IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000233
First-tier Tribunal No: DC/00045/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 March 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Fatos Troka
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mrs Nolan, Senior Presenting Officer
For the Respondent: Mr Jorro, Counsel instructed by Waterstone Solicitors

Heard at Field House on 26 February 2024

DECISION AND REASONS

1. The appellant is a naturalised British citizen. He was born on 18 September 1975 in Albania. He appeals with permission against the decision of First-tier Tribunal Judge Bibi dismissing his appeal against a decision dated 26 November 2021 to deprive him of his British citizenship. Permission to appeal to this Tribunal was granted on 5 January 2024 by First-tier Tribunal Judge Saffer.

The Appellant's Background

2. The appellant entered the United Kingdom on 23 January 2000 clandestinely by lorry. He claimed asylum on 25 January 2000 under the assumed identity of a Kosovan national. The details of his asylum claim were fabricated. His asylum claim was eventually refused on 22 September 2005. On 21 November 2007 and 26 March 2008 the appellant's representative wrote to the Home Office requesting that he be considered for indefinite leave to remain under the respondent's "Legacy Scheme" due to the excessive wait for a decision. On 15 September 2009, the appellant was granted indefinite leave to remain in his false

identity. He subsequently made an application to naturalise as a British citizen on 14 September 2010, again in his false identity. His application was successful, and he naturalised as a British citizen on the 15 December 2010. He is now married, living and working in the United Kingdom with two children, both of whom are British. He has his own business.

3. On 24 June 2021, information was received from Her Majesty's Passport Office, which suggested that the appellant had naturalised as a British citizen using a false identity. On 25 October 2021 he was sent a letter informing him that the Home Office was considering depriving him of his British citizenship as the result of a suspected fraud. On 10 November 2021 the appellant's legal representative submitted mitigation on his behalf. He confirmed his genuine identity as an Albanian national and made submissions as to why he should not be deprived of his British citizenship. On 26 November 2021 the respondent made the decision under appeal.

First-Tier Tribunal Decision

4. The judge directed herself to the legal principles in Begum v Secretary of State [2021] UKSC 7, Laci v Secretary of State [2021] EWCA Civ 769 and Chimi (deprivation appeals, scope and evidence) v SSHD [2023] UKUT 115. The judge heard oral evidence. The judge found that concealment was employed in obtaining the grant of citizenship. The deception was material to the grant of citizenship. The appeal should be dealt with within the statutory framework. The judge then decided that any public law error in the respondent's exercise of discretion does not concern the Tribunal and was outside the scope of the appeal. The judge decided that it would be for the appellant to pursue this argument through judicial review or other proceedings. The judge then found that it would not be a disproportionate breach of Article 8 ECHR to deprive the appellant of British citizenship.

Grounds of Appeal

Ground 1

5. The First-tier Tribunal Judge has misdirected herself in law as to the nature of the First-tier Tribunal's jurisdiction and approach to the appeal under the British Nationality Act 1981.

6. The issue before the First-tier Tribunal was set out in the skeleton argument and was whether the respondent had exercised her discretion correctly with reference to Wednesbury principles. In the light of Chimi it was an error for the judge to assert that the appellant could take these points in a judicial review challenge. The judge misdirected herself in law as to the nature of her jurisdiction to determine the issues raised by the decision.

Ground 2

7. The judge materially erred in law by failing to take any or adequate account of or by failing to make any or adequate reasoned finding on material matters when rejecting the appellant's challenge to the respondent's exercise of discretion to deprive him of British nationality.

8. The appellant's case was factually identical in all material and principal purposes to those of his two brothers who had both also applied for asylum in the

identity of Kosovan nationals when they were also Albanian nationals. The Secretary of State considered depriving them of British citizenship at the same time as he was considering the appellant's case. In respect of both brothers the Secretary of State decided not to proceed with deprivation proceedings. One brother lives with the appellant. The respondent's exercise of discretion is flawed on public law grounds. It was irrational for the Secretary of State to make an opposite decision in the appellant's case to the decision she made in the two brother's cases or, alternatively, the Secretary of State erred by failing adequately, if at all, to explain the reasons for doing this. The judge erred by failing to find that there was a public law error and allow the appeal on this basis. The judge materially erred in law by failing to take any or adequate account of material matters and evidence that went to the highly material matter of whether the respondent had erred in public law terms.

Ground 3

9. The judge failed to make a clear finding on whether Article 8 ECHR is engaged on the facts of the appellant's case and then failed to consider the proportionality question in light of the relevant facts.

Rule 24 Response

10. This was received on the day of the hearing. Mrs Norman indicated that the respondent intended to oppose the appeal. The position of the respondent that this was a statutory appeal not a judicial review appeal. The Rule 24 response referred to Begum and asserted that the First-tier Tribunal had correctly assessed the case in accordance with the powers afforded to the Tribunal in deprivation cases. It is submitted that the respondent's decision not to pursue deprivation in the case of the appellant's two brothers was not indicative that the instant appeal should be allowed. The decision made by the respondent was correct and lawful and this was accepted by the judge. The judge's approach to Article 8 ECHR was entirely lawful.

Submissions

11. I heard submissions from both representatives, which are set out in the Record of Proceeding. Mrs Norman's submissions were brief, and she did not vigorously seek to defend the decision, rather relying on her Rule 24 response.

Ground 1 - Misdirection in law as to the nature of jurisdiction.

12. I am in agreement with Mr Jorro that following Begum, Chimi sets out the role of the judge in a deprivation appeal. At [57] to [60] it is said:

> "57. The second question which arises is in relation to the Tribunal's examination of the Secretary of State's discretionary decision under s40(2) or 40(3). It is clear from the statutory language that deprivation is not the automatic consequence of deception having been employed in the acquisition of nationality, or even of the Secretary of State having concluded that deprivation is conducive to the public good. In either category of case, the Secretary of State may deprive the individual of their citizenship; she is not required by the 1981 Act to do so. In our judgment, the Tribunal must undertake its consideration of that discretionary decision in the following way.
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> 58. Firstly, it will only be necessary for the Tribunal to consider this issue in a case in which it has resolved the condition precedent question in favour of the

> Secretary of State. In the event that the Tribunal concludes that the Secretary of State's decision is vitiated by a material public law error, the appeal will be allowed and it will, as we explain below, be for the Secretary of State to consider whether or not to make a fresh decision.
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> 59. Secondly, it is clear that this part of the Tribunal's enquiry must also be undertaken in accordance with what was said by Lord Reed in Begum. The Tribunal must therefore consider whether the respondent erred in law when deciding in the exercise of her discretion under s40(2) or 40(3) to deprive the individual of their citizenship. It is not therefore for the Tribunal to consider whether, on the merits, deprivation is the correct course. It must instead consider whether, in deciding that deprivation was the proper course, the respondent materially erred in-law.
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> 60. Thirdly, and because the issue regarding the respondent's discretion is framed in that way, we consider that the Tribunal should consider that question before it comes to assess any submissions made by an appellant in reliance on Article 8 ECHR. The analysis of the respondent's decision under s40(2) or 40(3) is confined to a public law review of that decision, whereas the Article 8 ECHR analysis must, as we shall see, be on a somewhat broader canvas. Because the nature of the statutory part of the analysis differs from that conducted in relation to Article 8 ECHR, we consider that the Tribunal should conclude the former analysis before it proceeds to consider human rights issues. The structure of the analysis formerly required by the authorities we have cited above assumed that the Tribunal was to conduct a full merits assessment at each stage of its analysis. When each stage of the Tribunal's consideration was to be conducted on that basis, it made every sense for the consideration of the discretionary question to come last. In that way, the Tribunal could carry forward into its own analysis of the discretion all of the conclusions it had reached previously, including any it had drawn in relation to Article 8 ECHR. Since we have decided that Begum must govern the analysis of the condition precedent question and the discretion question, however, we consider that the structured approach set out at paragraph 6(4)-(5) of R (KV) v SSHD should be amended…"(My emphasis)

13. The factual basis of this claim was that the appellant's two brothers, one younger and one older, had entered the United Kingdom two years before him and in exactly the same way that he did, claimed to fear persecution as Kosovan nationals. Both brothers were also granted leave to remain ultimately under the Legacy Programme and subsequently went on to obtain British citizenship using their false details. The respondent considered whether to deprive British citizenship for all three brothers in 2021. Like the appellant, both were served with "investigation to deprive British citizenship letters" by the respondent. Both brothers served representations on the respondent admitting to their true Albanian identities and made representations as to why they should not be deprived of British citizenship. The appellant made similar representations. By decision letters dated 10 August 2021 in respect of one brother and dated 21 September 2021, in respect of the other brother, (both decisions being taken before the decision in respect of this appellant), they were informed that the respondent had decided not to deprive either of the brothers because their cases did not fall within Home Office policy. The decisions and representations were before the respondent.

14. When the appellant made his own representations in respect of deprivation, he clearly referred the respondent to the fact that, on identical facts, the respondent had decided not to pursue deprivation action in respect of his brothers and this matter was squarely before the respondent.

15. In the respondent's decision letter dated 26 November 2021, the respondent took this matter into account at paragraph 33 of the decision, where it is said:

> "Finally, in answer to paragraph 25g in relation to your brothers both being allowed to remain British citizens, each case must be considered on its own merits. All cases fall to be treated individually and in your case, it is considered that you perpetrated a deliberate fraud against the UK immigration system which was material to your grant of citizenship. Therefore, deprivation is deemed an appropriate and reasonable response to your individual case."

16. In the grounds of appeal to the First-tier Tribunal, this issue was dealt with at length, it being submitted by the appellant that in treating the appellant differently from his two brothers that there was a public law error in the respondent's approach to discretion on the basis that the respondent had failed to take into account material factors, had offended against the legal principle of equal treatment by where "like cases should be treated alike", and had acted unfairly to a degree of irrationality in making an opposite decision as set out in Arthur JS Hall v Simons [2002] 1 AC 615, 688H per Lord Hoffman and R (Gallaher Group Ltd) v The Competition and Markets Authority [2018] UKSC 25, [2019] AC 96 at [27]-[29], [40]), or alternatively had failed to explain adequately or at all the totally opposite outcomes on the appellant's case vis-á-vis his brothers' cases.

17. The respondent dealt with this issue on review arguing that this was a public law matter because it related to possible procedural impropriety by the respondent and that it was open to the appellant to challenge the decision by way of judicial review. This clearly fed into the judge's approach at [71], [72], [73], [74],[78] and [79], which I set out below.

> "71. A significant part of Mr Jorro's argument in this appellant's case was that the respondent had made a material public law error and/or that there has been what he argued was irrationality and/or procedural impropriety by the respondent in this appellant's case given that two of the appellant's adult brothers had also been granted British citizenship on the same footing as him, yet neither of them had been deprived of their British citizenship. Mr Jorro argued that this was irrational, analogous to judicial review terms, and that the appeal should therefore be allowed on this basis.
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> 72. I rejected all of Mr Jorro's arguments in this respect as the Tribunal has before it the appeal exercised by the appellant within the statutory framework and it is tasked with establishing and making findings of fact on whether firstly, the condition precedent is met when the respondent exercised her discretion to deprive this particular appellant of his British citizenship, and in so doing, whether or not any errors of public law may or may not have occurred in the exercise of that discretion based on materials/information/evidence/details or anything else the respondent may have relied upon at time of making her decision Chimi.
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> 73. The circumstances of the brothers' applications and the question of whether they concealed material evidence in their application and so were guilty of deception is for the respondent. It maybe and it does not concern the Tribunal in this case that the respondent makes a further decision in the naturalisations of the brother's cases. Mr Jorro has not shown that the circumstances and immigration histories, to date, concerning the appellant's brothers' cases undermine the lawfulness of the adverse decision made in the appellant's own case.

> 74. I have already found that the respondent lawfully exercised her discretion when she decided to deprive the appellant of his British citizenship as explained above, and I do not find that the decision was vitiated in any way by any material public law error. Accordingly, the fact that the respondent has at this time, it would appear on the evidence and facts I have before me, decided not to deprive the appellant's brothers of their British citizenship, is entirely outside the scope of this appeal, and this is of course a matter for the respondent as to whether she decides in the future at some point to again proceed with such action against the brothers.
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> 78. The fact that it was decided to flag the lack of deprivation action in the brothers' cases by the appellant and those acting for him is a matter for them to grapple with. I made directions giving the respondent an opportunity to provide details of the brothers' cases. The Respondent declined to provide those details. Nonetheless, I had sufficient evidence before me and cogent submission from the representatives to enable me to decide this appeal substantively. I cannot take this any further and it is entirely a matter for the appellant whether he decides to pursue that issue and his related irrationality arguments advanced by Mr Jorro on his behalf (including in his skeleton argument of 18 January 2023), through judicial review or other proceedings which must be outside the scope of this appeal.
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> 79. The Tribunal's task and jurisdiction here is to decide and dispose of the matter in this appeal and this is what I have sought to do in following the relevant reported authorities as rehearsed above at paragraph 19, and in accordance with that which stated in the most recent Upper Tribunal Reported decision in **Chimi**.

18. I am in agreement with Mr Jorro that the judge's approach to jurisdiction is flawed. In line with Chimi, it was for the judge to consider whether, in fact, there was a public law error in the respondent's exercise of discretion. It was simply wrong of the judge to say that this was not a matter for her to look into and that the appellant should pursue the irrationality arguments by way of judicial review. It was clearly open to the appellant to pursue public law arguments in the context of the statutory appeal and the judge erred by refusing to deal with these arguments in this manner. The Rule 24 response appears contradictory because it seems to submit on the one hand that this was a statutory appeal and that administrative law and principles did not apply and then on the other, to refer to Begum and state that administrative law principles do apply. I am satisfied that post Begum and in accordance with Chimi the approach to be taken by the Tribunal with regard to the respondent's exercise of discretion is very clear and the judge did not take that approach in this appeal finding that public law errors could be pursued by judicial review. Mrs Nolan did not defend Ground 1 preferring to argue that this error is immaterial because of Ground 2.

Ground 2

19. Mrs Nolan's argument in respect of this ground was that the judge had lawfully made a finding that there was no public law error by the respondent when exercising his discretion. This finding was open to the judge and is not flawed. She relied on Otshudi v SSHD [2004] EWCA Civ 893, in which it was said that it was not unlawful for two appellants in two different appeals with the same factual scenarios to have two different outcomes. This is clearly the position where there are two different appellants before two different judges both of whom may have made separate lawful decisions. However, this is in my view a distinctly different situation from this appeal where it was the same Secretary of State making decisions in respect of three brothers with the same factual scenarios, who was

fully aware of this and in the decisions of the two brothers referred to not proceeding with deprivation because of "policy".

20. I am in agreement with Mr Jorro that that the fact that the respondent had not pursued deprivation action in respect of his two brothers on the same facts was a material factor to be taken into account by the respondent when exercising his discretion in respect of this appellant. It was simply not sufficient for the respondent to state that the case would be considered on its individual merits and go no further to explain why a different decision had been taken in respect of the brothers. The decision offends the principle of equal treatment and there is no adequate explanation by the decision maker for the unequal treatment.

21. I am satisfied on this basis that the judge erred by failing to identify the public law error in the decision of the respondent which was addressed in great detail in the skeleton argument. The judge's reasoning appears to be that this was a matter for the respondent and did not concern her. It was up to the respondent as to what he decided. Any challenge was outside the scope of the appeal. However following Chimi her role in respect of the issue of discretion was one of review. Her role was to decide whether, in making the decision the respondent had had regard to all of the material factors, adequately reasoned the decision and made a rational decision.

22. I am satisfied that the respondent made a public law error in the decision when deciding whether to exercise discretion and that the judge failed to identify it. In these circumstances, the judge's findings at [74] that the respondent lawfully exercised his discretion, and that the decision was not vitiated in any way by a material public law error is unsustainable.

23. Since I have found that grounds 1 and 2 are made out and this is sufficient to set aside the decision there is no need for me to consider ground 3.

Disposal

24. In this appeal because the issues are narrow and concern matters of law only, I indicated that I would proceed to go on and re-make the appeal without a further hearing. Both parties agreed to this course of action.

Decision on the error of law appeal

25. The decision of the First-tier Tribunal involved the making of an error of law.

26. The decision to uphold the respondent's decision to deprive the appellant of his British citizenship is set aside.

Re-making

27. I indicated to Mr Jorro in accordance with my decision on ground 2 above that I am satisfied that when the respondent exercised the discretion to deprive the appellant of citizenship in the original decision, there was a public law error in that at paragraph 33 of that decision, the respondent has acted irrationally in making an opposite later decision in the appellant's case to the earlier decisions made in his brother's cases (on the same factual and legal scenario) and has failed to reason adequately or at all the totally opposite outcomes on the appellant's case vis-á-vis his brothers' cases. The Secretary of State's decision in respect of discretion is therefore vitiated by a material public law error.

Notice of decision

28. I remake the appeal and allow the appeal in accordance with Chimi.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 March 2024