In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/5698/2019

In the matter of an application for Judicial Review

The Queen on the application of
Gjon Matusha

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE The Hon. Mr Justice Lane, President and Upper Tribunal Judge Canavan

UPON considering all documents lodged and having heard Ms S. Naik and Ms H. Foot of counsel, instructed by Alexander Shaw Solicitors, for the applicant and Mr B. Seifert of counsel, instructed by GLD, for the respondent at a hearing on 27 April 2021.

AND UPON handing down the judgment at a hearing on 17 June 2021.

AND having considered the applicant's written submissions in support of an application for permission to appeal to the Court of Appeal.

IT IS ORDERED THAT:

Substantive decision

(1) The application for judicial review of the respondent's decision dated 15 August 2019 is refused for the reasons given in the attached judgment.

Costs

(2) The applicant shall pay the respondent's reasonable costs, to be assessed if not agreed.

Permission to appeal to the Court of Appeal

(3) Permission to appeal to the Court of Appeal is refused because there are no arguable errors of law in the Upper Tribunal decision.

Ground 1

(4) The applicant seeks to appeal the Upper Tribunal's refusal of permission in relation to the technical point pleaded in the first of the original grounds. It is not necessary

to apply for an extension of time for permission to appeal because the applicant can only apply for permission when a decision that disposes of immigration judicial review proceedings is handed down at a hearing: see rule 44(4A) The Tribunal Procedure (Upper Tribunal) Rules 2008. Consistent with the shifting sands of argument in this case the applicant relies on a different point that was not pleaded in the original grounds. It is difficult to see how the Upper Tribunal could have erred in refusing permission when the point relating to a potential break in continuity of leave was never argued at permission stage. In any event, it would be open to the applicant to argue in any future application for ILR that there was no break in leave in view of the agreed terms of the original consent order and the concession made by the respondent to UTJ Pitt, that the first revocation decision 'no longer has legal force'.

Ground 2

(5) It is not arguable that the Upper Tribunal erred in law in assessing whether the deception was directly material to the grant of leave under the Legacy Programme. The ongoing deception repeated in the correspondence accompanying the Legacy Questionnaire could not have been anything other than directly material when Chapter 53 required caseworkers to consider 'any evidence of deception practiced at any stage in the process'. The Upper Tribunal explained in detail how and why the ongoing deception plainly would have made a material difference to the outcome of the decision had it been known. At [60] the Upper Tribunal concluded that there was a 'direct link' between the applicant's continued deception about his nationality and age and the grant of leave to remain under the Legacy Programme.

(6) It is not arguable that 'failure to disclose a material fact' is insufficient to meet the condition precedent in section 76(2)(a) NIAA 2002. To characterise the applicant's actions merely as a failure to disclose a material fact is misleading in circumstances where he accepts that he lied about his age and nationality i.e. it was not an innocent omission nor a mere failure to disclose a material fact. The applicant actively and dishonesty claimed to be a Kosovan child to deceive the respondent and repeated the lie on several occasions. The fact that this lie included a failure to disclose his true identity did not make it any less of a deception that would engage section 76(2)(a).

Ground 3

(7) The last ground fails to refer to the correspondence with the respondent prior to the hearing nor provides a copy of that correspondence if it is not in the bundle. The Upper Tribunal was entitled to rely on the position stated by Mr Seifert in his skeleton argument, that the respondent did not consider that permission was granted to argue this further point. Mr Seifert did not expressly withdraw this argument at the hearing. Even if there had been an agreement between the parties that the point should be argued, it is a matter for the Upper Tribunal to decide whether it is distinct, and whether permission had been granted to argue it. In any event, the Upper Tribunal went on to make findings on the submissions that were made. The last ground fails to identity any material errors of law in those findings.

Anonymity

(8) The applicant began judicial review proceedings to challenge the first revocation decision in February 2019. It appears that no application was made for anonymity in those proceedings. This claim was filed in November 2019 yet no application for anonymity has been made until the eve of the hand down. This is not a case where

the question of the applicant's dishonesty is in dispute. The applicant accepts that he lied about his nationality and age and must have understood that the issue would be discussed in any published judgment. Had anonymity been of sufficient importance to the welfare of his child it is reasonable to assume that an application could and should have been made at a much earlier stage. The fact that the application is made at the eleventh hour does not necessarily preclude an order being made if there are good reasons to do so. However, the application makes nothing more than a general assertion that public exposure of the applicant's dishonest actions would be contrary to the best interests of the child without particularising how or why it might affect the child when he is only mentioned obliquely and is not named in the decision. Open justice is the norm unless there are good reasons to make an order, but insufficient reasons have been given to justify an order in this case.

(9) The application for an anonymity order is refused.

Signed: M.Canavan
Upper Tribunal Judge Canavan

Dated: **17 June 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR/5698/2019 (V)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

17 June 2021

Before:

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE CANAVAN

Between:

THE QUEEN
on the application of
GJON MATUSHA

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ms S. Naik QC and Ms H. Foot
(instructed by Alexander Shaw Solicitors), for the applicant

Mr B. Seifert
(instructed by the Government Legal Department) for the respondent

Hearing date (remote hearing by video conference): 27 April 2021

J U D G M E N T

Judge Canavan:

1. This judgment considers the respondent's power to revoke Indefinite Leave to Remain (ILR) under section 76(2)(a) of the Nationality, Immigration and Asylum Act 2002 (as amended) (NIAA 2002) and the associated policy guidance, Revocation of Indefinite Leave (Version 4.0) (19 October 2015), in the case of a person who was granted ILR under the Legacy Programme i.e. under an operational programme.

2. The applicant seeks to challenge the respondent's decision dated 15 August 2019 to revoke ILR granted on 12 August 2010.

3. Due to the continued need to take precautions to prevent the spread of Covid 19 the hearing took place in a court room at Field House with counsel appearing by video conference and with the facility for others to attend remotely. We were satisfied that this was consistent with the open justice principle, that the parties could make their submissions clearly, and that the case could be heard fairly by this mode of hearing.

Background

4. It is necessary to set out the background to the case in some detail because it is important to understand the context in which the decisions to grant ILR and then to revoke it were made.

Asylum application

5. The applicant is a citizen of Albania who was born on 04 May 1980. He entered the UK illegally on 14 September 1999 with the assistance of an agent. He was 19 years old on arrival in the UK.

6. The applicant applied for asylum the following day, claiming that he was born in Kosovo on 04 May 1982. He accepts that he made false claims about his nationality and date of birth.

7. The policy framework in place at the time is not disputed. The widespread persecution of Kosovar Albanians in the years running up to and during the conflict that took place in 1998 and 1999 led to a rare situation whereby the respondent recognised ethnic Albanians from Kosovo as refugees or granted them temporary protection solely on account of their ethnicity. By the time the Immigration Appeal Tribunal considered the position in *Dyli (Protection – UNMIK – Arif – IFA – Art.1D) Kosovo CG** [2000] UKIAT 00001 the situation in Kosovo had changed, as had the respondent's policy. Hostilities ceased on 10 June 1999 on the same day that the United Nations Security Council passed resolution S/RES/1244. The NATO led Kosovo Force (KFOR) entered Kosovo and the United Nations Interim Administration Mission in Kosovo (UNMIK) was created. In light of these developments the respondent suspended consideration of asylum claims from the Republic of Yugoslavia (as it then was) but continued to grant Exceptional Leave to Remain (ELR) to asylum seekers who applied before 24 March 1999. On 13 September 1999 the Home Secretary announced a return to the usual position whereby claims would be considered on their individual merits.

8. The policy relating to claims by Kosovar Albanians had only just changed when the applicant entered the UK. It seems unlikely that he would have been aware of the change when he claimed asylum, and even if he was, there was still a far better chance of being granted leave on humanitarian grounds than if he had claimed asylum as an Albanian national. The most likely motive for the first deception was to increase his chance of being granted leave to remain at a time when many

genuine Kosovar Albanians had been recognised as refugees or were being granted ELR. The most likely motive for the second deception was to take advantage of the respondent's policy to grant limited leave to remain to unaccompanied asylum seeking children (UASC).

9. The asylum application was not considered promptly. The claim was refused on 27 March 2001, by which time the situation in Kosovo had stabilised. Even according to the false age given by the applicant he did not benefit from the UASC policy. It is said that an appeal was dismissed on 24 July 2001 and his appeal rights became exhausted thereafter.

10. The applicant failed to report to the respondent when required. It appears that he was listed as an absconder. The respondent's GCID notes from August 2010 record that no absconder action was taken. The decision letter claims that an enforcement visit did take place. Whether absconder action was taken or not, the applicant remained in the UK in the knowledge that he had no leave to remain and was liable to removal.

Legacy Programme

11. In July 2006 the respondent instigated the Case Resolution Programme, more commonly known as the Legacy Programme. We will not repeat the history here because details of the programme were outlined in the Administrative Court decisions of *Hakemi & Others v SSHD* [2012] EWGC 1967 (Admin) and *Geraldo & Others v SSHD* [2013] EWHC 2763 (Admin). In *Geraldo*, the broad purpose of the programme was summarised as follows:

> '39. The Case Resolution Programme or the Legacy Programme, was instigated by the government in July 2006 to deal with a vast backlog of unresolved asylum claims, that is to say for the most part failed asylum claims, some going back many years in which the unsuccessful claimant had neither been removed nor a decision made to grant him or her leave to remain in the UK on some basis other than the claimed refugee status either within the Immigration Rules or outside the Rules, and with many of whom the Home Office had lost contact. One of the problems was that as at July 2006 there were in the region of 400-450,000 electronic and paper records concerning such claims within the Home Office which had not been opened or reviewed (and indeed once the programme was under way further records came to be included, ultimately reaching a total caseload of some 500,000 – see the report of the Parliamentary Home Affairs Select Committee for April – July 2011) but which were recognised to be '*riddled with duplication and errors and cases of individuals who have since died or left the country or become EU citizens*', (to quote the statement of the then Home Secretary Dr John Reid MP to Parliament in July 2006). As Mr Neil Forshaw told me, until the exercise of going through the vast archive of assorted records was undertaken to identify how many cases remained to be dealt with, the true nature of the task undertaken under the programme could not be known.
>
> 40. The programme was an operational programme only. That is to say it was a programme designed to deal with the backlog, with its own internal priorities and procedures, but it was always made clear that

> the programme did not involve any kind of amnesty and that cases handled within the programme would have applied to them the same generally prevailing law and policy which applied to all other immigration and asylum cases, being handled within other units elsewhere within the UKBA. I say at once that none of the evidence before me supports the proposition that there was a discrete 'legacy policy' different from that applied to other, for example, failed asylum cases not within the programme, where consideration was being given to the grant of leave outside the Rules (on this aspect see further the decision of Burton J in Hakemi and Others [2012] EWHC 1967 (Admin). In other words the programme did not purport to create any new substantive rights or new basis for the grant of leave.'

12. A report prepared by the Independent Chief Inspector of Borders and Immigration, John Vine, in 2012[1] was 'highly critical' of the programme. Some of the findings were summarised in *Geraldo* as follows:

> '64. I should record that the Vine report referred to, does contain material understandably relied upon by the claimants as evidence of maladministration and administrative delay on the part of the defendant in dealing with cases which fell within the legacy programme and as explaining why in their particular cases the defendant never got round to opening their files before she did. Thus for example Mr Vine referred as at September 2011 (report para 5.124) to a backlog of 100,000 pieces of correspondence with some 28,000 pieces of post remaining unopened, and to the likelihood that many cases placed into the Controlled Archive at the end of the CRD had been done so incorrectly 'on the basis that the applicants and/or legal representatives had not replied to Agency correspondence when in fact they had'. I should add however that Miss Anderson does not accept that this material has any relevance to these individual cases, the boxes of unopened correspondence being peculiar to the short period of time in 2011, not relevant to these cases, when the work of the CRD was being transferred to the CAAU.
>
> 65. Further the report criticises the inadequacy of 'tracing steps' undertaken by the UKBA to trace 'absconders' (para 5.29), the failure of the Agency to follow up employer contact details held on applicants in order to trace 'applicants' (paras 5.54/5.55) and the further failure by the Agency to undertake '*any proactive work within CRD to locate and trace any of the individuals in our sample prior to placing these cases into the asylum controlled archive*' (5.21). This was said to be a serious failing. The Agency was also said not to be 'meeting the commitments it had made to carry out extensive checks in these cases' with the point being made that the Agency should have been much more proactive in undertaking data matching exercises to identify whether any of the individuals were known to other government departments (for example the Department of Work and Pensions (DWP) or the HMRC) or financial institutions (e.g. credit reference agencies). Mr Forshaw was cross-examined on these particular 'tracing' failures in the context of Mr Aroun who had been working up until 2008, with the suggestion he had been capable of being traced between 1998 – 2008 through the DWP. Mr Forshaw's evidence was however that the tracing requirements referred to,

[1] An inspection of the UK Border Agency's handling of legacy asylum and migration cases (March-July 2012)

> were linked to the controlled archive and were steps undertaken to confirm that a person could be put in the archive as an untraced person whereas none of the claimant's cases were placed in the controlled archive. Moreover Miss Anderson made the further point that none of this material could have any relevance to Mr Aroun who, on the evidence referred to by Mr Bray, was never in the CRD cohort of cases until he got in touch again after some 10 years, his entry into the UK predating the CRD database (and possibly also because he had been treated as a marriage case and not an asylum case at his own request).'

13. Ms Naik referred to other aspects of the Vine report. She submitted that the nature of the programme meant that the respondent could not use the mere fact that the applicant was an absconder or that there was a long period of non-compliance due to Home Office delay to say that he should not have been granted ILR. The purpose of the programme was to resolve a large number of cases of failed asylum seekers. The respondent was prepared to 'overlook adverse behaviour' when considering cases under the programme. The evidence pointed to 'flexible consideration' of the character and conduct assessment under paragraph 395C of the immigration rules. She said that the Vine report showed that there was no coherent policy on how to approach the assessment, but the report indicated that a delay of about 6-8 years was likely to be sufficient to consider granting leave. At 5.88 the report set out some of the criteria used in the decision-making process. They are consistent with the guidance outlined in Chapter 53, which was the guidance caseworkers followed when considering a case under paragraph 395C. Figure 13 of the Vine report listed some of the assessment indicators as follows:

    1. Criminal convictions over threshold?
    2. Any activities meriting exclusion from the UK?
    3. Agency delay has contributed to a period of residence over 4 years?
    4. If evidence of previous non-compliance, is this outweighed by length of residence and recent compliance?
    5. Any evidence of connections to the UK?
    6. Limited prospect of enforcing removal?

14. Although the Vine report indicates that in a large numbers of cases considered under the Legacy Programme people were granted leave, and that on some occasions serious non-compliance was either missed or not given sufficient weight, it is clear from some of the figures outlined in the report that the programme was not an amnesty. The number of refusals was not insignificant. We were not referred to any evidence giving the overall statistics for grants and refusals, but Figure 12 of the Vine report took a sample of cases from April 2011 to February 2012. At the beginning of that period refusals amounted to 21% of the total although the figure dropped to 9% by the end of that period. In *Geraldo*, the court noted the following figures:

> 'By the time the CRD was wound up in 2011, HASC in its report of April-July 2011 (published November 2011) noted a final position of '500,500' records of which 479,000 cases were said to be 'concluded' of which 172,000 had been granted 'leave to remain', 37,500 had been removed, and 268,000 were 'others' which included duplicate records, errors or cases in the 'controlled archive' which then then stood at 98,000 to which

> 500 would be added if not traced within 6 months. 3,000 stood to be granted subject to security checks.'

15. The Legacy Programme did not operate as an application for leave to remain. Those who were eligible for consideration under the programme were supposed to be invited to complete a questionnaire for Home Office caseworkers to consider. In this case the GCID notes recorded that the file was sent 'to Layby' on 01 October 2005. They record no further action until 16 June 2009 when the note stated:

> 'Received letter from subject dated (20/03/09) Progress update requested and complained we have not acknowledged his previous correspondence dated (29/12/08) which enclosed a completed legacy questionnaire.'

16. The hearing bundle contains a copy of an undated letter from the applicant. It is reasonable to infer from the content that it was likely to be the letter dated 29 December 2008 referred to in the GCID notes. The applicant outlined the false nationality and date of birth given in his original asylum claim. The opening paragraph of the letter suggests that the applicant instigated the approach to the Home Office although it is likely that he would have been eligible for consideration under the Legacy Programme in any event.

> 'As you are aware, the Secretary of State for the Home Department announced Legacy in July 2006. I wish to apply for my leave to remain in the United Kingdom in line with the Legacy announced by the Secretary of State for the Home Department.'

17. The applicant enclosed a completed questionnaire and other supporting documents. The fact that the letter repeated the false identity in itself might not be that controversial had he then gone on to admit the deception, because those were the details under which he was known to the respondent. However, the applicant went on actively to maintain the deception by making a false representation that he still feared to return to Kosovo. The letter said:

> 'I also submit that the situation in Kosovo is still very unsettled and uncertain. In such a grave situation, my return from the United Kingdom to Kosovo will result in breach of my rights as guaranteed by the European Convention on Human Rights.'

18. There is no copy of the questionnaire to assess what other statements the applicant might have made, but it is clear from the cover letter that he continued the deception in, what he considered to be, an application for leave to remain under the Legacy Programme.

19. The Legacy Programme did not purport to set out any new substantive rights or a new basis for leave to remain. It was an operational exercise carried out within the existing framework of the immigration rules albeit with the broad objective of reducing the backlog of unresolved cases. The applicant was granted ILR on 12 August 2010. At that date, decisions were made within the framework of paragraph 395C of the immigration rules, which stated:

> 395C. Before a decision to remove under section 10 (the Immigration Act 1971) is given, regard will be had to all relevant factors known to the Secretary of State including:
> (i) age;
> (ii) length of residence in the United Kingdom;
> (iii) strength of connections with the United Kingdom;
> (iv) personal history, including character, conduct and employment record;
> (v) domestic circumstances;
> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
> (vii) compassionate circumstances;
> (viii) any representations received on the person's behalf.

20. The policy guidance in place at the relevant time was 'Chapter 53 – Extenuating Circumstances', which was last updated on 26 July 2010 (archived on 09 August 2010). The policy provided guidance to caseworkers on how to assess a case under paragraph 395C. At 53.1.1 the guidance began with general instructions on how to apply paragraph 395C.

> 'Before a decision to remove is taken on a case, the case-owner/operational staff must consider all known relevant factors (both positive and negative). ….. Removal should not be considered in any case which qualifies for leave under the Immigration Rules, existing policies or where it would be inappropriate to do so under this policy.
>
> Relevant factors are set out in paragraph 395C of the immigration rules and in the guidance below, **but this list is not exhaustive.** Additional factors to consider in relation to deportation / administrative removal of an individual as well as family members and civil partners are set out in paragraphs 365-367 of the immigration rules.'

21. At 53.1.2 the next section set out guidance about the factors to be considered under paragraph 395C. It began by making clear that it was a holistic assessment.

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

22. A person's age would be considered as well as their length of residence in the UK. The guidance recognised that, in general, the longer a person had lived in the UK, the stronger their ties would be. More weight would be attached to the length of time a child spent in the UK compared to an adult. The guidance stated that residence accrued as a result of non-compliance with the requirements of immigration control would weigh against an individual. There was also guidance on what weight should be given to a delay in decision-making when it led to the strengthening of private and family life ties to the UK. The assessment of non-compliance and delay in decision-making was focussed through the lens of the operational objectives of the Legacy Programme. However, the programme was not an amnesty and not all negative factors were waived. It is clear that the personal history of an applicant, including

evidence of deception, still formed part of the assessment. The guidance went on to state:

> '**Personal history** (**including character, conduct and employment record)**:
>
> When considering an individual's character and conduct, regard must be given to whether;
>
> - There is evidence of criminality that meets the Criminal Casework Directorate (CCD) threshold; or
> - The individual has been convicted of a particularly serious crime (below the CCD threshold) involving violence, a sexual offence, offences against children or a serious drug offence; or
> - There are serious reasons for considering that the individual falls within the asylum exclusion clauses; or
> - It is considered undesirable to permit the individual to remain in the UK in light of exceptional circumstances, or in light of their character, conduct or associations, or the fact that they represent a threat to national security.
>
> Caseowners must also take account of any evidence of deception practiced at any stage in the process, attempts to frustrate the process (for example, failure to attend interviews, supply required documentation), whether the individual has maintained contact with the UK Border Agency, as required, and whether they have been actively pressing for resolution of their immigration status. The caseowner must assess all evidence of compliance and non compliance in the round. The weight placed on periods of absconding should be proportionate to the length of compliant residence in the UK. For example, additional weight should be placed on lengthy periods of absconding which form a significant proportion of the individual's residence in the UK.'

23. It is clear that even if the assessment was viewed through the operational objective of the Legacy Programme, the nature and extent of any negative factors still formed part of an evaluative assessment of whether it was appropriate to grant leave to remain.

24. Negative factors relating to a person's immigration history might range in scale and seriousness. At the lower end of the scale a person might enter the UK with leave to enter, overstay their visa, but not carry out any other unlawful activities. Further up the scale a person might enter illegally and work without permission using false documents. Others may deliberately abscond. Others may actively falsify information and documents to support an application for leave to remain. Even more serious are those who become involved in fraud and serious criminality relating to the immigration system or who are convicted of other criminal offences.

25. Similarly, a range of circumstances might occur when considering the case of a failed asylum seeker. At the lower end of the scale might be a genuine claim which fails because the evidence shows that the person does not have a well-founded fear of persecution. Another person might come from a refugee producing country with the core of a genuine claim but embellish certain aspects of their account in a misguided attempt to improve their chances of protection. Others may gloss over the manner

in which they travelled to and entered the UK because it involved a journey through a safe third country or assistance from organised criminal networks.

26. At the more serious end of the scale are those who deliberately put forward what they know to be a false protection claim in a fraudulent attempt to obtain leave to remain in the UK. This might include a fabricated account, but could include lies about a person's nationality or age. The reason why this type of behaviour is so serious is because it exploits provisions designed to protect the most vulnerable and those in need of protection. A knowingly false claim to be a national from a refugee producing country undermines the integrity of the Refugee Convention and other international protection mechanisms. If false nationality claims are made in large numbers it might give rise to suspicion of genuine applicants from that country, making it more difficult for them to obtain protection. Policies and public services designed to support UASC are undermined by those who lie about their age to gain a greater level of support or a period of limited leave to remain to which they are not entitled. Public resources are wasted investigating and processing fraudulent claims.

27. In light of the above we find that Ms Naik's suggestion that the Legacy Programme was a 'concessionary scheme' is inaccurate. The operational objective was to resolve the large backlog of cases involving outstanding asylum claims and failed asylum seekers. When an assessment under paragraph 395C was focussed through that objective, in many cases less weight was given to certain acts of non-compliance and more weight may have been given to the length of time a person had been in the UK than usual. However, the character and conduct of a person was still a relevant factor in assessing a case under the Legacy Programme. The programme did not operate as a general amnesty regardless of a person's behaviour. The nature and extent of any negative factors were relevant to the exercise of discretion. Although many people who were liable to removal were granted leave to remain, the respondent retained discretion to refuse to grant leave under paragraph 395C in appropriate cases.

Legacy decision

28. As is the usual format for such letters, the decision to grant ILR under the Legacy Programme dated 12 August 2010 did not give reasons.

29. The GCID notes for the relevant period provide an indication of the reasons given by the caseworker for deciding to grant ILR. A note dated 12 August 2010 included a series of standard questions for consideration under paragraph 395C. The caseworker then inserted relevant information relating to the case. The notes summarised the application history. In a section relating to delay, the caseworker was asked to note whether in the case of a single applicant a delay in decision making may have contributed to residence of more than 6-8 years. The notes record that the applicant had resided in the UK for over 10 years. In relation to his character and conduct the notes said:

> 'Is the applicant of good character?
> YES
> Details (Include details of any exclusion decision, any concerns about their character, conduct or associations or any threat to national security)
> There is no evidence to suggest that Mr Matusha has been involved in activities that engage the refugee convention exclusion clauses, and has no criminal records. PNC returned clear.
>
> Has the applicant complied with UKBA?
> YES
> Details (Please detail evidence e.g. not attending an interview, failure to report, failure to co operate (sic) with re-documentation and periods of absconding)
> The applicant's reporting was set up for 18/08/03, applicant failed to show. However, the UKBA failed to initiate any absconder action against the applicant during or after that period.'

30. The notes went on to record that there was no barrier to his removal to 'Serbia'. When assessing the strength of the applicant's connections to the UK the notes indicate that the decision-maker proceeded on the assumption that he was a 'Serbian male' who 'arrived in the UK over 10 years ago'. The notes summarised the decision as follows:

> 'Decision:
> (After assessing all the evidence in the round briefly explain your decision)
>
> Mr Matusha has accumulated over a 10 year residence in the UK (sic). The UKBA has delayed enforcing removal of the applicant, since his ARE date of 24/07/01, adding to his length of residence in the UK. Although the applicant absconded, and failed to attend his reporting events, the UKBA failed to initiate any absconder action against the applicant during, or after that period.
>
> The applicants (sic) length of residence, is the compelling factor regarding this case, in justifying Mr Matusha remaining in the UK.'

31. The notes make clear that the caseworker made the decision based on the false information given to them by the applicant when he first claimed asylum. The decision was made in ignorance of a relevant fact, that the applicant lied about his nationality and age when he claimed asylum in 1999, and continued to maintain the deception in relation to his application for consideration under the Legacy Programme.

Naturalisation application

32. On 17 July 2013 the applicant applied to naturalise as a British citizen maintaining his false identity. The respondent made enquiries in Albania. Checks disclosed that he was likely to be an Albanian national born in Shkoder on 04 May 1980. The respondent wrote to the applicant on 10 September 2013 providing the outcome of the enquiries and gave him an opportunity to submit proof of his claimed identity.

33. The decision letter dated 15 August 2019, which is the subject of this challenge, stated that the applicant responded to the Home Office request for information on 24 September 2013 with a letter from the

Embassy of the Republic of Kosovo Consular Mission in London. The letter stated that he could only obtain a birth certificate and other registry documentation in Kosovo. This letter does not appear to be in the bundle, but it does not seem to be disputed that he provided evidence from the Kosovan Consulate in London. Even when presented with evidence of his true identity the applicant continued to maintain that he was Kosovan and tried to explain away his inability to produce evidence of the fact.

34. The respondent refused the application for naturalisation on 03 October 2013 with reference to the good character requirement:

> 'As you are unable to provide any such documentary evidence of your birth in Kosovo, we remain of the opinion (despite your correspondence of the 24 September 2013) that you have not been open and honest in your dealings with the Home Office and as a result your application has been refused as we do not consider that you meet the good character requirement for naturalisation.'

NTL application

35. The applicant met his partner in 2014. On 08 September 2015 he applied for a 'No Time Limit' (NTL) stamp to be placed in an Albanian passport issued in his true identity on 17 April 2015. He also submitted a current Albanian ID document, his Albanian birth certificate, and a copy of the UK travel document issued in his false identity which showed a number of visits to Albania.

36. The applicant prepared a witness statement in support of the application. Although the statement was presented as a declaration of his past 'mistakes' and stated that he wanted to 'take responsibility for my actions', in reality, the lies that the applicant told in his original asylum claim had already been exposed by the respondent in 2013. The motivation for the applicant to apply for an NTL to be endorsed in his Albanian passport was his desire to marry and start a family.

37. The applicant explained that he was young and impressionable when he arrived in the UK. He asserted that he had escaped a country that was coming out of a period of instability and 'in many respects was worse than Kosovo at the time'. He and many others sought to leave Albania for 'a more stable future and a safer way of life'. He travelled with a group of Albanians with the assistance of smugglers. His statement went on to give the following explanation:

> '6. Upon arrival to the UK the smuggling gangs referred us to a law firm where the Albanian translator for that law firm registered us as Kosovan nationals. The group and I were told that if we disclosed to anyone that we were Albanians then they would immediately get us deported. I was in constant fear and under immense pressure from the smugglers.
>
> 7. It was then on the 15th September 1999 that I went to Croydon and claimed Asylum as a Kosovan National. This was a decision that I have lived with for the next 16 years and it has not been easy to bear this burden and deny my own nationality. There hasn't been a day that I haven't regretted my decision but as a young man it became more

and more difficult to tell the truth and almost felt like I have to keep the pretence up for fear of repercussions.

8. I cannot continue living my life like this and want to start a family and settle down. I want to start a new chapter of my life with the right set of values and morals which I want to teach my children. I want to tell them the difference about right, wrong and building a platform for them to find their own identity and follow their path in life. Therefore in order for me to teach my children, first I must make amends for my mistakes and take responsibility for my actions.'

38. The respondent refused the application in a decision dated 13 July 2016. She outlined the applicant's immigration history and his repeated use of deception relating to his identity. The respondent concluded that the applicant knowingly practised deception to obtain ILR under the Legacy Programme. She refused to endorse the passport because it was in a different identity to the one in which the applicant was granted leave. The respondent retained his Albanian passport 'pending further investigations into his immigration status in the United Kingdom'.

Revocation decisions

39. Having known about the deception since 2013, and retained the applicant's passport pending further investigation in 2016, the respondent took no further action until 08 November 2018 when a decision was made to revoke ILR under section 76 NIAA 2002 ('the first revocation decision').

40. Section 76 was amended by the Immigration Act 2014 (IA 2014) to remove the requirement that a person could not be removed 'for legal or practical reasons'. The parties agreed that at the date of the relevant decision the applicable wording was as follows:

> **76. Revocation of leave to enter or remain**
> .....
> (2) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if –
> (a) the leave was obtained by deception.

41. The respondent's policy, Revocation of Indefinite Leave (Version 4.0) (19 October 2015) states at 1.3 that one of the policy intentions behind revocation is to 'instil public confidence in the immigration system by ensuring any abuse is tackled and dealt with accordingly'. Paragraph 3.2 says the following:

> '**3.2 Deception Cases**
> Section 76(2) gives the Secretary of State the power to revoke a person's indefinite leave to enter or remain in the UK where a person has obtained indefinite leave to enter or remain in the UK by deception.
> .....
> Deception has the same meaning as in paragraph 6 of the Immigration Rules. This means making false representations or submitting false documents (whether or not material to the application), or failing to disclose material facts.'

42. Section 4 of the guidance sets out four 'Reasons for not Revoking Indefinite Leave to Remain'.

> '**4.1 Passage of time**
>
> Length of time spent in the UK *may* constitute a reason for not revoking indefinite leave. It would only be relevant to cases under section 76(2) and 76(3). For cases under section 76(1) length of time spent in the UK will not constitute a bar to revocation of indefinite leave because it, and any other Article 8 considerations, will have been taken into account in deciding whether the person should be deported.
>
> What is of more relevance is the length of time that has passed since the incident(s) which is/are causing the review of a person's continuing entitlement to indefinite leave.
>
> For example, indefinite leave would not normally be revoked where the deception in question or where the person's travel to their home country occurred more than five years ago. Each case must be considered on its merits. The longer the person has been in the UK or, more crucially, the more time it has been since the incident, the less likely it will be appropriate to revoke ILR.
>
> **4.2 Genuine Mistakes/Errors**
>
> In deception cases, indefinite leave should not normally be revoked just because of minor errors in the application. For example, indefinite leave would not normally be revoked because the person has supplied an incorrect address or misspelt a name on their application form. However, deliberately providing false information because it is likely to result in a 'hit' or 'match' when checked against other Government departments or Agencies would normally be considered an attempt to deceive, as would providing a date of birth or nationality which is incorrect, in order to make a grant of leave more likely.
> ….
>
> The decision maker must assess the nature, extent and significance of the information which was either incorrectly supplied or omitted. There should be clear and justifiable evidence of deception and the deception was material to the grant of leave.
>
> **4.3 Previously Overlooked or Considered**
>
> Indefinite leave should not normally be revoked where the decision maker had the information available and either previously overlooked it, could reasonably be expected to act on it or considered it and granted anyway.
>
> Where the decision maker had the power/authority to grant leave and did so in error and if there was no deception by the applicant, it will not normally be appropriate to revoke the indefinite leave to remain or enter.
>
> **4.4 Compelling and Compassionate Circumstances**
>
> There may be exceptional circumstances in an individual case where it would not be appropriate to revoke a person's indefinite leave, notwithstanding the fact that they appear to fall within the remit of this policy.

Examples might include, but are not limited to, persons with serious mental health issues, victims of human trafficking or victims of domestic violence. Each case must be considered on its individual merits.'

43. Section 6 of the policy provides guidance on the 'Process for Referring and Considering Cases', including the following guidance about deception cases:

> **'6.2.2 Deception Cases**
>
> A person whose leave was obtained by deception will have this revoked under Section 76(2) and will, unless any other leave is granted, be liable to removal under Section 10(1). In such cases a person should normally be removed from the UK.
>
> Examples where removal may not be appropriate, but revocation should still be pursued include – but are not limited to – where a person has:
>
> i. been granted leave as a refugee and it is subsequently established that they are not the nationality they claimed to be;
> ii. been granted leave on the basis of marriage and it is subsequently established that the marriage was a sham or that the letter of support was forged or the spouse is not a British citizen/settled in the UK or the person had not disclosed that the marriage had already ended in divorce;
> iii. used different or multiple identities;
> iv. submitted forged documents such as bank statements, employment references;
> v. failed to declare that they have criminal convictions, including those outside of the UK particularly where these would have arguably led to a different outcome on the application;
> vi. failed to declare that they have been involved in war crimes, crimes against humanity or genocide; or
> vii. failed to declare that they are a member or supporter of a proscribed organisation.'

44. Soon after the first revocation decision the applicant made further representations in response to a section 120 notice. By this time, he had a partner and a child who was a British citizen. On 05 February 2019 the respondent granted 30 months leave to remain on the 10-year route to settlement. Dissatisfied with this response, the applicant sought to challenge the decision to revoke ILR by way of an application for judicial review filed on 06 February 2018. The claim settled by consent on 24 June 2019. The respondent undertook to make a further decision.

45. The respondent maintained the decision to revoke ILR in a further decision dated 15 August 2019 ('the second revocation decision'). The decision set out what was now known about the applicant's immigration history including the details of his prolonged and repeated deception regarding his identity. She considered the further representations made on behalf of the applicant in a letter dated 19 July 2019. The applicant argued that the main reason why he was granted ILR was because he

had lived in the UK for 10 years at the date of the decision and because no absconder action was taken.

46. The decision letter noted the submissions, but considered that the deception outweighed the accrual of 10 years' residence. He was granted ILR on the assumption that he was a Kosovan national who had entered the UK as a minor. If the facts of the deception about his identity had been known 'the decision maker's consideration would not have been so lenient in your favour'. Further enquiries revealed that absconder action was taken against him on 26 October 2001 following a failed attempt by the Eaton House Starring Team to locate him at his last known address. In light of this information, it was considered that the applicant only accrued the 10 years' residence which underpinned the decision to grant ILR because of his failure to report and his decision to abscond. Even if he had been located at the time, the fact that he had given a false nationality and date of birth would have frustrated efforts to remove him.

47. The respondent considered the submissions made about the revocation policy. Although she accepted that the deception occurred more than five years before the decision to revoke ILR, it was considered that the 'deception exercised was sufficient enough for revocation to be appropriate, your deception outweighed this policy'. Having considered the case six years after the deception came to light it was considered that the nature of the deception still weighed in favour of revocation. Despite the prolonged and repeated nature of the deception she noted that there was little evidence of regret. She concluded that the applicant's conducted was 'so serious that it warrants the revocation of your status'.

48. The respondent went on to consider the representations made about the impact that it would have on the applicant and his family. The respondent noted that the applicant was only able to obtain status for his partner and child because of the initial deception. It was not necessary to give further consideration to this issue because he had been granted limited leave to remain because of his personal circumstances in the UK.

49. Permission to bring judicial review proceedings was granted by Upper Tribunal Judge Pitt at a hearing on 22 October 2020 except in relation to a technical point relating to the status of the first revocation decision.

The issues

50. The applicant identified the following issues for determination:

    (i) Whether the applicant's deception as to nationality and age would have been directly material to the grant of ILR, such that the condition precedent in section 76(2)(a) of the NIAA 2002 was made out.

    (ii) Whether the decision was in accordance with the revocation policy.

    (iii) Whether the revocation policy is unlawful.

(iv) Whether the decision to revoke ILR was reasonable and proportionate.

Decision and reasons

Issue 1: materiality

51. Ms Naik argued that the respondent failed to place the grant of ILR within the proper context of the Legacy Programme. The Vine report made clear that the there was no consistency in decision making. The main factors were length of residence and a flexible approach to the character and conduct requirements, which overlooked negative factors such as absconding. Although she accepted that character and conduct were material to an assessment under the Legacy Programme, Ms Naik argued that only more serious matters such as criminal conduct, activities that engaged the exclusion clauses or threats to national security were sufficient to justify refusal. In support of this submission she relied on the decision making criteria identified in the Vine report (see [13] above) and referred to the factors relating to character and conduct in Chapter 53 (see [22] above).

52. She went on to argue that this case was far removed from the situation in *R (Abbas) v SSHD* [2017] WLR(D) 61, which the respondent relied upon. In that case it was alleged that the applicant used a false TOEIC certificate to obtain an initial grant of leave to remain as a spouse and was subsequently granted ILR. The deception formed part of the 'necessary building blocks' leading to the application for ILR. It was implicit that he was asserting that he had two years previous lawful residence. There was a causal link between the deception and the application for ILR. Ms Naik submitted that the way the Legacy Programme operated was quite different. The applicant's skeleton argument went so far as to say that the fact that the applicant lied about his nationality and age was 'wholly irrelevant' to the criteria for granting ILR under the Legacy Programme. The main reason for the decision was the applicant's length of residence. At the time, the fact that he had absconded was not deemed sufficiently serious to refuse leave to remain.

53. We do not agree that the applicant's repeated and longstanding deception relating to his nationality and age would not have been material to the assessment under the Legacy Programme had the respondent been aware of it at the time. The Legacy Programme did not operate as an amnesty. Nor was there any clear policy for granting leave save for the usual criteria considered under paragraph 395C and Chapter 53 albeit those criteria were assessed through the operational objective of reducing the large backlog of cases.

54. The guidance made clear that a caseworker must consider all known relevant factors (both positive and negative) and emphasised that the list of factors set out in paragraph 395C was not exhaustive (see [20] above). It also made clear to caseworkers that the assessment was holistic (see [21] above). Although the guidance identified serious criminality, activities justifying exclusion, and threats to national security

as negative factors that should be given weight, the same section also made clear that caseworkers must also take into account 'any evidence of deception practiced at any stage of the process' (see [22] above).

55. The Vine report suggests that there were no clear criteria for a grant of leave under the Legacy Programme. We accept that the report indicates that when paragraph 395C was viewed through the operational objective of the programme length of residence was likely to be a relevant factor. In practice, non-compliance at the lower end of the scale, such as overstaying or even absconding (as in this case), might have been given slightly less weight than usual. After all, the purpose of the programme was to resolve a large number of cases involving people who were remaining in the UK without leave.

56. We accept that there may be some distinction between the nature of an application for ILR under the immigration rules, where an applicant would have to satisfy a series of specific requirements, and the broad evaluative assessment that was undertaken under paragraph 395C for the purpose of the Legacy Programme. It might be easier to identify a material connection between the deception and a specific element of the immigration rules. However, that is not to say that no causal connection could be identified from a deception that the guidance made clear should form part of the evaluation under paragraph 395C. The more serious the negative factor the more likely it would have been to affect the assessment.

57. The applicant's case is premised on the reasons that were given for granting leave to remain under the Legacy Programme, but does not properly acknowledge that the decision was made on the basis of incorrect and incomplete information. When the applicant submitted the questionnaire he actively deceived the respondent by asserting that his removal to Kosovo would breach his human rights. But for this continued deception the decision maker would have had the full picture and could have taken into account the original deception as part of the overall assessment.

58. We have already noted that negative factors relating to a person's immigration history are likely to range in scale and seriousness. In our assessment the knowingly false claim to be from Kosovo was at the more serious end of the scale (see [26] above). The respondent was prepared to overlook the period of absconding, but if that factor was combined with the fraudulent assertions made in his asylum claim it is likely that greater weight would have been given to public interest considerations. The ongoing deception relating to his nationality and age clearly would have been a relevant consideration.

59. We note that the fourth claimant in *Hakemi*, Mr Mustafaj, was an Albanian national who falsely claimed to be from Kosovo. Similar to this applicant, Mr Mustafaj remained in the UK after his appeal rights became exhausted and had been living in the UK for 12 years at the date the decision was made under the Legacy Programme. The difference between Mr Mustafaj and this applicant is that Mr Mustafaj disclosed the previous deception to the respondent before the decision was made. The

deception was sufficiently serious to justify refusal of leave to remain. This is further evidence to indicate that the serious nature of a deception of this kind was likely to have a material impact on the exercise of discretion under the Legacy Programme.

60. Given that deception can include a failure to disclose a material fact, we conclude that there was a direct link between the applicant's failure to disclose the lies he told about his nationality and age when he sent the questionnaire and the grant of leave to remain under the Legacy Programme. But for the continued deception the case would have been assessed with reference to negative factors that may have been properly regarded as sufficiently serious to justify refusal. In light of what is now known about the applicant's immigration history, it was within a range of reasonable responses to the evidence for the respondent to conclude that, had his true identity been known at the time, 'the decision maker's consideration would not have been so lenient in your favour'. For these reasons we conclude that it was open to the respondent to invoke section 76(2)(a) NIAA 2002 on the ground that leave was obtained by deception.

Issue 2: whether the decision was in accordance with the revocation policy

61. The respondent uncovered the deception during the course of the application for naturalisation in 2013. In 2016 she retained the applicant's Albanian passport pending further investigation, but did not take steps to revoke ILR until 08 November 2018, just over five years after the applicant last sought to maintain the deception. Six years had passed by the time she reviewed the situation and issued the second revocation decision in 2019.

62. The arguments relating to the second issue were imprecise. The applicant's skeleton argument took a rather scattergun approach, asserting that the respondent 'did not exercise her discretion fairly or lawfully or in accordance with her policy or give proper reasons for her decision'. In submissions, Ms Naik did not appear to dispute that the wording of Section 4.1 was sufficiently flexible to allow for discretion to be exercised (see [42] above).

63. The wording of Section 4.1 emphasises that the length of time spent in the UK 'may' constitute a reason for not revoking indefinite leave. The example given at the bottom of that section is also phrased in non-mandatory terms. It says that ILR 'would not normally be revoked' where the deception in question occurred more than five years ago. Ms Naik argued that the wording gives rise to a presumption that ILR would not be revoked in such circumstances.

64. We agree that the wording of the policy gives rise to a presumption that ILR will not normally be revoked after five years, but it allows sufficient flexibility for the respondent to exercise discretion to revoke ILR in appropriate cases. We bear in mind that in each case considered under section 76(2)(a) it is a condition precedent that leave to remain was obtained by deception. In light of this, the mere fact of a deception is not likely to be sufficient, taken alone, to depart from the presumption. The

nature, extent and significance of a deception and other negative factors are likely to inform whether it is appropriate to depart from the usual practice outlined in the policy. If the respondent decides to depart from the usual practice she should take into account relevant considerations and give adequate and rational reasons for doing so.

65. The applicant's argument on this point appears to be either a reasons challenge or a challenge to the rationality of the decision to depart from the usual practice contained in the policy. The decision letter outlined his immigration history in some detail. It was open to the respondent to take into account the serious nature of the initial deception as well as its repeated and long standing nature. She considered the applicant's further submissions. On page 4 it is clear that the respondent took into account the fact that the applicant was granted ILR under the Legacy Programme. The letter quotes the reasons for granting leave contained in the GCID notes (see [30] above). The respondent found that 'your deception outweighs your actions to have accrued over 10 years residency in the UK'. She went on to explain that ILR was only granted under the Legacy Programme because the respondent was not aware of all the facts. Having considered the full extent of his immigration history the respondent concluded 'your conduct is so serious that it warrants the revocation of your status'. She outlined the requirements of section 76(2) and considered section 4.1 of the revocation policy. Whilst recognising that the deception occurred more than five years ago, she concluded that the deception was sufficiently serious to depart from the policy.

66. The applicant disagrees with the decision, but in our assessment it contains no public law error. The respondent took into account relevant considerations, including the context in which he was granted ILR. We have already explained why the serious nature of the deception could plainly have made a material difference to the assessment under the Legacy Programme. The respondent referred to the relevant law and policy. Her finding that the nature and extent of his deception was sufficiently serious to depart from the usual practice was within a range of reasonable responses to the evidence. We conclude that the respondent gave adequate and rational reasons with reference to relevant evidence and the correct legal framework.

Issue 3: lawfulness of the policy

67. The applicant's skeleton argument indicated that the third issue was encompassed by amended grounds 4 and 5. Ground 4 argued that the respondent failed to consider the exercise of discretion properly and failed to take into account the fact that the applicant was granted ILR under a 'concessionary policy'. We have already found that (i) the Legacy Programme was not a concessionary policy; and (ii) the decision letter considered the fact that the applicant was granted ILR in the context of the Legacy Programme. It is difficult to see how ground 4 made any wider point about the lawfulness of the policy. Ground 5 posited a wider argument relating to the policy, asserting that there was no provision to determine whether the deception was material to the grant of ILR or to take into account the nature of a grant of leave under a 'concessionary policy'.

68. Section 2.1 of the policy sets out the provisions of section 76 NIAA 2002. Section 3.1 also makes clear that section 76(2) gives the respondent the power to revoke ILR when a person obtained leave by deception. Section 4.2 states that the decision maker must assess the nature, extent and significance of the information which was either incorrectly supplied or omitted and emphasises that 'there should be clear and justifiable evidence of deception and the deception was material to the grant of leave'. Section 4.3 recognises that ILR should not normally be revoked when the decision maker had the relevant information but overlooked it or considered it and granted leave in any event.

69. Rightly, the point was reformulated in the applicant's skeleton argument at least to acknowledge the wording of Section 4.2. By then the applicant sought to argue that the wording of Section 4.2 of the policy was insufficient to guide decision makers to the need to find a direct causal link between the deception and the grant of leave. By the time the matter came to hearing Ms Naik made clear that she was not launching a full frontal challenge to the lawfulness of the policy nor was attempting to argue a point that might have wider application. In light of this, it is unclear whether she was still pursuing the third issue, and if she was, what argument she relied on.

70. When the wording of Section 4.2 is considered in the context of the whole policy it is clear that caseworkers are directed to the relevant legal framework. The need to find a causal link between the deception and grant of leave is also sufficiently clear. The Legacy Programme was not a 'concessionary policy'. The programme operated within the confines of the existing legal framework. Any grant of leave was considered on a discretionary basis having conducted an evaluative assessment of the facts of each case. The policy makes clear that there needs to be an individual assessment of the circumstances of each case, which should include consideration of the context in which leave was granted.

71. We recognise that it might be easier to establish a causal link between deception in an application for ILR made with reference to specific criteria contained in the immigration rules than in a case where ILR was granted following an exercise of discretion. However, the wording of the policy is sufficiently flexible to cover discretionary grants of leave. Decision makers are directed to ensure that there is clear and justifiable evidence of deception and that the deception was material to the grant of leave. Whether it is appropriate to exercise the power to revoke ILR will depend on the facts and evidence in each case and should be justified with adequate and rational reasons. In so far as the third issue still seemed to be before the Upper Tribunal for determination, we conclude that there is no merit in the argument that the revocation policy is unlawful.

Issue 4: proportionality

72. The applicant's skeleton argument suggested that the fourth issue was encompassed by the amended ground 4, but aside from a general assertion that the decision not to exercise discretion under the policy was irrational, that ground did not particularise any argument with reference to proportionality as a public law issue, nor did it contain any of the arguments now put forward on the applicant's behalf, which appeared for the first time in the skeleton argument. The respondent's skeleton argument stated that permission was not granted to argue this point, and in any event, the decision was not disproportionate.

73. We agree that this issue, as now formulated in the skeleton argument, is quite distinct from the point made in the grounds. Permission has not been granted to argue it. The fourth issue was not pleaded in the original grounds, and as explained below, raises issues that were not put forward in the further representations made to the respondent. The courts have repeatedly emphasised the need for procedural rigour in judicial review claims: see *R (Talpada) v SSHD* [2018] EWCA Civ 841 and *R (Spahiu) v SSHD* [2018] EWCA Civ 2604; [2019] Imm AR 524. However, in so far the issue of proportionality might touch on the reasonableness of the decision to depart from the presumption that ILR would not normally be revoked if more than five years have passed since the deception, and in light of the fact that both parties made submissions on the point at the hearing, we will make findings.

74. Section 76 NIAA 2002 sets out the respondent's power to revoke ILR if leave was obtained by deception. Section 1.3 of the revocation policy sets out a rational objective, which is to instil public confidence in the immigration system by ensuring any abuse is tackled and dealt with accordingly. The objective is sufficiently important to justify limitation of fundamental rights in appropriate cases. Whether the power is exercised in a rational and proportionate way will depend on the context and the facts in each case. A decision maker should consider whether, having regard to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community: see discussion in cases such as *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39, [2013] HRLR 30 and *Pham v SSHD* [2015] UKSC 19, [2015] Imm AR 950.

75. Ms Naik argued that maintaining the decision to revoke ILR, and instead granting discretionary leave to remain on a ten year route to settlement, was disproportionate. The applicant has lived in the UK for 20 years. By the time he is eligible to reapply for ILR he will have spent 30 years in the UK. The applicant's child is a British citizen because he was born at a time when the applicant had ILR. Any future children he might have would not enjoy this benefit. Aside from the applicant's length of residence and the potential effect on non-existent children the applicant identifies no other meaningful disadvantages to having limited leave to remain rather than ILR.

76. Given that the applicant was granted limited leave to remain on 05 February 2019 it would have been open to counsel to make these points in the further representations made to the respondent on 19 July 2019.

They were not. The representations explained the applicant's personal circumstances, argued that ILR was not obtained by deception (Issue 1), and that revocation would be contrary to the policy (Issue 2). Under the heading 'Compelling/compassionate circumstances' the representations referred to the explanation given for his behaviour in the witness statement submitted with the NTL application (without further comment) and asked the respondent to note that the applicant has significant ties to the UK. No submissions were made relating to the proportionality of granting limited leave of the kind raised for the first time in the skeleton argument in these proceedings. The second revocation decision could hardly be criticised when these arguments were not even put to the respondent to consider.

77. The applicant's skeleton argument asserts that, had he been granted limited leave to remain rather than ILR under the Legacy Programme in 2010 he would have qualified for ILR by 2017 in any event. This argument has no merit. First, the argument was not developed in oral submissions. Second, it is based on the assumption that the applicant would have been granted some form of leave when it is possible that had the facts been known he might have been refused. Third, there is no evidential basis for this theoretical scenario. The history outlined in *Geraldo* indicates that until the change in policy in July 2011 people were granted ILR under the Legacy Programme and not limited leave. Indeed, the effect of the change in policy from granting ILR to limited leave was at the heart of the challenge in *Geraldo*.

78. No copy of the 2013 decision refusing naturalisation appears to be included in the bundle. It is unclear whether the respondent proposed to take any action in relation to the deception at that stage. However, the applicant was put on notice that his immigration status would be reviewed when he was refused an NTL in 2016. Although no explanation has been provided for the further delay before the first revocation decision was made, during that time, and since, the applicant can have been under no illusion that his status was under review. Delay has not be put forward as an argument, but we conclude that any delay in taking action to revoke ILR is not sufficiently serious or prolonged, in itself or taken with the other factors, to render the decision disproportionate.

79. We have already found that the respondent's decision to depart from the practice normally followed in cases where the deception took place more than five years ago was within a range of reasonable responses to the evidence given the serious and prolonged nature of the deception.

80. When the deception was exposed, the applicant continued to assert that he was from Kosovo. It was only when it was in his interest to admit the lie because he wanted to start a family that he decided to be candid. He said: 'I must make amends for my mistakes and take responsibility for my actions'. Until now, he has faced no meaningful consequence for his actions.

81. The applicant benefited from a serious and prolonged deception. But for the deception he would not have accrued a long period of residence, his partner would not have been granted leave to enter, and his child would

not have been registered as a British citizen. The evidence indicates that the applicant has made good use of the opportunities afforded to him in the UK. He works as a photographer and runs several businesses. The respondent took into account the strength of his ties to the UK and recognised that removal would interfere with his right to private and family life in a sufficiently grave way to amount to a disproportionate breach of Article 8 of the European Convention. The applicant's ILR was revoked because of the public interest in ensuring that abuse is tackled, but he was granted limited leave to remain because it was disproportionate to remove him.

82. The applicant can continue to live in the UK with his partner and child and is on a ten year route to settlement. The fact that it will be inconvenient to apply for further leave to remain and that he will have to pay fees to do so is clearly proportionate in the circumstances of this case. The argument about perceived disadvantage to future children is even weaker. But for the deception his child would never have been entitled to British citizenship. As a matter of policy the respondent does not deprive children of British citizenship because of the actions of their parents, but that does not oblige the respondent to confer similar advantage on any future children that the applicant might have.

83. Accordingly, in so far as the arguments relating to proportionality touch either on the rationality of the decision to revoke ILR or might engage an argument with reference to Article 8 of the European Convention, the challenge fails.

Conclusion

84. The respondent gave adequate and rational reasons to explain why, had the deception been known, it would have made a material difference to the outcome of the decision to exercise discretion under the Legacy Programme. As such, the condition precedent for exercising her power under section 76 NIAA 2002 was satisfied.

85. The respondent's revocation policy is sufficiently flexible to allow her to consider whether ILR granted on a discretionary basis was obtained by deception. The policy emphasises that there must be clear and justifiable evidence of deception and that the deception was material to the grant of leave. The nature, extent and significance of the deception will form part of the assessment of whether it is appropriate to revoke ILR.

86. The respondent gave adequate and rational reasons to explain why she had decided to depart from the usual practice not to revoke ILR when the deception occurred more than five years ago. The decision was within a range of reasonable responses to the evidence given the serious and prolonged nature of the deception.

87. In view of the serious nature of the deception, and the fact that the applicant has been granted limited leave to remain, it is not arguable that the decision to revoke ILR is disproportionate.

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