Upper Tribunal
(Immigration and Asylum Chamber)

Deliallisi (British citizen: deprivation appeal: Scope) [2013] UKUT 00439(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 July 2013	………………………………

Before

UPPER TRIBUNAL JUDGE PETER LANE
UPPER TRIBUNAL JUDGE KEBEDE

Between

JURGEN DELIALLISI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Naik, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr P Deller, a Senior Home Office Presenting Officer

(1) An appeal under section 40A of the British Nationality Act 1981 against a decision to deprive a person of British citizenship requires the Tribunal to consider whether the Secretary of State's discretionary decision to deprive should be exercised differently. This will involve (but not be limited to) ECHR

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Article 8 issues, as well as the question whether deprivation would be a disproportionate interference with a person's EU rights.

(2) Although, unlike section 84(1)(g) of the Nationality, Immigration and Asylum Act 2002, section 40A of the 1981 Act does not involve any statutory hypothesis that the appellant will be removed from the United Kingdom in consequence of the deprivation decision, the Tribunal is required to determine the reasonably foreseeable consequences of deprivation, which may, depending on the facts, include removal.

(3) A person who, immediately before becoming a British citizen, had indefinite leave to remain in the United Kingdom, does not automatically become entitled to such leave, upon being deprived of such citizenship.

DETERMINATION AND REASONS

A. INTRODUCTION

1. At the end of the last Millennium, Kosovo was part of the territory of the state of Serbia, which itself had emerged as a separate entity, following the break-up of Yugoslavia. The majority of the population of Kosovo were and are ethnic Albanians. Many were in favour of achieving separation from Serbia. That led to an armed Serbian response and, in turn, large-scale conflict. In 1999, a NATO military force intervened, in a bid to restore order.

2. In 2000, the situation in Kosovo was still sufficiently grave for many of its inhabitants to seek protection in other countries, including the United Kingdom. In August 2000, the appellant, then aged 23, arrived in this country. Taking advantage of the crisis in Kosovo, he told the United Kingdom authorities that he was Kosovan. In truth, he was from Albania. That was where he had lived with his parents, although he told the respondent that they too were Kosovan.

3. On this false basis, the appellant in 2002 obtained refugee status and indefinite leave to remain in the United Kingdom. In 2005, he applied to be naturalised as a British citizen. On 15 May 2006 he was issued with a certificate of naturalisation. In his citizenship application, the appellant maintained that he was from Mitrovica in Kosovo.

4. In February 2007, the appellant's parents applied for entry clearance to the United Kingdom, as visitors. Their application, made in Tirana, indicated that the appellant was born in Durres in Albania on 17 July 1977 (not Kosovo, on 17 July 1975, as the appellant had claimed).

5. In response to a letter from the respondent, informing the appellant that she was considering depriving him of British citizenship, the appellant made a statement dated 11 August 2008, in which he admitted he was born in Durres, Albania on 17 July 1977. He said he had left Albania for a better life as the situation in that country was unstable and he was frightened of criminality there. The agent who had brought him to the United Kingdom instructed the appellant to tell the authorities that he was from Kosovo, since if he did so he would be granted asylum; were he to tell the truth, the appellant was told that he would be immediately returned.

6. In 2005, the appellant's fiancée had arrived from Albania, which was also her home, with entry clearance to join the appellant. They subsequently married and a son was born to them in 2007. A second son was born in 2010. The wife's initial application for naturalisation as a British citizen was refused by the respondent, who considered that she had used information concerning her husband, which she knew to be false. She was banned from making any further application for two years. That was in 2009. When she re-applied in 2011, her application was successful.

7. On 13 October 2009, the respondent gave the appellant notice of a decision to deprive him of his British citizenship under section 40 of the British Nationality Act 1981. The appellant was informed in the same document that he could appeal to the Asylum and Immigration Tribunal against that decision, pursuant to section 40A of the 1981 Act.

B. THE LEGISLATION

8. The present version of section 40 of the British Nationality Act 1981 was substituted for the original enactment by section 4 of the Nationality, Immigration and Asylum Act 2002. Section 40(2), however, was itself substituted by section 56 of the Immigration, Asylum and Nationality Act 2006. Section 40 reads as follows:-

> "*40. Deprivation of citizenship*
>
> (1) In this section a reference to a person's 'citizenship status' is a reference to his status as –
>
> (a) a British citizen
>
> (b) a British overseas territories citizen,
>
> (c) a British Overseas citizen,
>
> (d) a British National (Overseas),
>
> (e) a British protected person, or
>
> (f) a British subject.

(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.

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

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

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997.

(6) Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status 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."

9. The present method of challenging a decision under section 40 is by way of appeal. Leaving aside appeals which lie to the Special Immigration Appeals Commission, relevant provisions are to be found in section 40A of the 1981 Act:-

"*40A. Deprivation of citizenship: appeal*

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

(2) ....

(3) The following provisions of the Nationality, Immigration and Asylum Act 2002 shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82, 83 or 83A of that Act –

(b) ....

(c) section 106 (rules),

(d) section 107 (practice directions) and

(e) section 108 (forged document: proceedings in private).

(6) ....

(7) ....

(8) ....".

C. THE APPELLANT'S APPEAL TO THE FIRST-TIER TRIBUNAL

10. By the time the appellant's appeal came to be considered, the Asylum and Immigration Tribunal had been replaced by the Immigration and Asylum Chamber of the First-tier Tribunal. On 21 October 2011, Designated Immigration Judge Woodcraft and Immigration Judge Pullig made a ruling in respect of the appellant and five other appellants, in respect of whom the respondent had decided to make deprivation orders on the basis that they too had obtained British citizenship by making false claims. The ruling dealt with a number of matters, of which the following are relevant to the present proceedings.

11. At [19] to [23] of the ruling, the First-tier Tribunal decided that the scope of appeals under section 40A was as follows:-

"19. Section 40A(1) does not define the scope of the appeals. As we have said, a decision is not an 'immigration decision' under Section 82 of the 2002 Act so the grounds of appeal set out in Section 84 of that Act do not apply, in particular Section 84(1)(e) – that the decision is not in accordance with the law, and (f) – that the person taking the decision should have exercised differently a discretion conferred by the Immigration Rules.

20. Thus, altogether the power of the respondent to make the decision is simply that – the respondent 'may' do so – the Tribunal has no power to exercise discretion differently as such a decision is not an 'immigration decision'.

21. Subject to what we say below with regard to human rights, we find that the scope of the appeal simply on the basis of the wording of Section 40A(1) is to examine the facts on which the respondent made the

decision, examine the evidence and determine whether the basis upon which the decision was made is made out.

22. The essential fact of falsely asserting being Kosovan is not disputed by any of the appellants. It is in fact admitted by each of them. If this appeal were limited in scope as we have indicated then each one would fall to be dismissed for that reason.

23. That would be the case even if the respondent had not followed her own policy in the Nationality Instructions (Chapter 55) as a challenge to such would be upon the basis that the decision was not in accordance with the law. Subject as below, we have no jurisdiction in that regard. That would be a matter for judicial review. However, we now turn to Article 8.

Article 8 of the Human Rights Convention

24. Because of what we have said above, all the other submissions made to us raise matters that can only be argued under Article 8."

12. Having thus found that the scope of the section 40A appeal was, in effect, limited to Article 8 ECHR issues, the Tribunal concluded that Article 8 would be engaged only:-

"(i) Where as a result of deprivation an appellant will be unable to work and receive benefits and thus be unable to support himself or herself and dependant;

(ii) Where there are children who have no immigration status or will have none as a direct result of a Deprivation Order being made;

(iii) Spouses with limited leave who would only be able to obtain further leave if the appellant were not deprived of British citizenship." [50]

13. It was on this basis that the same panel of the First-tier Tribunal determined the appellant's appeal, following a hearing at Hatton Cross on 12 December 2011. At [4b] of its determination the Tribunal made the following findings:-

"25. It is not disputed that the appellant had deceived the respondent when he sought asylum, obtained indefinite leave to remain and subsequently obtained British Citizenship. It matters not that an Entry Clearance Officer may have overlooked that fact when he granted the appellant's wife entry clearance to come to this country as a spouse. There could be many explanations for that. It does not alter the fact that deception was practised. One way or another the appellant's conduct clearly falls within Section 40(3) of BNA 1981 and as a consequence of the facts found the Secretary of State's decision under Section 40(3) is right. It is not argued that the appellant would become stateless as a result of this decision or any order made following it.

26. Turning to Article 8 of the Human Rights Convention, we have dealt with this comprehensively in our ruling. There is no evidence of

precisely what the consequence to the appellant will be of deprivation in practical terms. If the respondent makes an order depriving him of his citizenship but grants him leave he can continue to work as he has been before, claim benefits if that becomes necessary, and continue to support his wife and son. Their position is not affected directly by the decision or any order made as a result.

27. It is appropriate to comment upon what was said in Fayed.[1] Mr Fayed was a man of considerable reputation one way or another. He was extremely well-known as the proprietor of Harrods. The decision of the respondent in that case was equally well-known and as a result the whole affair culminating in the Court of Appeal decision, from which we have quoted. It became notorious.

28. In this appeal the circumstances are rather different. No one has pointed out what the actual consequences would be of the appellant and his family having different nationalities when they travelled. There may be a certain amount of inconvenience if one or more of his family have a British passport and he does not but instead some other status, possibly Discretionary Leave to Remain endorsed on some newly acquired Albanian passport. That is a practical inconvenience and one for which the appellant himself is solely responsible.

29. As to loss of citizenship of the European Union and the rights that accompany that citizenship, there is no evidence as to what in this case would be the direct effect of that in this case.

30. Adopting the approach in Razgar (see paragraph 29 of the ruling) we find that Article 8 is not engaged in principle but if it is (because it can be) the interference will not have consequences of such gravity as to engage it in fact in this case, having a mind to what was said in AG (Eritrea) (see paragraph 31). If we are wrong, we find the decision to be in accordance with the lawful legitimate aim of immigration control (which includes the grant and deprivation of citizenship) in the economic interests of this country and we find it to be entirely proportionate in that legitimate aim."

14. Permission to appeal to the Upper Tribunal was granted by that Tribunal on 19 June 2012 and the appellant's appeal was thereafter linked with those of two other similar appeals. At a hearing on 3 June 2013 the Upper Tribunal, by consent, found that there was an error of law in each of the determinations of the First-tier Tribunal, such that those determinations fell to be set aside. In each case, the approach adopted by the First-tier Tribunal to the application of Article 8 of the ECHR meant that it failed adequately to consider the Article 8 issues advanced by the appellants.

[1] R v SSHD ex parte R v SSHD ex parte Fayed [2000] EWCA Civ 523; [2000] 1WLR 763: 'Apart from the damaging effect on their reputations of having their applications refused the refusals have deprived them of the benefits of citizenship. The benefits are substantial. Besides the intangible benefit of being a citizen of a country which is their and their families' home, there are the tangible benefits which include freedom from immigration control, citizenship of the European Union and the rights which accompany that citizenship – the right to vote and the right to stand in parliamentary elections. The decisions of the minister are therefore classically ones which but for section 44(2) would involve an obligation on the minister making the decision to give the Fayeds an opportunity to be heard before that decision was reached'. **[773(e) & (f)] [First-tier Tribunal's footnote]**

That much was common ground between the parties. As will become apparent, however, we found it necessary, in re-making the decision in the appellant's appeal, to consider a more general issue, which featured in the First-tier Tribunal's ruling ; namely, the scope of an appeal under section 40A.

D. EVIDENCE GIVEN AT THE RE-MAKING HEARING ON 9 JULY 2013

15. The appellant gave evidence with the assistance of an interpreter in the Albanian language. He confirmed as true his three witness statements. In that dated 11 August 2008, he had said that he "left Albania for a better life, as the political and economical situation was unstable. I was unemployed and my family was very poor". Law and order was said to be "very awful". Notwithstanding the family's poverty, they were able to borrow £5,000 from friends, which they used to pay an agent to take the appellant to the United Kingdom since he "had heard that UK is a country, where the human rights [sic] are properly respected and this country also treats the foreigners fairly. Therefore I decided that UK was the best place for me". The appellant claimed that "as soon as I had the opportunity… I admitted that I am from Albania". He had been on NASS support only for six months and thereafter "always worked lawfully", not relying on any form of government support. He said that he had "fully integrated into British society and I have never had any criminal record. I realise I have committed an offence and I sincerely apologise for what has happened".

16. In his statement of 26 September 2011, the appellant asserted that, whilst in Albania, he had been approached by gang members and told that he should join them. Since he was his parents' only remaining child, they decided that, rather than join the criminal gang, the appellant should be sent to the United Kingdom. The agent told him that he should say he was from Kosovo since he would be granted asylum. He was also told to say that he was older than his real age. Although he "always felt guilty that I was not able to reveal my true nationality" he was told that "in my community… if I reveal the truth at any time, I would be sent to prison and thereafter be returned to my country". He did not want to do this as he did not wish to return to live in Albania. The appellant confirmed that he had been working whilst in the United Kingdom, in a variety of capacities.

17. In his statement of 28 May 2013, the appellant referred to his elder son attending school and his wife currently attending college, whilst he worked part-time as a delivery driver. He said that "I have settled into British culture, I have friends here and my ties are all to the UK. I have adapted to life in the UK, I speak English fluently and I want my children to also establish their lives in the UK. Apart from my parents who are in Albania, I have no ties or connections to that country any longer". The statement continued by saying that if he was deprived of his nationality and sent back to Albania, this would be devastating for him and his family.

18. Ms Naik asked the appellant what it meant to be a British citizen. He said that he did not know where to start and there were so many things to say. He felt himself to be a member of the "British family". His elder son was at school, his wife was studying at college to be a chef and he was working part-time as a delivery driver, as well as taking care of the children. He had applied for citizenship in 2005 in order to "integrate into British life and look for a better future".

19. In cross-examination, the appellant said that if he lost his British citizenship he would be unable to travel together with his family. What he meant by this was that, although he was still a citizen of Albania, having an Albanian passport was not as advantageous as being British, since, for example, as an Albanian he needed a visa in order to visit such countries as the USA and Switzerland.

20. Re-examined, the appellant agreed that it was also more difficult to move freely in Europe, as an Albanian. In answer to a question from the Tribunal, the appellant said that he had travelled in Europe, namely to Italy, France, Belgium and Albania in the last six to eight years. He would return to Albania once every year or two, since his parents were still there.

E. THE TWO OTHER APPEALS

21. In response to the Tribunal's directions, following the error of law hearing in June 2013, Mr Deller, for the respondent, gave notice that deprivation action was to be discontinued in the case of the two other appellants. There was no appearance by the other appellants on 9 July. The Tribunal subsequently gave directions in order to ascertain whether, in the light of the respondent's stance, the appellants were withdrawing their appeals in the Upper Tribunal.

22. Ms Naik submitted that it could be helpful to the appellant's case in order to know in detail why the respondent had decided to discontinue deprivation action in the case of the two other appellants. Mr Deller confirmed what he had said in his e-mail of 27 June 2013, namely, that given that the two other appellants had been resident in the United Kingdom for fourteen years, the respondent had decided, pursuant to her policy in chapter 55 (Deprivation and Nullity of British Citizenship) of the Nationality Instructions, that it was not appropriate to pursue deprivation. Mr Deller told us that it was unlikely that anything more would or could be said in this regard.

23. In the event, we gave directions concerning the reasons for the discontinuance in the two other cases and for the parties in the present case to make written submissions on this issue, with the appellant having the last word (which was received on 29 July). We have taken these submissions into account. They are dealt with at [70] *et seq* below.

F. THE SCOPE OF AN APPEAL UNDER SECTION 40A OF THE BRITISH NATIONALITY ACT 1981

24. We have already seen how narrowly the First-tier Tribunal regarded the appellant's right of appeal under section 40A. Essentially, the Tribunal's task was no more than to consider whether the legal pre-condition for the operation of section 40 had been satisfied (in this case, a false representation within section 40(3)(b)) and, if it had, to determine whether the respondent's decision would violate Article 8 of the ECHR.

25. Part V of the Nationality, Immigration and Asylum Act 2002 confers a right of appeal against an "immigration decision" within the meaning of section 82. Section 84 sets out the grounds upon which such an appeal may be brought. These include, under subsection (1):-

> "(f) that the person taking the decision should have exercised differently a discretion conferred by Immigration Rules".

26. Section 86(3) requires the Tribunal to allow the appeal "insofar as it thinks that –

> "(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules), or
>
> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.
>
> …
>
> (6) Refusal to depart from or to authorise departure from the immigration rules is not the exercise of discretion for the purposes of subsection (3)(d)."

27. Mr Deller's skeleton argument is in close alignment with the ruling of the First-tier Tribunal:-

> "30. Whereas in an appeal regulated by section 86 of the 2002 Act the Tribunal is required to consider for itself whether certain types of discretion 'should have been exercised differently' but is expressly forbidden from doing so with others (specifically a refusal to depart from immigration rules), no such explicit parameters exist on what is prescribed by section 40A as simply an 'appeal'.
>
> 31. The Tribunal's explicit powers to review the exercise of discretion in certain cases and to hold that such discretion 'should have been exercised differently' are not the default position in the general consideration of appeals. They exist in immigration appeals (and have done so since the Immigration Act 1971) only where Parliament

provides them. Where (as here) the enabling legislation is silent as to any powers to review discretion those powers do not exist."

28. At paragraphs 25 and 26 of his skeleton, Mr Deller relied upon Arusha & Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC). In that case, the Upper Tribunal approved what had been said by a panel of the First-tier Tribunal, regarding the scope of an appeal under section 40A. At [13] of its determination, the Upper Tribunal had this to say:

> "13. It was also contended on behalf of the first respondent that the first appellant was not entitled to raise human rights in his appeal against this decision. The Tribunal summarised its findings on this issue as follows:
>
> > '41. We reject the submission that human rights grounds are outside the jurisdiction of the Tribunal in an appeal under s.40A of the 1981 Act although we find it equally plain that we cannot decide the case as if there had been a decision to remove the first appellant when no such decision had been made.
> >
> > 42. We have spent some time on this because it was the subject of detailed argument before us. Having given considerable thought to the matter the position is, we find, quite simple and clear. The first appellant cannot rely on a ground alleging that 'removal of the appellant from the United Kingdom in consequence of the immigration decision would … be unlawful under s.6 of the Human Rights Act 1998 as being compatible with the appellant's Convention rights. Such a ground can be raised as of right in appeals against immigration decisions but this is not such a decision. The grounds could, conceivably, be raised in a different deprivation case where, unusually and improbably, there was some reason to think that the appellant was going to be removed without an 'immigration decision' being made but this would not be because it was a statutory ground but because it was an expression of a claim on human rights grounds formulated to meet a particular case. In the absence of any statutory restriction, the appellant can raise general human rights grounds but they must be framed to deal with the breach alleged to be caused by the decision to deprive the appellant of his nationality, and giving effect to that decision, and not framed to deal with the fiction that the appellant would be removed'.
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> 14. We have set out these conclusions reached by the First-tier Tribunal following detailed comprehensive submissions. They have not been challenged by either party in the present appeal and we record them at the request of the parties to assist the First-tier Tribunal as there are a number of pending deprivation of citizenship appeals."

29. As can be seen, the first line of [13] of the Upper Tribunal's determination contains the word "also". This is because both the First-tier Tribunal and the Upper Tribunal in those appeals rejected not only the respondent's contention that human rights were not engaged in the section 40A appeal,

but also her contention that such an appeal was otherwise limited in its scope. This is plain from [11] of the Upper Tribunal's determination:-

> "11. As the First-tier Tribunal pointed out neither s.84 nor s.86 of the 2002 Act applies to appeals under s.40A. The right of appeal in s.40A is not an appeal under s.82(2) against an immigration decision and the grounds of appeal are not limited to or enhanced by those identified under s.84 and therefore the provisions of s.84(1)f giving the Tribunal power to allow an appeal on the ground that a discretion contained in the immigration rules should have been exercised differently do not apply. The Tribunal directed itself on the nature and scope of the appeal as follows:
>
> > '13. In our judgment the absence of prescribed grounds can only mean that the Tribunal is to have a wide ranging power to consider, by way of appeal not a review, what the decision in an appellant's case should have been. The Tribunal has to ask itself 'does the evidence in the case establish that citizenship was obtained by fraud?' If it does then it has to ask 'do the other circumstances of the case point to discretionary deprival?'.
> >
> > 14. As this is an appeal not a review, the Tribunal will be concerned with the facts as it finds them and not with the Secretary of State's view of them. In terms of the proof of fraud, the Tribunal will consider any evidence, whether or not available to the Secretary of State at the time he made his decision, which is relevant to the determination of that question'."

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

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

is plainly demanded, in the interests of coherent decision-making or other cogent considerations of public policy.

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

> "4.116 If the appeal is against a decision based on an exercise of judgment, the question arises whether the tribunal is limited to deciding if the judgment was exercised wrongly or is allowed or required to exercise the judgment afresh.
>
> 4.117 The approach to identifying the scope of the appeal in these cases was set out by Etherton J in *Banbury Visionplus Ltd v Revenue and Customs Commissioners* [[2006] STC 1568]. The position is this. The scope of the appeal may be made clear in the language of the statute that allows the appeal. In the absence of express provision, any limitation on the scope of the appeal must be apparent from the nature of the decision or the legislative context, [[2006] STC 1568 at [44]].
>
> 4.118 The general approach of the courts has been that the judgment must be exercised afresh on appeal [As in *Secretary of State for Children, Schools and Families v Philliskirk* [2009], ELR 68 at [19]]. Otherwise, the right of appeal would be rendered illusory [Lord Goddard CJ in *Stepney Borough Council v Joffe* [1949] 1 KB 599 at 602] or unduly restricted [Lord Parker CJ in *Godfrey v Bournemouth Corporation* [1969] 1 WLR 47 at 51].
>
> 4.119 However, there are cases in which this approach has not been taken. *John Dee Ltd v Customs and Excise Commissioners* [[1995] STC 941, as explained in *Banbury Visionplus Ltd v Revenue and Customs Commissioners* [2006] STC 1568 at [39]-[44]] is an example. There it was permissible to require security 'Where it appears to the Commissioners requisite to do so for the protection of the revenue'. Statute provided for a general appeal 'with respect to… the requirement of security'. Neill LJ explained the Court of Appeal's decision:
>
>> 'It seems to me that the 'statutory condition'… which the Tribunal has to determine in an appeal… is whether it appeared to the commissioners requisite to require security. In examining whether that statutory condition is satisfied the tribunal will… consider whether the commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law [[1995] STC 941 at 952]'.
>
> One factor that influenced the decision in this case was that the tribunal was under no duty to protect the revenue; that statutory responsibility was imposed on the Commissioners [[1995] STC 941

at 952]. It is not clear to what extent that factor affected the outcome.

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

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

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

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

34. Accordingly, unlike the First-tier Tribunal, we do not regard the absence in section 40A of the 1981 Act of the relevant wording found in sections 84 and 86 of the 2002 Act as limiting the scope of section 40A. There is, in our view, no ambiguity, obscurity or absurdity in the wording of that section, such as might call for the application of <u>Pepper v Hart</u> [1993] AC 593 principles. But, even if there were, Ms Naik's researches reveal that Parliament quite clearly intended section 40A to be construed in the way we have just described. During the passage of the Bill for the Nationality,

Immigration and Asylum Act 2002, which inserted section 40A into the 1981 Act, the Minister of State, Lord Filkin, gave this assurance to Lord Avebury (Hansard, 8 July 2002, column 508):-

> "The Noble Earl, Lord Russell, suggested that the only appeal is a judicial review. We do not believe that that is the case. The appeal against deprivation is a full appeal on the merits. We believe that perhaps the JCHR [Joint Committee on Human Rights] does not have that clearly in sight or perhaps we have not made it as clear as we could have done.
>
> The appellate body will be able not only to remove [sic; presumably 'review'] the legality of the Secretary of State's decision, but also to hear arguments at his discretion on whether or not the right to deprive should have been exercised differently. The bill proposes no restrictions on the issues which might be raised in an appeal either to an Adjudicator or, where that body had jurisdiction, to the Special Immigration Appeals Commission. The appellate body will be able to hear argument not only that the Secretary of State has failed to observe the statutory requirements, but also that his discretion whether to deprive should have been exercised differently."

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

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

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

37. So far as the ECHR is concerned, in most cases (including the present) the provision most likely to be in play is Article 8 (respect for private and family life). If, on the facts, the appellate tribunal is satisfied that

depriving an appellant of British citizenship would constitute a disproportionate interference with the Article 8 rights of that person or any other person whose position falls to be examined on the principles identified in Beoku-Betts [2008] UKHL 39, then plainly the tribunal is compelled by section 6 of the Human Rights Act 1998 to re-exercise discretion by finding in favour of the appellant. However, the fact that the scope of a section 40A appeal is wider than Article 8 means that, in a case where Article 8(2) is not even engaged, because the consequences of deprivation are not found to have consequences of such gravity as to engage that Article, the Tribunal must still consider whether discretion should be exercised differently.

38. In the present case, the First-tier Tribunal decided that the nature of the interference was not such as to require a positive answer to be given to the second of the five questions in Razgar [2004] UKHL 27. The First-tier Tribunal considered that finding to be determinative of the appeal. As a matter of law, it was not.

G. THE EUROPEAN DIMENSION

39. Even if the tribunal concludes that the issue of Article 8 ECHR proportionality does not arise in the particular appeal, it will still be necessary to decide whether deprivation of British citizenship “observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of a European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law” (Rottmann v Freistaat Bayers [2010] EUECJ C-135/08 (02 March 2010)). In that case, a citizen of Austria had exercised free movement rights so as to settle in Germany. He applied for and obtained naturalisation in that country but, when it was discovered he had failed to disclose, in connection with his naturalisation application, that he was subject to criminal investigations in Austria concerning an alleged fraud, the German authorities took steps to withdraw his German nationality. Upon becoming naturalised in Germany, Mr Rottmann had lost citizenship of Austria, pursuant to the nationality laws of that country.

40. For our purposes, the relevant findings of the CJEU are as follows:-

> “55. In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law.
>
> 56. Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the

consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.

57. With regard, in particular, to that last aspect, a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin.

58. It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.

59. Having regard to the foregoing, the answer to the first question and to the first part of the second question must be that it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality."

41. At 19.2 of Fransman's *British Nationality Law* (3rd Edition) the author notes that:

> "*Rottmann* concerned a case where a person had exercised free movement rights to move from his Member State of origin to a host Member State, in other words that there was a cross-border element engaging EU law in addition to the subsequent acquisition and thereafter loss of the nationality of the host Member State. The case did not test the proposition of whether the acquisition by deception and subsequent loss of the nationality of another Member State is within the scope of EU law in circumstances where the person remains within the Member State of origin during the period of acquisition and loss and does not move to that other state."

42. In the light of Zambrano (European Citizenship) [2011] EUECJ C-34/09 (08 March 2011), we do not consider that Rottmann can be said to be of no application to the circumstances of the present case, merely because the present appellant has not engaged EU free movement laws by moving to another EU State. It is clear from Zambrano that the CJEU requires importance to be attached to the rights and benefits derived from EU citizenship, not merely as regards free movement. Nevertheless, where a person affected by a deprivation decision has made actual use of rights flowing from EU citizenship, in particular, the right to work in another EU

State, then the effect of removing such citizenship may well have a greater practical impact, compared with the position where such rights have not been exercised. Depending on the circumstances, that degree of impact may well require a greater degree of justification on the part of the national authorities, as regards their deprivation decision.

H. BRITISH CITIZENSHIP AND INDEFINITE LEAVE TO REMAIN

43. As she had before the First-tier Tribunal, Ms Naik submitted that we should proceed to determine the appellant's appeal on the basis that, were he to be deprived of British citizenship, the appellant would nevertheless enjoy the indefinite leave to remain, which he had been granted prior to acquiring that citizenship and that the respondent would have to take action under section 76 of the 2002 Act, if she wished to deprive him of it. In its determination, the First-tier Tribunal noted, as we do, that if this submission is correct, the appellant's case is weakened, since deprivation of citizenship would still leave him with a significant form of leave under the Immigration Act 1971. In particular, a person with indefinite (as opposed to limited) leave to remain in the United Kingdom may not be made the subject of a condition restricting his employment or occupation in this country (see section 3(1)(c)(i) of the 1971 Act). Nor can a person with indefinite leave to remain be removed from the United Kingdom, except by way of deportation or after the completion of a legal process to revoke such leave.

44. The appellant's stance is articulated in this passage from the further skeleton argument of Ms Naik:-

> "34. The appellant was granted indefinite leave to remain in 2002. This grant of ILR is extant. It was not revoked when the [appellant] became a British citizen. The only means by which the Secretary of State may *revoke* ILR is under section 76 of the Nationality, Immigration and Asylum Act 2002. Such a decision was not taken.
>
> 35. The SSHD's view without any authority is that the appellant does not retain his ILR on deprivation that it lapsed on the grant of British citizenship and that the appellant would fall liable to removal or require the grant of further leave."

45. The following provisions of the 1971 Act are relevant:

> " **1. General principles**
>
> (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act …

…

2. Statement of right of abode in United Kingdom

(1) A person is under this Act to have the right of abode in the United Kingdom if-

(a) he is a British citizen; or

(b) he is a Commonwealth citizen who-

(i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and

(ii) has not ceased to be a Commonwealth citizen in the meanwhile.

(2) In relation to Commonwealth citizens who have the right of abode in the United Kingdom by virtue of subsection (1)(b) above, this Act, except this section and section 5(2), shall apply as if they were British citizens; and in this Act (except as aforesaid) 'British citizen' shall be construed accordingly.

2A. Deprivation of right of abode

(1) The Secretary of State may by order remove from a specified person a right of abode in the United Kingdom which he has under section 2(1)(b).

…

(4) While an order under subsection (1) has effect in relation to a person-

(a) section 2(2) shall not apply to him; and

(b) any certificate of entitlement granted to him shall have no effect.

3. General provisions for regulation and control

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen –

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period);

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely –

(i) a condition restricting his employment or occupation in the United Kingdom;

(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;

(iii) a condition requiring him to register with the police;

(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and

(v) a condition about residence.

…

5. Procedure for, and further provisions as to, deportation

(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

(2) A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes a British citizen."

46. As can be seen, the general provisions in the 1971 Act regarding leave to enter and remain are expressly stated not to apply where a person is a British citizen. We do not consider that it is compatible with the scheme of that Act to regard indefinite leave to remain (or any other sort of leave) as having some sort of vestigial existence, whilst the person concerned remains a British citizen. A person cannot be both a British citizen and concurrently subject to indefinite leave to remain. Upon becoming such a citizen, the appellant became a person to whom section 1(1) applied. As Mr Deller put it, the appellant's indefinite leave to remain simply ceased to exist.

47. Unlike the position in respect of a Commonwealth citizen who has a right of abode by reason of section 2(2)(b), and who may be deprived of that right under section 2A, the 1971 Act contains no provision regarding

deprivation of British citizenship. Furthermore, section 2A(4) indicates that the revocation of an order depriving a person of the right of abode will automatically bring the person back within the ambit of section 2(2) and that any certificate of entitlement will again be effective. One looks in vain for any comparable provision regarding indefinite leave to remain for a person who had it before becoming a British citizen.

48. We do not consider that the appellant can gain any assistance from section 5(2), which provides that a deportation order shall cease to have effect if the person subject to such an order becomes a British citizen. The relationship between the final words of section 1(1) and section 5 is such as to require the position to be made clear. The drafter of the 1971 Act evidently took the view that it was unnecessary to say that indefinite leave to remain ceases to have effect upon acquisition of British citizenship because that was obvious, given the scheme of the legislation.

49. In support of her proposition, Ms Naik referred to the judgments of the Court of Appeal in Fitzroy George v Secretary of State for the Home Department [2012] EWCA Civ 1362. In that case, the Court, by a majority, found that where, pursuant to section 5(1) of the 1971 Act, a deportation order against a person has invalidated that person's leave to enter or remain, the subsequent revocation of the deportation order has the effect of reviving the earlier grant of leave (in that case, ILR).

50. We do not consider that Fitzroy George assists the appellant's argument. Fitzroy George was at all material times a person subject to the general provisions for regulation and control, set out in section 3 of the 1971 Act. At no time had he enjoyed the right of abode, as described in section 1(1). That is not the position with the present appellant who, upon becoming a British citizen, was removed from the 1971 Act's "regulation and control of entry into, stay in and departure from the United Kingdom" (section 1(2)).

51. In further support of her argument on this issue, Ms Naik sought to invoke section 76 of the 2002 Act. This provides that the Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if that person is liable to deportation but cannot be deported for legal reasons. The existence of this section (and section 5 of the 1971 Act) does not, however, mean Parliament has legislated to the effect that indefinite leave to remain can cease *only* on deprivation under section 76 (or section 5 of the 1971 Act). Section 76 and the corresponding provisions in section 5 contain procedures for terminating indefinite leave, whilst such leave subsists. They do not purport to offer a comprehensive guide as to whether a person has such leave in the first place.

52. Ms Naik, in oral submissions, said that a British citizen who is also a citizen of another country would, in practice, retain his or her indefinite leave to remain "stamp" in the passport of that other country. Whilst that may be so (we express no view), the continued physical presence of a stamp in a foreign passport cannot be taken to govern the interpretation of the 1971

Act. We reiterate that it is incoherent with the legislation to assume indefinite leave to remain can remain extant, in the case of a person who is a British citizen, or that, without express statutory provision, such leave automatically reappears on deprivation of that citizenship.

53. Accordingly, for the purposes of these proceedings, we find that, were the appellant to be deprived of British citizenship, he would not fall to be treated as a person having indefinite leave to remain in the United Kingdom. This, of course, has a direct bearing on the consequences for the appellant of deprivation and, in particular, necessitates an examination of the respondent's policies; in particular, as set out in the NIs. Conversely, if we are wrong, our error could not be material to the outcome of this appeal, unless we were to allow it.

I. DETERMINING THE REASONABLY FORESEEABLE CONSEQUENCES OF DEPRIVATION

54. The first thing to notice here is that, unlike the position under section 84(1)(g) of the 2002 Act, an appeal under section 40A of the 1981 Act does not involve any statutorily imposed hypothesis, that the appellant would be removed from the United Kingdom in consequence of the decision to deprive him of British citizenship. Secondly, it is common ground that, in the event a decision were taken that the appellant should be removed, following deprivation, the respondent would have to take a decision on removal, whether or not also involving a decision to refuse to vary leave, which would be discretely appealable.

55. The absence of a statutory requirement to hypothesise removal, does not, however, mean that removal as a consequence of deprivation is automatically excluded from the factors to be considered by the Tribunal hearing a section 40A appeal. Removal will be relevant if, and insofar as the Tribunal finds, as a matter of fact, that in the circumstances of the particular case, it is a reasonably foreseeable consequence of depriving the person of British citizenship.

56. Indeed, the whole focus of a section 40A appeal is to ascertain the reasonably foreseeable consequences of deprivation, whether or not involving removal. Thus, even if removal is too uncertain to feature directly as a consequence, the possibility of removal and any period of uncertainty following deprivation may require 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.

57. In response to directions given by the First-tier Tribunal, the respondent on 1 December 2011, indicated as follows:

> "The current policy of the Secretary of State is that, in the event that directions are not given for the removal of the appellant:

(a) nonetheless, an Order will be made depriving the appellant of British citizenship.

(b) In such circumstances, the appellant will be assigned leave to remain in the UK with effect from the date of the commencement of the Order. The leave assigned will depend upon the applicant's circumstances, but it is anticipated that in the majority of cases, this leave will be limited in time and subject to the conditions normally associated with the type of leave granted."

58. Ms Naik submitted that this policy left open the possibility that the appellant, following deprivation, might be left in a position of "limbo", not knowing for an indefinite period of time whether, on the one hand, directions were to be given for his removal or, on the other hand, that he was to be granted limited leave to remain. There is, however, no such "limbo" period. Paragraph 55.7.7.1 of the current NIs makes this plain:-

"• In cases where a decision to deprive is appealed and this is unsuccessful, UKBA will then make a decision on removal prior to the issue of the Deprivation Order. This ensures that the individual remains a British citizen until such time that a decision is taken on removal. The individual therefore also remains a British citizen at the time they appeal a decision to deprive."

59. In the circumstances of the present case, we are fully satisfied, on all the evidence, that the likelihood of the respondent's deciding to remove the appellant, upon his ceasing to be a British citizen, is so remote as to be disregarded in the context of the present proceedings. The appellant has been present in the United Kingdom for almost thirteen years. Apart from the admittedly significant dishonesty he displayed in claiming to come from Kosovo, there is no suggestion that he is otherwise of bad character. He has been in gainful employment for almost all of his time in this country, supporting his (now British) wife and two British children, who live with him in West London. In short, we consider that Mr Deller was right to tell us that, in his view, it was extremely unlikely that removal action would be initiated.

60. Accordingly, we proceed on the basis that, immediately upon deprivation, the appellant will be granted a period of leave to remain in the United Kingdom. We consider that there is a sufficient likelihood that any such leave would be of limited duration and, accordingly, that it may be given subject to conditions pursuant to section 3(1)(c) of the 1971 Act.

61. The duration of any such leave will, undoubtedly, be of concern to the appellant. However, given what we have found concerning the lack of likelihood of removal, the reality of the matter will be that the appellant can expect any initial period of leave to be renewed, unless he commits criminal offences or otherwise behaves in a way which satisfied the respondent that it is no longer conducive to the public good that he should remain, notwithstanding his ties with the United Kingdom.

62. Of the conditions that might be attached under section 3(1)(c), the most important is, plainly, that in sub-paragraph (i): “a condition restricting his employment or occupation in the United Kingdom”. The appellant fears he would be refused permission to work and that, as a result, his family would suffer.

63. In assessing the reasonably foreseeable consequences of deprivation, the Tribunal needs to address this issue. In the circumstances of this case, we consider it is highly unlikely that the respondent could rationally resolve, on the one hand, to grant the appellant limited leave but, on the other, effectively to preclude him from continuing gainful employment. Whilst that is our primary finding on this issue, we shall, out of an abundance of caution, nevertheless consider the position on the assumption that the appellant is prohibited from working.

J. RE-EXERCISING DISCRETION

64. Although, as we have indicated, this function has a wider ambit than Article 8 of the ECHR or, indeed, EU proportionality, it is desirable to start with those issues, since it would plainly not be possible to uphold a decision which amounts to a violation of the ECHR or the EU Treaties.

(a) Would deprivation violate the ECHR Article 8 rights of the appellant and/or his family?

65. On its findings of fact, the First-tier Tribunal concluded that Article 8 was not engaged because, notwithstanding what had been said by the Court of Appeal in AG (Eritrea) [2007] EWCA Civ 801, the interference with the appellant’s ECHR rights would not be of such gravity as to require an affirmative answer to the second of the five questions posed by Lord Bingham in Razgar [2004] UKHL 27 at [17]. Thus, the issue of proportionality (question 5) was not reached.

66. Although we have made our own findings of fact and, in particular, have proceeded on the basis that the appellant will not enjoy indefinite leave to remain automatically on deprivation, we have reached the same ultimate conclusion as the First-tier Tribunal, so far as the engagement of Article 8 is concerned. Where, as here, a discretionary decision needs to be re-taken and where proportionality in EU terms falls to be addressed, the temptation for judicial fact-finders is to proceed to a determination of proportionality in ECHR terms. Given the potentially serious consequences of deprivation, such a course may be required, in any event. But here, the reasonably foreseeable consequences of deprivation are not ones which require question 2 of Razgar to be answered affirmatively. The evidence points strongly to the appellant’s continuing to live with his family in the United Kingdom and to being able to work. Even if he were not able to work, there is no evidence to indicate that the family would, as a consequence, have to split up or that its members would suffer material

hardship. The appellant's British wife has chosen to pursue a course designed to enable her to work as a chef. Despite the fact that she has not, hitherto, worked in the United Kingdom, there is no evidence before us to demonstrate that, were she to need to find gainful employment, she would be unable to do so. Nor is there any evidence that, if circumstances so required, the family would be unable to claim benefits.

67. In short, even on this "worst case" scenario, there is no material interference with the private and family life rights of the appellant or his family. In so finding, we have treated the best interests of the appellant's children as a primary consideration, as required by section 55 of the Borders, Citizenship and Immigration Act 2009 and ZH (Tanzania) [2011] 2 AC 166. We shall have more to say on that matter under paragraph (b) of this Part of the determination.

68. On the far more likely scenario, in which the appellant, albeit with only limited leave, continues to be able to work, the position of the family is unaffected by deprivation of his citizenship. The only matters which might conceivably be relevant were those identified in the appellant's evidence, concerning difficulties he might face in travelling, particularly with his family. We shall have more to say about this in the context of re-exercising our discretion; so far as Article 8 is concerned, however, such matters can have no rational bearing on the protection of the fundamental rights enshrined in the ECHR.

(b) Would deprivation be a disproportionate interference with EU rights?

69. We turn to EU proportionality. We apply the approach described earlier. In determining whether the deprivation of citizenship is proportionate, we have had regard to factors bearing on the appellant's side of the balance. Although the appellant has not exercised free movement rights and the evidence does not disclose any intention or wish to do so in the future, we nevertheless recognise that the principle of free movement is an important one and that, if deprived of British (and hence EU citizenship), the appellant will lose both that and the other benefits inherent in EU citizenship. We give this matter weight.

70. We find that depriving the appellant of British citizenship will have no effect whatsoever on the EU citizenship rights of his wife or children. There is no prospect of the children being deprived of their ability to exercise such rights, including the right to education.

71. We have considered the lapse of time between the naturalisation decision and the withdrawal decision. The certificate of naturalisation in the present case is dated 15 May 2006. In 2007, information came to light that the appellant may have given false information. The decision to make a deprivation order was made on 3 October 2009. Plainly, the passage of time between the naturalisation decision and the deprivation

decision raises no issues that might affect the proportionality of the latter decision. Thereafter, we acknowledge matters have moved more slowly, not least because of the delay in the First-tier Tribunal's promulgation of its determination in Arusha and Demushi. But, during that time, the evidence does not suggest the appellant's position has materially altered, such as by his becoming significantly more integrated into United Kingdom society. (Although he claims to speak English fluently, his decision to speak through an Albanian interpreter meant we could not assess his competence in the language.) In summary, we do not consider the lapse of time (or "delay") issue has a significant role to play in the circumstances of the present case.

72. Although deprivation will remove the appellant's EU citizenship, he does have continuing Albanian citizenship. So far as factors on the respondent's side are concerned, there is, of course, the important public policy aim of ensuring that the laws regarding British citizenship (and, by extension, EU citizenship) are not undermined by the kind of deception that undoubtedly was employed by the appellant. Confidence in the citizenship laws of a Member State needs to be maintained, with the inevitable consequence that those who are found to have obtained such citizenship deceitfully should, as a general matter, not be permitted to benefit therefrom. Overall, we find that the decision to deprive the appellant of British citizenship is, in all the circumstances, a justified and proportionate response, which does not go further than is necessary for the purposes of the respondent's legitimate policy aims. On the contrary, on the facts as we find them, any other conclusion risks being seen as undermining those aims, since the effectiveness of section 40 of the 1981 Act would be severely circumscribed.

(c) Is there any other reason why discretion should be re-exercised differently?

73. We turn to the question of whether, leaving aside ECHR and EU issues, the Tribunal should exercise discretion differently from that of the respondent. We reiterate that a finding against the appellant in terms of ECHR or EU proportionality is not fatal to his case, that discretion should be exercised differently.

74. We do not propose to reiterate the factors already described, all of which we have taken into account. We particularly take account of the appellant's length of residence in the United Kingdom and that he has a British wife and children (as to which see further below). We accept that, even though the facts of this case cannot properly be said to engage the protection of fundamental human rights, there are practical disadvantages in the father of a family, hitherto exclusively enjoying British citizenship, reverting to being a non-EU citizen, of a country which has stricter visa requirements (so far as third countries are concerned) than may be the case with the United Kingdom citizens. But, on the facts, we nevertheless do not find that the potential difficulties described by the appellant in

evidence are such as, combined with all the other factors weighing on his side, to persuade us to re-exercise discretion differently. The appellant will need to obtain an Albanian passport from the Albanian authorities and have it stamped with the leave which the respondent is likely to give him. The appellant may need to obtain a visa in order to travel abroad with his family, including to European destinations. That is a minor inconvenience for him and his family, to be balanced against the importance of maintaining the integrity of British citizenship laws.

75. As with the Article 8 issue, we approach this part of our task by considering the scenario in which deprivation results in the appellant being prohibited from working in the United Kingdom, albeit we reiterate that this scenario is not one which we consider to be reasonably likely to arise and is not our primary finding. The fact that the appellant's wife may, in this scenario, find it necessary to obtain gainful employment, rather than continuing her studies, is of some significance; but many others find themselves in the same position as family circumstances change; and we do not consider that, either alone or in combination with the other relevant factors, this scenario is one which should lead us to exercise our discretion differently. In so concluding, we have, again, treated the best interests of the appellant's children as a primary consideration; that is to say, a matter of substantial importance (SS (Nigeria) [2013] EWCA Civ 550 at [44]). Any change for the worse in a family's earning capacity is bound to have an impact on its children. But, even in this scenario, there is no evidence to indicate that the children would be likely to be less well cared for by their parents; that their education might suffer; or that they would otherwise experience anything approaching actual hardship. In conclusion, even in this scenario, the balance lies with the respondent.

(d) Does the existence of the respondent's policy in NIs 55.7.2.5 and the way it was exercised in the case of the two other appeals originally linked with this case mean that discretion should be exercised differently (including by reference to ECHR Articles 8 and 14)?

76. We return to the issue first mentioned at [21] to [23] above. In each of the two other cases that were due to be heard with the present appeal, but which were withdrawn under rule 17, the respondent gave essentially the same reasons for the decision to discontinue deprivation action:

> "although your client obtained citizenship as a result of deception, he has lived in the United Kingdom for more than 14 years and so the case falls outside (sic) the scope of our policy. As a result your client will remain a British citizen".

77. The policy is in Chapter 55 of the NIs:

> "55.7.2.5 In general the Secretary of State will not deprive of British citizenship in the following circumstances:

Where fraud *postdates* the application for British citizenship it will not be appropriate to pursue deprivation action.

If a person has been resident in the United Kingdom for more than 14 years we will normally not deprive of citizenship."

78. Ms Naik, in her written reply of 22 July, submitted that the terms of the letters to the other two appellants demonstrates that the policy is an "absolute" one, in that 14 years residence is, in fact, determinative, rather than being only a factor to be taken into account. As a result, the appeal should be allowed, following AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082. Furthermore,

> "if the policy is properly interpreted as containing other discretion outwith length of residence, then [the appellant in the present case] is entitled to the benefit of consideration of such factors consistent with that... Here the appellant has 13 years residence (less one month) but additional to and distinct from the appellant [H}, has 2 British born children who are British citizens and now a British wife".
>
> ...
>
> 5. There are no additional conducive to the public good factors that can properly be relied on by the SSHD ... to otherwise bring him outside the policy on such grounds.
>
> 6. Treating him fairly and consistently with the linked cases and properly applying article 8/14 this appellant can properly argue that when reviewing the exercise of the merits of the decision to deprive for themselves that given the impact on the Appellant and given his history, notwithstanding the reasons given by the SSHD in those cases (sic)."

79. We do not find that these submissions are made out. The fact that, in the two particular cases with which we are concerned only the 14 years residence was mentioned does not mean that the policy is, despite its express terms, absolute in nature. As Mr Deller submitted in his written response of 24 July, good administration cannot require every executive decision not to pursue action to provide detailed legal commentary and reviewable reasoning, merely in case this might benefit a different person in a different case.

80. But, in any event, even if the policy were absolute as to the 14 years residence requirement, the present appellant has not achieved that goal. In this respect, Ms Naik's submission looks very like a "near miss" argument of the kind disapproved by the Court of Appeal in Miah and others [2012] EWCA Civ 261. As for the rest of her submissions, as we understand them to be, we agree with Mr Deller's categorisation of them as an attempt to create an "imaginary policy", involving a sliding scale, rather than a clear 14 year requirement, whereby a person might bring himself within its terms by a combination of residence shorter than 14

years, coupled with the fact of having British citizen children. Such a policy does not, however, exist.

81. Accordingly, we do not consider that the eventual outcome of the two other cases has any material bearing on the manner in which the appellant's case falls to be decided. We have already taken account of his length of residence in the United Kingdom. Indeed, that residence is directly relevant to our finding that the reasonably foreseeable consequences of deprivation will not involve him being faced with a decision of the respondent that he should be removed from this country or, indeed, that he should no longer be allowed to work. The presence of his children within the family unit is another reason for that finding.

82. We see no scope for the application of ECHR Articles 8 and 14, in the way for which Ms Naik contends. In particular, there is no arguable discrimination in the way in which the respondent has chosen to formulate her policy in Chapter 55 of the NIs.

K. DECISION

83. Although the issues in this appeal have called for and received separate analysis, we have stood back and considered cumulatively each of those issues, as they relate to whether we should re-exercise the discretionary deprivation decision in favour of the appellant. Extracting from each of them the elements that lie on the appellant's side of the discretionary balance, we have nevertheless come to the conclusion that it is appropriate to deprive him of his British citizenship.

84. The making of the decision in this appeal by the First-tier Tribunal involved the making of an error on a point of law. We set aside that decision and substitute the following decision.

85. The appellant's appeal under section 40A against the decision of the respondent to make an order depriving the appellant of British citizenship is dismissed because we find that the discretion involved in making that decision should not be exercised differently; in particular, the decision is not a violation of the ECHR and is not disproportionate so far as concerns the law of the EU.

Signed
Date

Upper Tribunal Judge Peter Lane