IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000657
First-tier Tribunal No:
DC/50002/2020
IA/00638/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 March 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

FATMIR SHUTI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A W Khan, in-house counsel at Fountain Solicitors
For the Respondent: Ms S Cunha, Senior Presenting Officer

Heard at Field House on 20 December 2022

DECISION AND REASONS

1. On 9 June 2022, a panel of the Upper Tribunal comprising Hill J and UTJ Bruce allowed the Secretary of State's appeal against First-tier Tribunal Judge Cartin's decision to allow Mr Shuti's appeal against the respondent's decision to deprive him of British citizenship. The FtT's decision was set aside in full and the Upper Tribunal directed that the decision on the appeal would be remade by it after a *de novo* hearing.

2. The decision which follows, by which I dismiss the appellant's appeal, follows the *de novo* hearing which took place before me on 20 December 2022.

Background

3. The facts in this case are not substantially in dispute.

4. The appellant entered the United Kingdom on 24 September 1998. He claimed asylum immediately, stating that he was Fatmir Shuti, a Kosovan national who was born on 20 October 1967. His name and date of birth were his own; his stated nationality was not. He is, and always has been, an Albanian national.

5. The appellant's asylum claim was never determined by the respondent. In 2013, pursuant to what has come to be known as the 'Legacy programme' (the background and operation of which may be found in R (Jaku & Ors) v SSHD [2014] EWHC 605 (Admin)), the respondent wrote to the appellant's solicitors to indicate that he was to be granted Indefinite Leave to Remain ("ILR"). The Executive Officer, Mr Rotherham, who notified the appellant's solicitors of that decision asked, in his email of 25 November 2013, whether the appellant's solicitors could 'also confirm that your client is of Kosovo nationality.'

6. On 25 November 2013, the appellant signed the declaration which had been sent to his solicitors by Mr Rotherham. The declaration gave the appellant's details as Fatmir Shuti, a Kosovan national who was born on 20 October 1967, and confirmed that he wished to withdraw his asylum claim.

7. On 10 December 2013, the appellant was granted ILR. The letter of that date from the Older Live Cases Unit ("OLCU") gave the appellant's details as above and stated that he would be issued with a Biometric Residence Permit in due course.

8. On 28 February 2014, the appellant applied to naturalise as a British citizen. He completed the requisite application form ("Form AN") with the assistance of his then solicitors. Amongst other things, he stated that his name was Fatmir Shuti, that he was a Kosovan national and that he was born on 20 October 1967. He stated that he and his parents had been born in Kosovo; he and his father in Gjakova, his mother in Brekoc (a village near Gjakova). He gave his father's name as Selim Shuti and his mother's name as Sabrije Shuti-Jetishi.

9. Section 3 of Form AN concerned the Good Character requirement. In that section, the appellant stated that he was employed as a builder by the McGee Group Ltd. He stated, amongst other things, that he had no criminal convictions in the UK or any other country. In answer to question 3.18 (*Have you ever engaged in any other activities which might indicate that you may not be considered a person of good character?*), he ticked the 'No' box. The section at 3.19, which included a space to give further particulars of any potentially adverse matters, was accordingly left blank.

10. Section 6 of Form AN contained a declaration which was signed by the appellant. It contained a warning that it was a criminal offence to give false information on the form. Underneath the appellant's name, there was a declaration which included the following:

> … to the best of my knowledge and belief, the information given in this application is correct. I know of no reason why I should not be granted British citizenship… I understand that I may be liable for prosecution if I have knowingly or recklessly provided false or incomplete information….

11. The appellant also confirmed in Section 6 that he had read and understood 'the Guide AN and the Booklet AN' and that he understood that 'a certificate of citizenship may be withdrawn if it is found to have been obtained by fraud, false representation or concealment of any material fact…'

12. On 1 August 2019, the respondent received a letter from the British Embassy in Tirana. That letter relayed the contents of a communication to the British Embassy from the Albanian Ministry of the Interior. The Ministry had confirmed that an Albanian national called Fatmir Shuti appeared on the National Civil Register of Albania. That individual was an Albanian national with a date of birth of 20 October 1967, whose parents' names were Selim and Rive. He was born in Tregtan, Kukes, Albania. He was registered at an unspecified address in Durres (Northern Albania), and his family consisted of his wife and five children. Checks conducted with the Agency for Civil Registration in Kosovo had indicated no registration of a person with the appellant's details in that country.

13. Various documents were appended to the British Embassy's letter, including copies of the appellant's birth certificate, the family's entry on the civil register, the biodata pages of the appellant's Albanian passport and driving licence, and his Albanian identity card (issued in 2009).

14. On 26 September 2019, Her Majesty's Passport Office wrote to the appellant, stating that his British passport should not have been issued. He had applied for that passport as Fatmir Shuti, born 20 October 1967 in Gjakova, Kosovo, whereas his 'true birth identity' was Fatmir Shuti, born 20 October 1967 in Tregtan, Kukes. The details on the passport were therefore false.

15. On 27 January 2020, the respondent wrote to the appellant to indicate that she believed that he had obtained his certificate of naturalisation by fraud. Information received by the respondent indicated that he was an Albanian, rather than a Kosovan national as previously stated by him. The Secretary of State was therefore considering depriving the appellant of his citizenship under section 40(3) of the British Nationality Act 1981. He was invited to respond within 21 days.

16. The appellant's solicitors responded on 6 February 2020. The letter set out the date of the appellant's entry to the UK, the failure to process his asylum claim and the basis upon which he was granted ILR. The appellant accepted that he was born in Albania but an interpreter had 'told his previous representatives he was from Kosovo'. He had wanted to disclose his true identity but his representatives at the time (a firm of solicitors in Manor Park, London) had 'advised him not to do so'. The letter cited the respondent's guidance and submitted that the appellant had been granted ILR outside the Rules, as a result of which his actions had not had a direct bearing on the grant of citizenship. In any event, it was submitted, the appellant had a brother in the UK and suffered from mental health problems. It would be disproportionate, in all the circumstances, to deprive him of his British citizenship. Evidence of these matters was provided to the respondent.

The Respondent's Decision

17. On 3 July 2020, the respondent wrote to the appellant to state that she had decided to deprive him of his British nationality under section 40(3) of the BNA 1981. She had reached that decision, she said, because the appellant had obtained his citizenship fraudulently. She set out the statutory provisions and

made reference to relevant parts of published guidance on deprivation: [4]-[7]. She made reference to the events I have already described above: [8]-[14]. There was then reference, at [15]-[16], to the salient parts of Guide AN and to the Nationality Instructions. At [17], the respondent stated that:

> It is evident that you would have been refused British citizenship [on good character grounds] had the Nationality caseworker been aware that you had presented a false identity to the Home Officer and had continued to repeatedly advance the same false representation throughout the duration of your immigration history to that point.

18. The decision letter then set out the evidence that the respondent had received which established that the appellant was an Albanian national and not, as he had claimed, a Kosovan national: [17]-[19]. At [20]-[29], the respondent rejected the appellant's suggestion that there was a plausible explanation for the misleading information he had provided and concluded that his application for naturalisation would not have been successful if he had told the truth. At [30]-[39], she concluded that there was no reason, whether rooted in Article 8 ECHR or otherwise, not to deprive the appellant of his citizenship. He was notified of his right to appeal against the decision.

Proceedings on Appeal

19. The appellant appealed to the First-tier Tribunal and his appeal was allowed, as I have already mentioned, by Judge Cartin following a hearing at Taylor House on 3 March 2021. Judge Cartin concluded that the appellant's deception was not directly material to the decision to grant him ILR (that decision having been taken on a discretionary basis) or to naturalise him as a British citizen. The judge 'pondered' the question raised over the appellant's good character and concluded that it would be 'somewhat unfair' if the respondent were to succeed on that basis despite her failure on the 'nationality deception'. If the appellant were to be deprived of citizenship for that reason, so would a 'large number' of other people in a similar situation. The respondent had not established, therefore, that the fraud was material to the grant of citizenship and the condition precedent under s40(3) was not engaged. The judge considered, in any event, that the public interest in deprivation was significantly diminished by reference to the respondent's failure to consider the appellant's asylum claim for fifteen years.

20. The Secretary of State appealed and, as I have mentioned, her appeal was allowed by the Upper Tribunal, which found that the judge had erred: (i) in failing to adopt the approach in R (Begum) v SIAC [2011] UKSC 7; [2021] Imm AR 879 when considering the condition precedent question: [28]-[31]; (ii) in failing to have regard to salient parts of the respondent's guidance and misunderstanding Sleiman (deprivation of citizenship) [2017] UKUT 367 (IAC) when considering the good character requirement: [32]-[43]; and (iii) in failing to consider the respondent's delay on the basis set out in EB (Kosovo) v SSHD [2008] UKHL 41; [2009] 1 AC 1159 and in the context of the appellant's deception: [44]-[46]. So it was that the FtT's decision was set aside as a whole, and the appeal retained in the Upper Tribunal for remaking afresh.

21. In preparation for the hearing before me, the appellant's solicitors filed and served a copy of the bundle which had been before the First-tier Tribunal. The bundle had been amended and updated by the addition of a new section C. That section included Mr Khan's skeleton argument. On checking the papers at the

start of the hearing, it transpired that this amended bundle had not reached me or Ms Cunha, seemingly as a result of process errors in the Upper Tribunal and the Home Office.

22. Ms Cunha had provided a number of authorities for the hearing. These had only been filed shortly before the hearing and had not reached Mr Khan. I arranged for copies of these cases to be printed for Mr Khan.

23. Copies of the missing material was duly provided to those without it and the hearing resumed after the advocates and I had had an opportunity to consider it.

24. The appellant gave evidence before me through an Albanian interpreter. They confirmed that they were able to converse freely beforehand, and there were no problems with interpretation during the hearing. I then heard evidence from the appellant's brother, who was able to give evidence in English. I do not intend to rehearse the oral evidence. I shall instead refer to it insofar as I need to do so to explain my findings of fact.

25. In her submissions for the respondent, Ms Cunha invited me to conclude that Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC) had been correctly decided. Following the decision of the Supreme Court in Begum v SSHD [2021] UKSC 7; [2021] AC 765, the proper approach in a case such as this was to review all aspects of the decision with the exception of Article 8 ECHR on public law grounds. Nothing in the subsequent authorities held that Begum did not apply in a s40(3) context and it was clear from what had been said by Lord Reed that the Supreme Court had unanimously rejected what had been said in Delialisi and other such cases.

26. On any proper view, Ms Cunha submitted, the appellant's admitted deception as to his nationality had been material to the grant ILR and the grant of citizenship. The respondent would not have granted ILR if the appellant had 'come clean' about his deception in 2013 and she would not have granted his application for naturalisation if she had known about that deception in 2014. The decision had been procedurally fair and was not vitiated by any public law error.

27. As for Article 8 ECHR, Ms Cunha submitted that the reasonably foreseeable consequences of deportation were not such as to render deprivation disproportionate. There was a cogent public interest in maintaining the integrity of the immigration and citizenship systems and there was no evidence to show that the appellant's circumstances would be materially affected by deprivation in any event.

28. Ms Khan referred to his skeleton argument. It was accepted, as it had been throughout, that the appellant had not told the truth in his previous applications and in Form AN. The real question, he submitted, was whether this was material. I asked Mr Khan to address me on the good character requirement in light of paragraph 9.3 of Annex D to Chapter 18 of the Nationality Instructions (as included in the respondent's bundle). He accepted that there was a 'real difficulty' in this case about the appellant's good character but he submitted that the appellant had been naturalised on the basis of his ILR and length of residence thereafter. This was not a case in which the appellant had been granted asylum on the basis that he was a Kosovan national and had been naturalised thereafter: his skeleton argument referred, at [29]. The grant of ILR was not based on the appellant's stated nationality. As in Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367 (IAC), the deception had not been material.

29. The delay in this case was significant and was material to the proportionality of the respondent's decision. So too was the otherwise blameless life lived by the appellant. Even accepting that the Article 8 assessment should not be a proleptic one, the appellant's length of residence, payment of tax, and the respondent's delay were all relevant to the exercise of discretion and the consideration of proportionality. The appellant's appeal should be allowed on Article 8 ECHR grounds even if it were to be found that the condition precedent was satisfied.

30. I reserved my decision at the end of the submissions.

The British Nationality Act 1981

31. At all material times, section 6(1) of the British Nationality Act 1981 (BNA 1981) has provided materially as follows:

> *6 – Acquisition by naturalisation*
>
> (1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.

32. Schedule 1 of the BNA 1981 has at all material times provided materially as follows:

> 1. Subject to paragraph 2, the requirements for naturalisation as a British citizen under section 6(1) are, in the case of any person who applies for it –
>
> (a) the requirements specified in sub-paragraph (2) of this paragraph … ; and
>
> (b) that he is of good character; and
>
> (c)-(d) …
>
> 2. Subject to paragraph 4, the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it –
>
> (a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and
>
> (b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and
>
> (c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and

(d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and

(e) the requirements specified in paragraph 1(1)(b), (c) and (ca)."

33. The respondent is empowered to deprive a person of citizenship by section 40 BNA 1981, which provides materially as follows:

(1) In this section a reference to a person's "citizenship status" is a reference to his status as—

(a) a British citizen,

(b) - (f) …

(2) 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.

(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.

(4) - (6) …

34. An appeal against such a decision is brought under section 40A of that Act. Section 40A(1) provides that a person who is given a deprivation notice under section 40 may appeal to the FtT. By s40A(3), ss106-108 of the Nationality, Immigration and Asylum Act 2002 shall apply to such an appeal.

The Respondent's Guidance

35. It is necessary here to make reference to two types of guidance.

36. The first type might properly be described as 'external guidance', which is to say that it is guidance specifically for members of the public. The guidance in question is found in 'Guide AN' ("AN", in this context, stands for 'Application [for] Naturalisation'). The version in front of me was published in October 2013 and it is accepted on all sides that it was this version which was in force when the appellant confirmed in his declaration on Form AN stated that he had read and understood the guidance in that Guide (and in Booklet AN).

37. At page 8 of Guide AN, the respondent gives the following guidance to applicants as to what should be disclosed at section 3 of Form AN. That guidance is in the following terms:

> You must say whether you have been involved in anything which might indicate that you are not of good character. You must give information about any of these activities no matter how long ago it was. Checks will be made in all cases and your application may fail and your fee will not be fully refunded if you make an untruthful declaration. If you are in any doubt about whether you have done something or it had been alleged that you have done something which might lead us to think that you are not of good character you should say so.
>
> You must tell us if you have practised deception in your dealings with the Home Office or other Government Departments (eg by providing false information or fraudulent documents). This will be taken into account in considering whether you meet the good character requirement. If your application is refused, and there is clear evidence of the deception, any future application made within 10 years is unlikely to be successful.
>
> You should also tell us if you have any children who have been convicted of an offence or who have received a court order (eg an ASBO). We will consider if there are indications that you may have been complicit in their activities or particularly negligent in ensuring their good behaviour, and whether this reflects on your own ability to meet the good character requirement.

38. At page 12 of Guide AN, there was guidance on the declaration section of Form AN which included the following:

> Applications that fail generally do so because
>
> - Applicants do not tell us about offences and convictions; or
> - The residence requirements have not been satisfied, or
> - Applicants are former asylum seekers whose applications and appeals were refused and they were, therefore, in breach of the immigration laws during any part of the residential qualifying period

39. Booklet AN, the relevant version of which was published in October 2013, was to similar effect at pages 16-19 and I do not propose to set out tracts of that document in addition.

40. The second type of guidance might aptly be labelled ‘internal guidance’, in that it is primarily directed to those who are making decisions on behalf of the Secretary of State, albeit that it is published for the public to see in the interests of transparency.

41. Version 4.0 of Chapter 18, Annex D of the Nationality Instructions, as published on 2 October 2013, gave guidance and casework instructions on the Good Character Requirement in the BNA 1981. Section 8 was entitled ‘Deception and Dishonesty’ and included the following:

> *8.1 General Approach*

> Concealment of information or lack of frankness will raise doubt about – and therefore reflect poorly on – their character.
>
> The decision maker will normally refuse an application where the person has attempted to lie or conceal the truth about an aspect of their application, whether on the application form or in the course of enquiries.
>
> *8.2 Deceitful or Dishonest Dealings with Her Majesty's Government*
>
> The decision maker will normally refuse an application where the person has attempted to deceive or otherwise been clearly dishonest in their dealings another department of government.
>
> Examples might include but are not limited to:
>
> a. fraudulently claiming or otherwise defrauding the benefits system;
>
> b. unlawfully accessing services (e.g. housing or health care) for which access is controlled by the immigration rules and/or Acts;
>
> c. providing dishonest information in order to acquire goods or services (e.g. providing false details in order to obtain a driving licence); or
>
> d. providing false or deliberately misleading information at earlier stages of the immigration application process (e.g. providing false bio-data, claiming to be a nationality they were not or concealing conviction data). Where this applies, a refusal under deception grounds may also be merited.
>
> The decision maker will assess the extent to which false information was provided and what, if anything, was intended or actually gained as a result.
>
> The decision maker will not normally refuse an application because the person made a genuine mistake on an application form or because they claimed something to which they reasonably believed or were advised they were entitled.

42. Section 9 of the same document included the following:

> 9.3 Deception in Previous Applications The decision maker will normally refuse an application where there is evidence that a person has employed deception either: a. during the citizenship application process; or b. in a previous immigration application. It is irrelevant whether the deception was material to the grant of leave or not. The decision maker will also normally refuse any subsequent application for citizenship if it is made within 10 years from the date of the refusal on these grounds.

43. Chapter 55 of the Nationality Instructions gives guidance to decision makers on Deprivation and Nullity of British Citizenship. Definitions of the statutory terms in s40(3) appear at paragraph 55.4. Paragraph 55.7 is titled 'Material to the Acquisition of Citizenship' and provides as follows:

55.7.1 If the relevant facts, had they been known at the time the application for citizenship was considered, would have affected the decision to grant citizenship via naturalisation or registration the caseworker should consider deprivation.

55.7.2 This will include but is not limited to:

- Undisclosed convictions or other information which would have affected a person's ability to meet the good character requirement

- A marriage/civil partnership which is found to be invalid or void, and so would have affected a person's ability to meet the requirements for section 6(2)

- False details given in relation to an immigration or asylum application, which led to that status being given to a person who would not otherwise have qualified, and so would have affected a person's ability to meet the residence and/or good character requirements for naturalisation or registration

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.

55.7.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:

- Where fraud postdates the application for British citizenship it will not be appropriate to pursue deprivation action.

- If a person was a minor on the date at which they applied for citizenship we will not deprive of citizenship

- If a person was a minor on the date at which they acquired indefinite leave to remain and the false representation, concealment of material fact or fraud arose at that stage and the leave to remain led to the subsequent acquisition of citizenship we will not deprive of citizenship

> However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation.
>
> 55.7.6 Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship.

44. Paragraph 55.7.7.1 reminds caseworkers that deception must have been deliberate, in that there must have been an intention to deceive. Paragraph 55.7.10 requires that the decision would be seen to be a balanced and reasonable step to take. Paragraph 55.7.11.1 requires a caseworker to consider any mitigating circumstances. The following paragraph, 55.7.11.2, emphasises, however, that 'all adults are expected to take responsibility for the information they provided on acquisition of ILR and/or citizenship' and states that the following will not be considered examples of mitigation:

> - Where the applicant claims that a family member acted on their behalf
>
> - Where the applicant claims that a representative or interpreter advised them to provide false details
>
> - Where an applicant claims that he or she was coerced into providing false information or concealing a fact, but has since had the opportunity to advise the Home Office of the correct position but failed to do so

Authorities

45. In Laci v SSHD [2021] EWCA Civ 769; [2021] 4 WLR 86, Underhill LJ (with whom Newey and Baker LJJ agreed) undertook a detailed review of the authorities on appeals against the deprivation of citizenship under s40(3) of the BNA 1981. At [22]-[24], he considered the guidance given in three authorities from the Upper Tribunal: Deliallisi [2013] UKUT 439 (IAC), AB (Nigeria) [2016] UKUT 451 (IAC), and BA (Ghana) [2018] UKUT 85 (IAC).

46. At [25]-[33], Underhill LJ considered what had subsequently been said about the Upper Tribunal's guidance in Aziz v SSHD [2018] EWCA Civ 1884, [2019] 1 WLR 266 and KV (Sri Lanka) v SSHD [2018] EWCA Civ 2483, [2018] 4 WLR 166, albeit that he noted that the court which considered the latter appeal had not been referred to its decision in the former case. At [37]-[38] of his judgment in Laci v SSHD, Underhill LJ gave guidance on the proper approach to Article 8 ECHR in this context, thereby modifying what had been said in the Upper Tribunal authorities in light of Aziz v SSHD. The guidance given in BA (Ghana) was therefore substantially endorsed, although the approach to Article 8 ECHR was amended as a result of contrary Court of Appeal authority.

47. In Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC), the Upper Tribunal (Lane P and Mr CMG Ockelton V-P) drew together the principles from all of the above authorities at [15]-[16]. The previous President said this:

> [15] In KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Leggatt LJ set out the following principles as applicable in an appeal under section 40A of the 1981 Act:-

"6. Pursuant to section 40A(1), a person who is given such a notice may appeal against the decision to the First-tier Tribunal. The task of the tribunal on such an appeal has been considered by the Upper Tribunal (Immigration and Asylum Chamber) in a number of cases including Deliallisi (British Citizen: deprivation appeal; Scope) [2013] UKUT 439 (IAC) and, more recently, BA (deprivation of citizenship: Appeals) [2018] UKUT 85 (IAC). I would endorse the following principles which are articulated in those decisions and which I did not understand to be in dispute on this appeal:

(1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.

(2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.

(3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) 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.

(4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. *For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation*.

(5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. *But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently."* (Our emphasises)

[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.

48. At [17], however, Lane P observed that what had been said by Leggatt LJ in KV 'must now be read in the light of the judgment of Lord Reed in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7; [2021] Imm AR 879'. The Upper Tribunal stated that although the decision in Begum was concerned with an appeal to the Special Immigration Appeals Commission, there was no reason to distinguish between the two contexts. The Upper Tribunal set out what had been said by Lord Reed at [68]-[71] of Begum and, at [29], it reformulated the principles set out by Leggatt LJ in KV (Sri Lanka) in light of what had been said subsequently. That reformulation was in the following terms:

(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) (see paragraph 20 above).

(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.

49. There have been two further decisions of the Upper Tribunal in this area: Berdica [2022] UKUT 276 (IAC) and Muslija (deprivation: reasonably foreseeable consequences) [2022] UKUT 337 (IAC). I will not set out the judicial headnotes here but will refer to these decisions subsequently.

50. I am aware that there are appeals underway in the Court of Appeal which concern the correctness of what was said in Ciceri and the application of what was said in Begum to an appeal under s40(3) of the BNA 1981. Permission has been granted in two such matters, one of which (Ahmed v SSHD CA/2022/001854) is an appeal against one of my own decisions, permission having been granted by Newey LJ on 24 November 2022. The Upper Tribunal (Dove P and me) is also shortly to revisit these questions in Chimi v SSHD (DC/00037/2020) on 16 February 2023. For reasons which will shortly become apparent, however, I do not consider it necessary to await the guidance in these cases; the appellant's case turns on the facts and not on the resolution of these difficult issues.

Analysis

51. At [7] of his carefully crafted skeleton argument, Mr Khan invites me to reconsider what was said at [29](1) and (6) of Ciceri. He submits orally and in writing that Begum is confined to cases in which the decision under appeal was taken under section 40(2) of the BNA 1981 and that what was said cannot be read over to appeals under section 40(3). He notes the significant differences between deprivation decisions taken on national security grounds and those, such as the present, which concern deprivation because of dishonesty on the part of the recipient of citizenship.

52. I am not bound by any of the authorities cited above to adopt the approach in Begum in this appeal. All of the Court of Appeal authorities I have cited, with the exception of Laci, pre-date Begum. At [40] of Laci, Underhill LJ was careful to express no concluded view on these questions, noting in terms that Begum did not bear directly on the grounds of appeal. What was said at [29](1) and (6) of Ciceri was undoubtedly obiter, given that the appeal to the Upper Tribunal concerned only Article 8 ECHR. So too was what was said by the Upper Tribunal at [45] of Berdica, since the FtT judge in that case had considered the appeal on a traditional merits-based basis as well as undertaking a public law style review of the kind required in a s40(2) appeal.

53. I am content for the purposes of this appeal to assume without deciding that I should adopt the approach contended for by Mr Khan. I am able to do so because the outcome of the appeal is quite clear even if I follow the traditional approach set out at [47] above, rather than the post-Begum reformulation of that approach which I have set out at [48].

54. The facts, as I have observed, are not substantially in dispute. The appellant lied about his nationality when he applied for asylum. That claim was not processed (despite 'chasers') and the appellant was not granted asylum as a Kosovan. When he was asked to confirm his nationality as part of the withdrawal of his application for asylum, however, he signed the form which identified him as a person of Kosovan nationality. When he came to apply for naturalisation, he also stated that he was a Kosovan national who was born in Gjakova, Kosovo. It subsequently transpired that this was untrue.

55. There has been no serious attempt to suggest on the appellant's behalf that these lies were anything other than deliberate falsehoods told throughout the appellant's dealings with the authorities of this country. There was some suggestion at an earlier stage that the appellant had been told by his former solicitors to misrepresent his birthplace and nationality when he applied for naturalisation but he simply stated when he was cross-examined on the point by Ms Cunha that he maintained the lie because he was concerned that he would lose his status if he told the truth. The appellant therefore knew what he was about at all material times. He said that he was a Kosovan when he first arrived because he hoped to secure asylum as a result of the atrocities which were happening there at that time. He persisted in the lie because he knew that his status would be in jeopardy if he did not. He stated that he was a Kosovan when he came to apply for British citizenship because he suspected – quite rightly – that the truth would not assist his cause at that stage.

56. Mr Khan submits – as he did before the FtT – that the appellant's deception was not material to the grant of ILR or to the appellant's naturalisation. He cites what was said by UTJ Kopieczek in Sleiman in this connection: 'the impugned behaviour must be directly material to the decision to grant citizenship'. Sleiman was also a case in which leave had been granted leave to remain under the Legacy programme and UTJ Kopieczek concluded that the appellant's lie as to his age was not 'directly material' to the grant of leave to remain or, ultimately, to the grant of naturalisation.

57. What must be established by the respondent is that the appellant obtained *naturalisation* by means of fraud, false representation or concealment of a material fact. The focus must, to my mind, be on the application which was made for naturalisation. Be that as it may, I will make the following observations about the appellant's acquisition of ILR under the Legacy programme.

58. Mr Khan submits that the appellant did not acquire ILR by means of false representation. It is a matter of fact, he submits, that the appellant's asylum claim had been pending for a sufficient time that he qualified for leave under the Legacy programme and his nationality was wholly irrelevant to the decision to grant him ILR.

59. I disagree. This was obviously not a case in which the appellant was recognised as a refugee. In such a case, it is difficult to see how a lie as to nationality would be material. This appellant was instead granted ILR under the Legacy programme. But it is fallacious to suggest that the respondent would have ignored the appellant's deception and would have granted him ILR under the Legacy programme if he had stated, in response to the enquiry made of his solicitors on 25 November 2013 (see above, at [6]), that he was actually an Albanian man who had lied about his nationality in 1998 in an attempt to profit from the events which were at that time taking place in Kosovo.

60. The Legacy programme was not an amnesty and the guidance then in force expressly instructed decision-makers to consider an individual's personal history, including any deception practised at any stage of the process: [52] of King J's judgment in R (Geraldo & Ors) v SSHD [2013] EWHC 2763 (Admin) refers. Notwithstanding the significant delay in considering the appellant's asylum claim, it is more likely than not that the respondent would have taken an adverse view of his lies and would have refused ILR if he had 'come clean' at this stage, rather than signing the form and renewing the lie that he was a Kosovan.

61. Let it be assumed for the sake of argument, however, that the lie was not material to the grant of ILR. The next stage of Mr Khan's argument is that the appellant was then entitled to apply for British citizenship because he had accrued the necessary length of time in this country and had ILR, thereby satisfying the requirements in paragraph 1(1)(a) of schedule 1 to the BNA 1981. It mattered not, he submits, that the appellant was actually an Albanian man who had been masquerading as a Kosovan throughout his dealings with the Home Office.

62. I can certainly see the validity of that argument as regards the appellant's ability to satisfy the first statutory criterion for naturalisation but, as Mr Khan was constrained to accept during his submissions, that is not the whole story. The appellant was also required to satisfy the good character requirement in paragraph 1(1)(b). That is a separate statutory requirement which cannot be waived (R v SSHD *ex parte* Fayed [1998] 1 WLR 763) and which is not further defined in the legislation. The test is whether the Secretary of State is satisfied that the applicant is of good character and the test for disqualification on this basis is subjective: SS (Sri Lanka) v SSHD [2012] EWCA Civ 16, at [31], as cited by Ms Cunha.

63. The respondent did not submit in Sleiman that the appellant's deception as to his age would have resulted in the refusal of his application for naturalisation, had it been known to her at the time. That was made expressly clear by UTJ Kopieczek at [65] of his decision in that case. In the instant appeal, however, the respondent relies very clearly on such a submission, and has done from the outset.

64. Mr Khan frankly accepted that he was in difficulty in this regard. He was right to do so. The appellant not only lied to the Home Office about his nationality when he applied for asylum and when he was granted ILR; he repeated that lie when he

came to apply for naturalisation. He stated that he was a Kosovan national who had been born in Gjakova but he was an Albanian national who had been born in Tregtan. And he failed, despite the very clear instructions in Guide and Booklet AN, to reveal that he had lied throughout his dealings with the respondent.

65. The real question in any such case is whether the respondent would have granted naturalisation if the appellant had revealed these details when he came to apply for British citizenship. In other words, would the respondent have granted the appellant British citizenship if he had given his true nationality on Form AN and disclosed (as he was required to do in the Good Character section of the form) that he had lied about his nationality in all previous dealings with the Home Office?

66. On any sensible reading of the internal guidance which I have reproduced above, there can be only one answer to that question, and it is the answer which the respondent gave in the deprivation decision; the appellant's dishonesty obviously reflected poorly on his character and he would not have been naturalised if it had been known to the respondent. He would not have satisfied the statutory good character requirement and his dishonesty was accordingly 'directly material' to the acquisition of citizenship. That is the only proper conclusion one could reach in these circumstances, whether one approaches the question on the traditional KV basis or the basis suggested, obiter, in Ciceri. This is not a case in which an appellant lied before he 'acquired ILR under a concession' (as described at [55.7.4] of the respondent's guidance, as above); it is a case in he persisted in that lie when he acquired that status and when he applied for naturialisation.

67. In considering whether there is any scope for doubt as to the inevitability of that conclusion, it is worth bearing in mind the guidance in paragraph 9.3 of Annex D of Chapter 18 of the Nationality Instructions, which I have reproduced at [42] above. Predictably, the respondent instructs decision-makers that deception in the citizenship application itself will normally lead to refusal of an application on good character grounds.

68. The respondent also makes reference to there being a refusal on similar grounds for ten years following any such decision. I note that the ten-year period for refusal on good character grounds also applies (by paragraph 9.7 of the same guidance, which I have not set out) to cases in which there has been a lack of compliance with immigration requirements. That policy was defended by the Secretary of State and held to be lawful by the Court of Appeal in R (Al-Enein) v SSHD [2019] EWCA Civ 2024; [2020] 1 WLR 1349.

69. Considering the approach described in these paragraphs of the Nationality Instructions against the facts of the appellant's case, it is quite plain that he would have been refused naturalisation on good character grounds if the respondent had known in 2014 that he had lied in his application for naturalisation and when he confirmed that he was a Kosovan national when he withdrew his application for asylum in 2013.

70. I therefore come to the firm conclusion that the condition precedent existed for the exercise of the discretion whether to deprive the appellant of British citizenship. Mr Khan invites me, at [24] of his skeleton argument, to consider next whether the decision to deprive the appellant of his British citizenship would be in breach of Article 8 ECHR. I have been assisted in my consideration of that question by the guidance recently given in Muslija, which underlines that the

assessment of that question must not be proleptic and must only take account of the *reasonably* foreseeable consequences of the decision.

71. I have taken account of the factors set out by Mr Khan in his skeleton, and the matters to which the appellant referred in his oral evidence. He has suffered from some mental health problems in the past and with alcoholism, but there is no reason to think that either would be worsened by depriving him of citizenship. He has a close relationship with his brother and his brother's family, although it is not suggested (and sensibly so) that there is a relationship which discloses more than normal emotional ties. He has been in the UK for 24 years and has certainly built up a private life in that time. With the exception of his deception in 1998, 2013 and 2014, I accept that he has lived what Mr Khan describes as a blameless life. He has worked at times and it seems that he is still in work now.

72. I take account of all of that but it is to be recalled that the appellant is not to be removed from the United Kingdom, at least not without the respondent making a further decision. I am not considering his removal from this country in the context of this appeal, and there can be no suggestion that his relationship with his brother (or his brother's children) will be disrupted by the decision under challenge. There will, at most, be a period of 'limbo', during which the respondent will have to consider whether she wishes to remove the appellant. As explained in Muslija, however, exposure to that period cannot without more tip the balance of proportionality in favour of an individual retaining fraudulently obtained citizenship.

73. What Mr Khan submits is critical in this case is the significant delay between the appellant applying for asylum and being granted ILR. It will be recalled that the FtT failed to consider that submission with reference to EB (Kosovo). Recalling what was said by Lord Bingham in that case, I can certainly see that the respondent's delay between 1998 and 2013 allowed the appellant to deepen his ties to this country. Given that he was granted ILR and then citizenship, he will also have felt increasingly that he was not to be removed. And I can see that delay might ordinarily be said to reduce the weight which would otherwise be accorded to a firm and fair immigration control.

74. All of those considerations, however, are to be seen in context. This appeal does not concern the appellant's removal from the UK and, in any event, the entirety of the delay occurred during a time when the appellant was maintaining the lie he had told about his nationality in 1998. We cannot know what would have happened if the appellant had stated that he was an Albanian national in 1998 but since he has still not articulated any basis upon which he might legitimately have sought to remain in the UK, there must be a significant chance that he would simply have been removed if he had told the truth. For that reason, and given the speed with which the respondent acted when she became aware of the truth, this is not a case in which the delay from 1998 to 2013 carries any real weight.

75. There is plainly a cogent public interest in ensuring that applicants for leave to remain and citizenship tell the truth. Considering the period of uncertainty which will necessarily result from the dismissal of this appeal, and balancing it against the public interest in the deprivation of the appellant's fraudulently obtained citizenship, it is the latter consideration which I find to prevail in the assessment of proportionality.

76. I conclude that the condition precedent for the discretionary deprivation of citizenship exists and that it would not be contrary to section 6 of the Human Rights Act 1998 for the respondent to exercise that discretion. Whether I consider the exercise of the residual discretion for myself or on a Wednesbury basis, there can be only one rational answer to how that discretion should be exercised on the facts of this case. The respondent was undoubtedly entitled to decide that it was appropriate to deprive the appellant of the British citizenship which he obtained by means of dishonesty and the appeal is dismissed accordingly.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by dismissing it.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2023