Case No: JR-2023-LON-002043

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

30 July 2024

Before:

UPPER TRIBUNAL JUDGE McWILLIAM

- -

Between:

THE KING
on the application of
FATMIR SHULLI

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms A Childs
(instructed by AJ Jones Solicitors), for the applicant

Mr W Hansen
(instructed by the Government Legal Department) for the respondent

Hearing date: 15 May 2024

- -

J U D G M E N T

- -

Judge McWilliam:

1. By this application for judicial review the Applicant seeks to challenge the decision ("the decision") of the SSHD dated 29 June 2023 to revoke his indefinite leave to remain (ILR). The Applicant was granted ILR outside the Immigration Rules on 26 February 2011 under the Case Resolution Programme (CRP).

2. Permission to apply for judicial review was granted by UTJ Norton-Taylor on grounds 1 and 3 only on 20 December 2023. The salient parts of that decision are as follows:

> "1. The applicant seeks permission to challenge the respondent decision to revoke his indefinite leave to remain in the United Kingdom.
>
> 2. The applicant's central challenge is unattractive, but arguable. It might be seen as though he is seeking to brush aside his false assertion of Serbian nationality over the course of time. However, in light of what is said in the grounds and the apparent chronology of events, the challenge on the causation issue is arguable.
>
> 3. It is arguable that the assessment of Article 8 is inadequate.
>
> 4. I do not see any arguable merit in ground 2 as it relates to the respondent's policy. In my view, the grounds misinterpret what the passage in the decision letter was intended to convey".

3. The Applicant was born on 17 May 1979 and is of Albanian nationality. On 23 April 2001 he applied for asylum, citing harm from Serbian forces stated by him as his place of residence along with his claimed nationality. He said that his ethnicity is Serbian and/or an ethnic Albanian from Kosovo. On 22 May 2001 the SSHD refused to grant him asylum because the decision maker said that there were major discrepancies and inconsistencies in his account. It was not believed that he was from Serbia as claimed. On 5 June 2001 the Applicant lodged an appeal with the FtT against the decision of the SSHD. On 2 November 2001 the Applicant's appeal was dismissed following his non-appearance. The Applicant became appeal rights exhausted. On 4 September 2002 he was formally declared an absconder. On 19 January 2010 the SSHD received a letter from the Applicant's solicitor under the heading "Mr Fatmir Shulli – Date of birth 17 May 1983 – Kosovo" seeking expedited resolution of his case as a legacy case under CRP which resolved a backlog of incomplete asylum cases, mostly those refused but where there had not been a removal. On 15 June 2010 preliminary action under the CRP was to send a letter explaining the purpose of the Legacy Programme. The SSHD sent the Applicant a letter explaining the purpose of the CRP including that it is important that they hold the most recent information about his case. The SSHD stated that they needed the Applicant to send some photographs and original identity documents for him and any dependants. He was sent a form containing the recorded details for him to confirm or amend. The form contained the Applicant's name, Fatmir Shulli, his date of birth 17 May 1983 and that his nationality was Kosovan. On 31 January 2011 a CID note containing the minutes of consideration of the Applicant's case stated as follows:

> "*The apparent lack of action by the Home Office in this case has allowed the applicant to accrue time and establish a private life in the United Kingdom. The applicant absconded which allowed them to accrue time. However, as there is no evidence to suggest that*

the applicant has left the United Kingdom during the last 10+ years, when applying 395C guidance as set out by CRD management we should not seek to remove the applicant".

4. In the minutes, under the heading "Domestic Circumstances," it is stated that the Applicant has spent time in the UK and would have made friends, formed relationships and developed ties with their local community. There is nothing recorded under the heading "Previous Criminal Record". Under the heading "Compassionate Circumstances/Other Relevant Factors/Any Representations Made On Applicant's Behalf", it is stated that there is no evidence to suggest that the Applicant has left the United Kingdom during the last 9 plus years and when applying 395C guidance the Respondent should not seek to remove him. It is stated at the bottom of the form that taking all factors into account "*I have decided to grant ILR under the provisions of 395C".* The CID notes on 26 February 2011 confirm that "*Identity of applicant has been verified by signed photos and PNC*". The Applicant was issued with an immigration status document in the identity claimed which he did not amend. On 3 March 2011 he was issued a residence permit as a Serbian containing the details that the Applicant had given and confirmed.

5. On 16 August 2014 the Applicant was declined a travel document and biometric residence permit because having been asked to explain why he is unable to obtain a passport from his national authorities he failed to respond.

6. On 9 October 2019 the Applicant's daughter was born in the UK and on 21 October 2019 a birth certificate was issued. The informants are listed as mother and father and the father's details include place of birth "Kosovo". On 17 February 2020 the Applicant's daughter was issued with a UK passport as the Applicant held ILR.

7. On 11 May 2021 the Applicant applied for a " No time limit" (NTL) endorsement in his passport with the following details: Shulli Fatmir; Albania, born in Toplan; 17-5-79. The SSHD says that this was the first time that the Applicant revealed his correct nationality and date of birth both of which are said to be fundamental features of his true identity. On 6 October 2022 the SSHD sent the Applicant a "minded to revoke" ILR notice. On 29 June 2023 the Applicant's ILR was revoked by the SSHD. On 12 July 2023 a PAP was received by the SSHD challenging the decision to revoke ILR. On 26 July 2023 the PAP response was served maintaining the decision. The Applicant made an application for judicial review on 29 September 2023.

8. I had before me the Trial Bundle (TB) and an Authorities Bundle (AB). Mr Hansen added a CGID Case Record Sheet (CRS) (pp 139-141) to the TB. He added *Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19* to the AB. There was no objection by Ms Childs to the additions to the bundles. I had the Appellant's skeleton argument (ASA) and the Respondents (RSA). I heard oral submissions from the parties.

The Legal Background

9. Paragraph 76(2) of the Nationality, Immigration and Asylum Act 2002 (NIAA) sets out the basis on which the Secretary of State may revoke a grant of ILR due to deception as follows:

> "**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".

10. The relevant part of the Revocation of indefinite leave, version 5 published on 16 August 2021 ("the guidance") states:

> "**Introduction**
>
> This guidance explains the circumstances when the Home Office may consider revoking a person's indefinite leave to enter or remain in the United Kingdom under section 76 of the Nationality, Immigration and Asylum Act 2002 (2002 Act)
>
> **Deception – section 76(2) revocation**
>
> Indefinite leave obtained through the use of deception, including by a third party, may be revoked under section 76(2) of the 2002 Act. The deception must be material to the grant of leave.
>
> **Deception Cases**
>
> A person whose indefinite leave was obtained by deception may have this revoked under section 76(2) of the 2002 Act. The legal standard of proof is 'balance of probabilities', which means it is more likely than not that the applicant or a third party used deception to obtain indefinite leave.
>
> For the purpose of section 76(2) revocation, deception can include intentional representation or omission of the facts, making false representations, or submitting false documents, in order to make it appear that the applicant meets the requirements for a grant of indefinite leave. The deception must have been material to the grant of leave. Deception is considered to be material to the grant if, had it not been for the deception, leave would not have been granted. Section 76(2) cannot be used to revoke indefinite leave if the leave would have been granted irrespective of the deception.
>
> The following are examples of some of the types of deception you may encounter. This is illustrative only and not exhaustive.
>
> The person has:
>
> • been granted leave as a refugee and it is subsequently established that they are not the nationality they claimed to be

- used one or more different identities or provided false personal details to avoid being correctly identified or documented.

Available Information

Information may have been available to the decision maker who granted indefinite leave that should or would have called into question the applicant's entitlement to that leave. This could include but is not limited to the use of fraudulent or false documents in support of an application for leave, use of false biometrics or criminality or non-conducive behaviour sufficient to have failed the relevant suitability requirements in the Immigration Rules for that leave.

If you are aware that information was previously available, which would normally have cast doubt on the applicant's entitlement to indefinite leave, you:

- should not normally revoke indefinite leave if consideration was previously given to taking revocation or other enforcement action, but it was decided not to, and no new information has since come to light to warrant revocation
- may consider revoking indefinite leave if the decision maker who granted that leave overlooked the information in error, but the passage of time since the leave was granted will be relevant
- must consider revoking indefinite leave if the information was withheld or concealed by the person when making their application for indefinite leave; for example, it may become apparent that a person has a greater criminal history than was originally realised by the decision maker who granted indefinite leave or than was disclosed by the applicant".

11. Under the sub-heading "Legal basis for revocation of indefinite leave", page 7 of 29 of the guidance, under the general heading "Deception – section 76(2) revocation" the following is stated:

> "Indefinite leave obtained through the use of deception, including by a third party, may be revoked under section 76(2) of the 2002 Act. The deception must be material to the grant of leave.
>
> A person who obtains, or seeks to obtain, leave to enter or remain by deception is guilty of an offence under section 24A of the Immigration Act 1971 (1971 Act). Where a person has been convicted under section 24A of having obtained leave by deception, it will have been proven to the criminal standard".

12. Under the heading "Deception cases", page 12 of 29, the following is stated:

> "A person whose indefinite leave was obtained by deception may have this revoked under section 76(2) of the 2002 Act. The legal standard of proof is 'balance of probabilities', which means it is more likely than not that the applicant or a third party used deception to obtain indefinite leave.
>
> For the purpose of section 76(2) revocation, deception can include intentional misrepresentation or omission of the facts, making false representations, or submitting false documents, in order to make it appear that the applicant meets the requirements for a grant of indefinite leave. The deception must have been material to the grant of leave. Deception is considered to be material to the grant if, had it not been for the deception, the leave would not have been granted. Section 76(2) cannot be used to revoke indefinite leave if the leave would have been granted irrespective of the deception".

13. The relevant factors (which are not exhaustive) to be considered by a decision maker under paragraph 395C are as follows:

    (i) age;

    (ii) length of residence;

    (iii) strength of connections with the United Kingdom;

    (iv) personal history, including character, conduct and employment record;

    (v) domestic circumstances;

    (vi) previous any 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.

R (Matusha) v Secretary of State for the Home Department (revocation of ILR policy) [2021] UKUT 0175

14. At [24]–[27] and [53]–[60] the following was stated:

> *"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".

"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".*

The decision to revoke ILR

15. The decision of 29 June 2023 states:

> *"Upon consideration of your application for ILR, there was no indications (sic)available to the decision maker that there were concerns regarding your character and conduct in the UK. It is therefore considered that had the caseworker knew that you had provided a false identity to the home office, it would have affected the decision to grant you ILR, as you would have failed to meet the suitability requirements to warrant a grant of leave. It would have affected the decision to grant you ILR, as you would have failed to meet the suitability requirements to warrant a grant. Furthermore,*

it is considered that by maintaining your false identity, you intentionally sought to prevent any removal action being taken against you following the refusal of your asylum claim. It is noted that the length of residence that you were able to accrue in the UK was done so in the full knowledge of your deception. As a direct result of maintaining your false identity, your removal to Albania could not be arranged, and the decision maker was denied material facts prior to granting you ILR. In consideration of the above, it is accepted that the deception you have perpetrated is material to your grant of ILR.

Your deception was one that you maintained for a period of over 20 years.

Your actions have shown a total disregard for the UK's Immigration Rules. Considering all of the above evidence I consider it appropriate to revoke your ILR in this instance. I take this view having thoroughly considered all the available information and policy guidance within ***Revocation of Indefinite Leave 5.0, 16 August 2021****.*

Passage of Time

Having considered the policy guidance within ***Revocation of Indefinite Leave Version 5.0, 16 August 2021****. In particular:* ***Reasons Not to Revoke***

Indefinite Leave*,* ***Passage of Time;*** *which reads: 'The passage of time is relevant when considering information that has come to light after the person was granted indefinite leave. However, it does not automatically follow that because a person has been able to remain here for a considerable period of time before their entitlement to indefinite leave came under question, or because it has not been possible to remove them from the UK, their leave should not be revoked. For example, where there were barriers to taking revocation action such as needing to await the outcome of legal proceedings, or the person failed to co-operate with the process, revocation of indefinite leave may still be reasonable, regardless of the passage of time.'*

Whilst it is accepted that you have held indefinite leave since February 2011, your deception only came to our attention as a result of you submitting an NTL - ILR application in May 2021. When considering Passage of Time, it is accepted that you have maintained your deception for over 20 years and therefore the passage of time weighs in favour of the HO".

Ground 1

The Applicant's Submissions

16. I will summarise Ms Childs' submissions.

17. The GCID (TB/p142) compiled on 31 January 2011 states that the Applicant claimed asylum and therefore the decision maker knew the

details of this; namely, that the SSHD had not accepted his claimed nationality. The Applicant's identity was clearly disputed by the SSHD. The decision maker was aware of the Applicant having made an asylum claim in a false identity. The Casework Instructions relating to the application of paragraph 395C confirm that when caseworkers are considering an individual's character and conduct, regard must be given to whether there is evidence of deception at any stage of the process. There were indications available to the decision maker that deception had been used by the Applicant. There was nothing new identified by the decision maker within their knowledge sufficient to show that the false information had any material bearing on the outcome of the ILR decision.

18. The case is distinguished from *Matusha* because the decision in that case was made in ignorance of a relevant fact that the Applicant had lied about his nationality and age when he claimed asylum in 1999 and he continued to maintain the deception in relation to his application for consideration under the Legacy Programme. There was no ignorance of a relevant fact in this case because the deception was known to the SSHD prior to the grant of ILR.

19. A proper interpretation of the decision to grant ILR was that the SSHD decided that the deception perpetrated by the Applicant relating to his asylum claim was not material. This explains why it was not mentioned in the decision. The case notes disclosed by the SSHD do not identify the Applicant's nationality as relevant to the decision to grant ILR. This is supported by the notes of the CRO which considered that the Applicant's case met the terms of "significant delay" under paragraph 395C. The reason that the Applicant was granted ILR is disclosed in the decision granting the Applicant LTR dated 26 February 2011. It states that; *[t]his leave has been granted exceptionally outside the Immigration Rules. This is due to the length of residence in the United Kingdom.*

20. The false identity assumed by the Applicant did not allow him to accrue time in the UK. The Applicant's appeal was dismissed on 2 November 2001. The SSHD did not attempt to remove the Applicant. This was accepted by the decision maker as disclosed in the GCID (TB/p142), namely that the apparent lack of action by the Home office in this case has allowed the Applicant to accrue time and establish a private life in the United Kingdom.

21. In *Matusha* at [58] the court considered negative factors relating to a person's immigration history and that they are more likely to range in scale and seriousness, however, it was not said that in all cases deception would result in revocation.

The Respondent's Submissions

22. I will summarise Mr Hansen's submissions.

23. The central challenge is not only "unattractive" but wrong in law and fact. Age and nationality are intrinsic and fundamental aspects of a person's identity. The Applicant lied about both and the CRP decision maker specifically noted the Applicant's identity had been verified before

proceeding to grant ILR. The Applicant persisted in his lies and deception for twenty years from April 2001 until May 2021, notwithstanding that he had multiple occasions when he could have corrected the position. His very application to the CRP for ILR was founded on the same lies about his nationality and date of birth as he had told in 2001.

24. The fact that the SSHD disputed the Applicant's nationality and date of birth in the 2001 does not import a positive knowledge of deception. The findings of the FtT are not known. Had the appeal been allowed, the SSHD would still not know the Applicant's identity. There is no positive finding of the Applicant's nationality or date of birth. The SSHD doubted or disbelieved the Applicant in 2001 but this does not deprive the deception of materiality or causative effect. The SSHD did not know the true position until May 2021 and then acted promptly to revoke the Applicant's ILR. This is the most "telling pointer" to the fact that the lies were material. The Applicant revealed his deception only when it suited him to do so and persisting in the deception was proving inconvenient.

25. It is not appropriate to speculate about the findings of the FtT; however, the Tribunal, like the SSHD, would not have been aware of the Applicant's true identity. The SSHD did not know at this stage the nationality or date of birth of the Applicant.

26. The first time that the SSHD became aware of the deception was on 11 May 2021. He was then compelled to tell the truth, because he was unable to obtain a passport from the Serbian Embassy. In this application he said that he claimed asylum as a Kosovan on 23 April 2001 at the advice of an interpreter.

27. The Applicant's identity (and deception) was unknown until that point; however, by then it had been going on for many years. There is no deliberate or erroneous omission of the reference to deception in the decision to grant ILR. The SSHD was unaware of it because the Applicant had not by that point "come clean". The SSHD could not form a view about the deception until 2021. It is clear from *Matusha* that when making a decision under paragraph 395C a caseworker must take into account any evidence of deception practised at any stage of the process.

28. The Applicant has asserted a false identity and signed declarations in the following documents:

    (i) Asylum Case Record Sheet (CRS) (TB/p60) completed on 23 April 2001.

    (ii) The Applicant's statement (TB/p63) in support of his application for asylum.

    (iii) Statement of Evidence Form (TB/p78) wherein the Applicant signed a declaration.

    (iv) Interview transcript and signed declaration (TB/p88).

    (v) Statement of Additional grounds (TB/p98) and declaration.

    (vi) The Notice of Appeal (TB/p92).

29. The letter from the Applicant's solicitors dated 19 January 2010 maintains the falsehood (TB/p100). It is said by them that the Applicant is of good character. This discloses that he was aware of the significance of character to the application. There is no reference in the GCID or the CRS to character or conduct because of the Applicant's persistence in maintaining a falsehood and the SSHD was not aware of the deception.

30. The GCID indicated that security checks were completed and the Applicant's identity was verified by signed photographs and a Police National Computer (PNC) search (TB/p143). The "Team B Triage" form confirms these checks (TB/p104). It is because of the Applicant's deception that he made a life for himself in the UK. The caseworker notes show that the decision maker was influenced by and/or acting on the basis that the Applicant was from Kosovo. The case of *Matusha* does not assist the Applicant. The SSHD relies on [53]–[60].

31. The CRP was intended to resolve a backlog of incomplete asylum cases, mostly those refused but where there was no removal. The Applicant's case fell for consideration under paragraph 395C. Had the Applicant's deception been disclosed it would have been material to the grant of ILR. The decision letter granting ILR supports this. The following paragraphs of the decision say as follows:

> *"You were granted indefinite leave to remain (ILR). This was under the provisions of Paragraph 395c of the Immigration rules.*
>
> *Paragraph 395c confirms that before a grant of leave be awarded, that consideration is given to personal history, including character, conduct and any employment record.*
>
> *The case working instructions for Paragraph 395c grants confirm that when case workers are considering an individual's character and conduct, regard must be given to whether there is evidence of deception, at any stage in the process.*
>
> *Upon consideration of your application for ILR, there was no indications available to the decision maker that there were concerns regarding your character and conduct in the UK. It is therefore considered that had the caseworker known that you had provided a false identity to the home office, it would have affected the decision to grant you ILR, as you would have failed to meet the suitability requirements to warrant a grant. Furthermore, it is considered that by maintaining your false identity, you intentionally sought to prevent any removal action being taken against you following the refusal of your asylum claim. It is noted that the length of residence that you were able to accrue in the UK was done so in the full knowledge of your deception. As a direct result of maintaining your false identity, your removal to Albania could not be arranged, and the decision maker was denied material facts prior to granting you ILR. In consideration of the above, it is accepted that the deception you have perpetrated is material to your grant of ILR.*
>
> *Your deception was one that you maintained for a period of over 20 years. Your actions have shown a total disregard for the UK's Immigration Rules.*
>
> *Considering all of the above evidence I consider it appropriate to revoke your ILR in this instance. I take this view having thoroughly considered all*

the available information and policy guidance within Revocation of Indefinite Leave 5.0, 16 August 2021".

32. There is no distinction between this case and *Matusha*. In *Matusha* the UT analysed the Legacy Programme in detail in order to respond to the Applicant's submissions which included that the SSHD was prepared to overlook adverse behaviour and the evidence pointed to a flexible consideration of the character and conduct when making an assessment under paragraph 395C. The UT rejected that the Legacy Programme was a "concessionary scheme". It found that the Legacy Programme's operational objective was to resolve the large backlog of cases involving outstanding asylum seekers and failed asylum seekers. When an assessment under paragraph 395C was focussed through an objective in many cases less weight was given to certain acts of non-compliance and more weight to the length of time a person has been in the UK; however, the character and conduct of a person was still a relevant factor when assessing cases under the Legacy Programme and the nature and extent of any negative factors were relevant to the assessment of whether leave should be granted. There was a discretion to refuse leave under paragraph 395C.

33. In terms of grading the seriousness of the Applicant's conduct, Mr Hansen relied on what the UT said in *Matusha* about deliberate false asylum claims at [24]–[27]. The nature of the deception practised and persisted in, falsely claiming to be Serbian and/or at risk as an ethnic Albanian from Kosovo, was very serious for the reasons given by the panel in *Matusha* at [26]. The Applicant's lie about his date of birth was equally cynical and serious and designed to suggest that the Applicant was under 18 at the material time, no doubt in an attempt to take advantage of the policy relating to unaccompanied minors.

Conclusions (ground 1)

34. I reject the Applicant's claim that the asylum application and his appeal in 2001 is an act of deception which the SSHD would have mentioned in the decision had they thought it was material to the grant of ILR. It would be unreasonable for the SSHD to consider their rejection of an asylum claim as an act of deception by an Applicant. The Applicant's appeal was dismissed by the FtT. We do not know the findings that were made. Had the FtT found that the Applicant had not on the lower standard of proof established that he was Serbian with his claimed date of birth, I reject that this could be relied on by the SSHD as an act of deception. It cannot be said that all those who have not been believed by a Tribunal have engaged in deception of one kind or another. There is nothing to support that there is a judicial finding that this Applicant has engaged in deception. I do not accept that the SSHD were aware that this Applicant had engaged in deception and decided it was not relevant. I find that the SSHD did not become aware of the deception until 2021 when the Applicant made an application for NTL. This did not indicate contrition; rather, he realised that he was in a corner because he had to obtain a passport from his country of nationality to support the application. I conclude that the asylum claim was not a "deception" for the purposes of s.76(2)(a). The decision maker granting ILR did not refer to deception because they were not aware of it.

35. The next issue for me to consider is whether the Applicant's deception as to his nationality and age would have been directly material to the grant of ILR such that the condition precedent in section 76(2)(a) is made out and whether the decision to revoke was reasonable and rational.

36. This Applicant has been here since 2001. The decision maker attached weight to the length of residence when deciding to grant ILR. This was not the deciding factor. There is no reason to go behind the findings of the UT in *Matusha* about the Legacy Programme concerning the reasons behind and the decision making process. Paragraph 395C sets out certain factors to be considered by the decision maker. Character and conduct is part of the assessment process. The nature and extent of negative factors form part of the evaluative assessment of whether it is appropriate to grant leave. *Matusha* discusses at [25] a "scale". At [26] it describes the deception of the kind exercised by this Applicant as at the serious end of the scale because, amongst other things, it exploits provisions designed to protect the most vulnerable and those in need of protection. It undermines the integrity of the Refugee Convention. The nature and extent of negative factors are relevant to the exercise of discretion. The Applicant's solicitors understood this to be the case which explains why they made representations about his good character in their covering letter (TB/101).

37. The decision granting ILR states in the first paragraph *This has been granted exceptionally outside of the Immigration Rules. This is due to the length of residence in the United Kingdom*. Ms Childs relied on this to support her submission that the Applicant's nationality was not material to the grant because it was granted purely on long residence grounds, this misunderstands the application of 395C and the Legacy Programme. What is said by the decision maker should be considered in the context of the decision as a whole, the documents before the decision maker and the process of decision making generally under the Legacy Programme (as explained in *Matusha*).

38. The seriousness of the deception exercised by the Applicant in respect of his nationality is exacerbated by the Applicant lying about his age. I reasonably infer from this that he wanted to be considered an unaccompanied minor. The period of time the Applicant continued the deception is also relevant. It persisted over a significant period of time. Of course a decision maker would have to have considered the reasons not to revoke as set out in the guidance (TB/p21), in this case the passage of time. The Applicant absconded for many years during which time he can be said to have failed to cooperate with the process. I appreciate that the GCID of 31 January 2011 says; *the apparent lack of action by the Home Office in this case has allowed the applicant to accrue time and establish a private life in the United Kingdom;* however, it goes onto state *the applicant absconded which allowed them to accrue time.* What was said by those involved in granting leave, now has to be considered in the light of the deception. There is no heading in the GCID relating to conduct or character because there was nothing known by the decision maker to comment on. The Home Office guidance lists deception of the nature exercised by this Applicant as an illustrative example of a type of deception that may be encountered. In the light of the serious nature of the deception, it would have been a significant

consideration had the decision maker been aware of it. The fact that security checks, a PNC search and the Applicant's identity was ascertains supports that his identity was a relevant consideration.

39. I take into account that there is discretion to be exercised by the SSHD and that deception will not always result in revocation (see page 19 of 29 of the guidance). There is a direct link between the failure by the Applicant to disclose the lies that he had told about his nationality and date of birth and the grant of leave under the Legacy Programme.

40. I conclude that the decision of the SSHD to revoke the Applicant's ILR is rational.

Ground 3

The Appellant's Submissions

41. I will summarise Ms Childs' submissions.

42. The Applicant says that the SSHD's consideration of Article 8 ECHR is inadequate. He has a British citizen child living in the UK and he has resided in the UK since April 2001. He has developed a deep relationship with the UK, however, none of the points were considered. There is an email from the Applicant's solicitors to the Respondent on 12 November 2022 making representation about his family life namely that he has lived in the UK for over 21 years and has two British citizen children born on 2019 and 2022. He is the main "breadwinner" and a period of limbo will affect his work and his ability to pay rent which could leave the family destitute.

43. The Applicant has two British citizen children and whilst the decision mentions s.55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009) it simply states that:

> *"Your children's best interests have been considered with primacy. However, it should be noted that your child's best interests are not the only consideration in deciding whether to revoke your Indefinite Leave to Remain in the United Kingdom".*

44. This fails to set out what the children's best interests are and how they would be impacted by the revocation of the Applicant's ILR. The SSHD's guidance sets out that "*Your decision must demonstrate that you have considered all the information and evidence provided concerning the best interests of a child in the UK".*

45. The letter purports to consider the children's best interests and the Applicant's family and private life but simply fails to do so. Reliance on *MY (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1500* is misplaced. In that case the Court of Appeal found that the Home Office is entitled to ask that human rights claims are made in a particular way and can ignore applications that do not follow that process.

46. This Applicant did not make an application for his ILR to be revoked. This was a decision made by the SSHD after a review. The Applicant did not

make a human rights claim or application for LTR. However, the SSHD is required to make decisions in a way which does not breach the Applicant's Article 8 rights. This is supported by the SSHD's own guidance that contains a section on family and private life, and how they should take family and private life issues into account when considering revocation of ILR. This guidance further acknowledges revoking ILR will potentially remove benefits that derive from holding ILR even when LTR is granted. The guidance further considers that revocation will have less of an impact on those family members who are not directly dependent on them. The SSHD is required to carry out a full assessment of the impact of deprivation of ILR on the Applicant's private and family life. The Applicant has been deprived of ILR and has not been granted leave on any alternative basis. The Applicant's lack of LTR is impacting on his private and family life as he is the sole breadwinner for his partner and children. It is not an adequate response to this challenge that an Article 8 claim will be considered further at the next stage. If a proper assessment is made at this stage then the Applicant would not have been deprived of his ILR. In such a case as this the SSHD'S guidance not to grant leave to remain when ILR is revoked is itself unlawful because it fails to take into account the impact on the rest of the family.

The Respondent's Submissions

47. I will summarise Mr Hansen's submissions.

48. Mr Hansen's submission was that the SSHD is under no obligation to consider Article 8. He relied on *MY (Pakistan) v SSHD [2021] EWCA CIV 1500* and the guidance to caseworkers.

49. Reliance was placed on the decision letter which reads as follows:

> *"Consideration has been given to Section 55 of the Borders, Citizenship and Immigration Act 2009 and your children's best interests have been considered with primacy. However, it should be noted that your child's best interests are not the only consideration in deciding whether to revoke your Indefinite Leave.*
>
> *In terms of your family and private life, consideration has only been given as to whether your ILR should be revoked and not whether you should be removed from the United Kingdom.*
>
> *The decision to revoke remains proportionate and the human rights reasons that have been raised do not outweigh the public interest in tackling abuse in the immigration system and stopping people gaining an unfair advantage through deception, over those who comply with the law.*
>
> *Human rights grounds raised, will be considered further when you are contacted with regard to your liability for removal from the United Kingdom.*
>
> *Having considered fully your compassionate circumstances and weighed this up against your deception, it is considered to be another factor why the decision to revoke your ILR is the appropriate and enduring outcome in this case".*

50. The decision was concerned only with the issue of revocation at this stage and it was open to the Applicant to make a fresh application for leave to remain. This is consistent with the guidance.

51. At the revocation stage it was sufficient to conclude by reference to the children's best interests and the Applicant's circumstances generally that the revocation decision was proportionate and that neither the child best interests nor the compassionate circumstances were such as to outweigh the strong public interest in maintaining a fair and effective immigration system in which the public can have confidence and in which dishonesty is not rewarded.

52. It is a cardinal principle of legal policy that no one should be allowed to profit from his own wrong: see *Welwyn Hatfield BC v Secretary of State for Communities and Local Government at [45]. In AM (Belarus) v Secretary of State for the Home Department [2024] UKSC 13,* albeit in the context of so-called limbo status following that migrant's determined efforts to frustrate the deportation process is relevant in the present context in demonstrating the strength of the public interest in maintaining the integrity of the immigration system: see e.g. at [57], [68], [98], [99]. Having had his ILR revoked the onus is on the Applicant to seek to regularise his status by making a fresh application for LTR. The SSHD is in no way bound to bestow a new, more limited status upon him as a consolation for revocation, as appears to be the suggestion. It is proportionate to put the onus on the Applicant to make an honest application for further LTR. Insofar as the Applicant failed to apply for further leave, that is his choice and he has no valid basis for complaining that the outcome is disproportionate. If and when a removal decision is made any human rights claim in response will be considered on its merits and if not refused and certified the Applicant will have a right of appeal to the FtT. Consideration of the Article 8 claim at this stage was premature and unnecessary.

53. Even if contrary to the foregoing the Tribunal concludes that an Article 8 assessment was insufficient that is not a reason for quashing the decision because it is the substance not the form that matters in the context of Article 8. Instead the Tribunal must go on and carry out its own assessment and decide whether there has been a breach of Article 8; see e.g. *Belfast City Council v Miss Behavin' Limited [2007] UKHL 19 at [14]–[15].*

Conclusions

Ground 3

54. The relevant parts of the decision read as follows:

> "**Family and Private Life**
>
> The following points from your NOI response have been noted;
>
> - 'Mr Shulli has established a significant family and private life in the UK.'

- ‘Our client is unable to relocate to Albania. He has a British citizen child living in the UK.’
- ‘…resided in the UK since April 2001…….has developed a deep relationship with the UK’

Consideration has been given to Section 55 of the Borders, Citizenship and Immigration Act 2009 and your children’s best interests have been considered with primacy. However, it should be noted that your child’s best interests are not the only consideration in deciding whether to revoke your Indefinite Leave to Remain in the United Kingdom.

In terms of your family and private life, consideration has only been given as to whether your ILR should be revoked and not whether you should be removed from the United Kingdom.

The decision to revoke remains proportionate and the human rights reasons that have been raised do not outweigh the public interest in tackling abuse in the immigration system and stopping people gaining an unfair advantage through deception, over those who comply with the law.

Human rights grounds raised, will be considered further when you are contacted with regard to your liability for removal from the United Kingdom.

Having considered fully your compassionate circumstances and weighed this up against your deception, it is considered to be another factor why the decision to revoke your ILR is the appropriate and enduring outcome in this particular case”.

55. The guidance to caseworkers (TB/24) is headed “Family and private life” and states:

> *“This section tells you about taking family a private life issue into account when deciding revocation of indefinite leave”. It goes on to say that it is open to that person to make an application to remain. The guidance states that a person may claim that revocation would breach their rights to family or private life in response to the minded to revoke notice. However, a caseworker must not consider these as a human rights claim as it does not comply with section 113 of the 2002 Act”.*

56. Under the heading “”Human rights claim” it states:

> *“…. a person may claim that revocation would breach their rights to family and private life. However, you must not consider these as a human rights claim as the revocation stage” It states that section 113 of the 2002 Act defines a human rights claim and this is set out. It also states that under s.76 (2) and (3) if a decision is taken to remove is made and a human rights claim is made and refused (without being certified) the Applicant will have a right of appeal*.

57. There is a section on the "best interests of a child" which specifically states that there is a duty to have regard to the need to safeguard and promote the welfare of a child in the UK. The decision maker must consider any evidence provided and other information available concerning the children's best interests. It is also stated that when assessing the quality of evidence generally more weight will be given to independent sources than unsubstantiated claims.

58. The Applicant did not make a human rights claim. Following *MY*, the SSHD is entitled to ask that a human rights claim is made in a particular way. The decision made by the SSHD in the Applicant's case is not a substantive Article 8 decision where a removal decision has been made. While there was no obligation on the SSHD to make a human rights decision, the decision has to be compliant with obligations under s55. The decision does not directly engage with the representations made by the Applicant in the email from his solicitors. The decision maker should consider s.55 in accordance with the guidance. However, the claims made by the Applicant were unsubstantiated and there was no independent evidence. There was nothing before the decision maker that would suggest that the best interests of the children are anything other than to remain living with their parents in the UK. The decision does not interfere with this. It does not result in separation of a child from their parent or home or removal from the UK.

59. My attention was drawn to *AM (Belarus) v SSHD [2024] UKSC 13*. In this case the Supreme Court discussed the "limbo period" in the context of a migrant's efforts to frustrate his criminal deportation. The case supports the strength of the public interest in maintaining the integrity of the immigration system even if the result is limbo status. At [87] Lord Sales said this:

> *"AM's own conduct … is a highly material factor for the purposes of the relevant proportionality analysis under article 8. In my view, this is an inevitable consequence of the fact that the object of the proportionality analysis is to ensure that a fair balance is struck between the interest of the general community and the rights and interests of the individual. To the extent that the individual has brought particular detrimental consequences on himself or herself, or contributed to the situation in which they arise, the state's responsibility is liable to be diminished and the fair balance between the public interest and the individual interest is likely to be affected as a result. That will be so all the more where the individual, by their action, has deliberately and deceitfully sought to undermine or circumvent some clearly identified and strong public interest…"*

60. The Applicant deliberately put forward what he knew to be a false claim. The deception was perpetrated over many years in a fraudulent attempt to obtain leave. He told lies about his age and nationality. It can reasonably be inferred that the reason why he lied about his age was to take advantage of the policy relating to unaccompanied minors. His conduct is serious because it exploits the provisions designed to protect the most vulnerable. Making a false claim to be a national from a refugee producing country undermines the Refugee Convention. Policies

and public services are undermined and public resources are wasted: see paragraphs 24-27 of *Matusha*. The Applicant's deception was at the very serious end of the scale. There is insufficient evidence to outweigh the very strong public interest in this case.

61. Had the SSHD been obliged to consider the Applicant's rights under Article 8, I do not accept Ms Childs' submission that the decision maker would have decided that the revocation of his leave would breach his rights under Article 8. In my view the proportionality assessment in relation to the revocation could only reasonably lead to one answer in the light of the Appellant's serious conduct and the scant and unsupported evidence before the decision maker. As stated the children's best interest on the evidence before the decision maker are to remain with their parents and the decision does not interfere with this.

62. The Applicant is at liberty to make a human rights application now or after a removal.

63. Within ground 3, the Applicant says that the guidance is unlawful because it fails to take account of the impact on family life when considering whether to revoke leave. However, this is a misconceived argument. It is not incumbent on the decision maker to make a human rights decision when a human rights application has not been made. The guidance is not unlawful. A decision maker must consider the best interests of any children, which the guidance makes clear.

64. While it is not material to this decision I will deal briefly with Mr Hansen's submission that it is a cardinal principle of legal policy that no one should be allowed to profit from his own wrong doing relying *Welwyn Hatfield BC v Secretary of State for Communities and Local Government [2011] UKSC 15.* This case concerned statutory interpretation where someone who has acted in bad faith otherwise satisfies an unqualified statutory provision in their favour. It is about statutory construction. In the Applicant's case there is no such statutory provision giving him an unqualified benefit. The terms of s.76(2) leaves a discretion to the SSHD to revoke leave in circumstances where the leave was obtained by deception.

65. The grant of ILR to the Applicant was obtained by deception and this was material to the decision to grant leave. There was no obligation on the SSHD to make a decision under Article 8 ECHR; however, decisions must take into account the best interests of the children after consideration of all the evidence. The decision of the SSHD in respect of the best interests of the Applicant's children's was deficient in this respect. However, it is highly likely that the outcome for this Applicant would not have been substantially different if the conduct complained of had not occurred, therefore I must refuse judicial review (s.31 of the Supreme Court Act).

66. Judicial review is refused on both grounds.

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