



Neutral Citation Number: [2019] EWCA Civ 850

Case No: C5/2017/0844

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM) CHAMBER
UPPER TRIBUNAL JUDGE ALLEN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2019

Before :

LORD JUSTICE IRWIN
LORD JUSTICE HADDON-CAVE
and
SIR JACK BEATSON

Between :

RA (IRAQ)

Appellant

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

Mr David Chirico (instructed by Wilson Solicitors LLP) for the Appellant
Ms Claire van Overdijk (instructed by Government Legal Department) for the Respondent

Hearing date : 14th March 2019

Judgment Approved by the court
for handing down
(subject to editorial corrections)

LORD JUSTICE HADDON-CAVE:

Introduction

1. This case has procedural history stretching back to 2009. It has been before the Tribunals four times, in 2009 (twice), 2013 and 2016, and before the Court of Appeal twice, in 2011 and 2015. This is the third appeal to the Court of Appeal and concerns the Appellant's so-called 'limbo' status, that is to say a continuing *stasis*, whereby a person is prevented by continuing circumstance from being deported, but also prevented by lack of leave to remain from working, receiving normal State benefits, renting or buying property, or accessing the full range of NHS benefits, which together are said to constitute a disproportionate interference with family or private life under Article 8 of the Convention.
2. The Appellant appeals against the determination of Upper Tribunal Judge Allen dated 22nd November 2016 in which he dismissed the Appellant's appeal against the Respondent ("SSHD")'s decision, eight years earlier, on 9th October 2008 to deport him.

The Facts

3. The Appellant (now aged 31) was born in 1987 in Kuwait but is a national of Iraq. He arrived in the UK in November 2003 with no Iraqi passport or other documentation. He was granted discretionary leave until his 18th birthday, following refusal of his asylum claim.
4. On 10th April 2007, the Appellant was sentenced to three years in a young offenders' institution for robbery. The victim was an elderly woman of 81 who was targeted because she was carrying £18,000 cash in her bag having visited a currency exchange. The Appellant used or threatened force to steal the money from the victim who fell to the ground knocking out four of her teeth. The Appellant was caught because members of the public intervened.
5. On 9th October 2008, the SSHD made a decision to deport the Appellant on grounds that his continued presence was not conducive to the public good and refused his outstanding application for further leave to remain.
6. On 3rd March 2009, the Appellant's appeal against deportation was dismissed by the Asylum and Immigration Tribunal ("AIT") (Designated Immigration Judge Hanson and Mr S. S. Percy JP).
7. On 29th September 2009, the Appellant's application for reconsideration of the AIT's determination of 3rd March 2009 was heard by the AIT (before Senior Immigration Judge Waumsley and Mrs J Holt). However, regrettably it was not until ten months later, on 15th July 2010, that the AIT published its decision dismissing the Appellant's appeal.
8. On 21st March 2011, the Court of Appeal allowed an appeal against the AIT decision of 15th July 2010 and remitted it to the UT for further consideration. It was common ground that the delay in the promulgation of the AIT's determination meant the Appellant's case would need to be reconsidered on Article 8 grounds, and that the issues relating to general risk on return to Iraq should also be considered.

9. On 1st March 2013, the matter came before the Upper Tribunal (“UT”) (UT Judge Eshun). The Appellant raised three grounds. First, asylum and Article 3 ECHR. Second, Article 8 ECHR. Third, that because the Appellant was undocumented and could not be returned to Iraq, termination of his leave to remain had the effect of leaving him in a permanent state of ‘limbo’ (see above).
10. On 1st May 2013, the appeal was dismissed by the UT but UT Judge Eshun made no finding on the third ground, the ‘limbo’ ground.
11. On or about 20th May 2013, the Appellant filed a notice of appeal raising three grounds of appeal, the second ground of which was that UT Judge Eshun had failed to consider the ‘limbo’ ground. The Appellant submitted that, whilst s.84(1)(g) of the Nationality, Immigration and Asylum Act 2002 Act (“the 2002 Act”) required the UT to consider the effect of *removal* from the UK following an immigration decision, s. 84(1)(c) of the 2002 Act required the UT to consider the legality of the *decision* to make a deportation order.
12. On 13th December 2013, UT Judge Eshun, recognising her omission to deal with the point, granted permission to appeal to the Court of Appeal on the ‘limbo’ ground. Permission on all other grounds was refused.
13. In 2014, the Appellant was convicted of an offence of actual bodily harm and malicious communication and received a sentence of 20 weeks’ imprisonment.
14. On 21st December 2015, the Court of Appeal approved a consent order remitting the matter to the UT “for determination of the appeal, limited to the ground of appeal under section 84(1)(c) of the 2000 Act, the “limbo” issue (ground 2)” on the basis that the UT failed to consider this in its 1st May 2013 determination.
15. On 22nd November 2016, the UT (UT Judge Allen) dismissed the Appellant’s ‘limbo’ claim on human rights grounds. It is this decision that is appealed against.
16. On 3rd February 2017, the UT (UT Judge Allen) refused the Appellant’s application to appeal to the Court of Appeal.
17. On 27th October 2017, the Appellant filed an application entitled “Application to revoke a deportation order/ Further protection-based submissions” following the promulgation of the Court of Appeal’s judgment in *AA (Iraq) v SSHD* [2016] EWCA Civ 944 in which the Court amended the previous country guidance on Iraq contained in *AA (Iraq) v SSHD* [2015] UKUT 544 (IAC).
18. On 22nd February 2018, permission to appeal was granted by the Court of Appeal.
19. The Appellant now has two young children born in the UK, who live with their mother but whom he sees. The genuineness and closeness of his relationship with the biological children is not disputed. He has a permanent job as a hotel manager and provides £600 per month in financial support for his children.

Decision appealed

20. The single ground before UT Judge Allen was the ‘limbo’ ground. This arose under s.84(1)(c) of the 2002 Act (see below). The ‘limbo’ ground was characterised by Mr Chirico in his skeleton before UT Judge Allen in his decision as an issue “...as to the effect upon the appellant’s Article 8 rights and the state of limbo in which the

respondent's decision would leave him, and in particular the impact of cancellation of the leave to remain which he had had for some twelve years" ([4]).

21. UT Judge Allen found that the Appellant had no Iraqi passport or other documentation and recorded that it was accepted by the SSHD that "it appeared to be the case that he was 'unreturnable' to Iraq" in line with the country guidance in *AA (Iraq) v SSHD (supra)* ([5]).
22. UT Judge Allen noted that the Appellant did not seek to argue that the 2008 decision was not in accordance with the law and accepted that the SSHD had done what was required of her to make the deportation order (UT Decision, [14]). UT Judge Allen noted that the Appellant also accepted that questions arising in relation to the effect on him and his then family of removal from the UK were finally determined by the UT in its determination promulgated on 1st May 2013 ([15]).
23. In the light of this, UT Judge Allen said (at [15]):

"[15] ... It is necessary to proceed on the basis that the appellant's removal from the United Kingdom would not breach his family's protected rights. The issue is then whether the decision to make a deportation order itself breached the appellant's protected rights in the circumstances where he can neither be removed or make a lawful voluntary departure from the United Kingdom or where as Mr Chirico puts it, the only foreseeable effect of a deportation order would be to cancel his extant leave to remain."

24. After considering the particular facts in this case and the authorities, including the *dicta* of Lady Hale in *R (Khadir) v SSHD* (see below), UT Judge Allen concluded as follows:

"[32] Bringing all these matters together, it is necessary to decide on the particular facts of this case, bearing in mind the best interests of the children, where the appropriate balance in the proportionality assessment lies. Given that the appellant provides £600 a month for their welfare and that they see him regularly, I accept that it is in their best interests that he remains in the United Kingdom and that is a primary but not a paramount factor. It is not reasonable to expect them to move to Iraq, and the appellant is in any event currently not removable to Iraq.

[33] In his favour also are the fact of the employment that he now has and the fact that he seems to be doing well in that steady employment and the potential impact on his mental health going back to the 2009 medical report. In addition there is the fact that he has been in this country for a long time and that were it not for the deportation order he would be entitled to stay indefinitely and thus would have had lawful leave throughout. There is also the fact that at least at present it is the case that he is not returnable to Iraq.

[34] On the other hand there is the offence that he committed in 2007 and also the more recent offence. It is not, in my view, unduly speculative to consider that there may come a time when he can be returned to Iraq. I accept that a failure to grant status may amount to an interference with private life, but in my view the circumstances in this case are not such as to show that despite the factors that militate in his favour this is a case where the public interest is outweighed by the particular circumstances that favour the appellant. Accordingly the appeal is dismissed.”

25. The ‘Notice of Decision’ recorded: “This appeal is dismissed on human rights grounds”.

Grounds of Appeal

26. The Appellant’s somewhat discursive grounds of appeal can be summarised as follows:

- (1) *Ground 1:* The UT materially erred in failing to identify the public interest at play in the particular circumstances of this case where the issue to be considered does not relate to the consequences of removal from the UK but to the criminalisation of his/her continuing presence in the UK while they are in ‘limbo’.
- (2) *Ground 2:* The UT failed to direct itself to the question of whether it was in the children’s best interests for their father’s permission to remain in the UK to remain in place or be cancelled given his ‘limbo’ status.

Submissions

Appellant’s case

27. At the invitation of the court, Mr Chirico summarised the Appellant’s case in the following written propositions.

- (1) This appeal concerns the approach to the Article 8 balancing exercise when (i) a person (“P”)’s removal is held to be lawful, but (ii) there are practical obstacles to its enforcement.
- (2) The interference which must then be justified under Article 8(2), is the cumulative impact of refusing to grant leave to remain to P, where P has no option but to remain in the UK.
- (3) The interference thus includes (i) criminalisation of P’s presence in the UK (see e.g. s.24 of Immigration Act 1971); and (ii) effects on P and P’s family of P’s inability to participate fully in society: prohibitions on employment, obtaining accommodation, a bank account, a driving licence or secondary healthcare, and so on. This interference requires weighty justification.
- (4) In order to justify the interference, the SSHD must identify (i) the legitimate aim which is pursued by requiring a person to remain in the UK without leave to remain; and (ii) the rational connection between that aim and the interference which it purports to justify. It cannot be assumed without more

that a legitimate aim which is rationally served by removing P from the UK is also rationally served by requiring P to live without status.

- (5) Nor is the impact of P's removal upon children's best interests simply a 'larger' impact which contains the 'smaller' impact of requiring P to remain in the UK without status for an indeterminate period. For example, removal gives rise to a potentially permanent state of affairs to which a family may adapt.
- (6) The interference will be disproportionate where there is insufficient prospect of removal within a reasonable period, having regard to all the circumstances (including any earlier period of leave or limbo). This is a test analogous to the third *Hardial Singh* principle.
- (7) 'All of the circumstances' includes (a) the precise nature of the family and private life established; (b) and the effects of interference on P and P's family, which must be considered on a case-by-case basis (*SSHD v Huang* [2007] UKHL 11); (c) the obstacles to removal.
- (8) If there is no more than a fanciful prospect of removal at all, the result will inevitably be that some form of leave should be granted (because the Acts do not provide for indefinite period without leave to remain). Most cases will, however, be more nuanced.
- (9) The present UT erred by (i) failing to identify the relevant public interest to weigh against this particular interference; and (ii) failing to distinguish between the two different types of interference in the best interests of the Appellant's children.
- (10) Finally, using the word 'limbo' may create more problems than help. It is not a term of art. It refers to a subjective experience of uncertainty about the future. Depending on circumstances, that subjective experience may form a part of the interference to be justified, but it is not determinative of the question of justification.

Respondent's case

28. At the invitation of the court, Ms Claire van Overdijk summarised the SSHD's case in the following written propositions.

- (1) This appeal is limited to UT Judge Allen's consideration of whether the SSHD's decision to make a deportation order against the Appellant (if made) would breach the Appellant's and his children's Article 8 rights in circumstances where his leave to remain would be cancelled and he cannot be removed from the UK. As the Appellant accepted before the UT that consideration of his and his family's Article 3 and 8 rights on removal from the UK were not within the scope of the appeal then, they should not feature as a consideration in the appeal now.
- (2) The Appellant presently has leave to remain in the UK pursuant to Section 3C of the Immigration Act 1971. As this appeal is premised on the cessation of leave to remain in the event that the appeal is concluded, it is prematurely advanced. The Appellant is not in 'limbo' now and the question of whether he

might be in ‘limbo’ in the future is entirely dependent on an assessment of future facts.

- (3) UT Judge Allen’s determination should be upheld on additional grounds, namely that the Appellant is presently removable to Iraq as he can be returned on a *laissez-passer*, which can be issued and used once there are no obstacles to removal. The existence of any future obstacles to removal will be considered by the SSHD at the appropriate time and such decision is dependent on a future assessment of the facts and outside the scope of this appeal.
- (4) In relation to Ground 1, UT Judge Allen did not err in law because it is plain from [9] and [10] of the determination that he had in mind the children’s best interests in the ‘limbo’ context, as opposed to the “removal” context. Further, at §32 UT Judge Allen held that it is in the children’s best interests for A to remain in the UK. A natural corollary of this finding (particularly with regard to §§9 and 10) is that it is not in the children’s best interests for A to remain in the UK in ‘limbo’. As the UT has found that it would not be a breach of the Appellant and his family’s protected rights to be removed from the UK, it cannot logically be a disproportionate interference with their rights for the Appellant to be able to remain in the UK and to maintain a family life with them.
- (5) In relation to Ground 2, the UT Judge did not err in law because it is plain from [21] and [34] that he directly addressed the public interest in the context of the children’s best interests and the ‘limbo’ argument. At paragraphs [32]-[34] the Judge properly carried out a balancing exercise of factors in A’s favour (his relationship with the children, employment, length of time in the UK, him being non-returnable to Iraq, all of which are relevant to the ‘limbo’ issue) against the public interest, which was considered to outweigh A’s particular circumstances.

29. The SSHD also made an application to rely upon new evidence in relation to the prospects of returning the Appellant to Iraq which I deal with later in this judgment.

The Legislative Framework

Sections 82 and 84 of the 2002 Act

30. At the time of the SSHD’s decision to deport the Appellant, s.82 of the 2002 Act gave the right to appeal against an immigration decision, which included the decision to make a deportation order or the decision to remove an individual with no leave to remain in the UK.
31. At the material time, s.84 of the 2002 Act set out the bases on which an appeal against an immigration decision could be brought as follows:

“84 Grounds of appeal

- (1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

- a) that the decision is not in accordance with immigration rules;
 - b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities) or Article 20A of the Race Relations (Northern Ireland) Order 1997;
 - 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;
 - d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
 - e) that the decision is otherwise not in accordance with the law;
 - f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
 - 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.”
32. Sections 84(1)(c) and (g) are relevant to this case. Section 84(1)(c) required the Tribunal to consider whether the decision breaches an individual's human rights. Section 84(1)(g) on the other hand required the Tribunal to consider the individual's human rights only in the context of their removal as a consequence of an immigration decision.

Authorities

Domestic authorities

33. There are eight domestic authorities which feature, or touch upon, the so-called 'limbo' ground. It is useful to set them out in detail.

(1) *R (Khadir) v SSHD* [2005] UKHL 39

34. First, in *R (Khadir) v SSHD* [2005] UKHL 39; [2006] 1 AC 207, the House of Lords considered the case of a person who had no lawful basis for remaining in the UK, but could not be removed to the Kurdish Autonomous Area in Northern Iraq ("KAA"). The claimant had entered the UK clandestinely in November 2000, claimed asylum and was granted Temporary Admission ("TA"). His asylum claim was finally rejected by the SSHD and the Independent Asylum Adjudicator on 9th August 2001. From that date onwards, the SSHD was said to have a continuing inability "to find a safe means of enforcing his return" to the KAA and, meanwhile, the claimant

remained on TA. Finding a safe route for Iraqi Kurds to return to the KAA “was still being investigated” (see Kennedy LJ in the Court of Appeal at [2003] EWCA Civ 475 at [11]). The decision under review was that of 3rd May 2002 to refuse to grant Exceptional Leave to Enter (“ELE”). The period during which it was claimed the claimant had been in ‘limbo’ was 8 months 24 days (*i.e.* from final refusal of asylum claim to refusal of ELE).

35. The issue for the court was whether the claimant was liable to detention “pending... removal” pursuant to paragraph 16 of Schedule 2 of the Immigration Act 1971. Lord Brown of Eaton-under-Heywood, giving the leading judgment with which his colleagues agreed, held at [32]: “So long as the Secretary of State remains intent on removal and there was some prospect of achieving removal, paragraph 16 authorises detention meanwhile”. In a short concurring judgment, Lady Hale added the observation at [4]:

“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, but that is another question.”

(2) R v SSHD [2006] EWCA Civ 719

36. Second, in a permission decision in *R v SSHD* [2006] EWCA Civ 719, the court was concerned with challenges both to the lawfulness of removal to the West Bank and to the lawfulness of a failure to regularise the appellant’s status in the UK. Richards LJ (with whom Rix LJ agreed) gave permission for appeal on the basis that there had been an arguable error in approach of the Tribunal. Richards LJ recorded the submission made by Counsel for the Appellant (at [12]):

“[12] Ms Weston also submits that the consequence of the decision in this case... is to place a claimant in a precarious state of immigration limbo. His removal would be in breach of Article 8, yet he is not granted leave to enter or remain; and he is required to become an overstayer, liable to detention and removal. ... There are restrictions on his ability to seek or obtain employment, travel outside this country and pursue his normal, private and family life. A prolonged failure to regularise an immigrant's precarious status and the negative impact of that may itself amount to a breach of Article 8: see the recent decision of the European Court of Human Rights in *Affaire Aristimuno Mendizabal v France* [see below], though it is right to note that the delay in that case was very long indeed.”

(3) R (AR and others) v SSHD [2009] EWCA Civ 1310

37. Third, in *R (AR and others) v SSHD* [2009] EWCA Civ 1310, the Court of Appeal was concerned with a Palestinian who had claimed asylum and been placed on TA, but who had not been granted leave to remain because the SSHD considered that there was still a real prospect of removing him. The claimant entered the UK and claimed

asylum in 2001 on the basis of fear of persecution in the West Bank. His appeal was ultimately dismissed by the Immigration and Asylum Tribunal (“IAT”) on 13th July 2005 on the basis that his asylum claim was not credible. His Article 8 ground was dismissed on the grounds that he could not presently be removed from the UK to the West Bank because of entry clearance problems: there was said to be “no prospect of Palestinians from the West Bank being removed there from the United Kingdom in the foreseeable future” ([4]).

38. The Court of Appeal granted permission to appeal in May 2006 on the grounds of a “prolonged failure to regularise an immigrant’s precarious status and the negative impact of that”. The period during which it was claimed the claimant had been in ‘limbo’ was 9 months 19 days (*i.e.* from final determination of asylum claim to the grant of permission by Court of Appeal).
39. The issue was again whether the claimant was liable to detention “pending... removal” and whether the SSHD had the power to detain or grant temporary admission as an alternative. The question turned on whether there could be said to be “practical difficulties...impeding or delaying the making of arrangements for ... removal” under s.67 of the Nationality, Immigration and Asylum Act 2002. Sedley LJ referred to Lady Hale’s dicta in *Khadir* in the following passage in his judgment (at [27]-[28]):

“[27] If we were construing s.67 afresh, I would have much sympathy with a construction which gave value to the verbs “impede” and “delay”, neither of which suggests a more than temporary difficulty. But in my judgment the decision in *Khadir* puts this beyond our reach. It compels us to treat s.67(2)(b) as embracing all circumstances in which there remains, in Lord Brown’s words, some prospect of removal, ending only when there is “simply no possibility” of it. The corollary, as Baroness Hale put in a short concurring speech, is that the legal situation may change only “when the prospects of the person ever being able safely to return ... 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” (one notes the echo of Art. 8 jurisprudence).

[28] It is, however, not inconceivable that in two of the three cases before us this will turn out to be the case. We have not yet heard argument on the facts. Mr Supperstone has realistically accepted that in the case of AR a tipping point has not been reached. He reserves his position in the other two. In one of these cases, that of FW, the outcome of the interview with the embassy may prove decisive one way or the other. If not, it will be for counsel to decide whether it is appropriate to restore her appeal or that of MS in order to argue that the facts are such as to carry the case outside the twin powers of detention and temporary admission and make it incumbent on the Home Secretary (as Jason Beer on his behalf accepts would

follow) to give conscientious consideration, if asked, to a grant of discretionary leave to remain.”

40. Toulson LJ said in the context of Article 8 rights (at [45]):

“[45] I would not exclude the possibility that there might be a case in which the combination of a decision of the Secretary of State to grant temporary admission on the usual conditions and other statutory or bureaucratic provisions might result in a breach of Art 8; but I am not persuaded that such a stage has arisen in any of these cases...”

(4) R (Abdullah) v SSHD [2013] EWCA Civ 42

41. Fourth, in *R (Abdullah) v SSHD* [2013] EWCA Civ 42, the appellant arrived in the United Kingdom clandestinely in 2005 and claimed asylum. He claimed to be stateless by reason of his Palestinian origin which he said rendered his proposed return to Saudi Arabia impossible; and, given the conditions in which he would be required to live in the United Kingdom (*i.e.* without benefits or the right to work), he claimed that Article 8 was engaged by the prospect of his remaining in ‘limbo’ in the UK. His asylum claim was finally determined in May 2011, following which he appealed to the Court of Appeal on Article 8 ‘limbo’ grounds. The period during which it was claimed the claimant had been in ‘limbo’ was 21 months (*i.e.* from date of final refusal of asylum claim to date of appeal before the Court of Appeal. The primary obstacle to removal was found to be the claimant’s own non-compliance ([19]-[20] and [28]-[29]).

42. After referring to Lady Hale’s *dicta* in *Khadir*, Sir Stanley Burnton (with whom Beatson and Kitchen LJJ agreed) dismissed the appeal and said (at [21]-[22]):

“[21] However, the Senior Immigration Judge expressly envisaged that there was a prospect of further enquiries being made and further evidence being obtained that would bear upon the Secretary of State’s decision. Indeed, as I have already mentioned, it was only pending such enquiries that [Counsel for the Appellant] submitted in the Upper Tribunal that leave to remain should be given.

[22] I would dismiss this appeal on the ground that the Immigration Judge was entitled to conclude that at the date of his decision Article 8 did not require the Secretary of State to grant the Appellant leave to remain while seeking to secure his return to Saudi Arabia. If Article 8 was engaged, there could be only one answer to the balancing exercise required by Article 8.2, namely that the Secretary of State’s refusal to grant leave to remain was justified by the need to maintain a system of sensible immigration control.”

43. Beatson LJ added the following observations (at [26]-[29]):

- “[26] I add two observations. The first concerns the submissions of Mr Jacobs based on the statement of Baroness Hale in *Khadir's* case, and Sedley and Toulson LJ in *MS and others* [2009] EWCA Civ 1310 at [2], [27] and [45], on the so-called “limbo” point. It also concerns his reliance on analogical support from the decision of Blake J in *Tekle's* case [2008] EWHC 3064 (Admin) that denying the right to work to applicants for asylum whose applications remain undecided for substantial periods breaches their rights under Article 8.
- [27] Mr Jacobs argued that that the appellant's statelessness meant that, at the time of the Upper Tribunal's decision, there was no prospect of removing him and that consequently Article 8 was engaged and entitled him to limited leave. He maintained that Article 8 gave the appellant the right to have a private life “somewhere”, which, because, as at the date of the decision there was no prospect of removing him to Saudi Arabia, had to be this country. He argued that leaving the appellant without status and consequently with limited access to healthcare, no right to work and no right to social security benefits deprived him of the ability to have a private life and left him in a sort of “limbo”.
- [28] There may at some stage come a time when the “limbo” argument becomes a live question, but I consider it simply unarguable that it had done so at the time of the Tribunal's decision in this case. Given the limited information provided by the Appellant and the inconsistencies in the accounts he has given, the Secretary of State was entitled to further time to make inquiries.
- [29] My second observation concerns the length of time for such inquiries before the “limbo” argument could conceivably come into play. I consider that, in this context, some assistance can be gained from the decisions concerning the legality of the detention of persons the Secretary of State seeks to deport while efforts are made to establish their nationality or to obtain the requisite documentation of their nationality. One of the factors which has been held to affect the period of detention which is lawful is whether the detained person has co-operated with attempts to obtain documentation: see, for example, *R (MH) v SSHD* [2010] EWCA Civ 1112 at [44] and [68(iii)], per Richards LJ. Similarly, the time after which the “limbo” argument can come into play may depend on the attitude of the individual concerned to efforts to

establish his or her nationality or to obtain documentation.”

(5) *R (Hamzeh and others) v SSHD* [2013] EWHC 4113 (Admin); [2014] EWCA Civ 956; renamed *SH (Iran) and others v SSHD* [2014] EWCA Civ 1469 (CA)

44. Fifth, in *R (Hamzeh and others) v SSHD* [2013] EWHC 4113 (Admin) (Simler J), [2014] EWCA Civ 956 (permission hearing), renamed *SH (Iran) and others v SSHD* [2014] EWCA Civ 1469 (Court of Appeal), the court was concerned with 6 claimants with varying immigration histories who had all arrived illegally in UK between 2003 and 2006. In each case, save for SJ, an initial asylum claim had been finally determined between 2004 and 2007; and further claims had been determined between 2010 and 2011. In SJ’s case, he had been granted leave to remain as a minor, then had sought further leave to remain, and had become appeal rights exhausted in August 2011. Subsequently, in 2012, claim forms in all 6 cases were issued challenging either a refusal to grant leave to remain, or a delay in making a decision. These were all ‘legacy’ cases.

45. Simler J considered *inter alia* the following question: “Has the Defendant’s failure to remove (or to take steps to re-document etc) the claimants led to them being in a state of ‘limbo’ that constitutes a disproportionate interference with their rights to family or private life under Article 8 of the Convention?”. She held:

“[74] Mr Turner submits that the consequence of the fact that the Claimants are un-documented Iranians and irremovable is that the failure to grant them leave will leave them in limbo, and that this amounts to a breach of their article 8 rights. In *Khadir v SSHD* [2005] UKHL 39 at paragraph 4, Lady Hale observed that 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 that would enable him to make a proper contribution to the community in the UK. The short answer to this point is that no positive evidence has yet been adduced by the Claimants (on whom the burden must rest) to establish that voluntary departure is so remote as to be practically impossible.

[75] Mr Turner also relies on the decision of the European Court of Human Rights in *Kaftailova v. Latvia* (application 59643/00), a case that concerned an applicant with very long and lawful residence in Latvia (and no evidence that she had any other nationality), who became stateless upon the dissolution of the USSR. However the facts of this case are so different from the present cases as to make it irrelevant for my purposes.”

46. After noting that the ‘limbo’ argument was considered and rejected in *R (Abdullah) v SSHD* (supra), Simler J said (at [77]) that very similar considerations applied in this

case and the SSHD “continues to hold the rational view that voluntary departure is still possible in each of these cases”.

47. In the permission hearing, *R (Hamzeh and others) v SSHD* [2014] EWCA Civ 956, Underhill LJ (with whom Sir Stanley Burnton agreed) observed (at [12]):

“12. Of course, as [Counsel for SSHD] acknowledged, it is possible to conceive of cases where the Secretary of State may be obliged, most obviously by reference to article 8 , to grant leave to remain to migrants who have no legal right under the Rules but who it is established can “never” (whatever that means in this context) be removed: that simply reflects the observations of Lady Hale in *Khadir v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207 at para. 4 (p. 211) (see also *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42). But that has nothing to do with a policy of the kind alleged. Nor in any event was this conceivably a case of that kind. The Judge found, at para. 77:

“The Defendant continues to hold the rational view that voluntary departure is still possible in each of these cases and accordingly, any state of limbo that they find themselves in is self-induced.”

That finding has not been, and could not realistically be, challenged.”

48. As Underhill LJ further observed at [12] when refusing permission on the ‘limbo’ ground, “voluntary departure is still possible... and accordingly, any state of limbo that they find themselves in is self-induced”.
49. At the substantive appeal, the Court of Appeal in (renamed) *SH (Iran) and others v SSHD (supra)* approved Simler J’s judgment. The leading judgment was given by Davis LJ (with whom Aikens and Christopher Clarke LJJ agreed) who roundly rejected the ‘limbo’ argument (at [38]):

“[38] Fourth, there is no room for argument that these applicants and this appellant are to be treated as entitled to a grant of leave to remain simply because they otherwise (so it is said) will be left in a state of indefinite limbo. True it may be that there have been times when (for example) it has not proved possible for undocumented Iranians to be removed to Iran. But it does not follow that will always remain the case; and, as found as a fact by Simler J, there at no stage has been in existence a policy that those whose removal from the United Kingdom cannot be enforced should for that reason alone be granted leave. ...In any case, to the extent that [Counsel] sought to ghost such

an argument in his oral submissions, he is precluded from doing so by refusal of permission on this ground by this court at the earlier hearing.”

(6) BM (Iran) [2015] EWCA Civ 491

50. Sixth, in *BM (Iran)* [2015] EWCA Civ 491, the claimant claimed asylum in July 2012, asserting to be 2 years younger than his true age. The FTT dismissed his appeal on the grounds of credibility in December 2012. The UT upheld the FTT’s decision in September 2013. No ‘limbo’ argument was raised before the FTT “in any shape or form”; nor was it raised before the UT by reference to Article 8; nor could it have been because Article 8(1) was not engaged on the facts of the case.
51. The period during which it was claimed the claimant had been in ‘limbo’ was 5 months (*i.e.* from the date of the FTT decision whose lawfulness was under consideration). The claimant claimed there was a state of ‘indefinite suspension’ of (involuntary) removals to Iran. The Court of Appeal upheld the SSHD’s case that, absent any block to voluntary returns, the SSHD was entitled to expect him to return voluntarily. While it is possible that his attempt to obtain documentation would fail, he had not attempted to obtain any; and the policy suspending involuntary removals was expressly “subject to the possibility of change at any time in the light of changes in international relations with Iran” ([26]).
52. Richards LJ (with whom Sharp LJ agreed) rejected the ‘limbo’ argument raised in that case with the following observations (at [19]):

“[19] [Counsel for the Claimant] appeared to accept that at the time of the FTT’s determination the appellant had not established a sufficient family life or private life in the United Kingdom to engage article 8 and that the FTT’s findings on that were correct as far as they went. He argued, however, that the state of limbo in which the appellant would otherwise be left was a relevant consideration in determining whether the appellant was entitled to leave to remain pursuant to article 8. This looks to me like an unduly ambitious attempt to establish a positive obligation under article 8 to promote the appellant’s private life in the United Kingdom. In any event, however, none of the authorities cited by [Counsel for the Claimant] supports the view that article 8 has the effect for which he contended. There might come a time when a continuing state of limbo would give rise to issues under article 8, but that is a matter for the future and is not a basis upon which the FTT could sensibly have decided in the appellant’s favour in this case.”

(7) R (Abdullah) v SSHD (22nd March 2016, JR/6393/2013)

53. Seventh, in *R (Abdullah) v SSHD* (22nd March 2016, JR/6393/2013), the claimant, an Iraqi national, entered the UK and claimed asylum in or around May 2002. He became appeal rights exhausted in July 2004. He made further asylum claims, the final one being refused in November 2008, when he was granted TA as unremovable.

The decision under challenge was one to refuse to grant leave to remain by reference to paragraph 353B of the Immigration Rules. No Article 8(1) rights had ever been established in the UK. The period during which it was claimed the claimant had been in ‘limbo’ was potentially 5 years (*i.e.* from grant of TA on grounds of ‘irremovability’ in November 2008 until adverse decision on paragraph 353B in September 2013).

54. This was another ‘legacy’ case. The UT (Phillips J) rejected a claim based on ‘limbo’ grounds and emphasised that the approach outlined by Lady Hale was focused on the future prospect of removal, not on the historical inability to remove the Claimant to Iraq (see [38]). Phillips J also expressly relied upon the finding in the *Hamzeh* litigation about the possibility of voluntary departure.

(8) *AB (Sierra Leone) v SSHD* (Beatson and Davis LJJ, unreported 7th July 2017)

55. Eighth, *AB (Sierra Leone) v SSHD* (Beatson and Davis LJJ, unreported 7th July 2017) concerned a claimant who claimed asylum in May 2003 and became appeal rights exhausted in February 2004. He challenged a decision of 19th February 2009 to refuse to revoke his deportation order. This ultimately led to a decision of the FTT on 11th November 2014, in which it dismissed his appeal. The question before the Court of Appeal was whether, on that date, the FTT had materially erred by concluding that there was a realistic prospect of AB’s being removed to Sierra Leone or leaving voluntarily. The Court of Appeal considered that ‘limbo’ had not yet become a live issue. AB had been “non-cooperative, disruptive and... inconsistent”, albeit probably on account of his poor mental health ([16]). Meanwhile, the SSHD had not ceased to make “efforts to obtain a travel document” or been “so dilatory in her efforts that it would be disproportionate or unreasonable not to give [AB] some form of leave” ([20]). Beatson LJ concluded (at [20]):

“[20] This is an appellant who arrived in this country 14 years ago. All of his claims for protection and human rights have been turned down; he has no doubt in part because of his mental health been non-cooperative and disruptive. The Secretary of State will have to consider how to proceed and dismissing this appeal does not mean that the position will not change in the nearer rather than the more distance future, but we are judging the position as it was at the date of the Upper Tribunal’s decision. Looking at the timescale there, comparing it with the timescale in *Qadir* and *Secretary of State, the Home Department*, where the individual arrived in the United Kingdom in 2000, the refusal was in January 2001, the appeal was in August 2001, the hearing in the administrative court was in July 2002. The situation is more protracted than that but the time will come when the limbo argument will have more traction. For these reasons while having some concern about the persistent reliance without real explanation as to why, on an identity card with mismatching fingerprints I would dismiss this appeal.”

56. There were two decisions of the European Court of Human Rights (“ECtHR”) to which we were referred.

(1) *HLR v France* (1998) 26 EHRR 29

57. First, *HLR v France* (1998) 26 EHRR 29 concerned a convicted Colombian drug smuggler who claimed that he would be subjected to inhuman or degrading treatment by drug cartels if returned to Colombia. The Commission found that HLR could not be removed to Colombia because of a risk of a breach of Article 3. The Court reversed the Commission’s decision on Article 3 and held that HLR could be removed to Colombia. In his separate opinion, Judge Cabral Barreto, who agreed with the Commission’s interim finding that HLR’s removal would breach his Article 3 rights, made the following observations (at pp. 41-42):

“It should be noted in this regard that an individual who has been the subject of a deportation order is de facto an illegal resident. His residence permit may therefore be withdrawn. In such circumstances, the individual in question may be prevented from undertaking any salaried employment. Furthermore, without a residence permit, the individual is not covered by the social security scheme, unlike aliens who do have a valid residence permit.

In my opinion, an alien who lives in a particular country but who has no access to the employment market and cannot benefit from the social security scheme is in a situation which fails to meet the requirements of Article 8 of the Convention.”

(2) *Aristimuno Mendizabal v France* (2010) 50 EHRR 50

58. *Aristimuno Mendizabal v France* (2010) 50 EHRR 50 concerned a claimant that had arrived in France in 1975. She described herself as a “Basque having Spanish nationality” who had married a former leader of ETA. She was granted political asylum. Due to political changes, her status as a political refugee was withdrawn in 1979. Between 1979 and 1989, she continued to live lawfully in France with a series of temporary residence permits, valid for one year each. In 1989, the claimant applied for a renewal of her residence permit and for a work permit. For the following 14 years, from 1989 to 2003, the authorities granted her only temporary receipts for her application for renewal of her EU resident permit, each only valid for 3 months. There does not appear to have been any question of her removal to Spain. She challenged the refusal to regularise her status on Article 8 grounds. The Court recognised ([70]) that the complaint arose “not out of measures to deport or expel but out of the precarious situation and uncertainty experienced by the applicant over a long period”, and described the relevant interference as ([71]) as follows:

“[71] ... [T]he precariousness of her situation and the uncertainty as to her fate had a significant moral and financial impact on her (casual and unskilled jobs, social and financial difficulties, impossibility, as a result of not having a residence permit, of renting premises and carrying on the professional activity for which she had undertaken training).”

Discussion on the authorities

59. The authorities recognise that, in principle, there can exist a state of affairs, in respect of a person who is liable to be deported, where the prospects of that person ever being able safely to return, voluntarily or compulsorily, to his country of origin are so remote, that to keep him in that state of ‘limbo’ (*i.e. stasis*) would amount to a breach of his Article 8 rights; or, in the words of Lady Hale, mean that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here.
60. Whilst the authorities acknowledge the theoretical possibility of a state of ‘limbo’ giving rise to a breach of Article 8 rights, it is striking that there is no domestic case in which such a ‘limbo’ argument has succeeded. It is also striking that the only known example of a ‘limbo’ argument being successful is in the ECtHR case of *Aristimuno Mendizabal v France* (*supra*) which involved two singular features: (a) an exceptionally lengthy period of ‘limbo’, namely 14 years; and (b) there was no question of the claimant being returned to Spain.

Guidance on ‘limbo’ argument

61. The authorities have not hitherto analysed the precise considerations relevant to a ‘limbo’ argument. It may be useful if I set out some guidance as to the correct approach.
62. In my view, there are four stages to the analysis where a ‘limbo’ argument is raised in this context.

(1) Stage 1: Distinguish between prospective ‘limbo’ and actual ‘limbo’

63. The term ‘limbo’ is a convenient shorthand for describing the position of a person whom the SSHD wishes to deport or remove, but there is a limited prospect of ever effecting his deportation or removal (for the purposes of this judgment, the terms deport and deportation should be viewed interchangeably with remove and removal). The term ‘limbo’ is loosely used to cover individuals who may be in one of two discrete states: (i) first, someone in respect of whom a decision to deport has been taken, but no deportation order has in fact been made; or (ii) second, someone in respect of whom a deportation order has already been made but who has not yet been deported. In many cases, an individual in the first state (such as this Appellant to date) may have suffered little or no day-to-day impact on his or her private or family life. Thus, for a person in the first state, the effect of possessing leave to remain under s. 3C of the Immigration Act 1971 (*i.e.* pending appeal) will have been that they are free to work and to enjoy private and family life. This may be described as *prospective* ‘limbo’. Where, however, in the second state, a deportation order has in fact been made, there will normally be no leave to remain, and the individual will be unable to work, claim benefits or receive more than basic GP care under the NHS. This may be described as *actual* ‘limbo’.
64. In approaching any claim based on ‘limbo’ grounds, therefore, it is necessary first of all to distinguish between these two different situations, namely prospective ‘limbo’ and actual ‘limbo’, when assessing the balance between (a) the public interest in making or sustaining a decision to deport and then a deportation order on the one hand, and (b) the impact on Article 8 and other Convention rights of an individual on the other. The former state of prospective ‘limbo’ is likely to weigh less heavily in

the balance in the interests of the individual than the latter state of actual ‘limbo’, but each case will depend on its own facts and the periods involved.

(2) Stage 2: Prospects of effecting deportation must be remote

65. There is a threshold question to be addressed as to the (non) ‘deportability’ of the individual. 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.
66. If those criteria are not satisfied, a challenge to an otherwise lawful decision to deport, or deportation order, on the basis of ‘limbo’ (or prospective ‘limbo’) calling into question whether the public interest in deportation should be overcome by considerations of family or private life or other Convention rights, is likely to face formidable, or potentially insuperable, obstacles.

(3) Stage 3: Fact-specific analysis

67. Where those criteria are satisfied, a court or tribunal must next engage in a fact-specific examination of the case. This will typically comprise both a retrospective and prospective analysis, including: (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.

(4) Stage 4: Balancing exercise

68. The fourth stage is the balancing exercise to be carried out between (a) the public interest in maintaining an effective system of immigration control, and in deporting those who ought not to be in the United Kingdom and (b) an individual's Article 8 and other Convention rights.
69. This will involve an assessment of (i) whether the individual remaining in a state of 'limbo' (or prospective 'limbo') will have an impact on the individual's Article 8 or other Convention rights and, if so, the extent of that impact; and (ii) how far that impact is proportionate when balanced with the public interest in the decision to make an order, or to sustain the same.
70. The public interest in question is principally the public interest in maintaining an effective system of immigration control, and in deporting those who are in the UK illegally. There is no separate public interest in preventing such individuals from *e.g.* working or relying on benefits or gaining the full range of free health care. Parliament has, however, decreed by statute that such benefits and opportunities are to be withheld from those here illegally. Parliament must be taken to have intended that the lack of such benefits and opportunities will form a disincentive to coming or remaining here illegally. The statute has to be read in accordance with s.3 of the Human Rights Act 1998. It is compatibility with Article 8 and other Convention rights which is relevant - not 'criminalisation' of the Appellant's presence in the UK as Mr Chirico would suggest. Further, the parallels he seeks to draw with the *Hardial Singh* principles are of marginal assistance since they arise in the different context of release from temporary detention (*c.f. R (Hardial Singh) v. Governor of Durham Prison* [1983] EWHC 1 (QB)).
71. The principal basis on which it might be said that the public interest in continued 'limbo' may be so weakened, such that Article 8 rights or other Convention rights might tip the balance, will normally only arise in cases where it is clear that the public interest in effective immigration is extinguished because, in practical terms, there is no realistic prospect of effecting deportation within a reasonable period (see above).
72. Further, as Simler J said in *R (Hamzeh and others)* (*supra*) at [50]:
- “[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.”

Analysis

UT Decision

73. I turn first to consider UT Judge Allen’s decision in the light of the above guidance.
74. *Stage 1:* The present case is a prospective ‘limbo’ case. A decision to deport the Appellant was made by the SSHD in October 2008 following the Appellant’s conviction and sentence for robbery in 2007. The following 10 years have been taken up with appeals by the Appellant against the SSHD’s decision to deport. The Appellant first raised the ‘limbo’ argument in March 2013 in the context of being ‘undocumented’. The Appellant subsequently raised the ‘limbo’ argument in October 2017 in the context of the country guidance in *AA (Iraq) (supra)*. Despite the regrettable delays in the legal proceedings and the passage of time, the Appellant cannot be said to have been in ‘limbo’ to any significant extent. No deportation order was or has been made and the Appellant has had the benefit of s.3C leave to remain pending the resolution of his appeals. Accordingly, the Appellant has been able to continue his private and family life in the UK, work and provide financial and emotional support for his children.
75. *Stage 2:* It was common ground before UT Judge Allen that the Appellant was not currently removable to Iraq in view of the country guidance in *AA (Iraq) (supra)* (see [5] and [19]). He concluded, however, that that there might come a time when the Appellant could be removed to Iraq (in [31] and [34]). This was a view that he was entitled to reach given the nature of the guidance in *AA (Iraq)*.
76. *Stage 3:* UT Judge Allen specifically addressed and analysed (i) the time already spent by the Appellant in the UK since 2003, his status, immigration history and family circumstances ([5], [7], [9] and [10]); (ii) the nature and seriousness of any offences of which the Appellant has been convicted ([6], [8] and 11]); (iii) the time elapsed since the decision or order to deport (paragraphs [1]-[4]); and (iv) the prospects of deportation being achieved ([31] and [34]). UT Judge Allen’s decision on these points is expressed in clear and admirably succinct terms.
77. *Stage 4:* UT Judge Allen then carried out the relevant balancing exercise between the public interest in maintaining an effective system of immigration control and the Appellant’s Article 8 rights. He commenced his analysis by stating in terms: “Bringing all these matters together, it is necessary to decide on the particular facts of this case... where the appropriate balance in the proportionality assessment lies” (see [32]-[34]).
78. In my view, UT Judge Allen’s approach to the ‘limbo’ question was orthodox and conformed to the above precepts.

Appellant's Grounds

79. I turn to consider the Appellant's specific grounds of criticism.

Ground 1

80. As regards Ground 1, the Appellant contended that UT Judge Allen erred in his assessment of the best interests of the Appellant's children in [32] of his judgment in approaching the question on the basis of the children's interests in the Appellant *remaining* in the UK, rather than their best interests in his being lawfully resident in the UK and thus able to work and support them financially. Mr Chirico submitted that UT Judge Allen viewed the question of the best interests of the children through the prism the impact of the Appellant's removal from the UK, rather than through the prism of the Appellant's continued residence in 'limbo' in the UK.

81. In my view, there is no substance in this criticism of UT Judge Allen's judgment for the following reasons. First, UT Judge Allen correctly noted (in [15]) that the question of the impact of the Appellant's removal from the UK has already been finally determined in its decision of 1st May 2013 and, accordingly, "it was necessary to proceed on the basis that if the appellant is removed from the United Kingdom it would not breach his family's protected rights".

82. Second, UT Judge Allen then went on correctly to formulate the issue and central question before him as follows:

"[15]. ... The issue is then whether the decision to make a deportation order itself breached the appellant's protected rights in the circumstances where he can neither be removed nor make a lawful voluntary departure from the United Kingdom and where... the only foreseeable effect of a deportation order would be to cancel his extant leave to remain."

83. Third, a sensible reading of [32] in the context of the Decision as a whole is that UT Judge Allen was clearly directing his mind to the relevant issue which he had identified earlier. This is at the very least implicit from [32]:

"[32] Given that the appellant provides £600 a month for their welfare and that they see him regularly, I accept that it is in their best interests that he remains in the UK and that is a primary but not a paramount factor. It is not reasonable to expect them to move to Iraq, and the appellant is in any event currently not removable to Iraq".

84. Fourth, in any event, if and in so far as UT Judge Allen addressed the question of the impact of the Appellant being removed to Iraq (and thus being unable to support his children), this included him remaining in the UK without leave to remain (and thus being unable to support his children). As a matter of common sense, the greater includes the lesser.

85. Fifth, furthermore, the Appellant has enjoyed full access to work and to the benefits and opportunities flowing from his temporary leave to remain. Where the UT has determined that it would not be a breach of the Appellant's or his children's human

rights for him to be removed from the UK, it could not, at least for a very considerable period, be considered a disproportionate interference with the Appellant's or his children's Convention rights for the Appellant to remain in the UK and be able to maintain ties with them, albeit not able to support them financially.

86. For these reasons, Ground 1 of the Appellant's grounds is dismissed.

Ground 2

87. As regards Ground 2, the Appellant contended that UT Judge Allen materially erred in failing to identify the public interest (the relevant legitimate aims) at play in the particular circumstances of this case. The UT refers to the "public interest" in the final paragraph [34] of its determination, concluding that that public interest is not "outweighed" by the particular circumstances that favour the Appellant. Mr Chirico submitted that UT Judge Allen erred, however, in failing to specify the specific public interest at stake, and what weight should be attached to them in the context of the 'limbo' issue.

88. In my view, this ground of appeal is of no substance. It is plain that this experienced UT Judge had the relevant public interest well in mind when carrying out his balancing exercise in the context of Article 8. His decision is redolent with references to matters directly connected to the question of the relevant "public interest" in deporting the Appellant, namely his previous criminal conduct, in particular: (i) the fact that the decision to deport the Appellant "as a consequence of a robbery committed on 10 April 2007 for which he was sentenced to three years in a young offenders institution" ([6]); (ii) the fact that the Appellant was said to be "complying with his probation requirements" ([11]); (iii) the fact that the Appellant had committed another offence in 2014 which fell short of "the deportation trigger, involving as it did a sentence of less than six months" ([11]); (iv) the fact that Mr Chirico was arguing that "deportation would [not] be proportionate because the situation might be different in two years' time" ([11]); and (v) the fact of the different deportation regimes, including the automatic deportation regime for foreign criminal offenders under the UK Borders Act 2007 ([13]-[14]).

89. Further, the whole discussion by UT Judge Allen in the second half of his decision regarding the "public interest" in removal of the Appellant ([19]-[34]) is plainly in the context of the Appellant's criminal convictions which feature in the first half of the decision. That UT Judge Allen had the relevant "public interest" in mind is clear from his final paragraph ([34]);

"[34] On the other hand there is the offence that he committed in 207 and also the more recent offence. It is not, in my view, unduly speculative to consider that there may come a time when he can be returned to Iraq. I accept that a failure to grant status may amount to an interference with private life, but in my view the circumstances in this case are not such as to show that despite the factors that militate in his favour this is a case where the public interest is outweighed by the particular circumstances that favour the appellant. Accordingly the appeal is dismissed."

90. Mr Chirico further submitted that having recorded (*e.g.* in paragraphs [5] and [19]) the SSHD’s concession that the Appellant was not presently removeable to Iraq, UT Judge Allen went on to speculate that the Appellant might be removeable in the future in [32] when he said : “It is not, in my view, unduly speculative to consider that there may come a time when he can be removed to Iraq” .
91. In my view, there is again no substance in this criticism. UT Judge Allen recorded the careful concession by Counsel for the SSHD (in [5]) that “it appeared to be the case that [the Appellant] was unreturnable to Iraq in line with the country guidance in *AA (Iraq)* [2015] UKUT 544 (IAC)” (emphasis added). UT Judge Allen also expressly referred to the cautionary remarks of the Court of Appeal at [27] of *BM (Iran)* (*supra*) that asylum and human rights appeals, including appeals under Article 8, are to be determined on the basis of the facts as they are at the time when the appeal is heard and that it is not appropriate for the tribunal to speculate about the future. He was entitled nevertheless to conclude (in [34]) that there might come a time when the Appellant could be removed to Iraq.
92. Mr Chirico further sought to rely upon some remarks by Lord Kerr in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 in support of Ground 2 of his appeal. I fail to see the relevance of this reference: the appeal in *Hesham Ali* did not address the ‘limbo’ point; the majority judgment did not focus on the public interest; and Lord Kerr gave a dissenting judgment. In any event, his remarks on Article 8 requiring a proportionality assessment when deporting foreign national criminals do not take the Appellant’s case further.
93. In summary, in my view, there is nothing in the Appellant’s Ground 2 which is dismissed.
94. UT Judge Allen’s decision on the ‘limbo’ point raised by the Appellant was unimpeachable. He was right to dismiss the claim. This was not a case in which it could be said that the prospects of the Appellant’s removal to Iraq could be said to be “so remote” that it would breach his Article 8 rights or be irrational to deny him continued status here.

The Respondent’s new evidence application

95. The SSHD applied at the hearing pursuant to CPR 52.21(2) to adduce new evidence comprising recent notes from the Case Information Database which demonstrated that, following an interview of the Appellant by an Iraqi official on 28th February 2019 at Becket House, the SSHD had been notified on 7th March 2019 that the Iraqi authorities now recognised the Appellant as an Iraqi national and had agreed he could be issued a *laissez-passer* to effect return to Iraq.
96. Ms Van Overdijk submitted that the SSHD should be permitted to rely on the new material on the basis of the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489. This was resisted by Mr Chirico. The Court received the new evidence *de bene esse*.
97. I am minded to grant the SSHD’s application to adduce the new evidence on *Ladd v Marshall* grounds. However, in my view, the new evidence does not take the SSHD’s case much further since it is clear from *AA (Iran)* (*supra*) that a *laissez-passer* is insufficient in itself to enable someone to return to the Kurdish Region (“KRI”). The country guidance in *AA* referred to the fact of difficulties of former residents passing through Bagdad *en route* to the KRI without a Civil Status Identity Document. The

new evidence is, however, relevant to the limited extent that it is a reminder of what Simler J adverted to in *R (Hamzeh and others) (supra)*, namely, that “the practical situation in relation to enforcing removal may change or fluctuate over time so that any current difficulties cannot be regarded as perpetual” (at [50]).

Conclusion

98. In conclusion, for the reasons set out above, in my judgement, the Appellant’s appeal should be dismissed.

SIR JACK BEATSON:

99. I agree.

LORD JUSTICE IRWIN:

100. I agree.