



Neutral Citation Number: [2023] EWCA Civ 1087

Case No: CA-2022-001854

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL (IAC)**

**Judge Blundell**  
**DC/00135/2019**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 September 2023

**Before:**

**LORD JUSTICE MOYLAN**  
**LORD JUSTICE DINGEMANS**  
and  
**LADY JUSTICE ELISABETH LAING**

**Between:**

**MR SYED TAHSEEN AHMED** **Appellant**  
**- and -**  
**SECRETARY OF STATE FOR THE HOME** **Respondent**  
**DEPARTMENT**

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**Zane Malik KC and Reuben Solomon** (instructed by **Woolfe & Co Solicitors**) for the **Appellant**  
**Julia Smyth and Rajkiran Barhey** (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 22 June 2023  
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**Approved Judgment**

This judgment was handed down remotely at 12 o'clock on 28 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Dingemans:

### Introduction

1. This appeal raises issues about whether the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) made errors of law in a decision dated 24 January 2022 in finding that the Respondent, the Secretary of State for the Home Department (the Secretary of State), was entitled on 29 November 2019 to deprive the Appellant, Mr Syed Tahseen Ahmed (Mr Ahmed), of his British citizenship pursuant to the provisions of section 40(3) of the British Nationality Act (the 1981 Act). Mr Ahmed had obtained his British citizenship on 20 August 2018 following an application made on 30 July 2018.
2. In the argument before the Court, raised by a Respondent's Notice to affirm UTIAC's decision on different grounds, and a late application to amend the Appellant's Notice, issues were raised about the scope of an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) brought pursuant to the provisions of section 40A of the 1981 Act, against an order made under section 40(3) of the 1981 Act. This was in the light of the decision of the Supreme Court in *R (Begum) v Special Immigration Appeal Commission* [2021] UKSC 7; [2021] AC 765 (*R (Begum)*) and subsequent decisions of UTIAC on the approach to such appeals.

### Factual background

3. Mr Ahmed is a Pakistani national and was born on 6 January 1976. He married a Pakistani national, Ms Farhat Sbuhi (Ms Sbuhi), in Pakistan in 2001 and they had two children. Mr Ahmed came to the UK in March 2006 with leave to enter as a student. A third child was born to Mr Ahmed and Ms Sbuhi later in October 2006. It is relevant to note, given the later issues, that this child was conceived before Mr Ahmed left for the UK.
4. In December 2006 Mr Ahmed met a Polish national, Ms Weronika Lebkowska (Ms Lebkowska) and started a relationship with her.
5. In October 2008, Mr Ahmed received a document from Pakistan entitled Divorce Deed ("the divorce deed"). This divorce deed was signed by Ms Sbuhi and purported to end the marriage between Mr Ahmed and Ms Sbuhi irrevocably and to allow Mr Ahmed to remarry after a period of three months.
6. On 28 May 2009, Mr Ahmed made an application for a residence card as the extended family member of an EEA national, being Ms Lebkowska, based upon their durable relationship of two years' cohabitation. In the application form Mr Ahmed described Ms Lebkowska as his partner. It is common ground that the divorce deed was sent with this application. Mr Ahmed signed a declaration to the effect that the information that he had given was complete and true to the best of his knowledge.
7. On 16 September 2009 Mr Ahmed and Ms Lebkowska were married in an Islamic ceremony in September 2009. It is now common ground that this ceremony was not effective to create a lawful marriage in the UK. On 27 July 2010 Mr Ahmed was granted a residence card as Ms Lebkowska's extended family member.

8. On 27 July 2010 Mr Ahmed was granted residence in the UK based on his durable relationship with Ms Lebkowska as an unmarried partner.
9. In January 2011, Mr Ahmed travelled to Pakistan and stayed there for 34 days. At some stage during that visit Mr Ahmed had sexual relations with Ms Sbuhi. As a result Ms Sbuhi had a fourth child with Mr Ahmed who was born on 24 September 2011. Ms Sbuhi and the four children continued to reside in Pakistan.
10. On 21 July 2015 Mr Ahmed made an application (“the EEA application”) for permanent residence in the UK on the basis that he had resided in the UK in accordance with the EEA Regulations for five years with Ms Lebkowska. At paragraph 11.23 of that application Mr Ahmed answered that he had been married before his current relationship. At paragraph 11.24 he was asked to provide details “of all other current or previous marriages ...” Details were to include “date and place of any marriages and divorce, annulment or dissolution, how long the relationship lasted ... and any other relevant details”. Mr Ahmed gave Ms Sbuhi’s name and said “Divorced 14.10.2008. Relationship lasted 7.5 years”. There was no mention of the birth of his fourth child with Ms Sbuhi or the circumstances which gave rise to that. Mr Ahmed signed a declaration to the effect that the information that he had given was complete and true to the best of his knowledge.
11. The EEA application was refused in December 2015 on the basis that Ms Lebkowska was not registered with the Worker Registration Scheme (‘WRS’). Mr Ahmed appealed to the FTT. In the meantime, in December 2016, Mr Ahmed moved out of accommodation which he shared with Ms Lebkowska and they separated.
12. Mr Ahmed’s appeal was heard on 21 February 2017. The FTT judge was informed about the separation from Ms Lebkowska but considered it to be immaterial because the five-year qualification period had been completed in 2015, and the reason given by the Secretary of State for refusing the EEA application was wrong. This was because Ms Lebkowska had been a qualified person in the UK for over seven years and had registered her employment under the WRS. The appeal was allowed. The Secretary of State issued Mr Ahmed with a Permanent Residence Card on 12 July 2017.
13. On 25 August 2017, Mr Ahmed returned on a visit to Pakistan and is said to have reconciled with Ms Sbuhi. Mr Ahmed returned to the UK.
14. Mr Ahmed made an application for British citizenship on 30 July 2018. Mr Ahmed submitted a Form AN and in doing so, he confirmed that he had read and understood Guide AN, which states “you must tell us if you have practised deception in your dealing with the Home Office or other government departments (for example, by providing false information or fraudulent documents). This will be taken into account in considering whether you meet the good character requirement.” It also states “you may be deprived of British citizenship if it is found to have been obtained by fraud, false representation or the concealment of any material fact.”
15. Mr Ahmed was informed by letter dated 20 August 2018 that his application had been successful. On 29 August 2018 Mr Ahmed attended his ceremony and was issued with a certificate of naturalisation. He then applied for a British passport.

16. On 17 December 2018 Mr Ahmed applied for entry clearance for Ms Sbuhi and his four children to join him in the UK. This application was supported by a statutory declaration from Mr Ahmed. He stated that he wished to sponsor his wife and children to come to the UK. He gave details of his employment and means. He said “I confirm that my wife and I got married on 18<sup>th</sup> March 2001 at Village Pangpiran Qala Syedan Distt Kotli AJK Pakistan. I lived with my wife for 5 years and then I moved to the UK. I have continuously remained in regular contact with my family via WhatsApp and telephone calls. I regularly visit my family.” He then gave details of visits in 2008, 2011, 2012, 2013, two visits in 2014, 2017 and 2018. Mr Ahmed enclosed details of his marriage certificate, wedding photographs, family photographs and WhatsApp and telephone records. Mr Ahmed made no reference to his relationship with Ms Lebkowska, or to the divorce deed sent to him by Ms Sbuhi.
17. On 12 April 2019 the Secretary of State sent a letter telling Mr Ahmed that there was information confirming that he had obtained his status in the UK as a result of a bigamous marriage. On 1 May 2019 solicitors acting for Mr Ahmed responded. They stated that Mr Ahmed and Ms Sbuhi were first cousins and their respective families lived close to each other in Village Pang Piran, Pakistan. They had not been in a subsisting relationship from 2006 until 2017, even though they had had a child during that time.
18. Mr Ahmed made a statement dated 29 April 2019. In that statement he set out how he had moved to the UK and how that move led to arguments with Ms Sbuhi who had left his house in Pakistan. Mr Ahmed decided to move on and he met Ms Lebkowska. He did stay in contact with his children, and visited Pakistan to see his children and sisters and brothers in Pakistan. Ms Sbuhi was angry with Mr Ahmed and in October 2008 Mr Ahmed received the divorce deed. Mr Ahmed said “this statement was not an actual divorce, but it clearly stated she had divorced me ... I did not respond to that statement as I had moved on.” He related that during one visit in 2011 the children were staying with him. Ms Sbuhi had stayed with him for a couple of days as the youngest child was not well and they had sexual relations during that time. Mr Ahmed explained the break up of his relationship with Ms Lebkowska and his reconciliation with Ms Sbuhi. He denied any false representation or fraud, and said he had always been open, honest and truthful with the Home Office.
19. Ms Sbuhi made a statement dated 27 April 2019. Ms Sbuhi referred to Mr Ahmed’s decision to move to the UK, their separation and her move back to her parents’ house, and her discovery of Mr Ahmed’s relationship with Ms Lebkowska. That had been upsetting so she sent a formal statement advising him of her intention to divorce, but had been advised that “it did not constitute formal divorce”.
20. On 29 November 2019 the Secretary of State made a decision to deprive Mr Ahmed of his citizenship pursuant to section 40 of the 1981 Act. The letter stated: “Your residence/grant of further leave to remain was granted solely on the fact that you were in a relationship with an EEA national, Weronika Aneta Lebkowska and you were divorced from your previous marriage. If it had been known that you were still married to Farhat Sabuhi and the Pakistani Divorce Deed document was false, you would not have been granted residency.”. The Secretary of State concluded that it would not be contrary to article 8 of the European Convention on Human Rights (ECHR) to deprive Mr Ahmed of his citizenship, nor would it render him stateless.

## **Proceedings in the FTT and UTIAC**

21. The FTT heard Mr Ahmed's appeal from the Secretary of State's decision on 19 February 2019. The appeal was dismissed by a decision dated 9 March 2020. Mr Ahmed appealed to UTIAC against the decision of the FTT.
22. Upper Tribunal Judge Blundell ("the judge") set aside the FTT's decision as being wrong in law on 20 April 2021. This was because the FTT Judge had not addressed what the appellant had known about the divorce deed, and because there were misdirections on the shifting evidential burdens and standard of proof. The judge directed that the original appeal from the Secretary of State's decision would be heard in UTIAC for the purpose of remaking the decision.
23. In preparing for the hearing of the retained appeal in UTIAC, both parties had filed and served Skeleton Arguments in which they considered the effect of the Supreme Court decision in *R(Begum)*. In his decision the judge referred to the competing submissions about the approach to appeals following *R(Begum)*. He recorded that it was submitted on behalf of Mr Ahmed that UTIAC did not need to find a public law error and that the decision of precedent fact was for UTIAC to make on the appeal and not the Secretary of State. Although the judge expressed concerns about the possible application of *R(Begum)* to cases such as this one, where new evidence was being heard in any event, he decided to adopt the approach before the decision in *R(Begum)* as requested on behalf of Mr Ahmed. This was because it was clear to the judge that what he referred to as the "condition precedent" question, namely whether the conditions set out in section 40(3) of the 1981 Act had been proved, would be decided against Mr Ahmed "even on the conventional" approach, which had been set out by the Court of Appeal in *KV(Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483; [2018] 4 WLR 166 (*KV(Sri Lanka)*) at paragraph 6.
24. The judge heard evidence from Mr Ahmed, his brother and his brother in law at the hearing. The judge recorded that the issue of the genuineness of the divorce deed was no longer in issue, and it was not contended that Mr Ahmed had contracted a bigamous marriage because Mr Ahmed and Ms Lebkowska had never married, other than under Islamic law. The Secretary of State's case was that Mr Ahmed had continued to be in a relationship with Ms Sbuhi throughout the time that he was in the UK, that the submission of the divorce deed had been designed to mislead the Secretary of State, and Mr Ahmed had concealed the ongoing relationship with Ms Sbuhi from the Secretary of State. The judge identified that this meant that the single question of fact was the nature of Mr Ahmed's relationship with his wife from his entry to the UK onwards.
25. The judge concluded that the Secretary of State had prima facie evidence of fraud, false representation or concealment of a material fact in Mr Ahmed's applications for a residence card and then permanent residence. The evidential burden therefore then fell on Mr Ahmed to provide a plausible innocent explanation. Mr Ahmed had discharged that burden by giving an account of a one-night stand with Ms Sbuhi and a rekindling of their relationship after the demise of his relationship with Ms Lebkowska. This meant that the judge had to consider the whole of the evidence. When weighing up all the evidence, the judge recognised that the consequences of a finding of dishonesty were serious and that the Secretary of State was required to adduce cogent evidence. The judge recorded that there were character references on behalf of Mr Ahmed and he

had convinced the Secretary of State on two occasions that he was in a genuine and durable relationship with Ms Lebkowska.

26. The judge recorded the submission made on behalf of Mr Ahmed that Mr Ahmed, his brother and brother in law had all given consistent evidence about the breakup and then reconciliation between Mr Ahmed and his wife. The judge accepted that “in most respects” the submission was correct, but the judge found that in two important respects, however, their evidence was inconsistent. The first inconsistency related to the time when Ms Sbuhi had moved out of the family home, which was an important matter because it was either before or after the birth of their third child. The second inconsistency related to the reason for moving out of the family home, namely whether it was disillusionment with Mr Ahmed leaving for the UK or because of his relationship with Ms Lebkowska, which was later. The judge recorded that memory was fallible and that the events had taken place some time ago, but considered the importance of why the relationship had broken down and the time at which it had broken down. The judge considered that the inconsistencies in the versions were damaging to the credibility of the appellant’s account.
27. The judge stated that he also attached importance to another point on which Mr Ahmed had been cross-examined. That was Mr Ahmed’s evidence that he had believed (until he had been told much later that the divorce deed did not have the effect of divorcing Ms Sbuhi and him) that he was divorced from his wife when he had a onenight stand with Ms Sbuhi when she was staying over to look after one of their children who was ill, which had resulted in the birth of their fourth child. The judge said that evidence had to be put in the context of: (1) the context of the relationship, namely that she was so disgusted and upset by his relationship with Ms Lebkowska that she had pronounced a divorce; (2) the distance between the two homes, which was 200 yards; and (3) societal. In relation to the third point the judge then referred to two cases. These were *SM (lone women – ostracism) Pakistan* [2016] UKUT 67 (IAC) (*SM*) and *KA and others (domestic violence – risk on return) Pakistan CG* [2010] UKUT 216 (IAC) (*KA*). The judge stated that in the first case the UT noted “the way in which women in rural Pakistan (which is where events in question took place) are treated as chattels of the male head of their household.” The case had also referred to the role of gossip about the affairs of single women in rural Pakistan. The judge said that in the second case the UT noted “sexual intercourse is illegal in Pakistan except between a husband and wife”.
28. The judge found, against this backdrop, the account of events in 2011 to be wholly unconvincing. The judge found Mr Ahmed’s account of the reason why his wife was said to have instigated a one-night stand with him three years or so after she believed herself to have divorced him on account of adultery to be wholly incredible. The judge found that Mr Ahmed and his wife had had sexual intercourse in 2011 not as a one-night stand, but as part of a relationship which subsisted.
29. The judge found that the Secretary of State had established that Mr Ahmed had concealed a material fact being his ongoing relationship with his wife. The judge rejected the argument that the subsistence of the marriage would not necessarily have been fatal to the submission that Mr Ahmed was in a durable relationship with Ms Lebkowska. This was because it was the fact that Mr Ahmed was in an ongoing romantic relationship with Ms Sbuhi and not the mere existence of a continuing marriage in law which was directly material to the Secretary of State’s evaluation of the applications.

30. The judge found that the divorce deed came into existence to increase Mr Ahmed's chances of securing a residence card, in furtherance of a lie and in order to mislead the Secretary of State, although there was no basis for finding it was forged. The judge did not accept that Mr Ahmed did not know the document would be submitted in support of his application.
31. The judge found that the requirement for the impugned behaviour to have been directly material to the decision to grant the application for naturalisation was met because paragraph 1(1)(b) of schedule 1 to the 1981 Act requires that the applicant for naturalisation be of good character, and sections 1.3 and 9.3 of Chapter 18 of the Nationality Instructions referred at the material time to dishonesty and deception in dealings with UK Government and the employment of deception during the citizenship process or a previous immigration application. The judge concluded that the Secretary of State would have refused Mr Ahmed's application for naturalisation had she known about his dishonest conduct.
32. On the question whether the Secretary of State's discretion to deprive should have been exercised differently, the judge proceeded on the same basis of applying *KV (Sri Lanka)* because it would have made no difference whether he applied a Wednesbury-style review or considered the question himself.
33. The judge considered the reasonably foreseeable consequences of deprivation and whether the Secretary of State's decision was a breach of article 8 of the ECHR, weighing the consequences for Mr Ahmed against the public interest in removing British citizenship from those who obtained it illegitimately. The judge concluded that the discretion should not have been exercised differently and that the decision was proportionate for the purposes of article 8 of the ECHR.

### **The issues on the appeal**

34. There were three grounds of appeal in the Appellant's Notice. The grounds were: (1) the judge misapplied the country information in holding that Ms Sbuhi would not have initiated a "one-night stand" with Mr Ahmed in 2011; (2) the judge erred in law in proceeding on the basis that Mr Ahmed's EEA applications would have been refused if he had disclosed to the Secretary of State the true nature of his relationship with Ms Sbuhi; and (3) the judge erred in law in holding that Mr Ahmed's citizenship was obtained by the concealment of a material fact without considering whether that concealment was dishonest.
35. There was a Respondent's Notice in which the Secretary of State invited the Court to uphold the judge's decision on the basis that Mr Ahmed's appeal should have been considered in accordance with the principles set out in *R(Begum)* which required a public law error by the Secretary of State, which could not be shown. There was a late application to amend the Respondent's Notice to raise an argument that Mr Ahmed would not have met eligibility requirements for naturalisation absent his deception about the true nature of his relationship with Ms Sbuhi. There was also a late application dated 6 June 2023 to amend the Appellant's Notice. This noted that the Secretary of State had contended that the appeal should have been limited to public law grounds on the basis of the analysis in *R(Begum)*. The proposed additional ground of appeal continued "the appellant's position, as set out in his supplementary skeleton argument, is that the Secretary of State's contention is wrong. However, if the Court

finds in favour of the Secretary of State on the jurisdictional point ...” Mr Ahmed wanted permission to assert that the Secretary of State’s decision was vitiated by public law errors.

36. By the conclusion of the oral submissions, it was apparent that the following matters were in issue: (1) whether the judge misapplied country guidance which vitiated his finding of fact about whether there was a one-night stand; (2) whether the judge was wrong to find that Mr Ahmed’s EEA applications would have been refused if Mr Ahmed had disclosed what the judge found was the true nature of Mr Ahmed’s and Ms Sbuhi’s relationship; and (3) whether the judge was wrong to find concealment of a material fact and had considered whether it was dishonest; (4) whether the Court should allow the Respondent’s Notice and dismiss the appeal because the judge should have followed the approach in *R(Begum)* and whether an amendment to the Respondent’s Notice should be allowed; and (5) whether the Court should allow an amendment of the Appellant’s Notice so that Mr Ahmed might contend that under the approach of *R(Begum)* to the appeal from the Secretary of State, the decision of the Secretary of State was vitiated by public law errors.
37. I am very grateful to Mr Malik KC and Mr Solomon on behalf of Mr Ahmed, and Ms Smyth and Ms Barhey on behalf of the Secretary of State, for their helpful written and oral submissions.

#### **Relevant statutory provisions**

38. Section 40 of the 1981 Act, so far as relevant, provides:

“(1) In this section a reference to a person’s “citizenship status” is a reference to his status as—

(a) a British citizen,

...

(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.

...

(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, ...”

39. Section 40A of the 1981 Act, so far as relevant, provides:

“(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 ...”

**No basis for interfering with the finding of facts because of the use of the Country Guidance case law (issue one)**

40. Mr Malik submitted on behalf of Mr Ahmed that a key reason for the judge’s rejection of Mr Ahmed’s account of the “one-night stand” was the societal context of the treatment of women in Pakistan, including as taken from Country Guidance cases (CG cases) as set out in paragraph 58 of the decision. It was submitted that this was not a point raised at the hearing and the judge made a number of inappropriate assumptions about the culture and society in Pakistan, without which the judge would have accepted Mr Ahmed’s “one-night stand” account.

41. Ms Smyth submitted on behalf of the Secretary of State that the judge was entitled to take into account the inherent plausibility of Mr Ahmed’s account and societal norms in Pakistan when concluding that his account of what happened in 2011 was unconvincing. The judge had made a simple point about the status of women in Pakistan, illustrated by examples from CG cases, and was entitled to take into account the inherent unlikelihood of Ms Sbuhi acting as alleged by Mr Ahmed. In any event, the country guidance was only a very small part of the judge’s reasoning and any error would not have been material.

42. The CG cases referred to by the judge were *SM* and *KA*. The judge stated that in *SM* the way “in which women in rural Pakistan (which is where events in question took place) are treated as chattels of the male head of their household” was noted. Although Mr Malik is right to say that this specific finding did not feature in the headnote to the decision, as the headnote was directed to risks on return. Both the US State Department Report for Pakistan in 2014 and the Canada Immigration and Refugee Board had stated, as appears from the judgment in *SM*, that women were often treated as chattels in rural Pakistan. There was nothing in the decision in *SM* to suggest that this statement was not well founded. There was also expert evidence about gossip about single women, and the judge’s use of that evidence about gossip was permissible. Finally there was no basis for finding that there was a difference reported in the CG cases on Pakistan between the rural area in which Mr Ahmed and Ms Sbuhi had lived, which was the Kashmir region, and other rural areas of Pakistan. It was common ground that there may be differences between different regions of Pakistan in the CG cases, but there was nothing to suggest that these were material to the issue about treatment of lone women in rural areas.

43. As to *KA* the judge said that UTIAC noted that “sexual intercourse is illegal in Pakistan except between a husband and wife”. This was a permissible use of the evidence given in *KA* about the law relating to sexual relations outside marriage. In the headnote to *KA* it was reported that the Protection of Women (Criminal Laws Amendment) Act 2006 (“PWA”) “was one of a number of legislative measures undertaken to improve the situation of women in Pakistan in the past decade, has had a significant effect on

the operation of the Pakistan criminal law as it affects women accused of adultery. It led to the release of 2,500 imprisoned women. Most sexual offences now have to be dealt with under the Pakistan Penal Code (PPC) rather than under the more punitive Offence of Zina (Enforcement of Hudood) Ordinance 1979 ... Offences of adultery (both zina liable to 10ad and zina liable to tazir) have been made bailable. However, Pakistan remains a heavily patriarchal society and levels of domestic violence continue to be high". There was also expert evidence to the effect that sexual intercourse was illegal save as between a husband and wife. The judge was entitled to take into account the evidence that both Mr Ahmed and Ms Sbuhi believed that they were divorced at the time that they had sexual intercourse. If they were divorced sexual intercourse would have been illegal. Ms Sbuhi's own statement was to the effect that the next day she was both angry and ashamed that she had had sex outside marriage.

44. As to the point that the CG cases had not been specifically raised by the judge in the hearing it seems (from the footnote to paragraph 18 in the Appellant's Replacement Skeleton Argument) that the judge said that he might consider relevant CG. It does not appear that either party asked to address the judge on what the CG cases showed, and the judge's approach to the CG cases did not render his fact finding unfair to either party.
45. In this respect it is important to note the main reason for the judge's adverse findings against Mr Ahmed were based on two important inconsistencies in the evidence of Mr Ahmed, his brother and his brother-in-law about when Ms Sbuhi had moved out of the family homes and why Ms Sbuhi had moved out of the family home. It is fair to record that the judge stated that he also attached importance to another point on which Mr Ahmed had been cross-examined. That was Mr Ahmed's evidence that he had believed that he was divorced from his wife when he had a one-night stand with Ms Sbuhi when she was staying over to look after one of their children who was ill, which had resulted in the birth of their fourth child.
46. The judge did not accept that evidence, first because of the evidence about the relationship given by Ms Sbuhi, namely that she was so disgusted and upset by his relationship with Ms Lebkowska that she had pronounced a divorce, and secondly because the distance between the two homes was 200 yards, suggesting that there would be no need to spend the night. It was only the third reason which concerned the CG cases *SM* and *KA*.
47. In these circumstances I could discern no basis on which to conclude that if the judge had made any error about the decisions in *SM* and *KA*, it would have been a basis for overturning the judge's findings of fact, which were based on a proper appreciation of the evidence given before the judge.

**Refusal of the EEA applications if continuing relationship with Ms Sbuhi disclosed (issue two)**

48. Mr Malik submitted on behalf of Mr Ahmed that the judge erred in law in proceeding on the basis that Mr Ahmed's EEA applications would have been refused if he had disclosed to the Secretary of State the true nature of his relationship with Ms Sbuhi. This was because the judge was wrong to assume that a person may not be in a genuine and durable relationship with two individuals at the same time. There is no suggestion or finding of fact that the relationship with Ms Lebkowska was a sham and no finding

by the judge that Mr Ahmed's relationship with Ms Lebkowska was not genuine or durable. The application forms did not require Mr Ahmed to disclose the status of his previous relationship, although it was common ground that Mr Ahmed had sent in the divorce deed with his application on 28 May 2009.

49. It was submitted by Ms Smyth on behalf of the Secretary of State that whether Mr Ahmed's marriage had permanently broken down was relevant to the consideration of his EEA applications and the question of whether he was in a "durable relationship" with Ms Lebkowska. The relevant EEA Caseworker Guidance – Chapter 5 – Residence Card Applications required that "any previous marriage or civil partnership (or similar relationship) by either partner had permanently broken down" and that evidence of this be provided, which no doubt explained why the divorce deed had been sent in by or on behalf of Mr Ahmed.
50. Mr Ahmed or his representatives had sent in the divorce deed with his application. This shows that the person sending in the divorce deed was aware of the published guidance about the need to show that any previous marriage had permanently broken down. In my judgment it is clear from the later decisions made by the Secretary of State that the Secretary of State considered it material to know whether the relationship between Mr Ahmed and Ms Sbuhi had permanently broken down, and that approach is consistent with the published guidance.
51. The reason that the Secretary of State would want to know why a previous marriage had permanently broken down is not difficult to discern. Although it is true, as Mr Malik submitted, that Mr Ahmed might have had a relationship with both Ms Lebkowska and Ms Sbuhi at the same time, the Secretary of State was entitled to take the view that the continuing relationship with Ms Sbuhi, with whom he was married and had children, was highly relevant to and undermined the prospect of any relationship with Ms Lebkowska being "durable". For these reasons the status of the relationship with Ms Sbuhi was relevant, and the divorce deed was sent in with Mr Ahmed's application so that it might be relied on by the Secretary of State.

### **Dishonest concealment (issue three)**

52. It was common ground that the approach set out in *Adedoyin v Secretary of State for the Home Department* [2010] EWCA Civ 773; [2011] 1 WLR 564 and followed in *Balajigari and others v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 applied to decisions made by the Secretary of State in relation to decisions under section 40(3) of the 1981 Act. This meant that the Secretary of State had, so far as is material, to establish dishonest concealment of a material fact.
53. Mr Malik submitted that the judge erred in law in holding that Mr Ahmed's citizenship was obtained by the concealment of a material fact without considering whether it was dishonest. The judge should have adopted the approach to dishonesty set out in *Ivey v Genting Casinos* [2017] UKSC 67; [2018] AC 391 (*Ivey v Genting*). The judge did not, and did not scrutinise his findings carefully which he was required to do, because of their far-reaching consequences. Mr Malik submitted that the material time to be addressed was when the application for citizenship was made.
54. Ms Smyth submitted that Mr Malik's submissions missed the point that the judge decided that Mr Ahmed had, when making his applications, concealed the true state of

his relationship with his wife and brought a divorce deed into existence in furtherance of a lie. If Mr Ahmed had told the truth those applications would have been refused and he would never have been able to make an application for naturalisation. In any event Mr Ahmed failed to reveal that he had practised deception in his dealings with the Home Office, and if he had done so his application would have been refused on character grounds.

55. I record that in paragraph 40 of the decision, the judge did expressly refer to, with approval, the submissions made before him by Mr Solomon on behalf of Mr Ahmed that the Secretary of State had to establish that Mr Ahmed had obtained citizenship by means of fraud, false representation or concealment of a material fact. The judge went on “I add to that succinct statement of the law that the Tribunal must, in considering that question, bear in mind the serious nature of the allegation and the serious consequences which follow from a finding of dishonesty” and referred to *Balajigari*. In paragraph 47 of the decision the judge said “I recognise, firstly, that the consequences of a finding of dishonesty are serious and that it is for the respondent to adduce cogent evidence of the same ...”. When recording his findings the judge noted that there was a significant difference between a woman leaving the matrimonial home with two young children and a woman leaving the matrimonial home with two young children and a baby, and there was a significant difference between leaving the family home because she was disillusioned by her husband’s decision to go to the UK and because she was disillusioned by his having an affair. The judge found the inconsistencies “damaging to the appellant’s credibility”. Later the judge described the appellant’s evidence as “wholly unconvincing” and “wholly incredible”. The judge found that the Secretary of State’s case that there had been a plan “all along” for Mr Ahmed to establish himself in the UK and then to bring his wife and children to the UK was correct. The judge found that the divorce deed was brought into existence in furtherance of a lie. The judge found that Mr Ahmed had concealed a material fact being his ongoing relationship with Ms Sbuhi.
56. Mr Malik is right that the judge did not expressly say that the concealment was dishonest, but the judge had directed himself that he needed to find dishonesty on the part of Mr Ahmed. Further the judge found that the appellant’s credibility had been damaged, then found the appellant’s evidence to be “wholly incredible”, and found that there had been a plan “all along” to conceal his true relationship with his wife. The judge found that the divorce deed was brought into existence in furtherance of a lie. In these circumstances it is plain that the judge’s findings of fact amounted to a finding of dishonesty on the part of Mr Ahmed, so that there was a dishonest concealment of a material fact in accordance with the objective test set out in *Ivey v Genting*. It is also apparent from the judge’s acceptance of the Secretary of State’s case that there had been a plan “all along” to establish himself in the UK and then to bring his family to the country, that the dishonest concealment of the true nature of his relationship with Ms Sbuhi was a concealment of a material fact for the purposes of section 40(3) of the 1981 Act. The judge was entitled to make the findings that he did and there was no material error of law in his approach.

#### **No need to address the Respondent’s Notice**

57. In circumstances where Mr Ahmed’s three grounds of appeal have been rejected, the issue raised by the Secretary of State in the Respondent’s Notice does not arise. It is apparent, from the authorities set out in the bundle prepared by the parties for this

appeal, that UTIAC is addressing the implications of the decision in *R(Begum)* in relation to the approach to appeals, see for example *Chimi* [2023] UKUT 00115 (IAC). The issue has also been considered by the Court of Appeal, albeit in the context of SIAC appeals, in *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811 at paragraphs 51 to 75. In circumstances where anything that this Court said about the approach would not be necessary for the judgment, I consider that the issue should be left to be decided in a case where it is relevant to the outcome.

58. As the appeal has been dismissed, it is also not necessary to address the Secretary of State's application to amend the Respondent's Notice to uphold the third ground of appeal on an alternative basis to that given by the judge.

### **No amendments of the Appellant's Notice**

59. For similar reasons to those given in relation to the Respondent's Notice, in my judgment the application to amend the Appellant's Notice should be refused. The application to amend was expressed to be conditional on the Court finding in favour of the Secretary of State on the *R(Begum)* point. This appears from paragraph 1 of the draft additional grounds of appeal which reads "... if the Court finds in favour of the jurisdictional point raised in the Respondent's Notice, he respectfully seeks to advance an additional ground as follows ...". This Court has not found in favour of the Secretary of State on the jurisdictional point because the Court has not addressed the Respondent's Notice.
60. In oral argument Mr Malik submitted that the Court should address the jurisdictional or *R(Begum)* point, even if the Court were to reject the original three grounds of appeal. This is because the judge had relied on the inconsistencies in the evidence given before him from Mr Ahmed, his brother and brother-in-law to reject Mr Ahmed's appeal from the decision of the Secretary of State, and that if the appeal were to be restricted to a public law review of the decision of the Secretary of State under the approach in *R(Begum)* then that evidence would not have been available to the Secretary of State at the time of her decision. It was submitted that Mr Ahmed should have the benefit of a reasoned decision on his appeal from the Secretary of State's decision in accordance with *R(Begum)* so that his appeal should be remitted to the FTT or UTIAC for redetermination.
61. I would reject Mr Malik's invitation to address the *R(Begum)* point and, if we accept it, to remit the appeal, for any of the following reasons. First it had been submitted on behalf of Mr Ahmed that the appeal should be approached on the basis of *KV (Sri Lanka)* and the judge had agreed to do that. In general terms the court should be slow to permit a party to amend its grounds to take a position diametrically opposed to the one that it had successfully urged a Court to accept below, because in general the courts will not permit a party to approbate and reprobate.
62. Secondly, and illustrating the point that it had never been Mr Ahmed's case that *R(Begum)* ought to apply, the amended Appellant's Notice is conditional on the Court accepting the arguments set out in the unamended Respondent's Notice, which the Court has not done.
63. Thirdly, the judge below did not himself decide the *R(Begum)* point because he was clear that the condition precedent question must be resolved against the appellant, even

on what the judge described as the conventional *KV (Sri Lanka)* approach. This suggests that the judge would have rejected the appeal on public law grounds in any event.

**Conclusion**

64. For the detailed reasons set out above I would dismiss Mr Ahmed's appeal. In these circumstances the Respondent's Notice does not arise for decision, nor does the application to amend the Respondent's Notice. I would refuse Mr Ahmed permission to amend the Appellant's Notice.

**Lady Justice Elisabeth Laing**

65. I agree.

**Lord Justice Moylan**

66. I also agree.