IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006633
First-tier Tribunal No:
DC/50187/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th February 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr GAZMEN XHAJA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Susana Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr Tom Wilding, counsel instructed by A.J. Jones solicitors

Heard at Field House on 9 November 2023

DECISION AND REASONS

1. The Respondent, to whom we shall refer as the Claimant, is a national of Albania, born on 2.8.99. On 2 August 1999 he arrived in the United Kingdom and claimed asylum in the identity of Adem Elezi, from Kosovo, FRY. This application was refused in a decision dated 2 July 2002. The Claimant appealed against this decision and

his appeal was heard on 9 October 2003 and dismissed on the basis that he failed to appear or prosecute his claim.

2. The Claimant was subsequently granted leave under his false identity (Adem Elezi) pursuant to the legacy exercise conducted by the Case Resolution Directorate (CRD) on 9 August 2010. He then applied for and was granted ILR and on 7 February 2012 the Claimant was issued with a certificate of naturalisation as a British citizen.

3. On 13 November 2019, the SSHD contacted the Ministry of the Interior in Albania, who on 10 January 2020, confirmed the Claimant's true identity and that he is a national of Albania. On 18 June 2020, the SSHD wrote to the Claimant stating her intention to deprive him of his British nationality. In correspondence dated 8 July 2020, the Claimant's representatives accepted deception but asked that discretion be exercised. A letter depriving the Claimant of his nationality was issued on 30 June 2021.

4. The Claimant appealed against that decision and his appeal came before FtTJ Shepherd for hearing on 17 June 2022. In a decision and reasons promulgated on 5 August 2022, the Claimant's appeal was allowed. This was on the basis that the Claimant exhibited behaviour which constituted fraud, false representation and material facts when claiming asylum and throughout his immigration history until his admission of the same in 2020, because he knowingly used the false identity of Adem Elezi [48] the judge found that the fraud was not directly material to the grant of citizenship *cf.* Sleiman (deprivation of citizenship; conduct) [2017] UKUT 367 (IAC). The reasons provided were that this was because the Claimant had not been successful in his asylum claim based on his false identity [53]. In his legacy questionnaire the Claimant flagged that he was a failed asylum seeker [54] and it was difficult to understand why any kind of leave had been granted to him, let alone ILR on 9.8.10 [59]-[62].

5. The SSHD sought permission to appeal, in time on 9 August 2022 on the basis that:

(i) the judge misdirected herself in consideration of whether the condition precedent was met under s40(3) BNA 1981;
(ii) the judge materially misdirected herself in law and in her application of materiality as per *Sleiman* as it was perverse to have found that the SSHD could have removed the Claimant when his ethnicity impacted on his removability. The judge also misunderstood the nature of the legacy concession which was not a general amnesty: *Geraldo* [2013] EWHC 2763 Admin. The judge further misunderstood the good character provisions and the omission of an explanation as to why the Claimant was granted ILR does not demonstrate that prior deception employed in the asylum process was disregarded.

Laci [2021] EWCA Civ 769 makes clear that it is only when deception was disclosed to the SSHD that she had an obligation to investigate further.

6. Permission to appeal was granted by First tier Tribunal Judge Seelhof on 28 September 2022 in the following terms:

"2. The grounds assert at paragraphs 4 and 5 that the Judge erred in treating as relevant the Respondent's failure to remove the Appellant for six years to either of two countries he had falsely claimed to be a national of.

3. This is arguably an error of law in light of the guidance given in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC).

4. The grounds assert at paragraph 6 & 7 that the judge erred in treating the Appellant's grant of leave under the legacy program as reflecting an amnesty for his past behaviour when it is established that grants of leave under the legacy program were still related to returnability rather than being an amnesty.

5. This is arguably an error of law in light of R (oao Geraldo) v Secretary of State for the Home Department [2013] EWHC 2763 (Admin)

6. The grounds assert at paragraphs 8 and 9 that it was perverse for the judge to find that a lack of an explanation for the Appellant's grant of leave under the legacy program indicated that past deception had been intentionally disregarded. It is noted that the Secretary of State's obligation to investigate only arises at the point of discovery in line with Laci v SSHD [2021] EWCA Civ 769 and that there is no sign of the relevant departments being aware of the deception at the material time.

7. At paragraph 10 it is asserted that had the Appellant revealed his deception at the point of applying for citizenship the application would have been open to refusal of good character grounds. It is not identified at which point in the decision this would indicate an error.

8. The grounds read in the round disclose arguable errors of law.

9. Although not expressly pleaded in the grounds it is also relevant to the significance of the above errors to note that it is not clear that the Judge has applied public law principles in assessing the materiality of the deception in accordance with paragraph 1 of the headnote to Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC)."

7. Both parties produced skeleton arguments and Ms Cunha also provided a bundle of authorities in support of her appeal, which were served prior to the hearing.

8. At the commencement of the hearing, Ms Cunha sought to amend her grounds of challenge on the basis that the jurisprudence had changed: see Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 00115 (IAC) and Shyti [2023] EWCA Civ 770 and that, as identified by FtTJ Seelhof, it was not clear that the Judge had identified a public law error and applied Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC).

9. The proposed amendment to Ground 2 of the grounds is perhaps best encapsulated at [26]-[30] of Ms Cunha's skeleton argument dated 5 November 2023:

"26. Additionally, at §70 the FTTJ unlawfully fetters the SSHD's discretion by relying on the SSHD's inaction erroneously in the context of whether she erred in not applying her discretion differently.

27. Firstly, the UT in Chimi at 1(b), by qualifying Lord Reed's comments at [68] of Begum, intended the discretion consideration to be looked at through the prism of whether the SSHD had failed to apply or erroneously applied a policy supporting the exercise of discretion.

28. Secondly, 1(c) of Chimi applies to cases where the SSHD's decision might be considered arbitrary as confirmed in obiter by the Court of Appeal at E3 & ors at [46]; and situations where the SSHD inaction can reduce the heavy public interest in deprivation.

29. Any reference to the SSHD's inaction is restricted to delays following an investigation and intention to deprive, which are unexplained and lead to a reasonable belief that an Appellant will not be deprived.

30. This principle does not apply to situations where the SSHD might be privy to information which may later be used to prove a fraud, which hasn't been flagged up with evidence following an investigation §70."

10. Mr Wilding opposed the amendment to the SSHD's grounds of challenge on the basis that, whilst he fully accepted that developments in caselaw had to be taken into account, he did not consider that this required amendment to the grounds of appeal. In any event, he submitted that *Ciceri* made clear that the test is (i) whether the SSHD fell into public law error in concluding that there had been material deception/fraud, omission; (ii) whether, if lawful,

the SSHD made other public law errors and (iii) the reasonable consequences test. Mr Wilding submitted that the Judge applied these tests and the only difference that *Chimi* made was in recalibrating the order and that the public law error question needed to be considered first. Mr Wilding submitted that this was irrelevant in any event as the FtTJ found the decision was unlawful in relation to the first question.

11. Mr Wilding further submitted that *Shyti* simply clarified *Sleiman (deprivation of citizenship: conduct)* [2017] UKUT 00367 (IAC) which was still relevant. As he made clear in his skeleton argument the FtTJ at [70] and [71] made a decision on public law grounds and he rejected the observation at [9] of the grant of permission to appeal to the contrary. He further submitted that the ground of appeal was imprecisely advanced and insufficiently pleaded, which also mitigated against permitting the amendments. In reply, Ms Cunha reiterated the points already made.

12. We refused permission to amend the grounds of appeal on the basis that, to the extent Ms Cunha was relying upon developments in the law, these would be addressed in any event and that it was too late to seek to amend the grounds of appeal 4 days prior to the hearing in the form of a skeleton argument.

13. We then heard detailed submissions from the parties. We do not intend any disrespect by not setting them out in their entirety, but summarise the points made as follows.

14. Ms Cunha's submissions, in essence, were focused on a failure by the FtTJ to consider why the Claimant claimed asylum in two identities (a Kosovan from Serbia and a Serbian from Macedonia), neither of which were based on his Albanian ethnicity and that this was relevant in that he was not removable in his false identities at the time he claimed asylum. The Claimant instructed solicitors to make representations in response to the Case Resolution Directorate questionnaire on the basis that he was from Kosovo.

15. Ms Cunha drew attention to the SSHD's Good Character guidance at page 81, which provides that the use of deception in a previous immigration application "*is not a reason by itself to refuse the application*" and relied upon the example of an Albanian national falsely claiming to be Kosovan having been granted ILR under the family concession and therefore the deception was not material to the grant of ILR. Ms Cunha submitted that the Judge misunderstood the legacy concession and relied upon Hakemi [2012] EWHC 1967 (Admin) at [17] and that the Claimant had been granted ILR on the basis of what he stated in his questionnaire ie that he was a Kosovan national and would be at risk on return to Serbia. She submitted that the Judge did not properly acknowledge this at [54]

and that it was clear from the terms of the SSHD's decision of 3 June 2010 at RB 31 that the CRD resolved cases based on asylum. Ms Cunha submitted that this led to the FtTJ erring in finding that the deception was not material to the grant of citizenship, when clearly it was.

16. Ms Cunha further submitted that the FtTJ misdirected herself in relation to good character at [57] and whilst the Claimant had been convicted of utilising a false identity and the judge was aware of this, he then used a separate identity to claim under the legacy CRD, ILR and citizenship on the basis that the SSHD chose to accept this identity (in the name of Adem Elezi) so it was not then open to the SSHD to go behind this, having accepted it. The Claimant completed form AN declaring himself to be of good character and signed a statement of truth and lied. Consequently, the deception was material to the grant of nationality.

17. With regard to the judgment in *Shyti (op cit)* Ms Cunha submitted that whilst it was not asserted that *Sleiman* is bad law, it is fact specific and not applicable in this case. Ms Cunha acknowledged that it was not known exactly why the Claimant had been granted ILR under the legacy CRD because there were no longer casework notes. She denied in light of the caselaw *viz Hakemi* and *Geraldo* [2013] EWHC 2763 Admin that he was granted ILR on the basis of long residence but rather his case had been considered by the asylum part of the directorate.

18. In his submissions, Mr Wilding sought to rely upon his skeleton argument. His two overarching submissions were that, firstly, the SSHD's complaints were ill-founded and an attempt to re-argue the case and secondly, that they were based on assertions as to the basis upon which ILR had been granted, when there was absolutely no evidence or inference to be drawn from the grant of ILR that this was on the basis of a risk assessment that he could not be returned to Kosovo. The FtTJ noted that the SSHD had failed to provide any internal casenotes as to what had been considered when ILR had been granted and this was not a point raised in the SSHD's grounds of appeal.

19. Mr Wilding submitted that ultimately the judge considered all the evidence before her and found that the SSHD was unable to show that the Claimant's claimed Kosovan identity as being material to the deception. Mr Wilding acknowledged that this is a very unusual case in that the Claimant had a conviction for making a false asylum claim and the refusal decision was couched in terms of being manifestly fraudulent, so the SSHD was well aware of his dishonesty and the FtTJ identified these factors at [62] when she noted that it was difficult to know why any leave had been granted, let alone ILR.

20. Mr Wilding further submitted that the SSHD does not dispute that she has all the relevant information in relation to the two different false identities. He submitted that the true heart of the point is that the FtTJ did take everything into account, including that the SSHD granted ILR in 2010 despite being on notice of the false identities. It was clear from the terms of the grant letter dated 3.6.10 at AB 31 that whilst his case would be determined along with older asylum applications, the Claimant had no outstanding asylum application and the letter further provides that the SSHD had a backlog, that CRD were responsible for his case and aimed to resolve cases either by removing people or granting them ILR. Consequently, no implication could be drawn that his asylum case was being re-opened.

21. Moreover, Mr Wilding submitted, the FtTJ was well aware of the circumstances underlying the grant of ILR: see [54] where she expressly noted that he did not mention a wife, partner, children or any medical conditions. No submission was made to the FtTJ by the SSHD that the Claimant was granted ILR because he had a well-founded fear of persecution in Kosovo.

22. With regard to the application of *Sleiman* Mr Wilding submitted that that the SSHD's submission was erroneous and the FtTJ was correct to find a parallel, given that leave was never granted on asylum grounds and like this Claimant, *Sleiman* was granted ILR under the legacy having previously claimed asylum as an unaccompanied child with a deliberately wrong date of birth. The principle upon which *Sleiman* was reported – that deception has to be material to the grant of leave – is not contentious and nothing in *Shyti* changes that. Mr Wilding submitted that, in effect, the SSHD had waived the Claimant's historical deception.

23. With regard to good character, Mr Wilding submitted that the fundamental problem with the SSHD's submission is that it requires consideration of what the caseworking instruction was at the material time to see what criteria were being applied: part 9 of good character guidance at RB 57, Section 2 refers. A bare assertion that someone would have failed the good character test is simply not enough and has to be related to the materiality of the fraud/omission. The FtTJ set out the relevant guidance at [57] and [58] and also the deprivation guidance and concluded the SSHD had not shown deception had anything to do with the grant of ILR or nationality. The SSHD were simply seeking to re-argue their case before Judge Shepherd which she rejected.

24. Mr Wilding submitted that it is clear from [69] (vi) and the reference to "*not in accordance with the Respondent's own guidance*"; [70] and the use of the words unreasonable and irrational and at [71] where the FtTJ expressly found that the Respondent has, in effect,

committed a public law error in reaching the deprivation decision (reflecting *Ciceri*) that the FtTJ applied public law principles.

25. In reply, Ms Cunha reiterated her submission that the judge failed to explain why the deception was not material; she does not say what was actually claimed by the Claimant in his asylum case and did not consider the letter from 2010. Ms Cunha drew attention to *Geraldo* at [49], [51] and [58] and submitted that the High Court did look at more limited grants and tied these to what applications were made first and foremost and that a holistic evaluation was made applying paragraph 395C of the Rules and chapter 53 of the EIG. She submitted that the grant of ILR was made outside the Rules.

26. We reserved our decision, which we now give with our reasons.

Decision and reasons

27. Given that much of the argument before us focused on the reasons the Claimant was granted ILR pursuant to the legacy exercise by the CRD on August 2010 and the caseworking notes are no longer available, we begin by setting out the relevant guidance and jurisprudence, in order to decide the likely basis of the grant of ILR.

28. It is clear from the jurisprudence *viz* Hakemi [2012] EWHC 1967 Admin and Geraldo [2013] EWHC 2763 Admin that decisions to grant leave were taken by the Case Resolution Directorate of the Home Office [CRD] with reference to:

28.1. Paragraph 395C of the Immigration Rules then in force provided:

> **"Before a decision to remove under Section 10 is given, regard will be had to all the relevant factors known to the Secretary of State, including:**
>
> **(i) age;**
> **(ii) length of residence in the United Kingdom;**
> **(iii) strength of connections with the United Kingdom;**
> **(iv) personal history including character, conduct and employment record;**
> **(v) domestic circumstances;**
> (vi) **previous criminal record and the nature of any offence for which the person has been convicted;**
> **(vii) compassionate circumstances;**
> **(viii) any representations received on the person's behalf.**

28.2. Chapter 53 of the Home Office Enforcement and Immigration Guidance (EIG), which provides *inter alia* as follows:

'53 Extenuating Circumstances

It is the Policy of the agency to remove those persons found to have entered the United Kingdom unlawfully unless it would be a breach of the Refugee Convention or ECHR or there are compelling reason, usually of a compassionate nature, for not doing so in an individual case.

53.1.1. Instructions on applying paragraph 364 to 368 and 395C of the immigration rules.

Before a decision to remove is taken on a case, the case owner ... must consider all known relevant factors (both positive and negative). Removal should not be considered in any case which qualifies for leave under the Immigration Rules, existing policies or *where it would be inappropriate to do so under this policy*.

... Relevant factors are set out in paragraph 395C of the Immigration Rules and the guidance below but this list is not exhaustive ...

53.1.2. Relevant factors in paragraph 395C

The consideration of relevant factors needs to be taken as a whole rather than individually, for example, the length of residence may not be a factor, but it might when combined with age and strength of connections with the UK.'

52. Particular guidance given in relation to the listed factors, included (again using the August 2009 version):

'Length of residence in the United Kingdom

For those not meeting the long residence requirements elsewhere in the immigration rules, the length of residence is a factor to be considered. In general, the longer a person has lived in the UK, the stronger their tie will be with the UK.

Personal history (including character, conduct and employment record)

... case owners must also take account of any evidence of deception practised at any stage in the process, attempts to frustrate the process (for example failure to attend interviews, supply required documentation) whether the individual has maintained contact with the UK border agency as required, and whether they have been actively

pressing for resolution of their immigration status. *The case owner must assess all evidence of compliance and non compliance in the round*.'

29. In Geraldo [2013] EWHC 2763 Admin, which concerned decisions by the SSHD to grant 30 months leave outside the Rules rather than ILR, King J held *inter alia* as follows:

"53. The history of policy guidance on the exercise of this general discretion is more fully set out in the judgment of Burton J in Hakemi but as an example … is the shortening in August 2009 in the length of the guideline number of years that might be regarded as "significant" residence, a reduction from 10-12 years to 6-8 years.

54. In Hakemi Burton J recorded the evidence of Mr Forshaw to him that once an asylum applicant had been resident in the United Kingdom for 6 years, under the policy of the Secretary of State, 'everything being equal he should be granted leave to remain.'

The duration of any leave to remain

55. Save for possibly a short period (2 months) when a particular version of the Chapter 53 Guidance may or may not have been published in August 2008, the evidence is all one way that the Chapter 53 Guidance prior to July 2011 never itself specified the period of leave which could or should be granted if the para 395C factors were considered to prevent removal. However it is accepted by the Secretary of State that the practice in such circumstances was to grant ILR. This is borne out by the statistics given in response to a freedom of information request in March 2011 that for the period up to 19 January 2011, of the cases granted leave under the legacy programme, 97%, that is to say 145,843, were granted ILR, and of the remainder, 3,405 were granted DLR and 439 humanitarian protection. It is clear from the evidence I heard particularly from Mr Forshaw that these more limited grants will not have been by virtue of the exercise of the guidance under Chapter 53 but by reference to other 'rights based' criteria under which the person qualified. In other words if a person was one to whom the factors in Chapter 53 were 'positively', from the individual's standpoint, applied by the case worker so as to deem removal not appropriate, the practice was to grant ILR.

56. However, I should stress that I accept entirely the point emphasised by Miss Anderson that the CRD granted ILR

where there was a positive outcome of application of Chapter 53 EIG, not because a case fell within the legacy programme but because it was applying Chapter 53 in the same way as the rest of UKBA. It is clear beyond argument that CRD granted forms of leave other than ILR where appropriate to the circumstances of the case applying the current law and policy."

30. We conclude, in light of the above, that the grant of ILR to the Claimant was made on the basis of chapter 53 of the EIG and paragraph 395C of the Immigration Rules and that these criteria were nothing to do with the Claimant's asylum claim, but rather his length of residence at the point of consideration and that this included consideration of any previous convictions, character and conduct.

31. Therefore, we concur with the First tier Tribunal Judge's conclusions at [62] that the Claimant flagged that he was a failed asylum seeker and the caseworker had information about his identity deception available to them but chose to grant ILR in any case. The Judge further went on to find that the Claimant exercised deception in obtaining his citizenship, as he maintained his false identity in his application, but was unable to make findings as to the basis on which it was granted, although she noted that the relevant guidance states that checks will be conducted in all cases and had this been done his deception could have been uncovered [67].

32. The judge concluded at [69] that overall and on balance she found that the Claimant's deception was not directly material to the grant of citizenship because:

(i) ILR was not granted due to the Claimant's deception in using a false identity but in spite of it;
(ii) the Claimant did not change his behaviour or say anything different in his application for citizenship than he had previously in the application for ILR yet the information as to his history was in the possession of the SSHD throughout;
(iii) it appears likely in the absence of any change in circumstances or other explanation that the Claimant was granted a travel document and citizenship simply on the basis that he had already been granted ILR;
(iv) whilst the fact of the Claimant not being Mr Elezi was not known for certain, there was enough in his previous history to indicate that this identity may well have been false and had the caseworker who granted citizenship undertaken any investigations into his history beyond the fact that the Claimant was granted leave, doubt as to his identity would have been flagged and further investigated. As it was known that the Claimant's true identity was in doubt or had not

been confirmed the judge found the decision to deprive was not in accordance with the Respondent's own guidance;

(v) the current situation is one that has arisen due to the Respondent's own actions or inaction and that it was unreasonable and irrational for the SSHD to take issue with the deception now, when she has known about it ever since the Claimant made his first claim for asylum, since which time he has married and had three children [70];

(vi) there was no explanation for the SSHD's inaction in the 6 years between refusal of the Claimant's asylum claim and his CRD questionnaire being filed and the further 8 years between the grant of citizenship and the passport office making enquiries in Tirana [70];

(vii) overall it was not proved to the relevant standard that the Claimant's fraud was directly material to the grant of citizenship such that the SSHD was not entitled to conclude that the condition precedent in s40(3) was satisfied and the SSHD had in effect committed a public law error in reaching the decision to deprive the Claimant of his nationality [71].

33. We find that the judge was entitled for the reasons she gave to reach those conclusions, which were sustainable on the evidence before her.

34. We have also given careful consideration to the recent jurisprudence in respect of deprivation of nationality. We find that the Judge's decision is in accordance with the decision in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC) and that of the Presidential panel in Chimi (deprivation appeals; scope and evidence) [2023] UKUT 00115 (IAC) in that the judge determined at [70] that the SSHD materially erred in a public law sense in concluding that the condition precedent in s40(3) of the BNA 1981 was satisfied.

35. In Laci v SSHD [2021] EWCA Civ 769 the Court of Appeal reviewed the jurisprudence to date and concluded at [81]:

"81. On balance, and not without hesitation, I would accept that the FTT was entitled to regard the Secretary of State's inaction, wholly unexplained at the time and for so extraordinarily long a period, as sufficiently compelling when taken with all the other circumstances of the case, to justify a decision that the Appellant should not be deprived of his citizenship."

36. In Shyti [2023] EWCA Civ 770, the Court of Appeal left undecided, on the basis that it would be *obiter dicta,* the question of whether the correct legal approach following Begum [2021] UKSC 7 and subsequently *Ciceri* and *Chimi* is that the First tier Tribunal is limited

to applying a public law approach to the SSHD's deprivation decision. We find that the First tier Tribunal Judge in this Claimant's case did apply that approach in any event and that it is clear that the First tier Tribunal Judge determined that the SSHD had made an error of public law in her reasons set out at [71] of her decision and reasons.

37. Consequently, for the reasons set out above, we find that the SSHD's grounds of appeal are no more than a disagreement with the findings of fact made by the First tier Tribunal Judge and disclose no material errors of law in her approach.

Notice of decision

38. We dismiss the appeal by the SSHD, with the result that the decision of the First tier Tribunal allowing the Claimant's appeal against a decision of the SSHD to deprive him of British nationality pursuant to section 40(3) if BNA 1981 is upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

21 December 2023