Upper Tribunal
(Immigration and Asylum Chamber)

Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 00128 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28-29 November 2019, 7 January 2020	**On**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

DINJAN HYSAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Sonali Naik QC, Helen Foot, Counsel, instructed by Oliver & Hasani Solicitors
For the Respondent: Robert Palmer QC, Julia Smyth, Counsel, instructed by Government Legal Department

1. The starting point in any consideration undertaken by the Secretary of State ("the respondent") as to whether to deprive a person of British citizenship must be made by reference to the rules and policy in force at the time the decision is made. Rule of law values indicate that the respondent is entitled to take advice and act in light of the state of law and the circumstances known to her. The benefit of hindsight, post the Supreme Court judgment in R (Hysaj) v. Secretary of State for the Home Department [2017] UKSC 82, does not lessen the significant public interest in the deprivation of British citizenship acquired through fraud or deception.

2. No legitimate expectation arises that consideration as to whether or not to deprive citizenship is to be undertaken by the application of a historic policy that was in place prior to the judgment of the Supreme Court in Hysaj.

3. No historic injustice is capable of arising in circumstances where the respondent erroneously declared British citizenship to be a nullity, rather than seek to deprive under section 40(3) of the British Nationality Act 1981, as no prejudice arises because it is not possible to establish that a decision to deprive should have been taken under a specific policy within a specific period of time.

4. The respondent's 14-year policy under her deprivation of citizenship policy, which was withdrawn on 20 August 2014, applied a continuous residence requirement that was broken by the imposition of a custodial sentence.

5. A refugee is to meet the requirement of article 1A(2) of the 1951 UN Refugee Convention and a person cannot have enjoyed Convention status if recognition was consequent to an entirely false presentation as to a well-founded fear of persecution.

6. Upon deprivation of British citizenship, there is no automatic revival of previously held indefinite leave to remain status.

7. There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. Any effect on day-to-day life that may result from a person being deprived of British citizenship is a consequence of the that person's fraud or deception and, without more, cannot tip the proportionality balance, so as to compel the respondent to grant a period of leave, whether short or otherwise.

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Griffith ('the Judge'), issued on 26 October 2018, by which the appellant's appeal against the decision of the respondent to deprive him of British citizenship under section 40(3) of the British Nationality Act 1981 ('the 1981 Act') was refused.

2. By way of a decision dated 19 November 2018 Judge of the First-tier Tribunal Lambert granted the appellant permission to appeal to this Tribunal on all grounds.

Facts

3. The appellant was born in 1977 and is a citizen of Albania. He entered this country in 1998 and claimed asylum. He provided the United Kingdom authorities with his correct name, but falsely claimed to be a citizen of the Federal Republic of Yugoslavia and to have been born and resided in the autonomous province of Kosovo, which at the time he entered this country was subject to armed conflict. He falsely claimed to have been born in 1981 and presented to the British authorities as an unaccompanied minor escaping the conflict. He was accepted to be a refugee and granted indefinite

leave to remain ('ILR') in 1999. In 2004 he applied for and was granted naturalisation as a British citizen, using the same personal details he had provided in his application for international protection. It is common ground between the parties that the appellant obtained his British citizenship by fraud. He was issued with a British passport in 2004.

4. The appellant travelled to Albania and married his wife, a citizen of Albania, on 18 July 2007. Eight days later his wife submitted an application to the British Embassy in Tirana for entry clearance as the spouse of a British citizen. She was interviewed on 14 September 2007 and disclosed the appellant's true date of birth and that he was born in Shkoder, Albania.

5. On 27 August 2008, the respondent wrote to the appellant and notified him that she was considering depriving him of his British citizenship. The appellant admitted his deception by means of a letter sent to the respondent by his solicitors on 15 September 2008. Correspondence flowed between the appellant's solicitors and the respondent, with the appellant being informed that a decision as to deprivation was likely to be made by the end of March 2010.

6. In June 2010 the appellant fell into a disagreement over a spilt pint with another man in a public house in Hemel Hempstead. Staff sent him out of the building into the beer garden to calm down. Having smoked a cigarette, he re-entered the building and, with a pint glass in his hand, tapped the shoulder of his victim, who turned around to receive the pint glass in his face, which shattered on impact. The victim sustained several cuts, including one that went all the way through his cheek and cut the back of his tongue. He required over forty stitches and was left with a degree of scarring. The appellant was convicted by a jury at St Albans' Crown Court and on 20 May 2011 HHJ Catterson sentenced to him to five years' imprisonment for wounding with intent to do grievous bodily harm and 12 months' imprisonment for assault occasioning actual bodily harm, concurrent.

7. On 7 July 2012, whilst a serving prisoner, the appellant reached the 14-year mark of his residence in this country. The respondent wrote to the appellant on 13 February 2013 informing him that his grant of nationality was a nullity as he had used false particulars when making his application. On 8 April 2013 the respondent served notice of her intention to deport the appellant and on 9 April 2013 the application of the appellant's wife for entry clearance was refused. The appellant was released from custody on 18 November 2013. His wife entered this country clandestinely in 2014, with their eldest child who is a British citizen by descent. Upon their arrival they resided with the appellant. Two further children were born in this country and all three children continue to possess British citizenship.
8. The appellant challenged the decision to declare the grant of his British citizenship a nullity and was ultimately successful before the Supreme Court: *R (Hysaj) v. Secretary of State for the Home Department* [2017] UKSC 82; [2018] 1 W.L.R. 221.

9. The respondent withdrew her decision to treat the appellant's British citizenship as a nullity on 10 February 2018 and subsequently issued a decision on 3 July 2018 to

deprive the appellant of his British citizenship under section 40(3) of the 1981 Act. The respondent detailed that the appellant would not have been recognised as a refugee and granted ILR on the ground of possessing a well-founded fear of persecution as a Kosovan if his Albanian nationality had been known. Further, the appellant was only able to apply for citizenship on the basis that he possessed settled status arising from fraud. Consequently, the respondent decided that the exercise of deception was material to the grant of citizenship. The decision detailed, *inter alia*:

> 'At the time your client's deception had been discovered in 2007, your client had not been present in the UK for more than 14 years. Furthermore, it is noted that your client was sentenced to 5 years in prison on 20/05/2011. At that time, given he had less than 14 years residence, applying the principle of discounting periods of imprisonment from the residence calculation for long residence, your client would not have been considered to have accrued 14 years residence until significantly later than 2014 when the 14 year concession in the nationality guidance was withdrawn. As such, the assertion that your client should now benefit from this concession is not accepted.'
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> …
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> 'Your client fraudulently obtained his leave to remain and British citizenship and maintained this deception until the fraud was revealed in 2007. It is also noted that he also received a sentence of 5 years imprisonment for grievous bodily harm and assault occasioning actual bodily harm in 2011. It is not accepted that your client should now be considered to be of good character simply on the basis of the time that has passed.'
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> …
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> 'For the reasons given above it is not accepted that there is a plausible, innocent explanation for the misleading information which led to the decision to grant citizenship. Rather, on the balance of probabilities, it is considered that your client provided information with the intention of obtaining a grant of status and/or citizenship in circumstances where his application would have been unsuccessful if your client had told the truth. It is therefore considered that the fraud was deliberate and material to the acquisition of British citizenship.'

The appellant's appeal to the First-tier Tribunal

10. The appellant appealed to the First-tier Tribunal. Following a hearing in October 2018, the Judge refused the appeal. As to the issue of delay, the Judge decided at [73]:

> 'On 13 February 2013, the appellant was informed that those appeals had not yet been determined. It appears, therefore, that the respondent in order to make a decision examined the case law and, on the basis of the law as it then stood, decided to annul his citizenship. The appellant exercised his right of judicial review and in December 2017 it was determined that the decisions in the Court of Appeal were wrong. Albeit, therefore, the decision of February 2013 was unlawful, the respondent acted in accordance with the law at the time. Although this case has been ongoing for ten years, I am not satisfied that there has been any unreasonable or unaccountable delay on the part of the respondent that falls within the type contemplated in EB (Kosovo) [2008] UKHL 41.'

11. The Judge considered the reasonably foreseeable consequences of the deprivation of the appellant's British citizenship and found at [69]-[71]:

> 'I consider it reasonably foreseeable that the respondent would not take action to remove or deport the appellant but would grant him leave taking into account his family circumstances. He was granted ILR in the past and, whilst he would not automatically become entitled to such leave on deprivation, there are factors in his favour which make it less likely that he would be removed. These include the fact that his wife has very recently been granted limited leave to remain in the UK and is entitled to work (but has chosen not to do so) and that he has three British citizen children who are entitled to the benefits of such citizenship. It is recognised that it is in the best interests of children to be brought up by their parents. I cannot speculate on what conditions, if any, would be attached to any period of leave if granted. The family would remain as a family unit with some means of support even if that might entail a change of accommodation or change of school for the eldest child.
>
> On the other hand, the respondent might decide to deport the appellant in light of his conviction in 2011. If so, the appellant will be able to make representations and bring a challenge under article 8 at that stage. The relevant provisions he will have to meet are found in paragraph 398, 399 and 399A of the Immigration Rules together with the public interest considerations in section 117 of the 2002 Act. Owing to the length of his sentence he falls within paragraph 398(c) and will need to show very compelling circumstances over and above those identified in those paragraphs if the public interest in his deportation is to be outweighed.
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> I cannot pre-judge the outcome of such challenge but as suggested in Aziz [2018] EWCA Civ 1884, I should make a 'predictive assessment'. The threshold to be met is a very high one but there are factors in the appellant's favour which could act to tip the balance in his favour. These include the length of stay in the UK, now 20 years and amounting to half his lifetime; his change of circumstances; changes to his home country in the interim; the significant difficulties he is likely to have to overcome if re-establishing a life there and the fact that he has three British citizen children, two of whom were born here. Also, he has not been in any further trouble with the authorities since the incident that led to his conviction in 2011 which appears to have been an isolated and out of character episode. Taking into account all his circumstances I do not find it reasonably foreseeable that deprivation will result in his deportation.'

12. As to whether the application of the public interest was to be reduced consequent to the existence of historic injustice, the Judge reasoned at [74]:

> 'It was submitted that the appellant has been prejudiced by the actions of the respondent because, had a decision under section 40(3) been made earlier, he could have benefited under the fourteen year rule which was included in the old policy, withdrawn in August 2014. The relevant paragraph 55.7.2. stated:
>
> > 'In general, the Secretary of State will not deprive of British citizenship in the following circumstances:
> >
> > - If a person has been resident in the United Kingdom for more than fourteen years we will not normally deprive of citizenship.'

> It is clear from the use of the word 'normally' that there is not a guarantee that fourteen years' residence will mean that citizenship will not be deprived but rather that discretion may be exercised. The appellant completed fourteen years' residence in 2012, at which time he was serving a prison sentence for an offence involving violence. In light of public interest considerations, that is a factor that might have militated against the exercise of discretion in his favour. It is therefore speculative to say that he would not have been deprived of his citizenship under the old policy based on his length of residence had a decision been made to deprive him of citizenship under the old policy.'

13. The Judge concluded at [77] of her decision:

> 'The public interest in depriving this appellant of his citizenship is high. I have found above that it is reasonably foreseeable that he will not be removed, and I have not been able to find any exceptional circumstances that are likely to result in breach of his article 8 rights. It follows that I do not find that there would be a disproportionate interference to the appellant's article 8 rights as a result of depriving him of British citizenship, which he obtained through deception. Accordingly, I find no reasons why the respondent should have exercised discretion differently.'

Appeal to this Tribunal

14. The appellant relies upon five grounds of appeal, asserting that the First-tier Tribunal:

    1. Misdirected itself as to delay and the respondent's reliance upon the nullity doctrine.

    2. Unlawfully limited its consideration as to 'limbo' and reasonably foreseeable consequences.

    3. Failed to address a preliminary issue as to whether the appellant would be left without any leave pending any decision by the respondent as to whether to deport him.

    4. Applied an erroneous exceptionality test in its consideration of article 8.

    5. Conflated relevant tests and failed to assess the question of the respondent's exercise of discretion, independently of the assessment of article 8.

15. For the sake of clarity, permission to appeal was granted upon the four grounds originally advanced by the appellant. Ground 3 above was initially incorporated within ground 2 and Ms. Naik QC was granted permission at an earlier hearing to advance it on behalf of the appellant as a stand-alone ground.

16. Before this Tribunal, the respondent concedes that the Judge erred in law by failing to properly engage with the appellant's argument in relation to his loss of status on

deprivation, but asserts that it is a non-material error because ultimately the failure could not have made any difference to the outcome of the appeal.

The relevant statutory regime

17. Section 20 of the British Nationality Act 1948 ('the 1948 Act') provided at section 20(2) that a person who had registered or naturalised as a Citizen of the UK and Colonies ('CUKC'), the main nationality status at the time, could be deprived of his citizenship on the basis of fraud, false representation and the concealment of material facts. A person who had naturalised as a CUKC could be deprived of his citizenship if the respondent was satisfied that they had shown themselves to be disloyal or disaffected towards His Majesty, unlawfully traded or communicated with or assisted an enemy during war, been sentenced to at least 12 months' imprisonment, or had been ordinarily resident in a foreign country for seven or more continuous years: section 20(3) and (4). The Act provided that the respondent had to be satisfied that it would not be conducive to the public good for the person to continue to be a CUKC.

18. Section 40 the 1981 Act established four grounds upon which the respondent could by order deprive of citizenship a person who had acquired British citizenship by registration or naturalisation, if satisfied:

    - Registration or naturalisation had been obtained by fraud, false representation or concealment of material fact: section 40(1);

    - The person had shown disloyalty or disaffection towards Her Majesty by act of speech: section 40(3)(a);

    - The person had unlawfully traded or communicated with an enemy during any war in which Her Majesty was engaged or been engaged in or associated with any business carried out to assist an enemy in that war: section 40(3)(b); or

    - The person had been sentenced in any country to twelve months or more imprisonment within five years of the date of naturalisation or registration and the person would not become stateless: section 40(3)(c); section 40(5)(b).

19. The respondent could not deprive a person of his British citizenship unless satisfied that it was not conducive to the public good that that person should continue to be a British citizen. Such powers reflected the deprivation powers in place under the 1948 Act.

20. A wholly new 'section 40' was inserted into the 1981 Act by the Nationality, Immigration and Asylum Act 2002 and entered into force on 1 April 2003. Three of the specific grounds listed in the original section 40 were replaced by a general power for the respondent to deprive a person of his citizenship if satisfied that the person has done anything seriously prejudicial to the vital interests of the United

Kingdom or a British overseas territory: section 40(2). The power to deprive a person of citizenship because registration or naturalisation was obtained by means of fraud, false representation or concealment of a material fact was retained and set out in section 40(3). During the Act's passage through Parliament, the then Government confirmed that it intended to sign and ratify the 1997 European Convention on Nationality and the new measures were considered to be in line with the Convention. Article 7 of the Convention permits states to withdraw citizenship on the grounds of 'conduct seriously prejudicial to the vital interests of the State Party' but not if the person would be made stateless. In the event, the United Kingdom did not sign the Convention.

21. Further changes were made to the deprivation of citizenship powers in the aftermath of the London bombings in July 2005 through section 56 of the Immigration, Asylum and Nationality Act 2006. The wording of section 40(2) was changed so as to permit the respondent to deprive a person of citizenship if satisfied that 'deprivation is conducive to the public good' rather than on the grounds that the person had done something 'seriously prejudicial to the vital interests' of the United Kingdom and its territories.

22. For the purposes of our consideration, the relevant provisions of section 40 of the 1981 Act (as amended) are:

> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.

23. Whilst the need to avoid statelessness is elevated above other considerations in matters where section 40(2) applies such elevation does not arise under section 40(3). This reflects the seriousness with which fraud, false representation or concealment of a material fact are viewed, striking as they do at the heart of the system by which a foreign national can apply for British citizenship. The system is dependent upon applicants acting in good faith, and upon the truth of details provided by applicants.

24. The respondent's guidance as to the provision made for deprivation of British citizenship status by order under section 40 of the 1981 Act is detailed at Chapter 55 of the Nationality Instructions, titled 'Deprivation and Nullity of British citizenship'.

Consideration of an appeal under section 40A of the British Nationality Act 1981

25. In advance of a deprivation order being made, the respondent must provide notice in writing as to the decision to deprive a person of British citizenship: section 40(5) of the 1981 Act. The attendant right of appeal to the First-tier Tribunal under section 40A(1) is established by service of the notice. Under the 1981 Act an individual remains a British citizen until an order is made to deprive and until such order, they are not subject to immigration control, cannot be granted leave to enter or remain and cannot be required to submit biometrics. Where deprivation is pursued under section 40(3), the formal deprivation order is normally only made once appeal rights against the decision to deprive are exhausted.

26. The Court of Appeal identified several principles applicable to the consideration of an appeal in *KV (Sri Lanka) v. Secretary of State for the Home Department* [2018] EWCA Civ 2483; [2018] 4 WLR 166, per Leggatt LJ at [6]:

> 'Pursuant to section 40A(1), a person who is given such a notice may appeal against the decision to the First-tier Tribunal. The task of the tribunal on such an appeal has been considered by the Upper Tribunal (Immigration and Asylum Chamber) in a number of cases including Deliallisi (British Citizen: deprivation appeal; Scope) [2013] UKUT 439 (IAC) and, more recently, BA (deprivation of citizenship: Appeals) [2018] UKUT 85 (IAC). I would endorse the following principles which are articulated in those decisions and which I did not understand to be in dispute on this appeal:
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> (1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.
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> (2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.
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> (3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection.
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> (4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.
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> (5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have

to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently.

(6) As it is the Secretary of State who has been charged by Parliament with responsibility for making decisions concerning deprivation of citizenship, insofar as the Secretary of State has considered the relevant facts, the Secretary of State's view and any published policy regarding how the discretion should be exercised should normally be accorded considerable weight (in which regard see *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799).'

27. Upon considering the effect of *Pham v. Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, Leggatt LJ further observed at [16]:

> 'In making a decision whether to order deprivation of citizenship in the exercise of a discretionary power under section 40, the decision-maker (whether that be the Secretary of State or the tribunal on an appeal) has to form a view, not just as to whether it would be rational to make such an order, but whether it is right to do so. This necessarily involves an evaluation of the relative weight to be accorded to the public interest in depriving the person concerned of citizenship and any competing interests and considerations, including the impact of deprivation on the legal status of the individual concerned.'

28. Although deprivation of citizenship may result in interference with article 8 rights, the right to a nationality is not itself a right protected by the European Convention on Human Rights, at [17]

29. As for the use of deception when applying for naturalisation, at [19]:

> 'Where, as in the present case, it is established not only that deception was used but that, without it, an application for naturalisation as a citizen would not have been granted, it seems to me that it will be an unusual case in which the applicant can legitimately complain of the withdrawal of the rights that he acquired as a result of naturalisation. That is because the withdrawal of those rights does no more than place the person concerned in the same position as if he had not been fraudulent and had acted honestly in making the application …'

30. The Court of Appeal recognised that consideration will have to be given to circumstances where consequent to naturalisation an individual has lost other rights previously enjoyed which will not or may not be restored if he is now deprived of his citizenship. In such a case depriving a person of citizenship will not simply return him to the *status quo ante* but will place him in a worse position than if he had not been granted citizenship in the first place. It was acknowledged that this may occur where a person who was a national of another state lost that nationality as a consequence of having become a British citizen and would not be entitled to resume his former nationality if deprived of his British citizenship. Such assessment will involve a balancing exercise and a judgment as to whether in all the circumstances deprivation is proportionate, at [20]:

> '... In such a case the decision-maker (whether it be the Secretary of State or the tribunal on an appeal) will need to consider whether deprivation of citizenship is justified having regard to that consequence. Relevant factors in making that determination are likely to include both the nature and circumstances of the deception by means of which naturalisation was obtained but also, on the other side of the scales, the likelihood (if any) that the individual would be able to re-acquire his former citizenship and the extent to which the inability to do so will have practical detrimental consequences for the individual or others. Although it does not seem to me necessary that the assessment should have to be conducted using the formal four stage test of proportionality adopted in cases such as Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700, para 74, it will necessarily involve a balancing exercise and a judgment as to whether in all the circumstances deprivation of citizenship is proportionate.'

31. It is the respondent, rather than the Tribunal, who is primarily responsible for determining and safeguarding the public interest in maintaining the integrity of the rights flowing from British citizenship. Consequently, where the requirements in section 40(3) are satisfied, the Tribunal is required to place significant weight on the fact that Parliament has decided, in the public interest, that a person who has employed deception to obtain British citizenship should be deprived of that status.

32. Both the respondent and the Tribunal are bound to apply the policy guidance in the Nationality Instructions, or to say that they are departing from it and to give rational and defensible reasons for doing so: *Aziz v. Secretary of State for the Home Department* [2018] EWCA Civ 1884; [2019] 1 WLR 266, at [35]. Such policy indicates where and how the respondent considers that the balance falls to be struck, as between, on the one hand, the public interest in maintaining the integrity of immigration control and the rights flowing from British citizenship, and, on the other, the interests of the individual concerned and of others likely to be affected by that person's ceasing to be a British citizen: *Deliallisi (British citizen: deprivation appeal: scope)* [2013] UKUT 00439 (IAC), at [36].

33. Upon the Tribunal being satisfied that depriving an appellant of British citizenship would constitute a disproportionate interference with the article 8 rights of that person or any other person whose position falls to be examined on the principles identified in *Beoku-Betts v. Secretary of State for the Home Department* [2008] UKHL 39; [2009] 1 A.C. 115 it is then compelled by section 6 of the Human Rights Act 1998 to re-exercise discretion by finding in favour of the appellant. However, the fact that the scope of a section 40A appeal is wider than article 8 means that, in a case where article 8(2) is not even engaged, because the consequences of deprivation are not found to have consequences of such gravity as to engage that article, the Tribunal must still consider whether discretion should be exercised differently: *Deliallisi*, at [37]

34. In *BA (deprivation of citizenship: appeals)* [2018] UKUT 00085 (IAC); [2018] Imm. A.R. 807, the Tribunal held at [44]:

> 'The Tribunal will be required to place significant weight on the fact that the Secretary of State has decided, in the public interest, that a person who has employed deception etc. to obtain British citizenship should be deprived of that status. Where statelessness is not in issue, it is likely to be only in a rare case that the ECHR or some very compelling feature will require the Tribunal to allow the appeal.'

35. The focus of a section 40A appeal is to ascertain the reasonably foreseeable consequences of deprivation, which may involve removal. The Tribunal confirmed in *Deliallisi*, at [56], that even if removal is too uncertain to feature directly as a consequence, the possibility of removal and any period of uncertainty following deprivation may be required to be taken into account in assessing the effect that deprivation would have, not only on the appellant but also on members of his family. While it is necessary for the Tribunal to have regard to the reasonably foreseeable consequences of deprivation when determining whether the making of the deprivation order itself is lawful, it is not necessary for it to go further and conduct a proleptic, or anticipatory, analysis of whether the appellant would be likely to be deported at a later stage: *Aziz*, at [21]-[32].

36. Sales LJ (as he then was) held in *Aziz*, at [26], that whilst regard is to be had to the reasonably foreseeable consequences of deprivation, an examination of such consequences is only required in so far as it is necessary to make an assessment in relation to them in order to rule upon whether the making of the deprivation order itself will be lawful and compatible with Convention rights, in particular article 8 and section 55 of the Borders, Citizenship and Immigration Act 2009 ('section 55'). This is a fact specific assessment.

37. Even where the respondent's reasons for making a deprivation order include that deprivation is necessary to afford an opportunity to make a deportation order later, it is still unlikely to be appropriate for the Tribunal to conduct proleptic analysis. Sales LJ held in *Aziz*, at [29]-[30], a matter in which the respondent to sought to deprive several convicted criminals of their citizenship under section 40(2) of the 1981 Act:

> 'In other cases, it may be that part of the Secretary of State's reasons why the making of an order to deprive an individual of British citizenship is conducive to the public interest is that this step is necessary to afford the Secretary of State an opportunity to make a deportation or removal order at a later stage. In such a case, again it seems to me that it is likely to be unnecessary and inappropriate for the FTT on an appeal against deprivation of citizenship to conduct a full proleptic assessment of whether a deportation order will or will not ultimately be made at some time in the future (and after a separate appeal to the FTT in relation to the decision to make such an order). The evidence available and circumstances obtaining at the time of the making of the deprivation order (and the appeal in relation to that) are very likely to be different from that which will be available and those which will obtain when the decision regarding the making of a deportation order is actually taken (and when there is an appeal in relation to that). It will usually be sufficient to support this part of the reasoning of the Secretary of State in relation to making a deprivation order that it can be seen that by making such an order he will have a real prospect of making a deportation order at the later stage. The FTT should resist having tribunal time taken up with unnecessary and inevitably speculative evidence and argument about whether

> a deportation order will in fact be made at the end of the day, if all that needs to be shown is that there is a real prospect that a deportation order may eventually be made.
>
> In relation to such a case, it would in principle be open to the individual concerned to try to show that there was no real prospect of him being deported at the end of the day, as part of his case to challenge the making of the deprivation order (this would be especially important if the Secretary of State does not seek to or cannot justify the making of a deprivation order on the simple basis referred to in para. [27] above). If the individual could show that, then the Secretary of State's justification for making the deprivation order might fall away. I can see that if the individual does seek to make out such a case, this could give rise to case management issues for the FTT. Again, where possible, the FTT should resist being drawn at the deprivation of citizenship stage into a full proleptic assessment of whether a deportation order will be made at the end of the day, where that is unnecessary and would involve an inappropriate waste of time and effort for the tribunal and the parties. It may be that if an individual maintains that there will be no real prospect of his being deported at the end of the day, the FTT would in anything other than a very clear case be able to dismiss that contention at an early stage in the proceedings without needing to proceed to a full, elaborate proleptic assessment of whether a deportation order will be made or not. Much will depend upon the way in which the issues are framed on the appeal and whether the FTT is in a position sensibly to make an early assessment of the position and to avoid a full proleptic hearing on the issue of whether a deportation will in fact occur at the end of the day.'

38. Therefore, it will usually be sufficient for the Tribunal simply to support the respondent's reasoning that deprivation is necessary to make a deportation order at a later time because by making such an order there will be a real prospect of a deportation order being made later. Even if the Tribunal is not satisfied with the respondent's reasoning on the ground that it concludes that there is no real prospect of deportation, the Tribunal should still usually be able to avoid making a proleptic assessment.

Hearing before this Tribunal

39. Being mindful that there are presently a number of deprivation of citizenship appeals before the First-tier Tribunal and that a decision from a Presidential panel would aid consideration of such appeals this matter proceeded before us as a rolled-up hearing, permitting us to consider the error of law appeal and, if we found that the Judge had materially erred in law, to proceed to remake the decision.

40. With the agreement of the parties at the commencement of the hearing, we permitted reliance by both parties upon evidence that was not placed before the Judge. Such evidence as was admitted under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('2008 Procedure Rules') does not form part of our error of law consideration.

41. The respondent relies upon several witness statements from Fiona Johnstone, Policy Manager, BICS Policy and International Group, Home Office, and Sophia Grundy,

SEO Senior Caseworker, Status Review Unit, Refused Case Management Directorate, Home Office. By an order dated 9 September 2019, the first witness statements of both Ms. Johnstone and Ms. Grundy were admitted under the 2008 Procedure Rules. By the same order the appellant was permitted to put questions to the two witnesses and their responses were directed to be presented in the form of witness statement. Both witnesses answered the appellant's questions by individual statements dated 9 October 2019. In response to further permitted questions from the appellant, a third witness statement from Ms. Grundy, dated 3 January 2020, was filed and served.

42. By a letter dated 29 October 2019 the appellant requested that Ms. Johnstone and Ms. Grundy be directed to attend before the Tribunal for cross-examination. The request was re-affirmed by correspondence dated 7 November 2019. The respondent objected to this course of action. By an order dated 12 November 2019, the Tribunal confirmed its decision that neither witness was required to attend the hearing as the witnesses had answered the questions presented by the appellant and no adequate reason had been provided as to why oral evidence was required. It was observed that the issues raised by the appellant in correspondence could appropriately be addressed by submissions.

43. The appellant renewed his application for the attendance of the witnesses at the commencement of the hearing, providing general detail as to the terms of the proposed cross-examination. The Tribunal was satisfied there was a significant interplay between Ms. Grundy's evidence as to relevant policies and Ms. Naik QC's proposed questions to make it appropriate for Ms. Grundy to attend and be examined.

44. As to Ms. Johnstone the Tribunal concluded that the evidence conveyed by her witness statement was substantively in the nature of submissions. This was not a criticism, as the respondent had decided to provide evidence as to whether deprivation of citizenship leads to a 'resumption' of ILR in response to observations by a differently constituted panel of the Tribunal at an earlier case management hearing. The nature of her evidence was such that we concluded that there was no good reason for her to be called and examined.

45. The appellant and his wife relied upon additional witness statements and were permitted to present oral evidence before the Tribunal.

Delay

General delay arising from reliance upon the nullity doctrine

46. Ms. Naik and Ms. Foot succinctly identified the appellant's challenge on this ground as the Judge having misdirected herself and failed properly to consider the ratio of the Supreme Court judgment in *Hysaj* when concluding that the respondent's previous nullity decision was 'in accordance with the law at the time' and was made 'on the basis of the law as it then stood'. The appellant's position is that it was unfair and unreasonable for the respondent to exercise her discretion to deprive him of his

British citizenship in July 2018 as she had failed to do so for several years from 2007; then having erroneously declared his naturalisation to be a nullity proceeded to defend this course of action through the courts for a further five years. The Judge is said to have erred in law in accepting the respondent's position that at the relevant time she was bound by Court of Appeal authority to act as she did.

47. We observe that delay and maladministration are not to be equated, without more, with unlawfulness. In *R (FH) v. Secretary of State for the Home Department* [2007] EWHC 1571 (Admin), at [30] Collins J held:

> 'It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court.'

48. The respondent has on occasion become aware that 'Kosovan' nationals who were recognised as refugees and granted settled status, and then proceeded to secure British citizenship, were actually Albanian nationals who had presented false information both at the time of claiming asylum and when applying to naturalise. Upon being provided with information as to such falsehood, the respondent initially took steps to deprive British citizenship under section 40(3) of the 1981 Act. An early example is *Arusha and Demushi (deprivation of citizenship - delay)* [2012] UKUT 80; [2012] Imm. A.R. 645, where the respondent's decision to deprive was made on 2 February 2009. The First-tier Tribunal's decision was promulgated on 25 March 2011 and the Upper Tribunal's decision was dated 13 February 2012, some three years after the initial decision. The Tribunal concluded in that matter that the First-tier Tribunal had been entitled to find that the evidence relied on by the respondent to deprive a foreign national of his British citizenship was insufficient to establish that he had acquired that citizenship by fraud.

49. In 2011 the First-tier Tribunal considered eleven linked deprivation appeals concerning Albanian nationals who had represented to the respondent that they were Kosovan nationals. The decisions to deprive were all made under section 40(3) in 2009. One of the appeals proceeded to the Upper Tribunal with a decision promulgated in August 2013: *Deliallisi*. Ms. Naik refers to these appeals as to the 'Hatton Cross' or '*Deliallisi*' cohort.

50. In the meantime, the respondent amended her policy and subsequently informed several other recipients of British citizenship that their grants were a nullity on the ground of impersonation. Such decisions were issued to the two claimants in *R (Kadria and Another) v. Secretary of State for the Home Department* [2010] EWHC 3405 (Admin) on 15 April 2010 and 23 April 2010, post-dating the decisions issued in *Arusha* and the '*Deliallisi* cohort'. The High Court held that the deceptions perpetrated by the claimants on and after their arrival in the United Kingdom from Albania were such that the grants to them of British citizenship were a nullity and so the respondent had been entitled to detain them and direct their removal without

invoking the procedure for the deprivation of citizenship set out in section 40 of the 1981 Act. The judgment of HHJ Allan Gore QC, sitting as a Deputy High Court Judge, is dated 18 November 2010 and we observe the agreement of the parties before him at [22]:

> 'It is common ground between the parties that the relevant decisions from which the law is to be derived are, in the order in which they were decided in each case by the Court of Appeal: R v Secretary of State for the Home Department ex parte Sultan Mahmood [1981] QB 59; R v Secretary of State for the Home Department ex parte Parvaz Akhtar [1981] QB 46; R v Secretary of State for the Home Department ex parte Nahid Ejaz [1994] QB 496; and Bibi v the Entry Clearance Officer [2007] EWCA Civ 740.'

51. The High Court accepted that there is a limited category of cases in which the respondent was entitled to treat the grant of nationality as a nullity, and which involved no exercise of executive discretion. It rejected the suggestion that there was a distinction between the effect of a false claim to be another real person and a claim to be someone who in fact had never existed or did not now exist: at [32]:

> '… I do not understand and cannot see a justification for a distinction that asserts that, where what is in issue is the false adoption of attributes and status so as to obtain entry into and settlement in the United Kingdom, there is a material difference between falsely adopting an identity that either does exist or once existed and adopting one that never existed. If that distinction had merit, the fraudulent could obtain advantage simply by the device of ensuring that they pretended to be a fictitious person rather than pretending to be a real one. In my judgment, that cannot be right when what is at issue is the false claiming of the attributes and the status. I am fortified in that view by the fact that in Akhtar it was neither clear nor found whether the person who the appellant claimed to be had ever existed or not, and that it was clear that the answer to the question made no difference (see the judgment of Templeman LJ at page 50F). I do not accept that Wilson LJ's observation in Bibi at paragraph 15, that "it is important therefore to distinguish between adoption of a pseudonym from advancement of a false identity" is to contrary effect. It is clear from reading the whole of that paragraph that what he had in mind was distinguishing between simply the adoption of a pseudonym, which we are all entitled to do, and the adoption of a false identity in the sense of false attributes. In other words, if all that were false in a given case was the name, there would be no nullity, but if what was false were material facts or attributes, that would be or might be a nullity …'

52. The High Court identified the following propositions as being derived from the judgments relied upon by the parties, at [33]:

> (1) where an application is made for the grant of citizenship using fraud, false representation, or concealment of material fact, that may be treated as a nullity.
>
> (2) whether, in the circumstances of an individual case, it should be treated as a nullity is a question of fact and degree.

(3) where person A with attributes A represents himself to be person B with different attributes B and thereby obtains a grant to person B, the grant to A may be a nullity, in which case, the grant has and had no effect in law.

(4) where, however, the application is by A who has attributes A and the grant is to A who in fact has attributes B, the grant may remain effective or may be a nullity depending on the nature, quality and extent of the fraud, deception or concealment. This is in fact illustrated by the facts of Arusha, presently pending before the relevant Immigration and Asylum Tribunals, where the defendant had in fact accepted the validity of the grant but invoked the statutory deprivation procedure to secure removal of citizenship.

(5) a grant of citizenship for the purposes of section 10 of the 1981 Act is intended to be made to the identity with the attributes in respect of which the application is made.

(6) identity with claimed attributes are therefore material averments.

(7) as a result, when person A with attributes A represents himself to be person B with attributes B and thereby obtains a grant to person B, the grant to A either is a nullity in law, or alternatively is capable of being treated as such in the circumstances by the Secretary of State.

53. The respondent adopted the nullity approach just described to the appellant, writing to him in February 2013 informing him that his grant of nationality was a nullity as he was not and never had been a British citizen because the grant had been obtained by impersonation. The appellant challenged the decision by judicial review and his claim was linked with two others before the High Court: *R. (on the application of Kaziu and Others) v Secretary of State for the Home Department* [2014] EWHC 832 (Admin); [2015] 1 W.L.R. 945. The core of the argument advanced on behalf of the claimants was that the admitted lies did not mean that they had impersonated anyone. Impersonation was the test for whether naturalisation was a nullity, rather than, as with other lies, providing grounds for deprivation of nationality, with its statutory right of appeal. The respondent relied, in part, upon the judgment in *Kadria* and Ouseley J noted at [38]:

> 'Permission to appeal was refused at a hearing by Sullivan LJ, on a narrower basis than HHJ Gore's decision itself. He pointed to the "wholly false identities" assumed in name, age, adulthood or minority, nationality "and a vital characteristic, that is to say, as to whether they were refugees." This decision, [2011] EWCA Civ 696, carries no authority. But the point made by Sullivan LJ at paragraph 7 summarises the impersonation point well in language which I adopt, because it reflects my own thinking as to what impersonation in this context amounts to:
>
> > "The plain fact of the matter is that citizenship was not given to two adult Albanian citizens, Villion and Laurent Cakollari, who were born in 1978 and 1976 respectively; it was granted to Kosovan refugees who were called Villion Krasniqi and Rouland Kadria, who were minors born in 1981."'

54. Ouseley J addressed the judgment in *Kadria*, at [44]:

> 'Although I agree with the result of HHJ Gore's judgment in Kadria and Krasniqi, I consider that his approach was too broad, as to how in practice a case of nullification was to be distinguished from a case of deprivation. His listed factors do not sufficiently distinguish between nullification and deprivation; the question is not one of degree, nor of the nature, quality, extent or frequency or circumstances of the deceit, in the broad way he suggests. Although he is right that it is the attributes of the person which matter, those attributes have to be carefully defined; it is not just any matter which can be described as an attribute of a person or of his identity which matters in this context, since that blurs or removes the crucial distinction between nullification and deprivation. For example, sexuality may be core to personal identity in one sense, yet a false story of sexuality leading to persecution does not go to identity for naturalisation purposes.'

55. As to the earlier authorities noted at paragraph 50 above, Ouseley J observed, at [70]-[71]:

> 'I am also troubled by the fact that the SSHD can inform an individual that deprivation proceedings are unlikely although he obtained his nationality by nullifying deceit, and then some years later, at a time of her choosing, and not subject to any time limits such as those which would apply if she had to seek judicial review, announce to him that he is not a British citizen, that the grant she has made and the certificate he holds are nullities, leaving him to take judicial review proceedings to challenge the asserted ineffectiveness of a seemingly valid document. All that had happened the while is made irrelevant to his position. Without the earlier decisions, I would have agreed with Mr Knafler and quashed the purported nullification.
>
> Nonetheless, I do not think that, on Mr Knafler's submission, I can distinguish the well-established jurisprudence of the Court of Appeal, at least one case in which was decided after the 1981 Act so far as material assumed its present form. I cannot hold that the concept of a naturalisation void for impersonation died no later than 2003. Those decisions also have an undeniable force, applied to the circumstances they considered, and I have sympathy with the concept that it is objectionable for someone who obtains naturalisation as X to take advantage of it as Y, to be able to appeal against that truth being pointed out, and to ask a court to exercise its discretion to give effect to such a fraud.'

56. Ouseley J concluded as to the appellant in this matter, at [50]-[51]:

> 'More difficult are the other two cases, since in Hysaj, one, and in Kaziu, two, of the crucial characteristics was correct. However, it seems to me that the three are interlocking characteristics. A false name but correct date of birth or nationality cannot identify the person who receives the grant as who he says he is. The correct name and date of birth cannot identify the application as who he says he is if he gives the wrong nationality. Any of those aspects may be irrelevant in the context of other applications, but to my mind in this context each together identifies the person who applies for and receives the grant. It is to be remembered that these are aspects which do not lead to nullification unless material and given deceitfully.

> Accordingly, Hysaj, born on 20 December 1977 of Kosovan nationality, is not Hysaj, born on 20 December 1981 of Albanian nationality. The grant was to the former and no grant has been made to the latter …'

57. In reaching this conclusion, Ouseley J noted at [55] a problematic area regarding the effects of a finding of nullification upon others, which had been avoided by pragmatic concessions made by the respondent:

> 'There is a problematic area over the effect of the nullification of a person's nationality on those who have acquired nationality, whether knowing of the deceit or not, deriving from their relationship to that person. The parties' agreed position distinguishes the effect of nullification on the children of Bakijasi, by registration and by birth, and the effect on citizens by descent not requiring registration. There appears to be from Akhtar, Ejaz and Tohura Bibi a clear recognition that nullification should not be extended readily to nullifying derivative citizenship. But there is no clear and logical dividing line. The decisions more obviously seek a pragmatic limit to the logical effects of the nullification of citizenship on dependants. Such a pragmatic approach befits giving limited scope to nullification and a wide right of appeal in respect of deprivation. If nullification survives, as I hold it does, this case by case pragmatism leads to uncertainty in application of the concept and is unsatisfactory. Either nullification of one citizenship should nullify the citizenship of those whose citizenship had depended on its validity, or it should go no further than the impersonator's citizenship. Half-way pragmatism, which may or may not apply to a given case, simply illustrates the difficulty of the concept.'

58. The claimants appealed and the Court of Appeal (Kitchen, Floyd and Sales LJJ) held in *R. (on the application of Kaziu and Others) v Secretary of State for the Home Department* [2015] EWCA Civ 1195; [2016] 1 W.L.R. 673, at [30], that the High Court had been right to regard itself bound by the decisions in *Mahmood* and *Akhtar*. On a proper interpretation of the 1981 Act, an individual was not entitled to be naturalised if he engaged in fraud of such seriousness and of such centrality to the application being made as to wholly undermine the statutory process. Such fraud would keep him outside the operation of section 40 altogether. There was an interpretive presumption that a statute would not be given a construction which would enable a criminal to benefit from his crime. That presumption applied in relation to both the British Nationality Act 1948 and the 1981 Act.

59. Appellants in *Kaziu and Others*, including the appellant in this matter, filed notices and grounds of appeal with the Supreme Court on 24 November 2016 and the respondent filed a notice of objections on 8 December 2016. The Supreme Court granted permission to appeal on 27 February 2017. By notice dated 20 October 2017 the respondent applied to the Supreme Court for an order allowing the appeals from the decision of the Court of Appeal to dismiss the appeals from the High Court and to set aside the orders made by the Court of Appeal. The Supreme Court noted the respondent's reasoning and held in its judgment of *Hysaj*, at [16] – [20]:

> 'Having reviewed the matter after permission to appeal was granted in this case on 27 February 2017, the Secretary of State has come to the conclusion that the law took a wrong turning after Mahmood. The Mahmood type of case involves two real people, X

and Y. X impersonates Y for the purpose of applying for citizenship. Y has the characteristics required for citizenship. Y is considered by the Secretary of State and is granted citizenship. But Y has never applied for it, may not want it, or may even be dead. Thus, it cannot be said that citizenship has been granted either to Y or to X. Accordingly there was no grant of citizenship. Mahmood, in the Secretary of State's view, remains good law.

By contrast, in the later cases, X uses a false identity created by him (or someone on his behalf) and in that identity he acquires the characteristics needed to obtain citizenship. X applies for citizenship using the false identity Y. But X meets the requirements for citizenship albeit having acquired them by using the false identity Y. X is considered for citizenship by the Secretary of State in identity Y and is granted citizenship in that identity. In such a case, in the Secretary of State's view, the grant of citizenship is valid, albeit that the person may later be deprived of it under section 40. Ejaz was rightly decided but Akhtar and Bibi were wrongly decided.

Those cases, and the Court of Appeal's decision in this case, were based on the principle that there is a category of fraud as to identity which is so serious that a purported grant of citizenship is of no effect. But, argues the Secretary of State, the courts have not articulated any clear or principled definition of the types of fraud which will be so serious as to have this consequence. In the current cases, for example, neither appellant pretended to be someone he was not. Mr. Hysaj used his real name but put forward a false date of birth, nationality and place of birth in gaining his ILR and gained citizenship on the basis of the ILR that he himself had obtained. Mr. Bakijasi used a false name in gaining his ILR but otherwise gained citizenship in the same way. Ouseley J held that the key characteristics of identity for this purpose were the name, date of birth, and nationality or the country and place of birth, because this was the information on the certificate. But he also held that there had to be fraud - innocent mistakes or misunderstandings were not enough (paras 46, 47). Such uncertainty means that the law is difficult to apply in practice.

It also has a number of illogical and unsatisfactory consequences. Thus, it is not clear when the use of a false identity to obtain citizenship by one person will lead to the nullification of the grant of citizenship to those making a derivative claim, whether as a spouse or child. It is not easy to reconcile Akhtar, Ejaz and Bibi. Logically, as Ouseley J pointed out in this case (para 55) either all derivative citizenship should be of no effect if the citizenship from which it is derived is of no effect, or the nullity should be confined to the person who obtained citizenship using the false identity. As Ouseley J also pointed out (para 69) the logic of the position then adopted by the Secretary of State would also nullify the grant of ILR, but the Secretary of State has never contended for this.

This court agrees with the reasoning now put forward by the Secretary of State. It follows that the decisions of the Court of Appeal in Akhtar and Bibi must be overruled and that this appeal must be allowed by consent in terms of the detailed order proposed.'

60. The Supreme Court confirmed the law as to deprivation and nullity as it has always been, acknowledging that the correct identification of the law by the courts had taken a wrong turn from the case of *Akhtar* onwards. Ms. Naik correctly observes that the nullity decision taken in this matter on 13 February 2013 was unlawful from the

outset. She proceeds to assert that by this fact alone, significantly diminished weight should be attached to the public interest in deprivation because the respondent cannot rely on the application of an erroneous legal doctrine in order to justify delay.

61. We are satisfied that the adoption of such an approach to limit the application of the public interest based on delay alone is unsustainable as it seeks to deny any true engagement with the facts that arise. The respondent was clearly permitted to rely upon legal advice. The starting point in any consideration undertaken by the respondent as to whether to deprive the appellant of British citizenship must be made by reference to the rules and policy in force at the time the decision was taken, and such rules and policy will abide with relevant precedent, as understood. The respondent was entitled to rely upon the then favourable judgment in *Kadria* from which permission to appeal to the Court of Appeal had been subsequently refused at an oral hearing, and indeed did so rely before both the High Court and the Court of Appeal. Though *Akhtar* and subsequent Court of Appeal judgments that relied upon it cannot, with the benefit of hindsight post- the Supreme Court judgment in *Hysaj*, be considered to have finally and definitively settled the law the respondent and her legal advisors were entitled to observe the application of the doctrine of precedent. The respondent needs to have means of assessing the legality of her actions at a particular time, in order to know what her legal duty is. Rule of law values indicate that the respondent should be entitled to take advice and act in light of the circumstances known to her, and the state of the law, as then known: *R. (on the application of MH) v Secretary of State for the Home Department* [2009] EWHC 2506 (Admin), per Sales J, at [105]; approved *Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931, at [42] per Lord Thomas CJ. When defending her decision before the Court of Appeal the respondent was reasonably permitted to place reliance upon the principle that the Court of Appeal is obliged to follow one of its previous decisions unless specific exceptions arise, such as the judgment being per incuriam: *Young v. Bristol Aeroplane Co. Ltd* [1946] AC 163.

62. Ms. Naik is critical of the respondent for having filed a notice of objections some two weeks after the appellant filed his notice of appeal with the Supreme Court. We find that the respondent was entitled to protect her position and seek to secure appropriate legal advice, which ultimately resulted in her making an application under rule 34(2) of the Supreme Court Rules 2009 for the appellant's appeal to be allowed by consent.

63. We are satisfied that whilst the respondent had knowledge of the fraud in 2007 and a decision to deprive under section 40(3) was only taken in 2018, such delay did not arise from illegality on behalf of the respondent nor did it arise from a dysfunctional system yielding unpredictable and inconsistent outcomes. In the circumstances, we are satisfied that the Judge's consideration of delay at [74] of her decision was appropriate and contains no error of law.

Legitimate expectation

64. Since the date the appellant's wife submitted her application for entry clearance in the summer of 2007 there have been eight versions of Chapter 55 of the Nationality Instructions. The appellant reached his fourteenth year of residence in this country on 7 July 2012. At all relevant times, the relevant instructions were as follows:

> '55. 7 Caseworker Decisions – Completing the Deprivation Questionnaire
>
> 55.7.1 Following receipt of any information requested from the deprivation subject the caseworker, in order to deprive of citizenship, must be satisfied that the fraud, false representation or concealment of material fact was material to the acquisition of citizenship (55.7.2) and that the fraud was deliberate (55.7.3) ...
>
> ...
>
> 55.7.2.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:
>
> …
>
> - If a person has been resident in the United Kingdom for more than 14 years we will not normally deprive of citizenship
>
> …
>
> However, where it is in the public interest to deprive despite the presence of these factors they will not prevent deprivation.

65. The appellant posits that he had a legitimate expectation that the respondent would consider deprivation in line with the 'clear and unambiguous' 14-year policy expressed in Chapter 55 and that 'nothing in the policy suggests its disapplication to him' on the facts. Legitimate expectation protects certain expectations by identifying action which is procedurally or substantively unfair and underpins good administration. Such expectation, though not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law. The appellant's case is that the respondent's decision deprived him of a reasonably founded expectation that his claim would be dealt with in a particular way.

66. There is no specified period within which an immigration decision, or a decision to deprive, must be made and a decision to deprive a person of their British citizenship, as for any immigration decision, must be made by reference to the rules and policy in force at the time it is made, and not by reference to some earlier law and policy: *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 A.C. 1159, at [13]. The respondent is responsible for deciding and formulating policy as to the practice to be followed in naturalisation and deprivation matters and enjoys discretion to reformulate policy, so long as such reformulation is within the constraints which the law imposes. The appellant did not contend before us that the respondent could not amend her policy to remove reference to the 14-year residence exception to deprivation.

67. Lord Hoffman confirmed in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 A.C. 453, at [60], that a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification.' We observe the use of the qualifying words 'in general' and 'normally' within Chapter 55.7.2.5 [later renumbered Chapter 55.7.5] and the additional qualification that the public interest may still require deprivation even if the identified circumstances militating against deprivation are established. We are satisfied that the provisions in Chapter 55 relied upon by the appellant do not establish a clear and unambiguous promise that by reaching the fourteenth year of residence a person will not be deprived of their citizenship because it is clear that the respondent qualified the identified exceptions where deprivation will not normally occur so as to permit her to weigh the public interest in proceeding to deprive with the individual facts arising. The only legitimate expectation enjoyed by the appellant is that his case would be treated in accordance with the law and policy in place at the time the relevant decision was made. Consequently, the appellant's submission that he enjoyed a legitimate expectation to be treated in a particular way under an earlier policy must fail.

Historic injustice

68. The appellant submits that the Judge erred by failing to correct an historic injustice arising in this matter from the respondent's delay in making a decision. Such delay is said to have resulted in the appellant being denied the opportunity to benefit from the guidance previously in place under Chapter 55.7.2.5 [later Chapter 55.7.5]. Reliance is placed upon the judgment of the House of Lords in *EB (Kosovo)*, at [16]:

> 'Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.'

69. Ms. Naik submitted that the loss of an opportunity to be considered under the earlier, more favourable, instructions in circumstances where there were very compelling features that meant the respondent's discretion should have been exercised in his favour, is a factor that the respondent and the Tribunal are required to engage with as the impact of historic injustice is a relevant factor when assessing the public interest in depriving citizenship.

70. Where there is an interference with family or private life sufficient to engage article 8(1), recognition that someone has been the victim of a 'historic injustice' may well be relevant, in some cases highly relevant, when the proportionality of that interference is considered under article 8(2) but first it must be shown that there is family or private life for the purposes of article 8, and that the interference with it (or lack of respect for it) is sufficiently serious to engage the potential operation of article 8: *JB (India) v Entry Clearance Officer* [2009] EWCA Civ 234. An example of the identification of historic injustice is the less favourable treatment to Gurkha veterans with other comparable non-British Commonwealth veterans as to their entitlement to settle in this country prior to October 2004: *R (Limbu) v. Secretary of State for the Home*

Department [2008] EWHC 2261 (Admin); *R. (on the application of Gurung) v Secretary of State for the Home Department* [2013] EWCA Civ 8; [2013] 1 W.L.R. 2546.

71. The enhancement of claims by reliance upon historic injustice was considered by the Supreme Court in *TN (Afghanistan) v. Secretary of State for the Home* Department2015] UKSC 40; [2015] 1 W.L.R. 3083 where it examined Court of Appeal case-law as to the circumstances in which the 'Ravichandran' principle that asylum appeals should be determined by reference to the position at the time of the appeal should be displaced. The Supreme Court held that the approach adopted in *R (Rashid) v. Secretary of State for the Home Department* [2005] EWCA Civ 744; [2005] Imm. A.R. 608 was wrong where the Court of Appeal had considered there had been an historic failure to apply a favourable policy and the unfairness of such failure amounted to an abuse of process that permitted a court to correct the injustice by declaring an entitlement to leave to remain, even though at the date of decision the person no longer satisfied the criteria as a result of the invasion of Iraq by coalition forces and the removal of Saddam Hussein's regime. Lord Toulson JSC, giving the unanimous judgment in *TN (Afghanistan)*, confirmed that the respondent could not be compelled to grant leave to a person who would not be entitled to leave under current policy, and held at [72]:

> 'Discretionary leave by definition involves a discretion, but it is a discretion which belongs to the respondent and not to the court. The respondent must of course exercise her discretion lawfully, with proper regard to any policy which she has established, but I agree with Sir Stanley Burnton that it is not proper for a court to require the respondent to grant unconditional leave to an appellant who would not be entitled to such relief under current policy (or have a current right to remain in the UK on other grounds, such as article 8), as a form of relief for an earlier error or breach of obligation.'

72. Though the Supreme Court significantly curtailed the ability of a court to correct historic injustice, expressly in asylum claims, it did not extinguish it. Dyson LJ (as he then was) confirmed in *Mousasaoui v. Secretary of State for the Home Department* [2016] EWCA Civ 50 that the establishment of historic injustice requires prior illegality and there is a significant distinction between illegality and maladministration.

73. Prior illegality requires more than a mere unlawful decision having been taken at some stage in the past. There must be sufficient causal connection between the alleged historic injustice caused by the illegality and the alleged prejudice caused by the decision to justify the intervention of a court or tribunal. A judge must be perceptive as to efforts seeking to elevate an unfavourable previous decision into one that establishes such grave injustice as to be illegal. In *RS (Afghanistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 1179 Stanley Burnton LJ observed, at [16]:

> '... [T]he appellant seeks to elevate the significance of the error of the First-tier Tribunal by calling it "historic". The error of the First-tier Tribunal was no more than a regrettable but unexceptional incident of litigation: an error of law made by the Tribunal. The duty of the Tribunal is to determine the appeal before it on the facts and circumstances as they are at the date of the hearing (assuming there is no significant change between the date of the hearing and the determination). Saving highly

exceptional cases, I can see no basis for the Upper Tribunal having to consider, on a speculative basis, what might have occurred if a different decision had been made at an earlier stage.'

74. The appellant seeks the intervention of the Tribunal to disapply the policy existing at the date of the decision and to require the respondent to exercise her discretion in accordance with an earlier policy. He seeks to disabuse the usual rule that immigration and nationality decisions are made according to the law and policy in force at the time the decision is taken. We have explained above that the respondent did not unlawfully delay in making her decision and that though in hindsight she erred in relying upon the nullity doctrine she was entitled to rely upon legal advice. She could reasonably, and therefore lawfully, rely upon the High Court judgment in *Kadria*, as well as previous Court of Appeal precedent as generally understood. Reliance upon existing case-law cannot be categorised as illegality in this matter. The respondent was under no obligation to make a decision between 7 July 2012 and 20 August 2014, when the policy was withdrawn, and if there was an obligation to make a deprivation decision within a reasonable period of time, the failure to do so does not establish an illegal abuse of discretion. Even at their highest, and being mindful of the significant public interest in deprivation where citizenship has been obtained by fraud, the circumstances arising in this matter are not such that illegality was so obvious, and the remedy so plain, that there was only one way in which the respondent could have reasonably exercised her discretion when considering deprivation.

75. Though the respondent erred in law by initially deciding that the grant of citizenship to the appellant was a nullity, the appellant cannot establish that a decision to deprive under section 40(3) should have been taken under a specific policy within a certain period of time. He is therefore unable to substantiate the alleged prejudice. Rather, he has benefited from the delay, being able to continue to enjoy the benefits of his fraudulently obtained British citizenship from 2007 to the present time, including his present ability to work in this country. We are satisfied that no historic injustice arises in this matter and this ground of appeal must fail.

76. The appellant sought to rely upon decisions said to have been made by the respondent in matters that formed the '*Deliallisi* cohort'. Evidentially, the appellant advanced this argument through a series of questions to Ms. Grundy and Ms. Johnstone. We were informed that eleven appeals were listed and heard together at Hatton Cross in December 2011. Ms. Grundy informed us that two of the appeals were conceded by the respondent by reference to the 14-year policy that was in force at the time. Following the dismissal of the other nine appeals, deprivation orders were issued to the remaining nine appellants, each of whom was subsequently granted leave to remain on article 8 family life grounds. Ms. Grundy understood that no criminal convictions arose in that cohort and she was not aware of any deportation considerations arising. Though the witnesses sought to aid the Tribunal, they were not personally involved in the cohort appeals and we accept that there are practical difficulties in seeking to establish a detailed understanding of several linked appeals heard some eight years ago. The limited information provided as to the cohort, where no criminal convictions were considered, does not establish that the

respondent would have exercised her discretion in the appellant's favour under the 14-year exception. Further, for the reasons detailed above, the respondent was not required to make a section 40(3) deprivation decision under a specific policy within a certain period of time and so decisions arising in the *Deliallisi* cohort do not aid the appellant.

Substantive unfairness

77. The appellant asserts that substantive unfairness arises in this matter because 'he can point to others in the same position as himself to whom the policy was similarly applied'.

78. The failure to be considered under an earlier policy that the appellant perceives to have been more favourable to him does not amount to an abuse of power by the respondent.

79. Consistency is a generally desirable objective, but not an absolute rule: *R (O'Brien) v. Independent Assessor* [2007] 2 AC 312, per Lord Bingham, at [30]. The Supreme Court held in *R (Gallaher Group Ltd and others) v. The Competition and Markets Authority* [2018] UKSC 25; [2019] A.C. 96, at [26]-[29] that whilst domestic law does not recognise equal treatment as a distinct principle of administrative law it may arise as an aspect of rationality. Lord Sumption JSC said, at [50]:

> '… to say that the result of the decision must be substantively fair, or at least not 'conspicuously' unfair, begs the question by what legal standard the fairness of the decision is to be assessed. Absent a legitimate expectation of a different result arising from the decision-maker's statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense. …'

80. The substantive unfairness argument is based upon the appellant being treated by the respondent as a 'nullity' case, whilst others were being dealt with differently and, the appellant asserts, more favourably. As we have already held, the respondent was entitled to rely upon legal advice that was based upon an understanding of the law post-*Mahmood* and the favourable judgment of the High Court in *Kadria* concerning the application of the nullity doctrine to Albanian nationals who had identified themselves as 'Kosovan' when seeking to secure international protection and again when applying to naturalise. In all the circumstances of this case, having already found that the appellant was not subjected to unlawful delay in the consideration of his matter or that he enjoyed a legitimate expectation for his matter to be considered at a certain time and in a particular way, we find that there was no unfairness in the appellant's matter not being considered under Chapter 55 between 7 July 2012 and 20 August 2014. The appellant is wholly unable to establish that he was subjected to such unfairness as to amount to irrationality.

Disapplication of the policy – Appellant's criminal conviction

81. By her July 2018 decision, the respondent addressed the appellant's contention that he should benefit from the 14-year residence exception under an earlier policy and observed that the exception was not a guarantee that the appellant's circumstances were such that a decision to deprive would not have been made. The letter detailed, *inter alia*:

> 'At the time your client's deception had been discovered in 2007, your client had not been present in the UK for more than 14 years. Furthermore, it is noted that your client was sentenced to 5 years in prison on 20/05/2011. At that time, given he had less than 14 years residence, applying the principle of discounting periods of imprisonment from the residence calculation for long residence, your client would not have been considered to have accrued 14 years residence until significantly later than 2014 when the 14 year concession in the nationality guidance was withdrawn. As such, the assertion that your client should now benefit from this concession is not accepted.'

82. The appellant complains that the respondent seeks retrospectively to interpret the 14-year exception as requiring continuity of residence before it can bite because she was required to be consistent with an entirely different policy concerned with ILR. Consequent to our findings above, this issue is academic because the appellant is unable lawfully to rely upon the earlier policy or establish that his matter should have been considered at a particular point in time. However, we are mindful that guidance from a Presidential panel may aid consideration of related appeals, and note the evidence of Ms. Grundy that the 14-year exception in Chapter 55 was developed in line with the long-residence concession to be found at paragraph 276A of the Immigration Rules. It was introduced to ensure consistency with the respondent's policy on ILR, so that a person who would benefit from the long residence exemption if they were not a British citizen, would not ordinarily be deprived of their citizenship. Chapter 55 itself specifically refers to the 14-year exception in terms of 'long residence':

> '55.7.2.6 Deprivation on fraud grounds regardless of length of residence
>
> > Although the Secretary of State will not normally deprive someone of their British citizenship where they have more than 14 years residence in the United Kingdom (long residence), circumstances in which the Secretary of State may still proceed to deprive of British citizenship include …'

83. The existence of such link can be also observed by the respondent's Nationality Notice 8/14, dated 17 July 2014, that details, *inter alia*:

> 1. It was previously the policy that a person who had been resident in the United Kingdom for a period of 14 years would not normally be deprived of British citizenship on fraud grounds, although guidance set out exceptions to this. This policy was originally based on the 14-year long residence rule, which ended in July 2012.
>
> 2. It has now been agreed at Ministerial level that long residence in the UK alone should no longer be a bar to deprivation on fraud grounds.

84. Paragraph 276A(a)(iv) of the Rules expressly confirmed at the date of the appellant's conviction in 2011, and continues to so confirm, that the continuous residence requirement of the long residence rule shall be considered to have been broken if an applicant has been convicted of an offence and was sentenced to a period of imprisonment, provided that the sentence in question was not a suspended sentence. Time spent in prison is therefore considered a technical absence for the purpose of residence.

85. The respondent expressly referred to current policy in her decision of July 2018, noting confirmation at paragraph 55.7.6 of Chapter 55 (in force from 27 July 2017) that 'length of residence in the United Kingdom alone will not normally be a reason not to deprive a person of their citizenship'. Her consideration as to the application of the 14-year exception was an alternative to her primary position that the matter had to be considered in light of the law and policy applicable at the date of decision.

86. We are satisfied that as to the 14-year residence exception, the respondent was permitted to conclude in the alternative that the appellant enjoyed no benefit from it because she lawfully adopted the linked continuous residence requirement for long residence when undertaking her assessment, and such continuous residence was broken by the appellant's custodial sentence.

87. In the circumstances, we are satisfied that the Judge's consideration at [74] of her decision was appropriate and contains no error of law.

Other matters arising from the appellant's United Kingdom criminal conviction

88. At paragraphs 68 to 70 of the appellant's skeleton argument, it is asserted that the appellant's United Kingdom criminal conviction cannot play a part in whether the respondent decides to deprive under section 40(3). With respect, that cannot be right. Such a consideration may legitimately inform her decision whether to invoke section 40(3). So far as article 8 is concerned, it is a factor that is capable of increasing the weight to the public interest in depriving of citizenship a person who, whilst in the United Kingdom as a result of abusing its citizenship laws, commits a criminal offence.

Failure to determine the appellant's status on deprivation in order to determine the proportionality of deprivation

89. The appellant relies upon the judgment of Leggatt LJ in *KV (Sri Lanka)*, at [19]-[20] and asserts that as, immediately upon deprivation, he will be left with no status he will therefore be in a worse position than he was immediately prior to naturalisation, when he enjoyed ILR.

90. The respondent accepts that the Judge did not engage with the appellant's request that a finding be made, as a preliminary issue, as to whether he would be left without any leave pending a decision on the respondent's part as to whether to deport him.

Mr. Palmer QC contends that such failure is a non-material error of law as ultimately it made no difference to the outcome.

91. Unlike in *Deliallisi* where the respondent confirmed that in the event that directions were not given for the removal of the appellant, he would be assigned leave to remain in this country with effect from the date of the commencement of the deprivation order, the respondent accepts in this matter that the appellant will not enjoy status immediately upon being deprived of his British citizenship because the respondent intends to take time to consider whether to deport or grant a limited form of leave. By means of her decision of July 2018 the respondent informed the appellant:

> 'In order to provide clarity regarding the period between loss of citizenship via service of a deprivation order and the further decision to remove, deport or grant leave, the Secretary of State notes this period will be relatively short:
>
> - A deprivation order will be made within four weeks of your client's appeal rights being exhausted, or receipt of written confirmation from you that your client will not appeal this decision, whichever is the sooner.
>
> - Within eight weeks from the deprivation order being made, subject to any representations your client may make, a further decision will be made either to remove him from the United Kingdom, commence deportation action (only if your client has less than 18 months of a custodial sentence to serve or has already been released from prison), or issue leave.'

92. Though he was recognised as a refugee on a false understanding of his true history by the United Kingdom authorities, the appellant never met the requirements of article 1(2) of the 1951 UN Convention Relating to the Status of Refugees ('the 1951 Convention') and so never enjoyed Convention status as it is a surrogate international status and only enjoyed if article 1(2) is satisfied.

93. Further, in deprivation matters, where refugee status was granted on a true understanding of relevant facts, the subsequent securing of British citizenship brings into operation the second paragraph of article 1A(2) that provides if a person has more than one nationality, the term 'country of his nationality' shall mean each of the countries of which he is a national. This is consistent with the surrogacy principle. If a recognised refugee acquires British citizenship, then by operation of article 1C(3), his Convention status ceases because he enjoys the protection of the country of his new nationality. Paragraph 132 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees details that where refugee status has terminated through the acquisition of a new nationality, and such new nationality has been lost, depending on the circumstances of such loss, refugee status may be revived. However, revival is not automatic and therefore must be applied for. In the appellant's matter it is clear that the original claim for international protection was made on a false basis and he could never meet the requirements of article 1A(2).

Even if he wished to seek to 'revive' his former status based on his original claim it would be an application devoid of merit.

94. The cessation provision of article 1C(3) of the 1951 Convention is mirrored by Council Directive 2004/83/EC of 29 April 2004, the Qualification Directive, at article 11(1)(c) and has been transposed into domestic law by paragraph 339A(iii) of the Immigration Rules.

95. The Tribunal confirmed in *Deliallisi*, at [43]-[53], that upon deprivation a foreign national does not continue to enjoy ILR which had been granted prior to acquiring citizenship. The power to grant leave to enter or remain under section 3 of the Immigration Act 1971 ('the 1971 Act') is limited to those persons subject to immigration control. ILR is a status enjoyed by persons who do not possess a right of abode in this country and so it simply ceases upon a recipient becoming a person to whom section 1(1) of the 1971 Act applies. Whilst the respondent enjoys discretion to grant ILR consequent to deprivation, we are satisfied that there is no process in place by which automatic revival of such status can occur upon deprivation of British citizenship. The leave system is a permissive system of immigration control and revival is a significant and far reaching legal concept, particularly as to settled status, that requires express statutory provision that it be intended. There is no revival of previously held ILR status upon deprivation.

96. Some weeks after the conclusion of the hearing, the applicant's solicitors wrote to the Government Legal Department ('GLD') on 10 February 2020 and brought to the respondent's attention an anonymised consent order, which was attached to the letter. No written submissions from Ms. Naik or Ms. Foot accompanied the letter. As for the consent order itself, the claim number, the name of the applicant, the firm of solicitors, signatures, the date of the order and details present on various Upper Tribunal seals are redacted. The preamble details:

> 'Upon the respondent declaring on [redacted] that the applicant has reverted back to having indefinite leave to remain following the deprivation of [redacted] British citizenship'

97. The GLD responded by way of a letter sent to the Tribunal, dated 12 February 2020. Reference is made to Ms. Grundy's third witness statement where she confirmed that she had no recollection of a concession having been made in judicial review litigation that a person deprived of their British citizenship reverted back to enjoying ILR following such deprivation, but qualified this statement by observing that she could not be certain about this because to be sure as to what has happened in every individual case over the previous six years would require each and every litigated case to be checked and this would be 'a huge task'.

98. We note that beyond the limited contents of the letter of 10 February 2020, no submissions are made on behalf of the appellant as to the declaration detailed in the consent order positively impacting upon any consideration in this matter. The respondent asserts that the declaration was wrongly given. We confirm that an

unreasoned consent order of this kind does not displace the authority of the Upper Tribunal's judgment on this point in *Deliallisi*.

99. Ms. Naik posited that the loss of 'any immigration status *in and of itself*, combined with the practical consequences for the appellant and his family, renders deprivation disproportionate in all the circumstances.'

100. We are satisfied that the judgment in *KV (Sri Lanka)* does not aid the appellant. Leggatt LJ was specifically looking at the loss of rights previously enjoyed prior to securing British citizenship, not the loss of status. The Court was considering the position of someone who would become stateless upon deprivation, having automatically ceased to enjoy his original nationality upon being voluntarily naturalised as a British citizen through the mechanics of legislation in his home country. This is a discrete legal consequence that occurred consequent to the grant of citizenship. In this matter, upon deprivation, the appellant will continue to be an Albanian national, his children will continue to be British citizens and his wife will be an Albanian national enjoying limited leave to remain in this country. As for his own status as an Albanian national he continues to enjoy the rights that are entailed with such citizenship. Consequently, the loss of immigration status does not in and of itself render deprivation disproportionate.

101. This ground of appeal is linked to that concerned with 'limbo' and we proceed to consider that issue to identify whether the Judge's error of law was material to the outcome of this appeal.

'Limbo' - the reasonably foreseeable consequences of deprivation

102. In her decision letter the respondent confirms that within eight weeks of the deprivation order being made, subject to any representations received, a decision will be made as to whether to commence deportation, seek to remove or grant limited leave to remain. Mr. Palmer informed the Tribunal that the respondent would seek to minimise any period of disruption by issuing a notice of liability to deportation immediately after the deprivation order is made and that it is anticipated the respondent will be able to make a decision within six weeks from representations being received, assuming a protection claim is not lodged. We were further informed that if, in light of the representations being received, no deportation decision was taken, then it is likely that the appellant would be granted a short period of leave barring any change of circumstances.

103. Ms. Naik asserted that in assessing the reasonably foreseeable consequences of deprivation for the purposes of assessing the appellant's article 8 rights, and those of his British citizen children, the Judge limited her consideration to whether or not ultimately the appellant would be deported or granted leave to remain in this country. Ms. Naik submitted that the Judge was required to consider a certain consequence of deprivation, namely that the appellant would be left with no leave to remain and therefore would be unable to work in order to provide financial support for his family. Ms. Naik observed that the appellant would be unable to lawfully

drive a vehicle, access certain benefits, or rent property in his own name. The family's rent would be at risk of being unpaid resulting in the family becoming homeless, or at least reliant upon temporary accommodation and public funds. Ms. Naik submits that the appellant's historic fraud, and any claimed public interest in deprivation as a result of such fraud, is not such as to outweigh the children's best interests and they will be adversely affected by the consequences of their father's deprivation. She further submits that the appellant being placed in a state of 'limbo', or stasis, is such as to amount to a breach of both his and his family's article 8 rights.

104. The respondent acknowledges that for a period of time the appellant will be in this country without any leave and so will be unable to work or have recourse to public funds. However, it is not her policy to grant leave to persons in such a situation simply in order for them to continue living as before pending a decision or a subsequent outcome on appeal. The respondent contends that to grant individuals such as the appellant a limited period of leave until a further decision as to leave to remain or deportation is reached would give this cohort of individuals beneficial treatment over and above others who equally do not have a right to remain in this country, but who did not take fraudulent steps to obtain leave, still less citizenship. Further, the respondent observes that it would be wholly contradictory to grant leave to remain to an individual on article 8 grounds while at the same time considering whether to deport him, a decision which could only be made having concluded that the public interest in deportation outweighs any interference with the article 8 right to respect for private and family life.

105. 'Limbo' is convenient shorthand for the appellant's concern that he faces an uncertain period awaiting a decision. Though he has enjoyed lawful presence in this country for many years through his fraud, he is being returned to the position he would have been in at the time the respondent considered his application for international protection if he had been truthful as to his personal history. He has no identifiable claim for international protection and his wish is to remain here on the basis of established private and family life rights. There is no requirement that he enjoy temporary leave whilst a decision is made on possible deportation action.

106. We are satisfied in this matter that the short time-period identified by the respondent within which the appellant will be required to make representations and for a decision to deport or a grant of leave to then be made cannot require the grant of leave to remain pending the respondent's ultimate decision as to deportation.

107. The appellant's articulated concern is that deprivation will adversely impact upon not only his life, but also that of his wife and children. He contends that the expected 'upheaval' in their lives will be accompanied by financial and emotional concerns. Such upheaval is a consequence of the appellant losing rights and entitlements from his British citizenship that he should never have enjoyed.

108. The Court of Appeal has confirmed that article 8 does not impose any obligation upon the State to provide financial support for family life. The ECHR is not aimed at securing social and economic rights, with the rights defined being predominantly

civil and political in nature: *R. (on the application of SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615; [2019] 1 W.L.R. 5687, at [28]-[38]. The State is not required to grant leave to an individual so that they can work and provide their family with material support.

109. The time period between deprivation and the issuing of a decision is identified by the respondent as being between six to eight weeks. During such time the appellant's wife is permitted to work. She accepted before us that she could seek employment. She expressed concern as to the impact her limited English language skills may have on securing employment but confirmed that she could secure unskilled employment. She confirmed that her husband could remain at home and look after their children. The appellant accepted that his wife is named on the joint tenancy and will continue to be able to lawfully rent their home upon his loss of citizenship and status. In addition, the children can access certain benefits through their citizenship. Two safety nets exist for the family. If there is an immediate and significant downturn in the family's finances such as to impact upon the health and development of the children, they can seek support under section 17 of the Children Act 1989. If the family become destitute, or there are particularly compelling reasons relating to the welfare of the children on account of very low income, the appellant's wife may apply for a change to her No Recourse to Public Funds (NRPF) condition.

110. There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured. That is the essence of what the appellant seeks through securing limited leave pending consideration by the respondent as to whether he should be deported. Although the appellant's family members are not culpable, their interests are not such, either individually or cumulatively, as to outweigh the strong public interest in this case.

111. We find that though the Judge erred in law by not considering this aspect of the appellant's appeal, such error was not material.

Conflation of the grounds of appeal

112. An appeal against a decision to deprive under section 40(3) may succeed either because a reasonably foreseeable consequence of deprivation would be contrary to article 8 or because of some exceptional feature which means that the respondent's discretion should have been exercised differently having proper regard to the significant public interest in deprivation and the grounds for the same.

113. The Tribunal is tasked with forming a view, not just as to whether it would be rational to make such a deprivation order, but to decide whether it is right to do so. This involves an evaluation of the relative weight to be accorded to the significant

public interest in depriving the person concerned of citizenship and any competing interests and considerations, including the impact of deprivation on the legal status of the individual concerned. The Tribunal confirmed in *Deliallisi* that the scope of a section 40A appeal is wider than a consideration of article 8 and so in a case where article 8(2) is not engaged, because the consequences of deprivation are not found to have consequences of such gravity as to engage that article, the Tribunal must still consider whether discretion should be exercised differently.

114. The appellant contends that the Judge undertook no free-standing assessment of his public law grounds of appeal, namely that the respondent's decision was unlawful and unfair independently of article 8. Reliance is placed upon the respondent's unlawful reliance upon the nullity doctrine for several years and the failure to treat the appellant consistently with the cohort of cases that culminated in the *Deliallisi* appeal.

115. The Judge noted at [66] of her decision that she was required to consider the public law ground of appeal in addition to article 8 and consider whether delay could amount to an exceptional circumstance from [72]. However, we are in agreement with Ms. Naik that when concluding her assessment at [77], the Judge conflated the public law ground as an element of her article 8 assessment, rather than identifying it as a stand-alone consideration. We are, however, satisfied that the Judge did not materially err in law because, for the reasons identified above, no exceptional feature arises in this matter establishing that it is not right for a deprivation order to be made.

The application of the wrong test to the article 8 appeal

116. Ms. Naik submitted that the Judge erred at [77] of her decision by requiring the appellant to demonstrate 'exceptional circumstances' in order to succeed in his article 8 appeal, whereas 'all that was required was for him to demonstrate that public interest factors did not outweigh the best interests of his children, which would be very adversely affected as the result of the appellant losing his immigration status for an unspecified period'.

117. Significant weight is to be placed upon the public interest in a person who has obtained British citizenship through fraud, false representation or concealment of a material fact being deprived of that status and the Tribunal is to be mindful that it is the respondent who is primarily responsible for determining and safeguarding the public interest in maintaining the integrity of the rights flowing from British citizenship.

118. The exercise of discretion is to be approached on the basis that deprivation of citizenship involves interference with a right and that any such interference should be no greater than is necessary to achieve the legitimate aim of the interference. In this matter, the issue is as to deprivation, and whether the appellant will be deported or removed is not determined by the deprivation appeal. Upon the conclusion of the appeal process, he will remain in this country and continue to reside with his family.

The appellant will await a further decision as to whether he is to be deported or be permitted to remain in this country, and he will enjoy a further right of appeal to the First-tier Tribunal against a decision to refuse a human rights or protection claim. The children's best interests are in staying in a family unit with their parents, which they will continue to do upon deprivation. That the family unit may have to move accommodation or enjoy more limited financial resources is not such as to come close to defeating the significant public interest in the appellant being deprived of his British citizenship. The Tribunal held in *BA* that consequent to such weight, where statelessness is not in issue it is likely to be only in a rare case that the ECHR or some very compelling feature will require an appeal to be allowed. The circumstances in such a case would normally be exceptional in nature. We find that the Judge did not apply the wrong test when considering proportionality and article 8. She was employing exceptionality as a predictive device, rather than a threshold test.

Anonymity

119. The Judge made an anonymity direction confirming that no report of proceedings was to directly or indirectly identify the appellant or any member of his family. Ms. Naik requested that the direction continue.

120. We are mindful of Guidance Note 2013 No 1 concerned with the issuing of an anonymity direction and we observe that the starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: *Re: Guardian News & Media Ltd* [2010] UKSC 1; [2010] 2 AC 697.

121. Paragraph 18 of the Guidance Note confirms that the identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. We observe that we have not named either the appellant's wife or their children and no reference is made to where the family reside, the ages of the children or what school they attend.

122. Even in cases involving exploration of intimate details of an appellant's private and family life, the full force of the open justice principle should not readily be denigrated from: *Zeromska-Smith v United Lincolnshire Hospitals NHS* Trust [2019] EWHC 552 (QB**)**. The appellant was named in proceedings up to and before the Supreme Court. His personal history, including his fraudulent application for asylum, was expressly referred to within the Supreme Court judgment and his criminal conviction was detailed in the judgment of the Court of Appeal. Though not named, his eldest child was expressly addressed at paragraph 4 of the draft order attached to the judgment of the Supreme Court. Information as to the appellant's Supreme Court case, and attendant press and legal commentary, as well as his

conviction are publicly accessible. In all of the circumstances we are satisfied that there is no need to make a direction to protect the identity of the appellant, his wife or his children.

123. We therefore set aside the anonymity direction of the Judge.

Notice of decision

124. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. The decision of the First-tier Tribunal is upheld, and the appeal is dismissed.

125. The anonymity direction dated 26 October 2018 is set aside

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 17 March 2020