Neutral Citation Number: [2022] EWCA Civ 780

Case No: CA-2021-000493 formerly C2/2021/0485

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
The Hon. Mr Justice Lane President and
Upper Tribunal Judge Rimington
JR/5220/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2022

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE DINGEMANS

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
THE QUEEN (on the application of) AM	**Respondent**

- -

Rory Dunlop QC and Tom Tabori (instructed by **Government Legal Department**) for the **Appellant**
Amanda Weston QC and Mikhil Karnik (instructed by **Paragon Law**) for the **Respondent**

Hearing dates : 4 & 5 May 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10.45 hrs on 10 June 2022.

Lord Justice Dingemans :

Introduction and issues on the appeal

1. This appeal raises issues about the circumstances in which an individual, who is in a state referred to in the authorities of "limbo", may be entitled to some form of status pending their removal. Previous decisions have described "limbo" as being a state where an individual has no leave to remain in the United Kingdom, but there is no current prospect of that individual being deported from the UK.

2. This is an appeal by the Secretary of State against the order of Mr Justice Lane, President of the Upper Tribunal (Immigration and Asylum Chamber) ("the UTIAC") and Upper Tribunal Judge Rimington ("the judges") dated 11 February 2021. The UTIAC declared that the Secretary of State's refusal to grant leave to remain to AM infringed AM's rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). Domestic effect has been given to the ECHR by the Human Rights Act 1998 ("HRA 1998").

3. The Secretary of State raises four grounds of appeal. These are: first that the UTIAC's declaration that the refusal to grant leave was a disproportionate interference with AM's article 8 ECHR rights was inconsistent with case law from the European Court of Human Rights ("ECtHR"); secondly that when considering the effect of a grant on immigration control, the UTIAC wrongly focused on the benefits to AM of his time in the UK, rather than the impact of a grant in this case on other recalcitrant illegal entrants; thirdly the UTIAC wrongly applied a 'near miss principle' by taking into account, as a material factor in his favour, the fact that AM 'nearly' met the requirements of paragraph 276ADE of the Immigration Rules because he had spent twenty years in the UK, and the UTIAC was wrong to treat this as an 'important yardstick'; and fourthly the UTIAC failed to give due weight to the Secretary of State's assessment of the consequences, to other cases, of granting leave to remain in this case.

4. AM resists the appeal and says that the UTIAC applied the relevant law properly. There was no legal error by UTIAC and the Secretary of State is simply expressing a disagreement with UTIAC's assessment, which is not a proper basis for an appeal. AM originally sought to rely on a respondent's notice to affirm the judges' order on other grounds, but in the final event the grounds set out in the respondent's notice were not pursued. The respective positions of AM and the Secretary of State became more refined in the course of submissions.

5. I am very grateful to Mr Rory Dunlop QC and Ms Amanda Weston QC, and their respective legal teams, for the helpful written and oral submissions in this case. I set out below the relevant legal framework within which the issues arise. This legal framework was common ground between the parties.

Immigration detention and leave to remain

6. Previous decisions have described "limbo" as being a state where the individual has no leave to remain in the United Kingdom, but there is no current prospect of the individual being deported from the UK because there is no realistic prospect of removal within a reasonable time. As there is no current prospect of removing the individual from the UK the Secretary of State for the Home Department ("the Secretary of State") is not

entitled to detain the individual in immigration detention. This is because the power to detain in immigration detention is so that persons can be removed and if there is no current prospect of removal the power of detention cannot be exercised, see generally *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704.

7. If the individual has no leave to remain, but cannot be detained pending his removal, he has a status which used to be known as "temporary admission" under paragraphs 16(2) and 21 of Schedule 2 of the Immigration Act 1971. The fact that the person could not be kept in detention raised the question whether the Secretary of State had power to grant only temporary admission, rather than leave to remain.

8. In *R(Khadir) v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207 the House of Lords held that it was lawful to restrict a person to temporary admission, even though the prospect of removing that person was remote. This was notwithstanding the fact that the individual on temporary admission would be subject to a regime which had been sanctioned by Parliament and was described as harsh, see paragraph 34 of *R(Khadir).* It was common ground that such a person had no right to work in the UK, might be directed to live in accommodation by the Secretary of State, would have no right to benefits but would be provided with vouchers for food, and would have access only to basic care by a GP under the National Health System, see paragraph 63 of *RA(Iraq) v Secretary of State the Home Department* [2019] EWCA Civ 850; [2019] 4 WLR 132. In this case the evidence showed that AM survived on short term support provided by the National Asylum Support Service ("NASS"), living in NASS provided accommodation, as directed by the Secretary of State, and receiving £35.39 per week on a payment card for food, clothing and toiletries, see paragraphs 48 and 73 of the UTIAC.

9. Temporary admission under schedule 2 of the Immigration Act 1971 has now been replaced, by what is known as "immigration bail" pursuant to paragraph 1(2) of Schedule 10 to the Immigration Act 2016, see generally *R(Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875. In *R(Kaitey)* it was estimated that there may be more than 90,000 people on immigration bail. One of the reasons for the large number is because there are persons such as AM who have been refused leave to remain but who cannot, either for practical or legal reasons, be removed. Another reason for the large number is because of the length of time it takes for the Secretary of State to make decisions on cases involving victims of trafficking and asylum, which was the subject of comment in paragraph 91 of *EOG v Secretary of State for the Home Department* [2022] EWCA Civ 307.

10. In *R(Khadir)* at paragraph 4 it was recognised by Baroness Hale that there may come a time when the prospects of a person ever leaving voluntarily or being removed were so remote that it would be irrational to deny that person "the status which would enable him to make a proper contribution to the community here". This was described in the submissions before us as a common law right to leave to remain for those in limbo.

11. The issue was revisited in *R(MS, AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310; [2010] INLR 489. (This has been referred to as either *R(MS)* or as *R(AR)* in various reports, so I will refer to it as *R(MS, AR and FW)* in an effort to avoid confusion). In *R(MS, AR and FW)* the Court of Appeal confirmed that an individual could be restricted to temporary admission so long as there remained some prospect of removal. It was confirmed that once the prospect of removal had

disappeared it would be irrational to deny that individual some status of leave to remain. In *R(MS, AR and FW)* at paragraph 24 the Court left open the question whether keeping an individual on temporary admission for excessively long periods might infringe their rights under article 8 of the ECHR. Having set out the relevant legal test for the common law right to leave to remain for those in limbo, the Court adjourned the appeals of MS and FW to determine whether there was some prospect of removal. It is apparent from the Editor's Note on the report that MS was subsequently granted indefinite leave to remain.

12. The question left open in *R(MS, AR and FW)* was answered in, among other cases, *RA(Iraq)*. In *RA(Iraq)* there was a review of domestic authorities and two judgments of the ECtHR. At paragraph 63 the Court identified a form of prospective limbo, where a deportation order might be made but has not been made, and actual limbo, where a deportation order has been made. In the case of prospective limbo it was noted that under section 3C of the Immigration Act 1971 such a person might be free to work and to enjoy a private and family life. Those persons would have had to have some form of leave to enter in order to be able to take advantage of section 3C of the 1971 Act.

13. In *RA(Iraq)* Haddon-Cave LJ suggested four stages of an analysis to determine whether there had been an infringement of article 8 of the ECHR in a case of limbo, and addressed these in paragraphs 63 to 72 of the judgment. Stage 1 was distinguishing between prospective and actual limbo. Prospective limbo was likely to weigh less heavily in the balance. Stage 2 was identifying whether the prospects of removal were remote. Stage 3 was a fact-specific analysis which would typically include a retrospective and prospective analysis. It would involve considering, among other matters, whether the impossibility of achieving deportation was due in part to the conduct of the individual. Stage 4 was a balancing exercise which involved consideration of whether the individual remaining in a stage of limbo would have an impact on the individual's rights under article 8 of the ECHR, and how far that impact was proportionate when balanced with the public interest in the decision to make an order deporting those who are in the UK illegally.

14. Haddon-Cave LJ stated that it was striking that there was no case in which a person's claim under article 8 of the ECHR had succeeded. He also referred, with approval, to the dicta in *R(Hamzeh) v Secretary of State for the Home Department* [2013] EWHC 4113 (Admin) at paragraph 50 to the effect that no general policy or practice had been identified or established by the applicants to the effect that persons whose removal from the UK cannot be enforced, should, for this reason alone, be granted leave. Simler J had stated that "It is not difficult to see why this should be the case. A policy entitling a person to leave to remain merely because no current enforced removal is possible, would undermine UK immigration law and policy, and would create perverse incentives to obstruct removal, rewarding those who fail to comply with their obligations as compared to those who ensure such compliance." Simler J also noted that the practical situation in relation to enforcing removal might change or fluctuate over time.

15. In this appeal both sides agreed that, subject to the points made by the respective sides in paragraphs 17 and 18 below, the approach set out by the Court of Appeal in *RA(Iraq)* was correct. It is apparent that the judges in the UTIAC purported to follow and apply *RA(Iraq)*.

16. The Court of Appeal in *RA(Iraq)* recorded that the only known example of a limbo case being successful was in the ECtHR in *Mendizabal v France* (2006) 50 EHRR 50. The Court of Appeal said that *Mendizabal* involved two singular features, namely (a) an exceptionally lengthy period of limbo, namely 14 years, and (b) there was no question of the applicant being returned to Spain.

17. Mr Dunlop on behalf of the Secretary of State pointed out that in fact in *Mendizabal* the applicant had been living lawfully in France since 1979 and that the applicant had been granted temporary residence receipts for 3 month periods from 1989. I agree that these were relevant factors, but it seems that the 14 year period referred to in *Mendizabal* was calculated as the period when the applicant was receiving temporary receipts. The granting of only temporary receipts meant that the applicant was restricted to casual and unskilled jobs, could not pursue her profession for which she had trained, and had difficulty in renting premises.

18. Ms Weston also pointed out that it was apparent from the analysis of domestic authorities carried out by the Court of Appeal in *RA(Iraq)* that one reason why there might have been no previous authorities in which claims under article 8 of the ECHR had been successful for those in limbo, is because the Secretary of State had granted some form of leave to remain to some of those bringing claims. This was apparent from the editor's note in *R(MS, AR and FW)* although it seems probable that this would have been an example of a successful assertion of a common law right to leave to remain for those in limbo. Another example was provided by the consent order made after the grant of permission to appeal in *Rahman v Secretary of State for the Home Department* [2006] EWCA Civ 719, referred to at paragraph 36 of *RA(Iraq)*. It is right to record that this Court was told that there were particular features in the case of *Rahman* which were not present in this case.

19. For the purposes of this appeal therefore it is common ground that we should follow the approach set out in *RA(Iraq)*. Further, it is common ground that the UTIAC followed the approach set out in *RA(Iraq)* and analysed it in detail in paragraphs 95 to 103 of its judgment. This meant that the issue on this appeal was, in real terms, very narrow, namely whether the UTIAC had made an error of law in applying the tests set out in *RA(Iraq)*.

20. In this respect it is important, when approaching this task, to bear in mind that: the UTIAC is an expert tribunal; this was a very experienced tribunal and the President of UTIAC was one of the judges; and, as was made clear in *AH(Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 AC 678 at paragraph 30, courts should approach appeals from specialist tribunals with an appropriate degree of caution because it is probable that in applying the law in the specialised field the tribunal would have got it right. That said if the tribunals have misdirected themselves in law or are wrong, it is the duty of the appellate court to say so because otherwise appropriate deference would lead to an abdication of judicial duties.

21. It is trite law that it is not a justiciable error of law to show only that this court might have reached a different conclusion, or expressed itself differently. The test is whether the assessment of the UTIAC was wrong, compare *Poland v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551 at paragraph 24, referred to in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 at paragraph 84. In *Hesham Ali* at paragraph 84 Lord Thomas CJ referred to the use of a

"balance sheet" approach for setting out relevant factors in article 8 ECHR cases. That "balance sheet" approach had its origins in Family Division cases. It is now regularly used in extradition appeals. The President of the Family Division has stated that the continued use of the balance sheet may be of assistance as an aide memoire to judges, but warned in *Re R(A Child)(International Relations Case)* [2015] EWCA Civ 882; [2017] 1 FLR 979 at paragraph 52 of the risk, that in setting out factors in a tabular form, critical questions of weight might be lost.

Factual background

22. A comprehensive account of the relevant facts is set out in the judgment of the UTIAC. The parties also helpfully provided answers to various factual questions raised in the hearing in the Court of Appeal but, in the final event, none of the answers in our judgment altered the factual analysis undertaken by the UTIAC.

23. AM is a national of Belarus. AM claims to have arrived in the UK clandestinely in a lorry on 8 January 1998 when it appears he was about 21 years old. On 12 January 1998 AM claimed asylum giving a name. He gave the Secretary of State a document purporting to show that he had been employed in a book-binding factory in Minsk. He claimed some involvement in opposition activities.

24. On 16 April 1999 AM was convicted of actual bodily harm and false imprisonment and sentenced to an aggregate sentence of 3 years and 6 months imprisonment and recommended for deportation.

25. AM's claim for asylum was refused on 12 December 2000. AM appealed and his appeal was dismissed by an adjudicator in a decision dated 2 February 2001. The adjudicator made adverse credibility findings, saying that AM was not of any interest to the authorities in Belarus. On 29 June 2001 AM was deported to Belarus. Belarus refused him entry after (according to the findings of fact made subsequently by a Judge of the First-tier Tribunal ("FTT")) AM lied to the Belarus authorities about who he was, so that the Belarus authorities were not able to trace him. It appears that he told the officials in Belarus that he was not a citizen of Belarus. He was returned by the authorities to the UK the following day and has been in the UK since that date.

26. After his return to the UK, AM made a further asylum claim on a basis which it is now common ground was false. AM gave a different name from the name used in his first asylum claim, claimed that he had left Belarus in 1986 (which was before the breakup of the Soviet Union and would have meant that AM would not have been recognised as a citizen of Belarus) and gave other biographical details that were inconsistent with his first asylum claim. This asylum claim was refused and AM appealed. In February 2002, AM admitted that this second asylum claim was false.

27. In November 2001, the British Embassy in Belarus informed the Secretary of State that the book-binding factory ID was a forgery. On 14 June 2002, AM's second appeal hearing took place. The adjudicator found that AM had lied to immigration officials, both in Belarus and in the UK. There was no evidence to show that AM had any fear of persecution in Belarus. On 31 October 2002 and 1 January 2003 the British Embassy informed the Secretary of State that the schools AM claimed to have attended in Belarus had no record of him.

28. In February 2003, the Secretary of State arranged for AM to attend the Belarusian Embassy with a travel application form and three photographs, together with biometric information. The Belarusian Embassy later informed the Secretary of State that AM had categorically denied being a Belarusian citizen and said he was giving the officials false details and that it was "all a game". AM disputed this account of the meeting with the Belarusian authorities.

29. It became apparent that AM was not likely to be removed in the foreseeable future, and on 2 December 2003 AM was released from immigration detention on temporary admission. AM made further submissions against removal. The Secretary of State refused those submissions. AM brought a claim for judicial review of that refusal and permission to apply was refused on 6 December 2004.

30. It seems that on 23 March 2005 AM was convicted of possessing a class C drug and having an offensive weapon in a public place, and was sentenced to a conditional discharge. On 10 February 2008, AM was arrested for possession of a false Lithuanian identity document. It also appears that on 1 May 2008 AM was convicted of persistently making use of a public communication network to cause annoyance, inconvenience or anxiety and was sentenced to 3 months imprisonment. On 23 July 2008, AM was convicted of possession of a false instrument and sentenced to 10 months imprisonment. On 26 August 2008 (it seems on the expiry of his terms of imprisonment), AM was detained again under immigration powers. On 21 September 2009 AM was released on immigration bail.

31. On 15 September 2010, AM filed a claim for judicial review of the continuing failure to provide him with leave to remain or permission to work. Permission to apply for judicial review was granted on 17 May 2011. In September 2011, the Secretary of State agreed to reconsider AM's further submissions as a fresh application for asylum and the claim for judicial review was stayed.

32. The Secretary of State refused that further application for asylum and AM appealed to the FTT. AM's appeal was heard on 16 March 2012. In a determination dated 30 March 2012 the FTT Judge dismissed AM's appeal. The FTT Judge found that the refusal of the Belarus authorities to recognise AM as a citizen or issue him with a travel document was not based on his political opposition but was because he had failed to provide accurate information to enable the Belarus authorities to trace him.

33. On 8 May 2012 AM was convicted of criminal damage of property valued at £5,000 or less and was given a conditional discharge for 12 months.

34. AM was granted permission to appeal to UTIAC, but the appeal was dismissed on 23 April 2013. AM obtained permission to appeal to the Court of Appeal. In *AM (Belarus) v Secretary of State for the Home Department* [2014] EWCA Civ 1506, the Court rejected AM's submission that the FTT Judge had made an error of law about relevant guidelines. The Court considered AM's submissions under article 8 of the ECHR and concluded that AM might be granted entry to Belarus if he told the truth to the authorities there.

35. On 25 February 2015, AM applied again to the Belarusian embassy. There was a negative response. On 11 October 2015 AM provided further information to the embassy.

36. On 1 December 2015 Dove J made an order in judicial review proceedings. AM agreed to cooperate and participate fully in the process of obtaining travel documentation for his removal to Belarus. The Secretary of State stated that she would liaise with the Belarus embassy to obtain travel documents. In the event that there was no decision from the Belarusian authorities or the Belarusian authorities refused to issue documentation, the Secretary of State agreed to make a decision as to the appropriateness of the continued use of temporary admission.

37. On 19 January 2016 the Secretary of State sent another travel document application to the Belarusian authorities. A year later, the Secretary of State informed AM that the Belarusian authorities were requesting a version of that application in Russian. It then appears that the Secretary of State arranged a telephone interview between AM and Belarusian officials. Nothing came of this. The Secretary of State did not decide to grant AM any form of status and maintained AM on temporary admission.

38. On 9 February 2017, AM applied for leave to remain in the UK as a stateless person. By letter dated 17 July 2017 leave to remain was refused. Reference was made to lies told by AM to the Belarus authorities. It was stated "it is considered entirely reasonable to deem that you are not a national of Belarus as you claim" but the letter went on to state that AM had deliberately concealed his true identity to stay in the UK and that he was not stateless. On 19 July 2017 a team member of the Statelessness Determination Team at the Home Office wrote to AM's solicitors recording that AM had provided information that he was at "immediate risk of committing suicide/seriously self harming or attempting suicide". The letter asked the legal representatives to encourage their client to seek assistance regarding their health and wellbeing where appropriate.

39. On 30 November 2017 AM was convicted of possessing a knife in a public place and sentenced to 16 weeks imprisonment, suspended for 12 months. On 7 December 2017 AM was accused of two further counts of possession of a knife in a public place.

40. On 8 March 2018 a GP reported that AM had been taken to Accident and Emergency following an alleged assault and kidnapping. AM reported that he was punched and hit multiple times. AM was x-rayed and a facial wound was dressed. The GP reported that AM was reporting psychotic symptoms, and concluded "I think a delay in the Home Office reaching a decision may have an impact on his mental health". The Wellbeing Hub at Nottingham Recovery Network reported on 9 March 2018 that AM was reported to be suffering "new onset cognitive problems", but a CT scan had revealed no brain injury. An earlier letter from the Wellbeing Hub had referred to a diagnosis of functional psychotic disorder. That letter referred to past drug abuse by AM.

41. On 9 May 2018 the Home Office wrote to AM's solicitors stating that AM had provided information that he had been diagnosed demonstrating psychotic symptoms (both visual and aural hallucinations) and depression. It appeared that he had made several suicide attempts whilst previously in detention. A Home Office decision, refusing AM's application, was enclosed. The letter went on to advise the solicitors that "given the mental health issues involved, service at a face to face meeting may help to mitigate any distress the decision could cause this vulnerable person".

42. On 13 July 2018, AM applied to reinstate the judicial review proceedings which had been stayed after permission to apply had been given, and to add a second ground challenging the refusal to grant him leave to remain as a stateless person. On 31 July

2018, both applications were granted and the claim transferred to the UTIAC, with the ground relating to statelessness to be considered on a rolled up basis.

43. On 11 September 2018, AM was sentenced to an aggregate sentence of 42 weeks' imprisonment being 26 weeks for two counts of possession of an offensive weapon on 7 December 2017 and activation of the 16 week suspended sentence imposed on 30 November 2017.

44. By a letter dated 27 November 2019, AM's application for leave to remain as a stateless person was refused by the Secretary of State. The Secretary of State concluded that AM had provided no substantive proof that the name he used was his real name. If it had been, the Belarusian authorities would be able to provide a trace of AM's schooling, work or healthcare, even if his birth was not registered in Belarus. The Secretary of State concluded that the Belarusian authorities were correct in stating that AM had been dishonest about his true identity. The Secretary of State therefore concluded AM was not stateless, and he had "adopted a wilful strategy of lies, obfuscation and deceit to confuse and obstruct endeavours to confirm" his identity. The Secretary of State also found that AM failed on suitability grounds, because of his conviction on 11 September 2018 and because of his conduct, which included his convictions, character or associations.

45. In June 2020 Dr Felah, consultant neurologist, noted that AM was under the psychiatric team for drugs misuse, was on methadone, olanzapine and mirtazapine, and had a head injury and left frontal bone osteoma (a benign bone forming tumour) following an assault in 2018. AM had suffered attacks suggestive of generalised seizures following that attack, which were considered to be strongly suggestive of epileptic seizures.

46. On 21 July 2020 the UTIAC gave AM permission to amend his grounds of challenge in the judicial review proceedings in order to challenge the decision of 27 November 2019.

47. The evidence before the UTIAC showed that AM suffered from Hepatitis C and extensive plaque psoriasis. He had abused drugs and alcohol and been treated with methadone. He had suffered low mood and hallucinations. He had been living on the margins of society. There was evidence which suggested that AM's mental health had been adversely affected by delays in resolving his case and by his lack of status.

The judgment of the UTIAC

48. AM's claim for judicial review was heard at Field House, London by Skype on 11 November 2020. The decision and reasons were promulgated on 11 February 2021.

49. After setting out the factual background to this case, the judges found that the Secretary of State had the power to keep AM on conditions of immigration bail, as there was still some prospect of removal. This was because AM could change his mind and cooperate with the Belarusian authorities and that might lead to removal. This meant that there was no basis for a common law right to leave to remain on the basis that it would be irrational not to grant AM leave to remain. This meant that the only basis on which AM might succeed in his claim was under article 8 of the ECHR.

50. The judges found that AM has been in 'actual limbo' for over twenty years. The judges found that the prospects of removal were 'remote'. Removal would require AM to change his approach. That was 'not impossible' but the possibility was 'remote' because AM had an 'entrenched stance'. AM had no family life in the UK. AM had some, albeit minimal, private life through friendships in the UK. AM had committed serious criminal offences including an offence of violence. The time AM had spent in the UK was very great.

51. The judges found that given his criminal record, it was 'plainly unlikely' that if AM were to be given leave to remain he would become a 'model member of society', but the judges placed 'certain weight' on medical evidence that he 'retains capacity for self-improvement'. There was some modest reason to think that, if given leave to remain, AM would begin to turn his life around.

52. The judges held that AM could not satisfy exception 1 in section 17C(5) of the 2002 Act. He had never been lawfully resident in the UK and he was not socially and culturally integrated into the UK. The judges also held that a 'dispassionate' member of the British public would not think that AM had achieved a better life in the UK, so a grant of leave to remain to him would not encourage others to follow his example. AM was not entitled to leave to remain under paragraph 276ADE of the Immigration Rules (the provision for leave to remain after 20 years of residence) because he did not meet the suitability requirements. The judges also held that although AM did not meet the requirements of paragraph 276ADE, a period of 20 years spent in the UK was still a 'material Article 8 private life factor' and an 'important yardstick' which he had either met or was 'very close to doing so'.

53. The judges held that the combination of the remoteness of removal and the fact that granting leave to remain would not materially damage the principle of deterrence and the overall rationale of paragraph 276ADE led to the conclusion that the public interest in immigration control was weakened to the point where it was outweighed by the very compelling circumstances of AM's case under article 8 of the ECHR. As a result AM's claim under article 8 of the ECHR succeeded. The UTIAC made a declaration that continuing to refuse to grant leave to remain would be a disproportionate interference with AM's rights under article 8 of the ECHR.

54. The claim for statelessness failed because AM was not stateless. The refusal of the Belarus authorities to recognise AM as one of its citizens was due to his persistent failure to tell the truth as to his identity. It might be noted that this finding is part evidenced by the fact that AM has consistently reported that he has a brother and mother in Belarus but they have never been located.

Relevant statutory provisions

55. Sections 117A-117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Nationality Act") provide as follows:

> *"**117A Application of this Part***
> *(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—*
> *(a) breaches a person's right to respect for private and family life under Article 8, and*

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

...

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

...

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2…"

56. The immigration rules on long residence are set out in paragraph 276ADE of the Immigration Rules to which reference has already been made. This provides:

> *"**Requirements to be met by an applicant for leave to remain on the grounds of private life***
> *276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, AM:*
> *(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and*
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
> *(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or*
> *...*
> *(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to AM's integration into the country to which he would have to go if required to leave the UK."*

57. Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM provide:

> *"**Section S-LTR: Suitability-leave to remain***
> *S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply.*
> *S-LTR.1.2. The applicant is currently the subject of a deportation order.*
> *S-LTR.1.3. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years.*
> *S-LTR.1.4. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months, unless a period of 10 years has passed since the end of the sentence; or*
> *S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.*
> *S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.*
> *S-LTR.1.7. The applicant has failed without reasonable excuse to comply with a requirement to-*

> *(a) attend an interview;*
> *(b) provide information;*
> *(c) provide physical data; or*
> *(d) undergo a medical examination or provide a medical report. S-LTR.2.1. the applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.5. apply.*
> *S-LTR.2.2. Whether or not to the applicant's knowledge –*
> *(a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or*
> *(b) there has been a failure to disclose material facts in relation to the application.*
> *…*
> *S-LTR.3.1. When considering whether the presence of the applicant in the UK is not conducive to the public good any legal or practical reasons why the applicant cannot presently be removed from the UK must be ignored.*
> *S-LTR.4.1. The applicant may be refused on grounds of suitability if any of paragraphs S-LTR.4.2. to S-LTR.4.5. apply.*
> *S-LTR.4.2. The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim; or did so in order to obtain from the Secretary of State or a third party a document required to support such an application or claim (whether or not the application or claim was successful).*
> *S-LTR.4.3. The applicant has previously made false representations or failed to disclose material facts for the purpose of obtaining a document from the Secretary of State that indicates that he or she has a right to reside in the United Kingdom..."*

58. The stateless provisions are dealt with at paragraph 401, where statelessness is defined in part by reference to the United Nations Convention relating to the status of stateless persons, and paragraph 403, where the rules for granting leave to remain to a stateless person are set out.

Consistency with ECtHR caselaw (ground one)

59. Mr Dunlop complained that the form of declaration made by the UTIAC was inconsistent with ECtHR case law. The declaration had been framed on the basis that there was an interference with AM's rights under article 8 of the ECHR, but the obligation in this case could only be a positive obligation under article 8 of the ECHR. Mr Dunlop accepted that if all he achieved was to have the declaration granted by the UTIAC reworded, it would not represent much success on the appeal and the point was to some extent academic. This was particularly so in circumstances where it was common ground between both parties that this Court should follow the approach set out in *RA(Iraq)*. Ms Weston noted that the UTIAC had not required the Secretary of State to grant AM indefinite leave to remain. All that was required by the declaration made by the UTIAC was the grant of some leave, the duration and type of which would be

for the Secretary of State to determine. The effect of the grant of any leave would be to remove for AM, during the period of the grant of leave, the adverse consequences to him of being on immigration bail and being unable to work legally.

60. When it was put to Mr Dunlop that the authorities showed that it could be difficult to draw the line between analysing an obligation under article 8 of the ECHR as positive or negative, Mr Dunlop accepted that the most important point was whether AM's rights (either positive or negative) under article 8 of the ECHR had been infringed. Therefore Mr Dunlop did not press for a decision from this court about whether the obligation, if there was one, under article 8 of the ECHR was positive or negative. In these circumstances it is sufficient to say that it is not necessary to address the issue of whether the obligation in this case was negative or positive. As a matter of analysis preventing AM from working because he is on immigration bail is likely to be an interference with AM's rights to a private life under article 8, particularly given the medical evidence about the benefit that he has obtained and would be likely to obtain from working. On the other hand directing a state to grant a right to residence is more likely to be analysed in terms of whether there is a positive obligation to confer such a status, compare *Jeunesse v Netherlands* (2015) 60 EHRR 78.

61. This leaves the issue of whether the UTIAC should have found that AM's rights under article 8 of the ECHR were being infringed because AM was on immigration bail, with all of its attendant consequences, and did not have leave to remain. Mr Dunlop submitted that AM had thwarted his removal through dishonesty, and there was therefore no obligation to grant him any form of leave. In the admissibility decision in *Dragan v Germany* (2004) App No 33743/03, the Third Section of the ECtHR had found manifestly ill-founded a complaint arising under article 8 of the ECHR where a family had renounced Romanian nationality to make themselves stateless so that German authorities could not remove them. In *R(Hamzeh and others)* Simler J had identified the risks of creating perverse incentives to prevent removal. Ms Weston pointed out that this case was not about granting indefinite leave to remain, but granting some limited status to remove some of the restrictions imposed on AM, which were, on the findings of the UTIAC, creating exceptional difficulties for AM.

62. In my judgment, in circumstances where it is common ground that a proper approach to article 8 of the ECHR was set out by the Court of Appeal in *RA(Iraq)*, which itself expressly considered the approach set out in *R(Hamzeh and others)*, and it is common ground that this Court should set aside the judgment of the UTIAC if the Court considers it to be wrong, it will be necessary to consider the other specific grounds of appeal, before looking at the decision overall to see whether it is wrong.

The focus on AM's life (ground two)

63. Mr Dunlop submitted that the UTIAC was wrong to focus on AM's life rather than the impact of leave to remain on other illegal immigrants. Mr Dunlop specifically referred to paragraph 136 of the judgment of the UTIAC where the judges had referred to the fact that "a dispassionate member of the public" would not consider that AM had gained any real benefit from his presence in the UK over the past two decades or more where he had been at the outer margins of society, legally unable to work and had suffered street homelessness while addicted to drugs and alcohol. The judges concluded that a grant of leave would be unlikely to encourage others to follow his example and weaken the immigration system. In my judgment the judges in the UTIAC were right to

concentrate in parts of the judgment on AM's life, and this was because it is required by the third and fourth stages of the test set out in *RA(Iraq*). The judges were also right to consider the public interest in immigration controls.

64. Mr Dunlop submitted that the UTIAC was wrong to make the finding that a grant of leave would be unlikely to encourage others, because it had referred to dispassionate members of the public, and not the foreign national criminals who would consider that as a result of the decision they would have a good chance of being granted leave to remain. It seems likely that this part of the judgment was directed to submissions about concerns that members of the public in the UK might have in the immigration system if AM was granted some form of leave to remain. This paragraph was not wrong, and it was not central to the reasoning of the UTIAC. It is not a basis for setting aside the judgment of the UTIAC.

65. I should record that Mr Dunlop in his submissions referred to hypothetical examples of a foreign criminal who had thwarted deportation for 18 years and who was earning an income illegally, who was tiring of his "limbo" state but who might be encouraged to stay on by AM's success in this appeal. I did not find the example particularly helpful, because it was fact specific and inevitably speculative. Experience shows that different people will react differently to different events. It might also be noted that in the example given by Mr Dunlop the person was working illegally, although as Mr Dunlop pointed out, it was not necessary for the example to work for that person to have worked illegally. As noted above one of the restrictions imposed by immigration bail on AM is that he is unable to work legally, although the evidence shows that he worked illegally for a short period of time, and was able to work legally for another very short period of time. It is, however, not an answer to his claim to permit illegal working. This is for at least three reasons. First if illegal working is tolerated the deterrent effect of keeping persons on immigration bail, which was much emphasised by Mr Dunlop in his submissions, will be undermined because the conditions of the immigration bail will be ignored. Secondly the illegal worker will not make any contribution through taxation to the wealth of the UK (compare paragraph 4 of *Khadir*) because no taxes will be paid on illegal work (unless the worker is registered under a false name, and I note that one of AM's convictions was for having a false passport). Thirdly illegal working undermines the rule of law, and this is because the illegal workers who do not pay their taxes will be in a better position than those legal workers who do pay their taxes. The illegal workers will also be in a better position than those persons who are on immigration bail and who comply with the obligation not to work. All of that said, I accept Mr Dunlop's submission that it is for the Secretary of State, and the legislature, to determine what policies are to be pursued to deter both illegal immigration, and illegal working by those on immigration bail.

The application of a near miss principle (ground three)

66. Mr Dunlop submits that the UTIAC applied in paragraphs 141 to 142 of the judgment a 'near miss principle', and the judges treated what they considered a 'near miss' to paragraph 276ADE of the Immigration Rules as a weighty point in AM's favour in the balance. Mr Dunlop submits that this approach was wrong because there is no "near miss" principle, see for example *Patel v Home Secretary* [2013] UKSC 72; [2013] 3 WLR 1517 at paragraph 56. In any event, on a proper consideration of paragraph 276ADE of the Immigration Rules there was no near miss because AM could not begin to satisfy the suitability requirements. Mr Dunlop accepted, for the avoidance of any

doubt, that the Secretary of State was not saying that the UTIAC had to ignore AM's length of residence, but the judges were not entitled to treat 20 years as an important yardstick.

67. If the judges in UTIAC had treated this as a near miss case, that would have been a material misdirection and I would have allowed the appeal so that the article 8 ECHR balance would have had to be redone. Properly read, however, I do not accept that the judges did treat this as a "near miss" case for the purposes of paragraph 276ADE of the Immigration Rules. The judges were responding to the submission made on behalf of AM about paragraph 276ADE of the Immigration Rules, as recorded in paragraph 139 of the judgment. The judges expressly noted that AM would fail under paragraph 276ADE by reference to "general unsuitability" and the terms of Part 13 of the Immigration Rules. It was clear that the judges were well aware that AM was not and could not have been a near miss case.

68. Mr Dunlop submitted that the rationale of paragraph 276ADE was to encourage and reward compliance with suitability standards. It is apparent from the wording of paragraph 276ADE that the suitability requirements reward those who have complied with the requirements and have been present for a long time in the UK. I do not, however, accept Mr Dunlop's complaint that the UTIAC had misunderstood the rationale of paragraph 276ADE as suggesting that an amnesty would be granted to all illegal immigrants after 20 years. The judges did not say that.

69. What the judges said in paragraph 142 was that "Parliament has acknowledged that a period of 20 years spent in the United Kingdom is an important yardstick in determining the right to respect for a person's private life". This was an accurate summary of the effect of paragraph 276ADE of the Immigration Rules and, as Ms Weston had pointed out, earlier versions of the rules had set the relevant period at 14 years. The judges also made the point, by reference to the terms of the rule, that paragraph 276ADE of the Immigration Rules contemplated that a successful applicant might have spent some time in imprisonment. This again was an accurate summary of the terms of paragraph 276ADE.

70. In these circumstances the UTIAC was simply saying, as it was entitled to do and as the Secretary of State accepts, that 20 years residence in the UK was a material factor to be considered.

The Secretary of State's view (ground four)

71. Mr Dunlop contends that the UTIAC failed to give due weight to the Secretary of State's assessment of the consequences, to other cases, of granting leave in this case. He relied on a review of immigration bail carried out on 25 January 2019 by a caseworker on behalf of the Secretary of State who noted that there was a '*significant public interest question'* as to whether to grant AM residence in the UK, given his criminality and use of deception. Mr Dunlop accepts that this didn't refer in terms to the effect of the decision in this case on other illegal immigrants, but that must have been the "public interest question" considered in the review.

72. In my judgment there is nothing in this complaint about the judgment of the UTIAC. This is because it was for the judges in the UTIAC to determine whether there had been an infringement of AM's rights under article 8 of the ECHR. They were required to

have regard to the terms of the applicable statutes and the Immigration Rules, which give effect to the Secretary of State's policy. The judges were required to take into account submissions made on behalf of the Secretary of State, but it would be wrong to suggest that the judges in the UTIAC were bound to accept the Secretary of State's views on the matter, otherwise there would be no point in having an independent system of judicial supervision to audit and ensure the legality of decision making.

73. As to the public interest, it is apparent that the judges had well in mind the general public interest raised by this case. They specifically referred to the public interest in paragraph 144 of the judgment. The judges specifically referred to the "considerations mentioned in section 117B of the 2002 Act" and referred to the little weight to be attached to AM's private life. They had specific regard to the "very compelling circumstances" in AM's case and concluded that in the very particular circumstances of this case that outweighed the public interest in effective immigration control.

A permissible decision by UTIAC

74. This was a judgment by the judges in the UTIAC who had correctly directed themselves on the law by reference to *RA(Iraq)*. The judges had regard to public interest in the maintenance of effective immigration controls, as set out in section 117B of the 2002 National Act. The judges had full regard to AM's own responsibility for his very long period of limbo and his criminal convictions and the public interest in his removal, but the judges also recognised AM's vulnerabilities, that the prospect of removal of AM was remote, and had been remote for a considerable period. The judges considered carefully the factors supporting the grant of some form of leave and the public interest in deterrence. The experienced judges considered that in "the very compelling circumstances" of AM's case, the important principles of deterrence would not be undermined, and that the declaration made was appropriate.

75. In my judgment the assessment of the judges in the UTIAC was not wrong. The Court of Appeal in *RA(Iraq)* expressly contemplated that maintaining an individual in limbo might infringe the individual's rights. The judges in the UTIAC were, in the very unusual circumstances of this particular case, entitled to find that there was an infringement of AM's rights under article 8 of the ECHR and to grant the declaration in the terms that they did. It is common ground that this will not prevent AM's future removal, if circumstances change.

Conclusion

76. For the detailed reasons set out above I would dismiss this appeal.

Lady Justice Nicola Davies

77. I agree.

Lord Justice Moylan

78. I also agree.