UT Neutral citation number: [2022] UKUT 00337 (IAC)

Muslija (deprivation: reasonably foreseeable consequences)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 15 September 2022
Promulgated on 16 November 2022

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARTAN MUSLIJA (AKA GERIM MURIZI)
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D. Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr M. Moksud, Counsel, instructed by Metro Law Solicitors

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(1) The reasonably foreseeable consequences of the deprivation of citizenship are relevant to an assessment of the proportionality of the decision, for Article 8(2) ECHR purposes. Since the tribunal must conduct that assessment for itself, it is necessary for the tribunal to determine such reasonably foreseeable consequences for itself.

(2) Judges should usually avoid proleptic analyses of the reasonably foreseeable consequences of the deprivation of citizenship. In a minority of cases, it may be appropriate for the individual concerned to demonstrate that there is no prospect of their removal. Such cases are likely to be rare. An example may be where (i) the sole basis for the individual's deprivation under section 40(2) is to pave the way for their subsequent removal on account of their harmful conduct, and (ii) the Secretary of State places no broader reliance on ensuring that the individual concerned ought not to be allowed to enjoy the benefits of British citizenship generally.

(3) An overly anticipatory analysis of the reasonably foreseeable consequences of deprivation will be founded on speculation. The evidence available and circumstances obtaining at the time of making of the deprivation order (and the appeal against that decision) are very likely to be different from that which will be available and those which will obtain when the decision regarding a future application or human rights claim is later taken.

(4) Exposure to the "limbo period", without more, cannot possibly tip the proportionality balance in favour of an individual retaining fraudulently obtained citizenship. That means there are limits to the utility of an assessment of the length of the limbo period; in the absence of some other factor (c.f. "without more"), the mere fact of exposure to even a potentially lengthy period of limbo is a factor unlikely to be of dispositive relevance.

(5) It is highly unlikely that the assessment of the reasonably foreseeable consequences of a deprivation order could legitimately extend to prospective decisions of the Secretary of State taken in consequence to the deprived person once again becoming a person subject to immigration control, or any subsequent appeal proceedings.

DECISION AND REASONS

1. As confirmed in *Ciceri v Secretary of State for the Home Department* [2021] UKUT 238 (IAC); [2021] Imm AR 1909, a judge hearing an appeal against a decision of the Secretary of State to deprive a person of their British citizenship under section 40(2) or (3) of the British Nationality Act 1981 ("the 1981 Act") must consider (i) the "reasonably foreseeable consequences" of the decision but (ii) should not conduct a "proleptic analysis" of the individual's removal. This decision seeks address the boundary between (i) and (ii) and to give guidance as to the factors to be considered as part of those assessments.

Factual background

2. These proceedings commenced in the Upper Tribunal as an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Brannan ("the judge") promulgated on 21 July 2021, in which he allowed an appeal brought by Artan Muslija

against a decision of the Secretary of State dated 12 January 2019 to deprive him of his British citizenship.

3. By a decision dated 13 April 2022 (“the error of law decision”), Upper Tribunal Judge Stephen Smith found that the decision of the judge involved the making of an error of law, set it aside with no findings of fact preserved, and gave directions for the appeal to be reheard in this tribunal. We summarise the error of law decision at paragraphs 41 to 45, below, and set out the relevant extracts in the **Annex** to this decision.

4. It was in those circumstances that the matter resumed before us, sitting as a panel, in order to remake the decision.

THE LAW

5. A person may acquire naturalisation as a British citizen in accordance with section 6(1) of the 1981 Act:

> “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.”

6. Schedule 1 to the 1981 Act sets out the requirements for naturalisation as a British citizen. This includes at paragraph 1(1)(b) “that he is of *good character* ”. Good character is not defined under the 1981 Act. The Secretary of State has adopted guidance from time to time on the meaning of the term.

7. Section 40 of the 1981 Act empowers the Secretary of State to deprive a person of their British citizenship in certain circumstances:

> “(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.”

The criteria in section 40(2) and (3) operate as a condition precedent to the Secretary of State’s exercise of her power to deprive a person of their citizenship. The power to deprive is discretionary (“the Secretary of State *may*”), with the consequence that the Secretary of State must decide whether to exercise the power to deprive, even if she is satisfied that a statutory condition precedent to doing so is met.

8. There is a right of appeal to the First-tier Tribunal against the Secretary of State's decision stating her intention to exercise the power under section 40, rather than against the deprivation order itself: see section 40A(1). It follows that, during the currency of any pending proceedings challenging a decision to make a deprivation order, the individual concerned will remain a British citizen.

9. Article 8 of the European Convention on Human Rights ("the ECHR") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The role of a tribunal in an appeal under section 40A of the British Nationality Act 1981

10. The role of a tribunal in this jurisdiction in an appeal brought under section 40A of the 1981 Act must be understood through the lens of *R (oao Begum) v Secretary of State for the Home Department* [2021] UKSC 7; [2021] Imm AR 879 and *Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769; [2021] Imm AR 1410. In *Ciceri*, the President held that the legal principles regarding appeals under section 40A are as follows (with bold emphasis added):

> "Following *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483, *Aziz v Secretary of State for the Home Department* [2018] EWCA Civ 1884, *Hysaj (deprivation of citizenship: delay)* [2020] UKUT 128 (IAC), *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7 and *Laci v Secretary of State for the Home Department* [2021] EWCA Civ 769 the legal principles regarding appeals under section 40A of the British Nationality Act 1981 against decisions to deprive a person of British citizenship are as follows:
>
> (1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in *Begum*, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.
>
> (2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged (usually ECHR Article 8). If they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights, contrary to the

obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR.

(3) In so doing:

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

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

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

(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159. Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of *EB (Kosovo)*.

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

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

The reasonably foreseeable consequences of deprivation

11. The need to determine the reasonably foreseeable consequences of the deprivation of citizenship (see point (3) of *Ciceri*, above) arises because, upon a deprivation order taking effect, the former British citizen does not simply revert back to their pre-naturalisation or registration immigration status. Rather, the former British citizen usually immediately becomes a person without the right of abode under section 1(2) of the Immigration Act 1971 and will be exposed to the full spectrum of restrictions applicable to those subject to immigration control. The consequences can be both

immediate and longer term. Immediate because the individual concerned will exposed to the so-called "hostile environment", described in *R (oao JCWI) v Secretary of State for the Home Department* [2020] EWCA Civ 542, [2021] 1 WLR 1151 at paragraph 3, with all that that entails. In the longer term, the former British citizen will either have to regularise their status, by applying for some form of leave to remain, or face removal as a person who needs leave but does not have it. Some may face deportation.

12. In *Aziz v Secretary of State for the Home Department* [2018] EWCA Civ 1884; [2019] Imm AR 264, Sales LJ, as he then was, cautioned against a proleptic analysis of deportation in most citizenship appeals: see paragraph 28. "Proleptic" in this context means an anticipatory analysis of an individual's prospective removal or deportation. This is because there are inherent limits on the extent to which, in an appeal against the deprivation of British citizenship, it will be possible to take the prospect of being without leave to its logical conclusion, namely removal or deportation. At the time of the Secretary of State's deprivation decision, and even during any appeal against such a decision, the individual concerned will remain a British citizen, and will not (and indeed, can not) have made a human rights claim; still less will the Secretary of State have taken a decision to refuse the claim. It follows that prospective decision to remove or deport the individual will not, by definition, have been taken at the time of the deprivation decision. If and when a decision is taken to refuse a human rights claim made by a person deprived of their British citizenship, the subject of the decision will be able to bring a challenge against a specific decision, on grounds that engage with the reasons relied upon by the Secretary of State for taking the decision concerned.

13. As Sales LJ put it in *Aziz* at paragraph 28:

> "It was known that if a deportation order was sought to be made after deprivation of citizenship had occurred, the relevant appellant would have the opportunity of making representations and presenting full up-to-date evidence at that stage to contest the making of such an order; and that he would have a full right of appeal to present his arguments and relevant up-to-date evidence to the FTT. Since the rights of the appellants and their children as regards deportation (as distinct from deprivation of citizenship) would be fully protected by the procedures to be followed at that later stage…"

14. Sales LJ held that only where, in a conduciveness case under section 40(2) of the 1981 Act, the Secretary of State's reasons for making the order were expressly to pave the way for future deportation action, would it be appropriate for an individual to demonstrate that there would be "no real prospect" of his removal. Even then, save for anything other than a "very clear case" concerning the claimed prospects of removal, the tribunal would likely be able to dismiss that contention at an early stage in the proceedings: see paragraphs 29 and 30 of *Aziz*.

15. Often a significant concern of those seeking to resist the deprivation of their citizenship is the "*limbo*" period between the deprivation order taking effect, and the final resolution of a challenge to a subsequent decision of the Secretary of State concerning

whether to grant the individual some form of leave, or to remove them, assuming it were adverse to the appellant. The consequences of the limbo period were not addressed in *Aziz*, but they were addressed in *Hysaj*, and *Laci*.

16. *Laci* addressed the limbo period in the following ways that are relevant to this discussion.

17. First, Underhill LJ observed at paragraph 70 that the loss of the right to work was a factor of "real significance", whether or not the analysis is framed in Article 8 ECHR terms or addressed pursuant to a review of the Secretary of State's exercise of discretion. Addressing the First-tier Tribunal's brief analysis of Mr Laci's loss of the right to work in those proceedings, which extended to only two sentences, Underhill LJ said that "it might have been better" if the First-tier Tribunal judge had explored the possibilities facing Mr Laci in more depth. However, Underhill LJ also said that the exercise "would inevitably have been speculative" and that there was a "limit to how much [the judge] could have said."

18. Secondly, Underhill LJ endorsed what this tribunal said in *Hysaj* at paragraph 110 concerning the impact of the limbo period: we quote the relevant extracts at paragraphs 73 and 74, below.

19. We deduce the following propositions from the above analysis concerning the limbo period, the reasonably foreseeable consequences of deprivation and proportionality under Article 8 ECHR:

    a. The reasonably foreseeable consequences of the deprivation of citizenship are relevant to an assessment of the proportionality of the decision, for Article 8(2) ECHR purposes. Since the tribunal must conduct that assessment for itself, it is necessary for the tribunal to determine such reasonably foreseeable consequences for itself.

    b. Judges should usually avoid proleptic analyses of the reasonably foreseeable consequences of the deprivation of citizenship. In a minority of cases, it may be appropriate for the individual concerned to demonstrate that there is no prospect of their removal. Such cases are likely to be rare and are likely to be restricted to where the sole basis for the individual's deprivation under section 40(2) is to pave the way for their subsequent removal on account of their harmful conduct, in circumstances where the Secretary of State places no broader reliance on ensuring that the individual concerned ought not to be allowed to enjoy the benefits of British citizenship generally, quite apart from their removal.

    c. An overly anticipatory analysis of the reasonably foreseeable consequences of deprivation will be founded on speculation. The evidence available and circumstances obtaining at the time of making of the deprivation order (and the appeal against that decision) are very likely to be different from that which will be available and those which will obtain when the decision regarding a future application or human rights claim is later taken.

d. Exposure to the "limbo period", without more, cannot possibly tip the proportionality balance in favour of an individual retaining fraudulently obtained citizenship. That means there are limits to the utility of an assessment of the length of the limbo period; in the absence of some other factor (c.f. "*without more*"), the mere fact of exposure to even a potentially lengthy period of limbo is a factor unlikely to be of dispositive relevance.

e. It is highly unlikely that the assessment of the reasonably foreseeable consequences of a deprivation order could legitimately extend to prospective decisions of the Secretary of State taken in consequence to the deprived person once again becoming a person subject to immigration control, or any subsequent appeal proceedings.

THE INSTANT APPEAL

20. It is necessary first to outline the factual background, the decisions of the Secretary of State and the First-tier Tribunal, and the reasons the decision of the First-tier Tribunal was found to involve the making of an error of law. For ease of reference, we shall refer to the appellant before the First-tier Tribunal as the "appellant" in these proceedings, and the respondent simply as "the Secretary of State".

Factual background

21. In September 1997 a man later claiming to be one Gezim Muslija, a Kosovan citizen born on 20 October 1976, entered the UK clandestinely. Gezim Muslija claimed asylum on the basis that he and his father had been detained and beaten by the Serbian police. There were many cases like his, he said, where people disappeared into police stations, and nobody knew what happened to them. The Secretary of State accepted his claim and recognised him as a refugee. In April 1999, he was granted indefinite leave to remain, and on 23 September 2003, naturalised as a British citizen.

22. Gezim Muslija was, in fact, Artan Muslija, a citizen of Albania born on 20 October 1972. Mr Muslija had not been detained on three occasions by the Serbian police and was not at risk of being persecuted in Kosovo. He was right in one sense to say that there were many cases like his, but the similarity lay not in his experience at the hands of the Serbian police, but in the deception of the Secretary of State leading to the acquisition of indefinite leave to remain and later British citizenship by a person falsely claiming to be Kosovan.

23. On 13 May 2011, Mr Muslija informed the Secretary of State of his true identity and asked for his certificate of naturalisation to be amended accordingly. On 18 December 2013, the Secretary of State informed the appellant that she was considering whether to treat his citizenship as null and void, pursuant to her understanding of the law at the time, inviting representations from the appellant. On 26 February 2014, the respondent decided to treat the naturalisation application as a nullity. On 16 March 2014, the appellant applied for permission to commence judicial review proceedings against that decision. His application was stayed on 14 July 2014, pending the resolution of the litigation which later became *R (oao Hysaj) v Secretary of State for the*

Home Department [2017] UKSC 82; [2018] Imm AR 699, in which the Supreme Court clarified the law concerning purported nullity decisions. That led to the Secretary of State withdrawing the nullity decision in relation to the appellant on 18 February 2018. She invited representations concerning the proposed deprivation of his British citizenship, which the appellant provided.

24. By a decision dated 12 January 2019, the Secretary of State decided to deprive the appellant of his British citizenship under section 40(3) of the 1981 Act, and it was that decision ("the deprivation decision") that was under appeal before the judge below.

The deprivation decision

25. The deprivation decision outlined the appellant's past history of deception against the Secretary of State; at all stages of the asylum process, he reiterated his false Kosovan identity, and maintained his false representations. That led to him being granted asylum and later indefinite leave to remain in circumstances where, had the Secretary of State known his true identity, it was "more than likely" that he would have been removed, and he would not have been granted settled status. Had the Secretary of State known of that deception, the appellant would not have met the good character requirement when applying to naturalise as a British citizen.

26. At paragraphs 38 to 42, the Secretary of State addressed a number of factors going to the exercise of her discretion to deprive a person of their British citizenship, including the delay arising from the clarification of the law by the Supreme Court in *Hysaj*. The appellant had remained in the UK, and the withdrawn nullity decision had had "little or no impact" on the appellant's family life of business interests: paragraph 41.

27. At paragraph 45, the deprivation decision continued to address the discretionary nature of the Secretary of State's power to deprive a person of their British citizenship, and proceeded to discuss, under the heading "Article 8", a series of factors supporting the conclusion that the appellant's would be "just and proportionate". They included the fact that a deprivation decision was not a removal decision, meaning the impact of the appellant's removal on him and his family members did not need to be considered, consideration of the best interests of the appellant's two minor children (paragraph 46), statelessness (paragraph 48), and the consequences of deprivation (paragraph 50). As to the latter, the appellant would become subject to immigration control, and would, in principle be removable. Consideration would be given to granting a limited form of leave, and a decision would be taken within eight weeks of a deprivation order being made (paragraph 51). The effects of deprivation on the appellant and his family had to be balanced against a range of public interest factors, making it "reasonable and proportionate" for the appellant to be deprived of his British citizenship.

28. Before the First-tier Tribunal, the appellant conceded that he had obtained his British citizenship by means of false representation. The sole issue before the First-tier Tribunal, identified by the judge at paragraph 21, was "whether the Secretary of State has exercised [her] discretion correctly in depriving the Appellant of his citizenship status resulting from this."

The decision of the First-tier Tribunal

29. The hearing before the First-tier Tribunal took place on 13 May 2021. It was followed, at the judge's direction, by post-hearing written submissions from the parties. The judge gave directions for the parties to make submissions on a number of questions. The note circulated by the judge appeared to set out the judge's preliminary thinking about the case, as it foreshadowed some of his later findings. In the note, he stated, for example, "there is no possibility that the appellant in the present case will face deportation – he has committed no offence" (paragraph 3), and "I have been provided with evidence which suggests that removal might be a disproportionate interference with the appellant's family and private life" (paragraph 8), and, in relation to the appellant's then 15 and 17 year old children, "it would not be reasonable to expect them to leave the UK" (paragraph 9). In light of those observations, the judge directed the parties to address the following questions:

    a) What is the approach of the respondent to fraud which has already resulted in deprivation of citizenship under section 40(3) of the British Nationality Act 1981 when considering S-LTR.4.1 to S-LTR.4.3 of [Appendix FM] of the Immigration Rules?

    b) Will the respondent consider factors analogous to section 117B(6) [of the Nationality, Immigration and Asylum Act 2002] as described above [referring to paragraphs 8 and 9, quoted above] in making her decision on whether to grant leave?

    c) How long the decision of the Respondent takes following a deprivation?

    d) Will the appellant's representations within the deprivation of citizenship process and subsequent appeal be taken into account in the decision to grant leave or to remove?

30. Turning to his decision, the judge set out the facts and the applicable law, including his view concerning the impact of *Begum* and *Laci*. The judge commenced his operative reasoning with a discussion of why the Secretary of State had chosen to exercise her power to deprive this appellant of his British citizenship. The judge said that he "could not see why" she had chosen to exercise her discretion in that way: paragraph 29. Having quoted from paragraph 55.7.10.1 of Chapter 55 of the respondent's *Nationality Instructions*, which requires caseworkers to "consider whether deprivation would be seen to be a balanced and reasonable step", the judge said that the "problem" with the guidance was that it did not "make clear" what factors lead to the conclusion that deprivation of citizenship would be appropriate, other than "merely" the use of fraud, misrepresentation or concealment of a material fact. At [33], the judge said that the Secretary of State enjoys a "broad discretion" as to whether to invoke the power to deprive a person of their citizenship. Section 40(3) could be contrasted, said the judge, with the mandatory obligations imposed by the automatic deportation regime established by section 32 of the UK Borders Act 2007. The judge observed that in *Hysaj* and *Begum*, the appellants were of "impeachable character", in contrast to this appellant: see paragraph 34.

31. Having quoted extracts from the deprivation decision concerning the public interest in the deprivation of citizenship under section 40(3), the judge said this, at paragraph 36:

> "I accept that these reasons explain why the Respondent concludes [that] she should deprive (people) of fraudulently obtained citizenship unless there are reasons not to. The Respondent refers to the 'seriousness of the fraud' as a factor but does not explain how this is assessed or where the Appellant's fraud falls within the scale of seriousness."

32. At paragraphs 37 to 51, the judge addressed the reasonably foreseeable consequences of deprivation. The judge recognised at paragraph 37 that the appellant's removal from the UK would not be an inevitable consequence of deprivation: the deprivation decision stated that the Secretary of State would, if the appellant's appeal were unsuccessful, take a separate decision as to whether to grant the appellant leave to remain in the UK, remove him, or deport him. The judge added:

> "He is a man with no criminal convictions. He has a British wife and two British children. His family support themselves without recourse to public funds. He has lived in the UK for at least 23 years."

33. At [38], the judge quoted from this tribunal in *Hysaj* concerning the need to identify the reasonably foreseeable consequences of a deprivation decision. The extensive extract quoted by the judge included an embedded quote from *Aziz*, in which it was held that it was not necessary to conduct a proleptic, or anticipatory, analysis of whether an individual would be likely to be deported at a later stage. The judge distinguished *Hysaj* from the situation before him; Mr Hysaj had been sentenced to five years' imprisonment, in contrast to this appellant:

> "… there is no possibility that the Appellant will face deportation – has [*sic*] committed no criminal offence."

34. The judge turned to the limbo period between a deprivation order taking effect, and a subsequent decision concerning leave or removal at paragraph 41 and following. He said that a decision would be made within eight weeks of the appellant making further submissions, meaning he could expect a decision within 16 weeks. In what appears to be a reference to his earlier observations at paragraph 37, highlighted above, concerning the public interest factors apparently mitigating against the appellant's removal, and those at paragraph 40 in which he stated that there was "no possibility" that the appellant would face deportation, the judge highlighted the discretionary nature of the suitability provisions in Appendix FM of the Immigration Rules. He said, "as far as I am aware, the Respondent provides no guidance on when she will exercise this discretion", before quoting from the Secretary of State's post-hearing submissions on this issue which were in these terms:

> "In seeking a response as to how the Respondent will approach fraud when considering S-LTR4.1 and S-LTR 4.3 [of Appendix FM], the Tribunal would then be conducting a proleptic analysis of whether each appellant would be likely to be removed or granted leave post-deprivation which *Aziz*, clearly, finds is an error of law."

35. The judge dealt with that submission as follows, at paragraph 44:

> "I do not accept this. By asking the question I am trying to avoid a proleptic analysis by knowing with certainty the period of limbo so that the consequences of my decision are clear. The position of the respondent is to preserve her discretion. In that case all I can conclude is that it is possible that she will refuse to grant leave to the appellant because of his previous false representations and limbo will exceed 16 weeks."

36. At paragraph 46 the judge addressed section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), which provides (to paraphrase) that in the case of a person not liable to deportation, the public interest does not require the person's removal where (a) the person has a genuine and subsisting relationship with a qualifying child; and (b) where it would not be reasonable to expect the child to leave the United Kingdom. The judge then proceeded to give a number of reasons why, in his view, it was "extremely likely" that the appellant would win any appeal on the basis of this subsection, in light of the appellant's children's ages.

37. Drawing this analysis together, the judge found that the reasonably foreseeable consequence of the Secretary of State's decision would be that the appellant would continue in the United Kingdom for a year or longer, without leave, only to be granted some form of leave to remain after a successful appeal: paragraph 47. During that time, he would be unable to work. After outlining the appellant's health and financial circumstances, the judge said that, in his view, it would not be in the public interest for the appellant and his family to rely on public funds, in the event of the inevitable financial struggle they would experience, were the appellant no longer able to work. The judge addressed a footnote in *Laci* in which Underhill LJ suggested, without having heard argument, that he could see advantages were the Secretary of State to decide on a provisional basis whether a deprivation order should be accompanied by a form of leave. The judge added that the respondent had not suggested that it would be appropriate to promise leave on a provisional basis in these proceedings, in her post-hearing representations. In relation to the public interest in the appellant's deprivation, the judge said, at paragraph 67:

> "There appears to be nothing other than [the appellant's] misrepresentation, which is last made in 2003, going against a grant of leave if his citizenship is deprived."

38. The judge concluded his proportionality assessment by stating that the approach of the Secretary of State went beyond what was needed to achieve her aim of maintaining the integrity of the regime for conferring British citizenship. That was because "on the evidence before me removal is not a realistic ultimate outcome": paragraph 69. The judge allowed the appeal.

DECISION OF THE FIRST-TIER TRIBUNAL: ERROR OF LAW

39. The Secretary of State advanced two grounds of appeal against the judge's decision:

    a. Ground 1 is that the judge's analysis, properly understood, amounted to a proleptic analysis, of the sort that should usually be avoided.

b. Ground 2 was that the judge impermissibly minimised the public interest in the deprivation of citizenship.

40. Permission to appeal was granted by First-tier Tribunal Judge Barker on both grounds.

Submissions: error of law

41. In support of the Secretary of State's grounds of appeal against the judge's decision, Mr Clarke submitted that, despite his insistence to the contrary, the judge performed a "paradigm example" of a proleptic assessment. It was perverse for the judge to purport not to have done so. The judge speculated as to what the Secretary of State's future decision would be, and how any appeal against such a decision would be resolved. In relation to ground 2, the judge impermissibly minimised the public interest in the deprivation of the appellant's citizenship. Even on the pre-*Begum* state of the authorities (for example, see *KV* at [19]), where it was established that deprivation was used, "it would be an unusual case in which an appellant could legitimately complain about the withdrawal of rights that he acquired as a result of naturalisation".

42. On behalf of the appellant, Mr Moksud submitted that the appeal should be viewed against the background of the appellant's self-disclosure to the Secretary of State. He voluntarily disclosed his true identity to her, a considerable period of time ago. The delay is not his fault. It would now be disproportionate to exercise the power to deprive him of his citizenship. The delay was a relevant factor, which the judge was entitled to approach in the way he did. The judge expressly eschewed the performance of a proleptic analysis, and simply sought to ascertain the reasonably foreseeable consequences of his decision. Apart from giving false information to the Secretary of State, the appellant was without fault. It was plainly in the public interest for the family to avoid becoming reliant upon public funds, as found by the judge.

Decision: error of law

43. The Annex to this decision set out paragraphs 36 to 62 of the error of law decision, which contains Judge Stephen Smith's operative analysis of the decision of the First-tier Tribunal. We have not annexed that decision in its entirety to avoid significant overlap with this decision, in particular our summary of the facts, the outline of the judge's decision, and our discussion of the relevant legal principles.

44. In summary, Judge Stephen Smith found that the judge's analysis of the reasonably foreseeable consequences of the deprivation order entailed a proleptic analysis of a chain of future events that were outside the scope of a deprivation of citizenship appeal (paragraph 38). The judge erred by seeking to ascertain the consequences of deprivation "with certainty", rather than merely addressing the reasonably foreseeable consequences of deprivation (paragraph 39). The judge's attempt to envisage the Secretary of State's application of the suitability criteria in Appendix FM of the Immigration Rules in the event the appellant made a future human rights was "proleptic to the core" (paragraph 41). Similarly, the judge's approach to a future appeal against the prospective refusal of a human rights claim made by the appellant

was not reasonably open to him (paragraph 43). The judge impermissibly minimised the public interest in the deprivation of citizenship and criticised the Secretary of State's *Nationality Instructions* on grounds that were not reasonably open to him (paragraphs 44 – 56), and erroneously sought to draw factual comparisons with other cases which featured very different factual matrices to the instant appeal.

45. The error of law decision concluded with this summary, at paragraph 60:

> "Judge Brannan's proleptic analysis of the appellant's future immigration status led to him to purport to weigh the anticipated consequences of the Secretary of State's deprivation decision against his impermissibly reached, proleptic finding that it would be highly unlikely that the appellant would be removed. The judge minimised the weight attracted by the public interest in the deprivation of citizenship in a manner that was not open to him. In short, the judge weighed findings he was not entitled to reach against public interest considerations he was not entitled to rely upon."

REMAKING THE DECISION

46. We now remake the decision, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

47. At the resumed hearing on 15 September 2022, we heard evidence from the appellant, and his wife, Ardita Nurja. They adopted their witness statements dated 26 July 2022 and were cross-examined. The appellant relied on an updated, consolidated bundle. Mr Moksud and Mr Clarke each relied on skeleton arguments (the Secretary of State's skeleton argument was prepared by Mr C. Bates, dated 23 August 2022), which we have also considered.

48. We do not propose to set out the entirety of the evidence heard in the submissions made but will do so to the extent necessary to give reasons for our findings.

49. We approach our analysis by considering:

    a. whether the statutory condition precedent under section 40(3) is met;

    b. the reasonably foreseeable consequences of deprivation, and other Article 8 ECHR considerations;

    c. whether the Secretary of State was entitled to exercise her discretion to deprive the appellant of his British citizenship.

A. Condition precedent met

50. The first question for our consideration is whether the statutory condition precedent under section 40(3) of the 1981 Act has been met. Although the appellant conceded before the First-tier Tribunal that the section 40(3) condition precedent was met, Mr Moksud has made muted attempts to resile from that position: see paragraph 12(1) of his skeleton argument dated 9 August 2022, which states that the satisfaction of a statutory condition precedent is one of the issues in the case. However, the remainder of Mr Moksud's written and oral submissions focused on the reasonably foreseeable

consequences of deprivation and the Secretary of State's exercise of her discretion to invoke the power. Not only did Mr Moksud not apply to withdraw the concession made previously in these proceedings, he did not press this point with any vigour at the hearing before us.

51. In any event, assuming the concession was not withdrawn, we find that the Secretary of State was entitled to be satisfied that the appellant's naturalisation as a British citizen was obtained by means of false representation or the concealment of a material fact. Mr Moksud realistically recognises in his skeleton argument, as does the appellant at paragraph 14 of his witness statement, that the appellant did use deception at the initial stages of his asylum claim to the Secretary of State, and in his representations thereafter. The Secretary of State was plainly entitled to view the foundations of dishonesty laid by those initial acts of deception as materially leading to the acquisition of British citizenship.

52. As the deprivation decision sets out at paragraphs 19 to 30, the appellant falsely claimed asylum in the name of Gezim Murizi. At all stages of the asylum process, he reiterated his false Kosovan identity and submitted false, and detailed, accounts of his claimed life in Kosovo. The Secretary of State stated at paragraph 22 that, had the true details been known by her, it was more likely than not that she would have attempted to remove the appellant to Albania, rather than responding by recognising him as a refugee and granting indefinite leave to remain. In turn, the status acquired by the appellant pursuant to that process enabled him to demonstrate that he was free of immigration restrictions for the purposes of naturalising as a British citizen.

53. In addition, as the deprivation decision sets out at paragraphs 25 and 26, the appellant declared during the naturalisation process that he was of "good character" for the purposes of meeting that statutory eligibility requirement to be granted British citizenship. The appellant did not declare to the Secretary of State that he had dishonestly purported to be a Kosovar with a well-founded fear of being persecuted in Kosovo. That was a material fact that should have been declared to the Secretary of State as part of his application for naturalisation. Question 3.13 on the appellant's application for naturalisation asked the following:

> "have you engaged in any other activities which might be relevant to the question of whether you are a person of good character?"

54. The appellant ticked the box labelled "no". The good character guidance then in force, namely section 6 of chapter 18D of the *Nationality Instructions*, provided, at paragraph 6.1:

> "… it should count heavily against an applicant who lies or attempts to conceal the truth about an aspect of the application for naturalisation – whether on the application form or in the course of enquiries. Concealment of information or lack of frankness in any matter must raise doubt about the applicant's truthfulness in other matters.

And at 6.2:

> "We should take into account the intentions of any concealment. If it is on a minor matter, not relevant to the decision, it may be overlooked…"

55. There is considerable force to the Secretary of State's view that the applicant's application for naturalisation would have been refused on good character grounds had he declared his prior deception to her. It follows, therefore, that by failing to make a declaration of his prior dishonesty, the appellant concealed a material fact, thereby meeting the requirements of section 40(3)(c) of the 1981 Act.

56. Finally, we observe that the Secretary of State applied the balance of probabilities standard when reaching her findings of fact: see paragraph 16 of the deprivation decision.

57. It follows, therefore, that the Secretary of State reached findings of fact that not only were supported by evidence, but which were wholly merited on the basis of the materials before her. She was entitled to be satisfied that the condition precedent in section 40(3) of the 198 Act was satisfied.

B. Article 8 ECHR: reasonably foreseeable consequences of deprivation

58. We commence our analysis in this part by making findings of fact to the balance of probabilities standard as to what the reasonably foreseeable consequences of the appellant's deprivation of citizenship would be.

59. The deprivation decision states at paragraph 51 that a deprivation order will be made within four weeks of the appellant exhausting any rights of appeal against the decision to make the order. Within eight weeks of a deprivation order being made, the Secretary of State will take a further decision to remove him, deport him, or issue further leave.

60. Paragraph 4 of Mr Bates' skeleton argument states that in light of the length of the appellant's residence, his British wife, two British children (one of whom remains a minor), employment history and lack of criminality, the appellant's removal is not a foreseeable consequence of the deprivation of his citizenship:

> "The SSHD will, therefore, contend that removal is not a 'foreseeable consequence of deprivation' on the disclosed facts of this case and, therefore, should be disregarded in the context of the present proceedings."

61. The Secretary of State's prospective timescale set out in the deprivation decision, and her acceptance, through Mr Bates' skeleton argument, that the appellant's removal is not a realistic prospect, focusses the parameters of our assessment of the reasonably foreseeable consequences of the deprivation of the appellant's citizenship.

62. The appellant's oral evidence, and that of Mrs Nurja, underlined the impact that the family would experience in the short to medium term. The focus of this part of their evidence lay in the consequences of the appellant being exposed to the so-called "hostile environment" and the limbo period to follow.

63. The appellant previously worked as a builder on high profile infrastructure projects (of which he is evidently very proud) and now runs his own barbershop. He started trading as a barber upon having to leave the construction industry through unfortunately contracting bladder cancer, from which he now has largely recovered (although he remains under observation). In his written and oral evidence, the appellant said he would not be able to work in the barbershop if he was without status and would be unable to meet his financial obligations towards his family. Mrs Nurja works as a nurse for the NHS, with a gross income of around £32,000 annually, which would not be sufficient to meet the family's expenses, he said. In addition to there being a mortgage on the family home, their son, Fatjon Muslija, is now at university and is wholly reliant on the appellant and Mrs Nurja for his financial support. Their daughter, M, is still a child and continues to live at home. The modest savings the family have built up would be insufficient to meet any shortfall in income, the appellant said; the savings are in the region of £3,500.

64. A significant part of the appellant's concern was the potential loss of all that he has sought to build up in this country, having arrived at a relatively young age, ostensibly as an impoverished asylum seeker, subsequently battling cancer and establishing his own business to provide for his family. For the appellant, the deprivation of his citizenship would be a devastating reversal of the high point of his integration in the United Kingdom. His evidence conveyed the impression that he would view being subjected to deprivation as a humiliating step, taken after years of delay (a factor to which we return below), forcing him to rely on his wife and family for their support, rather than being able to provide for them. In his view, the Secretary of State's decision would deprive him not only of his British citizenship, but also of his pride.

65. Under cross-examination, the appellant said that he owns the premises at which his barbershop is located without a mortgage. There is also a considerable amount of equity in the family home, in the region of £100,000. His son benefits from a student loan, he explained, but that covers the fees; the additional expenses he incurs fall to the family to meet. He lives at home. A similar picture emerged from the evidence of Mrs Nurja.

66. We find that the reasonably foreseeable consequences of the deprivation decision would be that the appellant would be unable to work on a self-employed basis at the barbershop he owns, or in any other employed or self-employed capacity, and that the family would be exposed to potential financial hardship. They are very unlikely to be destitute, since Mrs Nurja's salary is not insignificant, and the family has assets, both in the family home, and in the form of the appellant's barbershop. On a salary of £32,000, the family will be able to continue to meet the monthly mortgage payments of £470. The appellant's evidence did not feature a breakdown of the family's monthly finances. We find that the family will be able to cope without the appellant's income, albeit not to the standard of living they currently enjoy.

67. The hardship may end after a relatively short period, if (as now appears to be the case in light of Mr Bates' skeleton argument at paragraph 4) the appellant is granted some form of leave. However, we cannot speculate further as to what would happen, or

when it would be likely to happen, and so we approach the uncertainty facing the family on the basis that it could outlast the timeframe indicated in the deprivation decision by a considerable period. While the appellant would be unable to continue the active role he currently enjoys in the barbershop, we find that a number of options would be open to him. The business could be sold as a going concern and placed entirely into the hands of another, or the appellant could engage staff to work there in his absence; his evidence was that he has a part-time employee at present. Significantly, the business premises do not have a mortgage, and were said by the appellant to be worth approximately £80,000. Throughout his evidence, the appellant emphasised his reluctance to expose his family to financial jeopardy, and to prejudice the lives they enjoy in this country. In our judgment, the appellant was reluctant to accept that he had a number of additional options open to him to cover the interim period between the deprivation decision becoming effective, and the resolution of any future application to, or decision of, the Secretary of State. He will not be destitute, and neither will the family. The appellant may have to sell his business, but he has savings to cushion any otherwise immediate impact of losing his British citizenship. We accept that the appellant will experience a great sense of personal loss, both through losing all that he has "worked" for (we use inverted commas because the success enjoyed by the appellant was built on the fraudulent foundation of his deception to the Secretary of State), and through being unable to provide for his family, something which he placed great emphasis in his oral evidence.

68. The reasonably foreseeable consequences of the deprivation of the appellant's citizenship would, therefore, engage the Article 8(1) private life rights of the appellant and his immediate family. It does not engage the family life limb of Article 8(1) since this decision will not prevent them from continuing to enjoy family life together.

Article 8(2): delay and proportionality

69. Many of the factors relevant to an assessment of proportionality under Article 8 ECHR will be similar to those to be assessed when conducting our public law review of the Secretary of State's exercise of discretion. Where a tribunal is assessing the proportionality of an interference with Convention rights, it must decide the matters for itself. By contrast, a public law review of the Secretary of State's decision must be confined to established public law principles, as emphasised at paragraph (6) of the Headnote to *Ciceri*. In *Laci*, Underhill LJ observed (having discussed the approach of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591), that:

> "… in principle a difference of approach is required depending on whether the deprivation of citizenship in the particular case will or will not involve an interference with Convention rights. However, it may be doubtful whether that theoretical difference of approach is likely to lead to different outcomes in practice…" (paragraph 32)

Best interests of M

70. The best interests of M, a child born in 2005, are a primary consideration in this part of the analysis. We accept that the family as a whole will be exposed to a degree of uncertainty, and to that extent there will be a collateral impact on M. However, her British citizenship, and that of her mother and brother, is not in question. Her mother will continue to work, and her father will continue to enjoy the benefits of holding the title to his barbershop premises, and the option, should he choose to avail himself of it, to release capital through liquidating that asset. M's schooling will not be threatened, and she will continue to enjoy the full panoply of rights enjoyed by British citizens. The decision itself would not have the consequence of separating M from her father, and she will be able to continue the genuine and subsisting relationship that she currently enjoys with him. That said, the impact on any child of the parent losing the right to work, and losing even their dishonestly obtained British citizenship, will be of some magnitude. To that extent, the best interests of M favour retaining the *status quo*.

71. Mr Moksud placed considerable reliance on what he categorised as the delay the appellant has experienced since first being informed by the Secretary of State that he was informed that his citizenship would be treated as a nullity, and later deprivation. The evidence of the appellant and Mrs Nurja emphasised the lengthy uncertainty to which the appellant has been subject, and the anxiety and unfairness that they consider they have experienced as a result.

72. The appellant's case concerning delay is that it is unfair to implement this deprivation decision, in 2022, some eleven years after he first informed the Secretary of State of his true identity, in 2011. Under the Nationality Instructions then in force, paragraph 55.7.2.5, the Secretary of State would have been unlikely to hold his earlier dishonesty against him, as he had resided here for over 14 years, he contends. The appellant considers that he enjoyed a legitimate expectation that paragraph 55.7.2.5 would be applied in his favour. That paragraph stated that the Secretary of State would "not normally" deprive a person of their British citizenship if they had been resident for more than 14 years: we refer to this as "the 14 year policy". The Nationality Instructions have since been amended and now state, at paragraph 55.6.7:

> "Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship."

Proportionality: discussion

73. The starting point for our discussion of proportionality is the considerable public interest that lies in the deprivation of dishonestly obtained British citizenship. The foundation of lies laid by this appellant led to him being allowed to remain in the country, acquire indefinite leave to remain, sponsor Mrs Nurja's entry clearance, and obtain British citizenship to which he was not otherwise entitled. As it was put in *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 128 (IAC); [2020] Imm AR 1044 ("*Hysaj UT*") at paragraph 110:

> "There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured."

74. That paragraph was approved in *Laci*, with a particular emphasis on the "without more" caveat, at paragraph 80:

> "I respectfully agree with that passage, which is entirely in line with the overall approach to cases where an applicant has obtained British citizenship by fraud. But it is important to note the 'without more'. Where there is something more (as, here, the Secretary of State's prolonged and unexplained delay/inaction), the problems that may arise in the limbo period may properly carry weight in the overall assessment."

75. We have found above that the "limbo period" will not leave the family destitute and will only be for a limited (although potentially lengthy) period. "Without more", that cannot tip the proportionality balance in the appellant's favour. Mr Moksud relies on delay, the appellant's legitimate expectation arising from the now withdrawn 14 year policy, the impact on the family, and the appellant's broader mitigation to demonstrate that there is "more" in this case that renders deprivation disproportionate.

76. We recall the best interests of M. They are, by a marginal extent, for the *status quo* to be preserved since deprivation will have a destabilising impact on the family's day to day life, although the family will by no means be destitute, and the decision will not separate the family. We address below whether this one factor outweighs all others militating in the opposite direction.

77. We turn to delay. The leading authority on delay in this context remains *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2008] Imm AR 713, at paragraphs 13 to 16 (with suitable modifications to apply the principles to a deprivation decision). As Lord Bingham held at paragraph 13:

> "… there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made."

78. Lord Bingham held that delay may still be relevant, in three ways.

    a. First, delay in a decision may entail the individual concerned developing closer personal and social ties in the community (paragraph 14).

    b. Secondly, lengthy delay may cause the sense of impermanence which would usually characterise a relationship commenced by a person with a precarious immigration status to reduce. The expectation may well be that, had the

authorities intended to remove the individual, they would have done so by now already (paragraph 15).

c. Thirdly, "if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes", it may reduce the weight to be ascribed to the public interest in the requirements of firm and fair immigration control (paragraph 16).

79. As it was held at paragraph (5) of the Headnote to *Ciceri*:

> "Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of *EB (Kosovo)*."

80. The deprivation decision represents the Secretary of State's now clarified understanding of the law. The decision explains that the time taken to reach this stage was attributable to the Secretary of State's earlier, incorrect understanding of the law concerning nullity and deprivation: see paragraphs 9, 10 and 31. In our judgment, the time taken by the Secretary of State in the case of this appellant is not a delay for which the Secretary of State is culpable, and therefore does not weigh heavily on the appellant's side of the proportionality balance. The 'delay', as Mr Moksud puts it, was attributable primarily to the Secretary of State's understanding of the law previously in force. It was not borne of culpable inaction. Nor was it the fruits of a dysfunctional system, yielding unpredictable, inconsistent and unfair outcomes. Pursuant to *Ciceri*, the 'delay' is not a factor which renders the decision disproportionate.

81. Turning to Mr Moksud's remaining submissions arising from the chronology, in particular the change to the 14 year policy. In *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 128 (IAC) ("*Hysaj UT*"), it was held, at paragraph 1 of the Headnote:

> "1. The starting point in any consideration undertaken by the Secretary of State ("the respondent") as to whether to deprive a person of British citizenship must be made by reference to the rules and policy in force at the time the decision is made. Rule of law values indicate that the respondent is entitled to take advice and act in light of the state of law and the circumstances known to her. The benefit of hindsight, post the Supreme Court judgment in *R (Hysaj) v. Secretary of State for the Home Department* [2017] UKSC 82, does not lessen the significant public interest in the deprivation of British citizenship acquired through fraud or deception."

In our judgment, it is not, therefore, disproportionate to apply the extant version of the Nationality Instructions to the appellant's circumstances. Those instructions provide that length of residence alone will not normally be a reason not to deprive a person of their citizenship.

82. Paragraphs 2 and 3 of the *Hysaj UT* decision address whether an individual in this appellant's situation enjoys a legitimate expectation that the old policy would be applied in preference to the present policy:

> "2. No legitimate expectation arises that consideration as to whether or not to deprive citizenship is to be undertaken by the application of a historic policy that was in place prior to the judgment of the Supreme Court in *Hysaj*.
>
> 3. No historic injustice is capable of arising in circumstances where the respondent erroneously declared British citizenship to be a nullity, rather than seek to deprive under section 40(3) of the British Nationality Act 1981, as no prejudice arises because it is not possible to establish that a decision to deprive should have been taken under a specific policy within a specific period of time."

83. It follows that the deprivation decision is not disproportionate on account of any expectation the appellant considered that he enjoyed at the time he revealed his dishonesty to the Secretary of State.

84. We accept that the appellant has not been convicted of any criminal offences. He has not been prosecuted for the dishonesty which underpins the deprivation decision. Save for his dishonesty with the Secretary of State, he is of good character. He self-declared his dishonesty to the Secretary of State. His work has contributed to major infrastructure projects, including a large tunnel under the River Thames, and the Olympics. He has demonstrated resilience in the face of a potentially fatal illness by starting his own barbershop business. His wife and children share his work ethic. He has lived here for 25 years, having arrived as a young man. These are factors that count in his favour.

85. Drawing this analysis together, we find that the decision to deprive the appellant of his British citizenship would not be disproportionate under Article 8 ECHR, even bearing in mind the best interests of M as a primary consideration. In our judgment, the impact to the family will be proportionate to the considerable public interest that attaches to upholding the integrity of the system by which foreign nationals are naturalised. The limbo period will be stressful for the family, but they will not be destitute. The impact to the appellant of the loss of all he considers he has worked so hard for counts for little, since it was built on the foundations of dishonesty. The impact on M will be limited, and her best interests are only marginally in favour of retaining the status quo. Length of residence alone is not a reason not to deprive a person of their citizenship. The cumulative weight of the factors militating in favour of the deprivation of the appellant's citizenship outweigh M's best interests for her father to remain British.

86. We find that the decision to deprive the appellant of his British citizenship would not breach section 6 of the Human Rights Act 1998.

Exercise of discretion

87. We do not consider that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted. Properly understood, the gravamen of Mr Moksud's submissions was that the experience of deprivation will be deeply unpleasant for the appellant and is something that he disagrees with profoundly. The appellant feels that the decision is deeply unfair, since he self-declared to the Secretary

of State in the expectation that he would benefit from the 14 year policy. That may be so, but that does not demonstrate that the Secretary of State fell into a public law error when taking the decision. Mr Moksud did not suggest that the Secretary of State failed properly to apply her current policies, or that she took into account some irrelevant consideration, or failed to address a relevant consideration. Nor did he submit that there has been some procedural irregularity, other than by reference to the claimed delay, which for the reasons we have given above cannot render the deprivation decision disproportionate. This is not a case where the Secretary of State would be prohibited by section 40(4) from taking the decision to deprive the appellant of his citizenship if it would leave him stateless, but in any event, she addressed that factor in her decision: see paragraph 49.

88. We conclude by recalling that the Secretary of State bears the responsibility, and enjoys the institutional competence, to take decisions concerning the deprivation of British citizenship. She has chosen to exercise her discretionary power to do so in a manner that is consistent with her policies, and which was not infected by any public law error. We have found that the decision was consistent with Article 8 ECHR, having considered its proportionality for ourselves. There is no basis for this tribunal to conclude that by taking the deprivation decision, the Secretary of State acted unlawfully.

89. We dismiss this appeal.

Notice of Decision

The decision of Judge Brannan involved the making of an error of law and is set aside with no findings of fact preserved.

We remake the decision and dismiss the appeal.

We do not make a fee award.

No anonymity direction is made.

Signed *Stephen H Smith* Date 16 November 2022

Upper Tribunal Judge Stephen Smith

EXTRACTS FROM THE ERROR OF LAW DECISION

The paragraphs below are the extracts from Judge Stephen Smith's 'error of law' decision promulgated on 13 April 2022. To avoid repetition of the facts, the summary of the decision of the First-tier Tribunal, the grounds of appeal and the submissions, we have included only the operative reasoning of that decision.

Paragraphs 36 to 62:

A36. I have come to the clear conclusion that the judge erred by conducting, as Mr Clarke put it, a paradigm example of a proleptic assessment of a deprivation of citizenship order, and that he impermissibly minimised the public interest in the deprivation of the appellant's citizenship.

A37. It will be convenient to address each ground of appeal in turn.

Ground 1 – proleptic analysis by the FTT

A38. I find that the judge's analysis of the reasonably foreseeable consequences of the deprivation order entailed a proleptic analysis of a chain of future events that were outside the scope of a deprivation of citizenship appeal. His analysis involved speculation as to not only what a future decision of the Secretary of State should be, but the likely outcome of any appeal against that decision if it were adverse to the appellant, and the prospective timings involved. Moreover, the judge's analysis was underpinned by factual assumptions that were not open to him, thereby highlighting precisely why proleptic analyses should be avoided.

A39. The judge erred by approaching the question of what the "reasonably foreseeable" consequences of deprivation were by stating, at [44], that he needed to know "*with certainty*" what the length of the limbo period would be. By definition, seeking to ascertain the future "with certainty" requires a level of foresight straying significantly beyond what is merely "reasonably foreseeable".

A40. The judge's post-hearing note, and his subsequent operative reasoning, demonstrates the extent to which his decision was characterised by prolepsis. At paragraph 3 of the note, and paragraph 40 of his decision, the judge declared that "there is no possibility that the appellant will face deportation – he has committed no criminal offence". Those were findings of fact that were not open to the judge. No reasonable judge could have reached them. At its highest, all that could be said is that, at this stage, the appellant has not (yet) been convicted of an offence that would render him a "foreign criminal" for the purposes of section 117C of the 2002 Act, or that the Secretary of State was yet to certify that his deportation would be conducive to the public good. However, not only did the judge not appear to hear any argument on whether the appellant had committed any immigration or nationality offences, but his emphatic statement ignores the possibility that it is always open to the Secretary of State to certify that someone's presence is not conducive to the public good, for the purposes of section 5(1) of the Immigration Act 1971. However unlikely that eventuality would

be in the judge's opinion, by declaring in such emphatic terms that there is "no possibility" that the appellant would face deportation, the judge not only misstated the legal position, but usurped the institutional competence of the Secretary of State to take such a decision in the future.

A41. The judge's proleptic analysis continued with his analysis of how the Secretary of State would determine an application for leave under Appendix FM of the Immigration Rules. Again, this was foreshadowed in his post-hearing note, at paragraphs 5 to 9, and featured in his operative decision at paragraphs 42 to 47. In each, the judge set out the suitability paragraphs contained in paragraphs S-LTR.4.1 to S-LTR.4.3 of Appendix FM. By definition, those paragraphs were relevant only to the Secretary of State's consideration of a future application, which had not yet been submitted, still less decided: this was a proleptic analysis to its core.

A42. The judge's proleptic approach extended to determining whether, in a future appeal against a refusal of a prospective human rights claim, a tribunal would conclude whether would be reasonable to expect the appellant's minor children to leave the United Kingdom, for the purposes of section 117B(6) of the 2002 Act. The judge concluded that it would be unreasonable, seemingly on account of the fact the children were born in the United Kingdom, had lived here for their entire lives, studying for their GCSE and A-Level exams. Again, this was a proleptic analysis. The judge purported to decide the outcome of an appeal against a decision that was yet to be taken, by reference to an application that was yet to be made. In doing so, perhaps again illustrating part of the rationale underlying the need to avoid proleptic analyses, the judge erred. The judge's three sentence analysis of the appellant's prospects of success in a hypothetical future appeal did not engage with the approach to section 117B(6) required by *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, in particular the "real world" context in which that assessment would take place, nor any of the other authorities concerning the application of the subsection. The application of the provision in relation to the appellant's children was by no means a foregone conclusion, yet the judge impermissibly treated it as though it were. The judge's finding that it was "extremely likely" that the appellant would win any future appeal on human rights grounds was not, within the confines of this deprivation of citizenship appeal, reasonably open to him.

A43. Drawing this analysis together, then, the judge's analysis of the consequences to the appellant of the deprivation of his British citizenship entailed a proleptic analysis, that was based on findings of fact that were not reasonably open to him. The judge sought to bring certainty to an exercise that only required the "reasonably foreseeable" consequences of deprivation to be considered. The entire exercise was conducted with a view to making findings concerning the length of the limbo period, despite the fact that, "without more" the length of the limbo period could not possibly tip the balance in favour of the appellant retaining the benefits of citizenship that he fraudulently secured.

Ground 2 – minimisation of the public interest

A44. I accept Mr Clarke's submissions that the judge impermissibly minimised the public interest in the deprivation of the appellant's British citizenship, for the following reasons.

A45. First, it was not rationally open to the judge to conclude that the Secretary of State's decision did not make clear why she pursued the deprivation of the appellant's citizenship. The judge appeared to consider that the Secretary of State had fallen into error by failing to identify why it was necessary to exercise discretion against this appellant. The issue troubled the judge in the following terms, at [29]:

> "During the hearing I expressed concern that I could not see why the Respondent had chosen to exercise her discretion against the Appellant."

A46. At paragraph 49 of the decision, the Secretary of State stated that the decision to deprive the appellant of his British citizenship was a reasonable and proportionate step, in light of the seriousness of the fraud, the need to protect and maintain confidence in the UK immigration system, and the public interest in preserving the legitimacy of British nationality. At paragraph 52, the Secretary of State wrote that the effect of deprivation on the appellant:

> "must be weighed against the public interest in protecting the special relationship of solidarity and good faith between the UK and its nationals and the reciprocity of rights and duties, which form the bedrock of the bond of nationality. Having weighed those effects, it has been concluded that it is reasonable and proportionate to deprive you of British citizenship."

A47. The reference to "the seriousness of the fraud" was a reference to the seriousness of the appellant's fraud, so it cannot rationally be said, as did the judge, that the Secretary of State did not say why she sought to deprive *this appellant* of his British citizenship. The decision letter must be read as a whole. At paragraph 34 of the decision, having acknowledged the appellant's representations concerning the impact upon him of the loss of his citizenship, it stated:

> "However, it is noted that deprivation is still appropriate and proportionate, due to an array of points of consideration as explained below."

The Secretary of State's decision then proceeded to give, as it put it, the "array" of reasons, including the following. The appellant was an adult when he arrived and would have been aware of his date of birth and nationality. Yet throughout his dealings with the Home Office, he knowingly falsely declared a different nationality, a false name, and a fictitious date of birth. At [37], the false claim to Kosovan nationality led to the appellant being granted refugee status and indefinite leave to remain. Had he declared his true details, not only would he have not been granted

indefinite leave to remain, and therefore have been unable to apply for British citizenship, but his wife would not have been eligible for entry clearance to join him in 2002. At [40], despite six years passing following the Secretary of State first contacting him about his citizenship status, he maintained his false identity and enjoyed the benefits of his deception. At [42], it was "important to note" that the appellant had perpetrated a deliberate fraud against the UK immigration system.

A48. Those reasons must be viewed in the context of the authorities on this issue, such as *Hysaj* at [110] (the headnote to which the judge quoted at paragraph 56). There was no rational scope for the judge to conclude that the Secretary of State had not articulated why deprivation action was appropriate in this case.

A49. Allied to these errors, the judge fell into error by criticising the Secretary of State's *Nationality Instructions* for failing, in his view, to articulate the circumstances in which she would pursue the deprivation of citizenship. At [31], having considered the terms of paragraph 55.7.10.1 of the *Nationality Instructions*, concerning the need for deprivation to be a "balanced and reasonable step to take", the judge said:

> "The problem with the respondent's guidance is it does not make clear what factors lead to a conclusion that deprivation of citizenship is appropriate, other than merely the use of fraud, false representation or concealment of a material fact."

A50. The judge erroneously approached the Secretary of State's exercise of discretion as though it were itself subject to a condition precent of being fully articulated in a policy, and thereby impermissibly minimised the public interest in the deprivation of the appellant's citizenship. As this was a statutory appeal, and not a judicial review of the Secretary of State's policy, the judge should have approached this issue on the basis of what was set out in the decision, in the context of the relevant authorities and the policy, rather than by criticising the *Nationality Instructions*. In any event, there is no obligation on decision makers to have a policy in every case where statute creates a discretionary power (see *R (oao A) v Secretary of State for the Home Department* [2021] UKSC 37 at [53]).

A51. Secondly, the judge appeared to approach the question of the Secretary of State's exercise of her discretion as though some *additional* public interest factor(s) were required, over and above those set out by the Secretary of State in the decision letter, and the generally accepted public interest in the deprivation of citizenship, as summarised in *Hysaj* at [31], and [110].

A52. At paragraph 34, the judge contrasted the circumstances of the appellant with those of the appellants in *Begum* and *Hysaj*:

> "Ms Begum had travelled to Syria to join Islamic State. [She and Mr Hysaj] are people for whom the public interest in deprivation of citizenship may be self-evident. That is not the case with the appellant…"

See also the judge's further treatment of *Hysaj* as a factual precedent at [40].

A53. The judge's observations in this respect may be contrasted with his own minimised view of the seriousness of the appellant's conduct, such as stating that the appellant had "merely" engaged in conduct triggering a statutory condition precedent, at [31] (see paragraph A49, above).

A54. The public interest in the Secretary of State exercising the power is well established: see, for example, *Hysaj* at [31], as quoted by the judge at [32] of his decision:

> "… where the requirements in section 40(3) are satisfied, the Tribunal is required to place significant weight on the fact that Parliament has decided, in the public interest, that a person who has employed deception to obtain British citizenship should be deprived of that status."

I pause to observe that the above extract from *Hysaj* was in the context of an understanding of the law whereby the tribunal would decide *for itself* whether discretion should have been exercised differently. The principle in [31] of *Hysaj* applies with all the more force pursuant to the post-*Begum* understanding of the law whereby the tribunal enjoys only the ability to review the decision, on public law grounds, rather than re-take the decision itself. To the extent that Article 8 requires the tribunal to assess for itself the proportionality of any interference with private or family life rights, the tribunal would have to afford the appropriate weight to the views of the Secretary of State concerning the public interest in any event.

A55. Parliament would have been aware of the potential impact on public funds where a person is deprived of their British citizenship. By elevating his concern that the appellant's family would be so reliant to the level he did (see [64]), without expressly taking into account Parliament's endorsement of this prospect, the judge fell into further error.

A56. In light of the established public interest in the deprivation of fraudulently obtained citizenship, it was not open to the judge to search for some additional culpability on the part of the appellant, regardless of the fact that the judge was able to identify other candidates who, in his view, were more worthy of being subject to the deprivation process. Such as Mr Hysaj or Ms Begum. Nor could it be said that the appellant had *merely* engaged in the use of fraud, misrepresentation, or the concealment of a material fact: the seriousness of the conduct encapsulated by section 40(3) is not capable of being minimised in those terms.

A57. It was also an error of law for the judge to seek to draw conclusions from the facts of individual cases, as was recently re-emphasised in *MI (Pakistan) v Secretary of State for the Home Department* [2021] EWCA Civ 171 per Simler LJ, at [50]:

> "It is dangerous to treat any case as a factual precedent as *HA (Iraq)* made clear (at [129]). In the particular context of an evaluative exercise there is a limit to the value to be obtained from considering how the

> relevant legal test was applied to the facts of a different (albeit similar) case, especially where there may be questions as to the true level of similarity between the two cases given the almost infinitely variable range of circumstances…"

A58. Perhaps the risks of seeking to draw factual comparisons can be highlighted by the following points. The comparison with Ms Begum was inapposite, as those proceedings entailed a decision taken on conduciveness grounds under section 40(2) of the 1981 Act, where Ms Begum's activities in Syria were coterminous with the Secretary of State's reasons for pursuing deprivation. In the case of Mr Hysaj, the Secretary of State had already begun considering whether to deprive him of his British citizenship *before* he was convicted of the offence for which he was sentenced to five years' imprisonment: see *Hysaj* at [5] and [6]. Judge Brannan strayed into the territory of seeking to treat both cases as factual precedents, and in doing so fell into precisely the error which Simler LJ cautioned against.

A59. Finally, the judge's overall proportionality assessment at [69] was based on the flawed premise that the deprivation of the appellant's citizenship would be "very unlikely to result in the appellant's removal from the UK…" As I have set out above, that was a finding based on flawed factual and legal assumptions and was reached on a proleptic basis. In any event, pursuant to *Aziz*, it is only where the Secretary of State's express purpose in making a deprivation order under section 40(2) was in order to pave the way for the individual's deportation that the prospective irremovability of an individual would be a relevant factor: see *Aziz* at [30]. The judge had therefore failed properly to identify the "more" that would be required in order to negate the considerable public interest that would otherwise attach to the deprivation of fraudulently obtained citizenship.

Conclusion

A60. In summary, this appeal succeeds on both grounds advanced by the Secretary of State. Judge Brannan's proleptic analysis of the appellant's future immigration status led to him to purport to weigh the anticipated consequences of the Secretary of State's deprivation decision against his impermissibly reached, proleptic finding that it would be highly unlikely that the appellant would be removed. The judge minimised the weight attracted by the public interest in the deprivation of citizenship in a manner that was not open to him. In short, the judge weighed findings he was not entitled to reach against public interest considerations he was not entitled to rely upon.

A61. The decision involved the making of an error on a point of law and must be set aside with no findings preserved. The decision will be remade in this tribunal.

A62. The appellant has permission to rely on updated materials concerning the reasonably foreseeable consequences of the deprivation of his citizenship and an assessment of the Article 8 ECHR implications of a deprivation order being made. He must file and serve any such new materials within 28 days of being sent this decision. The Secretary of State may issue a supplementary decision within 56 days of being sent this decision,

addressing, if necessary, any additional materials relied upon by the appellant. The matter will be listed for a resumed hearing on the first available date thereafter.

Notice of Decision

The decision of Judge Brannan involved the making of an error of law and is set aside with no findings preserved.

The decision will be remade in the Upper Tribunal.

The appellant has permission to rely on additional evidence concerning the reasonably foreseeable consequences of the deprivation of his British citizenship. He must file and serve any such evidence **within 28 days of being sent this decision.**

The Secretary of State must review the additional materials relied upon by the appellant, and, if she chooses to do so, take a supplementary decision addressing the impact, if any, of the appellant's new materials. Any supplementary decision must be served **within 56 days of being sent this decision**.

No anonymity direction is made.

Signed *Stephen H Smith* Date 11 April 2022

Upper Tribunal Judge Stephen Smith