IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-006470; UI-2022-006705
First-tier Tribunal No: DC/50036/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 October 2024

Before

UPPER TRIBUNAL JUDGE NEVILLE

Between

JULIAN NIKAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, counsel instructed by Marsh & Partners Solicitors
For the respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 9 October 2024

DECISION AND REASONS

1. The respondent decided to deprive the appellant of his British citizenship because he obtained it by fraud, putting a false age and nationality on his application. The Upper Tribunal's decision is that the respondent's decision was unlawful, because it did not take into account the long delay between when the fraud was discovered and when something was done about it. If that delay and its consequences had been considered, then the deprivation decision might have been different. The appeal is therefore allowed.

2. This decision is not about whether depriving the appellant of his citizenship was, on the merits, the right thing to do. That is up to the respondent, who must now look at the matter again. The reasons for the Upper Tribunal's decision are as follows.

Factual background

3. The appellant was born in Albania and entered the United Kingdom on 6 November 1999, a few days before his eighteenth birthday. He then claimed asylum under a false identity, using his real name but pretending to be a year younger and from Kosovo. The asylum claim was refused, but because of the appellant's claimed age and nationality he was granted Exceptional Leave to Remain. The same false details were then used in successful applications for Indefinite Leave to Remain, granted on 16 February 2005, and for naturalisation as a British citizen, granted on 15 August 2006.

4. The false identity was revealed when the appellant's parents made an application to visit him in the UK, providing a copy of their family certificate which contained the appellant's true biographical details. The Home Office department that received the parents' application passed the details to the Status Review Unit, which initiates consideration of whether to deprive someone of British Citizenship.

5. No action was taken until 18 September 2020, over 8 years later, when an 'investigation letter' was sent to the appellant. It alleged that he had obtained British citizenship by fraud and asked for his response, present circumstances, and other information he wished to be taken into account. The appellant wrote back 10 days later admitting the fraud and setting out why he should not be deprived of his British citizenship.

6. On 30 October 2020, the respondent issued the appellant with a notice of decision (from now on, 'the Decision') to deprive him of his British nationality under section 40(3) of the British Nationality Act 1981. the appellant's appeal against the Decision was dismissed by the First-tier Tribunal in a decision issued on 14 November 2022. Dissatisfied, the appellant pursued an onward appeal to the Upper Tribunal.

7. Following a hearing on 14 August 2024, the Upper Tribunal found that the First-tier Tribunal's decision contained an error of law, set it aside, and directed that it be re-made by the Upper Tribunal. The reasons why are in the separate annexed document, which should be read together with this one.

8. At the re-making hearing, I heard evidence from the appellant and submissions from both representatives. I shall only set out in these reasons what is necessary to understand how this decision has been reached.

Issues

9. Section 40(3) of the British Nationality Act 1983 gives the respondent a discretionary power to deprive a person of their British citizenship resulting from registration or naturalisation if she is satisfied that it was obtained by means of fraud, false representation, or concealment of a material fact. Section 40A(1) gives a right of appeal against deprivation

decisions. In *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 115 (IAC), it was held that such appeals should be approached by answering the following questions:

a. Did the respondent materially err in law when she decided that the condition precedent in s40(2) or s40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not,

b. Did the respondent materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,

c. Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed.

10. There is no need to consider the first question; everyone agrees that the appellant obtained his citizenship by fraud.

Error of law

11. Mr Collins, on behalf of the appellant, puts forward two legal errors: first, that the respondent failed to take into account the delay in commencing the deprivation process and its consequences, and was required to do so; second, that the Decision was 'Wednesbury' unreasonable, being that no reasonable person acting reasonably could have made it.

12. I turn first to delay, which raises three questions of its own:

a. What was the nature of the delay?

b. Did the respondent take (sufficient) account of it and if not, should she have done? If so,

c. Was the same outcome inevitable even if delay had been sufficiently taken into account?

<u>What was the nature of the delay?</u>

13. The time between when the Status Review Unit found out about the fraud and when it wrote to the appellant to establish the facts was 8½ years. When this case was heard in the First-tier Tribunal, the Judge had found that not only was the delay unexplained, but that the respondent had continued to deny that there was any delay at all. Mr Terrell made clear that the respondent now accepts the delay, but argued that what matters is the situation at the time the Decision was taken rather than how these proceedings have been fought since. I agree, and must consider what was known (or should have been known) to the respondent when the decision was made.

14. First, I deal with what was not relevant to the nature of the delay. In some cases where citizenship was obtained by fraud, deprivation action was put on hold because of legal uncertainty over whether it was even necessary. That uncertainty was resolved on 21 December 2017, when the Supreme Court in *R. (Hysaj) v SSHD* [2017] UKSC 82 held that citizenship obtained by someone using fictitious biographical details was not a nullity, and continued until a deprivation order was made. In *Ciceri (deprivation of citizenship appeals: principles) Albania* [2021] UKUT 238 (IAC) it was confirmed that "the period during which the respondent 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", but it is clear from the judgment in *Laci v SSHD* [2021] EWCA Civ 769 that this depends on the nature of the delay, its effects, and the communication with the appellant.

15. Mr Terrell accepted that while the Decision does refer to the author having been provided with the chronology, nowhere is the delay either directly acknowledged or attributed to the pursuit of nullity in other cases. He had, shortly before the hearing, been able to locate a file note that might shed some light on the issue should the Tribunal go on to consider Article 8, but given that there was no evidence the note had been before the decision-maker he expressly excluded it from his arguments on the present topic. I therefore conclude at the date of Decision that the delay remained completely unexplained and I treat it, like that in *Laci*, as incapable of being excused by reference to the nullity issue.

16. Second, I deal with what was relevant to the nature of the delay. Mr Collins and Mr Terrell were at odds concerning the similarity or otherwise between the facts in this appeal and those considered in *Hysaj* and *Laci*. At this stage I need only look at what was before the decision-maker. Relevantly, the nature of the delay was informed by the appellant's reply to the investigation letter stating that he is married, has two children aged 8 and 2, had "assimilated … into this country and its culture" and that his family "feel British", and that he is a director of his own limited company in the building trade. All these facts were acknowledged in the Decision but not that they had all come into being after the respondent found out about the appellant's fraud. Less favourable to the appellant was the fact that he had, so far as is likely to have been known at the time of the Decision, never previously volunteered or confessed his deception. Unlike in *Laci*, the appellant had not been left to get on with his life for years after being told that the respondent was aware of the problem. Nor, however, is there any reason to speculate that if he had proactively informed the respondent that anything would have happened sooner – all the necessary information to commence an investigation was already held.

Did the respondent take (sufficient) account of it and if not, should she have done?

17. As already held above, the respondent took no account of the delay. Should she have done? Referring me to *R. (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [116]-[121], Mr Terrell argued that when considering a failure to take into consideration a relevant factor, there are three categories:

> "First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so."

18. I agree that delay does not fall into the first or second categories. At [120], the Supreme Court confirms that failure to mention a particular consideration at all will only mean that the decision is unlawful if "the consideration is obviously material according to the *Wednesbury* irrationality test". Mr Terrell argued that while a rational decision-maker might decide to take account delay, it could not be said that it was that it was such an obviously material factor in the present case such that its omission was *Wednesbury* irrational.

19. It was, in my judgment, irrational for the respondent not to consider the factor of delay in the present case. The potential significance of delay in the context of Article 8, by reference to *EB (Kosovo) v SSHD* [2008] UKHL 41 at [13]-[16], was obvious given the appellant's circumstances. While there may be some merit in Mr Terrell's arguments that the appellant's case on delay was not so compelling on its facts as that in *Laci*, nor can I accept that it was capable of being rationally disregarded. During the unexplained period of inaction the appellant built a significant family and private life in this country and this would have been apparent to the decision-maker. Furthermore, the then-applicable caseworker guidance on deprivation of citizenship also required, at paragraph 55.7.11.6, consideration of human rights. No rational decision-maker exercising the discretion conferred by section 40(3) could simply ignore the delay.

Was the same outcome inevitable even if delay had been sufficiently taken into account?

20. *Chimi* confirms that inevitability is required before a legal error can be disregarded. I agree with Mr Collins that a decision-maker might rationally decide not to deprive. While the appellant did not disclose his deception, the fact that the appellant in *Laci* did so was afforded little weight in his favour by the Court of Appeal. The appellant has lived his entire adult life in the UK. No reason has been put forward why the respondent could not have told the appellant why deprivation action was being considered.

Conclusion

21. Given that this conclusion rests on failure to consider a factor that is also plainly relevant to Article 8 proportionality, I have considered whether I should simply note the absence of its consideration and go on to perform my own proportionality analysis. This would, however, have the effect of bypassing the guidance in *Chimi* at (1)(b) and the fourth question posed in *R. (Razgar) v SSHD* [2004] UKHL 27: is the decision in accordance with the law? It would also undermine the appellate approach described in *R. (Begum) v SSHD* [2021] UKSC 7 at [71], which envisages that the discretion to deprive might be vitiated by the respondent disregarding something to which she should have given weight. Few factors relevant to "the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision" will not also weigh in the balancing exercise required by Article 8. Nothing in the authorities justifies carving out consideration of material factors from the requirements of a lawful decision if they would be considered as part of human rights compliance in any event.

22. The appeal is therefore allowed, without any need for the Tribunal address the other errors asserted by Mr Collins or to reach its own conclusion on Article 8 proportionality.

Notice of Decision

(i) The decision of the First-tier Tribunal is set aside.
(ii) The Upper Tribunal remakes the decision by allowing the appeal.

J. Neville
Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 October 2024

ANNEX – ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-006470; UI-2022-006705
First-tier Tribunal No: DC/50036/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

29 August 2024

Before

UPPER TRIBUNAL JUDGE KAMARA
UPPER TRIBUNAL JUDGE NEVILLE

Between

JULIAN NIKAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, instructed by Marsh & Partners Solicitors
For the respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 14 August 2024

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Abdar, promulgated on 14 November 2022, to dismiss his appeal against the respondent's decision to deprive him of his British citizenship pursuant to section 40(3) of the British Nationality Act 1981.

23. The application for permission to appeal to the First-tier Tribunal was made on two grounds, each relating to the respondent's delay of 8½ years between detecting the appellant's deception on 16 April 1992 and formally commencing the process of deprivation on 18 September 2020: first, that the Judge had erred by failing to address whether the exercise of discretion to deprive was vitiated by failure to consider delay as a factor; and second, that the Judge likewise failed to take account of the delay when deciding for himself whether deprivation was a proportionate interference in the rights afforded by Article 8

of the European Convention on Human Rights. No issue was taken with the Judge's conclusion that the condition precedent to deprivation had lawfully been established, which had always been common ground. Permission was granted on the second ground by First-tier Tribunal Judge Karbani on 19 December 2022 and on the first ground, following a renewed application, by Upper Tribunal Judge Blundell on 3 June 2024. As those dates reveal, this case has suffered regrettable further delay in the Upper Tribunal.

The parties' arguments

24. Mr Collins' arguments before us can be summarised as follows. As accepted by the Judge at [35], the "gravamen of the Appellant's argument" in relation to both the lawfulness of the respondent's exercise of her discretion and Article 8 had been the 8½ year delay. The Judge had found that no explanation had been offered and at [40] that "the respondent continues to deny there being a delay at all". At [41], when considering Article 8, the Judge had found the unexplained delay to be a cogent consideration, albeit not determinative. The Judge had nonetheless failed to reach any reasoned conclusion as to why its absence from the factors considered by the respondent did not stand as an error of law. The Judge had likewise failed to explain why delay was an insufficiently weighty consideration to render deprivation disproportionate under Article 8 by reference to EB (Kosovo) v respondent for the Home Department [2008] UKHL 41, as argued under the second ground. This is not a case where any period of the delay has been attributed to the "pursuit of the 'nullity' route" as described in Ciceri (deprivation of citizenship appeals: principles) Albania [2021] UKUT 238 at [78]. Mr Collins put forward that in Laci v respondent for the Home Department [2021] EWCA Civ 76, similar facts had led the Court of Appeal to find that deprivation was disproportionate.

25. In response, Mr Terrell began by contextualising the Judge's comments concerning the denial by the respondent of any delay. This appeared to arise from a paragraph in the respondent's Review of 29 January 2022, which sought to argue that there was no delay because disclosure of the true biographical details had been in an application made to an Entry Clearance Officer rather than the Home Office, so the latter should not be taken as having been put on notice. As Mr Terrell acknowledged, that argument was unsustainable given that the ECO had notified the Home Office Status Review Unit less than three months after the application had been made. It was therefore important, Mr Terrell submitted, to appreciate that the deprivation decision itself did not seek to deny that there had been any delay. Its lawfulness could not be undermined by the way in which it had subsequently been defended before the First-tier Tribunal. We accept this.

26. On the remaining issues, we can fairly summarise Mr Terrell's well-crafted submissions as follows. First, the decision can be seen as taking delay into account as a factor. At paragraph 27 the decision records that "the respondent has taken into account the following factors, which include the representations made by you in your letter dated 28 September 2020". That letter had in turn set out the relevant chronology, as did the decision letter at paragraph 13 where the date of referral from the ECO to the Status Review Unit and the date of the initial investigation letter were clearly recorded. It was therefore plainly a matter taken into account by the decision maker and it was either unnecessary for the Judge to say so explicitly or, if it was necessary, his error was immaterial.

27. Second, there was no basis on which the Judge could have found a public law error in relation to delay. As conveniently summarised by Singh LJ in B4 v

respondent for the Home Department [2024] EWCA Civ 900 at [36] onwards, there are three categories of consideration in the exercise of a statutory power:

> 37. …First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. These are mandatory relevant considerations. Secondly, those clearly identified by the statute as considerations to which regard must not be had. These are prohibited and are therefore irrelevant considerations. Thirdly, those considerations to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide what considerations should play a part in the reasoning process. This category therefore covers relevant considerations which it is permissible to take into account but which are not mandatory.

The authorities, argued Mr Terrell, show that delay falls into the third category.

28. Third, in relation to Article 8, the relevance of delay in Laci had been approached by reference to the appellant's state of mind. Mr Laci had voluntarily and deliberately disclosed his true identity to the respondent, who on receiving representations against deprivation had done nothing for over nine years except for renewing his passport. Mr Laci had "accordingly come to believe that the respondent had decided not to proceed with depriving him of his citizenship" with the first and second consequences identified by Lord Bingham in EB (Kosovo) at [13]-[16]. This appellant, on the other hand, had been found by the Judge to have inadvertently disclosed his true details then continued to perpetuate the deception. The delay could be properly seen a period during which the appellant simply thought he had not been caught. The Judge had set out that analysis at [44] and must be taken as having weighed it in the balance when assessing proportionality. Having done so, that assessment could be seen to inform the Judge's subsequent analysis of whether the respondent's exercise of discretion was lawful.

Consideration

29. The Judge approached the issues before him in the order suggested by the Upper Tribunal in Ciceri, considering Article 8 before going on to consider whether the respondent's exercise of discretion was vitiated by public law error. In the subsequent case of Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 115 (IAC) that guidance was reformulated as follows:

> (1) A Tribunal determining an appeal against a decision taken by the respondent under s40(2) or s40(3) of the British Nationality Act 1981 should consider the following questions:
>
> (a) Did the respondent materially err in law when she decided that the condition precedent in s40(2) or s40(3) of the British Nationality Act 1981 was satisfied? If so, the appeal falls to be allowed. If not,
>
> (b) Did the respondent materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,
>
> (c) Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on

human rights grounds. If not, the appeal falls to be dismissed.

(2) In considering questions (1)(a) and (b), the Tribunal must only consider evidence which was before the respondent or which is otherwise relevant to establishing a pleaded error of law in the decision under challenge. Insofar as Berdica [2022] UKUT 276 (IAC) suggests otherwise, it should not be followed.

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

30. If we may say so, the present appeal shows the wisdom of approaching the issues in the order set out in Chimi. In approaching discretion, the Judge was bound to consider the decision itself and the material and considerations that were before the respondent when it was made. Instead, the Judge first embarked on his own assessment of the relevance of delay, on the evidence before him. This led him into both omitting the lawfulness of the decision as a relevant factor under Article 8 and into a failure to determine the lawfulness of discretion on the proper basis.

31. Turning to whether the respondent was obliged to consider delay, this was one of the issues that the Judge had to decide. If the answer was positive, he was then required to determine whether it had been taken into account and, if not, this amounted to a material error of law. That argument was made by the appellant and the Judge did not deal with it. The only reference to delay is in the Judge's own Article 8 assessment where he considers it to be a "cogent" consideration. There is then no further analysis of delay as it relates to the respondent's discretion until the Judge concludes:

> 56. The Appellant does not rely on any additional or distinct ground beyond what I have already taken into consideration above and I find, on a holistic view and on balance, that the respondent has not acted in a way in which no reasonable respondent could have acted; has not 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) of the BNA, albeit the latter is not a relevant consideration in the appeal before me.

32. This is insufficient. Nor can that failure to engage with the argument made concerning discretion be saved by bringing forward the Article 8 assessment, which plainly took into account the ongoing lack of explanation for the delay and the Judge's own interpretation of the appellant's actions. Those cannot be disentangled so that a consideration of the respondent's approach on public law grounds can be discerned.

33. We further reject the respondent's argument that the error was immaterial. Mr Terrell's first two submissions above aim to establish that there was only one possible outcome. The paragraphs of the decision he cited only show that the decision-maker was provided with the chronology, not that it was taken into account. Nowhere does the decision appear to directly acknowledge the delay. Nor would the Judge have inevitably determined that the respondent was not obliged to consider delay, given its potential relevance as shown in the authorities and, as shown by the Judge's own Article 8 analysis, its obvious potential relevance on the instant facts.

34. The Judge's conclusions at [56] therefore contain a material error of law. As a positive outcome for the appellant on that issue would, applying Chimi, be dispositive of the appeal without consideration of Article 8, the decision must be set aside.

35. None of the above should be taken as unduly critical of the Judge's decision, which in many respects demonstrates both care and thoughtfulness. It is simply a risk of the Ciceri decision-making structure, which at the time of the Judge's decision was still authoritative, that the broader evaluation of current Article 8 proportionality confuses a subsequent public law-based analysis of the lawfulness of the respondent's decision.

Re-making

36. At the hearing before us, after announcing our decision to set the decision aside, we invited submissions on disposal. Mr Collins argued that the appeal should be remitted to the First-tier Tribunal, further fact-finding relevant to Article 8 being necessary due to the passage of time. Considering the relevant Practice Direction, the appeal should be retained in the Upper Tribunal. The scope of any fact-finding is likely to be narrow, and there has already been significant delay. No findings are preserved, given that they were made contrary to the decision-making structure in Chimi and, further, the proper finding and evaluation of facts relevant to Article 8 is best conducted by the same Tribunal.

[directions omitted]

J. Neville
Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 August 2024