Upper Tribunal
(Immigration and Asylum Chamber)

BA (deprivation of citizenship: appeals) [2018] UKUT 00085 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2017	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

BA

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:-

For the Appellant: Mr Z. Malik, counsel, instructed by R Spio & Co Solicitors

For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

(1) In an appeal under section 40A of the British Nationality Act 1981, the Tribunal must first establish whether the relevant condition precedent in section 40(2) or (3) exists for the exercise of the Secretary of State's discretion to deprive a person (P) of British citizenship.

(2) In a section 40(2) case, the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue.

(3) In a section 40(3) case, the Tribunal must establish whether one or more of the means described in subsection (3)(a), (b) and (c) were used by P in order to obtain British citizenship. As held in Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 196 (IAC) the deception must have motivated the acquisition of that citizenship.

(4) In both section 40(2) and (3) cases, the fact that the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is

some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.

(5) As can be seen from AB (British citizenship: deprivation: Deliallisi considered) (Nigeria) [2016] UKUT 451 (IAC), the stronger P's case appears to the Tribunal to be for resisting any future (post-deprivation) removal on ECHR grounds, the less likely it will be that P's removal from the United Kingdom will be one of the foreseeable consequences of deprivation.

(6) The appeal is to be determined by reference to the evidence adduced to the Tribunal, whether or not the same evidence was before the Secretary of State when she made her decision to deprive.

DECISION AND REASONS

A. Introduction

1.
The appellant was born a Ghanaian citizen in 1965. He was naturalised as a British Citizen in 2013. In his application for naturalisation, the appellant produced a Ghanaian passport, in the name of BA.

2.
The appellant answered "no" to the entirety of the questions in section 3 of the form, dealing with good character. He accordingly denied that he had any criminal convictions and said he had not been engaged in any other activities which might have indicated that he may not be considered a person of good character.

3.
In November 2 01 5, the respondent wrote to the appellant to say that she had reason s to believe the appellant had not told the truth in his application for British citizenship . The respondent gave details of information received by her, indicating that before acquiring indefinite leave to remain in the United Kingdom and subsequently British Citizenship, the appellant had obtained or attempted to obtain numerous UK drivers ' licences and British passports in different identities.

4.
The respondent further explained that a photograph submitted with the appellant's application for naturalisation matched the photograph of the appellant bearing the nam e B A. Accordingly, documentation said to have be en used by the appellant in the identity of FJR, TA-W and SK-W must, according to the res pondent, have been false.

5.
The appellant's response to the respondent was somewhat singular. He appeared to accept using the three names mentioned by the respondent, in addition to BA. He also said he "got in trouble" in the USA , was detained there and subsequently deported.

6.
A later response, made on behalf of the appellant by his solicitors, sought to explain the ap pellant's actions by reference to " some spiritual experience which cleansed him of destructive and oppressive thoughts, causing the deletion of certain facts linked to the traumatic experiences of his life… He therefore pleaded with the Secretary of State to assist him in his self-help spiritual journey".

7.
Unsurp risingly, in February 2017 the r espondent wrote to the a ppellant to inform him that she had decided he had obtained British citizenship fraudulently and that he should be deprived of it.

B. The appellant's appeal

8.
The a ppellant appealed under s ection 40A of the British Nationality Act 1981 ("The 1981 Act") . His grounds of appeal contended that he had not obtained British citizenship fraudulently. He also submitted that the respondent had failed to carry out an assessment of the best interests of his three children, as required by section 55 of the Borders, Citizenship and Nationality Act 2009.

9.
In handwritten representations to the respondent , the appellant said that he had provided "services to the UK government " and that he

" was very young at the time of these misdeeds and just had a hard life… at the tim e of these identity problems I had no status in the UK and it was hard to live without documentation and all that led to me trying to find a way to live and survive in the UK . I am sorry I had to do things the wrong wa y. I am older now and a parent" .

10.
The appellant's appeal in the First-tier Tribunal was originally due to be heard on 19 June 2017. A week earlier, however, the appellant's solicitors requested an adjournment. The case was said by them to be of a "sensitive nature which involves national security". A key witness was a police officer , initial c ontact with whom had been made by the solicitors only on 9 June 2017.

11.
The appeal was relisted for 7 August 2017. On 3 August, the solicitors requested a further adjournment. They said they remained in the same positio n as they had been on 12 June a nd that :-

" We have been unable to take the statement from the police officer and we are yet to have a conference with the Home Office which we were informed was due to the presenting officer dealing with the case being on leave. Unfortunately, these are [matters] that [need] to be dealt with, from the information received our client assisted the C rown and information that is classified has found its way in the decision from the respondent. We believe it is in the interests of justice, the C rown and our client as well as his minor children to have 3-4 months adjournment with a view to resolving this before it is dealt within the courts".

12.
At the hearing before the First-tier Tribunal judge on 7 August, Mr Siaw, a solicitor appearing for the appellant , re newed the adjournment application. He told the judge that the appellant "had worked as a police informant and had infiltrated drug gangs in America . The appellant had been told to obtain false identities by his handler".

13.
Faced with this, the judge requested the presenting officer to take instructions from a senior case worker. Having done so, the presenting officer objected to any further adjournment.

14.
The judge refused to adjourn. He noted that almost two years had passed since the appellant had originally been notified that the respondent was considering depriving him of his British citizenship. The judge also noted that the appellant's original responses were inconsistent with his later representations that he had been fully aware of his false identities but employed them in order to live in the United Kingdom. The judge was "not confident that there was a realistic prospect of the

appellant obtaining any evidence from a police officer which would assist his case. Accordingly, I refuse d the application for an adjournment”.

15.
Having been made aware of the judge’s decision to proceed , Mr S ia w said he had no submissions to make. H e expressed his view that the hearing should not go ahead, in the interests of justice. Everything the appellant had done “was because he was working for the Metropolitan Police”.

C. The decision of the First-tier Tribunal judge

16.
The First-tier Tribunal judge ’ s findings begin at paragraph 23 of his decision. In reaching them , the judge said he had had r egard “to the recent guidance given by the U pper T ribunal in P irzada (Deprivation of c itizenship: g eneral p rinciples) [2017] UKUT 19 6 (IAC).”

17.
The judge considered it manifest that the respondent had told the appellant she intended to deprive him of his citizenship pursuant to section 40(3) of the 1981 Act . This provides as follows :-

“ (3) the Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the r egistration or naturalisation was obtained by means of –

(a)
fraud,

(b)
false representation, or

(c)
concealment of a material fact. ”

18.
The judge then set out the following extract from the headnote of P irzada :-

“ (3) The power under sub-s (3) arise s only if the Secretary of State is satisfied that registration or naturalisation was obtained by fraud, false representation or concealment of a material fact. The deception referred to must have motivated the grant of (in the present case) citi zenship, and therefore necessarily pr ece ded that grant”.

19.
At paragraph 26, the judge noted that , in his written representations to the respondent , the appellant had accepted making false representations and using false identities to obtain passports and driving licences. The judge concluded that :-

“I cannot look into any reasons why the appellant may have done so. Nor am I concerned with whether the appellant could be regarded as being of good character, if, as is claimed, he was acting at the time as a police informant”.

20.
At paragraph 27, the judge noted that:-

“ As clarified in Pirzada , I can only consider whether the Secretary of State had information from which he was satisfied that the appellant’s naturalisation was obtained by fraud, false representation or concealment of a material fact”.

21.
The judge noted that it was not disputed the appellant had answered “no” to the question in the application form “ H ave you ever engaged in any other activities which might indicate that you may not be considered a person of good character?”. The judge was satisfied that , in answering that question in the negative, the appellant had committed a deception, involving the concealment of material facts. That concealment had been deliberate and related to the fact that over a long period of time, the appellant had “ used false identities and had obtained or attempted to obtain false passports or driving licences”.

22.
At paragraph 29, t he judge said he was satisfied that the appellant’s deception in concealing his use of false identities had “ motivated the grant of his citizenship”. Plainly, the judge thought, the use of false identities to deceive government departments was “obviously something that might indicate [the appellant] m ay not be considered a person of good character ” . That was so, according to the judge, “irrespective of any motivation on the appellant’s part”.

23.
The judge also noted the respondent’s guidance, which stated that the decision maker will “normally refuse an application where the person has attempted to deceive or otherwise been clearly dishonest in their dealings with another department of government”.

24.
The judge, accordingly, concluded at paragraph 31 that the respondent had properly exercised her discretion under section 40(3) and that her decision was in accordance with the law.

25.
So far the appellant’s other ground s of appeal w ere concerned, the judge said the following:-

“32. In relation to the other grounds of appeal, whilst the effect of the decision is that the appellant has no leave to remain in the United Kingdom , no removal notice has been issued and therefore the appellant does not have to leave the United Kingdom at present. Accordingly, the decision to deprive the appellant of his citizenship does not amount to an interference with his private or family life and A rticle 8 E CHR is not engaged at this stage. ”

D. The appellant’s grounds of challenge

26.
The appellant applied for permission to appeal against the decision of the First-tier T ribunal judge.

27.
Permission was granted by the First-tier Tribunal on all grounds . Th ese included the contention that the Tribunal had “ misunderstood the nature of its appella te jurisdiction and erred in law in failing to consider and determine material matters ” . In particular, the grounds alleged that the judge had fallen into error in paragraph 26, where he had said he could not look into any reasons why the appellant might had made f alse representations and used false identities and that the issue whether the appellant was a police informant was a matter with which the judge was not concerned.

28.
In support of his grounds , the appellant made reference to the decision of the Upper Tribunal in Arusha and Demushi (deprivation of citizenship – delay [2012] UKUT 80(IAC) (“ Arusha ”) . The decision of the Upper Tr i bunal in P i rzada was said to be inconsistent with Arusha , which did not appear to have been discussed by the Upper Tribunal in Pi rzada. The grounds submitted that Arusha should be followed.

29.
So far as paragraph 32 of the judge’s decision was concerned, the grounds argued that the finding that A rticle 8 was not in play in the appeal was contrary to the decision of the Upper Tribunal in Deliallisi (British Citizen: d eprivation appeal; S cope) . [2013] UKUT 439 (IAC), as confirmed in AB (British Citizenship: d eprivation ; Deliallisi considered) (Nigeria) [2016] UK UT 451 (IAC).

E . The Secretary of State’s position

30.
At the beginning of the hearing on 21 November, Mr Clarke informed the Upper T ribunal that , following discussions within the Home Office , the respondent’s position was that, inso far as there is a conflict between the decisions in Arusha and Pirzada , the respondent consider s that P irzada should not be followed.

31.
Mr Clarke further informed us that the respondent was now of the view that, as held by the T ribunal in Deliallisi and AB , an appellant in an appeal under section 40A o f the 1981 Act may raise A rticle 8 of the ECHR as a ground of appeal.

32.
Accordingly, Mr Clarke conceded that the decision of the First-tier Tribunal judge in the present case was materially wrong in law and should be set aside.

F . Discussion

(a) The legislation

33.
Section s 40 and 40A of the 1981 Act, so far as relevant , read as follows:

“ 40. Deprivation of c itizenship

(1)
I n this section a reference to a person’s “citizenship status” is a reference to his status as-

(a) a British citizen,

…..

(2)
The S ecretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.

(3)

The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that registration or naturalisation was obtained by means of –

(a) fraud,

(b) f alse representation, or

(c) c oncealment of a material fact .

…

(5) B efore making an order under this section in respect of a person the Secretary of State must give the person written notice specifying –

(a) that the Secretary of State has decided to make an order,

(b) the reason s for the order, and

(c) the person's right of appeal under section 40 A(1) …

…

40A. Deprivation of citizenship: appeal

(1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against that decision to the First-tier Tribunal.

…"

(b) The scope of a deprivation appeal: Arusha , Deliallisi and Pirzada

34.
The problematic findings in Pi rzada , which the respondent is satisfied are incorrect , occur i n the following passage in paragraph 9E of the decision :-

"… T he grounds of appeal are… limited by the formulation of s 40 and must be directed to whether the Secretary of State's decision was in fact empowered by that section. There is no suggestion that the Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-ss (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State's discretion".

35.
It woul d appear that the Tribunal in Pi rzada was not referred to the decision in Arusha or, for that matter, the decision in Deliallis i .

36.
In Arusha , at paragraph 11 of its determination and reasons, the Upper Tribunal cited, with approval, what the First-tier Tribunal in that case had said about the nature and scope of an appeal under section 4 0A of the 1981 Act:-

" 13. In our judgment, the absence of prescribed grounds can only mean that the Tribunal is to have a wide ranging power to consider, by way of appeal, not a review, what the decision in the appellant's case should have been. The Tribunal has to ask itself ' does the evidence in the case establish that

citizenship was obtained by fraud? ’ If it does then it has to ask ‘ do the other circumstances of the case point to discretionary deprival? ’

14. As this is an appeal not a review, the T ribunal will be concerned with the facts as it finds them and not with the Secretary of State’s view of them. In terms of the proof of fraud, the T ribunal will consider any evidence, whether or not available to the Secretary of State at the time he made his decision, which is relevant to the de termination of that question. ”

37.
We consider it is necessary to set out in detail what the Upper Tribunal said in Deliallisi . Having set out paragraphs 13 and 14 of the First-tier Tribunal’s decision in Arusha , the T ribunal in Deliallisi explained in some detail why the First-tier Tribunal in Arusha was essentially correct in its conclusion regarding the scope of the appeal:-

“ 30. It is apparent from [13] of the First-tier Tribunal’s determination, that that Tribunal held, in effect, that the section 40A appeal is a full merits-based appeal, involving an appellate re-examination of the discretionary decision under section 40 to deprive a person of British citizenship. Although the determination of the First-tier Tribunal in Arusha & Demushi was mentioned by the First-tier Tribunal in the case of the present appeal, this important finding went unnoticed. As a result, the First-tier Tribunal came to the conclusion that, because section 40A, unlike section 86 of the 2002 Act, contains no provision allowing or permitting an appeal to succeed if discretion should have been exercised differently, the Tribunal was required to construe section 40A as excluding such a possibility.

31. The correct approach is, we find, precisely the opposite of that taken by the First-tier Tribunal in the present appeal. If the legislature confers a right of appeal against a decision, then, in the absence of express wording limiting the nature of that appeal, it should be treated as requiring the appellate body to exercise afresh any judgement or discretion employed in reaching the decision against which the appeal is brought. We acknowledge that, in certain circumstances, the subject matter or legislative context may, nevertheless, compel a restricted reading of the enactment conferring the right of appeal; but courts and tribunals should not be over-ready to find such exceptions, and should do so only where it is plainly demanded, in the interests of coherent decision-making or other cogent considerations of public policy.

32. In this regard, the following passage from Jacobs, Tribunal Practice and Procedure (2 nd Edition) is helpful:-

“4.116 If the appeal is against a decision based on an exercise of judgment, the question arises whether the tribunal is limited to deciding if the judgment was exercised wrongly or is allowed or required to exercise the judgment afresh.

4.117 The approach to identifying the scope of the appeal in these cases was set out by Etherton J in Banbury Visionplus Ltd v Revenue and Customs Commissioners [[2006] STC 1568]. The position is this. The scope of the appeal may be made clear in the language of the statute that allows the appeal. In the absence of express provision, any limitation on the scope of the appeal must be apparent from the nature of the decision or the legislative context, [[2006] STC 1568 at [44]].

4.118 The general approach of the courts has been that the judgment must be exercised afresh on appeal [As in Secretary of State for Children, Schools and Families v Philliskirk [2009], ELR 68 at [19]]. Otherwise, the right of appeal would be rendered illusory [Lord Goddard CJ in Stepney Borough

Council v Joffe [1949] 1 KB 599 at 602] or unduly restricted [Lord Parker CJ in Godfrey v Bournemouth Corporation [1969] 1 WLR 47 at 51].

4.119 However, there are cases in which this approach has not been taken. John Dee Ltd v Customs and Excise Commissioners [[1995] STC 941, as explained in Banbury Visionplus Ltd v Revenue and Customs Commissioners [2006] STC 1568 at [39]-[44]] is an example. There it was permissible to require security 'Where it appears to the Commissioners requisite to do so for the protection of the revenue'. Statute provided for a general appeal 'with respect to… the requirement of security'. Neill LJ explained the Court of Appeal's decision:

'It seems to me that the 'statutory condition'… which the Tribunal has to determine in an appeal… is whether it appeared to the C ommissioners requisite to require security. In examining whether that statutory condition is satisfied the tribunal will… consider whether the commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law [[1995] STC 941 at 952]'.

One factor that influenced the decision in this case was that the tribunal was under no duty to protect the revenue; that statutory responsibility was imposed on the Commissioners [[1995] STC 941 at 952]. It is not clear to what extent that factor affected the outcome.

4.120 A fresh exercise of the judgment is also excluded if, exceptionally, a right of appeal is given against a decision that involves a discretion which is non-justiciable. This may be because the discretion involves a consideration of a number of unrelated factors with no indication, in the legislation or the context, of which were relevant. Or it may be because the discretion involves non-legal judgments on considerations of policy, finance or social matters. In these limited circumstances, the right of appeal does not allow a tribunal to substitute its exercise of discretion for that of the decision-maker. It is limited to challenges to the legality of the decision on judicial review grounds. [See the decision of the Tribunal of Commissioners in R(H) 6/06 (especially at [24] and [39]) analysing the decision of an earlier Tribunal of Commissioners in R(H) 3/04].

4.121 If discretion (or any other judgment) has to be exercised afresh on appeal, the way in which it was exercised below is not binding, but must be taken into account for whatever it is worth. As Lord Atkin explained in Evans v Bartlam : [[1937] AC 473]

'… where there is a discretionary jurisdiction given to the Court or judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it [[1937 AC 473 at 478]."

33. In the case of section 40 of the 1981 Act, it cannot possibly be said that the discretionary decision to deprive a person of British citizenship involves a discretion which is non-justiciable. The decision clearly involves important considerations of public policy; but so too do very many of the discretionary decisions of the respondent taken under the immigration rules, as against which a "full" right of appeal exists, by reason of sections 84(1)(f) and 86(3)(b) of the 2002 Act. The Immigration and Asylum Chamber of the First-tier Tribunal routinely has to balance public policy considerations against individual rights and other interests, in reaching decisions in such appeals; and in doing so it will have regard to the importance attached by the respondent to public policy interests, in a particular case.

34. Accordingly, unlike the First-tier Tribunal, we do not regard the absence in section 40A of the 1981 Act of the relevant wording found in sections 84 and 86 of the 2002 Act as limiting the scope of section 40A. There is, in our view, no ambiguity, obscurity or absurdity in the wording of that section, such as might call for the application of Pepper v Hart [1993] AC 593 principles. But, even if there were, Ms Naik's researches reveal that Parliament quite clearly intended section 40A to be construed in the way we have just described. During the passage of the Bill for the Nationality, Immigration and Asylum Act 2002, which inserted section 40A into the 1981 Act, the Minister of State, Lord Filkin , gave this assurance to Lord Avebury (Hansard , 8 July 2002, column 508):-

"The Noble Earl, Lord Russell, suggested that the only appeal is a judicial review. We do not believe that that is the case. The appeal against deprivation is a full appeal on the merits. We believe that perhaps the JCHR [Joint Committee on Human Rights] does not have that clearly in sight or perhaps we have not made it as clear as we could have done.

The appellate body will be able not only to remove [sic; presumably 'review'] the legality of the Secretary of State's decision, but also to hear arguments at his discretion on whether or not the right to deprive should have been exercised differently. The bill proposes no restrictions on the issues which might be raised in an appeal either to an Adjudicator or, where that body had jurisdiction, to the Special Immigration Appeals Commission. The appellate body will be able to hear argument not only that the Secretary of State has failed to observe the statutory requirements, but also that his discretion whether to deprive should have been exercised differently."

If a search for the legislature's intentions were necessary, Lord Filkin's words could not be clearer.

35. Having identified the nature of the overarching scope of an appeal under section 40A, it is possible to identify the significance of issues such as the operation of the ECHR and of the respondent's policy on deprivation, as disclosed in the Nationality Instructions ("the NIs ").

36. The fact that the respondent has reached a decision, in the exercise of her discretion, by reference to her published policy regarding deprivation of citizenship is a matter to which an appellate tribunal might have regard, in deciding whether that discretion should be exercised differently. This is part of the wider principle, extrapolated from Evans v Bartlam (see above), whereby the way in which discretion was exercised by the primary decision-maker, whilst not binding, must nevertheless be taken into account by the appellate tribunal. In cases of the present kind, the application by the respondent of her policy on deprivation must be taken as indicating where, as a general matter, the respondent considers the balance falls to be struck, as between, on the one hand, the public interest in maintaining the integrity of immigration control and the rights flowing from British citizenship, and, on the other, the interests of the individual concerned and of others likely to be affected by that person's ceasing to be a British citizen. As in similar appeals governed by the 2002 Act, the appellate tribunal must give the respondent's policy due weight, bearing in mind that it is the respondent – rather than the judiciary – who is primarily responsible for determining and safeguarding public policy in these areas.

37. So far as the ECHR is concerned, in most cases (including the present) the provision most likely to be in play is Article 8 (respect for private and family life). If, on the facts, the appellate tribunal is satisfied that depriving an appellant of British citizenship would constitute a disproportionate interference with the Article 8 rights of that person or any other person whose position falls to be examined on the principles identified in Beoku -Betts [2008] UKHL 39, then plainly the tribunal is compelled by section 6 of the Human Rights Act 1998 to re-exercise discretion by finding in favour of the appellant. However, the fact that the scope of a section 40A appeal is wider than Article 8 means

that, in a case where Article 8(2) is not even engaged, because the consequences of deprivation are not found to have consequences of such gravity as to engage that Article, the Tribunal must still consider whether discretion should be exercised differently. ”

38.
One thing we would add to th at analysis is to emphasise the fact that the respondent has been charged by Parliament with making decisions concerning deprivation of citizenship. In a section 40 A appeal, the r espondent’s view should normally be accorded significant weight: see Lord Carlile of Berr iew v Secretary of State for the Home Departmen t [201 4] UKS C 60 ; H e sham Ali v Secretary of State f or the Home Department [2016] UKSC 60 . In the majority of cases, the weight will be such that the Tribunal will have no proper basis for exercising its discretion differently. This does not, however, mean the Tr ibunal is absolved from the duty of deciding that issue.

39.
The passage in paragraph 9E of Pirzada quoted at paragraph 34 above is, accordingly, not to be followed.

40.
As both Deliallisi and AB make clear, the task of the T ribunal in a section 40 A appeal will be to decide, on the facts before it (which , it should be emphasised, may not be the same as the facts upon which the respondent made her decision) , w hat the reasonably foreseeable consequences of deprivation might be. In this regard, it is useful to recall what the Upper Tribunal said in AB :-

“58. Before embarking on an analysis of the evidence, it is necessary to establish the legal parameters. With one exception, to which I will turn in due course, Ms Naik submitted that the correct basis was as set out by the Upper Tribunal in Deliallisi (British citizen: deprivation appeal: scope) [2013] UKUT 00439 (IAC). In that case, the Tribunal held that an appeal under section 40A of the 1981 Act requires the Tribunal to consider whether the Secretary of State’s discretionary decision to deprive a person of British citizenship should be exercised differently. That consideration will involve (but not be limited to) ECHR Article 8 issues, as well as whether deprivation would be a disproportionate interference with a person’s EU rights. In carrying out its task, the Tribunal is under no obligation to assume that the person concerned will be removed from the United Kingdom in consequence of the deprivation decision. The Tribunal is, however, required to determine the reasonably foreseeable consequences of deprivation which may, depending on the facts, include removal.

59. Mr Jarvis told me that the Secretary of State does not consider that a deprivation appeal can ever encompass the possibility of removal. He did not, however, elaborate upon this view and I see no reason why, as a matter of law, the reasonable foreseeability test, elucidated in Deliallisi , should be circumscribed in this or, indeed, any other way.

60. Having said that, it seems to me the facts of the present case are indicative of why, in practice, the reasonably foreseeable consequences of deprivation are often unlikely, as a general matter, to include removal. Even in a case where, unlike Deliallisi , the Secretary of State has not expressed an intention to grant leave, immediately upon deprivation taking place, the factual matrix (including the availability of rights of challenge to possible future decisions of the Secretary of State) will often preclude the Tribunal from identifying removal as a reasonably foreseeable consequence of deprivation, viewed from the vantage point of the hearing of the deprivation appeal. “

41.

The important point Pirzada illuminates is that, before one reaches the question of discretion and A rticle 8 ECHR issues, the Tribunal must be satisfied that the circumstances for exercising discretion exist. In other words, in an appeal against a section 40(2) decision, deprivation must be "conducive to the public good". In an appeal against a s ection 40(3) decision, the registration or naturalisation must have been obtained by means of one or more of the three actions described in paragraphs (a) to (c).

42.
I n the case of s ection 40(2), the matter on which the respondent must be satisfied – involving "the public good" – is one in respect of which the respondent's conclusion will almost inevitably be determinative. In other words, it is very hard to see how, on a particular set of facts, the Tribunal could find that deprivation would not be conducive to the public good if, on those facts, the Secretary of State has decided that it would.

43.
Nevertheless, as with criminal deportation, a f inding that something may be in the public interest or conducive to the public good will not be necessar ily d ispositive of the overall appeal. The T ribunal will be required to allow the appeal, notwithstanding such a finding, if to do otherwise would violate the United Kingdom 's obligations under the ECHR. The T ribunal would also have to exercise its discretion differently from that of the respondent, if some particular (we would venture to say , exceptional) feature of the case necessitated it .

44.
In the case of section 40(3), the matter of which the Secretary of State must be satisfied is much more hard-edged. The fact that the subsection speaks of the Secretary of State being " satisfied " that fraud etc was employed does not mean the question for the Tribunal is merely whether the Secretary of State was rationally entitled to conclude as she did. In Secretary of State for the Home Department v Al- Jedda [2013] UKSC 62, the Supreme Court was not disposed to say more than that the use of the word " satisfied" in section 40(2) and (3) "may afford some slight significance", although the Court found it difficult to articulate what that significance might be (Lord Wilson at paragraph 30). We consider the T ribunal is in a position to take its own view of whether the requirements of subsection (3) are satisfied. If they are, then the points made in paragraph 43 above will apply in this class of case also. The Tribunal will be required to place significant weight on the fact that the Secretary of State has decided , in the public interest, that a person who has employed deception etc to obtain British citizenship should be deprived of that status . Where statelessness is not in issue, it is likely to be only in a rare case that the ECHR or some very compelling feature will require the Tribunal to allow the appeal.

(c) Summary

4 5 . It may be convenient to set out the following summary of the position concerning appeals under section 40A of the 1981 Act :

(1) The Tribunal must first establish whether the relevant condition precedent exists for the exercise of the Secretary of State's discretion to deprive a person (P) of British citizenship.

(2) In a section 40(2) case, the fact that the Secretary of State is satisfied that deprivation is conducive to the public good is to be given very significant weight and will almost inevitably be determinative of that issue.

(3) In a section 40(3) case , the Tribunal must establish whether one or more of the means described in subsection (3)(a), (b) and (c) w ere used by P in order to obtain British citizenship. As held in Pirzada , the deception must have motivated t he acquisition of that citizenship.

(4) In both section 40(2) and (3) cases, the fact tha t the Secretary of State has decided in the exercise of her discretion to deprive P of British citizenship will in practice mean the Tribunal can allow P's appeal only if satisfied that the reasonably foreseeable consequence of deprivation would violate the obligations of the United Kingdom government under the Human Rights Act 1998 and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently.

(5) As can be seen from AB , the stronger P's case appears to the Tribunal to be for resisting any future (post-deprivation) removal on ECHR grounds, the less likely it will be that P's removal from the United Kingdom will be one of the foreseeable consequences of deprivation.

(6) The appeal is to be determined by reference to the evidence adduced to the Tribunal, whether or not the same evidence was before the Secretary of State when she made her decision to deprive.

G. Next steps

46. At the hearing of 21 November, after in forming the representatives that the decision of the First-tier Tribunal judge would be set aside and re - made by the Upper Tribunal, we went into private session, pursuant to a direction under rule 37 of the Tribunal Procedure (Upper Tribunal) Rules 2008, in order to hear the evidence of a witness. We then made directions regarding the re-making stage.

Mr Justice Lane

President

22 January 2018