Upper Tribunal
(Immigration and Asylum Chamber)

Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 November 2011	………………………………

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE WAUMSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
First Appellant

and

ALTIN ARUSHA
First Respondent

and

UGEZA DEMUSHI
Second Appellant

and

ENTRY CLEARANCE OFFICER – TIRANA
Second Respondent

Representation:

For the First Appellant and Second Respondent:	*Mr M Barnes*, instructed by the Treasury Solicitor
For the First Respondent and Second Appellant:	*Mr C Jacobs* instructed by Nova Legal Services

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(i) The following rulings made by the First-tier Tribunal on the nature and scope of an appeal against the deprival of citizenship under s.40 of the British Nationality Act 1981 were not challenged by either party before the Upper Tribunal:

(a) The Tribunal has a wide-ranging power to consider, by way of appeal not a review, what the decision in an appellant's case should have been. The Tribunal has to ask itself 'does the evidence in the case establish that citizenship was obtained by fraud?' If it does then it has to ask 'do the other circumstances of the case point to discretionary deprival?'

(b) In terms of the proof of fraud, the Tribunal will consider any evidence, whether or not available to the respondent at the time he made his decision, which is relevant to the determination of that question.

(c) It is for the respondent to prove that the appellant's conduct comes within the scope of s.40 of the 1981 Act.

(d) The appellant can raise general human rights grounds but they must be framed to deal with the breach alleged to be caused by the decision to deprive the appellant of his nationality, and giving effect to that decision, and not framed to deal with the fiction that the appellant would be removed.

(ii) To establish that a delay in the promulgation of a decision has led to an error of law it has to be shown that the decision was not safe and therefore unlawful. There must be a nexus between the delay and the safety of the decision: see Secretary of State v RK (Algeria) [2007] EWCA Civ 868.

DETERMINATION AND REASONS

1. There are two appeals before the Tribunal. The first is by the Secretary of State against the determination of the First-tier Tribunal (Senior Immigration Judge Perkins and Immigration Judge Kopieczek) allowing Altin Arusha's appeal against the decision made on 2 February 2009 depriving him of his British citizenship on the basis that it was obtained by fraud and the second by Ugeza Demushi against the decision of the Tribunal dismissing her appeal against the decision of the Entry Clearance Officer, Tirana to refuse her entry clearance as Mr Arusha's fiancée. In this determination we shall refer to the parties as they were before the First-tier Tribunal, Altin Arusha as the first appellant, Ugeza Demushi the second appellant, the Secretary of State the first respondent and the Entry Clearance Officer Tirana the second respondent.

Background

2. The background to this appeal can briefly be summarised as follows. The first appellant was born on 22 June 1984. He arrived in the UK on 17 October 2000 and made an application for asylum relying on his claim that he was a Kosovan national born in Presevo, Kosovo. His application was refused and following a hearing on 21 March 2002 his appeal was dismissed by an Adjudicator on asylum grounds but allowed on human rights grounds. He was subsequently granted exceptional leave to remain and on 1 November 2006, indefinite leave to remain. He applied for and was granted British citizenship by naturalisation on 10 April 2008.

3. On 28 July 2008 the second appellant, an Albanian national born on 9 October 1985, applied for entry clearance as the first appellant's fiancée. The history given was that they had met in Albania in April 2007 when the first appellant was on holiday and become engaged on 1 August 2007 following a further visit by him. Inquiries were made as a result of this application which led the respondent to believe that the first appellant had not been born in Kosovo but in Albania and was an Albanian citizen.

4. On 2 November 2009 the first appellant was notified of the first respondent's decision to deprive him of his British citizenship under s.40 of the British Nationality Act 1981 because it had been obtained fraudulently. This was on the basis of information received from the Ministry of the Interior in Albania that he was named in the Albanian National Civil Register and it was therefore concluded that he was in fact a citizen of Albania. When he had claimed political asylum he had said that he was from Kosovo and it had been on this basis that his appeal had been allowed on human rights grounds leading to the later grant of indefinite leave to remain.

5. On 6 November 2009 the second appellant's application was refused as the second respondent was not satisfied that their relationship was genuine and, in the light of the decision to deprive the first appellant of his citizenship, that she was engaged to a person who could properly be regarded as present and settled in the UK.

6. Both appellants appealed against these decisions to the First-tier Tribunal and their appeals were heard together with the agreement of the parties on 26 and 27 April 2010.

<u>The Decision of the First-tier Tribunal</u>

7. At the hearing before the First-tier Tribunal there was a dispute between the parties on where the burden of proof lay in an appeal involving the deprival of citizenship and on whether the first appellant was entitled to raise human rights arguments in support of his appeal. The Tribunal also considered the general scope of the appeal in light of the fact that the provisions of s.84 and s.86 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") do not apply to appeals under s.40. There is no challenge before us to the decisions of the Tribunal on these issues.

8. The Tribunal heard oral evidence from the first appellant and had before it documentary evidence comprising firstly, the respondents' bundle of 288 pages with the following additional documents, a letter to the first appellant from the Home Office dated 18 March 2008, a document verification report, a letter from the Ministry of Interior in Albania dated 9 September 2009 with a translation and three pages of supporting documents and secondly the appellants' three bundles of 92, 123 and 202 pages respectively, a further bundle with tabs 1 to 20 and, finally, a BAE ticket dated 22 May 2007.

9. The Tribunal set out its findings and conclusions relating to the first appellant at paras 103-140 of its determination. It was not satisfied that the first respondent had discharged the onus of proving that he had obtained his citizenship by fraud. The findings in relation to the second appellant are set out in paras 141-154. It found that the second appellant had not established that she was seeking leave to enter the UK for the purpose of marriage or that the parties intended to live permanently with the other as spouses after any marriage. On this basis the first appellant's appeal was allowed and the second appellant's appeal dismissed. The written determination of the First-tier Tribunal was promulgated on 25 March 2011.

The Legal Framework

10. The provisions relating to deprivation of citizenship are set out in ss.40, 40A and 41 of the British Nationality Act 1981. It is provided by s.40(3) that:

> "The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of –
> (a) Fraud,
> (b) False representation, or
> (c) Concealment of a material fact.

A right of appeal is given by s.40A(1) as follows:

> "A person who has been given notice under s.40(5) of a decision to make an order in respect of him under s.40 may appeal against the decision to [the First-tier Tribunal]."

11. As the First-tier Tribunal pointed out neither s.84 nor s.86 of the 2002 Act applies to appeals under s.40A. The right of appeal in s.40A is not an appeal under s.82(2) against an immigration decision and the grounds of appeal are not limited to or enhanced by those identified under s.84 and therefore the provisions of s.84(1)f giving the Tribunal power to allow an appeal on the ground that a discretion contained in the immigration rules

should have been exercised differently do not apply. The Tribunal directed itself on the nature and scope of the appeal as follows:

> "13. In our judgment the absence of prescribed grounds can only mean that the Tribunal is to have a wide ranging power to consider, by way of appeal not a review, what the decision in an appellant's case should have been. The Tribunal has to ask itself 'does the evidence in the case establish that citizenship was obtained by fraud?' If it does then it has to ask 'do the other circumstances of the case point to discretionary deprival?'.
>
> 14. As this is an appeal not a review, the Tribunal will be concerned with the facts as it finds them and not with the Secretary of State's view of them. In terms of the proof of fraud, the Tribunal will consider any evidence, whether or not available to the Secretary of State at the time he made his decision, which is relevant to the determination of that question."

12. At the hearing it was argued by each party that the burden of proof lay on the other. The Tribunal resolved this issue as follows:

> "17. For all these reasons we are satisfied that it is for the first respondent to prove that the appellant's conduct comes within the scope of s.40 the [1981] Act.
>
> 18. It is for the second appellant to show that she satisfied the requirements of the Immigration Rules.
>
> 19. Human rights issues aside it is, in both cases, sufficient for the party bearing the burden of proof to establish a fact on the balance of probabilities."

13. It was also contended on behalf of the first respondent that the first appellant was not entitled to raise human rights in his appeal against this decision. The Tribunal summarised its findings on this issue as follows:

> "41. We reject the submission that human rights grounds are outside the jurisdiction of the Tribunal in an appeal under s.40A of the 1981 Act although we find it equally plain that we cannot decide the case as if there had been a decision to remove the first appellant when no such decision had been made.
>
> 42. We have spent some time on this because it was the subject of detailed argument before us. Having given considerable thought to the matter the position is, we find, quite simple and clear. The first appellant cannot rely on a ground alleging that 'removal of the appellant from the United Kingdom in consequence of the immigration decision would … be unlawful under s.6 of the Human Rights Act 1995 as being compatible with the appellant's Convention rights. Such a ground can be raised as of right in appeals against immigration decisions but this is not such a decision. The grounds could, conceivably, be raised in a different deprivation case where, unusually and improbably, there was some reason to think that the appellant was

> going to be removed without an 'immigration decision' being made but this would not be because it was a statutory ground but because it was an expression of a claim on human rights grounds formulated to meet a particular case. In the absence of any statutory restriction, the appellant can raise general human rights grounds but they must be framed to deal with the breach alleged to be caused by the decision to deprive the appellant of his nationality, and giving effect to that decision, and not framed to deal with the fiction that the appellant would be removed."

14. We have set out these conclusions reached by the First-tier Tribunal following detailed comprehensive submissions. They have not been challenged by either party in the present appeal and we record them at the request of the parties to assist the First-tier Tribunal as there are a number of pending deprivation of citizenship appeals.

<u>The Challenge to the First-tier Tribunal's Findings in the First Appellant's Appeal</u>

15. We now turn to the specific challenges made to the Tribunal's findings and conclusions in the present appeals. The first respondent argues that although the Tribunal directed itself correctly as to the test to be applied it erred in law by failing properly to apply that test in respect of the evidence produced at the hearing, to place sufficient weight on that evidence or to weigh up the evidence as a whole with the result that its conclusions were unlawful.

16. Mr Barnes supported this submission by referring to the evidence relied on by the first respondent in support of the assertion that the first appellant had obtained his citizenship by fraud. The matter first came to attention in a referral dated 30 October 2008 from the British Embassy in Pristina as a result of the second appellant's application for entry clearance. It was said that the first appellant appeared to have obtained his British nationality through deception. His birth certificate had not been provided with the application and checks with the authorities in Serbia revealed that he was not registered with them. This was a reference to a redacted e-mail at R133 from a visa assistant at the British Embassy, Pristina, which says:

> "Checked with the Presevo registration office who have confirmed that Altin Arusha is not (not) registered with them … therefore the birth identity of Mr Altin Arusha does not exist in Presevo Municipality (in Serbia)."

17. Information was then sought from the Ministry of Internal Affairs in Kosovo and a reply was received on 6 July 2009 (R142) which confirmed that local registry books of births, marriages and deaths were considered to be 95% accurate but during the Kosovo war most of these books (generally 80%) were burned or taken over by the Serb authorities and sent somewhere in the territory of Serbia. The response to the request of verification that a person was a citizen of Kosovo and was recorded in the birth registry book

was 90 to 95% accurate. Mr Barnes submitted that this letter indicated that the Kosovan authorities had made efforts to make good the deficiency in their records and were saying that those records were 90 to 95% accurate.

18. The respondent then carried out further investigations, this time with the Albanian authorities. This produced a reply at R144 to the effect that Altin Adem Arusha was registered in Sukth Municipality, Dures District, National Register "Hamalle" number 34.41 with the following details, father: Adem, mother: Cbane, dob: 22/06/1984, place of birth Bajram Curi, civil status: single, nationality and citizenship: Albania. Mr Barnes submitted these details chimed with the details the appellant had given at A16 save for his mother's name and that this evidence was persuasive, even if not conclusive, that the first appellant was not from Kosovo but was a citizen of Albania.

19. Mr Barnes pointed out that the Tribunal had considered the first appellant's evidence but had rejected it. It did not find him to be reliable about how he had obtained the documents he relied on, a Kosovan birth certificate, identity card and passport, describing his evidence as inconsistent at times and otherwise unreliable [118]. It was not satisfied that any reliance could be placed on those documents in light of the evidence as a whole [127]. It summarised its views on the first appellant's credibility on these issues as follows:

> "133 It is apparent therefore from the observations we have made in relation to the appellant's credibility that we did not find him to be a credible witness. However, for the most part, the credibility issues relate to the circumstances in which he is said to have obtained his Kosovan documents.
>
> 134. These credibility issues do not affect the conclusion we have come to that the respondent has not established on a balance of probabilities that the appellant obtained his British citizenship by fraud, or by false representation or concealment of a material fact. We are not satisfied, for the reasons we have given above that the evidence adduced on behalf of the respondent establishes this to be the case. The appellant's credibility does not affect these observations."

20. Mr Barnes argued that having made that finding in respect of the first appellant's credibility there was no evidence to set against the inferences which could and should properly have been drawn from the respondent's evidence. He then argued that the Tribunal approached the evidence in the wrong way, failing to consider each part of it in the light of the evidence as a whole and that if this was done, the only rational conclusion could be that the first respondent had established her case on a balance of probabilities. He submitted that the Tribunal had considered the evidence piece by piece but had failed to consider the weight of the evidence in total. He argued that it was mandatory for the Tribunal to consider the effect of the evidence from both the British Embassy, the Kosovan

authorities and the Albanian authorities by asking whether as a whole it satisfied the balance of probabilities.

21. In response, Mr Jacobs argued that these grounds amounted to no more than a disagreement with the findings of fact made by the Tribunal which had clearly been aware of the requisite standard of proof and had properly applied it. It had given clear reasons for its concerns about the evidence from the British Embassy dated 3 October 2008, the accuracy of the Kosovan records referred to in their reply of 6 July 2009 and the letter from the Albanian authorities of 9 September 2009. In substance he argued that the Tribunal had given adequate reasons and reached a decision properly open to it.

Assessment of the Issues

22. So far as the e-mail from the visa assistant at the British Embassy dated 3 October 2008 was concerned, the Tribunal noted that it was criticised by the first appellant because of the lack of detail given and said that in its view there was some merit in that criticism. It commented that perhaps for understandable reasons the details of the sender of the e-mail and the recipient's details were blanked out but that may not be significant but said that what in its view was significant was that the information said to have come from the Presevo Registration Office had not been provided. There was no indication of precisely what information had been provided or whether it was subject to any qualification and that the conclusion that the birth identity of the first appellant did not exist in Presevo Municipality did not, on the face of the e-mail, necessarily follow from the contention that he was not registered with the Presevo Registration Office [104].

23. We are satisfied that these comments were properly open to the Tribunal when deciding what inferences could be drawn from this e-mail. It went on to consider the letter from the Department of Registration dated 6 July 2009 and to the reference at para 2 that the back up system for records was considered to be 95% accurate. The Tribunal commented that this degree of accuracy could also be read as meaning that the back up system was suspect in as many as one record in twenty. It referred to births, marriages and deaths and there was no assessment in fact of the accuracy of the birth records alone. Para 3 of the letter said that most of the local registry books (80%) were burned or taken over by the Serb authorities. The Tribunal said that one interpretation of that letter and, in its view, a fair interpretation on a close reading of it was that whilst the records were 95% accurate, 80% of the records were destroyed or taken by the Serb authorities. In these circumstances whilst confirmation of the first appellant's evidence from the records would be useful, the absence of such confirmation did not amount to very much. Again we are satisfied that these comments were ones the Tribunal was entitled to make. It found that the letter was not a sufficient basis on which to conclude that the first appellant was not born in Kosovo.

24. The Tribunal then referred to the letter from the Ministry of Interior in Albania dated 9 September 2009 referring to the registration of one Altin Adem Arusha in the Sukth Municipality. It was argued on behalf of the first respondent that the coincidence of the details recorded and those previously given by the first appellant was such that it made it very likely that it referred to him. The Tribunal noted that the name of the mother was different from the name he had given for his mother, Mane rather than Cbane, and that it was argued on behalf of the first respondent that the difference in the mother's name might have been significant if the first appellant had been a more convincing witness but the Tribunal rejected that argument holding that the deficiencies in his evidence did nothing to improve the quality of the first respondent's case which necessarily included an argument that the first appellant was probably Albanian because of a registration certificate which identified the first appellant's mother by a name that the first appellant had not been shown to have used [111].

25. The Tribunal also commented that the information provided from the Ministry of the Interior did not give the dates of birth of the parents in relation to the match found. The evidence showed that an individual was registered in Albania with the same name and date of birth as the appellant and with the same father's name but it went no further than that. The Tribunal said that the question arose as to whether only some of the details in relation to the first appellant were found to match that of the individual whose details were given in the reply and it had not been told the answer. We are satisfied that these comments were properly open to the Tribunal. It was a question of fact for the Tribunal to decide what inferences could properly be drawn from these documents.

26. In [114]-[115] the Tribunal commented that there was other information which it was reasonable to have expected the respondent to provide in relation to these enquiries. There was no explanation why the dates of birth of the parents had not been given. It said that it could have been told if there was any significant difference in Albanian between the names Cbane and Mane and how, or otherwise, the appellant's names were spelled. The Tribunal was not satisfied that this letter established on a balance of probabilities that the first appellant was born in Albania. Having made those comments on the documents produced by the first respondent, the Tribunal went on to consider in [117] – [133] the evidence of the first appellant explaining why it did not find him to be credible. It then said that these credibility issues did not affect the conclusion it had come to which was that the first respondent had not established on a balance of probabilities that the first appellant had obtained his British citizenship by fraud. It said in [137]:

> 137. "We must and have given weight to the Secretary of State's evidence and we have not been impressed by it. It really boils down to the Secretary of State telling us about (not producing) a birth certificate for a person with the name and date of birth as the appellant, a father with the same name and date and birth as the appellant's father but a

different mother. As explained above we have no direct evidence that the identified dates of birth are the same.

138. In all the circumstances we think that the most probable explanation for the birth record relied on by the respondent referring to a person with a mother whose name is not the same as the first appellant's mother's name is that the person identified in the record is not the first appellant."

27. We are not satisfied that the first respondent has established any error of law in the way the Tribunal approached or assessed the evidence about the first appellant's nationality. It properly directed itself on the burden and standard of proof. It did not fall into the error of compartmentalising the evidence or considering it piece by piece or of failing to consider the weight of the evidence in total. It considered the evidence in the round and reached a decision properly open to it. In substance the first respondent's challenge is to a question of fact where the Tribunal reached a decision properly open to it for the reasons given. We are not satisfied that the findings of fact can be categorised as unreasonable, irrational or as not properly open to it on the evidence.

The appeal of the Second Appellant

28. We now turn to the appeal by the second appellant against the decision dismissing her appeal against the refusal of entry clearance. Mr Jacobs argues firstly that the Tribunal erred in law by failing to put to the first appellant a number of relevant matters on which it drew an adverse inference as to the parties' intentions and in particular whether the first appellant had contacts outside the UK other than the second appellant in view of marking every 0207 and 0208 number on his phone records as calls to her [148], whether the numbers marked on his Vodafone account related to the second appellant [149] and whether it was their custom and culture to exchange cards. He argued that these failures also support an argument that the Tribunal's credibility findings are unsafe because of the long delay between the hearing in April 2010 and the issue of the determination in March 2011.

29. We were referred to two Court of Appeal authorities on the issue of delay, Sambasivam v Secretary of State IATRF 1999/0419/4 and Secretary of State v RK (Algeria) [2007] EWCA Civ 868 and two determinations of the IAT, Omonijo [2002] UKIAT 02643 and Liaqat [2002] UKAIT 08142. We referred the parties to a further Tribunal decision SB (Sufficiency of protection – Mafia) Albania [2003] UKIAT 00028

30. Mr Barnes submitted that we should follow the position set out in RK (Algeria) that the passage of time alone did not undermine the safety of the decision. He argued that Mr Jacobs had failed to identify any inadequacy in the reasoning and that when the Tribunal's determination was read with the Records of Proceedings provided by both judges there was no basis on which it could properly be said that the findings were

unsafe. Mr Jacobs argued that a nexus had been established between the delay and the credibility findings which depended on an assessment of the bearing and demeanour of the first appellant when giving oral evidence and inevitably this would be lost over the passage of time. He drew a distinction between appeals where the outcome depended on the analysis of documents with those depending on the assessment of oral evidence.

Assessment of the Issues

31. The first challenge raised by Mr Jacobs is that the Tribunal erred by failing to put to the first appellant a number of relevant matters on which it then drew an adverse inference as to the parties' intentions.

32. There is no obligation on the Tribunal particularly in appeals where the parties are represented by competent Counsel, as in the present case, to raise each and every matter on which it has or may have concerns. There will certainly be cases where a point not pursued in evidence should, out of fairness, be put to a witness before a Tribunal draws an adverse inference as to credibility. However, the issue of whether a failure to raise a particular matter amounts to a procedural irregularity or lack of fairness depends upon the circumstances of each particular case. In Maheshwaran [2002] EWCA Civ 173 Schiemann LJ said whether a failure by the Tribunal expressly to put a particular inconsistency to a witness would amount to procedural unfairness would depend on the facts of each appeal as the requirements of fairness were very much conditioned by the facts of each case and whether a particular course was consistent with fairness was very much an initiative judgment of the facts.

33. We are not satisfied that the issues raised by Mr Jacobs in his grounds and submissions were such that it can properly be said that the Tribunal erred in law by not raising these issues for itself. The Tribunal heard the first appellant's evidence about the extent of the contact between him and the second appellant, setting out its analysis in [144]-[152]. It was a question of fact for the Tribunal to assess what inferences could properly be drawn from that evidence. The onus was on the second appellant to show that she was able to meet the requirements of the rules for entry clearance. The first appellant gave oral evidence about his contact by telephone and on the issue of whether they exchanged cards. There was an opportunity for cross-examination and re-examination of the first appellant's evidence on these issues and we are not satisfied that the Tribunal can be faulted for not pursuing for itself the specific issues now raised in the grounds.

34. We now turn to the issue of delay. In Sambasivam the Court of Appeal referred to the jurisprudence of the IAT summarised by the Tribunal in Mario [1998] Imm AR 281 in the context of an asylum appeal where it said that when credibility was in issue a duty was imposed on Adjudicators to reach their decision within a reasonable period of time and that this was a period of no more than three months from the date of hearing to the date the determination was handed in for typing. The court said that the

decision in Mario was no more and no less than a useful statement of guidance for practitioners upon the usual attitude and likely decision of the IAT in a case where an issue essential to the disposition of the claim for asylum depended upon a careful weighing of the credibility of the appellant where it appeared that the delay between the hearing date and the preparation of the determination exceeded three months. It commented that in the absence of special or particular circumstances that was plainly a useful and proper rule of thumb which in the experience of the Tribunal it was broadly just to apply but added that it might be appropriate to depart from the rule of thumb in a broad spectrum of individual cases.

35. In his judgment Potter LJ summarised his views by saying:

> "In cases of delay of this kind, the matter is best approached from the starting point, where important issues of credibility arise, a delay of over three months between hearing and determination will merit remittal for rehearing unless, by reason of particular circumstances, it is clear that the eventual outcome of the application, whether by the same or a different route must be the same."

36. However, those comments must be read in the light of the judgment of the Court of Appeal in RK (Algeria), where Wilson LJ, having referred to the comments of Potter LJ, made the point that where the issue is whether the Tribunal had erred in law, the task was to persuade the Court of Appeal that it should have no confidence in the correctness of the determination or, to put it more precisely, in its safety and therefore in its lawfulness. He went on to say:

> "22. The currency in which this court deals is that of reason; and, if her case is to prevail, Ms Chan must tender reasoned arguments why the determination is unsafe. She has not appealed against the delay. She is appealing against the decision; and, if she can, she must, in some rational way, present the delay as a source of infection of the decision. I am quite unable to see how in any case a delay between preparation and promulgation, however lamentable, can thus be presented. And, in relation to the delay until preparation, we have both Ms Chan's confirmation that credibility was not in issue and her specific acknowledgment today that she cannot even argue that in its determination the Tribunal did not adequately address the submissions made orally to it.
>
> 23. Ms Chan's brief is in effect to submit that, of itself, a delay of about six months until preparation of the decision, with or without the gross further delay thereafter, represents such a lamentable failure on the part of the system that the only fair reaction of an appellate court is to require the exercise to be undertaken again. When in the course of argument I suggested to her that, were her submission upheld, all judges and Tribunal chairman should, in cases in which their decisions were not fully prepared by the expiry of six months, cease work on them, she, in a way reasonably, qualified her submission. The length of delay which would trigger the need for a rehearing under her

> suggested principle would of course depend upon the complexity of the decision. I also accept that the anxious scrutiny to be applied to immigration cases might make them more appropriate candidates for the sort of principle which she purports to enunciate. But, even as thus qualified, I cannot accept her principle. For she has failed to show, indeed she does not purport to show, any nexus between the delay and the safety of the decision."

37. The relevance of delay and the assessment of whether it makes the determination unsafe must be considered in the light of the comments of the Judicial Committee of the Privy Council in Cobham v Frett [2001] 1WLR 1775 (referred to in SB (Albania) at [14]) where the Judicial Committee held that if excessive delay was to be relied upon in attacking a judgment, a fair case must be shown for believing that the judgment contained errors that were probably or even possibly attributable to that delay. Excessive delay may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It would be important to consider the quality of the judge's notes not only of the evidence but also of the appellant's submissions. It was not permissible to conclude merely from the fact of delay that a judge had difficulty in remembering the demeanour of witnesses. An appellate court must be satisfied the judgment was not safe and to allow it to stand would be unfair to the losing party.

38. In order to show that delay has led to an error of law it has to be shown that the judgment was not safe and therefore unlawful. In RK (Algeria) the court said that a nexus had to be shown between the delay and the safety of the decision. Mr Jacob relied on the long delay in the issue of this determination between April 2010 and March 2011 and the fact that the issue of the parties' intentions and whether in particular they intended to live together as husband and wife depended, at least to a significant extent, on the credibility of the first appellant's oral evidence.

39. The second appellant's appeal was heard together with the first appellant's appeal against the deprival of citizenship, an appeal which raised difficult issues both of fact and law. As we have already indicated, the respondents produced a bundle of 288 pages with a number of further documents; and the appellants, three bundles with a total of over 400 pages together with a further bundle with 20 tabs. The hearing lasted for two days. It was inevitable that there would be some delay in the preparation and the issue of this determination. SIJ Perkins who prepared the determination apologised for the delay in its promulgation in para 3 where he said: "I regret the delay in the promulgation of this decision. This is not in any way the fault of Immigration Judge Kopieczek who has assisted me expeditiously during the preparation of this determination." However, we see no reason to infer from the delay alone that the decision of the Tribunal, a panel of two experienced judges, is unsafe or that there is any error of law in its assessment of the relevant legal and factual issues.

40. We have also seen the Records of Proceedings prepared by both judges. It is clear both kept careful and extensive notes of the evidence and the submissions. We also take into account the fact that the assessment of the parties' intentions turned only in part on the assessment of the first appellant's oral evidence but also on the documentary evidence as is inevitable in an appeal by an appellant who is seeking entry clearance from abroad.

41. When assessing the parties' intentions the Tribunal took into account the visits said to have been made by the first appellant to the second appellant, his passport showing visits to Albania in August 2008, December 2008, April 2009 and October 2009 which corresponded to the visits described in his witness statement [147]. It noted that the dates of the visits were supported by other evidence relating to his travel. It then went on to consider the evidence about the phone records [148]-[149] and the lack of evidence about letters or cards [150]. It noted that the first appellant said he was in Albania for the second appellant's birthday, New Year and other holidays and that there was no reason for communication by letters or cards. It also noted that none of the visits had taken place on his birthday and commented that in any event even if they were together on any of their birthdays, which suggestion the evidence did not support, or on other festive occasions that did not rule out their having exchanged cards [150]. It found that the evidence in the phone record was of little weight in establishing the nature and extent of their relationship. These were comments and findings properly open to the Tribunal.

42. It noted that photographs were produced but none had a date and it was not clear which photographs referred to the date of their engagement [152]. It is correct that the Tribunal took into account the views it had formed about the first appellant's credibility but we are not satisfied that it has been shown that simply by reason of the delay in promulgation that its assessment of his credibility was unsafe so as to undermine the lawfulness of the decision. It is not shown that the unfortunate delay in the promulgation of this decision had any effect on the assessment of credibility or on any of the other issues such as to make it unsafe and unlawful. In our judgment the delay has not led to any error of law.

43. In summary, we are not satisfied that the Tribunal erred in law in its assessment of either appeal. In both cases it reached findings properly open to it for the reasons it gave.

Decision

44. The First-tier Tribunal did not err in law and its decisions stand. Both appeals are dismissed.

Signed Date: 2 February 2012

Upper Tribunal Judge Latter
Immigration and Asylum Chamber