Neutral Citation Number: [2023] EWCA Civ 770

Case No: CA-2022-000948

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
Upper Tribunal Judge Kamara
and First Tier Tribunal Judge A K Sharma
DC/00038/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

SHYTI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Hugh Southey KC and Alasdair Mackenzie (instructed by **TRP**) for the **Appellant**
Julia Smyth and Rajkiran Barhey (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 20 and 21 June 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 4 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. On 4 March 2020, the Secretary of State notified the Appellant ('A') of her decision to deprive him of his British Nationality in a fully reasoned letter ('the Decision'). A appealed against the Decision to the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT'). The F-tT allowed his appeal. The Secretary of State then appealed to the Upper Tribunal (Immigration and Asylum) Chamber ('the UT'). The UT allowed the appeal of the Secretary of State. The UT held that there was an error of law in the F-tT's determination and remitted the appeal to the F-tT for it to be re-heard. A now appeals against the determination of the UT.

2. A was deprived of his nationality on the ground, in short, that he had obtained his citizenship by fraud. He admits lying in his application for citizenship. It is also uncontroversial that he lied in other earlier applications he made to the Secretary of State. He did not disclose any of those other lies in his application for citizenship, despite being given an opportunity to do so.

3. The grounds of appeal raise two issues. At the F-tT, the Secretary of State was represented by a presenting officer ('HOPO'). The HOPO did not, in his limited oral submissions, rely on the full reasoning in the Decision, but it is accepted, as the UT found, that he did not concede that any part of the Decision was withdrawn. The first issue is whether it was open to the UT to find that the F-tT erred in law by failing, in this case, to consider the reasoning in the Decision in full ('ground 1'). A second potential issue concerns the correct legal approach to appeals in cases such as this. A contends that they are still governed by the reasoning in paragraph 6 of *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483; [2018] 4 WLR 166 ('ground 2'). The Secretary of State argues that the reasoning in *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7; [2021] AC 765 ('*Begum*') now applies to such appeals, as the UT has held in *Ciceri (deprivation of citizenship appeals; principles)* [2021] UKUT 00238 (IAC) ('*Ciceri*') and, more recently, in *Chimi (deprivation appeals: scope and evidence) Cameroon* [3023] UKUT 00115 (IAC), a decision of a Presidential Panel.

4. In this judgment I will summarise some of the documents in A's case which were annexed to the Decision, and the reasoning of the F-tT and of the UT. I will then summarise the legal framework. Against that background, I will then summarise the submissions and give the reasons for my conclusions.

5. For the reasons given in this judgment, I have decided that the UT did not err in law in holding that the F-tT did err in law in not considering the main strands of the reasoning in the Decision, despite the lack of help from the HOPO. I have also decided that, notwithstanding the force of Mr Southey KC's argument on ground 2 (although I have one reservation about it: see the last two sentences of paragraph 91, below) we should not decide the second issue, as, on any view, anything we might say about it would be obiter.

6. A was represented by Mr Southey KC and Mr Mackenzie. The Secretary of State was represented by Ms Smyth and Ms Barhey. The Secretary of State's skeleton argument was drafted by Ms Smyth and Ms Wakeman. I thank counsel for their written and oral

submissions. Paragraph references are to the determinations of the F-tT or of the UT, as the case may be, or to whichever other document or authority I am referring to in the relevant passage of this judgment.

The facts

7. The key facts are summarised in the Decision (see paragraphs 14-24, below). I will now describe some of the annexes to the Decision in order to supplement that summary in some relevant respects. All those annexes were in the Secretary of State's bundle of documents for the F-tT hearing. Both the parties also relied on the Secretary of State's internal case record, known as the 'GCID notes', and it is convenient also briefly to refer to that material in this part of the judgment.

8. A is an Albanian citizen. He arrived in the United Kingdom in 1999. He claimed asylum by falsely claiming to be a Kosovan national. The name he used was very similar to his true name, and he gave his true date of birth. His asylum claim was refused, and his appeal was dismissed. He stayed in the United Kingdom. He made and maintained this false claim to be a Kosovan national in five different communications/applications with or to the Home Office, two of which concerned his asylum claim. On four occasions he signed declarations that he was telling the truth, and acknowledging various consequences if he was not doing so. I will now say a little more about his applications under what has been called 'the Legacy Programme', his application for a travel document, and his application for naturalisation as a British citizen.

The grant of indefinite leave to remain

9. One of those communications was a 'Case Resolution Questionnaire' which A submitted on 7 September 2009 under what has been referred to as 'the Legacy Programme'. He falsely claimed (for the third time) to be a Kosovan national, again using his false name. The parties disagreed whether his lies were material to the grant, on 2 July 2010, of indefinite leave to remain ('ILR') under the Legacy Programme. A submitted that ILR was expressly granted because of the length of time which A had spent in the United Kingdom and his ties with the United Kingdom. His nationality was not relevant to that grant: many people who made false asylum claims must have been granted ILR under the Legacy Programme. The Secretary of State submitted that it was clear from the later decision in *R (Gjon Matusha) v Secretary of State for the Home Department* [2012] UKUT 0175 (IAC) (a decision of a Presidential Panel of the UT) that, on the contrary, good character was relevant to the grant of ILR, because paragraph 395C of the Immigration Rules (HC 395 as amended) ('the Rules') applied to a decision under the Legacy Programme. Both the parties referred to the GCID notes recording the Secretary of State's internal consideration of the decision to grant ILR. The GCID notes show that the Secretary of State took into account both A's length of residence in the United Kingdom, and whether or not he was considered to be of good character (by reference to paragraph 395C). At that stage, it is also clear that the Secretary of State concluded that A was of good character.

A's application for a travel document

10. A made an application for a travel document dated 3 August 2010. In that application he claimed, in three different places, to be a Kosovan national. He also claimed that he had been born in Kosovo. He again used his false name.

The application for naturalisation

Guide AN

11. The application form which A filled in tells applicants, at the start, to read 'Guide AN'. Section 2 of Guide AN, as it applied when A made his application, advised applicants to 'Make sure that all the information is correct before you submit the application. It is a criminal offence to give false information knowingly or recklessly'. Section 3 is headed 'Good character'. Under paragraph 3.17 is the following text: 'You must tell us if you have practised deception in your dealings with the Home Office…(eg by providing false information…). This will be taken into account in considering whether you meet the good character requirement. If your application is refused, and there is clear evidence of deception, any future application made within 10 years is unlikely to be successful.'

A's application form

12. In the application form, A used his false name. He claimed to be a Kosovan national and that he was born in Kosovo. He said that both his parents were born there, and gave their claimed names. Section 3 of the form is headed 'Good Character Requirement'. Various specific questions are asked, for example, about criminal convictions, civil judgments and civil penalties, entries on the 'sex offenders register' and outstanding criminal charges. Question 3.16 asked, 'Have you ever been engaged in any other conduct which might indicate that you may not be considered a person of good character?'. Paragraph 3.17 asked for further details to be provided in a text box, or on a separate sheet, if the applicant had answered 'Yes' to, among others, question 3.16. A replied 'No'. At the foot of section 3, the form continued, 'For the purpose of answering questions 3.10-3.16, please refer to the Booklet AN which provides guidance on actions which may constitute war crimes, crimes against humanity, genocide or terrorist activities.'

13. Section 6 was headed 'Declaration by applicant'. It was headed by a warning that it is a criminal offence knowingly or recklessly to give false information on the application form. In this section, A again gave his false name, twice. He declared, in short, that the information on the form was correct. He confirmed that he understood the risk of prosecution. He also confirmed, in his answer to question 6.2, that he had read and understood Booklet AN and Guide AN. A's application was granted on 27 June 2013.

The Decision

14. The Decision said that the Secretary of State 'has decided that you did in fact obtain your British citizenship fraudulently' and that A should therefore be deprived of his citizenship (paragraph 3). The letter referred to section 40 of the British Nationality Act 1981 ('the BNA') (paragraph 4). The Secretary of State could deprive a person of his citizenship if he had obtained it by fraud, false representation, or the concealment of any material fact. The letter referred to various provisions of Chapter 55 of the Nationality Instructions. It said that concealment of any material facts meant 'operative concealment', that is concealment practised by the applicant must have had a direct bearing on the decision to issue a certificate of naturalisation. 'Fraud' included false representation and concealment of a material fact (paragraph 5).

15. The Decision described A's application for asylum dated 9 August 1999, in which A claimed to be 'Erion Shyti', that his parents were both dead, and that they had been Kosovan citizens. He claimed to have been forced out of Kosovo and to fear for his life from the Kosovan Serbs and from the Kosovo Liberation Army. If he returned to Kosovo he feared persecution by both. He signed a declaration that the information he had given was true and that making a false statement might be an offence (paragraph 9). In his screening questionnaire he gave the same name. He said he was born on 4 July 1978 in Kosovo (paragraph 10). His claim was refused in a letter dated 9 September 2004. He appealed. His appeal was dismissed on 30 December 2004 (paragraph 12).

16. On 7 September 2009, A submitted a case resolution questionnaire. He gave the same name and date of birth as in his asylum claim. He claimed to have been born in Kosovo. He signed a second declaration. This confirmed that the information in the form was correct and complete, and that if he had given false information, he might be liable to prosecution and that any leave he was granted might be revoked. The Home Office notified him in a letter dated 2 July 2020 that he had been given ILR in the United Kingdom (paragraph 13).

17. A applied for a travel document on 3 August 2010. He claimed the same identity and date of birth, and that he had been born in Silatine, Kosovo. When asked 'Any other name(s) by which you have been known' he answered 'same'. He signed a third declaration. He said that he was aware that it was an offence, in an immigration context, to make a statement or representation which he knew to be false or did not believe to be true (paragraph 14).

18. On 9 April 2013, A applied for naturalisation as a British citizen. He gave the same name, place and date of birth. In response to the question 'Name at birth', he answered 'as above'. He did not give his real name in answer to the question 'Known by any other names apart from above?' He claimed that his parents were Refat and Fildeze Shyti, both Kosovan nationals. He signed a fourth declaration. This pointed out that giving false information on the form was a criminal offence. He confirmed that he had read and understood Guide AN (paragraph 15).

19. After A was sentenced to ten years' imprisonment, the Home Office received a referral from another government department. In short, A's real identity was Erion Shuti. He had been born on 4 July 1978 in Berat, Albania. The photograph in this report was the same as the photograph on A's Home Office file. Other genuine documents, such as A's Albanian birth certificate, confirmed this (paragraph 16).

20. On 21 November 2019, A was sent an investigation letter. His solicitors accepted that A was an Albanian national. They said he had come to the United Kingdom from Kosovo in 1999. They said that as A had been given ILR outside the Rules, his nationality did not matter. The response to that argument in the Decision was 'This is not the case, you accrued residence in the UK because you claimed to be a resident of Kosovo but had the truth been known that you were in fact a national of Albania it is highly likely that you would have been removed from the UK to Albania if the immigration caseworker was aware of this fact at the time'. He would not then have met the requirements for ILR. The Decision then referred to a statement by A's solicitors that he had come to the United Kingdom as a young man and was proud to be a British

citizen. The riposte in the Decision was that A had entered the United Kingdom as an adult and claimed asylum, knowing that he was deceiving the Home Office, declaring a false name and place of birth which was material to his grant of status. He continued the deception in all his applications to the Home Office. As an adult he was responsible for his applications and the information in them. A's solicitors were said to have claimed that there was no lawful basis to continue with deprivation. The letter continued, 'It is noted that your false place of birth, Kosovo, was material to your grant of [ILR] and consequently British citizenship' (paragraph 17).

21. The Decision then referred to Chapter 55: a caseworker should be satisfied that there was an intent to deceive. The evidence showed that A had 'perpetrated a material fraud claiming that [he was] a citizen of Kosovo in order to obtain ILR status and citizenship' (paragraph 18).

22. Section 9.1 of the Nationality Staff Instructions in force at the date of A's application dealt with deception and dishonesty. It was clear that A would have been refused citizenship under sections 9.5.1 and 9.5.2 had the caseworker known that A had presented a false place of birth to the Home Office and continued to do throughout his immigration history (paragraph 19).

23. A had persisted in the deception despite the refusal of his asylum claim. Had the truth that he was an Albanian citizen been known, 'it was likely that you would not have met the mandatory requirement to possess settled status for the purpose of naturalisation'. A had persisted with the deception in his application for naturalisation. He ticked the box to say that he had not done anything to suggest that he was not of good character and used the same fabricated place of birth. Had he told the truth in his application for naturalisation it was 'highly likely' that he would have been refused citizenship on good character grounds. 'Therefore the deception was material in that you should not have had settled status' (paragraph 20).

24. For those reasons, the Secretary of State did not accept that 'there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is considered that you provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where your application(s) would have been unsuccessful if you had told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship' (paragraph 21).

A's appeal to the F-tT

25. A appealed. His notice of appeal was signed on 10 March 2020. His grounds of appeal were that '1. The decision to deprive is unlawful. The false nationality given by the Appellant was not material to the decision to grant him citizenship. 2. The SSHD's discretion should have been exercised differently.'

A's skeleton argument for the F-tT hearing

26. A's skeleton argument is dated 11 May 2020. A characterised the basis of the Decision, 'in particular' as 'the fact that [A] held himself out at relevant times as Kosovan, when in fact he was Albanian' (paragraph 1). The first issue was whether 'A's conduct was "directly material to the grant of citizenship"' (paragraph (i) on page 1). A contended

that the leading case on 'the necessary link between the fraudulent conduct relied on and the original grant of citizenship' was *Sleiman (deprivation of citizenship: conduct)* [2017] UKUT 00367 (IAC) ('*Sleiman*'). The conduct must be 'directly material to the decision to grant citizenship'. If the conduct had only an indirect bearing on the grant, 'deprivation would not be appropriate'.

27. A submitted that his conduct only had an indirect bearing on the grant of citizenship. The grant of ILR was based on the length of his residence, not his nationality. The claim that he would have been removed had his true nationality been known was speculative. There was no reason to think that the fact he had made false statements in his asylum claim would have affected the grant of ILR. Similarly, whether he was Kosovan or Albanian when he applied for citizenship had no direct bearing on the grant, which was based on the length of his residence in the United Kingdom. He would have been granted citizenship whether he was Albanian or Kosovan. At best, his deception about his nationality only had an indirect bearing on the grant (paragraph 14).

28. In paragraph 15 A said he understood that the Secretary of State was not also arguing that A should have been refused citizenship because of the false statement about his nationality in his application form. Each of the relevant paragraphs in the Decision, which were said to be paragraphs 17-21, was said to link the grant of citizenship 'back to the grant of ILR', so that it was the deception which led to the grant of ILR which led to the grant of citizenship. A then said, 'If (contrary to the above), any such argument is being advanced, it should be clearly spelt out in the decision letter and not left for others to tease out from ambiguous wording'.

29. Even if that was the Secretary of State's case, it took things no further. The deception was said to be the same throughout. If it was not directly relevant to the grant of ILR, it could not have been directly relevant to the grant of citizenship (paragraph 16).

30. A's case was not materially different from *Sleiman*.

31. If the fraud was material, A's fraud was not very serious. It was 'peripheral' to the grant of citizenship. It was not relevant to the grant of ILR. It did not involve 'falsifying an immigration history'. It would be 'excessive' to deprive A of his citizenship 'on the basis of a relatively low-level past act of fraud' (paragraph 23).

The Respondent's Review

32. The Respondent's Review is undated. It was sent to the F-tT on 27 May 2020 (see paragraph 34, below). It therefore post-dated A's skeleton argument. The introduction stated that 'The respondent continues to rely on the Reasons for Refusal Letter dated 04/03/2020'.

33. The Respondent's Review reproduced A's grounds of appeal as a 'list of issues'. The counter-schedule said 'This point is maintained by the respondent. The appellant has admitted that he lied and misled the Secretary of State at the material time about his nationality in paragraph 3 of his witness statement…and the appellant accepts that his actions were significant and material to achieve a fraudulent outcome. It is submitted that the appellant maintained that lie until a letter received from your legal representatives dated 16/1/2020 in which they say you accept that you are an Albanian

national. It is submitted that the appellant had every opportunity to inform the Home Office of his true nationality at three key stages: his asylum application, his application under the legacy programme and the application for British citizenship but he carried on with the deception'. The deception would not have come to light had he not been convicted of a serious criminal offence. The review then referred to the Secretary of State's desire to cross-examine A 'on evidence' in respect of various matters and 'those raised within the refusal notice'. The Respondent's Review added that the second ground of appeal (concerning the exercise by the Secretary of State of her discretion) was addressed in paragraph 22 of the Decision.

The determination of the F-tT

34. A was represented by counsel at the F-tT hearing. The Secretary of State, as I have said, was represented by a HOPO. The F-tT described the history, observing that A had maintained that he was a citizen of Kosovo in all his applications to the Home Office (paragraphs 2-5). In paragraph 8 the F-tT referred to the Respondent's Review, sent to the F-tT by email on 27 May 2020 and noted that the Secretary of State 'continued to rely on the refusal letter'. In paragraph 10, the F-tT said that the papers included the Secretary of State's bundle, and the Respondent's Review. The F-tT also referred to the Respondent's Review in paragraph 11, observing that the Secretary of State had not provided any of the authorities to which the Respondent's Review referred. The hearing had been listed for submissions only (paragraph 9). It took place remotely (paragraph 10).

35. The F-tT summarised the Decision very briefly (paragraph 6). The Secretary of State 'deprived [A] of his British citizenship pursuant to s40(3) of [the BNA] as it had been obtained fraudulently on the basis of his claim to be Kosovan'. The F-tT noted part of the Secretary of State's response in the Decision to the suggestion that A was given ILR on the basis of long residence and not on his claimed nationality was that if it had been known that A was Albanian, it was 'highly likely that he would have been removed from the United Kingdom. The false representation made in this respect was therefore material to the grant of [ILR] and consequently British citizenship'.

36. The F-tT had a detailed skeleton argument from A's counsel (see paragraphs 26-31, above). The F-tT asked for submissions in response to that argument from the HOPO. The HOPO said that he was not relying on any authorities. The F-tT told the HOPO that it could see the force of A's argument that this appeal was on all fours with *Sleiman* (paragraph 11).

37. The F-tT then summarised *Sleiman*. The impugned conduct had to be directly material to the grant of citizenship. Where fraud only has an indirect bearing on the grant of citizenship, deprivation would not be appropriate (paragraph 13). The indirectly relevant conduct in that case was the appellant's claim to be a child when he arrived in the United Kingdom. He had been granted leave to remain as child, had applied for further leave to remain, and, while that application was pending, had been given leave to remain under the Legacy Programme. He was granted citizenship in 2011. His lie about his age had come to light in 2015 and a deprivation decision had been made.

38. The F-tT noted that the grant of ILR was 'due to the length of time that the application for further leave had been outstanding. The appellant's deception was not regarded as

directly material to the decision to grant citizenship. The contention that the appellant would have been returned promptly to Lebanon had his true age been known was rejected as 'speculative' (paragraph 15). A argued that the facts of this case were not materially different from the facts in *Sleiman* and that A's appeal should succeed for the same reasons (paragraph 16).

39. In paragraph 17, the F-tT said that the HOPO's submissions were brief. The F-tT 'set them out in full'. In essence, that argument was that while A rejected the idea that he had gained status because of his claim to be Kosovan, he had claimed asylum on that basis. His only lawful basis of stay in the United Kingdom was his asylum claim and the only reason he was not removed to Albania was his claim to be Kosovan. His only basis for remaining in the United Kingdom for a significant number of years was the claim that he was Kosovan. He benefitted from his dishonesty 'as he was able to stay for that period of time and thereby succeed under the Legacy system'.

40. The F-tT recorded that it had told the HOPO, 'in order to enable [him] to fully argue his case' that the F-tT saw the points on which he relied to distinguish *Sleiman* as similarities, and that A's deception was to be regarded as having an indirect bearing on the grant of citizenship. The F-tT asked for further submissions. The HOPO 'confessed' that he had not read *Sleiman*. The F-tT offered him time to read it, but 'he did not wish to do so' (paragraph 18). A submitted that the points raised by the HOPO were the same as the points which were rejected in *Sleiman* (paragraph 19).

41. The F-tT agreed with A's submissions about the similarities between *Sleiman* and this case. A's deception (singular) about his nationality had an indirect bearing on the grant of citizenship (paragraph 20). The F-tT had 'carefully considered *Sleiman*'. The grant of ILR was based on the length of time for which the current application was outstanding. The appellant's age was specifically said to be irrelevant (in paragraph 62 of *Sleiman*). The F-tT referred to that point at the hearing. 'Arguably that is one step further than the instant appeal as nationality is not specifically stated to be irrelevant. However, that point has not been raised before me' (paragraph 21).

42. In any event, the F-tT did not consider that would make any difference to the conclusion that 'the deception had an indirect bearing only'. It was clear from the letter granting it that ILR had been based on 'the long period of residence in the United Kingdom'. There was no reference to A's claimed nationality. It was clear from the case record that long residence and connections with the United Kingdom 'are the matters which had a direct bearing on the decision'. If anything, the lack of any reference to nationality supported A's argument, not the Secretary of State's (paragraph 22).

43. In paragraph 23, the F-tT dismissed the argument that it was likely that A would have been removed to Albania had his true nationality been known. As in *Sleiman*, that assertion was not supported by evidence 'and can only be regarded as speculation'.

The Secretary of State's application for permission to appeal to the UT

44. In her application for permission to appeal, the Secretary of State relied, under the heading 'Background' on the terms of paragraphs 20 and 21 of the Decision (see paragraphs 23 and 24, above). Character and conduct, and the fraud in the case resolution questionnaire were 'expressly in issue in this appeal'. Had the Secretary of

State known the truth 'at the material time of A's applications, they would have fallen for refusal'. The Secretary of State did not know of A's fraud until after the grants of ILR and of citizenship.

45. Ground 1 was 'Material misdirection of Law/Inadequate Reasons/Failure to make findings'. The F-tT had wrongly applied *Sleiman*. The F-tT had treated the appeal as a 'simple chain of causation case and failed to reason/consider or make findings as to whether A would have been refused ILR or citizenship had the Secretary of State been aware of A's fraud at the time when ILR and citizenship were considered'.

46. In *Sleiman*, the Secretary of State's case had been 'of incredibly limited scope'. The Secretary of State had failed to suggest that 'A's fraud would have resulted in a refusal of ILR or citizenship due to character or conduct'. The Secretary of State referred to paragraph 20 of the decision letter in that case, set out by the UT in paragraph 42 of its determination. It was submitted that it was wrong to construe *Sleiman* as authority for the proposition that a grant of ILR under the Legacy Programme necessarily breaks the chain of causation and makes any fraud immaterial to the grant of citizenship. The Secretary of State had simply failed to argue that Sleiman's character and conduct had any bearing on the grant of ILR or citizenship. In this case, the Secretary of State's case had not been limited in that way. The Secretary of State had expressly raised conduct and character and expressly 'took issue with the Fraud within representations made by A to acquire status'.

47. The Secretary of State submitted that the F-tT did not recognise (a) that the Secretary of State did not rely on character and conduct in *Sleiman* and (b) that the Secretary of State in the present case did argue that fraud was directly relevant to the grant of ILR. The F-tT had failed to make any findings about whether the Secretary of State would have refused the applications for ILR or for citizenship had she known of A's fraud/character and conduct when those applications were being considered and granted.

48. A had continued the deception about his nationality in his application for naturalisation. He ticked 'No' when asked whether he had done anything to indicate that he was not of good character. He therefore committed fraud in the application and concealed material facts. The Secretary of State did not know about A's fraud when she considered the application and was therefore unable to apply her policy correctly 'to the facts as they existed in the real world at that time'. The F-tT did not consider this, and these facts were not caught by the reasoning in *Sleiman*. The F-tT had failed to consider whether the Secretary of State would have refused A's application had she known about 'the fraud/character and conduct' at the material time.

49. The Secretary of State also submitted that the fraud was relevant to the Legacy Programme. That factor was not considered in *Sleiman* (see paragraphs 62 and 63 of *Sleiman*). The Legacy Programme was not an amnesty (see *Hakemi* [2012] EWHC 1967 (Admin)). Cases were considered by reference to paragraph 395C of the Rules and character and conduct were relevant. The relevant policy made it clear that caseworkers must take into account 'any deception practised at any stage in the process, attempts to frustrate the process…'. The Secretary of State was not aware of the facts when she granted ILR and was unable to 'correctly apply the policy to facts as they existed in the real world'. The grant under the Legacy Programme could not be

considered as a 'concession to A's fraud'. The F-tT had failed to consider whether A's ILR would have been granted if his fraud had been known at the material time.

The grant of permission to appeal to the UT

50. The F-tT gave the Secretary of State permission to appeal to the UT on 19 March 2012. Mr Southey confirmed my understanding that that grant of permission to appeal is to be understood as a grant of permission to appeal on all grounds.

A's rule 24 response

51. A served a rule 24 response dated 6 April 2020. The F-tT had been right to allow the appeal for the reasons it had given. The Secretary of State's 'discursive' grounds of appeal did not identify any error of law. A also argued that the appeal should, in any event, have been allowed on different grounds.

52. A did not dispute the facts relied on by the Secretary of State (paragraph 4). His case was that he did not obtain citizenship 'by means of fraud, false representation or concealment of a material fact'. A said that nothing turned on these three bases and that 'fraud' would be used to cover all three (paragraph 5).

53. A summarised *Sleiman* (paragraphs 7-10) and his case before the F-tT (paragraph 11). In paragraphs 12-17, A described the Secretary of State's case before the F-tT. 'As in *Sleiman*, the best the SSHD could show in this case was that [A's] deception had an indirect bearing on the grant of citizenship. *Sleiman* shows that this is insufficient' (original emphasis) (paragraph 12).

54. A asserted that the Secretary of State had not advanced a separate argument that A should have been refused citizenship on the basis of his false statement about his nationality in his citizenship application. The grounds of appeal to the UT did not quote the decision letter accurately because they left 'therefore the deception was material in that you should not have had settled status' off the last sentence of paragraph 13. This was said to show what was relied on was an argument that the original grant of ILR had been fraudulently obtained (paragraph 13).

55. It was not part of the Secretary of State's argument in the F-tT that A had not been honest when he filled in his application form. 'On the contrary, the SSHD was expressly challenged to indicate if she wanted to advance such an argument, and did not do so.' A quoted paragraph 15 of his skeleton argument before the F-tT (see paragraph 29, above). This was said to deduce from paragraphs 17-21 of the Decision (see paragraphs 24-28, above) that the Secretary of State was not arguing that A should have been refused citizenship on the basis of the false statement about his nationality in his application for naturalisation, because each of those paragraphs linked 'the grant of citizenship back to the grant of ILR and suggests that it was the deception allegedly relating to the latter which led to the former'. Paragraph 15 ended by saying that, if contrary to that understanding, any such argument was being advanced, that should be clearly spelt out in the decision and not left for others to tease out from ambiguous wording.

56. A said that the Secretary of State had not responded to that invitation in the Respondent's Review or in her oral submissions to the F-tT. The HOPO's limited

submissions had been recorded by the F-tT. A quoted paragraphs 17-18 of the F-tT's determination (see paragraphs 41-42, above). It was not surprising that the F-tT had decided that the Secretary of State's submissions were identical to those in *Sleiman* and had allowed the appeal. The Secretary of State's argument, that A would not have been in a position to apply for citizenship had he not committed fraud in his earlier dealings with the Secretary of State, was the same as her argument in *Sleiman*. That could only show an indirect, and not a direct, bearing on the grant of citizenship.

57. If the Secretary of State was now trying to put forward a different argument in the UT, she was not entitled to. The F-tT 'cannot be criticised for not accepting submissions which were not made; nor is an appeal to [the UT] an opportunity to make good gaps in a party's case below'. A submitted that *Begum* was not relevant as, in that case, the Secretary of State had not relied on section 40(3) of the BNA.

58. Finally, A submitted that if the UT concluded that the F-tT had 'erred in relation to misstatements in [A's] actual application for citizenship', the appeal would need to be reconsidered. Whether or not the condition precedent was made out, A's case was that the appeal should have been allowed because the Secretary of State had exercised her discretion incorrectly. That issue would have to be decided by the F-tT.

The determination of the UT

59. A was again represented by counsel. The Secretary of State was represented by a Senior Home Office Presenting Officer. The UT briefly summarised the background, the F-tT's determination, the grounds of appeal and the rule 24 response (paragraphs 2-10).

60. In paragraph 12 the UT recorded that the parties had been told at the end of the hearing that it had decided that the F-tT had materially erred in law in failing to consider the false statements made by A in his citizenship application (paragraph 12).

61. It was not necessary to consider *Sleiman* in any detail because of the 'clear material error of law in relation to the second ground' (paragraph 14). The F-tT had not taken into account at any stage that A's fraud about his nationality had continued in his application for citizenship. It was obvious from the decision letter that the Secretary of State had relied on this. The UT quoted paragraph 20 of the decision letter (see paragraph 23, above).

62. It was clear from paragraph 15 of the Decision that the Secretary of State relied strongly on A's continuing deception (see paragraph 18, above). Paragraphs 18 and 19 referred to Chapter 55 and to the Nationality Staff Instructions (see paragraphs 21 and 22 above). The relevant annexes to the decision letter (R and S) were in the F-tT's bundle of documents. 'While the judge was not adequately assisted by the Secretary of State's representative in relation to *Sleiman*, there was no concession that any part of the decision letter was withdrawn, and the judge ought to have considered it in full along with the accompanying guidance'. In the light of that, the UT rejected A's argument that the Secretary of State failed to indicate before, or during, the hearing, whether a separate argument about fraud in the citizenship application was being advanced. It was plain on its face that the Secretary of State relied on this in the decision letter, and 'it cannot be said, therefore, that [the F-tT] properly reviewed the decision under appeal' (paragraph 15).

63. In paragraph 16, the UT considered the correct approach to deprivation of citizenship appeals. The UT referred to the headnote of *Ciceri*. In short, in deciding whether or not the condition precedent in section 40(3) has been met, the F-tT is to apply judicial review principles (rather than deciding the facts for itself). There was discussion about where the decision should be re-made in view of 'the different approach to this appeal now required, following *Begum*'. The UT took into account among other things, that the parties had not so far had an adequate consideration of the appeal in the F-tT and remitted it to the F-tT (paragraph 17).

The Respondent's notice

64. The Secretary of State served a Respondent's Notice ('RN'). The RN made two points, which were alternative reasons for upholding the decision of the UT.

    i. The UT was entitled to, and would have been right, to allow the Secretary of State to advance an argument which she did not advance in the F-tT. Even if paragraph 15 was wrong, the UT did not err in law.
    ii. The F-tT materially erred in law.
        1. It misdirected itself about the correct test in considering whether the condition precedent in section 40(3) was met. The Secretary of State relied on paragraphs 38-71 of *Begum*.
        2. Even if *Sleiman* is still good law, the F-tT wrongly treated it as determinative on the facts of this case.

The legal framework

65. Section 6(1) of the BNA gives the Secretary of State power, 'if he thinks fit' to grant a certificate of naturalisation as a British citizen to a person, if he is satisfied that the applicant meets the requirements in Schedule 1 to the BNA. One of the requirements is that the applicant must be of good character (paragraph 1(1)(b) of Schedule 1). Schedule 1 expressly provides that some of its requirements may be modified or waived by the Secretary of State (see, for example, paragraph 2(1), 2(1B) and paragraph 4). Paragraph 1(1)(b) is not such a provision. I did not understand Mr Southey to dispute Ms Smyth's submissions that there is no right to a certificate of naturalisation, that 'good character' is not defined in the BNA, that the authorities indicate that it is for the Secretary of State in the first instance to decide whether or not a person is of good character, and that, in doing so, she is entitled to apply a high standard.

66. The Secretary of State published a policy about good character which applied when she granted A's application, Annex D to Chapter 18 of the Nationality Staff Instructions. The Introduction said that there was no statutory definition of 'good character' (paragraph 1). Paragraph 2 said that the Secretary of State had to be satisfied on the balance of probabilities that the applicant was of good character. To help the Secretary of State to decide this, 'applicants must answer all the questions asked of them on the application form…to inform the assessment of good character.'

67. Section 2 is headed 'Aspects of the requirement'. Caseworkers are advised that they should not 'normally consider applicants to be of good character' in various circumstances. One of those is that they have practised deceit in their dealings with the government.

68. That topic is further addressed in section 9. Paragraph 9.1 says that caseworkers should 'normally count heavily against an applicant any attempt to lie or to conceal the truth about an aspect of the application for naturalisation - whether on the application form or in the course of inquiries. Concealment of information or lack of frankness in any matter must raise doubt about an applicant's truthfulness in other matters'.

69. Section 9.5 is headed 'Evidence of fraud in the immigration and nationality process'. Section 9.5.1 says that where there is evidence to suggest that an applicant has used 'fraud' in the process of applying for citizenship, or in previous immigration application processes, and, in both cases, the fraud was 'directly material' to the acquisition of immigration leave or to the application for citizenship, they should refuse the application unless section 9.5.2 applied. In those cases, the applicant should be advised that a further application was unlikely to succeed if repeated within 10 years of refusal on those grounds.

70. The circumstances described in paragraph 9.5.2 are where there was deception in 'a previous immigration application' and it was 'identified and dismissed by UKBA or was factually immaterial to the grant of leave'. Caseworkers 'should not use *that* deception as a reason by itself to refuse an application under section 9.5.1'. Three examples are then given. Mr Southey relied on example B. Example B describes the case of Mr B, an Albanian citizen, who applied for asylum on the grounds that he was from Kosovo and would be at risk on return there. He was not granted leave as the result of a successful asylum claim, but under a Family Concession 'to which a consideration of nationality was not a primary factor'. The deception was not material to the grant of ILR, as regardless of his claim to be Kosovan on entry he would have got leave 'as a result of his family arrangements. In this scenario, UKBA has already disregarded the claimed nationality of the individual as being irrelevant to the grant of ILR under the Family Concession. It would therefore be perverse to assert that a previously disregarded fact could be relevant at a later date to a consideration of good character. Nationality on the date of application is, in any case, irrelevant to the naturalisation consideration.'

71. Section 40 and section 40A in (more or less) their current form were inserted in the BNA by the Nationality, Immigration and Asylum Act 2002, replacing section 40 as it then stood.

72. Section 40(2) of the BNA defines 'citizenship status'. Section 40(2) gives the Secretary of State power, by order, to deprive a person of that status if 'the Secretary of State is satisfied that deprivation is conducive to the public good'. Section 40(4) provides that the Secretary of State may not make an order under section 40(2) if 'satisfied that the order would make a person stateless'. Section 40(4) is subject to the exception described in section 40(4A). Section 40(3) gives the Secretary of State power to deprive a person of that status, if it results from naturalisation, 'if the Secretary of State is satisfied that the …naturalisation was obtained by means of fraud, false representation or concealment of a material fact'. Section 40(5) provides for notice of the decision to be given.

73. Section 40A applies to a person who has been given a notice under section 40(5). That person 'may appeal against the decision to' the F-tT, unless the Secretary of State has given a certificate under section 40A(2). Section 40A(3) applies listed provisions of the

2002 Act to appeals under section 40A. Those provisions are sections 106, 107 and 108. The parties agree that even when section 86 of the 2002 Act was in force, it was not listed in section 40A(3).

Ground 1

Submissions

74. Mr Southey submitted that the F-tT did not err in law in focussing on the way in which A put his case, in circumstances in which it had received no relevant help from the HOPO. He submitted, when asked, that the F-tT would have been entitled to take the same approach if the Secretary of State had not been represented at all. He relied on *JK (Democratic Republic of Congo) v Secretary of State for the Home Department* [2007] EWCA Civ 831 ('*JK*'). He submitted that this decision shows that the F-tT is not obliged to deal with every point in a decision letter.

75. He made two submissions about the Decision. His primary submission was that it was based only on A's deception about his nationality when he filled in the Case Resolution questionnaire. Following *Sleiman*, that deception was not directly material to the grant of citizenship, and the F-tT was right so to hold. That position was reinforced by Example B in Annex D (see paragraph 70, above). His fall-back submission was that the Decision was ambiguous. The express terms of A's skeleton argument for the F-tT hearing were an invitation to the Secretary of State to clarify that ambiguity which the Secretary of State had not taken. That impression was supported by the limited submissions from the HOPO which are recorded in the determination of the F-tT. In that situation, the F-tT did not err in law, particularly given the HOPO's conduct of the appeal, in not considering other strands in the Decision.

76. Ms Smyth submitted that it was wrong to characterise the Decision as being based only on A's use of a false nationality in his asylum application and in the case resolution questionnaire. The Decision was clearly also based on the five occasions on which he had lied in applications, the four declarations he had made, and the fact that he claimed in the application to be of good character, had not disclosed the earlier lies, and, indeed, had persisted in the lie in the application itself.

77. She frankly conceded for the Secretary of State that the F-tT did not receive help from the HOPO which it was entitled to expect. She accepted that this was regrettable. But the HOPO had not expressly withdrawn the Decision. She submitted that the F-tT had materially erred in law in only considering one aspect of the Decision (effectively, paragraph 17). The F-tT had been obliged to, and had failed to, consider the Decision in the round.

78. Had it done so, it would have realised that *Sleiman* was not decisive. The UT in *Sleiman* considered that the fraud relied on had to be directly material to the decision to grant citizenship (paragraph 61). *Sleiman* was distinguishable on several linked grounds. The terms of the Secretary of State's decision in *Sleiman* (see paragraph 42 of *Sleiman*) showed that the deception relied on by the Secretary of State in that case was the appellant's deception in claiming to be younger than his real age when he initially applied for asylum, which meant he was not removed from the United Kingdom while

he continued to be a 'child', was then able to apply for ILR under the Legacy Programme and, then in turn, that he could apply for naturalisation. The UT noted (paragraph 62) that the Secretary of State had herself accepted in the decision that the appellant's age was 'irrelevant' to the grant of ILR. The UT noted a potential 'counter-argument' in paragraph 62, that the deception as to age was not necessarily irrelevant. The UT added, in paragraph 63, that that argument was not advanced by the Secretary of State. Nor did the Secretary of State suggest that if she had known of the false date of birth when the appellant applied for citizenship, he would have failed to show that he was of good character (paragraph 65). It was in that context that the UT held in paragraph 69 that the appellant's deception about his date of birth was immaterial to the grant of citizenship.

Discussion

79. The issue on ground 1 is narrow. It is whether or not the UT was right to hold, in paragraph 12, that the F-tT made a material error of law in failing to consider 'the false statements made by [A] in his citizenship application'. As the UT explained in paragraph 15, the HOPO did not concede that the Decision was withdrawn, it was clear from the Decision that the Secretary of State relied on A's continuing deception (see paragraphs 15, 18, 19 and 20 of the Decision), and the F-tT should have considered the Decision letter in full, with the accompanying guidance.

80. I reject Mr Southey's argument that the Decision is ambiguous. I consider that it relies on several logically distinct bases for the conclusion that A obtained his citizenship by the relevant means. I also reject the submission that the Secretary of State was given an opportunity to, and had failed to, clarify her position before the F-tT hearing. The Respondent's Review was a response to A's skeleton argument. It was clear that the Secretary of State continued to rely on the Decision in full. The F-tT was aware of the Respondent's Review, and of its terms. It expressly noted (see paragraph 34, above) that the Secretary of State 'continued to rely on the refusal letter'.

81. A's argument to the F-tT only addressed one strand of the Decision. If the Decision is properly understood, A's argument was not a complete answer to the other strands in the Decision. In that situation, I accept Ms Smyth's submission that the F-tT was obliged in principle, not only to address A's argument, but also to consider, for itself, whether, in the light of the terms of the Decision read as a whole, A's argument meant that his appeal had to succeed. The F-tT failed to do that. As Ms Smyth emphasised, and as I repeat, this is not to criticise the F-tT. I have much sympathy for the F-tT, which was entitled to expect more help from the HOPO than it received. But it could only lawfully have narrowed its focus in this way if it was clear that the HOPO had instructions not to rely on the other points made in the Decision. It is common ground that no such concession was made.

82. I should also consider Mr Southey's submission based on *JK*. The appellant in that case appealed from a decision of the Secretary of State refusing his asylum claim ('the refusal decision'). He gave evidence at this appeal. He was cross-examined by a HOPO, who asked him questions based on some, but not on all, of the points which had been made in the refusal decision. The immigration judge ('the IJ'), having heard his evidence, found that it was credible, and allowed his appeal. There was no dispute that, if his account was credible, his appeal should have succeeded.

83. The Secretary of State appealed. A senior immigration judge ('SIJ') held that the IJ had erred in law because 'he did not consider properly the reasons which [the Secretary of State] put forward for refusing the appellant's claim…albeit that he was not assisted by shortcomings in the respondent's representation on the day'. The SIJ's reasons referred to two points which were raised in the refusal decision. Not only had the HOPO not cross-examined the appellant on those points, but she had not relied on them in her submissions. The SIJ considered that the IJ should have tried to 'ascertain the true position'. The appeal should not have succeeded through the accident that the HOPO had failed to advance a significant part of the Secretary of State's case.

84. Toulson LJ gave the leading judgment, with which all three members of this court agreed. Arden LJ gave a concurring judgment with which Pill LJ also agreed. Toulson LJ disagreed with the prominence given by the SIJ to the two points. In paragraphs 28-30 he summarised the points on which the HOPO had, and had not, cross-examined the appellant. The IJ summarised the various points made in cross-examination and concluded that he believed the appellant's evidence. Toulson LJ considered that there was not much a judge could say in giving reasons for accepting evidence other than a summary of the main points, as the IJ had done.

85. On the appeal, the Secretary of State submitted that because the HOPO had said that she adopted the reasons in the refusal letter, the IJ should have asked the HOPO whether she maintained each point in the letter. If she was intending to pursue them all, he had to deal with each in his determination. Toulson LJ said that no authority had been cited for such a broad proposition and he would not accept it. A judge was not obliged, when presented with a refusal letter on which a HOPO relied, 'to pursue each and every point in it regardless of whether it has been actively pursued' by the HOPO. He added that the HOPO seemed to have 'done a competent job' in pursuing the points that she regarded as the ones which needed to be tested in cross-examination' (paragraph 35). He also rejected the argument that the IJ's failure to deal in his determination with the two points identified by the SIJ amounted to an unlawful failure to give reasons. The strength of the points was 'a matter of judgment' (paragraph 36).

86. *JK* was a very different case from this case. The only issue on that appeal against the refusal of an asylum claim was whether or not the appellant's account was credible. This court did not criticise the way in which the HOPO had represented the Secretary of State: she had done 'a competent job'. She had taken a forensic decision not to cross-examine the appellant on every single adverse point taken in the refusal letter. All those points addressed the same issue: the appellant's credibility. This court held that the IJ was not obliged distinctly to pursue those points, on those facts. In this case, by contrast, first, the Decision relied on several distinct examples of 'fraud'. Those distinct examples are not forensic details, but different and independent reasons justifying the Decision. In this case, by contrast, second, the HOPO, did not do a 'competent job', if the summary in the F-tT determination is accurate. The approach in *JK* cannot be generalised to the facts of this case.

87. For those reasons, I do not consider that the UT erred in law in remitting this case to the F-tT, for the reasons which it gave. First, it was right that *Sleiman* was not decisive, because it could be distinguished, on the grounds given in the Secretary of State's notice of appeal to the UT, as elaborated by Ms Smyth. Second, it was also right that, in this

case, the F-tT had to consider the reasoning in the Decision as a whole, and erred in law in not doing so.

Ground 2

88. A invited this court to decide the *Begum* question. As I have indicated, there is now a body of authority in the UT (including *Ciceri* and *Chimi*) in which the UT has decided that, on an appeal in a section 40(3) case, the F-tT is limited to applying a public law approach to the Secretary of State's deprivation decision.

89. We have heard full and able argument on this question. Ms Smyth defended the approach of the UT in those decisions. I note two points about the reasoning in *Begum*. First, it concerns an appeal to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997 in a case in which the appellant was deprived of her nationality on the grounds that that was conducive to the public good in the interests of national security. Second, the reasoning on the scope of a section 2B appeal was expressed at a relatively high level of generality because the Supreme Court was not considering an appeal against a decision of SIAC's after the hearing of a full appeal, but rather, an appeal concerning a preliminary issue which, on any view, was an issue to which public law principles applied.

90. Ms Smyth submitted, nevertheless, that much of that reasoning must be exported to an appeal in a case like this. She did acknowledge that cases involving statelessness are 'sui generis' and accepted that the F-tT could or must make findings of fact in such cases. I also note that this court has observed, obiter, that on a section 2B appeal, in a case in which there is an issue about statelessness, the appellate body must make relevant findings of fact (see *E*3 *v Secretary of State for the Home Department* [2023] EWCA Civ 26, paragraphs 31, 32, 34 and 40).

91. I acknowledge the apparent force of Mr Southey's detailed argument that the reasoning in *Begum* does not apply to section 40(3) cases. I hope I do him no injustice by the following summary. He submits, in short, that there are, for this purpose, two distinct relevant stages in a section 40(3) case. The Secretary of State may not decide to deprive a person unless she is satisfied of the matters listed in section 40(3). I note that in *E3*, this court described the analogous provision in section 40(4) as 'a limitation on the circumstances in which the power can be exercised'. But by the time of the appeal, the power has been exercised. If, on the appeal, the fraud component and/or the causation component is or are disputed, the F-tT, having heard all the evidence, has institutional competence to decide those questions on the evidence. Section 40(3) does, however, give rise to a third issue, which is whether the discretion should have been exercised differently. I see the force of Ms Smyth's argument that the reasoning in *Begum* does apply to that question on an appeal in a fraud case.

92. I am aware of two determinations of the UT in other cases in which the UT has loyally followed C*iceri,* but has nevertheless, out of an abundance of caution, also decided the appeal after making relevant findings of fact, and/or has expressed concerns about applying *Begum* in this context. One such case is *Ahmed v Secretary of State for the Home Department* (Appeal Number: DC/00135/2019), in which the constitution which heard this appeal also heard an appeal, on the day after the hearing in this case finished. Ms Smyth and Ms Barhey also represented the Secretary of State in that appeal.

93. We raised with the parties our concern that any decision we might make on this point might be obiter. A submitted that a decision on this point would not or might not be obiter, but I think that Ms Smyth recognised that any such decision would be obiter. Ms Smyth was neutral on the question whether, if the point would be obiter, this court should nevertheless comment on it. Mr Southey, on the other hand, invited us to decide it anyway.

94. In this case the UT did not allow the appeal from the F-tT on the grounds that the F-tT should have followed *Begum.* It allowed the appeal on the basis of a wholly distinct error of law. The only live question on this appeal is the question raised by ground 1. I would resolve that question in the way in which I have indicated, above. I therefore consider that any decision on the *Begum* point in this case would be obiter. The fact that the UT referred to *Begum* in the context of remittal makes no difference to that view. It is impossible to know now whether or not the approach which is taken by the F-tT on that remittal will make any difference to the outcome of the remitted appeal in this case. It is not, therefore, on any view, necessary for us, in considering this appeal, to decide the *Begum* question. Any such consideration in this case would not bind another court, and would therefore be pointless, but would, at the same time, create legal uncertainty.

95. I would therefore decline to decide ground 2.

Conclusion

96. For those reasons, I would dismiss A' s appeal on ground 1, and would decline to decide ground 2.

Lord Justice Dingemans

97. I agree.

Lord Justice Moylan

98. I agree.