Upper Tribunal
(Immigration and Asylum Chamber)

Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 June 2021	

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

Between

GURI CICERI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Ms Helen Foot, instructed by BHT Sussex

For the respondent: Mr Steven Walker, Senior Home Office Presenting Officer

Following KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884, Hysaj (deprivation of citizenship: delay) [2020] UKUT 00128 (IAC), R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 and Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 the legal principles regarding appeals under section 40A of the British Nationality Act 1981 against decisions to deprive a person of British citizenship are as follows:

(1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum , which is to consider whether the Secretary of State has

made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

(2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged (usually ECHR Article 8). If they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights, contrary to the obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR.

(3) In so doing:

(a) the Tribunal must determine the reasonably foreseeable consequences of deprivation; but it will not be necessary or appropriate for the Tribunal (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom; and

(b) any relevant assessment of proportionality is for the Tribunal to make, on the evidence before it (which may not be the same as the evidence considered by the Secretary of State).

(4) In determining proportionality, the Tribunal must pay due regard to the inherent weight that will normally lie on the Secretary of State's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159. Any period during which the Secretary of State 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 by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of EB (Kosovo) [1] .

(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has 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) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3) and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good.

DECISION AND REASONS

A. INTRODUCTION

1.
The appellant appeals under section 40A(1) of the British Nationality Act 1981 against the respondent's decision of 6 September 2018 to deprive him of his British citizenship, pursuant to section 40(3) of that Act. The appellant arrived in the United Kingdom in 1996, claiming to come from Kosovo, using a false name. In May 1999, the appellant was granted refugee status on those false details. On 4 November 2003, he became a British citizen, in the false name and Kosovan identity.

2.

In 2005, the appellant returned to Albania in order to marry an Albanian citizen, who subsequently applied for entry clearance to join the appellant in the United Kingdom. In November 2005, the appellant's wife was interviewed at the British Embassy in Tirana, subsequently being given entry clearance to join the appellant, who was still known by his false name.

3.
In 2007, the appellant's wife was granted indefinite leave to remain. In order to support his wife's application for such leave, the appellant submitted to the respondent his Albanian birth certificate, marriage certificate and Albania n family certificate, showing that he was an Albanian national.

4.
In July 2008, the appellant changed his name by deed poll from his false name to his real name and a passport was re-issued in his real name, though the appellant's place of birth was still recorded as Pristina, Kosovo.

5.
In October 2008, the appellant sponsored the entry clearance of his mother to the United Kingdom, using the 2008 British passport, with the place of birth recorded as Pristina, Kosovo. His mother, however, provided evidence in the form of an Albania n family certificate , showing that the appellant was born in Durres, Albania. At this point, the British Embassy in Tirana alerted the respondent to th e problematic state of affairs.

6.
In February 2009, the appellant's wife became a British citizen. The previous year, she had bor ne the appellant a son, who is also a British citizen.

7.
On 14 March 2013, the appellant was issued by the respondent with a "nullity decision" on the basis that he had falsified elements of his identity when he applied for British citizenship. Acting on the basis of the law as it was understood to be at that time, the respondent's stance was that, because of the appellant's deceit, the grant to him of British citizen ship had been of no effect.

8.
In Hysaj and Others v Secretary of State for the Home Department [2017] UKSC 82 ; [2018] Imm AR 699 , the Supreme Court held that the scope of the "nullity" principle was narrower than the respondent considered it to be. Accordingly, in February 2018, the appellant was advised by the respondent that the latter was considering depriving the appellant of his British citizenship, as a result of fraud, false representation or concealment of a material fact. On 6 September 2018, the respondent decided to deprive the appellant of his British citizenship.

B. THE APPEAL

9.
The appellant's appeal against that decision was heard at Taylor House on 13 May 2019 by First-tier Tribunal Judge Rai. In a decision dated 18 July 2019, Judge Rai dismissed the appellant's appeal. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal and , following renewal, by the Upper Tribunal. The Upper Tribunal's refusal of permission was, however, quashed, following a judicial review in the High Court. Permission to appeal to the Upper Tribunal was granted by the Vice President on 4 March 2021.

10.

Although the hearing on 30 June 2021 was notified to the parties as being “for mention” only, both Ms Foot and Mr Walker had framed their written and oral submissions by reference to the issue of whether there was an error of law in the decision of First-tier Tribunal Judge Rai, such that th e decision should be set aside. Both parties were content for the Upper Tribunal to proceed on that basis. Accordingly, what follows is our decision on that issue.

11.
At the time of the judicial review proceedings in the High Court, the decision of the Upper Tribunal in Hysaj (deprivation of citizenship: delay) [2020] UKUT 00128 (IAC) ; [2020] Imm AR 1044 was the subject of a renewed application for permission to appeal to the Court of Appeal. Subsequently, however, that renewed application was dismissed by the Court of Appeal.

12.
As a result, the present appellant no longer seeks to pursue his argument that First-tier Tribunal Rai erred in law in effectively discounting the delay occasioned by the respondent’s decision to treat the grant of British citizenship to the appellant as a nullity, as a result of which delay the appellant lost the opportunity to benefit from the respondent’s previous policy whereby she would not normally impugn the grant of British citizenship to a person who had been resident in the United Kingdom for at least fourteen years.

13.
The appellant, nevertheless, submits that, even accounting for the respondent’s reliance on her nullity decision of 14 March 2013, she still failed to act on the appellant’s fraud for almost eight years after first being put on notice of it in 2005, as a result of the entry clearance application of the appellant’s wife. This delay is said to reduce the public interest in depr i vation , when considering if the decision to deprive would be a disproportionate interference with Article 8 ECHR . Had First-tier Tribunal Judge Rai approached the matter in thi s way , the appellant’s appeal could have been allowed on Article 8 grounds.

14.
Before we embark upon our analysis of th is submission, it is necessary to establish the overarching law regarding deprivation of citizenship.

C. THE LAW REGARDING DEPRIVATION OF CITIZENSHIP

15.
In KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Leggatt LJ set out the following principles as applicable in an appeal under section 40A of the 1981 Act:-

“6. P ursuant to section 40A(1), a person who is given such a notice may appeal against the decision to the First-tier Tribunal. The task of the tribunal on such an appeal has been considered by the Upper Tribunal (Immigration and Asylum Chamber) in a number of cases including Deliallisi (British Citizen: deprivation appeal; Scope) [2013] UKUT 439 (IAC) and, more recently, BA (deprivation of citizenship: Appeals) [2018] UKUT 85 (IAC) . I would endorse the following principles which are articulated in those decisions and which I did not understand to be in dispute on this appeal:

(1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.

(2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.

(3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection.

(4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation .

(5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently. ” (O ur emphasise s)

16.
As Underhill LJ observed in Laci v Secretary of State for the Home Department [2021] EWCA Civ 769, the second sentence in sub-paragraph (4) of paragraph 6 of KV must be read as subject to the judgment of the Court of Appeal in Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884 ; [2019] Imm AR 264 . In Aziz , Sales LJ held that “at least in the usual case” it was “neither necess a ry nor appropriate for a tribunal considering the deprivation question to conduct a ‘ proleptic assessment ’ of the likelihood of a lawful removal” (paragraph 26). To this extent, therefore, the determination of the reasonably foreseeable consequences of deprivation must, usually, exclude the issue of removal.

17.
In addition and more fundamentally , Leggatt LJ’s statement of principles must now be read in the light of the judgment of Lord Reed in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 ; [2021] Imm AR 879 . Although Lord Reed was considering the nature of an appeal to the Commission under section 2B of the Special Immigration Appeals Commission Act 1997, that provision is the equivalent of section 40A and we see no reason to distinguish between those provisions for present purposes.

18.
The essence of Lord Re e d’s conclusions on this issue was helpfully synthesised by Underhill LJ in paragraph 40 of La c i . Where Article 8 of the ECHR is engaged, the Tribunal must “determine for itself whether the decision was compatible with the obligations of the decision-maker under the Human Rights Act 1998”. In so doing, the Tribunal must pay due regard to the inherent weight that will normally lie on the respondent’s side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

19.
Irrespective of whether Article 8 (1) is engaged , the Tribunal must also determine whether the respondent’s discretionary decision under section 40 (2) or (3) to deprive the individual of his or her

British citizenship was exercised correctly. Here, however, Lord Reed has held that the correct approach is not to undertake a “balancing” exercise in which one set of scales will normally carry an inherent weight . Rather, the Tribunal must approach its task by reference to what are “essentially Wednesbury principles”. The importance of Lord Reed’s judgment is such that the following passages from it merit citation in full :

68. … appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 . They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

69. For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC’s jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State’s exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant’s Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State’s statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State’s assessment may not be justiciable, as Lord Hoffmann explained in Rehman . Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in Rehman and Lord Bingham of Cornhill reiterated in A , para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State’s assessment should be accorded appropriate respect, for reasons

both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in Rehman and Lord Bingham reiterated in A , para 29.

71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in Rehman and Lord Bingham reiterated in A . In reviewing compliance with the Human Rights Act, it has to make its own independent assessment.

20.
Since the judgment of Lord Bingham in EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159 ; [2008] Imm AR 713 , it has been recognised that delay on the part of the respondent in reaching a decision in an individual's case can affect the outcome of an appeal brought by the individual on the ground that removal would violate Article 8. It can do so in one or more of the following ways, articulated by Lord Bingham at paragraphs 13 to 16:

(1) The longer an applicant remains in the country the more likely they are to develop close personal and social ties and put down roots of a kind which deserve protection under Article 8;

(2) The more time goes by without any steps being taken to remove an applicant, the more the sense of impermanence which will imbue relationships formed earlier in the period will fade "and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so", which may affect the proportionality of removal.

(3) Delay may "reduce the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes".

21.
La ci is an example of how the respondent's delay may result in an individual succeeding in their section 40A appeal on Article 8 grounds. The relevant fact s were set out by Underhill LJ as follows:-

"5. On 16 May 2005 the Appellant applied for British nationality, which was granted on 22 August 2005. In his application (and in the previous application for ILR) he again gave the same false date of birth and details of his nationality that he had given when he applied for asylum. He also gave false details about his parents' nationality. His evidence to the FTT was that he felt locked in to the lies that

he had told originally. He says in his witness statement that he was very ignorant and naïve at the time but that he now understands the seriousness of his deception and that there is no excuse for it.

6. On 17 February 2009 the UK Border Agency wrote to the Appellant saying that the Secretary of State had reason to believe that he had obtained his status as a British citizen by fraud and that she was considering whether he should be deprived of his nationality under section 40 (3) of the 1981 Act. It asked him to provide any evidence that he was in fact born in Kosovo and any other matters which he wished the Secretary of State to take into account in reaching a final decision. UKBA's letter does not state the basis of its (correct) belief that the Appellant had obtained his naturalisation by fraud, but it was common ground that it derived, albeit rather late, from information supplied two years previously by his mother in support of an application (which was granted) for entry clearance to visit him in the UK. His evidence in the FTT, which appears to have been accepted (see para. 43 below), was that both he and his family had been unhappy about his having given false details in order to claim asylum and thereafter, but that he did not know how to go about disclosing the truth; and that he accordingly agreed that his mother should supply his correct details with her application "and then we would see what happens". That falls a long way short of making a clean breast of his deception, but the fact remains that he was responsible for providing the information that led to it being discovered.

7. The Appellant's then solicitors replied to UKBA on 17 March 2009. They admitted what he had done but advanced the arguably mitigating circumstances noted above, together with other reasons why the Secretary of State ought not to deprive the Appellant of his citizenship notwithstanding the deception.

8. Remarkably, the Appellant heard nothing further from the Home Office for nine years, and he got on with his life on the basis that a decision had been taken not to pursue the matter. As he put it in his witness statement in the FTT, "months and years went by and I believed the Home Office was not taking any further action". He had since 2006 worked for the London Borough of Islington as a payroll officer. He continued in that role (as he does to this day) and obtained a qualification from the Association of Accountancy Technicians. In due course he became a senior payroll officer, and an excellent reference from the Deputy Payroll Manager was in evidence before the FTT. In April 2014 he bought a flat in London. In 2016 he applied for and was issued with a new British passport following the expiry of his original one.

9. In June 2013 the Appellant married an Albanian national who was studying in the UK. In March 2018 she was granted indefinite leave to remain, following an application in which she gave the Appellant's correct date and place of birth. Also in March 2018 they had a son. He is a British national by virtue of the Appellant's nationality. (I mention for completeness that they have recently had another child, but that is not relevant to the issues before us.)

10. On 28 February 2018, the Home Office wrote to the Appellant, out of the blue, again notifying him that the Secretary of State was considering depriving him of his British citizenship on the basis that it had been obtained by fraud and asking him for any further information that he wished her to take into account in reaching a final decision. It makes no reference to UKBA's letter of 17 February 2009 or to his solicitors' then reply. (It also contains a paragraph stating that if he was deprived of his British nationality he would not be able to resume his previous refugee status; but that is misconceived since he had been refused asylum.)

11. The Appellant's (new) solicitors replied on 21 March 2018 advancing arguments against the deprivation of his citizenship.

12. On 9 April 2018 the Home Office wrote the Appellant a further letter in mostly the same terms as the letter of 28 February, to which, and to his solicitors' reply, strangely it makes no reference. The letter does, however, refer to the correspondence in 2009. It says that the Appellant's solicitors' letter of 17 March 2009 would be considered, but that an opportunity was being given to him to provide further information because of the passage of time. In that context it refers to the fact that the "finalisation" of decisions in cases under section 40 (3) had been "impacted" by the need to monitor a number of appeals in other such cases which had been lodged in October 2009 and had only been finally determined in the Supreme Court in December 2017. This is a reference to the Hysaj group of cases to which I will refer later and is evidently intended as an explanation of the delay.

13. On 22 June 2018 UK Visas and Immigration ("UKVI") wrote to the Appellant giving formal notice, pursuant to section 40 (5) of the 1981 Act, of the Secretary of State's decision to deprive him of his British citizenship under section 40 (3). It is against that decision that the Appellant appealed to the FTT. ”

22.
The First-tier Tribunal Judge in Laci found that the delay in that case meant “the public interest in depriving the appellant of citizenship is significantly reduced” (paragraph 20 of the decision). Underhill LJ dealt with the matter as follows:-

“49. The Judge referred to the delay as "unexplained". In one sense that is not quite accurate, because the Home Office's letter of 9 April 2018 does refer, albeit in opaque terms, to the uncertainties caused by the Hysaj litigation (see para. 19 above). However he was no doubt referring to the fact that neither that nor any other explanation was offered to the Appellant at any time during the nine-year period. That is important: the impact of the delay would evidently have been different if the Appellant had been told when the Hysaj issue first emerged that the Secretary of State was deferring a decision in his case until it was resolved. Having said that, it does not necessarily follow that the delay would have been excusable. The Judge records Mr Jafar's submission that there had been no reason to await the outcome of the Hysaj proceedings because the Secretary of State had not in the Appellant's case sought to treat the naturalisation decision as a nullity. Mr Malik told us, on instructions, that the Secretary of State's approach had been to defer a decision in all cases in which, until the law was clarified, the Appellant's naturalisation might have been a nullity. Whether that was a legitimate approach was not explored before us, but it does not appear from the Reasons that that explanation was offered to the FTT, in which case the delay not only was not explained to the Appellant at the time but was also not explained to the Judge.

50. I turn to the factors weighing against deprivation. Those which the Judge appears to have taken into account are as follows: I have enumerated them separately, in the order in which they appear, though there may be a degree of overlap.

51 . The Secretary of State's inaction. This is the point made in the first half of para. 17. It is important to appreciate that this is not simply a case where the Secretary of State could have taken action but did not do so. Rather, it is a case where she started to take action and invited representations, but then, having received those representations, did nothing for over nine years. Indeed it goes beyond mere inaction: as the Judge expressly notes, she took the positive step of renewing the Appellant's passport in 2016. During that period the Appellant had accordingly come to believe that the Secretary of State had decided not to proceed with depriving him of his citizenship: the Judge does not say this in terms, but that had been the Appellant's evidence (see para. 8 above), and it was common ground that he was an honest witness. That understanding, on the part of a

layperson, was hardly unreasonable and would have been further confirmed by the renewal of his passport. There is arguably an overlap between this factor and the Judge's identification of delay as a reason going to diminish the public interest in depriving the Appellant of his citizenship, but that is unobjectionable: it is often a matter of choice whether to treat a factor as adding to the weight on one side of the balance or as reducing it on the other. (It was not suggested that any such overlap here led to the Judge's reasoning being vitiated by double-counting.) ”

23.
At paragraph 76, Underhill LJ examined the delay in making the deprivation decision in Mr La c i’s case by reference to the three points made by Lord Bingham in EB (Kosovo) (paragraph 20 above). Having found that the first point did not apply and that the second did so only faintly, he continued:

“ Lord Bingham's third point does potentially apply, because it goes to reduce the weight of the public interest involved; and that is consistent with how the FTT treated the delay in this case. I do not think it is necessary to treat his reference to the delay being "the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes" as definitive of the kinds of case in which delay may be relevant: he clearly had in mind the facts of EB (Kosovo) itself. Lady Hale put it rather more generally: the delay in this case was, in Lady Hale's words, prolonged and (on the case as presented before the FTT) inexcusable. ”

24.
At paragraph 78, Underhill LJ distinguished between delay of the kind discussed by the Upper Tribunal in Hysaj ; that is to say, delay which arose from the respondent’s decision to pursue the “nullity” route, until the Supreme Court judgment and, on the other hand, delay that, upon analysis, cannot properly be attributed to the issue of nullity:-

“78. I should note that the UT in Hysaj rejected an argument based on delay: see paras. 46-63 of its Reasons. But the facts were very different. Although there was a delay of much the same length as in this case between the Secretary of State's original notification that she was considering depriving the appellant of his British citizenship and her eventual decision, much of that period was spent pursuing the ultimately unsuccessful nullity alternative. There was no suggestion that the appellant (who was also for part of the period serving a prison sentence) ever understood that the Secretary of State was not pursuing any further action, let alone anything equivalent to the period of nine years' silence in this case (and the renewal of the Appellant's passport). Rather, the issue in the UT was whether the Secretary of State was disentitled to pursue deprivation under section 40 (3) because of her wrong-headed pursuit of the nullity option. ”

25.
So far as concerns disruption to day-to-day life caused by loss of citizenship, Underhill LJ at paragraph 80 approved the finding of the Upper Tribunal in paragraph 110 of Hysaj , which reads:-

"There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured."

26.

In approving that passage, Underhill LJ pointed out that it was “important to note the ‘without more’ ” in paragraph 110 of Hysaj . He held that “where there is something more (as, here, the Secretary of State’s prolonged and unexplained delay/inaction) , the problems that may arise in the limbo period may properly carry weight in the overall assessment ” .

27.
All of this caused Underhill LJ, on balance “and not without hesitation” to accept that the First-tier Tribunal was entitled to regard the respondent’s inaction “wholly unexplained at the time and for so extraordinary 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”. In so saying, Underhill LJ recognised that :-

“ not every tribunal would have reached the same conclusion as the FTT in this case. However, that is not the test. We are concerned with the exercise of a judicial discretion, and it is inevitable that different judges will sometimes reach different conclusion s on similar facts . ” (paragraph 8).

28.
Whether or not one considers the proportionality balancing exercise in Article 8(2) as involving the exercise of judicial discretion, it is a mixed question of fact and law leading to the making of a value judgment. As such, different judges can validly reach different conclusions by reference to the same or similar facts.

D. THE LEGAL PRINCIPLES REGARDING APPEALS AGAINST DECISIONS TO DEPRIVE A PERSON OF BRITISH CITIZENSHIP

29.
Before returning to the present case, we shall attempt to re formulate the principles articulated by Leggatt LJ in KV (Sri Lanka) in a way which takes account of Aziz , R (Begum), Hysaj (deprivation of citizenship: delay) and Laci . In the light of Lord Reed’s judgment in Begum , the re formulation needs to highlight the fact that , in practice, where there is no issue regarding the conditions precedent mentioned in Leggatt L J ’s original principle (3) , the Tribunal’s starting point is highly likely to be the ECHR and the compatibility of the Secretary of State’s deprivation decision with her obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with a Convention right. If that issue is determined in favour of the appellant, then the appeal must be allowed. Otherwise, the Tribunal will consider whether to allow the appeal , according to the principles set out in paragraphs 6 8 to 71 of the judgment of Lord Reed in Begum .

30.
Our reformulation is as follows.

(1) The T ribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the 1981 Act exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the T ribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum , which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

(2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the E CHR are engaged (usually Article 8) . If they are, the T ribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights , contrary to the obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR .

(3) In so doing :

(a) the T ribunal must determine the reasonably foresee able consequences of deprivation ; but it will not be necessary or appropriate for the Tribunal (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom ; and

(b) any relevant assessment of proportionality is for the Tribunal to make , on the evidence before it (which may not be the same as the evidence considered by the Secretary of State) .

(4) In determining proportionality, the Tribunal must pay due regard to the inherent weight that will normally lie on the Secretary of State's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a disproportionate interference with Article 8, applying the judgment of Lord Bingham in EB (Kosovo) . Any period during which the Secretary of State 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 by reference to the second and third of Lord Bingham's points in EB (Kosovo) (see paragraph 20 above).

(6) If deprivation would not amount to a br each of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted ; has taken into account some irrelevant matter ; has disregarded something which should have been given weight ; has been guil t y of some procedural impropriety ; or has not complied with section 40(4) (which prevents the Secretary of S tate from making a n order to deprive if she is satisfied that the order would make a person stateless) .

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3) and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good .

E. THE DECISION OF THE FIRST-TIER TRIBUNAL

31.
In the present case, First-tier Tribunal Judge Rai made findings on delay that w ere adverse to the appellant :

"37. A relevant issue submitted by Ms Foot for me to consider was whether the delay by the respondent in addressing deprivation meant the appellant could not benefit from the respondent's policy in force between February 2009 and August 2014. The policy stated those who had been resident in the UK for 14 years were not normally deprived of their citizenship. I do not agree with this submission. The respondent first wrote to the appellant stating his intention to consider depriving him of his citizenship in 2009. At that time, he identified the fraud and went on to make a nullity decision in 2013. The appellant did not seek to judicially review the decision at the time, which he

states he did not receive as his solicitors had gone into administration. The appellant did not contact the respondent to find out any further information. The delay thereafter was caused, partly by a change in the law, resulting in the respondent withdrawing the nullity decision and replacing it with a deprivation of citizenship decision. Throughout, the respondent made clear his intention, that as a result of fraud committed by the appellant, he intended to take action."

32.
The reference in paragraph 37 to a "change in the law" needs to be read with caution. The law did not change as a result of the judgment of the Supreme Court in Hysaj. Rather, in accordance with established legal principles, the Supreme Court identified an error in the way in which the Secretary of State had understood the law. Nothing material turns on this, however.

33.
At paragraph 37, Judge Rai was considering whether the respondent should have exercised her discretionary power of deprivation differentl y. Compatibly with the principles set out in paragraph 30 above, this means that the judge must have concluded that the delay in the present case was not such as to diminish the weight to be given to the factors weighing in the Secretary of State's favour for the purposes of Article 8(2) of the ECHR . Having regard to the late st case law, p aragraph 37 contains an approach to delay that was perfectly legitimate.

34.
T here is , in any event, a clear difference between the delay in the present case and th at in Laci . Despite Ms Foot's able submissions, we find that Judge Rai was entitled to place no significant weight, in favour of the appellant, upon the period between November 2005, when the appellant's wife was interviewed by the British Embassy in Tirana , and 2013, when the appellant was issued with the nullity decision. There is no indication that the British Embassy drew the respondent's attention to anything untoward arising from the entry clearance interview with the appellant's wife. In 2007, it is true that the appellant submitted his Albanian birth certificate, in support of his wife's application for indefinite leave to remain. The appellant was , however, still operating under his false name. Furthermore, when the appellant was re - issued with his British passport, in 2008, his place of birth was still recorded as Kosovo, even though he had by then reverted to his real name.

35.
In short, during this period the true facts were still being materially obscured by the appellant. The position can be said to have changed only in October 2008, when the appellant sponsored his mother's application for entry clearance . This resulted in her providing the British Embassy with her Albanian family certificate, which led the E mbassy to alert the respondent. At most, only some four years five months elapsed between this alert and the decision in March 2013 to issue the appellant with a nullity decision.

36.
Bearing in mind what Underhill LJ said in Laci , Judge Rai was undoubtedly entitled to find that any delay on the part of the respondent i n the present case did not have the effect of diminishing the respondent's reliance upon the public interest ; or in increasing the weight to be given to the appellant's case, such as, in either event , to entitle the appellant to succeed under Article 8.

F. DECISION

37.

We accordingly find that the decision of the First-tier Tribunal does not contain an error of law, such as to make it appropriate to set the decision aside. The appellant's appeal is, accordingly, dismissed.

Signed

Mr Justice Lane

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

6 September 2021

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[1] (2) The more time goes by without any steps being taken to remove an applicant, the more the sense of impermanence which will imbue relationships formed earlier in the period will fade "and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so", which may affect the proportionality of removal.

(3) Delay may "reduce the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes".