Neutral Citation Number: [2021] EWHC 1677 (Admin)

Case No: CO/4638/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

THE QUEEN (on the application of LEONARD GJINI)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

David Jones (instructed by **OTB Legal Solicitors**) for the **Claimant**
Eric Metcalfe (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 19 and 26 January 2021
Further evidence and written submissions on 4 and 12 February 2021

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Approved Judgment

Mr Justice Morris :

Introduction

1. By this application for judicial review, Leonard Gjini ("the Claimant") challenges the decision of the Secretary of State for the Home Department ("the Defendant") dated 22 October 2019 ("the Decision"). By the Decision, the Defendant refused to issue the Claimant with a British passport. By an application for permission to amend his grounds, the Claimant further seeks to challenge the subsequent decision of the Defendant dated 6 August 2020 ("the Naturalisation Certificate Decision"). By the Naturalisation Certificate Decision, the Defendant refused to amend the Claimant's naturalisation certificate in order accurately to reflect his date and place of birth.

The facts in summary

2. The Claimant is a dual British and Albanian national. He was born in Dajc, Lezhe, Albania on 23 July 1980. In 1998 the Claimant entered the United Kingdom and claimed asylum. He claimed asylum on the false basis that he was born in Deqan, Kosovo, Yugoslavia on 16 March 1982. In May 1999 he was granted asylum and indefinite leave to remain. On 29 September 2004 the Claimant was granted a naturalisation certificate in the name of Leonard Gjini. In October 2004 Claimant was issued with a British passport bearing his false date, country and place of birth.

3. On 13 August 2019 the Defendant wrote to the Claimant indicating that verification checks had shown that he had obtained his British citizenship through fraud and notified him that the Defendant was considering whether to deprive him of his citizenship under section 40(3) of the British Nationality Act 1981 ("BNA 1981"). On 15 August 2019 the Defendant revoked the Claimant's passport.

4. On 1 October 2019 the Claimant made a fresh application for a British passport. By the Decision, on 22 October 2019, Her Majesty's Passport Office ("HMPO") refused the Claimant's application, noting that he had obtained his British citizenship by deception and also that there was a mismatch between the date, country and place of birth as it appeared on his naturalisation certificate and his actual date, country and place of birth.

5. On 22 November 2019 the Claimant apply for permission to judicially review the Decision. On 28 November 2019 the Claimant apply for rectification of his naturalisation certificate. On 20 December 2019 the Defendant notified the Claimant of a decision to deprive the Claimant of his British Citizenship under section 40(3) BNA 1981 ("the Citizenship Decision"). The Claimant has appealed against the Citizenship Decision to the First Tier Tribunal ("FTT").

6. At an oral renewal hearing on 10 March 2020, Richard Clayton QC, sitting as a Deputy High Court Judge, granted permission to apply for judicial review.

7. On 6 August 2020 the Defendant took the Naturalisation Certificate Decision. On 19 December 2020 the Claimant applied to amend his grounds in the proceedings, seeking to challenge the Naturalisation Certificate Decision.

The legal framework

Passports

General

8. The grant or withdrawal of a passport has always been an exercise of the Royal Prerogative: see *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett*) [1989] 1 QB 811 at 817C-D. A passport does not confer citizenship, it is merely evidence of it. Passports are issued at the discretion of the Home Secretary under the Royal Prerogative. They can be withdrawn through the use of the same discretionary power.

Written Ministerial Statement

9. On 25 April 2013 the then Home Secretary, Theresa May, made a written ministerial statement in the House of Commons (hereinafter 'the WMS'). The WMS is at the heart of this case. It states, inter alia, as follows:

> *…" The British passport is a secure document issued in accordance with international standards set by the International Civil Aviation Organisation. The British passport achieves a very high standard of security to protect the identity of the individual, to enable the freedom of travel for British citizens and to contribute to public protection in the United Kingdom and overseas.*
>
> *There is no entitlement to a passport and no statutory right to have access to a passport. The decision to issue, withdraw, or refuse a British passport is at the discretion of the Secretary of State for the Home Department (the Home Secretary) under the Royal Prerogative.*
>
> *This Written Ministerial Statement updates previous statements made to Parliament from time to time on the exercise of the Royal Prerogative and sets out the circumstances under which a passport can be issued, withdrawn, or refused. It redefines the public interest criteria to refuse or withdraw a passport.*
>
> *A decision to refuse or withdraw a passport must be necessary and proportionate. The decision to withdraw or refuse a passport and the reason for that decision will be conveyed to the applicant or passport holder. The disclosure of information used to determine such a decision will be subject to the individual circumstances of the case.*
>
> *The decision to refuse or to withdraw a passport under the public interest criteria will be used only sparingly. The exercise of this criteria will be subject to careful consideration of a person's past, present or proposed activities.*

For example, passport facilities may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organised criminal activity.

This may include individuals who seek to engage in fighting, extremist activity or terrorist training outside the United Kingdom, for example, and then return to the UK with enhanced capabilities that they then use to conduct an attack on UK soil. The need to disrupt people who travel for these purposes has become increasingly apparent with developments in various parts of the world.

Operational responsibility for the application of the criteria for issuance or refusal is a matter for the Identity and Passport Service (IPS) acting on behalf of the Home Secretary. The criteria under which IPS can issue, withdraw or refuse a passport is set out below.

Passports are issued when the Home Secretary is satisfied as to:

i. *the identity of an applicant; and*

ii. *the British nationality of applicants, in accordance with relevant nationality legislation; and*

iii. *there being no other reasons (as set out below) for refusing a passport. IPS may make any checks necessary to ensure that the applicant is entitled to a British passport.*

A passport application may be refused or an existing passport may be withdrawn. These are the persons who may be refused a British passport or who may have their existing passport withdrawn:

i. *a minor whose journey was known to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour a residence or care order had been made or who had been awarded custody; or care and control; or*

ii. *a person for whose arrest a warrant had been issued in the United Kingdom, or a person who was wanted by the United Kingdom police on suspicion of a serious crime; or*

iii. *a person who is the subject of:*

- *a court order, made by a court in the United Kingdom, or any other order made pursuant to a statutory power, which imposes travel restrictions or restrictions on the possession of a valid United Kingdom passport; or*

- *bail conditions, imposed by a police officer or a court in the United Kingdom, which include travel restrictions or restrictions on the possession of a valid United Kingdom passport; or*

- *an order issued by the European Union or the United Nations which prevents a person travelling or entering a country other than the country in which they hold citizenship; or*

- *a declaration made under section 15 of the Mental Capacity Act 2005.*

iv. A person may be prevented from benefitting from the possession of a passport if the Home Secretary is satisfied that it is in the public interest to do so. This may be the case where:

- *a person has been repatriated from abroad at public expense and their debt has not yet been repaid. This is because the passport fee supports the provision of consular services for British citizens overseas; or*

- *a person whose* ***past****, present* ***or*** *proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest.*

There may be circumstances in which the application of legislative powers is not appropriate to the individual applicant but there is a need to restrict the ability of a person to travel abroad.

The application of discretion by the Home Secretary will primarily focus on preventing overseas travel. There may be cases in which the Home Secretary believes that the ***past****, present* ***or*** *proposed activities (actual or suspected) of the applicant or passport holder should prevent their enjoyment of a passport facility whether overseas travel was or was not a critical factor."* (***emphasis*** *added)*

10. In an earlier ministerial statement from 1998, Lord Williams of Mostyn stated that "*in practice, refusal and withdrawal of passport facilities to United Kingdom nationals is confined to certain well-defined categories, of which Parliament has been informed*

from time to time". In *R (on the application of Easy) v Secretary of State for the Home Department* [2015] EWHC 3344 (see further below), Lang J placed express reliance upon this statement.

EU Law: Directive 2004/38 EC

11. Chapter VI of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (commonly referred to as the "Citizens Directive") is entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health" and comprises Articles 27 to 32.

12. Article 27 provides, inter alia, as follows

> *"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*
>
> *The personal conduct of the individual concerned must represent <u>a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society</u>. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.*
>
> *…"* *(<u>emphasis</u> added)*

13. Articles 30 and 31 go on to provide certain procedural safeguards in respect of any decision taken under Article 27. By Article 30(1), the persons concerned must be notified in writing of any decision taken under Article 27 (1) in such a way that they are able to comprehend its contents and the implications for them. By Article 30 (2), they shall also be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision has been taken. By Article 30 (3), the notification must specify the court or administrative authority to which the person concerned may appeal. By article 31 the persons concerned must have access to judicial and administrative redress procedures, including provisions for interim orders, to enable an appeal against any decision taken against them on grounds of public policy, public security or public health.

14. Chapter VII of the Citizens Directive is entitled "Final Provisions" and includes Article 34 and 35. Article 35 of the Directive provides as follows:

> *"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."* *(emphasis added)*

Thus, measures withdrawing rights as a result of fraud or abuse of rights must comply with the provisions of Article 30 and Article 31.

Case law on passports

15. The following principles are derived from relevant case law on passports:

(1) A decision by the Secretary of State whether to issue a British passport is one made under the Royal Prerogative: *R (on the application of Liaquat Ali) v Secretary of State for the Home Department* [2012] EWH 3379 (Admin) §17.

(2) Whilst the power to issue a passport is derived from the Royal Prerogative, the power is not to be exercised arbitrarily or capriciously. Passports will generally be issued to those who have established that they are British citizens, unless there are exceptional reasons not to do so: *Easy*, supra, §32.

(3) A decision to refuse to issue a passport may be challenged on public law grounds: *Ali* §§17 and 23.

(4) Before issuing a passport the Secretary of State must be satisfied that the person concerned is entitled to it. The burden of proof of entitlement to a passport is upon the applicant for the passport: *Ali* §17.

(5) It is necessary to distinguish between the issue or renewal of a passport and the grant or withdrawal of British citizenship. Because they are separate decisions, a passport may be withdrawn even if citizenship is not withdrawn: *Easy* at §29.

(6) Renewals have to be supported by the required proof of identity and citizenship. When considering a renewal application, the Secretary of State ought to exercise discretion in accordance with the WMS which reflects her policy and usual practice and the cardinal public law principles of "rationality, consistency and fairness": *Easy* §38.

16. As regards consistency more generally, whilst English domestic law does not recognise equal treatment as a distinct principle of administrative law, issues of consistency and treating like cases alike may arise as aspects of rationality, and can be taken into account in considering the rationality of a decision. There is a general duty on a public authority to offer equal treatment. See *R (on the application of Gallaher Group Ltd) v The Competition and Markets Authority* [2018] UKSC 25 at §§24-30 and 50.

The position under EU law and its relationship with the WMS

17. As a matter of EU law, a decision to remove citizenship has to observe the principles of proportionality. That is in turn acknowledged in the WMS which itself refers to the need for proportionality. In deciding whether to renew or withdraw a passport, the Defendant is required to take account of the principle of proportionality: *Easy* §51.

18. In *R (on the application of XH) v Secretary of State for the Home Department* [2018] QB 355 the Court of Appeal considered the "public interest" grounds in the WMS in the context of the Citizens Directive. The two claimants sought judicial review of decisions to cancel their passport because they were suspected of involvement in terrorist-related activities. It is notable that in both cases, the reasons given in the Secretary of State's letter cancelling the passport were specifically set out in the precise terms of the WMS (i.e. that likely future travel overseas for the purpose of terrorism related activities were "so undesirable that the grant or continued enjoyment of passport facilities is believed to be contrary to the public interest" and that "these activities overseas would present a risk to the national security of the United Kingdom"). XH submitted that the decision to cancel his passport infringed his EU law rights under the Directive because it was disproportionate and there were insufficient procedural safeguards. The Court of Appeal proceeded on the basis that EU law was engaged. The decision would undoubtedly restrict XH's freedom of movement within the EU. Although the possibility of a single use travel document arose, the Court of Appeal concluded that "*the cancellation of his passport is undoubtedly, and is intended to be, a substantial interference with XH's freedom of movement*" (§108).

19. After setting out the provisions of Articles 27, 30 and 31 Citizens Directive, the Court of Appeal went on to consider (§§111 to 119) the proportionality of the decision to cancel the passport and in particular whether the decision to cancel XH's passport was in accordance with the Directive. Nevertheless, at §112, the Court of Appeal observed that the WMS itself is in accordance with the provisions of the Directive:

> *"The Directive provides that measures taken on grounds of public policy or public security shall comply with the principle of proportionality and must be based exclusively on the personal conduct of the person concerned. The WMS complies with these requirements. It provides that a decision to refuse or withdraw a passport must be necessary and proportionate and that a decision to refuse or withdraw a passport under the public interest criteria will be used only sparingly. It also provides that the exercise of these criteria will be subject to careful consideration of a person's past, present or proposed activities".* *(emphasis added)*

20. At §113 the Court of Appeal addressed an argument by the appellant that the standard in the WMS set by the provision relating to "past, present or proposed activities" was lower than that in Article 27. The Court of Appeal responded (in relation to that provision in the WMS):

> *" ... This provision must be considered in the context of the provisions of the WMS which are referred to above.*

> *Furthermore, we are here concerned with the evaluation of future risk, in particular the likelihood of a person engaging in future in terrorism -related activities. The words of the second paragraph of 27(2) - a genuine, present and sufficiently serious threat - require an assessment of the likelihood of the risk materialising. The degree of likelihood will be a matter for consideration in each case."* (*emphasis added*)

It is arguable that these words do not mean that in all cases the WMS is always concerned only about future risk, and that past conduct is not of itself potentially a public interest ground, even where there is no risk in relation to future conduct. It seems to me that in this paragraph the Court of Appeal were directing their comments specifically to a case of the type which was before them, which did involve the evaluation of future risk activities.

21. At §116 the Court of Appeal stated :

> *"We accept that the fundamental nature of the rights involved in the present case gives rise to a need for a strong justification for any interference. The grounds relied upon by the Secretary of State demonstrate a genuine, present and sufficiently serious threat to a vital national interest. In particular, we agree with the conclusion of the Divisional Court that it is readily apparent from the letters setting out the reasons of the Secretary of State that the decision to cancel XH's passport was based exclusively on his personal conduct and was made for national security reasons.".* (*emphasis added*)

In this way, the Court emphasised that the "public interest" reasons for cancelling the passport were clearly set out in the letter from the Secretary of State. At §118, the Court of Appeal found that the ability to apply for an alternative travel document was not significant. The interference, arising from the cancellation of the passports, with freedom of movement in the EU was near absolute and a compelling justification was required for such interference.

22. In the subsequent decision of Nicol J in *B and ND v. Secretary of State for the Home Department* [2018] EWHC 2651 (Admin), the Secretary of State cancelled the passports of the two claimants who were due to take part in a humanitarian convoy destined to provide assistance to those in need in Syria. In the case of B, he had previously provided support to Islamist extremists. In the reasons given for cancellation, the Secretary of State again relied expressly upon the public interest ground in the WMS relating to past, present or proposed activities. In both cases the decision was based on a perceived future risk of engaging in terrorism-related activities (§16). Nicol J stated the following propositions:

(1) The Royal Prerogative must be exercised consistently with EU law and in particular the Citizens Directive: §27.

(2) The need for cancellation of a passport to be necessary and proportionate derives from both domestic and European law: §41.

(3) The Royal Prerogative must be used "sparingly": §41.

(4) The cancellation of a passport was, and was intended to be, a substantial interference with a citizen's freedom of movement and as such it impinges on fundamental rights under the Citizens Directive: §41.

(5) Article 27(2) requires that the restriction based on public security must comply with the principle of proportionality and on personal conduct. That conduct must represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society": §42.

23. An issue arises as to whether the "public interest" ground of "past, present or proposed activities" in the WMS is wider (in that it covers past conduct and does not require consideration of future activities and risk) than the "public interest" ground in Article 27(2), and, if so, whether this is permissible; or whether the WMS public interest grounds must be construed as being consistent with, and limited to, Article 27(2). I consider this issue further in paragraphs 143 and 144 below

Passports and Article 8 ECHR

24. In *Easy,* supra, Mrs Justice Lang accepted (at §52) that Article 8 ECHR is potentially engaged by a refusal to renew a passport, because of its effect on private life. A refusal which is for a legitimate reason and proportionate will usually be justified. Mr Metcalfe submits that this was wrong in law and that refusal of a passport does not engage Article 8, relying upon *Genovese v Malta* (2014) 58 EHRR 25 and suggesting that the right to a passport is, rather, expressly covered by Article 2 of Protocol 4 ECHR, which the UK has not ratified. In this regard, I have been referred to a number of decisions of the European Court of Human Rights (ECtHR).

25. In *M and S v Italy and United Kingdom* (application no. 2584/11, 13 March 2012), it was not contested that the decisions constituted an interference with the applicants' family life under Article 8 which was in accordance with the law and the Court considered that the measure pursued legitimate aims. The question was whether the measures were necessary in a democratic society (and thus one of proportionality). The Court addressed the applicants' case based on Article 2 of Protocol 4. The Court then pointed out that the UK had not ratified Protocol 4 and, for that reason, that part of the applicants' complaint was incompatible ratione personae with the provisions of the Convention and fell to be rejected. For that reason, the Court declared the application inadmissible. However the Court did not rule that the withdrawal of a passport cannot constitute an interference with private and family life under Article 8.

26. In *Stamose v Bulgaria* (application no 29713/05, 27 November 2012) the question was whether a ban on the applicant leaving the territory of Bulgaria infringed his rights under Article 2 of Protocol 4. The Court found first that there was a violation of that Article. As regards the further alleged violation of Article 8, the Court declared the application admissible (§42) but went on to find (at §43) that, in view of its finding in relation to Article 2 of Protocol 4, it did not consider it necessary to examine the travel ban imposed on the applicant also by reference to Article 8. In so doing the Court referred to a number of earlier cases, including *Pasaoglu v Turkey* 8 July 2008, where the Court had examined prohibitions to travel abroad under Article 8.

27. In *Genovese v Malta*, supra, at 33, the ECtHR found that, even in the absence of family life, the denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity. While the right to citizenship is not as such a Convention right and whilst its denial in that case was not such as to give rise to a violation of Article 8, the Court considered that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that article.

28. Most recently in *Usmanov v Russia* (application no 43936/18, 22 December 2020), the Russian authorities had annulled the applicant's Russian citizenship, his "internal passport" (a citizen's identity document for use in Russia) and "travel passport" (a citizen's identity document for use abroad). The applicant complained that these decisions were in breach of Article 8. The Court held that the decision to annul citizenship deprived him of any legal status. Further he was left without any valid identity documents. Russian citizens have to prove their identity unusually often in their everyday life and the internal passport is required for more crucial needs, such as finding employment or receiving medical care. The Court concluded (at §§59, 60), against this background, that the deprivation and the annulment of the applicant's passports amounted to interference with his private life under Article 8. It concluded that measure was arbitrary.

29. In the light of these authorities, in my judgment, refusal or withdrawal of a passport is capable of amounting to an interference with private and family life in breach of Article 8 ECHR. Whether, in any particular case, there is such an interference will turn on the facts of the case.

Citizenship and deprivation of citizenship

30. Section 6 BNA 1981 provides, inter alia as follows:

> *"Acquisition by naturalisation*
>
> *(1) If, on application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen."*

Schedule 1 of the Act provides that applicants have to be of good character, fluent in a domestic language, possessed of an intention to reside principally in the United Kingdom and to have satisfied certain residence criteria.

31. As regards deprivation of citizenship, section 40 BNA 1981 provides, inter alia, as follows:

> "...
>
> *(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 <u>may</u> 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) <u>Before making an order</u> 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) <u>the person's right of appeal under section 40A(1)</u>…"*
>
> *(<u>emphasis</u> added)*

32. As regards appeal, section 40A BNA 1981 provides, inter alia, as follows:

> *"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.*
>
> *…"*

Until there is final determination of an appeal under section 40A against a section 40(5) notice of a decision to make a deprivation order, and the subsequent service of a deprivation order - which is not a given - a person remains a British Citizen.

33. The case law on deprivation of citizenship establishes the following:

(1) Where an applicant for British citizenship has made false representations, which do not amount to impersonation of another's identity, the subsequent grant of such citizenship is not a nullity, but the misrepresentations may render the applicant liable to be deprived of the grant of citizenship under section 40

BNA 1981: *R(Hysaj) v Secretary of State for the Home Department* [2017] UKSC 82.

(2) In an appeal under section 40A the tribunal is required to consider for itself whether the respondent's power to deprive should have been exercised differently. When doing so, it will take into account applicable policy on deprivation as well as an appellant's rights under the ECHR and/or EU law. It is not contrary to EU law to withdraw from a citizen the nationality of a Member State acquired by naturalisation when that nationality had been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality. See *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 00439 (IAC) at §§ 31, 35-37, 39-42.

(3) However, unless a section 40A deprivation appeal has a cross-border element, EU law has no part to play in the appeal's determination: *AB (British citizenship: deprivation; Deliallisi considered) Nigeria* [2016] UKUT 00451 (IAC) at §§81 to 85 (not following earlier observations in *Deliallisi*).

(4) In a section 40(3) case, the tribunal must establish whether one or more of the means described in subsection (3)(a),(b) and (c) were used by the person in order to obtain British citizenship. The deception must have motivated the acquisition of that citizenship. Further the fact that the Secretary of State has decided, in the exercise of her discretion, to deprive the person of citizenship will in practice mean that the tribunal can allow the appeal, only if satisfied that the reasonably foreseeable consequence of deprivation would interfere with ECHR rights and/or that there is some exceptional feature of the case which means the discretion in the subsection concerned should be exercised differently: *BA (deprivation of citizenship: appeals)* [2018] UKUT 00085 (IAC).

(5) It is for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal. If the appellant or any other person's Article 8 ECHR rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute a disproportionate interference with those rights. The test is not merely whether the Secretary of State's decision to deprive was rational but rather whether "it is right to do so". Whilst deprivation of citizenship may result in an interference with Article 8 rights, the right to nationality is not itself a right protected by the ECHR*: KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483 at §§16 and 17.

Home Office policy documents

34. There are a number of Home Office policy documents relevant to passports, nationality and naturalisation certificates.

35. First, the Defendant's policy entitled *"Nationality policy: identity* (v1.0, 14 July 2017)" states that HMPO "will not issue a British passport if the <u>name</u> on the naturalisation certificate does not match the other official documents". The policy is

silent as to whether a passport will be issued where details of place and date of birth differ, but the name matches other official documentation.

36. Secondly, the Defendant's internal guidance entitled "*Naturalisation certificates"* provides, inter alia, as follows:

> *"**Introduction***
>
> *...*
>
> *If examining staff are concerned about the authenticity of a Naturalisation certificate, they should check the system in both names. If checks are clear, telephone the UKBA who will be able to confirm the details.*
>
> *...*
>
> ***Incorrect details entered on Naturalisation and Registration certificates***
>
> *Where UKBA agreed through the production of evidence that they have made an error on a certificate (that is that the information provided at the time of the certificate was correct, but that UKBA have not issued a certificate showing that information), then they will ordinarily re-issue the certificate showing the correct details.*
>
> *Where the information printed on the certificate was believed to be correct at the time of issue, but new evidence came to light after issue that it was in fact incorrect and the certificate holder can provide satisfactory proof of the new details to UKBA, the certificate will be officially endorsed to show the correct details. Please see Amended Naturalisation Certificates below.*
>
> ***Amended Naturalisation and Registration certificates***
>
> *...*
>
> *Only endorsements where the change to personal details has been officially accepted by UKBA may be used as evidence by an applicant to change their personal details on a passport or passport application."*

37. Thirdly, the Defendant's policy entitled "*Nationality Policy: general information – all British nationals* (version 1.0, 14 July 2017)" provides, inter alia, as follows:

> *"**Certificates (endorsement)***
>
> <u>*You can add an endorsement to a certificate of registration or naturalisation:*</u>

- *when a person holding British citizenship by registration or naturalisation makes a declaration or renunciation*

- *when a registration or naturalisation is declared a nullity or when a person is deprived of citizenship under section 40 of the British Nationality Act 1981*

- *when an applicant has made a genuine error over something like a date of birth and supporting evidence is produced."* *(emphasis added)*

The policy is silent as to whether a naturalisation certificate will be amended where an applicant initially gave false details of birth date and origin.

38. Fourthly, the Defendant's policy entitled *"Home Office: Changes to dates of birth"* (dated 14 September 2020) sets out "policy on dates of birth and the circumstances they may be changed". At page 8, it states, inter alia,

> *"Fraud*
>
> *Officials will correct a date of birth where they have clear evidence an individual was issued a Home Office document using a false date of birth. For example:*
>
> - *Where an individual obtained leave by deception using false biographic details and officials have obtain satisfactory evidence of the individual's correct identity, such as the individual's national passport - officials must re-issue a replacement document in details following recovery of the document containing the false information unless the individual's status in the UK is revoked.*
>
> - *Where an individual obtained a UK passport using false biographic details and officials obtain satisfactory evidence the information provided by the individual to be incorrect-officials must seek to recover the document where possible."* *(emphasis added)*

At page 11, this policy explains how HMPO records a date of birth in a passport and how individuals can correct an error in their passport. It states, inter alia,:

> *"[HMPO] relies upon information contained in source documents to issue a passport to an individual. ... For individuals who have naturalised or registered as a British citizen, [HMPO] primarily rely on information contained on the naturalisation or registration certificate." (emphasis added)*

The Facts

39. The Claimant is a dual British and Albanian national. He was born in Dajc, Lezhe, Albania on 23 July 1980. He is now 40 years old.

40. In September or October 1998 the Claimant entered the United Kingdom and claimed asylum. At the time he was 18 years old. He claimed asylum in his true name, but on the basis that he was born in Deqan, Kosovo, Yugoslavia 16 March 1982, and, therefore, on the basis that he was an ethnic Albanian from Kosovo and a minor, rather than an adult from Albania. On 15 May 1999 the Defendant granted the Claimant asylum and indefinite leave to remain on the basis of his falsely claimed nationality, and place and date of birth, under the name of Leonard Gjini.

The original naturalisation certificate and passport

41. Subsequently the Claimant applied to naturalise as a British citizen and continued to rely on the false biographical information. On 29 September 2004 the Defendant granted the Claimant's application for naturalisation and issued him with a naturalisation certificate which recorded his date of birth as "16 March 1982" and his place and country of birth as "Deqan, Kosovo, Federal Republic of Yugoslavia". On 20 October 2004, HMPO issued the Claimant with a British passport, containing the same false place and date of birth.

42. On 3 December 2003 the Claimant married Gystina Topalli, an Albanian national, in Croydon. On 23 January 2005, the Claimant's elder son, Jamie, was born in the UK. On 23 June 2008, the Claimant's younger son, Ryan, was born in the UK. The Claimant and his wife have now separated. He retains access to, and has regular contact with, his two sons.

43. On 16 November 2012, the Claimant applied for, and was issued with, a fresh British passport, containing the same false place and date of birth as before.

Discovery of false details

44. In mid-2019, the Claimant applied for a British passport for his son, Ryan. On the application, the Claimant gave his place of birth as Kosovo but, as a result of identity checks with the British Embassy in Kosovo, it was confirmed that there was no record of his birth there.

45. On 13 August 2019, the Status Review Unit ("SRU") of the Deprivation and Revocation Team within UK Visas and Immigration ("UKVI") sent the Claimant a letter, indicating that the Defendant had reason to believe that the Claimant had obtained his naturalisation as a British citizen by way of fraud, and notifying him that, in light of this, she was considering depriving him of his British citizenship under section 40(3) BNA 1981. The letter stated that enquiries with the authorities in Kosovo have found no record of his birth but that similar enquiries with the authorities in Albania had revealed a birth record for the Claimant as being born in Dajc, Lezhe, Albania on 23 July 1980. The Defendant expressed the view that this deception was fundamental to the Claimant obtaining refugee status, indefinite leave to remain and, subsequently, naturalisation at a British citizen. The Claimant was invited to make representations within 21 days on any matter which he was to be

taken into account. This letter was subsequently returned to UKVI by Royal Mail as "not called for".

Revocation of passport

46. On 15 August 2019, HMPO wrote to the Claimant notifying him that his British passport had been revoked. It referred to the verification checks that had been carried out, showing that the Claimant had falsely claimed to be from Kosovo when in fact he was from Albania. The letter also notified the Claimant that the matter had been passed to UKVI for further consideration and instructed him to return his British passport to HMPO forthwith. On 12 September 2019 the Claimant surrendered his revoked British passport to HMPO.

47. As a consequence of the revocation of his passport, the Claimant says that he encountered significant difficulties returning to the UK since he had possession only of an Albanian document which did not entitle him to re-admission.

Application for fresh passport

48. On 23 September 2019 the Claimant applied for a fresh British passport by way of the fast-track procedure. In his application form, the Claimant admitted to providing false details when he originally entered the UK and that he had been granted refugee status and British citizenship on this basis. The Claimant confirmed that he was in fact an Albanian national, and that he had been born in Dajc, Lezhe, Albania on 23 July 1980.

49. In that application, the Claimant asked for the expedited production of a passport highlighting his urgent need to travel. He pointed out that he had no means to travel abroad and return to the UK and he needed to be able to travel to accompany his son who regularly engages in international football team tournaments. The application was supported by evidence from the Head of Academy Player Care at Fulham FC confirming that Ryan was a category one player and took part in many elite competitions all over Europe. It would be a concern if the Claimant was unable to accompany and support his son on these trips. It appears that, by the time of this second application in September 2019, the Claimant was not, or might not have been, aware of the fact that the Defendant was "considering" depriving him of his citizenship.

50. On 30 September 2019 in accordance with the accelerated service procedure, the Claimant attended an appointment at HMPO and was informed that his application of 23 September 2019 would not be accepted.

51. On 1 October 2019 the Claimant applied again for a fresh British passport via post, using his real place and date of birth. He re-served the evidence sent with the expedited application and appended further detailed material, referring to the need to accompany his son Ryan on travel to international tournaments; and setting out his case in relation to proportionality and in particular the significance of a passport in the light of "the hostile environment" and his inability to travel abroad and return to the UK on the basis of his Albanian passport alone. The application included a letter of support from Ryan's mother emphasising the importance of the Claimant emotionally to Ryan's dream of becoming a professional footballer. She could not accompany

Ryan on trips and matches abroad. He also submitted evidence confirming the Claimant's travel with his son to tournaments in France in January 2019 and in Portugal in June 2019.

52. On 4 October 2019 HMPO acknowledged receipt of the revoked passport. At this time, it also enclosed a copy of the Defendant's letter dated 13 August 2019 and invited the Claimant to make representations on deprivation of British citizenship. On 17 October 2019 the Claimant submitted representations to UKVI against the deprivation of citizenship.

The Decision

53. In response to the application of 1 October 2019, on 22 October 2019 HMPO sent a letter to the Claimant's solicitors in the following terms:

> *"Your client entered the UK and obtained UK passport facilities in the identity of Leonard Gjini, born in Deqan, Yugoslavia 16 March 1982. Checks carried out in line with current Her Majesty's Passport Office (HM Passport Office) policy and procedures show that there is no trace of your client's birth in Kosovo. A birth was traced in Albania in the name of Leonard Gjini born in Dajc, Lezhe, Albania 23 July 1980.*
>
> *In my letter of 15 August 2019 I explained to your client that his British passport had been revoked as he had obtained UK passport facilities in a false identity.*
>
> *You advise in your letter of 01 October 2019 that your client did enter the UK in false details and that he was born in Albania in the identity Leonard Gjini born in Dajc, Lezhe, Albania on 23 July 1980. <u>Your client supported his current application with Albanian documentation which confirms his genuine identity</u>.*
>
> *In my letter of 15 August 2019 I also advised your client that HM Passport Office had <u>referred</u> his claim to British Citizenship back to United Kingdom Visas & Immigration (UKVI) <u>for consideration</u>. <u>Until UKVI reach a decision on your client's status, HM Passport Office is unable to issue a British passport</u>.*
>
> *Please note that a passport cannot be issued in your client's <u>Kosovan identity as we now know this to be false.</u> We are also unable to issue a passport in <u>the Albanian identity as your client's naturalisation certificate does not reflect his genuine Albanian details</u>.*
>
> *I have considered the application with the documentation provided and can confirm that we are unable to proceed with*

> *the application and it has now been withdrawn on HM Passport Office systems. …*
>
> *You may wish to consider contacting UKVI to review the position of your client's claim to British Citizenship.*
>
> *…"* (emphasis added)

Pre-action correspondence

54. On 1 November 2019 the Claimant's solicitors sent the Defendant a pre-action letter challenging her refusal to issue the Claimant with a British passport. The Claimant claimed that there "*is nothing with any published policy guidance which states that the details contained within a British passport must match the details held on a naturalisation certificate*". In that letter the Claimant complained that HMPO's decision did not "*show any consideration of whether the refusal to issue a passport was either "necessary" or "proportionate" under EU law*". The Claimant also contended that without a British passport he was unable to travel abroad and had no means of evidencing his status as a British citizen.

The Pre-Action Response

55. On 12 November 2019 ("the Pre-Action Response") HMPO responded to the pre-action letter stating that its refusal had been made "*for fair and legitimate reasons*" as set out in the letters of 15 August and 22 October 2019. Significantly, in these proceedings, the Defendant relies upon the Pre-Action Response as a valid elucidation of the reasons for the Decision. The Pre-Action Response stated, inter alia, as follows:

> *"In considering passport applications, using Royal Prerogative, we will only issue a passport when nationality, identity and entitlement criteria have been met."*
>
> *…*
>
> *"The requirements to satisfy entitlement to a British passport are fair, proportionate and applied objectively in order to discharge that duty equitably. It is our belief that documentary evidence to support a claimed identity is necessary and conforms to the obligations outlined by Collins J in FH & Others v SSHD [2007] EWHC 1571 (Admin)*
>
> *…*
>
> *For clarification, it was your client who chose to give false information to the SSHD stating that his date of birth was 16 March 1982 and that he was born in Deqan Yugoslavia. Your client was fully compliant in the falsehood knowing that his true date of birth is 23 July 1980 and his correct place of birth is Dajc, Lezhe, Albania. A date and place of birth are significant facts taken into consideration when determining*

> *someone's identity. Your client's claim to a British passport derives solely by virtue of his naturalisation as a British Citizen. As a direct consequence of your client's falsehoods the legitimacy of his nationality status has now been compromised. Therefore, I do not believe that the SSHD has been unreasonable in refusing to issue a British Passport to your client"* (*emphasis added)*

The Defendant submits that the foregoing paragraph sets out the reason for the refusal of the passport on "public interest" grounds. The Pre-Action Response continued:

> *"I do not accept your client is unable to travel abroad. It is evident from the enclosures sent with your letter before claim that your client holds an Albanian passport. It is not the responsibility of HM Passport Office to be concerned with the immigration matters of travel made by your client on his Albanian passport."*

In respect of EU law, the HMPO said, in an apparent reference to Article 35 Citizens Directive, as follows:

> *"By your client's own admission, he obtained British Citizenship by falsely claiming to be from Kosovo. Therefore, the SSHD is fully entitled to adopt the necessary measures to refuse, terminate or withdraw any rights by which your client has obtained because of that deception [*sic*]".*

In respect of Article 8 issues, the HMPO commented as follows:

> *"You also state that the SSHD's decision is in breach of Article 8. I also find this statement unfounded. The decision to revoke your client's British Passport was made in accordance with passport office policy, procedure and nationality legislation using the Royal Prerogative. Your client is required to show, using a balance of probability judgement that he is entitled to a British passport is in accordance with the law and is justifiable and proportionate."* (*emphasis added)*

The Pre-Action Response went on to state that the application had been dealt with "*in the same manner as any other applicant who applies with a false place and date of birth*". It concluded that:

> *"If SRU confirm that your client's claim to nationality and identity is correct he can then submit a further passport application… [which] will be examined in line with our usual policies, procedures security checks and all legal requirements"*

The implication of this last paragraph is that the HMPO considered that the Claimant had not satisfied the nationality or identity criteria; i.e. the decision to refuse the

passport remained based upon failure to satisfy either the nationality or the identity criteria.

Application for rectification of naturalisation certificate

56. These proceedings were issued on 22 November 2019. On 28 November 2019, the Claimant applied, using Home Office Form RR, for rectification of his naturalisation certificate to reflect his true date, place and country of birth.

The Citizenship Decision

57. By formal "Notice of Decision to deprive British citizenship under section 40(3) of the British Nationality Act 1981" dated 20 December 2019 ("the Citizenship Decision"), the Defendant notified the Claimant that:

> *"… the Secretary of State has decided that your British citizenship was obtained fraudulently. The Secretary of State has decided that you should therefore be deprived of British citizenship for the reasons outlined below"*

Among other things, the Defendant noted that, had she known about the Claimant's true nationality and date of birth, she would not have granted him asylum and, without that status, he would not have been awarded ILR and would not have been eligible for naturalisation as a British citizen. The Defendant noted, moreover, that, although the misrepresentation was first made when the Claimant was just 18 years old, he "*continued to provide the false information to the Home Office on all correspondence up until your passport application for your son in 2019*" and that the "*misrepresentation only came to [her] attention as a result of evidence acquired by [HMPO] 2019*".

58. By the same Notice, the Defendant recognised that at that point in time no deprivation order had been made. Such an order would be made within four weeks of his appeal rights being exhausted or receipt of confirmation that the Claimant would not appeal. At paragraph 34, the Defendant pointed out that should any appeal be dismissed "*the deprivation order under section 40 (3) … depriving you of your British citizenship will be served on you*".

Grounds of Defence

59. On 24 December 2019, the Defendant filed acknowledgement of service in the current proceedings. Significantly in her Summary Grounds of Defence, the Defendant contended, for the first time, that the Decision fell within the terms of the WMS public interest ground based on "past activities" as set out above.

60. On 27 April 2020 the Defendant filed her Detailed Grounds of Defence. Her first submission was that the application for judicial review was premature, because the Claimant had the alternative remedy of applying for rectification of his naturalisation certificate, which the Claimant had subsequently done.

The FTT appeal proceedings

61. On 3 January 2020 the Claimant appealed to the FTT against the Citizenship Decision. A case management review hearing in the FTT appeal was listed for 11 February 2020. On 23 June 2020, the FTT issued directions. On 13 July 2020 the Claimant filed submissions and a bundle with the FTT with a request for an expedited substantive hearing. A prehearing review took place on 18 February 2021.

The Naturalisation Certificate Decision

62. By letter dated 6 August 2020, the Defendant refused to amend the Claimant's naturalisation certificate to reflect genuine biographical information (the Naturalisation Certificate Decision). The letter stated as follows:

> *"I would inform you that your client was deprived of British citizenship on 20 December 2019 (see file copy letter aside for your reference) and therefore I regret that we are unable to agree to an exception being made in this case. Your client's certificate of naturalisation has now been destroyed."*
> *(emphasis added)*

63. By letter dated 18 September 2020, the Defendant stated that, in the light of the Naturalisation Certificate Decision, rectification now fell away and was relevant only to the question of costs. However the Defendant maintained that the fact that the application for rectification was unsuccessful did not negate the Defendant's point that the original application for judicial review was premature. The Defendant added that the failure of that application also underlined the second objection made in the Detailed Grounds of Defence, namely that the application for judicial review of the Decision was now wholly academic in the light of the Citizenship Decision. In this way, the Defendant therefore continued to rely upon the *existence* of the deprivation proceedings as a ground for refusal of the passport.

64. By letters dated 20 November, 4 December and 8 December 2020 the Defendant maintained the Naturalisation Certificate Decision and declined to consent to an amendment of the grounds for judicial review. The Defendant maintained her position that the Claimant has no entitlement to hold a naturalisation certificate bearing false details in circumstances where he has already been deprived of his citizenship and no entitlement to hold a naturalisation certificate in any event unless his appeal was successful.

Two other cases: Mr Nuka and Z

65. The Claimant refers to the cases of two other individuals whose situations, he maintains, are indistinguishable from the facts of his case: namely, the cases of Mr Nuka and Z. The relevant facts have been set out, first, in the Claimant's solicitor's two witness statements (the second of which I admitted into evidence), and subsequently and in greater detail, following my order, in the witness statement dated 4 February 2021 of Christopher Hanson, litigation team manager at HMPO. In summary the position is as follows.

The case of Z

66. The case of Z has a long history. Like the Claimant, Z provided false details as to his birth and nationality leading to grant of refugee status, naturalisation and British citizenship. He claimed to be Kosovan. In fact he is Albanian. In February 2018, the Defendant notified him that she was considering depriving him of citizenship. In April 2018 Z applied for a passport in his correct details. In May 2018 Z applied to amend his naturalisation certificate. There was no response to that application. In June 2018 the Defendant refused a passport because doubts remained about his citizenship, stating that the decision to refuse "has *not* been made in the public interest". Z sought judicial review of the refusal. The Defendant, having notified Z of her decision to deprive him of citizenship, defended the judicial review, maintaining that Z's right of appeal against the deprivation decision was an alternative remedy. On 7 November 2018, the judicial review claim was settled by consent order under which the Defendant agreed to consider a fresh application for a passport. Significantly, in a recital to the consent order, the Defendant expressly accepted not only that Z remained a British citizen but that that citizenship remained valid until the outcome of Z's appeal against the earlier deprivation of citizenship order. At first, the Defendant issued Z with a passport, but then revoked it again on grounds of operational error. Z replied by pre-action letter, saying the relevant information was known. The Defendant then responded in October 2019, at that point relying upon the fact of incorrect information in Z's naturalisation certificate.

67. Z applied again for judicial review and in February 2020 the parties agreed a consent order, in which the Defendant agreed to issue him with a fresh passport. At that point, his naturalisation certificate continued to record incorrect details.

68. In summary, the Defendant settled judicial review proceedings and granted him a passport, in circumstances where (a) there was a pending appeal against the Defendant's decision to deprive him of citizenship and (b) Z's naturalisation certificate with the false place of birth had not been amended and there was thus a mismatch between the certificate and the correct details on the passport.

69. The Defendant distinguishes the case of Z from the present case. Mr Hanson states in his evidence, that it was appropriate to settle Z's claim because of four factors: first, there was no dispute as to Z's correct identity, having issued him with a correct BRP; secondly, the Defendant could not continue to rely on the mismatch with his naturalisation certificate, because Z had applied earlier for rectification of the naturalisation certificate (before applying for judicial review of the refusal of his passport application) and had received no response; thirdly, the Defendant had accepted that Z remained a citizen unless and until a formal deprivation order was made; and fourthly, because the Defendant had in June 2018 expressly disavowed reliance on the public interest as a ground of refusal.

Mr Nuka

70. Mr Nuka's case has an even longer and more complex history. Mr Nuka is an Albanian national who had secured a right to reside and nationality in reliance upon false claim of Kosovan birth and nationality and date of birth. His naturalisation certificate contained those false details.

71. In 2017 his passport was revoked. In May 2018 Mr Nuka applied to rectify his naturalisation certificate. That was refused in May 2018 on the grounds that it was

not the Defendant's practice to alter or amend a certificate of naturalisation after it has been issued, as the details it contains are those declared to be correct at the time of the application and adding "*a naturalisation certificate is* <u>*not*</u> *evidence of holder's date of birth, it is merely intended as evidence of the holder's nationality status*" (<u>emphasis</u> *added*). In July 2018 the Defendant refused Mr Nuka's application for a passport in his correct details, on the ground that the SRU was investigating his British status. In October 2018 the Defendant then agreed to consider a further passport application on the basis that Mr Nuka remained a British citizen pending any deprivation order and appeal. But then the Defendant refused the application on grounds of (i) mismatch with his naturalisation certificate and (ii) the Defendant was still considering whether to deprive him of citizenship i.e. refusal was on essentially the same grounds as in the Decision in the present case. Further refusal and further application for judicial review ensued in 2019. Then after the Defendant had made a deprivation decision, on 6 December 2019 she refused a further, fourth, passport application on this specific ground (contradicting her position in October 2018). There was no reference to the public interest ground now relied upon in the present proceedings, despite the fact that on 24 December 2019, it has been raised in the present case. In January 2020 the Defendant refused a further application to rectify his naturalisation certificate, because of the decision to deprive him of citizenship. Mr Nuka's appeal against the deprivation decision was dismissed by the FTT in January 2020. He applied for permission to appeal to the Upper Tribunal.

72. Mr Nuka then applied for judicial review of the refusal of his most recent passport application and his most recent rectification application. On 27 April 2020, the Defendant proposed a consent order stating "*in any event your client is protected as their passport application cannot be rejected on the basis of its contingency to the Deprivation action (as outline in the case of [Z])"*. A consent order was agreed, under which the Defendant agreed to consider his further application for a passport. Mr Hanson states that, at that point, it was appropriate to settle because of following factors amongst others: the earlier statement that he had currently no claim was incorrect; the further reasons given that doubts remained about his identity were incorrect; and that the reason to refuse rectification – that it was nullified by the decision to deprive citizenship - was also incorrect. I note that this is the same reason as given in the Naturalisation Certificate Decision.

73. On 4 September 2020 the Defendant refused the fifth passport application because of the absence of a naturalisation certificate in the correct details. In October 2020 the Defendant refused both the passport and amendment of the naturalisation certificate, on the ground that identity was not established on balance and the appeal against deprivation order remained ongoing. In neither decision was any reference made to the public interest grounds, sought to be relied upon in the present case, despite the fact that this had by this time been raised in the present proceedings in the Summary Grounds of Defence.

74. Finally in December 2020 by a consent order, the Defendant agree to set aside the September 2020 decision and to *reconsider* the applications for passport and rectification of naturalisation certificate.

75. Although Mr Hanson makes no reference to it, Mr Lilley-Tams goes on to explain in his second witness statement that on 23 December 2020 the Defendant amended Mr Nuka's naturalisation certificate to reflect his correct details and on 24 December

2020 issued Mr Nuka with a new British passport in the corrected details, and with comments on the observations section of the passport referring to the previous identity details as disclosed on earlier passports.

76. The Defendant's reasons for finally settling Mr Nuka's case are stated by Mr Hanson to include the incorrect statement that Mr Nuka's identity remained in doubt and the incorrect statement that it had no power to issue a passport pending a deprivation appeal and further that the Defendant had given an assurance that an application could not be rejected pending deprivation action. The Defendant now contends that the basis of that assurance was wrong, but because that assurance had been given in April 2020, she was obliged to honour it. The Claimant contends that the Defendant's conduct as regards issuing Mr Nuka a passport tends to confirm first that the commencement of deprivation proceedings is not an obstacle to the grant of a passport and public policy considerations did not fall to be invoked so as to prevent the issue of such a passport.

Evidence as to practice in relation to naturalisation certificates

77. Mr Lilley- Tams also gave evidence as to the practice in relation to naturalisation certificates and in particular as to the long period of time it takes for decisions to be taken on applications for amendment to naturalisation certificates- in one case a period of 12 months with no decision. In another case, at time of writing the application had been outstanding for 9 months despite the applicant wanting to travel to Albania because his father had died.

78. In a response to a Freedom of Information Request made by the Claimant's solicitor, the Defendant confirmed on 29 October 2020 that HMPO is able to issue a British passport to an individual with details that do not match those recorded on the naturalisation certificate stating:

> *"... passports can be issued in details which do not match the details on their naturalisation certificate, <u>for example</u> for individuals who marry or change their name by deed poll following naturalisation".* *(<u>emphasis</u> added)*

These examples do not purport to be an exhaustive list of occasions when passports can be (or have been) issued in such circumstances.

Consequences of not having a passport

79. In his first witness statement, Mr Lilley-Tams set out a number of negative consequences of not having a British passport. The Home Office have introduced a number of measures - now described as "the Compliant Environment" – affecting the right to work, the right to rent, to hold a bank account and the right to hold a driving licence. Further, another consequence of not being able to establish immigration status in the UK is that a person cannot travel abroad if he wishes to come back. The Claimant could not return on his Albanian passport without being able to prove, to airline carriers, his British nationality.

<u>The Grounds of Challenge</u>

80. As regards the Decision, the Claimant puts forward the following three grounds of challenge:

    (1) The Decision is irrational, perverse and insufficiently reasoned and unlawful as being incompatible with the WMS.

    (2) The Decision does not comply with the principle of proportionality as set out within EU law and is incompatible with the Claimant's right to respect for private life under Article 8 ECHR.

    (3) The Decision is unlawful as being indicative of the application of an inconsistent practice as between comparable cases.

81. As regard the Naturalisation Certificate Decision, the Claimant contends that it was wrong in law, contrary to the Defendant's own policy statements and irrational.

The Defendant's response in summary

82. The Defendant responds, that, first, the Decision was reasonable and in accordance with her published guidance; secondly the Decision did not involve any breach of EU law or Article 8 ECHR; and thirdly and in any event, the application for judicial review is academic in the light of the Citizenship Decision. As regards the Naturalisation Certificate Decision, permission to amend should be refused and in any event the further ground of challenge is academic.

Ground 1: the Decision was unlawful and/or irrational

The parties' arguments

The Claimant's case

83. The Claimant submits that there is no legal or rational basis furnished in the Decision for declining to issue a passport. In summary the Defendant:

    (1) misunderstood the consequences of the Claimant's susceptibility and/or being subject to deprivation proceedings in relation to nationality;

    (2) wrongly sought to rely upon matters relating to the Claimant's identity; and

    (3) did not, and is not entitled now to, rely upon public interest/public policy considerations.

(1) Deprivation of citizenship

84. In the Decision, the Defendant stated it could not issue a British passport "until UKVI reach a decision on your client's [citizenship] status". Reliance upon that reason was misconceived. It is unlawful and irrational for the Defendant to deny access to a British passport on the basis of the *institution* of deprivation proceedings. It is inconsistent with the statutory scheme which allows for a merits-based appeal, the exercise of which suspends the effect of the deprivation process. Secondly, there is no reference in the Defendant's own policy statements to the initiation of deprivation

proceedings as being a ground for refusing to issue a passport. Thirdly, it would lead to the prolonged denial of access to one of the principal benefits of citizenship, namely a passport. Fourthly, it would effectively impose the consequences of a final deprivation order in circumstances where ultimately, following appeal, no such deprivation order might be made.

85. In summary, whilst a final order depriving a person of British citizenship, would be a ground for refusing to issue a passport, the commencement of deprivation proceedings by the Defendant (let alone an intimation that the Defendant is considering to commence such proceedings) is not and cannot be a ground for refusing to issue a passport. In response to the Defendant's argument that, because of the subsequent Citizenship Decision, the challenge to the lawfulness of the Decision is academic, the Claimant submits that the statutory appeal process in relation to the Citizenship Decision is not an effective remedy.

(2) The Claimant's identity: "mismatch"

86. The Defendant was wrong to rely upon the Claimant's earlier false biographical information as a ground for refusing to issue a passport. First, at the time of the application the Claimant had satisfied the Defendant as to his true identity (and entitlement to nationality) as per the relevant requirements as to identity and nationality in the WMS. The Defendant was Leonard Gjini and has been granted citizenship in 2004 and as of the date of the Decision retained his British citizenship. This was all accepted by the Defendant, not least in the Decision letter itself, referring to Albanian documentation submitted by the Claimant.

87. Secondly, that left, as the only reason given for refusal, the fact that the Claimant's naturalisation certificate did not reflect his genuine Albanian details. That was not a valid ground for refusal. First, as a matter of law and practice there is no obstacle to the issue of a passport resulting from a discrepancy in biographical information as between a naturalisation certificate and a passport application. Secondly, the relevance of the naturalisation certificate is only to establish the holder's entitlement to nationality; in the present case that was not an issue. Thirdly, from its practice, the Defendant does not regard anomalies in the date and place of birth details on a naturalisation certificate as bearing on an entitlement to a passport. Further, there is an inherent inconsistency in the Defendant's position in these proceedings with regard to the naturalisation certificate.

(3) Public interest/ public policy considerations

88. The Claimant submits, first, that in the Decision the Defendant raised no public policy or public security considerations as justification for the denial of the passport. Moreover, such considerations were not even raised in the Pre-Action Response even though, the Defendant has expressly sought to rely on that letter as an elucidation of the Decision. The public policy justification now relied upon by the Defendant cannot be sustained on the reasoning contained within the Decision, as amplified by the Pre-Action Response.

89. Secondly, the issue of public policy was introduced for the first time in the Summary Grounds of Defence. That is procedurally improper, particularly where the Defendant

has issued no further decision letter articulating her justification by reference to her own policy and guidance notes.

90. Thirdly, and in any event, when consideration is given to the Defendant's own policy and prevailing case authority, the use of deception in connection with naturalisation is not, and is nowhere stated to be, sufficient to justify the denial of a passport. The WMS makes it clear that the power to deny a passport must be used carefully and sparingly and only by reference to "past, present and proposed activities". The Defendant's reliance now upon a single past event, namely the use of deception to acquire citizenship 14 years previously, cannot on any rational view be described as founding a "present or future threat to society". In fact there are no relevant "present and future" concerns in relation to the Claimant's conduct. Past actions are insufficient under Article 27 of the Citizens Directive.

91. There is no authority or policy statement indicating that denial of a passport based on past conduct of the sort in this case is permissible or possible. Rather the type of conduct indicated in the WMS as being of sufficient gravity to justify refusal on public policy grounds is of a wholly different order, such as extremist activity, or terrorist training. The cases of *Everett* and *XH* do not support the Defendant's position.

92. Further and in any event, the Defendant was required to consider all material considerations and, even taking account of past conduct, would and/or should have taken account of: the fact that the Claimant had acknowledged his use of deception; the steps taken to amend his naturalisation documents initiated shortly after the Decision; his compliance with the Defendant's requirement to surrender his previous passport; his prompt provision of authentic identity documentation; and the fact that the relevant misconduct has not resulted in the initiation of criminal proceedings. Further the Defendant should take, and should have taken, into account the fact that, even if it is established that the Claimant used deception to obtain naturalisation, that of itself does not require deprivation of citizenship and that there remains a discretion to retain citizenship in those circumstances and the fact that that is a matter which remains to be resolved. The Defendant has done none of those things. That is because the public interest matters have been put forward belatedly and without consideration of all relevant material.

The Defendant's case

93. The Decision was plainly within the scope of the Defendant's discretion as set out in the WMS. The WMS makes clear that there *"is no entitlement to a passport and no statutory right to have access to a passport"*. Amongst other things, the Defendant may refuse to issue a passport where she is not satisfied as to "*the identity of the applicant*"; she is also entitled to refuse where she believes that an applicant's "*past… activities*" are "*so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest*".

94. In the present case there was nothing irrational or unlawful about the Defendant's refusal in the following circumstances.

(1) The details of the Claimant's date, country and place of birth were manifestly different from those appearing on his naturalisation certificate.

(2) The Claimant obtained the grant of British citizenship by means of deception which he maintained for a period of some 15 years.

(3) At the material time, the Defendant was considering depriving the Claimant of citizenship, in the light of that deception, under section 40(3) BNA 1981.

95. As to (1), it was reasonable for the Defendant to refuse to grant the application due to reasonable doubts about his identity; and to require an applicant to ensure that the application details match those on the naturalisation certificate. To permit otherwise would give rise to a serious risk of fraud even if the Defendant was satisfied that the Claimant was the same person as was granted asylum and naturalised. The Defendant was entitled to require the Claimant to submit a naturalisation certificate reflecting the correct details.

96. As to (2), it was reasonable for the Defendant to refuse to issue the Claimant with a British passport in circumstances where she was satisfied that he had obtained that citizenship by means of deception and indeed was considering depriving the Claimant of his citizenship for that very reason. The fact that at the time the Claimant remained a British citizen is irrelevant. It is reasonably open to the Defendant to refuse to issue a passport to a person even where there is no doubt about their identity or their underlying entitlement to hold a passport. Just as it is reasonable to refuse a passport to a British citizen because she considers that the person is a flight risk or planning to travel abroad for purposes related to terrorism, so it is reasonable for the Defendant to refuse a passport to a person whom she knows obtained citizenship by deception. This falls squarely within the terms WMS, as it is a case where *"it is in the public interest"* to prevent a person *"from benefiting from the possession of a passport"* because *"the Claimant's past… activities… are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest*." These are precisely the kind of "cogent reasons" referred to in the case of *Ali*. Even if the Decision to refuse on grounds of *identity* was in error, any such error was not material since it is clear from *the terms of the Decision* that the Claimant would have been refused a passport on this basis in any event.

97. It is not the case that the Defendant may only exercise the power to refuse where she is satisfied that the Claimant represents a "genuine, present and sufficiently serious affecting one of the fundamental interests of society" under Article 27(2) Citizens Directive. The WMS is wider than that, allowing reliance on past conduct.

98. The Defendant further contends, in the light of the Citizenship Decision, that the Claimant's challenge to the lawfulness of the Decision is academic. Whilst the Claimant's appeal against the Citizenship Decision is pending, in the event that it is unsuccessful, any entitlement he may have to a British passport will cease. Further it is a relevant factor in assessing the proportionality of the decision to refuse a passport that the Defendant has already taken the decision to deprive the Claimant of his citizenship.

Discussion and Analysis

99. The starting point is to consider the decision under challenge, namely the Decision, as elucidated by the Pre-Action Response. The Decision as so elucidated puts forward two express bases for the refusal of the passport: consideration of deprivation of citizenship and the mismatch between the Claimant's correct details and those in his naturalisation certificate. The Defendant puts forward a third basis, contending that it is implicit that the Decision as so elucidated relies also on a "public interest" ground identified in the WMS. Thus I consider Ground 1 under three sub-heads and address them in turn. Furthermore, whilst the comparative position of Z and Mr Nuka is the subject of Ground 3, it is factually and legally convenient to consider their position under this ground, as forming part of the rationality challenge. I also address here the Defendant's case that the Citizenship Decision has rendered the claim academic.

(1) Deprivation of citizenship

100. The first reason for refusal given in the Decision was that the Defendant could not issue a British passport "*until UKVI reach a decision on your client'[citizenship] status"*. i.e. the Defendant was "considering" depriving the Claimant of citizenship on grounds of deception. At that time, no decision to make a deprivation order had been made. In my judgment, the fact that the Defendant was *considering* making such an order is not a ground of itself to refuse to issue a passport. Nor indeed is the making of such an order. Under section 40 BNA 1981, the use of false representations does not, without more, render citizenship a nullity, nor does it necessarily lead to deprivation of citizenship. In any event deprivation of citizenship does not occur until all rights of appeal have been exhausted: see paragraph 32 above. It therefore follows that, unless and until deprived of citizenship, the Claimant remains a British national. Therefore, as at the time of the Decision, there was no basis, under the terms of the WMS, upon which the Defendant could not be satisfied "*as to the British nationality of [the Claimant] in accordance with relevant nationality legislation*". The Defendant's reliance upon the *possibility* of the Claimant being deprived of citizenship was misconceived and based on a failure to understand fully the operation of the provisions of section 40 BNA 1981.

101. The Defendant's argument in response that it was open to her to refuse a passport even where there is no doubt about identity and because *she* was satisfied that citizenship had been obtained by deception amounted in substance to nothing other than reliance upon the "public interest" ground. This is addressed in paragraphs 111 to 122 below.

102. Further it is notable that in the cases of both Z and Mr Nuka, the Defendant initially relied, as it did in the present case, upon the commencement of the deprivation process as a ground of refusal. However, in both those cases, the Defendant subsequently issued a passport despite the existence of such deprivation proceedings, thereby apparently accepting that their existence was not, in principle, an obstacle to the issue of a British passport.

103. For these reasons, whilst a final order depriving a person of British citizenship would be a ground for refusing to issue a passport, neither the intimation, nor the commencement, of deprivation proceedings by the Defendant is, nor can be, a lawful or rational basis for refusing to issue a passport. I conclude that it was unlawful and irrational for the Defendant to refuse to issue a passport to the Claimant on the basis of the contemplation or institution of deprivation of citizenship proceedings.

(2) Mismatch with naturalisation certificate

104. In the Decision, the second express reason given is that "*your client's naturalisation certificate does not reflect his genuine Albanian details"*. The Defendant's rationale for relying upon this mismatch with his naturalisation certificate is difficult to understand and confused.

105. First, the rationale cannot have been that the mismatch called into question the Claimant's *identity*. It is, and was at the time, accepted by the Defendant that there is no issue in the present case as to the Claimant's true identity. Contrary to Mr Metcalfe's argument, there were no doubts about his identity. It was expressly confirmed as genuine in the Decision itself. The relevant passport application(s) have been made by the Claimant in his correct name and place and date of birth. Thus the passport was not, and could not have been, refused under the terms of the WMS on the ground that the Defendant was not satisfied "*as to the identity of [the] applicant*". The mismatch was therefore not based on the "identity" ground in the WMS. There is no separate basis in the WMS to refuse purely on grounds of such a mismatch.

106. Secondly, the Defendant's policy relates only to a requirement that the *name* on the naturalisation certificate matches that on the travel document. *"Nationality policy: general guidance"* states that only variations in name justify the denial of a passport: see paragraph 35 above. Further the Defendant's response to the Freedom of Information Request confirms that there is no bar on issuing a passport when details do not match: see paragraph 78 above. In the present case, the Claimant's name was correctly stated on his naturalisation certificate. Further, contrary to Mr Metcalfe's submission, the Defendant's "*Changes to dates of birth*" policy does not *require* verification of date of birth exclusively from a naturalisation certificate: see paragraph 38 above. It is open to verify identity/date of birth from other source documents, as in fact happened in the case of the Claimant.

107. Thirdly, as regards the Defendant's assertion that the mismatch in biographical details gives rise to a risk of fraud, this was not expressly relied upon in the Decision. In any event, the Defendant has not satisfactorily explained or provided evidence to show that such a risk arises either in general, or more particularly in the present case. The Defendant's "*Naturalisation certificates*" policy (see paragraph 36 above) makes provision for checks to be carried out where there are variations in biographical details. On the facts in the present case, the Defendant was able to ascertain the true position in mid-August 2019 as a result of exchanges between HMPO and UKVI. The risk of fraud was met in the present case. Further the Defendant's "*Changes to dates of birth*" policy (paragraph 38 above) means that, in the case of the Claimant, the Defendant was *required* to update her records in about August 2019, once she was satisfied of the Claimant's correct identity. (This also supports the Claimant's case on the Naturalisation Certificate Decision). This would have minimised (if not avoided altogether) any suggested risk of fraud arising from the mismatch in the present case. Neither in the Claimant's case, nor in the cases of Mr Nuka and Z, did the Defendant seek to recall the naturalisation certificate once it became clear that they contained incorrect details. Finally, in the case of Mr Nuka, his naturalisation certificate was amended to reflect his correct details and the Defendant then issued a new passport with correct details, adding comments in the observations section referring to the previous identity details as disclosed on earlier passports. In this way any risk of confusion and fraud was avoided. Further in the case of Z, the risk of fraud from

mismatch was not regarded as sufficiently serious to require a decision to be made on his application to amend his certificate. Rather, even though the naturalisation certificate was not amended in this case, his passport was also endorsed with observations about an alternative name and place and date of birth.

108. Fourthly, that there is no underlying rationale for reliance on the mismatch is demonstrated by the inconsistency in the Defendant's position over the course of these proceedings. In her Detailed Grounds of Defence, the Defendant contended that these proceedings were premature and that an amendment to his naturalisation certificate was a prerequisite to the issue of a passport; and yet when the Claimant did what the Defendant suggested, that amendment was refused by the Naturalisation Certificate Decision on the sole ground that the commencement of the deprivation proceedings prevented such an amendment. To this extent, the "mismatch" ground of refusal appears to add nothing to the ground based on deprivation proceedings, as above.

109. Finally, that there is no rational basis for reliance upon the mismatch ground is further demonstrated by the inconsistent stance taken by the Defendant in other cases, and in particular in the cases of Z and Mr Nuka. In the case of Z, he has been issued with a British passport with his correct details, but which did not match those contained in his naturalisation certificate, and his naturalisation certificate was not amended prior to issue. The Defendant declined to amend the naturalisation certificate to modify the date of birth stating that a *"certificate of naturalisation does not purport to be evidence of the holder's date of birth. It is merely intended as evidence of the holder's nationality status"*. In the case of Mr Nuka, one of the two grounds for initial refusal of his passport was mismatch with his naturalisation certificate. Yet in the final result, the Defendant allowed amendment of his certificate and a passport was issued.

110. I conclude that, in so far as the Decision was based on the mismatch with details on the Claimant's naturalisation certificate, it was irrational.

(3) Public interest

111. Ultimately Ground 1 turns on the "public interest" issue. The Defendant's case now relies centrally upon the specific ground in the WMS, namely that of *"past, present or proposed activities"* being *"so undesirable… that the grant of passport facilities is contrary to the public interest"*.

112. First, I do not accept that this public interest ground was relied upon or in any way formed the basis of the Decision. It is not referred to in the Decision. Nor, in my judgment, does the passage in the Pre-Action Response referring to the Claimant's falsehoods compromising his nationality status amount to an invocation of this public interest ground: see paragraph 55 above. The position is to be contrasted with the clear and precise express reasons given by the Defendant in the cases of *XH* and *B and ND* where this public interest ground was relied upon. In the present case, the first time that the public interest ground was referred to by the Defendant was in her Summary Grounds of Defence. For this reason, in my judgment, the Decision itself cannot be justified on this "public interest" ground. In the light of my conclusions on the two foregoing aspects, I conclude that in principle the Decision was unlawful and irrational.

113. Secondly, however, I go on to consider the "public interest" ground now put forward by the Defendant on the basis either that the Decision itself was justified, albeit on a different ground, or that the Defendant might wish to rely upon that ground, on further consideration of the Claimant's present or any future passport application. In this way the Defendant contends that, in any event, relief should not be granted.

114. On the basis of the evidence and argument place before the Court, I am not satisfied that the Defendant has concluded, or can rationally conclude, that the Claimant is *"a person whose past, present or proposed activities, actual or suspended, are believed by the Home Office to be so undesirable that the grant of passport facilities is contrary to the public interest"*, for the following reasons.

115. First, the categories of public interest in WMS are enumerated clearly and precisely. As indicated by Lord Williams' ministerial statement, and affirmed by Lang J in *Easy*, the exercise of the power under the WMS to refuse to issue a passport is intended to be confined to those "well-defined categories". There is no express reference in those categories to "deception" or "obtaining citizenship by deception" as a public interest category. There is some force in the suggestion that this sub-category of the "public interest" here should be construed *eiusdem generis* with "cases of terrorism-related activity or other and serious or organised criminal activity."

116. Secondly, the WMS states expressly that the power to refuse on this ground is to be exercised only "sparingly".

117. Thirdly, however, looking at the terms of the WMS itself (and leaving out of account consistency with the Citizens Directive (see paragraphs 143 and 144 below), I do not accept that, as a matter of strict construction of the words, this public interest ground is necessarily confined to "future risk". By its terms, past activities may be taken into account. Whilst the primary focus of this public interest ground is concern about preventing overseas travel on a prospective basis (and thus future risks arising therefrom), the final sentence of the policy leaves open, on its wording, the possibility of relying on this ground on the basis of past activities being such as to prevent enjoyment of a passport facility, and regardless of overseas travel. To the extent that this is possible on this basis the Defendant will, in effect, be penalising that person for their "past activities"

118. Fourthly, nevertheless, given the foregoing focus of the public interest ground, in my judgment the Defendant must be able to articulate clearly what - if not future risk - makes it "so undesirable" to grant a passport. It is important that the Defendant identifies the "activities" said to be so undesirable as to render the grant of a passport contrary to the public interest. This can be tested by considering the Defendant's position in the event that the Claimant's deprivation appeal were to be successful. If, in that event, the Defendant would proceed to issue a passport, it follows that its current ground for refusal is no more than the *existence* of deprivation proceedings ground (a ground which is not justified, for the reasons given at paragraphs 100 to 103 above). It follows that, on the public interest ground now advanced, the Defendant would maintain the refusal, even if the Claimant were not ultimately deprived of citizenship. Mr Metcalfe in oral argument left this open as a possibility, although he did not have clear instructions either way. If this is right - as it must be, if there is a distinct public interest ground - it follows that the underlying basis of that ground is that the relevant "the past activity" is the Claimant's conduct of making false

representations (over 15 years ago) in order to obtain British citizenship i.e. the mere fact of having obtained citizenship by deception. It further follows that, even if, on appeal, it is ultimately decided that, taking account of this conduct and all other considerations, the Claimant should not be deprived of that citizenship, nevertheless that conduct warrants refusal of a passport to a British citizen.

119. However to date the Defendant has not articulated the reason why the act of deception of itself (in obtaining the passport) is "so egregious" as to deprive the Claimant of his passport, of his ability to travel overseas in the future (and potentially to put him at the disadvantage in the domestic "Compliant Environment"), nor what the purpose of such action is. In my view, the act of deception itself cannot be a good ground; otherwise any citizen who has committed any act of dishonesty could be refused a passport on public interest grounds. That could not fall within the WMS. Nor do I consider that deception leading to the grant of citizenship is of itself sufficient. In so far as the purpose of such a policy is to punish the Claimant for past deception and to deter others from similar deception to obtain citizenship, then it seems to me that this purpose can equally already be achieved by prosecution for relevant criminal offences. The law already provides for sanctions for having obtained citizenship (and/or a passport) by deception: through deprivation of citizenship itself under s.40 BNA 1981 and through prosecution for a criminal offence.

120. Fifthly, it is relevant that in the cases of neither Z nor Mr Nuka did the Defendant rely upon this wider "public interest" ground as the basis for refusal of a passport. No explanation has been given as to why, in the case of the Claimant, but not in the case of Z or Mr Nuka, the deception was "so egregious" as to make issue of a passport contrary to the public interest. In the case of Z, the Defendant expressly disavowed reliance on the public interest. What is more, even after the Defendant had raised the public interest ground in the present case on 24 December 2019, in the case of Mr Nuka, it made a further decision refusing a passport, but did not rely upon that ground, even where by that stage the FTT had concluded that there were strong public interest considerations for not allowing his appeal against deprivation. No explanation has been given for why the public interest ground relied upon in the Summary Grounds of Defence did not equally apply to Mr Nuka.

121. In my judgment, on the basis put forward by the Defendant, to allow refusal of a passport on the simple ground of having obtained citizenship by deception would widen public interest categories set out in the WMS beyond its current terms and in an imprecise and open ended way. (Whilst the Defendant may be able to articulate such a basis in the future, it has not done so to date).

122. For these reasons, on the basis of the evidence and argument put forward to this Court, the Defendant has not established that the refusal of the Claimant's passport in the present case was (nor that a further refusal would be) justified on the public interest ground that his past conduct past was *"so undesirable... that the grant of passport facilities is contrary to the public interest"*.

The challenge to the Decision is not academic

123. Finally I do not accept the Defendant's contention that, because of the subsequent Citizenship Decision, the challenge to the Decision is now academic. The substantive legal issue is whether the Defendant has offered sufficient lawful or rational reasons

when exercising her discretion to refuse to issue a passport *pending* final resolution of whether to deprive him of citizenship. The appeal against citizenship deprivation does not resolve the question of whether the Decision was rational at the date of the Decision or at any time before the deprivation takes effect. The suggested alternative remedy of the appeal to the FTT is not convenient expeditious or effective as judicial review. Deprivation of citizenship and refusal of a passport are distinct and separate decisions. The FTT on appeal under section 40 has no power to quash the Decision. Secondly and in any event a key issue in respect of the exercise of discretion to refuse to issue a passport is whether the refusal is necessary and proportionate. The statutory deprivation appeal does not deal with such issues. Thirdly, if at the time of the Decision or now, there is no rational basis to deny a passport, it is no answer to say that at some point in the future there will be a rational basis. Fourthly, to treat the outcome of the deprivation appeal as an adequate remedy visits the consequences of that procedure on the Claimant before his lawful status has been resolved. Finally, rectification of the naturalisation certificate is not an alternative remedy, since it has been refused by the Naturalisation Certificate Decision.

Conclusions on Ground 1

124. For the foregoing reasons, the Decision was not in accordance with the WMS and was irrational and unlawful. The Decision will be quashed. Further, on the material before the Court, the Defendant has not established other grounds to refuse to issue a passport to the Claimant. I turn now to the remaining grounds, although in the light of this conclusion, Grounds 2 and 3 do not materially affect the outcome.

Ground 2: proportionality, EU law and Article 8 ECHR

The parties' arguments

125. *The Claimant* submits that the Decision (1) does not comply with the EU law principles of proportionality; and (2) is incompatible with the Claimant's right to respect for private life under Article 8 ECHR.

126. As regards *EU law* the discretionary power to decline to issue a passport is circumscribed by EU law: see *B and ND*. The Decision had to be necessary and proportionate. The Defendant was required to demonstrate the manifestation of risk sufficient to meet the threshold laid down in Article 27(2) Citizens Directive. The Defendant did not consider this issue. The failure to do so is sufficient to vitiate the decision: *Easy* §51.

127. As regards the Defendant's reliance upon Article 35 Citizens Directive, Article 35 is concerned with the deprivation of rights in the context of restrictions on a right of entry or residence on public policy, public security or public health grounds under Article 27. Article 35 does not avoid the obligation to show that the Claimant represented a "genuine present and sufficiently serious risk" within the meaning of Article 27 (2) when determining the propriety of denying the Claimant a passport. In fact Article 35 necessarily confirms the existence of that obligation. Further Articles 30 to 31 of the Citizens Directive require that a person subject to termination of rights under Article 35 are afforded the opportunity to know the case against him and to seek redress before any deprivation action can be taken. Even if it were possible for the Defendant to rely on Article 35 in order to deprive the Claimant of the benefit of a

travel document, the Directive prohibited the imposition of any actual deprivation of this benefit until after an independent merits based judicial review.

128. As regards *Article 8 ECHR, t*he Claimant raised a claim that his family and private life had been and would be infringed by the Decision. Accordingly there was a burden on the Defendant to justify the Decision. Yet no such proportionality assessment was undertaken by the Defendant in the Decision.

129. The Claimant advanced a number of matters evidencing the significant adverse impact which had arisen from the revocation of his passport and would arise from the refusal to issue a new passport. First, the Claimant himself would encounter substantial obstacles to travelling abroad and returning reliably. Without a British passport he had no certainty of admission back into the UK. Section 40 Immigration and Asylum Act 1999 prevents any carrier from allowing him to board, absent a valid visa in his Albanian passport. However since the Claimant is a British citizen, he could not obtain a visa as he is not subject to immigration control pursuant to section 1 Immigration Act 1971. Secondly, and as a result, he would therefore be unable to support his son who is involved in regular international football tournaments and that might jeopardise his son's retention of his position within the Fulham Academy. Thirdly the Claimant would struggle to travel to see his elderly parents in poor health in Albania.

130. The provision of a passport more generally is highly beneficial in establishing immigration status, which in turn facilitates the exercise of basic rights within the UK (under the so-called "Compliant Environment") including, the right to work, the right to rent, the ability to travel, the right to hold a bank account and the right to hold a driving licence. The Claimant has no alternative means of evidencing his entitlement to rights within the UK. Guidance issued by the Defendant indicates that the Claimant must rely upon certain key documentation to establish as lawful residence. The Defendant gave no consideration to any of these issues.

131. In any event the Defendant's asserted case that the Decision was proportionate is no more than a restatement of her claimed rationality justification under Ground 1.

132. Even if EU law and Article 8 do not apply, it is clear that the WMS policy itself requires an assessment of proportionality. Thus in any event the Defendant's failure to make such an assessment amounted to a failure properly to take account of, and properly to apply, the WMS policy.

133. *The Defendant* submits that the Claimant's claim that the refusal of a passport was disproportionate either as a matter of EU law or under Article 8 ECHR is unfounded.

134. First, as regards *EU law and the Citizens Directive*, as a matter of EU law, and in particular by reason of Article 35 Citizens Directive, the requirements of proportionality were not engaged in this case. The Claimant obtained both indefinite leave to remain and British citizenship by falsely claiming to be from Kosovo. That he is a British citizen and therefore an EU national is plainly an "abuse of rights or fraud" within the meaning of Article 35. Since he had obtained British citizenship by his false claim, the Defendant was fully entitled "to adopt the necessary measures to refuse, terminate or withdraw any rights" which the Claimant had obtained because of the deception and the Decision to refuse him a passport was such "a measure".

Therefore there was no requirement on the Defendant to show that the Claimant's conduct represented "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" within the meaning of Article 27(2).

135. *Secondly*, even if the requirements of proportionality were engaged, it is plain from the decision letter that the Decision was a proportionate one having regard to (1) the manifest difference between the details contained in the naturalisation certificate and those in the application for the passport; (2) the Claimant's deception in obtaining citizenship; (3) the not unreasonable prospect that the Claimant would be deprived of that citizenship in the near future; and (4) the fact that the Claimant would be free to travel using his Albanian passport. The Defendant further relies, as she is entitled to, on the further clarification in the Pre-Action Response. The Pre-Action Response in turn referred not only to the Decision but also to the Defendant's letter dated 15 August 2019.

136. As regards *Article 8 ECHR* the Decision does not engage the Claimant's rights under Article 8 (see paragraph 24 above). The Claimant remains a British citizen. His wife has leave to remain and his two sons are British citizens.

137. Alternatively, even if the Decision were found to engage Article 8, this was specifically addressed in the Decision and the Pre-Action Response. The latter stated that the Decision had been made "in accordance with passport offices policy, procedure and nationality legislation using the Royal Prerogative". Whilst accepting that the wording of the Pre-Action Response in this respect is somewhat garbled, it is clear that the Defendant was endeavouring to express the view that any interference with the Claimant's Article 8 rights was proportionate. In any event it is plain reading the Decision, the Pre-Action Response and the 15 August letter that the Defendant had considered the requirements of proportionality. The Decision pursued a legitimate aim: both in ensuring that the Home Office is satisfied as to the identity of an applicant before it issues a passport and also preventing a person who has obtained a grant of citizenship by deception from benefiting from that deception. Both objectives are sufficiently important to warrant any interference caused to the Claimant's family and private life and the refusal of the passport is rationally connected to those aims. Further no less intrusive measure was available and the refusal struck a fair balance between the Claimant's rights and the interests of the community.

Discussion and Analysis

138. Ground 2 has a number of strands: EU law, Article 8 ECHR and proportionality in general. In fact regardless of the position under EU law and Article 8 ECHR, the WMS itself directly requires that any decision to refuse a passport "must be necessary and proportionate". This ground therefore turns on that issue. Before turning to it, I deal briefly with the other aspects.

EU Law

139. First, a decision under the WMS can engage free movement rights, as established by the Court of Appeal in *XH* at §§108 and 112. On the facts here, the refusal of the passport has prevented or restricted the Claimant's overseas travel, given the difficulties of re-entering on an Albanian passport (see further paragraph 146 below).

If required, there is a cross-border element in the present case (see, in the context of deprivation of citizenship, *AB* (paragraph 33(3) above)).

140. Secondly, as regards the Citizens Directive, the relationship between Article 27 and Article 35 is neither entirely clear nor easy to ascertain. The Claimant relies upon Article 27; the Defendant relies (and relied in the Pre-Action Response) distinctly on Article 35. However, I consider that Article 27(2) applies to the present case, and has not been overridden by the application of Article 35. Article 35 is a general provision in a separate chapter. Whilst Article 27 grants a direct power on a Member State to restrict movement, by contrast Article 35 refers to a power on the part of a Member State to adopt "necessary measures" by a Member State. This suggests a measure of general application. As far as I am aware no such general measure has been adopted by the UK. For this reason alone I am not satisfied that Article 35 applied here.

141. As regards the reference in Article 35 to Articles 30 and 31, I express no final conclusion. The words "subject to the procedural safeguards provided for in Article 30 and 31" are ambiguous. On the one hand, Articles 30 and 31 apply in terms specifically and only to decisions taken under Article 27(1). On the other hand, it may be that those words fall to be read as applying, to a restriction based on abuse of rights or fraud, safeguards of the *same type* as the safeguards applicable to an Article 27 restriction based on public policy, public security or public health, and not as confining the power in Article 35 more generally to cases falling within Article 27.

142. Thirdly, whatever the position under the WMS (see paragraph 117 above) it is clear that Article 27(2) *is* concerned with "future" risk. The requirement of a "threat" to the fundamental interests of society necessarily imports the element of future risk. Past conduct alone is not sufficient under Article 27. See *XH* supra, at §§113 and *B and ND* §67. In the present case, the Defendant has not relied upon, nor identified any such "present and sufficiently serious threat affecting one of the fundamental interests of society" posed by the Claimant. On this basis alone, the Defendant has not established an entitlement to rely upon Article 27(1) as the basis for the refusal of the passport.

143. There remains the issue of the interrelationship between the "public interest" ground in the WMS and Article 27(2) (identified in paragraph 117 above). The terms of the WMS and of Article 27(2) of the Citizens Directive are not identical. Under the latter, there is a requirement to consider future risk (because of the reference to a present "threat"). Under the former there is no express reference to future risk and "past conduct" appears to be potentially sufficient. The question arises as to whether the WMS must be read in conformity with Article 27(2), such that in order to cancel or withdraw a passport on this "public interest" ground, the Secretary of State must be satisfied that the person concerned represents some future risk himself.

144. In view of my other conclusions, it is not necessary for me to reach a final conclusion on this point. *XH* states (at §112) the general proposition that there is a requirement for the WMS to be in accordance with the Directive and this supports the view that the WMS must be read as confined to future risk. *B and ND* (at §67) also supports this view. On the other hand, in *XH*, the Court of Appeal then goes on (at §113) to confine its analysis to the facts of the case before it, where the entire issue was

"concerned with the evaluation of future risk": see my observations at paragraph 20 above.

Article 8 ECHR

145. First, in my judgment, and in the light of the authorities set out in paragraphs 25 to 28 above (and in particular *Stamose* at §42), I consider that in principle the refusal of a passport is capable of engaging Article 8 ECHR (as well as Article 2 of Protocol 4) . I agree with Lang J in *Easy* §51. If and in so far as the absence of a passport may make access to certain rights and services impossible or more difficult in the "Compliant Environment" in the UK, then by parity of reasoning with the *Usmanov* case, there is likely to be an interference with the right to a private and family life. (In this regard, I note that, in the Decision (as elucidated), the Defendant assumed that Article 8 was engaged).

146. Secondly as to whether on the facts of this case, the refusal of the passport has interfered with the Claimant's right to a private and family life, I am not satisfied on the evidence that the need for a passport in the "Compliant Environment" has led to an interference with the Claimant's Article 8 rights. He has not established that the absence of a passport had had or will have any practical effect on his personal ability to conduct his day-to-day life. On the other hand, I do consider that the effect of the absence of his passport on his ability to travel abroad and back to the UK does interfere with his and his son's Article 8 rights. The difficulty concerns his ability to return to the UK travelling on his Albanian passport. The Defendant accepts that refusing a British passport can make it difficult for him to travel. In order to do so, he would require a valid visa on his Albanian passport. However he could not obtain such a visa, because as a British citizen he is not subject to immigration control. The only way round this is for the Defendant to make an endorsement on his Albanian passport or to obtain an emergency travel document from the British Embassy in the foreign country from where he would be returning. The Defendant contended that therefore he was not prevented from travelling back (and thus from travelling out) and that the difficulty is of his own making. However in argument the Defendant was not prepared to give any undertaking that it would grant such a document to the Claimant. (This is to be contrasted with the position in *XH* where the Defendant indicated that such a temporary travel document might be offered in certain circumstances.) On this basis, I conclude that the refusal of the passport does interfere with the Claimant's and his son's rights under Article 8 ECHR.

Proportionality

147. In any event, the Decision was required to be "necessary and proportionate". As a matter of EU and ECHR law, the burden was on the Defendant to establish this. I consider that, under the WMS too, the burden was, and is, on the Defendant. In this regard, the Defendant's approach to proportionality at the time (in the Pre-Action Response) was not only expressed unclearly but based on the erroneous approach that the burden was on the Claimant to demonstrate that his "entitlement to a passport was proportionate". In my judgment, this error alone vitiates the Decision.

148. Further and in any event, the proportionality justification now put forward by the Defendant comprises in substance the same reasons relied upon to justify the rationality of the Decision in the first place – the mismatch, the existence of

deprivation proceedings and the deception in obtaining citizenship. In my judgment, just as these do not establish the rationality of the Decision, they equally are insufficient to establish its proportionality.

Conclusion on Ground 2

149. In the light of my conclusion on Ground 1, Ground 2 does not fall to be determined. However, if had been necessary so to do, I would have found that the Decision did not comply with the requirement of proportionality under the WMS (nor under EU law nor under Article 8 ECHR).

Ground 3: Inconsistency

The parties' arguments

150. *The Claimant* contends that the Defendant's conduct in the present case is unlawful because the Defendant has applied an inconsistent practice as between comparable cases, and in particular in relation to the case of Z and Mr Nuka. Secondly in those cases where the Defendant has settled and reconsidered, that was prompted by the grant of permission on applications for judicial review, necessarily importing that the Defendant's approach was arguably vitiated by legal error. In the case of Mr Nuka, the consent order for reconsideration recorded by way of preamble that the earlier decisions made by the Defendant in that case were legally vitiated. The case of Mr Nuka raised the same legal issues and argument as in the present case. The Defendant then went on to issue Mr Nuka with a passport, despite being in the same position.

151. *The Defendant* accepts that the settlements in the two cases are on their face inconsistent with the position taken in the Claimant's case. Nevertheless ground 3 is without merit. The settlements in the cases of Mr Nuka and Z turn on their particular facts, as now explained by Mr Hanson in his witness statement. Secondly, the Claimant has failed to identify any legal basis upon which the Decision can be impugned for inconsistency alone. The decision to treat those two cases differently was neither *Wednesbury* unreasonable nor unfair.

Discussion and Analysis

152. Inconsistency in treatment of similar cases falls for consideration as part of the rationality of a public body's decision: see paragraph 16 above. Accordingly I have identified in my analysis under Ground 1, those aspects of the treatment of the Claimant which were unjustifiably inconsistent with the treatment of the cases of Z and Nuka and which support the conclusion, under Ground 1, that the Decision was irrational. It is not therefore necessary to make a separate finding on Ground 3. I add only the following. It is not surprising that the particular details of the facts of each of the cases of Z and Mr Nuka were different from each other and from the Claimant's case, and I note Mr Hanson's explanations for the different outcome in those two cases, some of which might serve to distinguish those cases on their particular facts. Nevertheless there are certain inconsistencies between the approach in principle in those two cases and in the present case which, in my judgment, are not explicable as being fair or rational; namely, the issue of a passport without amendment of the naturalisation certificate; the absence of any reference to, let alone reliance upon, "public interest" as a ground for refusal and the issue of a passport despite ongoing

deprivation proceedings. Each of these inconsistencies have highlighted the irrationality, under Ground 1, of the Decision

The Application to amend to challenge the Naturalisation Certificate Decision

The parties' arguments

153. *The Claimant* contends that the decision to refuse to amend the naturalisation certificate was wrong in law, contrary to the Defendant's policy statement and irrational.

(1) Contrary to the terms of the Naturalisation Certificate Decision, the Claimant has not been deprived of his British citizenship. Until the Claimant's appeal is determined adversely, the Defendant cannot issue a deprivation order. The Claimant will cease to be a British national only when, and if, a deprivation order is made. Accordingly the Claimant remains entitled to all the rights that accompany his citizenship

(2) Even if the Claimant had been deprived of citizenship by the Citizenship Decision, the appropriate response would not be to destroy the certificate but rather to endorse it, as provided for in the Defendant's policy entitled "Nationality policy": general information - all British nationals (see paragraph 37 above)".

(3) Where, as here, there is no issue as to true identity and evidence is provided which provides the correct date and place of birth, a properly directed decision-maker applying prevailing policy would have proceeded to endorse the certificate with the correct information: see policy "Naturalisation certificates" as set out in paragraph 36 above.

(4) A deprivation decision does not preclude the making of such an amendment, as in fact the Defendant did in the case of Mr Nuka.

154. Permission to amend should be granted. The Defendant's approach to amendment of the naturalisation certificate is relevant to the issues in the extant proceedings. The Defendant contends (or contended) in the extant proceedings that relief should be declined because of the Claimant's failure to apply to amend his naturalisation certificate. Once permission was granted and the Decision was to be reviewed, review of the Naturalisation Certificate Decision avoids the necessity for further litigation and the issues which fall to be addressed in the extant proceedings are founded upon the same basis as those arising out of the Naturalisation Certificate decision. This is an appropriate case where the Court should exercise a measure of flexibility to admit the further ground. To do so is in the interests of justice. It will not extend the present proceedings nor does it prejudice the Defendant and the matter was promptly raised by the Claimant following the Naturalisation Certificate Decision.

155. *The Defendant* contends that in the Decision, the Defendant put forward as one of the reasons for refusing the passport the fact that the Defendant was unable to issue a passport since his naturalisation certificate did not reflect his genuine Albanian details. At that time of the Decision, it was reasonably open to the Claimant to apply

for rectification of his naturalisation certificate in order that his place and date of birth might match the details given in the passport application. The Claimant however did not do so but instead applied for judicial review. It was only following the application of judicial review that the Claimant applied for rectification of the naturalisation certificate. It was on that basis the Defendant argued that the application for judicial review was premature since the Claimant had an alternative remedy available to him, namely rectification of his naturalisation certificate. Then on 6 August 2020 the Defendant refused the application for rectification on the basis that the Claimant had *by then* already been deprived of his citizenship on 20 December 2019.

156. The Defendant opposes the application to challenge the Naturalisation Certificate Decision on the basis that the issue is wholly academic. Any interest which the Claimant may have in the rectification of his naturalisation certificate is inextricably bound to the outcome of his appeal against the Citizenship Decision. If that appeal succeeds he will be entitled to a fresh naturalisation certificate. If his appeal fails then he will have no entitlement to a naturalisation certificate at all. In the interim the Claimant has no entitlement to hold a naturalisation certificate bearing false details in circumstances where he has already been deprived of his citizenship and no entitlement to hold a certificate in any event unless and until his appeal succeeds. Further, and in any event even if the Court were to direct the Defendant to reconsider the application for naturalisation, it would be entirely reasonable to defer any decision concerning rectification until the appeal against the Citizenship Decision has been determined.

Discussion and Analysis

157. First, I grant permission to amend the claim to allow the Claimant to challenge the Naturalisation Certificate Decision. Whilst this Decision post-dates the issue of proceedings and whilst conscious of the need to exercise caution in permitting "rolling" judicial review, there is no absolute bar upon allowing such claims to be introduced in appropriate circumstances and there is a need to maintain procedural flexibility to so as to do justice between the parties: see *R (on the application of Spahiu) v Secretary of State for the Home Department: Practice Note* [2018] EWCA Civ 2604 [2019] 1 WLR 1297 at §§63 and 64. In the present case, it is the correct course to allow this additional claim, in circumstances where it is the Defendant which expressly relied on the failure to apply to amend the naturalisation certificate as part of its defence to this claim and where it is convenient for all issues relating to that certificate to be dealt with together.

158. Secondly, as to the substance of this ground of challenge, the only express basis to justify the Naturalisation Certificate Decision is that the Claimant "was deprived of British citizenship on 20 December 2019". That falls into the same error as made in the Decision. The Claimant was not, and has not yet been, deprived of his citizenship. Unless and until his deprivation appeal is determined against him, the Claimant remains a British citizen, and on that basis is entitled to a naturalisation certificate reflecting the correct details. Indeed Mr Hanson accepted in his witness statement that this reason, when given in the case of Mr Nuka, "was incorrect". Further under the *"Changes to date of birth"* policy (set out at paragraph 38 above), the Defendant was obliged to issue an amended certificate in his correct details. Upon the conclusion of his deprivation appeal, the position will be clear: depending on the outcome, the Claimant will either be granted a naturalisation certificate or he will not.

But in my judgment, consistent with the legislative scheme under section 40 and 40A BNA 1981, and just as with the position relating to his passport, the existence of ongoing deprivation proceedings is not a good reason for withholding a naturalisation certificate in the meantime and granting to the Claimant that to which he is entitled in his capacity as a British citizen. There is, or may be, benefit to the Claimant in holding such a certificate in the meantime.

159. For this reason, I find that the challenge to the Naturalisation Certificate Decision as being irrational and unlawful is well founded. The Claimant has a concern that the Defendant may delay issuing a fresh certificate until the outcome of the deprivation appeal is known. I will hear argument from counsel as to whether the Defendant should take steps to proceed to issue such a certificate without delay.

Conclusions

160. For the foregoing reasons:

(1) in the light of my conclusions at paragraph 124, Ground 1 of the claim is established and the Decision was unlawful and irrational and will be quashed;

(2) in the light of my conclusions at paragraph 159, the additional ground is established and the Naturalisation Certificate Decision was unlawful and irrational and will be quashed.

161. I will hear the parties on the appropriate remedies pursuant to these conclusions (including possibly, relief by way of declaration, quashing order or mandatory order) and all other consequential matters.

162. Finally I am most grateful to counsel and solicitors for the quality of the argument, and the helpful manner in which this case has been conducted, not least in the circumstances of the Covid-19 pandemic.