Neutral Citation Number: [2022] EWCA Civ 809

Case No: CA-2021-001949

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
Upper Tribunal Judge Rintoul
DA/01472/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 June 2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE WARBY
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

PAULO ANTONIO	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

Alex Goodman (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Julie Anderson (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 11 May 2022

- -

JUDGMENT

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 16 June 2022.

Lord Justice William Davis:

Introduction

1. The appellant appeals against the decision of Judge Rintoul of the Upper Tribunal (Immigration and Asylum Chamber) (the "UT") promulgated on 20 May 2021. Judge Rintoul dismissed the appellant's appeal from the determination of the First-tier Tribunal (Judge McCarthy). Judge McCarthy had dismissed an appeal against the decision of the Secretary of State for the Home Department (the "SSHD") made on 9 July 2013 whereby the SSHD had determined that the appellant was a person to whom Section 32(5) of the UK Borders Act 2007 applied.

Factual and procedural background

2. The appellant claims that he entered the UK in 1992 when he was 14 or 15. There is no record of any lawful entry by him. There are records which tend to show that he was in this country by 1993. Information about his activity between then and 2003 is sketchy. HM Revenue and Customs hold no record in relation to him though in 2002 he applied for a job at a company in Telford. There is no suggestion that he has family in this country.

3. In 2003 the appellant committed a robbery and an attempted robbery two days apart at small corner shops. He was armed with an imitation firearm. He had an accomplice who was armed with a knife. In 2005 the appellant was convicted after a trial of the robbery offences. He was sentenced to nine years' imprisonment.

4. On 27 June 2006 the SSHD served a notice of deportation on the appellant on the basis that his presence in the UK was not conducive to the public good. The appellant responded two days later claiming that he had been born in Portugal. In 2008 the SSHD made a deportation order based on the appellant's claimed Portuguese nationality. The appellant waived his appeal rights. When the custodial part of his sentence expired in 2010, he was deported to Portugal. However, the Portuguese authorities did not accept that the appellant was a national of their country. He was returned to the UK.

5. On 18 October 2010 the SSHD revoked the deportation order because she was not satisfied that the appellant was a Portuguese national. The appellant, who thereafter was detained in immigration detention, nonetheless continued to maintain that he was Portuguese. For a period of around 3 years the SSHD made a variety of enquiries into the appellant's nationality. These concentrated on whether he had Jamaican nationality. The appellant had said that his late mother had been a Jamaican national. In June 2013 the SSHD in a detention review concluded that "the possibility that Mr Antonio is a Jamaican national is far greater than of his being of any other nationality". This conclusion was not supported by anything emanating from the Jamaican authorities; rather the reverse.

6. On 9 July 2013 the SSHD made a decision that Section 32(5) of the UK Borders Act 2007 applied to the appellant. Accordingly she decided to make a deportation order. The notice of the decision ran to 12 pages. Attached to it was the deportation order. The order simply stated that the SSHD was obliged to make a deportation order in respect of the appellant as a foreign criminal, namely pursuant to Section 32(5) of the

2007 Act, and that the appellant was required to leave the UK and was prohibited from entering the UK. The decision letter said that, if the appellant did not leave the UK as required, it was proposed that he would be removed to Jamaica. The letter dealt in some detail with the provision that could be made for the appellant in Jamaica.

7. The appellant appealed against the decision of the SSHD to the First-tier Tribunal i.e. the decision that Section 32(5) of the 2007 Act applied to him. That appeal was stayed pending the outcome of an application for permission to apply for judicial review of the decision to make a deportation order. The appellant's case on that application was that the making of the order was unlawful because some change of circumstances was required to make a second or fresh deportation order. He succeeded at first instance and the deportation order was quashed. The SSHD appealed against the quashing order. That appeal was successful: see *R(Antonio) v SSHD* [2017] 1 WLR 3431.

8. The appeal before the First-tier Tribunal then proceeded, the stay being lifted. The appeal was dismissed on 11 October 2018. There followed the appeal before Judge Rintoul in the UT with which we are concerned.

The decision of Judge Rintoul

9. For reasons with which I am not concerned, the decision of the First-tier Tribunal was set aside. The appeal before Judge Rintoul was a *de novo* re-hearing. He heard evidence, in particular from the appellant. Judge Rintoul subjected the appellant's evidence to close analysis. Judge Rintoul's conclusion of fact was that the appellant's "evidence is not something on which I can safely rely upon unless confirmed by other independent material". He said that "I am not…satisfied that he has given all the information available to him". Judge Rintoul concluded that it was improbable that all of the enquiries made by the SSHD, including those to the Jamaican authorities, would have led to dead ends if the information given by the appellant had been accurate.

10. Before the First-tier Tribunal the SSHD had conceded that "the appellant is neither Portuguese nor Jamaican and cannot be deported to either country". Judge Rintoul determined that the SSHD was bound by that concession notwithstanding the fact that he was hearing the appeal *de novo*. Having made that determination, he said he took "into account the concession….but that is hardly a ringing endorsement that what [the appellant] has said is true; on the contrary". He said that there was no concession that the appellant had been truthful or had complied fully in providing all the information available to him. Judge Rintoul said that the consequence of the concession was that he was bound to accept that there was "no realistic prospect" that he could leave the UK or that the deportation could be enforced "during a reasonable period of time to Jamaica or any other country".

11. Specifically in relation to deportation of the appellant to Jamaica, Judge Rintoul said this: "…on the basis of the evidence and concession, and in the absence of any foreseeable change in the circumstances, there is no prospect of effecting deportation; any removal is likely to result in him being returned to the United Kingdom".

12. Judge Rintoul recorded the submissions made on behalf of the appellant and the SSHD. It was argued on behalf of the appellant that, notwithstanding the inconsistencies and discrepancies in the appellant's evidence, his account had "core

veracity". The appeal was put in two ways. First, it was said that removal of the appellant from the UK in consequence of the SSHD's decision would be incompatible with the appellant's Convention rights. The submission was that the judge had to proceed on the hypothetical assumption that removal would be effected. On that assumption, removal to Jamaica would breach the appellant's Convention rights. Second, it was argued that the effect of the decision was to criminalise the presence of the appellant in the UK when it was impossible for him to leave whether voluntarily or by removal. That was clearly incompatible with his Convention rights. Further, to make a deportation order in those circumstances was not in accordance with the law.

13. The submission on behalf of the SSHD was that the appellant's evidence was not credible. That fact undermined the entirety of the appellant's case. Were he to be removed to Jamaica, there would be no compelling circumstances indicating that his Convention rights would be breached. The reality was that the apparent inability to remove the appellant was because he was not giving accurate information.

14. Judge Rintoul rehearsed the relevant statutory provisions (to which I shall refer in due course) and cited paragraphs [62] to [72] of *RA (Iraq) v SSHD* [2019] 4 WLR 132. In *RA (Iraq)* Lord Justice Haddon-Cave reviewed in considerable detail the authorities in relation to what he termed "limbo" cases. I shall consider the effect and relevance of *RA (Iraq)* in relation to the appellant hereafter.

15. Judge Rintoul considered the hypothetical scenario of removal to Jamaica. He found that there was insufficient material to demonstrate that the appellant would face a breach of Article 3 of the Convention in the event of such a return. He further concluded that there were no "very compelling circumstances" applicable to the appellant. This conclusion referred to the statutory term to be applied when assessing interference with the Article 8 rights of a foreign criminal.

16. The judge moved on to consider the proposition that the decision was not in accordance with the law because the appellant could not be removed and that the making of a deportation order in those circumstances could not be justified. He said this: "…I do not accept that maintaining a deportation order that cannot be carried out is an improper purpose; they are imposed and endure for many reasons, not just to require departure from and prohibit return to the United Kingdom. They express the public interest in removing foreign criminals…."

17. Having reached that conclusion, Judge Rintoul considered the principles in *RA (Iraq)*. The appellant was in "actual limbo" because a deportation order had been made. He said that "the prospects of effecting deportation are remote". In respect of the fact specific analysis of the appellant's case, the judge found that he had not been candid or told the whole truth about his background. As a result the appellant was "in effect responsible for his situation". In those circumstances, the judge concluded that, taking account of all of the circumstances, there was no disproportionate interference with the appellant's Convention rights.

18. Judge Rintoul finally considered the proposition that the deportation order was being used for an improper purpose because it could not be put into effect and/or because it was inconsistent with the existing statutory scheme in relation to immigration bail. The judge found that the narrow scope of the appeal did not allow this argument to be made. The decision under challenge was the decision that the appellant was a foreign

criminal. In any event, the judge rejected the submission that the deportation order was being used as a form of regulation of the appellant whilst he remained in the UK. The limitations imposed on the appellant were created by the operation of the usual immigration rules, the appellant having no leave to be in the UK.

The statutory framework

19. The decision under consideration by the UT was taken in July 2013. Thus, Sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 in their form as at that date governed the appeal against the decision. Significant changes were made to the statutory appeal scheme by the Immigration Act 2014. By Section 15 of that Act Sections 82 and 84 of the 2002 Act were substituted. The new Sections 82 and 84 are substantively different to the old provisions. When giving permission Lady Justice Laing considered that the issues raised in the appeal could be relevant to an appeal under the provisions as they now stand. As such they raised an important point of principle or practice. In the event no submissions were made on either side in the course of the hearing of the appeal in relation to the statutory appeal scheme as it now stands. I do not consider that it is appropriate to consider whether the arguments we heard might be of relevance in an appeal under the current provisions. In the absence of any submissions it is not possible to address the position of someone in the appellant's situation were he to be subject to the post 2014 statutory appeal scheme. That must await a case where that issue arises on the facts of the case.

20. Section 82 of the 2002 Act as it stood in July 2013 gave a right of appeal against an "immigration decision". Section 82(2) set out the list of decisions which fell within that definition. Those decisions included decisions that a person was to be removed from the UK pursuant to various statutory provisions e.g. Section 82(2)(h) identified the decision to remove an illegal entrant by way of directions under paragraphs 8 to 10 of Schedule 2 of the Immigration Act 1971. Section 82(2)(j) included "a decision to make a deportation order under section 5(1) of [the Immigration Act 1971]" in the list of appealable decisions. An order under Section 5(1) of the 1971 Act would include an order for deportation on the ground that it would be conducive to the public good.

21. However, Section 82(3A) of the 2002 Act made specific provision for a deportation order of the kind made in the appellant's case:

> *(3A) Subsection (2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007; but–*
> *(a) a decision that section 32(5) applies is an immigration decision for the purposes of this Part, and*
> *(b) a reference in this Part to an appeal against an automatic deportation order is a reference to an appeal against a decision of the Secretary of State that section 32(5) applies.*

Thus, the immigration decision in question so far as the appellant was concerned was the decision that Section 32(5) applied in his case.

22. Section 84(1) of the 2002 Act as it applied at the time of the decision in the appellant's case provided that an appeal had to be brought on one or more of the grounds set out in that section. The sub-sections relevant to this appeal are:

> *….(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;*
> *.....*
> *(e) that the decision is otherwise not in accordance with the law;*
> *.....*
> *(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.*

Sub-sections (c) and (e) are said by the appellant to be relevant to the underlying decision whereas sub-section (g) is concerned with the effect of his removal.

23. The relevant decision in this case was the decision that Section 32(5) of the UK Borders Act 2007 applied to the appellant. Section 32 of the 2007 Act provides for automatic deportation of a foreign criminal. For the purposes of this appeal a foreign criminal is someone who is not a British or Irish citizen convicted of an offence and sentenced to at least 12 months' imprisonment. Section 32(4) stipulates that the deportation of a foreign criminal is conducive to the public good. Section 32(5) provides that the SSHD "must make a deportation order in respect of a foreign criminal". Thus, the decision under challenge was the determination that the appellant was a foreign criminal. Provision is made for Section 32(5) not to apply where an exception in Section 33 of the 2007 Act applies. Section 33(2) is as follows:

> *Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–*
> *(a) a person's Convention rights, or*
> *(b) the United Kingdom's obligations under the Refugee Convention.*

That provision requires the SSHD to consider the person's Convention rights when making a deportation order. Were she to conclude that removal of the person would breach those rights, she would not be obliged to make a deportation order. However, Section 33(7) provides that the application of the exception does not prevent the making of a deportation order.

24. There are further provisions as to deportation in Schedule 3 of the Immigration Act 1971. Paragraph 1(1) of the Schedule reads:

> *Where a deportation order is in force against any person, the Secretary of State may give directions for his removal to a country or territory specified in the directions being either—*
> *(a) a country of which he is a national or citizen; or*
> *(b) a country or territory to which there is reason to believe that he will be admitted.*

I should say that, to put the matter at its lowest, this provision was not at the forefront of the submissions put before Judge Rintoul. It was barely touched on in any written submissions. The judge did not refer to it in his decision. Whether it formed any part of the appellant's argument in the UT is far from clear. As will become apparent, it took on far greater significance in the appellant's submissions on this appeal.

25. The SSHD gave notice of her decision that Section 32(5) of the 2007 Act applied because she was required to do so by Regulation 4 of the Immigration (Notices) Regulations 2003. Regulation 5(1) is as follows:

> *A notice given under regulation 4(1) is to –*
> *(a) include or be accompanied by a statement of the reasons for the decision to which it relates;*
> *and*
> *(b) if it relates to an immigration decision specified in section 82(2)(a), (g), (h), (i) or (j) of the 2002 Act, state the country or territory to which it is proposed to remove the person.*

It will be observed that Regulation 5(1) does not apply to the decision made in this case. Section 82(2)(j) does not apply to a decision under Section 32(5) of the 2007 Act. However, the terms of the Regulation are of relevance to an argument pressed by the appellant in this appeal.

26. Also relevant, by reason of a submission made by the appellant, is paragraph 8(1)(c) of Schedule 2 of the Immigration Act 1971. This sets out the country or territory to which an illegal entrant may be removed. Four possibilities are identified:

> *(i)* *a country of which he is a national or citizen; or*
> *(ii)* *a country or territory in which he has obtained a passport or other document of identity; or*
> *(iii)* *a country or territory in which he embarked for the United Kingdom; or*
> (iv) *a country or territory to which there is reason to believe that he will be admitted.*

Reference will be made to this paragraph when considering the appellant's argument in relation to *MS (Palestinian Territories) v SSHD* [2010] 1 WLR 1639 as set out hereafter.

The grounds of appeal

27. When the case was argued before Judge Rintoul the appellant's submission in relation to Section 84(1)(g) of the 2002 Act concentrated on the proposition that the judge should proceed on the hypothetical basis that the appellant would be removed to Jamaica. The argument was that this would be incompatible with the appellant's Convention rights because of a significant risk of a breach of the Article 3 rights of the appellant on removal to Jamaica and that there would be unacceptable interference with his Article 8 rights given his lack of any real connection to Jamaica. The written grounds of appeal against the decision of Judge Rintoul criticised the judge's supposed failure to consider this argument properly or at all. In his oral submissions Mr Goodman on behalf of the appellant acknowledged that this was how the case had been put before Judge Rintoul. He said that it was "a strand of the argument" before

the UT. I would describe it as rather more than "a strand" but this may be no more than semantics. In any event Mr Goodman said in terms that it was no longer pursued as part of this appeal.

28. The argument now put in relation to Section 84(1)(g) concentrates on the effect of paragraph 1(1) of Schedule 3 of the Immigration Act 1971. It is said that the appellant's liability to deportation arises from Section 3(5)(a) of the 1971 Act i.e. his deportation would be conducive to the public good. Section 32(4) of the 2007 Act merely overlays that provision. The effect of paragraph 1(1) of Schedule 3 of the 1971 Act is that directions to remove a foreign criminal to a country of which he is not a national or a citizen or to which there is no reason to believe that he will be admitted must be unlawful. They would be incompatible with that person's Convention rights. The submission is that, because Section 84(1)(g) deals with "..removal…in consequence of the immigration decision…", the SSHD's inability to comply with paragraph 1(1) is fatal to her case and her decision should be quashed. Reliance is placed on the judgment in *MS (Palestinian Territories)*, in particular at [23]. I shall refer to this as Ground 1.

29. Ground 2 relates to Section 84(1)(c) and (e). The findings of Judge Rintoul as set out at [10] and [11] above mean that there is no prospect of deporting the appellant to any country. That was the position at the date of the decision. A deportation order that cannot be enforced is not in accordance with the law. Allied to that submission it is said that the effect of a deportation order on the Article 8 rights of someone who cannot leave the UK is disproportionate. When Judge Rintoul considered in some detail the judgment in *RA (Iraq)* he fell into error. Not only were there significant factual differences between the circumstances in that case and the position of the appellant but also the judgment was not concerned with whether the decision of the SSHD was in accordance with the law.

30. The final part of the appellant's submission – Ground 3 - is that Judge Rintoul's conclusion as to the appropriateness of a deportation order as set out at [16] above was wrong in law. Reliance is placed on concessions made by the SSHD in *R (Kaitey) v SSHD* [2021] EWCA Civ 1875 in relation to the power to detain. In *Kaitey* the appellant challenged the dismissal of his application for judicial review of the decision of the SSHD to place him on immigration bail when on *Hardial Singh* principles he could not be detained. The appeal failed. The court in *Kaitey* did not consider the issue of "some prospect" of removal because the appellant did not have permission to pursue the ground. However, the court recorded a concession by the SSHD that, if there were no prospect at all of removal, there would be no power to place the appellant in that case on bail. The appellant here relies on that concession to support the argument that, in the circumstances applicable to him, it was not in accordance with law to use a deportation order to regulate his presence in the UK.

Discussion

Ground 1

31. The decision from which the appeal lay to the UT was the decision of the SSHD that the appellant was a person to whom Section 32(5) of the 2007 Act applied. That was the only decision which had been made and the immigration decision for the purposes of Section 82 of the 2002 Act. It was Section 82(3A) of the 2002 Act which defined

the right of appeal and the nature and extent of the decision under appeal. The appellant's submissions hinge on the proposition that, because he relies on ground (g) under Section 84(1) of the 2002 Act, his appeal can encompass the lawfulness of his removal to an assumed destination.

32. As I have said the appellant submits that *MS (Palestinian Territories)* supports his argument. In that case the Supreme Court was concerned with an appeal against a decision by the SSHD that MS, an illegal entrant, should be removed from the UK. The decision stated that, were MS not to leave voluntarily, directions would be given for his removal to the Palestine National Authority. This decision was an immigration decision within Section 82(2)(h) of the 2002 Act. The evidence before the tribunal which considered the appeal against that decision was that, without any identification documents, MS's return to the Palestinian Territories would be "very unlikely" at best and probably "impossible". In those circumstances, it was argued that the decision was not in accordance with law.

33. MS in his first appeal to the First-tier Tribunal against the decision that he should be removed had raised human rights issues which the FTT judge had dismissed along with the argument that the decision was not in accordance with the law. However, in his application for a reconsideration, MS did not rely on any argument relating to his human rights. The sole basis for that application was that there was no reason to believe that the Palestinian Territories would admit him. In consequence, the decision to remove him was not in accordance with the law. The argument was that the Palestinian Territories was not a country or territory within Paragraph 8(1)(c) of Schedule 2 of the 1971 Act. The ground relied on was as set out in Section 84(1)(e) of the 2002 Act. The application for a reconsideration was refused. It was the refusal of that application which fell to be considered by the Supreme Court.

34. The Supreme Court held that, in the context of a decision to which Section 82(2)(h) applied, the proposed destination country was not part of the decision. Thus, the position vis-à-vis the Palestinian Territories was of no relevance. It was noted that MS had argued that Regulation 5(1) of the 2003 Regulations supported the proposition that the proposed destination was part of the decision. This argument was rejected. The requirement to state the place to which it was proposed to remove the person was there to give a focus for any human rights claims. The purpose of the Regulation was to make the right of appeal given by Section 84(1)(c) and (g) effective. Thus, a tribunal would be able to identify whether the conditions in a proposed destination were such that removal to that country would breach Convention rights. The concluding sentence of the judgment in *MS (Palestinian Territories)* reads as follows:

> *There is no right of appeal against an immigration decision under section 82(2)(h) on the ground that the country or territory stated in the notice of the decision is not one that would satisfy the requirements of para 8(1)(c) of Schedule 2 to the 1971 Act.*

35. The appellant seeks to distinguish the appellant's case from the outcome in *MS.* Particular reliance is placed on a passage at [23] of the judgment:

> *…in section 84 a clear distinction is drawn between an immigration decision that a person is to be removed from the United Kingdom and removal pursuant to removal directions in consequence of an immigration decision. Section 84(1)(g)*

> *provides as a ground of appeal that removal of the appellant from the United Kingdom "in consequence of the immigration decision would" breach the Refugee Convention or be incompatible with the appellant's ECHR rights. The use of the conditional "would" is to be contrasted with the use of the present tense "is" in sections 84(1)(a)(c) and (e). Thus Parliament has provided that in a case where it is alleged that removal in consequence of a decision to remove would involve a breach of the Refugee Convention or the ECHR, there is a right of appeal against the immigration decision itself. But that is the only case where Parliament has provided a right of appeal against a decision to remove by reference to the potential illegality of a consequent removal. This is a strong indication that the proposing of a destination country is not an integral part of an immigration decision under section 82(2)(h).*

The appellant's argument is that this passage demonstrates that the destination country will be part of the decision where the ground of appeal relied on is Section 84(1)(g). Thus, if the proposed destination country does not fulfil the requirement in Schedule 3 of the 1971 Act, the decision will be unlawful. In my view this argument is misconceived.

36. First, the passage on which the appellant relies does no more than identify that there is a right of appeal against a decision to remove which would involve a breach of Convention rights. It does not suggest that supposed unlawfulness by reference to Schedule 2 or Schedule 3 of the 1971 Act provides a basis for an appeal. Second, the passage at [23] does not stand alone. The judgment went on at [24] to [27] to set out four further reasons why the destination country was not part of the decision, each of which is relevant to a decision of the kind made in the appellant's case. At [24] the court noted that all of the decisions referred to in Section 82 are decisions that a person is to be removed *"from the United Kingdom".* This indicated that a destination was not part of the decision. The same words appear in Section 84(1)(g). At [25] the court considered the proposition that the immigration decision in question had to comply with the requirements of paragraph 8 of Schedule 2 of the 1971 Act i.e. the provisions equivalent to those set out at paragraph 1 of Schedule 3 of the 1971 Act. That proposition was unequivocally rejected. At [26] the court concluded that "*Parliament is unlikely to have intended that the proposing of a destination country should be an integral part of any immigration decision".* The appellant's position is clearer than that of MS since the decision in the appellant's case was merely that he was a person to whom Section 32(5) of the 2007 Act applied. The deportation order made in his case made no reference to removal directions. Finally, at [27] the court noted that under the statutory appeal scheme in the 2002 Act, there is no right of appeal against removal directions. That had an inevitable consequence. The destination country could not be part of the decision against which the appeal lay.

37. The appellant relies on the terms of paragraph 1(1) of Schedule 3 of the 1971 Act. They do not take the appellant anywhere any more than MS was able to pray in aid the equivalent provisions in Schedule 2 of the 1971 Act. On behalf of the appellant it is said that MS could have relied on those provisions had he relied on the ground of appeal in Section 84(1)(g) of the 2002 Act. That is not the position. That ground brings into play an appellant's Convention rights. Those rights will be considered by reference to the proposed destination country. Reliance on Section 84(1)(g) does not mean that a destination country becomes integral to the decision and that the

destination country must fall within the relevant provisions of Schedule 2 or Schedule 3 of the 1971 Act. Section 84 of the 2002 Act cannot be used to expand or redefine the right of appeal pursuant to Section 82(3A) of the 2002 Act.

38. The UT in this case did consider whether removal to the destination referred to in the decision, namely Jamaica, would breach the appellant's Convention rights. Whether that was necessary given the scope of the appeal is open to question. In the event Judge Rintoul stated in terms that there was insufficient material to show any breach of Article 3 would result were the appellant to be returned to Jamaica. Although the judge did not refer specifically to the interference with the appellant's Article 8 rights in the event of removal to Jamaica, he found that there were no "very compelling circumstances" i.e. such as would be required to conclude that the public interest in deportation was outweighed by the appellant's Article 8 rights: see 117C(6) of the 2002 Act and paragraph 398(c) of the Immigration Rules. No material has been provided by the appellant at any stage which might indicate that removal from the UK would be a disproportionate interference with his private and family life. Hence no doubt his abandonment of that aspect of his appeal.

Ground 2

39. The appellant's argument on this ground depends upon the proposition that Judge Rintoul's findings recited at [10] and [11] are determinative of his position. The submission is that they must mean that the SSHD's decision was not in accordance with the law because deportation could not be enforced. Further, the decision was unlawful because it involved a disproportionate interference with the appellant's Convention rights as enjoyed in the UK. It is said that, when Judge Rintoul went on to say that the prospects for deportation were "remote", that was a clear error of law given the findings set out earlier in his decision.

40. I do not accept the premise of the appellant's argument on this ground. Judge Rintoul's analysis of the appellant's evidence led him to conclude that the appellant was unreliable and had failed to make full disclosure of his true antecedents. What the judge then said about the prospects for removal must be read in that context. Where a person has suppressed information or lied about their background, it is not unreasonable to assume that the position could change. So it was the judge was entitled to use the term "remote" in relation to the prospect of deportation being effected.

41. Judge Rintoul did not err when he considered *RA (Iraq)*. The grounds of appeal in that case were described as "discursive" and the court summarised them. The first ground was summarised as follows: the UT had erred by failing to identify the public interest in criminalising someone who was in "limbo". Whilst this is not put in terms of *"not in accordance with the law"* the issue in reality is the same. It follows that the judge was correct to consider the analysis as set out in *RA (Iraq)*. I also reject the proposition that factual differences between the appellant's case and *RA (Iraq)* meant that consideration of that case was wrong. *RA (Iraq)* provides detailed guidance on the correct approach in what are termed "limbo" cases. The guidance was and is relevant to the appellant's case.

42. The first step is as set out at [65] of *RA (Iraq)*:

> *In order to raise a 'limbo' argument in the first place, i.e. whether the public interest justifies making or sustaining a decision to deport or issuing a deportation order itself, the following must be demonstrated: (i) first, it must be apparent that the appellant is not capable of being actually deported immediately, or in the foreseeable future; (ii) second, it must be apparent that there are no further or remaining steps that can currently be taken in the foreseeable future to facilitate his deportation; and (iii) third, there must be no reason for anticipating change in the situation and, thus, in practical terms, the prospects of removal are remote.*

Judge Rintoul found that the appellant satisfied that first step. I agree that he was right to do so.

43. The second step involves an analysis of the facts of the particular case. The relevant criteria as set out at [67] of *RA (Iraq)* include:

> *(i) an assessment of the time already spent by the individual in the UK, his status, immigration history and family circumstances; (ii) the nature and seriousness of any offences of which the individual has been convicted; (iii) an assessment of the time elapsed since the decision or order to deport; (iv) an assessment of the prospects of deportation ever being achieved (see above); and (v) whether the impossibility of achieving deportation is due in part to the conduct of the individual, e.g. in not co-operating with obtaining documentation.*

Judge Rintoul found that the appellant's circumstances in the time he had spent in the UK gave rise to no family life and no significant private life, that the offences committed by him were very serious, that the prospects of effecting deportation were remote and that the appellant had not co-operated with the process. There can be no challenge to those findings.

44. The final step involves a balancing exercise between the public interest in deporting those who should not be in the UK and a person's Convention rights. Judge Rintoul concluded that the public interest in removing the appellant was not extinguished by the lack of any current prospect of removal. In my view he was entitled to come to that conclusion. I have already rejected the appellant's argument that the judge's factual findings meant that removal was impossible. Given the circumstances in which the problems with deporting the appellant arose, the judge was entitled to rely on the citation at [72] of *RA (Iraq)* of the judgment of Simler J in *Hamzeh* [2013] EWHC (Admin) 4113 at [50]:

> *"There is no policy or practice whereby persons whose removal from the UK cannot be enforced, should, for this reason alone, be granted leave to remain. 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. Moreover, in the same way as immigration law and policy may change, so too the practical situation in relation to enforcing removal may change or fluctuate over time so that any current difficulties cannot be regarded as perpetual."*

As the judge said, the appellant was and is the author of his own misfortune. No doubt there will be a case where, to adopt what was said in a different context by Baroness Hale in *R (Khadir) v SSHD* [2006] 1 AC 207, "*there may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here*…" No such irrationality can arise on the facts of the appellant's case.

Ground 3

45. The reliance on what was said in *Kaitey* is misconceived. First, a reference to a concession in relation to a ground of appeal in relation to which the appellant did not have permission is not a proper basis for a challenge to the decision of the UT in this case. Second, this appeal is against the decision that Section 32(5) of the 2007 Act applied to the appellant. Whether the appellant could be maintained on bail was of no relevance to that decision. The UT was not exercising a judicial review jurisdiction. Judge Rintoul was considering a statutory appeal. Third, on the finding of Judge Rintoul that the prospects of removal were "remote", the appellant's case is factually distinguishable from the hypothetical position to which the concession referred.

46. The appellant's broader submission is that the deportation order was being used for an improper purpose, namely to regulate his presence in the UK. He criticises the conclusion of Judge Rintoul as set out at [16] above. In my view this criticism is ill-founded. The judge said in terms that the deportation order was not being used to regulate the appellant. The limitations on the appellant's activities within the UK flowed from the operation of the usual immigration rules as applied to someone with no leave to be in the country.

47. In any event the conclusion as set out at [16] above reflected the statutory purpose of the 2007 Act in relation to foreign criminals. That purpose does not involve regulation of the individual whilst in the UK.

Conclusion

48. It follows that I consider that none of the grounds relied on by the appellant is sufficient to impugn the decision of the UT in his case. I would dismiss his appeal.

Postscript

49. Following the circulation of the judgments in draft for the purpose of the correction of typographical and other obvious errors, the court received from Mr Goodman, counsel for the appellant, a document headed "Note on Corrections to Draft Judgment on behalf of the Appellant". The document set out what were described as "observations on the accuracy of the record of the Appellant's argument". Two points were raised.

50. First, it was said that paragraph 24 of the lead judgment implied that the point based on paragraph 1(1) to Schedule 3 to the 1971 Act may not have been argued before the Upper Tribunal. The court was asked to review that implication. We declined to do so since, as was apparent from the terms of paragraph 24 of the judgment, all that the court said was that what was argued before the Upper Tribunal was far from clear.

That was and is the court's view. The court nonetheless went on to consider the argument for the purposes of the appeal.

51. Second, it was submitted that the judgment failed properly to reflect the Appellant's argument in relation to the ground under Section 84(1)(g) of the 2002 Act. Issue was taken with what is said at paragraphs 35 and 37 of the judgment. Nothing was said in the note about the accuracy of paragraph 28 of the judgment which is where the Appellant's argument on this ground is summarised. In paragraph 35, where further reference is made to the Appellant's argument, issue is taken with the words "the destination country will be part of the decision where the ground of appeal relied on is Section 84(1)(g)" (our emphasis). Mr Goodman complained that this was not his argument. Rather, the submission was that the ground of appeal was concerned to inquire into removal in consequence of the decision. In relation to paragraph 37 Mr Goodman submitted that the court erred in suggesting that the Appellant's argument involved the proposition that the destination country was an integral part of the decision. Rather, the argument was that removal in consequence of the decision would breach the Appellant's Convention rights.

52. We set out these arguments since we were invited to consider them. We are satisfied that we have reflected the core of the Appellant's argument faithfully. Mr Goodman sought to make the destination country a critical factor. To say that the proposition that the destination country was an integral part of the decision simply expressed his argument in different language. The crucial passage in paragraph 37 is the final sentence thereof.

Lord Justice Warby:

53. I agree.

Lord Justice Moylan:

54. I also agree.