**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-005549**
**First-tier Tribunal No: DC/50197/2021**
**LD/00100/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 22 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**SANDY McGRATH**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Z. Malik KC, instructed by VH Lawyers Ltd.
For the Respondent: Ms A. Everrett, Senior Home Office Presenting Officer

**Heard at Field House on 07 February 2023**

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision dated 07 June 2021 to deprive her of British citizenship with reference to section 40(3) of the British Nationality Act 1981 ('the BNA 1981') (obtained by fraud, false representation or concealment of a material fact). The appeal was brought under section 40A of the same Act.

*Background*

2. The appellant was naturalised as a British citizen on 27 October 2005. Following an arrest in 2007 the respondent became aware of the fact that the appellant had a number of criminal convictions that were not declared in the application for naturalisation. On 01 August 2007 the respondent notified the appellant of her intention to deprive her of British citizenship and provided an opportunity for her

to make representations. There was further correspondence between the parties in 2007 and 2008. No further action was taken by the respondent in relation to deprivation until 31 March 2014 ('the first deprivation decision'), when a decision was made to deprive the appellant of British citizenship.

3. The appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Munonyedi allowed the appeal in a decision sent on 16 July 2015. Although the BNA 1981 does not specify the grounds upon which an appeal can be brought, the judge allowed the appeal on the narrow basis that the respondent had failed to consider a material matter i.e. whether deprivation would be unlawful under section 6 of the Human Rights Act 1998 ('the HRA 1998').

4. The respondent's decision letter records that enquiries were made on 24 February 2016 with medical professionals who were treating the appellant. On 28 March 2016 the appellant was invited to make further submissions before a fresh decision was made. The decision letter notes that the appellant responded by letter dated 11 April 2016. No further action is noted until the respondent made the decision dated 07 June 2021 that is the subject of this appeal ('the second deprivation decision').

5. The chronology indicates that there was an unexplained delay of nearly seven years before the first deprivation decision was made and a further delay of another five years before the second deprivation decision was made (12 years in total). Deprivation proceedings have been ongoing since 2007, an overall period of 15 years, at the date of the First-tier Tribunal decision.

*First-tier Tribunal decision*

6. First-tier Tribunal Judge D. Webb ('the judge') dismissed the appeal in a decision sent on 23 September 2022. It is a careful and thorough decision in which the judge sets out the facts and evidence in detail. He outlined the appellant's immigration history, the documentary and oral evidence, the submissions, and referred to the relevant legal framework. The judge noted the statutory scheme contained in the BNA 1981, the Supreme Court decision in *Begum v SIAC* [2021] UKSC 17, and quoted the headnote to the Upper Tribunal decision in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC) in full.

7. The judge began his findings by considering whether the condition precedent contained in section 40(3) was established. He considered the reasons given by the respondent, the appellant's explanation in response, and then the situation as a whole, before coming to the following conclusion:

> '29. The paragraphs of the Decision letter mentioned above are clear, detailed, and comprehensive. The central findings of fact made by the Respondent were reached after reviewing representations submitted by the Appellant and her solicitors. The Respondent considered the explanation given by the Appellant, but found that it should be rejected. She gave cogent reasons for her decision which was based on the evidence before her. Applying a 'review approach to this case, I consider that the respondent's view was clearly one that could reasonably be held. Even if I had been approaching this matter on a 'merits' approach as suggested by Counsel for the Appellant, I would myself have come to the same conclusion as the Respondent for the same reasons. Indeed, I would also have pointed out that the plausibility of the Appellant's

> current account was not only compromised by the seven-year delay in it being raised, but also by the Appellant's previous and apparently habitual behaviour in giving false information (aliases and dates of birth) to the police. Whether one adopts a 'review' or 'merits' approach to this matter, the relevant condition precedent specified in section 40(3) clearly exists.'

8. The judge then turned to consider whether the respondent's decision to exercise discretion to deprive the appellant of British citizenship 'complied with the obligation under section 6 of the Human Rights Act 1998'. In the first paragraph following this heading the judge stated that he would consider 'whether the Respondent acted in a way in which no reasonable Secretary of State should have acted.' [30]. He went on to direct himself to the decision in *Ciceri* and the caution against a 'proleptic analysis' in assessing the impact of a deprivation decision. The judge then went on to analyse the reasons given by the respondent in the decision letter, including her consideration of the impact of delay [32]-[35]. The judge came to the following conclusion:

> '36. In conclusion, whilst I cannot agree with the submission of the Respondent that deprivation would not infringe the Appellant's rights under Article 8 because the facts *"are not so grave as to engage Article 8"* (see paragraph 30 at page 17 of the Respondent's Review), I nevertheless accept the Respondent was entitled to reach a decision that such interference would be justified and proportionate in light of the heavy weight to be placed upon the public interest in maintaining the system in which foreign and commonwealth citizens can be naturalised, and so obtain the benefits of being a British citizen. The Upper Tribunal Decision in *Ciceri* [at paragraph 38(4) and at headnote [4] emphasises *"the inherent weight that [will] normally lie on the Secretary of State's side"* in a case of this nature where citizenship was fraudulently obtained.
>
> 37. I am satisfied that the Respondent was entitled to exercise her discretion to deprive the Appellant of her British citizenship.'

*Grounds of appeal*

9. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:

(i) The First-tier Tribunal erred in taking a review approach to the assessment of proportionality under Article 8, when the Tribunal should have decided the matter for itself.

(ii) The First-tier Tribunal misapplied the principles outlined by the Supreme Court in *Begum* by failing to make any reasoned findings of fact on the evidence.

(iii) The First-tier Tribunal made inconsistent findings as to whether the appellant had provided an explanation in response to the allegation of fraud/deception that satisfied a 'minimum level of plausiblity'.

**Decision and reasons**

10. It is necessary to understand the two elements that the judge needed to consider in this appeal. First, an assessment of whether the condition precedent contained in section 40(3) BNA 1981 was satisfied. Second, whether human rights issues were engaged by the decision, and if so, whether the decision was unlawful with reference to section 6 HRA 1998.

11. Ms Everrett sensibly acknowledged that there was some difficulty in the judge's approach to the second of these questions but argued that any error was not material because the judge made clear that he would have come to the same decision as the Secretary of State.

12. However, one can see from the First-tier Tribunal's findings set out above that the section in which he made the finding that his decision would have been the same as the Secretary of State, and for the same reasons, related to the first issue regarding the condition precedent in section 40(3) i.e. whether naturalisation was obtained by means of fraud, false representation, or concealment of a material fact.

13. Mr Malik launched an argument based on a single line in the Court of Appeal decision in *SSHD v P3* [2021] EWCA Civ 1642; [2022] INLR 88 at [114], which stated that '*Begum* is authority for the proposition that, broadly, SIAC should take a public law approach to challenges to the Secretary of State's assessment of national security. It is not authority for any wider proposition.'. This, he argued, narrowed the application of *Begum* to SIAC cases and superseded the Upper Tribunal's reliance on the decision in *Ciceri*. He argued that, in light of *P3* the judge should have considered the condition precedent question for himself.

14. For the reasons given below, I have found that the First-tier Tribunal decision involved the making of a material error of law. As a result, it is not a proportionate use of court time to go into the argument put forward by Mr Malik in any detail. I was also told that the Court of Appeal will soon be considering these issues in another case. However, I will make the following observations.

15. First, the arguments relating to what was said in *P3* do not appear to have been ventilated before the First-tier Tribunal and did not form any part of the written legal arguments even though the decision was available at the date of the First-tier Tribunal hearing.

16. Second, the decision in *P3* was focussed on the question of whether SIAC took the right approach in an appeal against an entry clearance decision brought on human rights grounds following a decision to deprive that appellant of citizenship under section 40(2) while he was outside the UK. *Begum* focussed on the broad approach to an appeal relating to a decision taken under section 40(2) and was not directly concerned with human rights issues save for general observations made at [69], [71] and [120]. In *P3* the court was concerned with arguments relating to the scope of SIAC's role when assessing what weight should be placed on national security issues when considering them in the context of human rights issues (as opposed to the non-human rights context in *Begum*). On my reading of the decision, all that Lady Justice Laing was emphasising at [114] was that *Begum* impressed the need to take a broadly public law approach to the Secretary of State's assessment of national security issues. The decision in *P3* is confined to the specific issues before it relating to the scope of a SIAC appeal and in light of its particular procedures. The court was not considering whether *Begum* might have a wider application in non-certified appeals brought in the

First-tier Tribunal. For this reason, I do not consider that the brief observation made in *P3* in any way undermines or supersedes what was said in *Ciceri*.

17. Third, while I accept that the Upper Tribunal in *Ciceri* did not provide a specific explanation as to why the principles outlined in *Begum* were equally applicable to a decision made under section 40(3), it is apparent from the face of the decision in *Begum* as to why the principles apply equally to a decision taken under section 40(2) (conducive to the public good) and to a decision made under section 40(3) (fraud).

18. Whether an appeal against deprivation of citizenship is heard in SIAC or in the First-tier Tribunal the underlying powers to deprive a person of citizenship with reference to sections 40(2) and 40(3) are the same. The rationale of the Supreme Court's decision in *Begum* was drawn largely from the case of *SSHD v Rehman* [2001] UKHL 47; [2003] 1 AC 153 and the wording of the statutory provisions contained in the BNA 1981. The Supreme Court emphasised that the wording of section 40(2) focussed on the exercise of discretion by the Secretary of State (illustrated by the wording 'the Secretary of State may…')[66]. The condition precedent was not that 'SIAC is satisfied', but that 'the Secretary of State is satisfied' that deprivation is conducive to the public good [67]. The discussion in the paragraphs immediately preceding the guidance explain why the Supreme Court came to the conclusion it did at [71].

19. Similar wording is used in section 40(3), which sets out the condition precedent that 'the Secretary of State is satisfied' that naturalisation was obtained by fraud. For this reason, the same principles considered in *Begum* in relation to section 40(2) are also likely to apply to decisions made under section 40(3). Although [1] of the headnote in *Ciceri* did not elaborate on why the same principles applied to decisions made under section 40(3), it is obvious from the decision in *Begum* as to why the same principles are likely to apply.

20. It should be apparent from that analysis that the First-tier Tribunal judge did not err in considering the question of the condition precedent by way of a 'review' approach. This is consistent with the decisions in *Begum* and *Ciceri*, which outline the current position of the law in this area.

21. However, when one turns to consider the findings made in relation to the human rights arguments raised in the appeal it is clear from what is said at [30] and [36] that the judge adopted the same 'review' approach. He accepted that the impact on the appellant's right to private life was sufficiently grave to engage the operation of Article 8 of the European Convention [36]. Having considered what the second decision letter said about the delay in taking deprivation action, he went on to find that 'the Respondent was entitled to reach a decision that such interference would be justified and proportionate'. This is the wording of review. Nowhere in section (c) of the decision does the judge appear to conduct his own evaluation. Unlike the comments made at [29] in relation to the condition precedent issue, the judge does not indicate what his own conclusion might be on the question of proportionality. This is contrary to the guidance given in both *Begum* and *Ciceri*.

22. Even taking into account the judge's direction to the 'inherent weight that will normally lie on the Secretary of State's side' it is not possible to conclude that the decision inevitably would have been the same if he had decided the issue for himself. For this reason, I find that the error was capable of making a material

difference to the outcome of the appeal. In light of this finding, the other criticisms made about inconsistent findings do not need to be determined.

23. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law.

24. I have considered the best way to dispose of the appeal before the Upper Tribunal. On the one hand I have found that there was no error of law in the judge's consideration of the condition precedent issue, but I have found a material error of law in the judge's approach to the human rights issues raised. Bearing in mind that the courts have repeatedly cautioned against a proleptic assessment of human rights issues in cases where removal is not yet an issue, Mr Malik made clear that the main human rights issue in this appeal is the proportionality of deprivation action following many years of delay.

25. Although it was argued, but not determined by the First-tier Tribunal, the issue of delay arguably is also relevant to the rationality of the decision on *Wednesbury* grounds. Although the two main elements of the appeal will need to be considered in different ways, the impact of the delay will need to be considered with reference to the evidence as a whole. For these reasons, I consider that it is appropriate to set aside the whole decision and for the appeal to be remitted to the First-tier Tribunal for a fresh hearing.

**Notice of Decision**

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is remitted to the First-tier Tribunal for a fresh hearing

**M.Canavan**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

08 February 2023