findings which suggested that she took into account immaterial matters. We find that the judge conducted a proleptic

assessment which discloses an error of law. Ms Gunn's overarching submission is that the error is not material. We will return to this point.

Ground 4

25. Ground 4 asserted that the judge took into account the fourteen-year policy when assessing proportionality. This is a reference to a policy which was withdrawn in August 2014 which provided that in general the SSHD will not normally deprive a person of British citizenship if a person has been resident in the United Kingdom for more than fourteen years unless it is in the public interest to deprive. Chapter 55 of the Nationality Instructions provided as follows: 55.7 Caseworker Decisions – completing the deprivation questionnaire 55.7.1 Following receipt of any information requested from the deprivation subject the caseworker, in order to deprive of citizenship, must be satisfied that the fraud, false representation or concealment of material facts was material to the acquisition of citizenship (55.7.2) and that the fraud was deliberate (55.7.3). 55.7.2.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances… what the judge made of the submission advanced by Ms Gunn that had the decision been taken sooner by the SSHD the Appellant would have benefited from the policy. The judge recorded Ms Gunn's submission, however, she did not make a finding on it. We cannot be certain what weight, if any, the judge attached to the submission when assessing proportionality. This is problematic because if she did attach weight to the policy in our view this would amount to an error. The policy was withdrawn in 2014. The Appellant had not been here for fourteen years until 2012. It is unarguable that the SSHD should have taken a decision during that two year window when the discretionary policy applied. We take into account what the Upper Tribunal said in Hysaj:- "74. The appellant seeks the intervention of the Tribunal to disapply the policy existing at the date of the decision and to require the respondent to exercise her discretion in accordance with an earlier policy. He seeks to disabuse the usual rule that immigration and nationality decisions are made according to the law and policy in force at the time the decision is taken. We have explained above that the respondent did not unlawfully delay in making her decision and that though in hindsight she erred in relying upon the nullity doctrine she was entitled to rely upon legal advice. She could reasonably, and therefore lawfully, rely upon the High

Court judgment in Kadria, as well as previous Court of Appeal precedent as generally understood. Reliance upon existing case-law cannot be categorised as illegality in this matter. The respondent was under no obligation to make a decision between 7 July 2012 and 20 August 2014, when the policy was withdrawn, and if there was an obligation to make a deprivation decision within a reasonable period of time, the failure to do so does not establish an illegal abuse of discretion. Even at their highest, and being mindful of the significant public interest in deprivation where citizenship has been obtained by fraud, the circumstances arising in this matter are not such that illegality was so obvious, and the remedy so plain, that there was only one way in which the respondent could have reasonably exercised her discretion when considering deprivation".

Ground 5

26. The SSHD asserted that the First-tier Tribunal erred in the consideration of the limbo period because she considered that it had already started. The SSHD relied on the following paragraphs to support the submission:-

> "55. The Appellant has to show that the inference with the rights he has is disproportionate. The Appellant has established two businesses in the UK and has been paying the relevant taxes. He has not been reliant on public funds – he has maintained and supported his family. In the limbo period the Appellant's wife has undertaken employment which is insufficient to meet the family's needs. It is unlikely that she will be able to meet the mortgage payments to the home where they live. The Appellant in his evidence said that they may lose it. All this will have a detrimental effect on the children and cannot be said to be in their best interests. If a person has been resident in the United Kingdom for more than fourteen years we will not normally deprive of citizenship. ... however, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation.
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> 59. In particular I find that the factors I have outlined above, namely the delay in taking any action against this Appellant since 2005; the fact that he has two British citizen children who have never lived in Albania; that he has been until recently the main financial supporter of his family; that he has established two businesses in the United Kingdom and has paid the relevant taxes in relation to these; and the businesses support his family until recently".

27. Ms Gunn accepted that the decision reads as though the judge accepted that the limbo period had commenced which it had not. However, she said that the error is

grammatical and not one of substance. She relied on the following paragraph of the judge's decision:-

> "51. The Appellant set up two automobile businesses. He and his family were financially supported by these businesses. It is argued on the Appellant's behalf that if he was deprived of his citizenship, he will have no status until the Respondent decides what action is to be taken – there will be a limbo period. At the hearing Ms Agakwe, who represented the Respondent said that it was likely that the Appellant would be granted discretionary leave. She was not able to say why this was more feasible than him not being granted any leave".

28. We are satisfied that the decision discloses confusion as to whether or not the limbo period had commenced. We are not satisfied that this is simply a grammatical error because both paragraphs 55 and 59 disclose that the judge thought that the limbo period had commenced. This in itself is not a material error because the judge did take into account matters that would on the evidence arise during the limbo period, once a deprivation decision had been made by the SSHD. However, where the problem lies is that the judge did not make adequate findings of fact with reference to the partner's earnings. There was no evidence available that if the Appellant was not in employment his wife would not be able to increase her hours of work and therefore increase the family's income. It is accepted by Ms Gunn that the judge did not consider why the Appellant's wife cannot increase her hours of work.

29. We take into account that experienced judges are taken to be aware of the relevant authorities and to be seen to apply them without needing to refer to them physically unless it is clear from their language that they have failed to do so: per Popplewell LJ in AA (Nigeria) v Secretary of State [2020] EWCA Civ 1296 (09 October 2020), 4 WLR 145 at [34]. However, in our view the judge has simply not engaged with Hysaj in respect of the period of limbo. The judge did not identify the "more" in this case which would be capable of tipping the proportionality balance in favour of the Appellant (see para 110 Hysaj). 3 3 In Hysaj the UT in respect of the limbo period stated as follows: 105 to 110:-

> "105. 'Limbo' is convenient shorthand for the appellant's concern that he faces an uncertain period awaiting a decision. Though he has enjoyed lawful presence in this country for many years through his fraud, he is being returned to the position he would have been in at the time the respondent considered his application for international

protection if he had been truthful as to his personal history. He has no identifiable claim for international protection and his wish is to remain here on the basis of established private and family life rights. There is no requirement that he enjoy temporary leave whilst a decision is made on possible deportation action.

106. We are satisfied in this matter that the short time-period identified by the respondent within which the appellant will be required to make representations and for a decision to deport or a grant of leave to then be made cannot require the grant of leave to remain pending the respondent's ultimate decision as to deportation.

107. The appellant's articulated concern is that deprivation will adversely impact upon not only his life, but also that of his wife and children. He contends that the expected 'upheaval' in their lives will be accompanied by financial and emotional concerns. Such upheaval is a consequence of the appellant losing rights and entitlements from his British citizenship that he should never have enjoyed.

108. The Court of Appeal has confirmed that article 8 does not impose any obligation upon the State to provide financial support for family life. The ECHR is not aimed at securing social and economic rights, with the rights defined being predominantly civil and political in nature: R. (on the application of SC) v Secretary of State for Work and Pensions [2019] EWCA Civ 615; [2019] 1 WLR 5687, at [28]-[38]. The State is not required to grant leave to an individual so that they can work and provide their family with material support.

109. The time period between deprivation and the issuing of a decision is identified by the respondent as being between six to eight weeks. During such time the appellant's wife is permitted to work. She accepted before us that she could seek employment. She expressed concern as to the impact her limited English language skills may have on securing employment but confirmed that she could secure unskilled employment. She confirmed that her husband could remain at home and look after their children. The appellant accepted that his wife is named on the joint tenancy and will continue to be able to lawfully rent their home upon his loss of citizenship and status. In addition, the children can access certain benefits through their citizenship. Two safety nets exist for the family. If there is an immediate and significant downturn in the family's finances such as to impact upon the health and development of the children, they can seek support under section 17 of the Children Act 1989. If the family become destitute, or there are particularly compelling reasons relating to the welfare of the children on account of very low income, the appellant's wife may apply for a change to her No Recourse to Public Funds (NRPF) condition. 110. There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits

of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured. That is the essence of what the appellant seeks through securing limited leave pending consideration by the respondent as to whether he should be deported. Although the appellant's family members are not culpable, their interests are not such, either individually or cumulatively, as to outweigh the strong public interest in this case".

30. Ms Gunn's overriding submission was that the errors identified in the grounds of appeal are not material to the outcome. We have exercised appropriate caution against finding an error of law taking into account the view expressed by the House of Lords in HA (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] 1 AC 678 at paragraph 30. However, the errors identified by the SSHD considered cumulatively are material. We are not able to conclude with any degree of certainty that had the judge not made the errors identified she would have reached the same conclusion.

31. We set aside the decision of the First-tier Tribunal to allow the Appellant's appeal under Article 8. Taking into account the Practice Statement of the Senior President of Tribunals, of 25 September 2012, concerning disposal of appeals in the Upper Tribunal, our provisional view is that the Upper Tribunal should re-make the appeal.

32. The matter will be listed in the Upper Tribunal for a resumed hearing subject to written submissions from the parties in relation to venue to be submitted within 14 of the sending of this decision. No anonymity direction is made.

Signed Joanna McWilliam Date 19 May 22