IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004316

First-tier Tribunal No:
DC/50132/2022

Heard at: Field House on 26 February 2024
And at Newcastle on 7 June 2024

Promulgated on: 9 December 2024

THE IMMIGRATION ACTS

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

THEODOR LACI
Aka THEODHORI LACI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Lee, Counsel
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer
And Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 4 February 2005 the Appellant, using the identity of Theodor Laci born in Mitrovica, Kosovo on 27 August 1973, applied to the Respondent for naturalisation as a British citizen. In doing so he declared himself to be of good character. The application form required of him a declaration that the contents of his application were true, and warned him that to give

false information knowingly, or indeed recklessly, was a criminal offence. His application was granted on 10 May 2005.

2. On 10 November 2021 the Appellant was served with notice that the Respondent was considering by reference to s40(5) of the British Nationality Act 1981 ("the Act") whether it would be appropriate to make an Order pursuant to s40(3) of the Act, because he was satisfied in the light of information received that the Appellant's naturalisation was obtained by means of dishonesty. The Respondent set out her reasons for that conclusion. In summary they were that she had been informed that the Appellant's true identity was Theodhori Laci, born in Tirana, Albania on 28 August 1973, and that in consequence the Appellant's claim to be of "good character" when making his application for naturalisation was untrue. The Appellant was invited to provide documents relating to his genuine identity, and to respond with his reasons why the Respondent should not make an order that would deprive him of his British citizenship status. The Respondent volunteered that the effect would be to render the Appellant liable to immigration controls for a limited period of time, of up to 8 weeks, whilst consideration was given as to whether he should be granted a period of leave to remain, or, removed from the UK.

3. In response the Appellant denied that he had been untruthful, and asserted that he had used his true identity in all of his dealings with the Respondent, which was an identity that had also been accepted as his own in the course of all of his dealings with the Albanian authorities. He suggested that he was the victim of a case of mistaken identity. He repeated that his true identity was that of Theodor Laci, born in Mitrovica, on 27 August 1973 to Pandeli and Nazime Laci. There must, he suggested, be another individual whose identity, coincidentally, was that of Theodhori Laci, born in Tirana, Albania on 28 August 1973, who was the son of Pandelli Laci, but he was not that individual.

4. On 15 June 2023 the Respondent, having considered the representations made on behalf of the Appellant, concluded;

   (i) that the subject of the photograph in the Albanian identity documents for Theodhori Laci was a match for the subject of the photograph supplied by the Appellant when applying to the Respondent for a travel document,
   (ii) that they were the same man,
   (iii) that the Appellant had dishonestly created and maintained the false identity of Theodor Laci so that he was not of good character when he was granted naturalisation, and,
   (iv) that in the circumstances she should exercise her discretion so as to deprive the Appellant of his British citizenship status.

5. The Respondent served the Appellant with a decision to make an Order depriving him of his British citizenship by reference to Section 40(3) of the Act, which set out her reasons for the decision, and the Appellant lodged an appeal against that decision, relying upon the right of appeal provided by s40A of the Act. He denied that he was the subject of the photograph used in the identity documents issued by the Albanian authorities to Theodhori Laci.

6. In the course of the appeal the Appellant's representatives disclosed to the Respondent, and to the Tribunal, the report dated 30 December 2022, of James Zjalic, who described himself as a multimedia forensics scientist. This report was said to have been peer reviewed by an independent expert. It was entitled a Morphological Analysis, and the stated aim of the author was to offer an opinion upon whether the subject of the photograph provided to him was a photograph of the Appellant, or not. There is no dispute before us that the photograph which was the subject of this report was originally provided by the Albanian authorities to the Respondent, as a copy of the photograph which was used when issuing an Albanian ID card to the Albanian citizen, Theodhori Laci born on 28 August 1973 in Albania (being the same photograph borne in the Albanian passport that was also issued to that individual).
7. The opinion of Mr Zjalic was that on a morphological comparison there were 35 points of similarity, and 7 points of dis-similarity, between a photograph of the Appellant, and this photograph. The assessment of the points of dis-similarity was that they each had the potential of being a normal variation between photographs taken of the same subject on different occasions, which would result from ageing, facial expression, lighting, or, perspective. He assessed the number of similarities as high, and, compounded by the presence of an individual facial mark at the base of the right cheek. He observed that the duplication of the location and nature of an individual facial mark would be rare within the general population. Thus, Mr Zjalic's overall conclusion was that it was more probable than not that the subject of the photograph provided by the Albanian authorities was indeed the Appellant.
8. The appeal was heard and dismissed by First-tier Tribunal Judge Hamilton in a decision promulgated on 19 July 2023.
9. The Appellant initially sought permission to appeal that decision to the Upper Tribunal on two grounds. The first was that the Judge had misunderstood the approach taken by the expert, and in consequence had acted irrationally in relying upon the evidence of Mr Zjalic. The second was that the Judge had erred in limiting himself to considering only a public law challenge to the Respondent's decision that the statutory condition provided for by section 40(3) of the British Nationality Act 1981 was made out, rather than deciding for himself whether the Appellant was who he claimed to be, or, was instead the individual who the Respondent asserted he was.
10. Permission was refused on ground 1 but was granted on ground 2 by the First-tier Tribunal on 3 October 2023.
11. When the appeal was called on for hearing before us on 26 February 2024, Counsel sought and was granted an adjournment, with the issue of the costs of that adjournment reserved. We granted the Appellant permission to amend the terms in which ground 1 was cast, and to renew the application for permission to appeal on the amended ground 1, which in due course was granted. The amended ground 1 now complains that the methodology adopted by the expert is so obviously flawed that any reliance upon it by the Tribunal was irrational. Separately, the parties were directed to address at the adjourned hearing with full argument; (i) the challenge raised against the public law approach that had been taken by

the Tribunal, and if that challenge failed, (ii) the question of whether they were bound by a similar "duty of candour" as if they were engaged in proceedings before the Tribunal by way of judicial review.

12. The amended grounds of appeal do not seek to raise any complaint concerning the Judge's approach to the Appellant's reliance upon his Article 8 rights.

The opinion evidence of Mr Zjalic

13. It is accepted before us on behalf of the Appellant that there are only two possibilities concerning his identity. Either he is who he claims to be, and it is a mere coincidence that the records maintained by the Albanian authorities disclose the existence of an Albanian citizen with a similar name, father's name, and date of birth, or, he is in truth that man and he has dishonestly invented and used a false Kosovan identity in all of his dealings with the Respondent.

14. The Albanian authorities have confirmed to the Respondent that according to their records the Albanian citizen, Theodhori Laci, was born in Tirana on 28 August 1973 to Pandeli and Androniqi Laci. Theodhori Laci has been issued with a Birth Certificate, a Family Certificate, a passport, and a photo ID. A copy of the photograph used for his passport and photo ID was made available to the Respondent, and it was this which the Respondent compared to the photograph that the Appellant had supplied when he applied for a travel document. The Respondent has concluded that these photographs were a match, in the sense that they were each a photograph of the same man, albeit taken on different occasions. In turn she concluded that the Appellant was not who he claimed to be, but that he had used a false identity throughout his dealings with the Respondent, and in particular when applying for naturalisation. It was this conclusion that lay at the heart of the decision to exercise her discretion to deprive the Appellant of his British citizenship status.

15. Mr Zjalic was provided with a copy of the photograph in the Albanian identity documents, and instructed by the Appellant to offer an opinion on whether it was more likely than not that its subject was the Appellant, or someone else. That opinion evidence was then disclosed to the Respondent and to the Tribunal. There is no evidence from the Appellant's representative to explain why this was done, but we can see no reason why we should not accept, as the Judge did, that the Appellant's representatives did not do so because they had misread its content, but rather, having recognised that it did not assist the Appellant's case, they did so in the belief that there was a professional duty upon them to do so.

16. In addition to the professional obligations owed by the representatives who from time to time appear before it, both parties accepted before us the existence of a duty upon a party not to knowingly mislead the Tribunal. We would observe that, properly respected, professional obligations, coupled with a party's duty not to mislead the Tribunal will avoid circumstances in which a party advances an argument without adequate disclosure of the evidence which is known to be available and which is known to contradict it.

17. We conclude that it was in an attempt to discharge these professional obligations that the report of Mr Zjalic was disclosed to the Respondent

and to the Tribunal. We note that no argument of procedural fairness was raised before the Judge below, or before us, to suggest that the report of Mr Zjalic should be ignored because it was disclosed by mistake.

18. It is argued before us that because of the reasons for its disclosure, Mr Zjalic's report was not evidence which was relied upon by the Appellant in the traditional sense, and that the Judge erred in law if he treated it as if it were. We are not persuaded there is any merit in attempting such a distinction between categories of evidence. The simple fact, as the Judge recorded in paragraphs 21(8) and 34 of his Decision, is that the Appellant accepted before him that Mr Zjalic had concluded that the Appellant was Theodhori Laci, but argued that he found Mr Zjalic's conclusions difficult to understand and inconclusive. The weight to be attached to Mr Zjalic's evidence was therefore accepted to be a matter for the Judge.

19. That is enough to dispose of the amended ground 1, but for completeness we would add this. In our judgement Mr Zjalic's reference to a comparator group formed of the light skin tone population of the UK does not diminish in any way his central conclusion. He observed that he had found 35 points of similarity between the photographs, of which one was an individual facial mark, with a similar size and location. He suggested it would be "rare" within the light skin tone population of the UK for this to be replicated, and that was plainly a conclusion which was well open to him. In contrast he identified only 7 points of dis-similarity. His assessment of each of those was that they had the potential to be normal variations between photographic samples resulting from ageing, facial expression, lighting, or, perspective. We can see no reason why Mr Zjalic's view would be likely to be different if he had limited his control group to the smaller population pool of citizens of Albania.

The nature of the s40A appeal

20. The Judge records [33] that the decision of the Upper Tribunal in Chimi (Deprivation Appeals: Scope and Evidence) Cameroon [2023] UKUT 115 was promulgated on the same day that he heard this appeal, so that he heard no argument about its scope or application. We note that he was not asked by either party to reconvene the hearing as a result of the guidance to be found within that decision. We are satisfied that this was undoubtedly because (as he records) both parties had already argued the appeal on the basis that the Tribunal's role was limited to a consideration of any public law challenges raised against the Respondent's decision, first that the statutory pre-condition was made out, and, second that in all the circumstances she should exercise her discretion to deprive the Appellant of the British citizenship status he had thereby acquired. In consequence, in the course of their arguments to him, both parties had invited the Judge to apply Begum and to consider only a public law challenge to the Respondent's decision that the statutory condition of s40(3) was made out.

21. By ground 2 the Appellant abandons that approach, and argues instead that it was quite simply wrong, and that Chimi was wrongly decided. We mean no disrespect to Mr Lee's careful and detailed approach to the authorities in summarising his argument as follows;

i) the Supreme Court in Begum do not appear to have been referred to the earlier Court of Appeal decision of KV (Sri Lanka) v SSHD [2018] EWCA Civ 2483 – paragraph 6 of which had confirmed that the correct approach to s40A appeals was to undertake a full merits review,

ii) the approach of the Supreme Court in Begum to the nature of a s40A appeal against decisions taken by reference to s40(2) is inconsistent with the approach previously taken by the Supreme Court in Al-Jedda v SSHD [2013] UKSC 62 [30] to a dispute over whether deprivation would render an individual stateless. As such, the statutory language does not prevent a distinction being drawn between s40(2) cases on the one hand, and s40(3) and s40(4) cases on the other,

iii) a dispute over an individual's true identity, or whether they acted honestly in providing information as part of an application for naturalisation, are paradigm examples of questions that can only be answered Yes/No, and as such there is no obvious policy reason, or question of democratic accountability, as to why the Tribunal should not possess an institutional competence to decide such a question on the merits of the evidence made available to it at the date of the hearing,

iv) there has never been any formal statutory grant to the First-tier Tribunal of the powers of judicial review, and there was nothing to indicate the nature of the relief that the First-tier Tribunal might give a party in the event that a public law challenge was upheld. These were powerful indications that Parliament had never intended such a grant to be made.

22. Section 40 of the 1981 Act, so far as material to the current issues, provides as follows:

> "40 Deprivation of Citizenship
>
> (1) In this section a reference to a person's "citizenship status" is a reference to his status as –
> (a) a British citizen,
> (b) a British overseas territories citizen,
> (c) a British Overseas citizen,
> (d) a British National (overseas)
> (e) a British protected person or,
> (f) a British subject.
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of –
> (a) fraud,
> (b) false representation, or
> (c) concealment of a material fact.

(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless."

23. As noted in Chimi the statutory language creates two classes of case in which a deprivation order may be made, but the provisions of section 40A provide only a single jurisdiction for appeal in the following terms:

"40A Deprivation of citizenship: appeal

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

(2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public –
(a) in the interests of national security,
(b) in the interest of the relationship between the United Kingdom and another country, or
(c) otherwise in the public interest."

24. Notwithstanding the industry of Counsel we are not persuaded that the statutory language permits a distinction to be drawn within s40(2) between decisions that have been taken pursuant to it by reference to national security, or, the protection of society. There is simply no scope within the statutory language for that approach.

25. In Begum Lord Reed set out the essence of the Supreme Court's decision in relation to the scope of the jurisdiction on an appeal under section 2B of the Special Immigration Appeals Commission Act 1997 against a decision under section 40(2) of the 1981 Act in paragraphs 63 to 71. That reasoning deserves repetition:

"[63] Considering, against that background. The functions and powers of SIAC in an appeal under section 2B of the 1997 Act against a decision to deprive a person of their citizenship under section 40(2) of the 1981 Act, it is clearly necessary to examine the nature of the decision and any statutory provisions which throw light on the matter, bearing in mind that the jurisdiction is entirely statutory.

[64] It is also necessary to bear in mind that the appellate process must enable the procedural requirements of the ECHR to be satisfied, since many appeals will raise issues under the Human Rights Act. Those requirements will vary, depending on the context of the case in question. In the context of immigration control, including the exclusion of aliens, the case law of the European Court of Human Rights establishes that they generally include, in particular, that the appellant must be able to challenge the legality of the measure taken against him, its compatibility with absolute rights such as those arising under articles 2 and 3 of the ECHR, and the proportionality of any interference with qualified rights such as those arising under article 8. SIAC must also be able to allow an appeal in cases where the Secretary of State's assessment of the requirements of national security has no reasonable basis in the facts or reveals an interpretation of "national

security" that is unlawful or arbitrary: see, for example, *IR v United Kingdom* (2014) 58 EHRR SE14, paras 57-58 and 63-65 (concerning an appeal under section 2 of the 1997 Act, prior to the amendments made by the 2014 Act). A more limited approach has been adopted in cases concerned with deprivation of citizenship. The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under article 8. In determining whether there is a breach of that article, the Court has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant. In determining arbitrariness, the Court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE18, paras 49-50 and 54-61.

[65] Section 2B of the 1997 Act confers a right of appeal, in distinction to sections 2C to 2E, which provide for "review". The latter provisions require SIAC to apply the principles which would be applied in judicial review proceedings, and enable it to give such relief as may be available in such proceedings: see section 2C(3) and (4), and the equivalent provisions in sections 2D and 2E. No such limitations are imposed upon SIAC when determining an appeal under section 2B. It is also relevant to note section 5(1)(b), which enables the Lord Chancellor to make rules regulating "the mode and burden of proof and admissibility of evidence". Clearly, appeals involving questions of fact as well as points of law are contemplated. That is also reflected in the rules made under section 5.

[66] In relation to the nature of the decision under appeal, section 40(2) provides:

"(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."

The opening words ("The Secretary of State may …") indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.

[67] The statutory condition which must be satisfied before the discretion can be exercised is that "the Secretary of State is satisfied that deprivation is conducive to the public good". The condition is not that "SIAC is satisfied that deprivation is conducive to the public good". The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged.

It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.

[68] As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

[69] For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

[70] In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a

> consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29.
>
> [71] Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations, and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment."

26. In the light of that analysis, it does not matter whether the Supreme Court were referred to the Court of Appeal decision of KV (Sri Lanka), or not. Nor does it matter that the Tribunal would be in a position to undertake its own assessment on the balance of probabilities, of the evidence placed before it by the parties, between the two disputed identities of a particular individual.
27. Mr Lee correctly identifies that the approach on appeal to decisions concerning statelessness taken by reference to s40(4) was accepted by the parties before the Supreme Court in Al-Jedda as being that of a full

merits review. Although their Lordships were then plainly exercised by the proper approach to be taken by the Tribunal pursuant to a s40A appeal, given the statutory language, in our judgement those concerns have now been answered conclusively by the Supreme Court in Begum [77-79].

28. The simple point is that the Supreme Court's reasoning is abundantly clear, and it has concluded that the Tribunal's role is a limited one when considering either the existence of the statutory pre-condition, or, the exercise by the Secretary of State of her discretion. There is nothing in the decision of the Supreme Court of 7 August 2024 to refuse Ms Begum permission to appeal that offers any support for an alternative approach. Thus it is only in the event that an Appellant's article 8(1) rights are engaged by the decision under appeal that the Tribunal is required to undertake a proper balancing exercise of its own between the public interest in deprivation and the matters relied upon by the Appellant as outweighing it.

29. As explained in Chimi, the relevant statutory language in both s40(2) and s40(3) is the same. s40A applies to both, without distinction. Accordingly, the analysis of the statutory language undertaken by the Supreme Court in Begum simply does not permit the distinction between s40(2) and s40(3) that the Appellant now argues for. As Lord Reed observed, there is no indication in the statutory language that Parliament intended the Tribunal to exercise for itself the discretion that Parliament had afforded to the Secretary of State.

30. Both Deliallisi (British citizen: deprivation appeal: scope) [2013] UKUT 00439 and Pirzada (Deprivation of citizenship: general principles) [2017] UKUT 00196 concerned appeals against decisions taken by the Secretary of State by reference to s40(3). Again, their Lordships considered both, and rejected the full merits review approach, drawing no distinction between the approach that should be taken on s40(2) cases from s40(3) cases. We are therefore wholly unpersuaded that a distinction can or should be drawn so as to distinguish either, between cases concerning national security or organised crime, or, between those taken under s40(2) and those taken under s40(3).

31. In the circumstances the Tribunal needs no greater power of relief upon finding a public law challenge made out either at stage 1 to the Respondent's conclusion that the statutory condition is made out, or, at stage 2 to the Respondent's conclusion that he should exercise his discretion in favour of deprivation, than to allow the appeal. In those circumstances the decision under appeal is an unlawful one, and there is no basis upon which the Tribunal could or should proceed to the next stage. Should that occur, then the Secretary of State would no doubt consider carefully the reasons why the challenge was upheld, and then decide in their light whether or not to make a new and lawful decision to deprive.

35. The existing authorities concerning the scope of the Tribunal's role when considering issues of statelessness arising under s40(4) predate the guidance of the Supreme Court in Begum v SSHD [2021] UKSC 7. Since the relevant statutory language in s40(2), s40(3), and s40(4) is the same, the role of the Tribunal must also be limited to a consideration of any public law challenge to the legitimacy of the Secretary of State's decision under

s40(4). The fact finding role of the Tribunal is limited to that which is required to fulfil its role in exercising error of law scrutiny of the decision, such as in relation to contentions related to breaches of the Tameside duty or the public law error of fact jurisdiction. The Tribunal will also, obviously, have a fact finding role in relation to its consideration of Article 8 - it must assess for itself the credibility and weight of the evidence relied upon by the Appellant as the basis for a claim that Article 8(1) is engaged by the decision under appeal, or, that the decision is disproportionate.

32. The Court of Appeal has been clear: deprivation of citizenship status will be the ordinary consequence of the statutory condition to s40(3) being made out: Laci v SSHD [2021] EWCA Civ 769.

33. To the extent that ground 2 can be read as a complaint that the Judge should have undertaken a full merits review of the Respondent's decision to exercise his discretion in favour of deprivation, and remake that decision for himself, it must fall away in the light of the analysis undertaken by the Supreme Court of the nature and scope of the appeal. In the light of the analysis in Begum the role of the Tribunal at the second stage of the appeal is limited to a consideration of the public law challenges to the decision to exercise his discretion that have been properly identified by the Appellant. No doubt the First-tier Tribunal will seek to issue directions in appeals under section 40A of the 1981 Act to ensure that an appellant identifies with clarity the nature of the public law challenge relied upon, but the burden lies upon the Appellant to do so from the outset, and without the need for such an invitation or reminder. Case management hearings, and adjournments, that result from the Appellant's failure to do so will inevitably attract a consideration of the First-tier Tribunal's costs powers.

34. As presently cast, the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 do not make specific provision that recognises the unique nature of an appeal to the First-tier Tribunal under s40A of the 1981 Act. No doubt the Tribunal Procedure Rules Committee will in due course consider, in the light of Begum, whether a review of those Rules is required in order to do so.

Conclusions

35. In the circumstances we are not satisfied the amended grounds disclose any material error of law. The decision of the First-tier Tribunal is therefore confirmed.

Notice of Decision

The decision promulgated on 19 July 2023 did not involve the making of an error of law and is accordingly confirmed. The appeal is dismissed.

J. Holmes
Deputy Upper Tribunal Judge Holmes

9 December 2024