IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal Nos: UI-2023-000116
UI-2023-000117
First-tier Tribunal Nos: DC/50020/2022
DC/50021/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

Secretary of State for the Home Department

Appellant

and

(1) Andre Mfade
(2) Georgina Mfade
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellants: Mr N. Wain, Senior Home Office Presenting Officer
For the Respondents: Mr S. Karim, instructed by Mascot Solicitors

Heard at Field House on 3 May 2023

DECISION AND REASONS

1. By a decision promulgated on 23 August 2022, First-tier Tribunal Judge Barrowclough ("the judge") allowed two linked appeals brought under section 40A(1) of the British Nationality Act 1981 ("the 1981 Act") against two decisions of the Secretary of State to deprive two naturalised British citizens of their British citizenship dated 19 and 20 January 2022 respectively. The decisions were taken

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pursuant to section 40(3) of the 1981 Act. The Secretary of State now appeals against the decision of the judge with the permission of Upper Tribunal Judge Grubb.

2. For ease of reference, we will refer to the appellants before the First-tier Tribunal as "the appellants", or as the first and second appellant respectively. We will refer to the Secretary of State simply as "the Secretary of State".

Post-hearing submissions

3. Shortly after the hearing before us, the decision in *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 115 (IAC) was reported. We issued directions to the parties in the following terms:

> "If either party wishes to make written submissions concerning the impact, if any, of *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 115 (IAC) on its submissions in these proceedings, it must do so within seven days of being sent these directions."

4. We are grateful to Mr Karim for his written submissions dated 31 May 2023 on behalf of the appellants. The Secretary of State did not respond.

5. Following *Chimi*, there has been a further development. The Court of Appeal handed down judgment in *Shyti v Secretary of State for the Home Department* on 4 July 2023, which was an appeal under section 40A of the 1981 Act. The operative reasoning in *Shyti* concerned the failure of the First-tier Tribunal to address the entirety of the reasoning of the Secretary of State in the impugned decision. As such, we did not consider it necessary to seek further submissions on that matter.

Deprivation of citizenship

6. Section 40(3) of the 1981 Act provides:

> "(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."

7. The criteria contained in section 40(3)(a) to (c) operate as a condition precedent to the Secretary of State's exercise of the section 40(3) power. The role of a tribunal hearing an appeal against a decision of the Secretary of State to deprive a person of their British citizenship has been the subject of much litigation recently. Prior to *R (oao Begum) v Secretary of State for the Home Department* [2021] UKSC 7, it was understood that the tribunal must decide for itself whether one of the statutory conditions precedent was met. *Begum* concerned proceedings before the Special Immigration Appeals Commission ("SIAC") and related to decisions taken on grounds of national security under section 40(2) of the 1981 Act.

8. In *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC), a Presidential panel held that the *Begum* approach to section 40(2) cases applied to section 40(3) cases. See paragraph 1 of the headnote:

> "(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."

9. Whether the *Begum* approach may properly be regarded as extending to section 40(3) cases was a matter of dispute before the judge below, to which we turn in due course. At the risk of oversimplification, the conclusions of this tribunal in *Ciceri* were that the role of tribunal in a section 40A(1) appeal is now commensurate with a public law review of the impugned decision, rather than a "full merits review". The tribunal must ask itself whether the Secretary of State was entitled to be "satisfied" that the statutory condition precedent was met, by reference to established public law principles. It is not to decide that issue for itself, as though it, the tribunal, temporarily assumed the decision making powers of the Secretary of State.

10. But a tribunal still has a primary decision making function in relation to any human rights grounds of appeal that are pursued. The position was summarised in these terms in *Ciceri*:

> "(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 [European Convention on Human Rights] 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."

11. These proceedings concern the interaction between a judge's fact-finding functions in relation to the human rights issues and the more limited public law review of the condition precedent issue.

12. See also the headnote to *Chimi*, concerning a sequential approach to be followed by judges when hearing section 40A appeals, and the interaction between the public law and human rights stages of that analysis. We will turn to the relevant extracts from *Chimi* in due course.

Factual background

13. The appellants, who are brother and sister, are naturalised British citizens of Togolese descent, born in July 1985 and March 1983 respectively. They were brought to the UK as small children by their parents, arriving in 1991. Their parents claimed asylum, with their father, Yousouf Mfade, as the main applicant. The application was refused. The family, including the appellants, were eventually granted indefinite leave to remain as Yousouf Mfade's dependents. In

2005 once they had attained the age of majority, the appellants applied to naturalise as British citizens. Their applications were successful, and they naturalised in May and April 2006 respectively.

14. In February 2017, the appellants' British passports were revoked. On 16 November 2021, the Secretary of State informed their solicitors (who had by this stage been engaged to contest the revocation of the passports), that she was minded to deprive them of their British citizenship under section 40(3) of the 1981 Act. That process culminated in the Secretary of State deciding to deprive each of the appellants of their citizenship pursuant to the decisions of 19 and 20 January 2022 that were appealed to the judge below ("the deprivation decisions").

15. In the deprivation decisions, the Secretary of State explained that Yousouf Mfade had been charged with multiple immigration offences. The Yousouf Mfade identity was false, as were the details the appellants provided concerning their identities in their naturalisation applications. The Secretary of State had invited the appellants to provide their original birth certificates, but they had not done so. They had made multiple false declarations in their dealings with the Home Office, thereby undermining their credibility. Yousouf Mfade's fingerprints revealed that his true identity was Hendrik Witke, and that he had been convicted of driving offences committed in 2004 in that name. Neither those offences, nor his true identity, had been declared to the Secretary of State during the immigration or naturalisation processes, meaning that the appellants' British citizenship had been obtained by means of fraud, misrepresentation or the concealment of a material fact. The appellants were responsible for their acquisition of indefinite leave to remain and British citizenship. The condition precedent in section 40(3) of the 1981 was met.

16. Further, in the case of each appellant, the Secretary of State concluded that it would be reasonable and proportionate to deprive them of their British citizenship, and consistent with Article 8 of the European Convention on Human Rights ("the ECHR"). It was not necessary for the Secretary of State to address the issue of statelessness, but in any event, they would be able to engage with the authorities of Togo if their original citizenship had been lost.

17. The appellants appealed to the First-tier Tribunal. Their appeals were linked and heard together by the judge on 5 August 2022.

The decision of the First-tier Tribunal

18. As will be seen, the structure adopted by the judge in his decision is relevant to our assessment of the Secretary of State's appeal, so it is necessary to outline it some depth. The judge:

    a. set out the details of the parties (paragraphs 1 to 3);

    b. outlined the disputed issues by reference to the parties' immigration and naturalisation histories, and the deprivation decisions under challenge (paragraphs 4 to 8);

    c. marshalled the evidence (paragraphs 9 to 20);

    d. summarised the submissions (paragraphs 21 to 28);

    e. reached findings of fact (paragraphs 29 to 31);

    f. set out the relevant law (paragraph 32);

g. applied the law to the facts as found, in relation to section 40(3) of the 1981 Act (paragraph 33);

h. applied the law to the facts as found, in relation to Article 8 of the European Convention on Human Rights ("the ECHR") (paragraphs 34 and 35); and

i. allowed the appeal on human rights grounds (paragraph 36).

19. In his findings of fact at paragraphs 29 to 31, the judge accepted the appellants' evidence that they were the innocent victims of their father's fraud. Their evidence to that effect, the judge noted, had largely gone unchallenged by the Secretary of State's presenting officer. Both appellants were, found the judge, people of good character, in work and with families of their own. He found their accounts to be plausible (paragraph 29) and accepted that they did not know about their father's motoring convictions, in 2005, before Leeds Magistrates' Court (paragraph 30). The judge concluded his findings of fact in the following terms, at paragraph 31:

> "In my judgment, it is entirely credible that the appellants would have been unaware of that conviction, when at the relevant time the first appellant was only just an adult, his father was living a semi-detached existence working away from home, and his parents' relationship was disintegrating, whilst the second appellant was on the verge of leaving home, if not already having done so; and that they would be equally unaware of their father's reliance on a false identity, which I have already found to be unlikely, certainly so far as the appellants' state of knowledge is concerned. In any event, I find that the respondent has failed to prove any such knowledge or awareness on their part on a balance of probabilities."

20. At paragraph 32, the judge introduced his legal analysis in these terms:

> "I turn to consider the legal framework within which those findings of fact fall to be considered."

21. Mr Karim, who also appeared below, had invited the judge to distinguish *Begum*, and to decide for himself whether the section 40(3) condition precedent was met. The judge rejected that submission, relying on paragraph (1) of the headnote to *Ciceri*. He went on to find that the Secretary of State had been entitled to be satisfied that the section 40(3) condition precedent had been met. See paragraph 33, with emphasis added:

> "Accordingly, the next issue is whether the respondent's conclusions that the appellants' failed to disclose in their applications for naturalisation their father's criminal convictions in April 2004, and/or that their father relied on a false identity, unsupported by any evidence or based upon a view of the evidence that could not reasonably be held? **Manifestly not, in my judgment.** The respondent has established both the fact of those convictions and that the appellants' father relied on one or more false identities. Whilst for the reasons I have set out above I conclude that it is probable that the appellants' father is in fact Yousouf Mfade, **it was perfectly possible and reasonable in the light of the PNC report and Ms Begum's statement to come to a different conclusion. So in my judgment the s.40(3) condition precedent has been established**."

(The reference to Ms Begum was to Fatema Begum, an official of HM Passport Office, not to Shamima Begum, the appellant in *Begum*.)

22. Against that background, the judge proceeded to make findings for the purposes of Article 8 ECHR, applying the guidance at paragraphs (2) to (5) of the headnote to *Ciceri*. The judge took several factors into account when conducting the proportionality assessment, at paragraph 35. He addressed the length of their residence, their age on arrival, the potential limbo they would face upon their deprivation, and the delay in the respondent taking action. At the heart of that analysis lay the finding that:

> "…it is most probable that neither of the appellants were aware of either their father's criminal convictions or his reliance on a false identity when making their naturalisation applications."

That, said the judge, meant that the public interest in the deprivation of citizenship was "significantly reduced in these appeals." The deprivation of their citizenship would be disproportionate, he found. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

23. On a fair reading of the Secretary of State's grounds of appeal, there are two main challenges to the decision of the judge.

24. First, the Secretary of State contends that the judge erroneously decided for himself whether the condition precedent in section 40(3) of the 1981 Act was met. Whether the appellants were themselves personally culpable was "besides the point". The Secretary of State relied on a decision of SIAC in *U3 v Secretary of State for the Home Department* SC/153/2018, SC/153/2021 (Chamberlain J, Upper Tribunal Judge Perkins, Mr Philip Nelson CMG) at paragraphs 36 to 40, summarising the role of SIAC in an appeal against a section 40(2) decision, in light of *Begum*. None of the limited ways in which SIAC envisaged considering evidence post-dating a decision of the Secretary of State taken under section 40(2) were engaged before the judge below in these proceedings. The question for the judge was whether the Respondent had made findings of fact which were unsupported by any evidence, or which were based on a view of the evidence that could not reasonably be held (as the judge had "ironically" directed himself at paragraph 32).

25. Secondly, the judge erred in his assessment of Article 8. The proportionality assessment conducted by the judge was infected by the erroneous findings of fact he reached concerning the appellants' personal culpability. The judge erred, and acted contrary to authority, by ascribing minimal weight to the public interest in the deprivation of citizenship, and erred when considering delay.

26. Mr Karim submitted a rule 24 notice, inviting us to dismiss the appeal. The notice submitted that the authorities concerning SIAC and section 40(2) decisions do not read across to decisions under section 40(3). The judge was wrong to confine his assessment of the section 40(3) condition precedent issue to a public law review. He should have considered whether the condition precedent was met for himself. Had he done so, he would have concluded that the condition precedent was not met. The evidence clearly demonstrated that the appellants were not personally culpable, and had no personal involvement with, or knowledge of, the fraud committed by their father on their unknowing behalf. As for Article 8, the judge's assessment was flawless, and the Secretary of State's grounds of appeal were merely an attempt to relitigate the case. It was difficult to envisage a more disproportionate interference with an individual's Article 8

rights arising from the reasonably foreseeable consequences of deprivation than for their citizenship to be revoked in circumstances when they had no personal culpability whatsoever.

The First-tier Tribunal's analysis was *Begum*-compliant

27. We have concluded that the Secretary of State's challenge to the judge's decision represents a misreading of it, for the following reasons which we explain below.

    a. The judge reached findings of fact which, in principle, covered all relevant matters he had to consider.

    b. Having reached those findings, the judge applied the law to them.

    c. The judge did not purport to perform the section 40(3) assessment for himself, or otherwise exercise the Secretary of State's discretion for her. He manifestly rejected the appellants' submissions that he should do for himself and found that the Secretary of State *was* entitled to be satisfied that the statutory condition precedent was met.

    d. The judge's operative reasons for allowing the appeal were based on his Article 8 findings; such findings were, on a proper reading of the authorities, matters for the judge to consider and assess for himself.

Statutory condition precedent

28. On an appeal to the First-tier Tribunal against a decision taken under section 40(3) of the 1981 Act, the intensity of the tribunal's review differs significantly depending on which stage of the analysis it is performing:

    a. If the tribunal is determining whether the Secretary of State of was entitled to be satisfied that the section 40(3) condition precedent was met, it is to perform what we shall term a public law review, consistent with the approach identified at paragraph 71 of *Begum*. See also paragraph (1) of the Headnote to *Ciceri*, quoted above.

    b. By contrast, if a tribunal is deciding whether the rights of the individual concerned under Article 8 ECHR are engaged, it must decide for itself whether Article 8 is engaged. If it is, it must determine for itself whether depriving the individual concerned of British citizenship would constitute a violation of those rights.

29. Properly understood, the judge's analysis was entirely consistent with (a) the limited public law review of decisions taken under section 40(3) of the 1981 Act, and (b) the broader, merits-based analysis of ECHR issues required by *Begum* and the authorities subsequent to it.

30. Even in relation to point (a), the authorities, including *U3,* suggest that reviewing evidence that was not before the Secretary of State at the time she took the impugned decision may be relevant, albeit for limited purposes: see the discussion at paragraphs 36 to 40 of *U3.* Evidence post-dating the decision may identify the significance of a matter which the Secretary of State did not consider, but ought to have considered (paragraph 37). Once an appeal against a section 40(2) decision is lodged with SIAC, the Secretary of State will undertake an exculpatory review of the decision, on the basis of the evidence supporting the appeal (a similar process took place in these proceedings: see, for example, paragraphs 2, 14 and 15, of the Respondent's Review before the First-tier Tribunal). At paragraph 40 of *U3*, the Commission held, "SIAC is, accordingly, not

debarred from considering evidence that was not before the decision-maker at the time of a decision." There is plainly a role for a judge in assessing the evidence in relation to whether the statutory condition precedent was met, even while fully respecting the confines of the limited public law review to which such assessments are restricted.

31. In relation to point (b), it is for the tribunal to assess such matters for itself. At paragraph 71 of *Begum*, Lord Reed held that in order to determine whether the decision was compatible with the ECHR:

> "SIAC may well have to consider relevant evidence… In reviewing compliance with the Human Rights Act, [SIAC] has to **make its own independent assessment**." (emphasis added)

32. The justiciability of human rights considerations in statutory appeals to the First-tier Tribunal against section 40(3) decisions to the First-tier Tribunal is that as summarised at paragraphs (2) and following of the Headnote in *Ciceri*:

> "…the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights…"

33. The approach of the judge in these proceedings to the above analysis was to reach global findings of fact to which he then applied the law. In doing so, the judge structured his judgment in a manner that many judges find helpful: he outlined the parties' details, the disputed issues, reached findings of fact, applied the law to those findings of fact, and reached an overall conclusion. In other words, he adopted the '*parties – issues – facts – law – application – conclusion*' structure which may be found in many judgments.

34. It may, on one view, have been helpful for the judge expressly to address the legal tests first, before reaching findings of fact. However, as observed by Peter Jackson LJ in *B (A Child)(Adequacy of Reasons)* [2022] EWCA Civ 407 at paragraph 59, "[j]udgments reflect the thinking of the individual judge and there is no room for dogma…" In *Simetra Global Assets Limited v Ikon* [2019] EWCA Civ 1413, Males LJ said at paragraph 46 that, "it has been said many times that what is required [in a judgment] will depend on the nature of the case and that no universal template is possible…"

35. The judge had to make findings of fact based on evidence from two appellants, in two parallel appeals, concerning at least two separate but related legal questions. As we have observed above, the Respondent's Review engaged with the substance of the appellants' rebuttal of the statutory condition precedent, in any event. It was entirely open to the judge to structure his judgment as he did, by reaching global findings of fact, by reference to the disputed issues, to which he then applied the legal tests.

36. Understood in that way, it is readily apparent that the judge fully understood the limits of the tribunal's role in relation to the section 40(3) limb of the appeal. As a judge of an expert tribunal, he plainly had those jurisdictional limits firmly in mind when reaching his global, composite findings of fact.

37. Despite having found that the appellants had no personal culpability for their father's fraud on their unknowing behalf, the judge dismissed their challenge to the Secretary of State's section 40(3) decision. He rejected, in robust terms, the appellants' submissions that (i) he should decide whether the statutory condition precedent was met for himself, and (ii) find that it was not met. At paragraph 33, he correctly identified and posed the *Begum*-compliant question as to whether the Secretary of State's section 40(3) decision was unsupported by any evidence,

or based on a view of the evidence that could not be held. The judge's answer to that question could not be more *Begum*-complaint:

> "Manifestly not, in my judgment."

38. We find that the judge reached findings of fact that were relevant to both his public law review of the section 40(3) condition precedent, and his full-merits review of the ECHR issues. In applying the law to those findings of fact, he confined the section 40(3) analysis to *Begum*-compliant issues, on the basis of the basis of the material that was before the Secretary of State at the time she took that decision. The Secretary of State's criticism represents a misunderstanding of the structure of the judge's decision, and a failure to consider the decision as a whole.

Article 8 assessment legitimately considered post-decision evidence

39. The judge's Article 8 analysis was conducted pursuant to the findings of fact he reached having heard the appellants' evidence. That was plainly the correct approach; the judge decided all factual matters for himself and balanced the reasonably foreseeable consequences of deprivation against those findings. For example, see *Begum* at paragraph 68; Lord Reed said that appellate courts and tribunals:

> "…must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises."

40. See also paragraph 69. In the context of having underlined the public law nature of SIAC's analysis of the section 40(2) condition precedent, Lord Reed contrasted SIAC's assessment of Article 8 matters in the following terms:

> "But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment."

41. See also paragraph 71:

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

42. For the reasons we explain later, the judge's approach remained correct even after the decision in *Chimi*.

43. It is important to note that the scope of a human rights assessment in a deprivation of citizenship case is narrower than in a case concerning immigration control, as the Supreme Court in *Begum* had already emphasised, before making the above observations. See paragraph 64:

> "In determining whether there is a breach of [Article 8], the [ECtHR] has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant. In determining arbitrariness, the Court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE18, paragraphs 49-50 and 54-61."

44. Paragraph (2) of the headnote to *Ciceri* summarised the role of a tribunal in this context in the following terms:

> "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."

45. See also paragraph (3)(b) of the headnote:

> "…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)."

46. The Secretary of State has not challenged the judge's findings of fact on any of the established bases upon which such a finding may be challenged; rather she challenges the fact that the judge purported to reach any findings of fact *at all*. Properly understood, the Secretary of State has mounted a jurisdictional challenge, contending that the judge reached findings of fact he was simply not entitled to consider or otherwise reach.

47. The judicial headnote to *Chimi* suggests that a more nuanced approach should be taken to Article 8 assessments in deprivation cases. The headnote would, on an initial reading, appear to support the Secretary of State's case. While headnote (1)(c) to *Chimi* reflects the conventional understanding of the intensity of review by a court or tribunal deciding a human rights issue, namely that it should determine the matter for itself, paragraph (3) of the headnote suggests that in performing that assessment, the tribunal must not revisit its earlier public law findings concerning the lawfulness of the Secretary of State's assessment that the relevant condition precedent was met. The headnote provides:

> "(1) A Tribunal determining an appeal against a decision taken by the respondent under s40(2) or s40(3) of the British Nationality Act 1981 should consider the following questions:
>
> > (a) Did the Secretary of State materially err in law when she decided that the condition precedent in s40(2) or s40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not,
> >
> > (b) Did the Secretary of State materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,
> >
> > (c) Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed.
>
> (2) In considering questions (1)(a) and (b), the Tribunal must only consider evidence which was before the Secretary of State or which is otherwise relevant to establishing a pleaded error of law in the decision under challenge. Insofar as *Berdica* [2022] UKUT 276 (IAC) suggests otherwise, it should not be followed.

> (3) In considering question (c), the Tribunal may consider evidence which was not before the Secretary of State but, in doing so, it may not revisit the conclusions it reached in respect of questions (1)(a) and (b)."

48. At paragraph 72, *Chimi* emphasised that the reference point for the Article 8 analysis is the "lawfully determined" deprivation decision. On that footing, the Article 8 assessment will involve weighing post-decision evidence concerning the reasonably foreseeable impact of deprivation against what are, in essence, deemed findings of fact on the Secretary of State's side of the scales. It follows that the headnote to *Chimi* requires a tribunal to perform an Article 8 assessment of the proportionality of the reasonably foreseeable consequences of deprivation balanced against a factual scenario which may differ from the findings of fact concerning the same issue which the tribunal would have reached, were it considering the issue for itself. Further, the appeal process would not accommodate post-decision evidence undermining the decision. The approach in *Chimi* resonates with the terminology of the Secretary of State's grounds of appeal in these proceedings, which state that whether an appellant was personally culpable is "besides the point". Taking the approach in the headnote in *Chimi* to its logical conclusion, an appellant who is, in fact, not personally culpable for their fraudulently obtained citizenship, would not be able to deploy post-decision evidence in order to refute those allegations.

49. The judge in these proceedings found that the Secretary of State was lawfully entitled, on the basis of the material before her at the time she took the deprivation decisions, to conclude that the section 40(3) condition precedent was met. Pursuant to the headnote in *Chimi*, that assessment should have formed the reference point against which any interference with the appellants' Article 8 rights arising from the consequences of deprivation should have been balanced, rather than any broader findings of fact, reached on the basis of more up to date evidence.

50. While the headnote to *Chimi* would appear to throw the judge's Article 8 analysis into sharp relief, we also note that the operative analysis in *Chimi*, and the reasons the panel gave for reaching its conclusions in the proceedings before it, adopted a different approach. In our judgment, we should base our approach on the operative reasoning in *Chimi*, rather than the headnote.

51. For example, at paragraph 83, in the context of finding that the Secretary of State was entitled to be satisfied that the section 40(3) condition precedent was met, the panel performed its own parallel assessment of the issue:

> "*We state clearly* that we would have reached the same conclusion if it had been open to us to stand in the shoes of the Secretary of State and subject this aspect of her decision to the kind of full merits review which was required pre-*Begum*." (Emphasis added)

The panel added that it had heard the appellant's oral evidence *de bene esse* and found her to be a "thoroughly unsatisfactory" witness. She had been unable to address the central issue in the case, namely how she, as a Cameroonian citizen, had obtained a French birth certificate. The French authorities regarded the birth certificate as fraudulent, and the panel was, "unable, having heard the appellant on the subject, to begin to understand how we might reach a different conclusion…"

52. We have added the emphasis above ("*We state clearly…*") to highlight the certainty and force with which the panel in *Chimi* reached findings of fact

concerning the condition precedent issue for itself. While the panel expressed those findings as findings it would have made had it been required to do so, it seems to us that in order to have expressed itself in those terms, it had to engage in an analysis of the facts and evidence for itself in any event. The panel heard oral evidence on the point. Ms Chimi was cross-examined. The panel reached findings of fact that were on all fours with the Secretary of State's analysis of the pre-decision evidence. The panel relied on those findings as a means to underline the correctness of its public law analysis of the Secretary of State's section 40(3) decision.

53. We also note that, in relation to the proportionality of the reasonably foreseeable consequences of Ms Chimi's deprivation decision, the reference point against which the panel assessed the proportionality of those consequences was based on the premise that her British citizenship <u>was</u> fraudulently obtained, and not simply that the Secretary of State had been entitled to be satisfied that it had been fraudulently obtained. For example, at paragraph 88, the panel said, "this is not a case in which there had been any significant delay in between the identification of <u>the fraud</u> and the respondent taking action in relation to it…", and later referred to the "<u>fraudulently obtained</u> citizenship." At paragraph 89, the panel referred to the public interest in the preservation of a "robust system of national law in relation to citizenship" being undermined when "citizenship <u>is obtained</u> by fraud…" We respectfully consider that the certainty with which the panel spoke of the fraud on the part of Ms Chimi involved a degree of finality that went beyond assessing any Article 8 interference merely by reference to the facts as the Secretary of State lawfully determined them to be by reference to pre-decision evidence but took as the operative reference point the panel's own determination that Ms Chimi had engaged in fraud.

54. The operative reasoning in *Chimi* thus endorsed a degree of judicial fact-finding and analysis on the condition precedent issue. Nothing in the approach taken by the judge below in these proceedings is inconsistent with the operative reasoning in *Chimi*.

55. We have a further observation concerning *Chimi*. As the facts of these proceedings demonstrate, it is entirely possible that the Secretary of State may lawfully determine that the section 40(3) condition precedent has been met on the basis of the materials before her at the time of the decision, in circumstances where the subject of the decision had, in fact, not engaged in the very deception which the Secretary of State was legitimately entitled to be satisfied that she or he had. That issue did not arise in *Chimi* since the panel was confident that its own analysis of the facts would have been entirely consistent with that of the Secretary of State in any event. Thus, *Chimi* did not consider the approach to be adopted where, having heard evidence (to which no objection had been raised by the Secretary of State before the First-tier Tribunal) a judge reached a legitimate finding of fact in the context of a broader Article 8 analysis, based on new evidence, which threw the Secretary of State's legitimate public law conclusions into sharp relief.

56. The Secretary of State's grounds of appeal contend that the approach of the judge was inconsistent with the decision of SIAC in *U3* SC/153/2018, SC/153/2021. *U3* adopted the operative reasoning of the Court of Appeal in *Secretary of State for the Home Department v P3* [2021] EWCA Civ 1642.

57. In our judgment, neither *P3* nor *U3* are determinative of this issue, in this tribunal.

58. *P3* and *U3* concerned decisions taken on national security grounds under section 40(2) of the 1981 Act, and the approach of the Court of Appeal and SIAC to the Secretary of State's national security assessments in those cases was informed and underpinned by the Secretary of State's institutional competence in matters of national security. At paragraph 97 of *P3*, Laing LJ said:

> "Even when SIAC had full jurisdiction in fact and law, and had power to exercise the Secretary of State's discretion afresh, there were narrow limits on its institutional capacity to review the Secretary of State's assessment of the interests of national security."

59. See also her summary at paragraph 102:

> "Despite its expert membership, SIAC does not have the institutional competence to assess the risk for itself as a primary decision-maker. Nor is it democratically accountable. If SIAC were to call the risk incorrectly, the executive, not SIAC, would suffer the political fallout. The executive can be removed at a general election; SIAC cannot."

60. Put another way, the judicial deference towards decisions of the Secretary of State under section 40(2) on conduciveness grounds in *P3* and *U3* was driven by the nature of section 40(2) decisions. That is not to collapse the *Begum* distinction between a public law review and full merits appeal. Rather it is to highlight SIAC's deference to the institutional competence of the Secretary of State when reviewing the impact of a section 40(2) decision taken on grounds of national security, in the context of an Article 8 analysis: see paragraph 99 of *P3*.

61. In contrast to section 40(2) national security assessments, determining whether a section 40(3) condition precedent is met for the purposes of determining the proportionality of any Article 8 interference is capable, in principle, of falling squarely within the institutional competence of the First-tier Tribunal. Prior to *Begum*, the prevailing understanding of the law was that that was precisely what a tribunal should do in a section 40A appeal in relation to the primary condition precedent issue in any event. While a tribunal should not now conduct a full-merits review of the section 40(3) decision when determining whether the statutory condition precedent is met, the institutional limitations which characterise SIAC's inability to re-take a national security assessment performed by the Secretary of State in the context of a human rights analysis do not apply with equal measure to a judge of the First-tier Tribunal in section 40(3) cases.

62. Against that background, and reading *Chimi* as a whole, we therefore respectfully follow the approach the panel there adopted, in practice, to its operative reasoning concerning the Article 8 issue. We find that it was open to the judge to address the proportionality of the interference in the appellants' Article 8 rights arising from the reasonably foreseeable consequences of deprivation by reference to his legitimate findings of fact that the appellants were not personally responsible for the fraud upon which their immigration histories were founded by, on the judge's findings, their father.

A rational Article 8 assessment

63. The Secretary of State's grounds of appeal relied on *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 128 (IAC) at paragraph 110, to which we have added emphasis:

> "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."

64. The above passage was cited with approval by the Court of Appeal in *Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769 at paragraph 80, and by this tribunal in *Ciceri* at paragraphs 25 and 26,

65. We have added emphasis to the extract from *Hysaj*, above, to demonstrate the required linkage between the personal culpability of the individual concerned, on the one hand, and the public interest in a deprivation order being made, on the other. In circumstances where, as here, the judge legitimately found that the appellants were not personally culpable, the public interest in their being subject to a deprivation order diminishes. More significantly, the proportionality of any interference with their Article 8 rights becomes very difficult to justify. It was therefore open to the judge to conclude that the interference with the appellants' Article 8 rights arising from judge's unchallenged findings concerning those consequences for these appellants: see paragraph 35.

66. For the same reasons, the judge's approach to the issue of delay was open to him; the findings of fact reached by the judge in the course of his Article 8 analysis meant that the time taken by the Secretary of State to reach her decisions, four and a half years after the appellants' passports were revoked, was a relevant factor.

67. The judge's Article 8 analysis was rational and not characterised by an error of law.

Conclusion

68. Drawing the above analysis together, the judge structured his decision in a manner that was open to him. He set out the parties, identified the issues, reached global findings of fact, applied the law to the facts as found, and reached conclusions that were open to him. The judge's analysis of the statutory condition precedent issue was entirely *Begum*-compliant, and he plainly had the delineation between the public law review of the section 40(3) decision and the Article 8 findings firmly in mind. Consistent with *Begum* at paragraph 71, the judge made his own independent assessment of the Article 8 issues that were before him. In doing so, he took into account post-decision evidence, just as the operative reasoning in *Chimi* ascribed significance to post-decision evidence concerning Ms Chimi's personal culpability. The judge's legitimate (and unchallenged) findings of fact concerning the lack of the appellants' personal culpability in these proceedings informed his Article 8 assessment.

69. The Secretary of State has not challenged the judge's findings of fact concerning the reasonably foreseeable consequences for the appellants of the deprivation of their citizenship by reference to any of the legal principles governing challenges to trial judges' findings of fact. Those were findings that he legitimately reached. The judge was, therefore, rationally entitled to conclude that the deprivation of the appellants' citizenship would breach their rights under the Convention, for the reasons he gave.

70. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 July 2023