IAC-AH-SC/SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01472/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2021	**On 20 May 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR PAULO ANTONIO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Goodman, instructed by Duncan Lewis & Co, Solicitors
For the Respondent: Ms J Anderson, instructed by Government Legal Department

DECISION AND REASONS

1. The appellant, whose nationality is in dispute, appeals against a decision of the respondent made on 9 July 2013 that he is a person to whom section 32(5) of the UK Borders Act 2007 applies. That was on the basis that he had been sentenced to 9 years' imprisonment for robbery, attempted robbery and possession of an imitation firearm with intent.

2. This appeal was brought before the amendments to section 82 and section 84 of the Nationality, Immigration and Asylum Act 2002 (enacted by the Immigration Act

2014) came into force. By operation of Articles 9 and 11 of the Immigration Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order 2014, sections 82 and 84 of the 2002 Act apply in this appeal as they were in force prior to the changes introduced by the 2014 Act.

3. The appeal against the decision made was heard by Designated First-tier Tribunal Judge McCarthy who dismissed it in a determination promulgated on 11 October 2018. That decision was set aside for the reasons set out in my decision promulgated on 4 October 2019, a copy of which is annexed to this decision.

History of this appeal

4. This is a "limbo" case, that being a convenient shorthand for describing the position of a person whom the respondent wishes to deport or remove, but where there is a limited prospect of ever effecting his deportation or removal.

5. The core of the dispute in this case is the extent to which the appellant has been co-operative to permit the obtaining of documentation and whether the alleged lack of co-operation has contributed to the impossibility of achieving deportation.

6. The appellant's case is that he was born in Portugal in 1977, his father being a Portuguese national and an officer in the Portuguese Forces; his mother was a Jamaican citizen. He left Portugal at the age of 3, the family going to live in the United States where his father was a military attaché attached to the Portuguese Embassy in Washington DC. He arrived in the United Kingdom in 1993 and has remained here since.

7. On 21 July 2005 the appellant was convicted of robbery, attempted robbery and two offences of possession of an imitation firearm and sentenced to nine years' imprisonment, offences committed in 2003. On 11 September 2008 the respondent issued a notice of decision to make a deportation order against him against which he did not appeal and, on 24 October 2008, the respondent issued a deportation order made under Section 5(1) of the Immigration Act 1971 bearing in mind the criteria of the Immigration (European Economic Area) Regulations 2006 which were then in force.

8. On 21 September 2010 the appellant was due to be released on licence but was instead detained by direction of the Secretary of State and on 28 September 2010 she sought to deport him to Portugal. He was, however, returned the same day as there was no evidence presented to support his nationality. He was then detained for a further 38 months.

9. During that period of detention, the deportation order was revoked on 18 October 2010; the Secretary of State issued a further deportation order on the basis that the appellant is a foreign criminal as defined in section 32 (1) of the UK Borders Act 2007. The decision was served on 11 July 2013 and an apply duly lodged within time.

10. On 16 July 2013 the appellant issued proceedings for judicial review seeking: a quashing order against the deportation order served on 11 July 2013; release from detention; and, the award of damages for false imprisonment.

11. A substantive judicial review application was heard on 28 and 29 October 2014, the High Court quashing the second deportation order and declaring that the appellant had been falsely imprisoned between 18 October 2010 and 30 November 2013. There then followed further hearings to consider the quantum of damages.

12. The Secretary of State appealed the High Court's decision to the Court of Appeal which, in the decision reported as R (on the application of Paulo Antonio) v SSHD [2017] EWCA Civ 48, quashed the decision of the High Court in respect of the second deportation order and remitted for retrial the issue of the lawfulness of the appellant's detention from 20 January to 30 November 2013. The retrial did not proceed as the action was settled by consent. The Secretary of State's position is that this was for pragmatic reasons.

13. The proceedings in the First-tier Tribunal were stayed pending the outcome of the litigation in the High Court and subsequently the Court of Appeal as the legality of the decision giving rise to the appeal was under challenge in those proceedings.

14. The appellant's case is that there is no prospect, or no realistic prospect, that he can leave the United Kingdom or that his deportation can be enforced in a reasonable period of time to Jamaica, to Portugal or elsewhere. His case is that he has made a full and frank disclosure of all the relevant material about his antecedents in Jamaica, Portugal and in the United States; and, has complied with the Home Office's requests for information. He accepts that there is no avenue left open to him to establish his entitlement to Portuguese nationality and that it has been established, on the basis of detailed investigations by the respondent and enquiries made by them, that the Jamaican authorities would not accept he is a national.

15. The Secretary of State's case is that the appellant has not in reality been co-operative and has withheld information about his origins and history and thus defeating attempts to establish his nationality. In short, the information he has given cannot be verified, and she submits it is false which is why the Jamaican authorities (and Portuguese authorities) have been unable to document him. In doing so she points to discrepancies and inconsistencies in the accounts the appellant has given over time.

16. It is, however, of note that Designated Judge McCarthy records in his decision that:

> "[50] In case it is not clear from elsewhere, I record that Mr Swaby (the Home Office Presenting Officer) confirmed the respondent accepts the appellant is neither Portuguese nor Jamaican, and cannot be deported to either country. To that extent, the respondent's position has moved on slightly from when the Court of Appeal considered matters."

17. It is also of note that since that decision, on 30 April 2019, the respondent disclosed as part of the High Court proceedings a draft release referral document in which, amongst other matters, it was stated that the appellant may have been compliant and had been forthcoming with information.

18. The Secretary of State, although not seeking to withdraw her concession, maintains her position that the appellant has not been candid and that any compliance has been apparent rather than real.

The Hearing on 15 March 2021

19. It is unfortunate that despite my error of law decision being promulgated in 2019, it was not possible to list this appeal before 15 March 2021. A hearing listed on 31 January 2020 had to be abandoned and it was not possible to list this for hearing owing to the pandemic. I am, however, indebted to both sets of solicitors in providing comprehensive bundles and to both Counsel for production of skeleton arguments.

20. It is common ground that the appeal was to be heard *de novo* and that none of the findings of fact reached by Judge McCarthy were to be maintained. I heard evidence from the appellant and Ms Okoh. I also heard evidence via Skype from Ms B Haque and Ms G Carpenter, Home Office officials and from Mr Hilaire Sobers, an expert witness relied on by the appellant. In addition, I had before me the following:

    (1) Consolidated bundle paginated from A1 to G77.

    (2) Supplementary bundle.

    (3) Further supplementary bundle.

    (4) Authorities bundle.

    (5) Skeleton argument from Ms Anderson.

    (6) Skeleton argument from Mr Goodman.

21. The appellant adopted his witness statement adding that he had not heard anything from the Portuguese Consulate since the conversation which he had had with their official, Ms Morgado, on 4 June 2020, nor had he been contacted with regard to possible Jamaican nationality. He said he had not been asked by the Home Office for further information regarding Jamaican nationality.

22. In cross-examination the appellant was referred to the witness statements of Ms Haque which set out the alleged discrepancies in his various accounts. He said that he had not seen these witness statements before. He said that he could not actually remember what he had said in 2011 but he was sure it was not an accurate recording of what he had said. He said he was aware of the previous allegations of inconsistency. He said that what was recorded at paragraph 19 should be "1990" not "1991". He said, responding to the exhibit at BC4 referring to the qualifications he had obtained in Jamaica and then in New Jersey, USA (O levels and A levels), that although he recalled putting down the names of St Anne's College and Newark College, New Jersey he had not attended either. He had chosen a college in Jamaica because people always assumed that he is Jamaican. He said that the name "Major" which appears in his name was a nickname which he had used from about the age of 16.

23. Asked about his date of birth being given as 27 May 1975 (page 146, page 159) that it should be 1977, that he had not corrected it because it was some twenty years ago. He said he had ticked the "black Caribbean" box of ethnic origin in the job application form as that was what he identified with.

24. He said that on his birth certificate his parents and nationalities had been recorded but he had not seen it since before he was 12 years of age.

25. The appellant said that he had had a ten year passport issued in 1991 and a Portuguese ID card issued at the same time. He said that the ID card had been retained by the police in Telford and the passport had been retained later when he had been arrested by police from Tottenham Police Station in 2003. He said that neither had been returned to him.

26. Asked what identity documents he had used from 2001 onwards the appellant said that he had held a provisional licence and that he had opened accounts with Barclays, NatWest and Lloyds TSB banks prior to the expiry of his passport. He said he had not had a reason not to renew his passport but that he had not done so.

27. The appellant denied that the information he had given about by his father's identity was not true and he could not explain why the Portuguese Embassy had not been able to verify details about his father. He said he could not explain it and he had given the best information. It was also put to him that he had not given the right details and name about his mother which was why there was no record of her and that if he tried, he would be able to contact his siblings. He said he could not say why the Jamaican government could not find records relating to his mother but that it was false to say that he had chosen not to be in contact with family. He said he had fallen out with his sister and had not spoken to her since he went into prison. He said he had tried to contact her since but not been able to do so. He had tried contacting the telephone numbers of her friends but on the last occasion in 2014, he had been told that she no longer lived in Georgia. He said he had last tried to contact his brother in 2011 before he left detention. He did not know what happened to him, he had tried to contact him by phoning ex-girlfriends. He said one by the name of Jennifer, whose surname he did not know, lives in Maryland, and said she had not seen him for a long time.

28. It was put to the appellant that if he wanted to, he could get sufficient information to get a Jamaican passport. He said that that was not so. He confirmed that his unlawful detention claim had been settled.

29. In re-examination, he said that he had not told the truth in his application to DENSO as he really wanted the job, that they had wanted somebody who knew about assembly work so he had lied to get the job. He said with regard to page 156, at the time he did not really see things as they ought to be done and did not care about certain things, which is why he had not put down the correct date. He confirmed that he had not spoken to his sister since before he went to prison in 2003. The last time he had known her whereabouts was in 1999.

30. The appellant added that his mother's sister was called Sylvia Johnson whose daughter was called Stella Yvette. He said his mother had two other sisters, Audrey and McKenzie as well as a brother called Amos. He said he had never seen or heard from them but believed that Audrey had been living in Canada. He said that the aunt that came with him to London was not a blood relation but a good friend who had died in 1997. She had been a Jamaican national.

31. Ms Okoh adopted her witness statement adding that she currently lives in Nottingham about twenty miles away from where the appellant lives in Derby. She confirmed that she had two boys and two girls as well as a grandchild. She said that the appellant was close to her children and that, if asked to state his nationality then he would say he was black and assume that he is Jamaican. He said that they had links with Jamaica through her father. She said her elder son's father now lives in Jamaica but had left to go there many years ago.

32. I then heard evidence from Ms Bridget Haque (formerly Carter)[1], who adopted her witness statements. In cross-examination she said that the 2013 witness statement had been prepared in relation to the judicial review claim commenced by the appellant; the second had been prepared in connection with the High Court damages claim that followed. Asked how they were prepared, she said that somebody from their "legal side" prepared them but she did not know who and did not remember. She said that a person preparing the statement would contact her, then request any emails that she might have in relation to the case. She gave a summary of her side and the other person produced the witness statement and sent it to her. She made sure that she verified it and signed it off. She confirmed that both witness statements had been prepared in the same way. She said that she had been able when asked in preparing the 2013 witness statement to verify things. She said she had been informed that she had to read it through to make sure what they had written was to the best of her knowledge.

33. Ms Haque said that the decision as to what was to be exhibited to her statements and what was just to be summarised was not a decision she made. Asked about exhibit BC4 and whether she had chosen not to exhibit the release referral she said somebody had asked her if she had it and she had said she did not have it in her folder. She said she knew it had existed because she had written it and it was noted in the statement that had been written. She was not sure why it had not been attached to the statement and somebody else had dealt with the attachments.

34. Referred to the letter from GLD of 19 August 2019 stating that the draft release referral had been found in her inbox [F58], she accepted that she would at the time have had access to it. She was asked why, if she had written in the release referral that the appellant had been compliant, she had not mentioned in her witness statement [41] that he had been forthcoming with information, she said that it is one thing to give information, but if it is pursued and it comes back unfounded it is different. Ms Haque said she had not mentioned it because the statement was written for her and she had not to put it in as she did not write the statement. She

[1] Her earlier witness statement was in her then name Bridget Carter.

said that she did understand her duty was to make full and frank disclosure and she did not know why it was not put in her statement. Asked if it was because it did not fit the narrative of the person writing the statement, she said she did not know.

35. In re-examination she was asked if information is given but cannot be verified whether that was compliant; and, what she had meant by being compliant. She had had conduct of the file, had weekly conversations with the appellant. She said someone can quite happily give information yet every avenue they had looked into and investigated had come up null and void. She said there came a point when the appellant was not complying; he had provided enough information to investigate but that everything had turned out false and he was wasting time even as to his name. She said there had not been compliance.

36. In response to my questions about how she knew what tests or investigation had been carried out by those asked to do so, she said that they were allocated to specialists who used their systems who would then tell her what had been found. She said that this was by way of a simple email saying that they had found nothing rather than a detailed explanation of what had been done.

37. I then heard evidence from Ms Gemma Carpenter who adopted her witness statement. She confirmed that she was not giving evidence as an expert and she understood the difference between fact and opinion. Asked about the list of documents said to have been omitted from the letter of instructions to Hilaire Sobers, set out in paragraph 5 of her witness statement, she accepted that what was said at 5(a) and (b) was wrong but that it would have been GLD who drafted that. She said she assumed that the drafter was David Williams, the gentleman to whom she was speaking. She said that when she had said in the witness statement of truth that it was true, she had just relied on what GLD had sent her. She accepted that in 2014 the Home Office had been satisfied that the appellant was not Portuguese and that further investigations had had the same result. She said these investigations had been made as she was not aware that they had gone down the Portugal route before. She said they do not at all times check what had been done before it is recorded and they rely on colleagues. It had not been flagged at the time that this had been investigated. She said they had not investigated again the possibility that the appellant is Jamaican as she has been told that there was nothing else they could do without further information. She accepted she was not an expert on Jamaican culture.

38. In re-examination Ms Carpenter confirmed that her role within the Home Office is to redocument individuals, to liaise with overseas missions and they might arrange interviews. She said that she had operational expertise.

39. I then heard evidence from Mr Hilaire Sobers who adopted his witness statement and supplementary letter. He said that as far as that he was aware, in order to establish his Jamaican citizenship, the appellant would need to provide his mother's birth certificate, his own birth certificates and his mother's passport or government issued ID, which would need to be originals.

40. In cross-examination Mr Sobers confirmed that there were in effect two types of people returned to Jamaica: those who had money and those who were deportees. He confirmed that his statement has been targeted with respect to those who do not return with money. He said that assuming that the appellant could be landed he would be classified as a deportee. He said he had no personal knowledge of the appellant and was just acting on instructions given. He said it was not his practice to interview people about whom he was giving an opinion. He confirmed that the minimum wage in Jamaica is approximately 7,000 Jamaican dollars a month and that if told that the appellant had £35,000 on which to rely, he considered that hypothetically that would be a large sum. It would be difficult to say how long somebody could live on that, it depended on where that person lived, urban areas being more expensive than rural areas. Asked about the provisions of the Constitution with regard to nationality he said he was not a nationality expert but believed that if you entered as a legal resident (that is as an alien, not a commonwealth citizen), you would need to establish residence on aggregate for seven years in order to obtain citizenship. Asked how he knew what documents were needed to establish nationality, if not an immigration specialist, he said had looked up the information provided by the Passport and Immigration Agency. He said he had no knowledge of anybody being accepted as a Jamaican citizen on the basis of interview on arrival.

41. In response to my questions Mr Sobers said that he was unsure when systems of record keeping of births had changed in Jamaica.

Submissions

42. Ms Anderson submitted that the appellant was not credible given the different accounts he had given and the inconsistencies identified in Ms Haque's second witness statement. She submitted that there are also inconsistencies between the witness statements of the appellant and his oral evidence including as to the names of siblings and his mother. She submitted that some of the details should, like the identity of his father, be verifiable given that he had been a government employee and also that one would expect there to be records of a passport and identity card being issued. This issue regarding Portuguese nationality had been put to the officials again and different personnel had come up with the same result.

43. Ms Anderson asked me to note that the appellant had a conviction for dishonesty, that he was not a man of good character and that he had lied to get a job, which was relevant. He had given false information as to qualifications and experience and false date of birth. She submitted that it was an indicator that he would give false information to suit his ends. She submitted that the information regarding Jamaica was vague and the details regarding the mother were not accurate.

44. Ms Anderson submitted that the appellant needed to show that he was giving an accurate account especially concerning his father. As regarding losing touch with siblings he submitted it was not impossible to trace people around the world and given that he had dates of birth and proper names, this ought to have been done.

45. With regard to his Jamaican nationality, Ms Anderson submitted this was a matter of law, relying on AS (Guinea) [2018] EWCA Civ 2234 at [52] citing R (on the application of Nhamo) v Secretary of State for the Home Department [2012] EWHC 422

46. Ms Anderson submitted that the appellant's mother was Jamaican and as a matter of law he was entitled to nationality based on his mother's nationality at birth. She accepted that plainly there would be cases where that information could not be produced but that the appellant ought to be able to produce them and the mother would have needed to have some form of identity if she had been able, as was said to be the case, to travel. The appellant said that he was born in a hospital and that with the right name and details he could be documented as a Jamaican national.

47. Ms Anderson submitted that weight could be attached to the evidence of Ms Haque and Ms Carpenter and there had been no significant change in the Home Office's position. They had always doubted the evidence about his Portuguese antecedence. Turning to the grounds of appeal, Ms Anderson submitted that the decision to deport could not be challenged, this being *res judicata* that it had been decided by the Court of Appeal. She submitted further that simply because someone could not be removed did not mean that they had to be granted leave, relying on Jeunesse v The Netherlands [2014] ECHR 1036 where distinction had been drawn between positive and negative obligations.

48. Ms Anderson submitted that this appeal ought to be dealt with in the basis set out in RA (Iraq) [2019] EWCA Civ 850 and that in this case, each of the arguments put by the appellant rely on his case on the evidence being accepted. There was no fall-back position of what would happen if he was not being truthful as he needed to show he cannot leave the United Kingdom and cannot document himself as a Jamaican national. She submitted in this case that there was a very strong public interest in removal; that the appellant had twice been refused parole and there was evidence of poor conduct whilst in prison. She submitted that there would not be very compelling circumstances here as he would be going back with money, having received £35,000 in damages. She submitted that the case had been settled on pragmatic grounds as the damages had long since eclipsed the cost of defending the action which cost public funds and was on the basis of no admission of liability. She submitted further that Ms Okoh had contacts and friends in Jamaica on whom the appellant would be able to rely.

49. Ms Anderson submitted that the appellant had not shown that he was in limbo and that the apparent inability to remove was because the appellant was not giving accurate information and thus he failed at the first hurdle; he was not genuinely in limbo. Ms Anderson submitted that this is a case in which there had been concealment and therefore it was legitimate to accept that the appellant can be removed. This was not a case in which the appellant said he had never been documented. She submitted that R (on the application of AM) v Secretary of State for the Home Department (legal "limbo") [2021] UKUT 62 (IAC) ought not to be followed but in any event was a very different factual situation.

50. Ms Anderson submitted that it was not permissible to step into the shoes of the Secretary of State to say that the appellant must be granted leave and that, relying on Kaitey v SSHD [2020] EWHC 1861, it could not be argued that there is a situation whereby because the appellant cannot be detained he must be granted leave.

51. Mr Goodman submitted that the respondent's concession was properly made on the evidence and that it was not possible to go behind it. He submitted that the Secretary of State's position is contradictory in that the she appears to have revived an intention to deport the appellant to Jamaica yet there was the concession that he is neither Portuguese nor Jamaican and cannot be deported to either country, the position previously accepted and which was inescapable on the evidence. He submitted that little weight could be attached to the witness statements of Ms Haque or Ms Carpenter and that the statements drafted in response to defend the unlawful detention claim required it to be said that there was sound evidence of removal to Jamaica to defend the case. He submitted further that it could not be said, contrary to what Ms Haque had said, t all the evidence could not be verified. Evidence had been found relating to the former employers and that no records were available as regards the documents seized by the police.

52. Mr Goodman submitted that the inability of the appellant to prove his entitlement to Portuguese nationality did not mean that the whole account was a fabrication. He submitted that his evidence was careful, that he had listened to the questions and answered them and taken time to respond to the evidence set out in Ms Haque's statements to the effect that he had been consistent. He submitted further that I should adopt a Lucas direction, that there was no real difference between the appellant's father being a military attaché as opposed to being in the Air Force. He submitted further that the discrepancies in names of those of Jamaican relatives had not been properly put to him and that he had properly explained the apparent difference in the name of his mother. He submitted further that the name Stella had been given several times, it was not clear why there were differences, but this did not undermine the core veracity of the account given.

53. Turning to the evidence of the Secretary of State's witnesses, Mr Goodman submitted that they had not written their own evidence which was quite a serious matter. They were in effect submissions made by GLD presented as evidence, both statements containing errors yet had been signed as statements of truth. He submitted there had been serious failures in disclosure and no proper information how a damaging document (the draft referral) had not been disclosed. Ms Haque had been unable to explain why, if it was in her inbox, it had not been disclosed.

54. Mr Goodman submitted that there had been no proper evidence to show why the claim had been settled nor evidence to show that this was due to the cost to the public purse.

55. Mr Goodman submitted that insofar as it purports to give opinion evidence, Ms Carpenter's evidence should be disregarded. Turning to Section 84(1)(g) of the 2002 Act Mr Goodman submitted that it is implicit in relying on this Section the appeal must be determined on the hypothetical assumption that removal will be given effect

in consequence of the immigration decision. He submitted further that this ground was not concerned, unlike the other grounds of appeal, with the reality that removal cannot be enforced pursuant to the deportation order. He submitted further that the evidence of Ms Carpenter that the Secretary of State would not return the appellant without the agreed documentation necessary for immigration demands the Tribunal to assume that removal would be effected, relying on MS (Palestinian Territories) v SSHD [2010] 1 WLR 1639 at [23].

56. Turning to the damages award Mr Goodman submitted that the appellant would not have access to the £35,000 awarded given that he had to repay £13,000 from a previous award. In addition, there were debts he had to repay to people from whom he had borrowed money in the United Kingdom and there were also statutory charges payable in respect of legal aid costs.

57. Mr Goodman submitted that it was only a fanciful possibility that the appellant would be able to obtain his mother's birth certificate.

58. Mr Goodman submitted that submissions that any matter was res judicata were misconceived as judicial review requires that there be no alternative remedy, that is it considers something that cannot be raised in the First-tier Tribunal which is in this case requesting a deport decision to be quashed.

59. Mr Goodman submitted that the effect of the deport order is to criminalise the appellant's presence here unless he is held on bail subject to conditions preventing him for applying for leave to remain or to be treated as being stateless. He submitted that success in this appeal would open an opportunity for him to apply for leave and that the Secretary of State, loses nothing if the appellant is not deported or removed given the restrictions that could be imposed on the terms of any leave granted.

60. Mr Goodman submitted that, following Kaitey, immigration bail and detention were corollaries of each other and that liability to detention can only exist where there is a possibility of removal. He submitted that if the power to detain does not exist then there is no liability to detention and that if there is no prospect of removal then there is no power to detain. He submitted that there was, in terms of the ground of appeal under section 84 (1) (c), clearly an interference which would not necessarily achieve the objective given the lack of purpose in maintaining the deportation order. He submitted, turning to RA (Iraq) that this is an actual limbo case. The appellant cannot just leave the United Kingdom, he cannot just change his mind and establish his nationality. He submitted it was speculation to suggest that he could do so and the Secretary of State's concession was properly made. He submitted that this case was similar to that in Mendizabal v France. He accepted that the decision in AM was, factually very different, that the appellant was the author of his own misfortune which is not the case here. He submitted that the appellant had not been able to prove his own identity let alone his mothers and accordingly the appeal ought to be allowed.

The law

61. Under the legislation in force at the date of decision in this appeal, the decisions against which an appeal could be brought were set out in section 82 of the 2002 Act and, so far as is material, provided:

> 82 Right of appeal: general
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal
>
> (2) In this Part "immigration decision" means—
>
> (a) refusal of leave to enter the United Kingdom,
>
> …
>
> (j) a decision to make a deportation order under section 5(1) of that Act, and
>
> (k) refusal to revoke a deportation order under section 5(2) of that Act.
>
> (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.

62. The grounds of appeal against immigration decision were, at the relevant time, set out in section 84 which provided:

> 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;
>
> …
>
> (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.

63. The Secretary of State's powers to deport foreign national offenders are set out in Section 32 UKBA 2007. It is not disputed that the claimant is a foreign criminal as defined in that section. By operation of section 32 (5) UKBA, the Secretary of State must make a deportation order in respect of a foreign criminal unless she thinks that an exception in section 33 of the Act applies. That section provides, so far as is relevant, as follows:-

> 33 Exceptions
>
> (1) Section 32(4) and (5)–
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
>
> (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
>
> (2) 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.
>
> …
>
> (7) The application of an exception–
>
> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4.

64. Article 8 of the Human Rights Convention, as set out in Schedule 1 to the Human Rights Act 1998 provides:

> Article 8
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

65. I am satisfied that the facts of this case on any reasonable view fall within the terms of a "Limbo" case as defined in RA (Iraq). It is, I consider, necessary to set out paragraphs [62] to [72] of that case given its centrality to much of the submissions made.

"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."”

66. It is necessary also to consider the scope of this appeal given that there has already been a decision by the Court of Appeal which addresses to an extent the lawfulness of the deportation order made.

67. I turn first, then, to the extent of that decision as binding on me. In doing so, I remind myself that the decision under appeal is “a decision that section 32(5) of the UK Borders Act 2007 applies”; that was not the question before the Court of appeal which was considering the lawfulness of the second deportation order.

68. The Court of Appeal found that the decision to make the second deportation order was lawful. The Secretary of State submits that, in consequence, the appellant cannot properly argue on other grounds that the immigration decision giving rise to this appeal was unlawful. I respectfully disagree.

69. The appeal before the Court of Appeal arose from an application for judicial review brought the issues in which could not have been raised in a statutory appeal which law against the *decision that the appellant is a person to whom s 32 (5)* applies, not against the decision to make the deportation order, or against the deportation order itself.

70. As was noted in R (Sivasubramaniam) v Wandsworth [2002] EWCA Civ 1738 at [47]:

> “… judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review. Usually, however, the alternative procedure is more convenient and judicial review is refused.”

71. There is no indication from the Court of Appeal that they thought the case had been improperly brought. As is evident from the Court of Appeal’s decision [45] only ground one related to the lawfulness of issuing the second deportation order. The court found for the respondent on that issue, an issue which could not have been brought to the FtT.

72. Whether, and to what extent, the principles of *res judicata* and issue estoppel apply in public law is complex, particularly where, as here, the argument from the respondent is necessarily that the grounds raised in this appeal could (and should) have been raised in the action before the Court of Appeal. The appellant accepts that the Tribunal cannot consider the lawfulness of the decision to make a deportation order or the deportation order itself.

73. The relevant principles were discussed by Carnwath JSC in R (DN) Rwanda [2020] UKSC 7 at [44] onwards. In essence, the respondent’s case is that there is no logical

difference between "a point which was previously raised and decided and one which might have been but was not". But that is not the case here; the points as to legality in this appeal could not have been brought in the judicial review action (as there was a statutory appeal) and vice versa.

74. For these reasons, I consider that the appellant can properly argue that the immigration decision made in this case was wrong under the grounds set out in section 84 (1)(c) and (e).

75. That is not, of course, to say that the decision of the Court of Appeal is not relevant. It is evident from the material before me and from the comments made by the Court of Appeal in its decision at [4] to [6], it being amongst other things the Secretary of State's case at that point that the appellant had been less than co-operative [28] but I bear in mind that these conclusions are based primarily on a decision of the High Court about which the Court of Appeal observed at [39] to [40]:

> "39. In considering the conduct of the Respondent, and indeed the actions of the Appellant's officials, the Judge noted more than once that he had heard no oral evidence, and thus no cross-examination, of the Respondent or of the Home Office representatives (2014 judgment, paragraphs 103 to 110). Insofar as fraud might be relevant to damages, that could have been cured by the time of the later damages hearing. However, as matters fell out, no such evidence could be brought to bear on liability.
>
> 40. In addressing the problematic conflicting accounts from the Respondent, the judge first considered whether there was sufficient in this to establish wrongdoing so as to support a defence based on *ex turpi causa*. He noted that there had never been any prosecution for the offences under Section 26 of the 1971 Act, of failing to produce information or making false statements [2014 judgment, paragraph 105/106]. The judge concluded there was no basis for the application of *ex turpi causa*. In my view, he was right. His conclusion on this has not been appealed. I need not expand on the point beyond observing that it is clear even active deception by a detainee cannot prevent an application for release from detention, or access to the court in order to establish the legality of detention. To conclude otherwise would be to undermine the rule of law. Such conduct may of course be relevant to the level of damages to be awarded for wrongful detention."

76. I bear in mind that oral evidence had not been heard, but it is sensible to note what the Court of Appeal said at paragraphs [76] to [78] and [82]:-

> "76. It seems to me that the judge in essence rejected the claim that the Respondent had misled the authorities and had set out to frustrate deportation. It is certain that he did not reach detailed conclusions on the matters raised and did not consider the third *Hardial Singh* principle in the light of such conclusions.
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> 77. I am fully conscious of the degree to which a judge at first instance is better placed than an appellate judge to reach factual conclusions. That is circumscribed here by the fact that the judge heard no live evidence, although he made it clear he thought that would have been desirable. He certainly reached no conclusions on the detail of the matters advanced by the Appellant, nor did he link such findings to the proper approach to the application of the third *Hardial Singh*

> principle. It may be that he was not greatly helped in this regard by submissions on behalf of the Appellant.
>
> 78. With respect to the Judge, it seems to me that he was wrong not to reach clear conclusions as to the Appellant's conduct and move from such to consider the third *Hardial Singh* principle. In my view the conduct may be highly relevant to what should be regarded as a breach of that principle. Here too the strong policy of Parliament set down in the 2007 Act is an essential part of the context.
>
> …
>
> 82. It is not necessary for us to consider Ground 3. I do add, however, that if in due course there is a finding that the Respondent failed to cooperate or set out to frustrate his deportation, then to the extent that he is nevertheless found to have been unlawfully detained, I am of the clear view that such conduct is or may be an important factor in assessing the level of damages, following earlier authority including my own judgment in the decision of *R (NAB) v SSHD* [2011] EWHC 1191 (Admin). Given that the action was settled, there was no prior finding on the issue identified by the Court of Appeal."

77. In assessing the evidence, it is appropriate to start with the concession recorded by Judge McCarthy set out at [12] above. No formal application has been made to withdraw it although it is possible to make such application as is clear from AM (Iraq) [2018] EWCA Civ 2706 at [39] to [45] although there is, buried at pages 38 to 39 of Ms Anderson's skeleton argument, a submission that what was said is not a concession which could be binding on the respondent, nor could it materially impact on the article 8 appeal, as it is a rejection of the veracity of the appellant's claims, nor is it an accurate

78. With respect, this is not the sort of issue to be put into the very end of a lengthy skeleton argument, and I recall the observations of the Court of Appeal in this case at [48] to [49]. If the respondent wishes to withdraw a concession, then she can apply to do so; she has had ample time in which to do so.

79. I consider that on no proper basis can it be said that the respondent had not made a concession on an issue of fact; the appellant's nationality is in issue and as a matter of foreign law that is a question of fact before the First-tier (and Upper) Tribunal. No proper explanation is given as to why the statement by Mr Swaby is not binding and if it is not the respondent's current position, it begs the question of why no application has been made to withdraw the concession. The respondent wishes to read into the concession, as is submitted in the skeleton at [88], that it is a rejection of the appellant's assertions as to his antecedents; that may be implicit but it is not what was said which is a concession of a material question of fact as to the prospect of the appellant's nationality and as to the possibility of removal.

80. I bear in mind also that the events to which the appellant refers occurred, in some cases such as the death of his father over 30 years ago. Much of the material collected from him with respect to family details, education and work history and so on was obtained in interviews taken over a period of several years. Further, with the exception of the recent attempts made in respect of the Portuguese Consulate seeking details of the appellant, there appears to have been no interviews conducted by the

respondent since the appellant was released from detention in November 2013. That is over seven years ago.

81. Unlike the Court of Appeal and the High Court, I heard evidence from the appellant and two witnesses from the Home Office, all of whom were cross-examined. Bearing in mind it has been submitted to me that the witnesses have not told the truth, I consider it appropriate to direct myself that sometimes people do not tell the truth in fact lie, for many reasons: see MA (Somalia) [2010] UKSC 11 at [32] to [33], per Dyson SCJ.

82. Given the decision of the Court of Appeal, the appellant cannot have been unaware that it is a major part of the respondent's case that he has not told the truth and has given different names, dates of births and details about his family.

83. In that context it is surprising that the appellant was not, as he says, shown the witness statement of Ms Haque of 24 November 2020 which sets out in detail at [18] to [21] the information provided in the past as do records at paragraphs and the discrepancies alleged by the respondent. These are tabulated at paragraph [22].

84. I note also that when questioned, Ms Haque explained that the witness statement had been prepared for her by someone she did not know from her legal department. She had given them a summary of the case and the witness statement was then prepared from that and other material. I have taken careful note of where evidence and the explanation provide for the failure to exhibit earlier the draft referral release.

85. In re-examination it was put to Ms Haque that it was one thing to give information and another to give information that cannot be verified. When asked what she had meant by being compliant she said that he had been given all sorts of information in the weekly conversations she had with him but that every avenue they looked into and investigated could not be confirmed and that there was a point when this was not compliance. She said that he had given enough information to investigate but everything was false and that he was wasting his time even as to his name.

86. The appellant does, however, seek almost to make compliant a term of art. It is not. It is certainly true that the appellant was providing information, some of it in relation to addresses and schools in the USA, and dates of birth, being quite detailed. But it is remarkable that ultimately it has not led to any of that being confirmed.

87. I have serious concerns about the evidence of Ms Carpenter who accepted that despite the witness statement of truth that she had signed, her statement at paragraph 5 that two witness statements from the appellant had been omitted from the documents supplied to the expert, Mr Sobers, was not true. Her explanation for the error was that the GLD had drafted it and that she assumed that the witness statement had been written by David Williams.

88. It is evident from Mr Sobers' report at pages 76 to 115 the opinion was based on the documents provided by Duncan Lewis listed in Appendix 2 (see footnote 1 at page 76) and this lists the witness statement of 8 June 2020 as confirmed in the letter of instruction. Also included were the undated and 5 July 2013 witness statements.

89. I do not understand how a witness statement could have been prepared with the assistance of a lawyer such that it records something which is clearly untrue on the basis of the material provided to the Home Office. I do not consider that Ms Carpenter set out deliberately to mislead but there is no satisfactory explanation for her signing a statement of truth and then accepting that what she had said in that statement was not true. I accept that witness statements are prepared within government, as indeed in any large organisation in the manner described but that does not in any away absolve those responsible from ensuring that statements are true and reliable. It is of greater concern where, as here, it is unusual for Home Office representatives to be cross-examined and to a large extent the Tribunals and indeed the High Court exercising its judicial review function have to take what the Home Office says at face value. The danger is this: through cross-examination and because the documents were before me, it was established that what was said was not true; in many cases where witness statements are given, summarising or where the documents are not also disclosed, this simply would not have come to light.

90. In these circumstances and where the party concerned is the state, it is all the more important that the highest standards are maintained. Whether or not this amounts to a contempt in the face of the court is not a matter for me to decide. It is not evident that CPR 81 or Practice Directions 81 or 81X are of applicability in this matter.

91. I do not consider that any proper explanation has been given by Ms Carpenter for saying what she said in paragraph 5 yet which she admits is not true. In the circumstances, absent any good reason as to why a civil servant should not tell the truth, I consider that weight should not be attached to her evidence unless confirmed by other sources and certainly no weight could be attached to her opinions.

92. Much of what Ms Haque says is confirmed by other sources and is to a great extent drawn from other documents. It has not been submitted that the material quoted in length at paragraphs [18] to [21] are untrue but equally these are summaries of evidence made by the people who undertook the interviews. Further, the documents referred to in the table at paragraph 22 do appear elsewhere and the appellant has had ample time to consider the alleged discrepancies and to explain them.

93. In assessing the investigations undertaken by the Secretary of State to confirm the appellant's identity, I bear in mind Ms Anderson's submission that it would not be in the Secretary of State's interest not to be able to show that the appellant is a citizen of Jamaica or for that matter Portugal. There is substantial force in that argument. But equally insofar as the witness statements were prepared for the court hearing in 2013, it was important for the Secretary of State at that point to show a lack of co-operation and that the appellant had not been forthcoming with evidence. I was not satisfied by the explanation of the failure by Ms Haque to include or refer to the referral draft in which she had said in the "referral case suitable for contact management" at [23]. "Mr Antonio may have been compliant as he has been forthcoming in supplying information, however all the avenues that have been pursued and he still claims to be Portuguese".

94. Whilst that statement is not as categorical as the appellant might like, nonetheless it is difficult to understand how it was not disclosed earlier. Ms Haque accepted that she was aware of it as she had written it, but I bear in mind also that the witness statement was prepared in December 2013 and that she may have difficulty recalling exactly what happened. Ms Anderson's first question in re-examination was clearly a leading question; it suggested to Ms Haque that there was a difference between giving information and giving information which could not be verified. Whilst Ms Anderson later amended her questioning, nonetheless I consider that the damage had been done in concerning the weight that I can attach to Ms Haque's evidence. That said, it is consistent with the respondent's position that none of the checks which had been undertaken on the appellant had provided any evidence. Other than on one occasion an official being able to talk to the appellant's brother, and verification of the appellant working for DENSO, nothing of substance has been verified. But I do bear in mind that there is no incentive for the Secretary of State not to be able to verify information about the appellant; on the contrary.

95. Turning now to the appellant's testimony and the allegations of inconsistency made, I bear in mind that the appellant was given an opportunity to comment on what was recorded at paragraphs [18] to [21] of Ms Haque's statement. These were issues highlighted by the Court of Appeal as noted above.

96. There was a degree of consistency about the appellant's mother's date of birth, 24 August 1945, but it is not clear why in the biodata form she is referred to as Wilhelmina Wilson rather than later Stella Yvette Wilson (or Stella Francesca Wilson). It is of note that Ms Stella Francesca Wilson's name comes from information supplied by the appellant's solicitors in the letter of 6 December 2011 but I consider that no satisfactory explanation has been given as to why the mother is recorded as Wilhelmina. I accept that the notes at C34, extracted from the Home Office notes, indicate that is the mother's name but the information must have come from somewhere. The father's name has also changed from Juan Carlos Antonio to Jorge Silva Antonio, then in the letter from Duncan Lewis to Carlos Hugo Antonio and then to Jorge Carlos Hugo Silva Antonio in Duncan Lewis' letter of 4 June 2013.

97. Similarly, the names and dates of birth of the brother and sister vary significantly in the case of the sister from 1974 (biodata form) to 1982 in an interview on 2 December 2011 and 1984 in the grounds of appeal against deportation order. Some of the differences regarding the name such as Juanita or Joanita are easily explainable as recorded by people unfamiliar with either Portuguese or Spanish, similarly no inferences can be drawn to the brother's name varying from Henrique to Enrique. Other differences arise from when he arrived in the United Kingdom. In the 8 February 2011 interview he is recorded as having arrived in February 1995 yet on 25 February 2011 that it was in 1992. He is also recorded on 24 January 2013 as saying his Portuguese passport was issued in New York in 1992 yet in oral evidence that it was in 1990.

98. Although there is no evidence of the appellant having made National Insurance contributions, checks undertaken with HM Revenue & Customs finding no trace of him, it does appear that the appellant did work for DENSO. The application appears

to have been in 2001 but the appellant openly admitted that his education and training recorded there was untrue and that he had not attended either of the colleges he claimed to have attended. He indicated that he did not require a work permit which is consistent with him having a Portuguese passport.

99. I consider that the appellant's explanation for his lies is wholly unacceptable. That he was also prepared to permit an incorrect date of birth to be used also casts doubt on his credibility. His explanation that he really wanted the job and that DENSO wanted somebody who knew about assembly work and he therefore lied to get the job is not in my view a satisfactory explanation. I consider that this counts significantly against the appellant and undermines significantly his credibility.

100. I note the submission that the appellant has been convicted of a crime involving dishonesty. That is of little assistance given that it was a robbery rather than fraud. But, having undertaken a robbery in the circumstances described in the sentencing marks does go to the appellant's character.

101. Taking that into account with the other material identified above, and viewing his evidence in the round with the other material, I find that his evidence is not something on which I can safely rely upon unless confirmed by other independent material.

102. In reaching that conclusion I have borne in mind the submissions by Mr Goodman that the appellant has no incentive in not showing that he is Jamaican as the leave he would receive in the United Kingdom even were he successful would be very limited, and subject to many restrictions to all intents and purposes the same as he faces now whilst on bail, but that is predicated on the assumption that there is not some other good reason the appellant does not want to go to Jamaica.

103. Having heard the appellant, and considered the evidence as a whole, I am not, given my findings on his credibility, satisfied that he has given all the information available to him. It is, I consider, unlikely that all the information would have drawn a blank; and, although I have doubts about Ms Carpenter's evidence, I consider it improbable that the respondent's enquiries, including those made in the USA (some correspondence with US government departments are exhibited) and to the Jamaican authorities who responded that there was no trace, all lead to dead ends if the information given was accurate.

104. In reaching my conclusions I, take into account the concession that the appellant is not Jamaican and not a citizen of Portugal but that is hardly a ringing endorsement that what he has said is true; on the contrary.

105. In respect of the Portuguese citizenship, it is I consider fair to note that if what the appellant has said is true, it is very surprising that the Portuguese government would have no record of his father who had been attached to the embassy in Washington. Similarly, it is difficult to understand how the Portuguese government would not have records of having issued the appellant a passport and an ID card his name.

106. There is little evidence of the appellant's presence in the United Kingdom in documentary form. Other than the job application for DENSO there is little to support his account; there are no national insurance records or other documentary evidence of his employment.

107. Much has been made about the draft in which Ms Haque had indicated that the appellant had been "compliant". That draft states (F12, [14])

> "Mr Antonio may have been compliant as he has been forth coming in supplying information, however all the avenues that have been pursued"

108. It is evident that words are missing from that paragraph, which is a draft, but, importantly, it is expressed conditionally: "may have been compliant".

109. What then is the impact of the concession that the appellant is neither Jamaican nor Portuguese? Both issues are matters of foreign law and as such are questions of fact on which a concession can be made. But there is no concession that the appellant has been truthful, or has complied fully in providing all the information available to him. While it can be argued that that is implicit in the concession, it is certainly not accepted by the respondent that the appellant has told the truth; on the contrary as the hearing demonstrated. Nor can it be construed as a concession that the appellant has been "compliant" in providing information. The concession is simply as to certain facts which make up the matrix of the facts for consideration in the appeal. It does not follow from the acceptance that he is not Jamaican or Portuguese that he has no nationality, or an acceptance that he has told the truth about his background.

110. While I accept, as I must, in the light of the concession that the appellant is neither Jamaican nor Portuguese, his compliance with the documentation process, such as it is, has resulted in dead ends.

111. Applying the law to the facts, I proceed on the basis that the appellant is not a Jamaican national and is not a Portuguese national. I accept in consequence that there is no realistic prospect that he can leave the United Kingdom or that his deportation order can be enforced during a reasonable period of time to Jamaica or any other country.

112. I accept that if what the appellant was telling is the truth, then he is or would appear to be on the evidence of Mr Sobers entitled to Jamaican citizenship but is unable to show that he is so entitled. I accept on the basis of Mr Sobers' evidence, albeit that he is not an expert on nationality law, that it is highly unlikely that the Jamaican authorities would be persuaded that the appellant is, in the absence of documentary evidence and in the light of the enquiries they have already undertaken, a Jamaican national and that he would be permitted to land in Jamaica. In reaching that conclusion, I note that the Jamaican authorities have not been able to document him. I accept that it is more likely that, on the evidence as currently exists, he would be detained for a short time and returned to the United Kingdom probably by the next return flight. To that extent, any interference with his protected rights in Jamaica is likely to be minimal, and there is no sufficient basis for submitting that it would engage article 3 of the Human Rights Convention.

113. Accordingly, on the basis of the evidence and concession, and in the absence of any foreseeable change in circumstances, there is no prospect of effecting deportation; any removal is likely to result in him being returned to the United Kingdom.

114. Returning then to the grounds of appeal, I consider ground (g) first, accepting that this involves a hypothetical assumption that removal will be given effect. The appellant's case is that he is not Jamaican and would not be admitted.

115. The removal scenario is, as Mr Goodman accepts, hypothetical, in that it assumes the appellant will be allowed to enter Jamaica. But equally, it is hypothetical that if that were to occur, he would not be given some form of leave.

116. I am not satisfied that the appellant would face a breach of article 3 on return to Jamaica. There is insufficient material to show that any detention would breach article 3, and while I accept that he would, if admitted, have difficulty in establishing himself, he would have some money from his damages award and some grant paid on removal. He has not shown that he would be destitute even if he could not work.

117. Given I have not accepted what the appellant has told me about his lack of ties to Jamaica, or support, even if he is not Jamaican, I am not satisfied on the evidence he has given me that he would be destitute to the extent necessary to engage the high threshold in article 3, nor am I satisfied for these reasons and those set out below that his circumstances are such as to amount to "very compelling circumstances", even taking into account the length of time he has spent here; and, I have only his word for it (and to an extent that being repeated by other witnesses) that he has no connection with Jamaica, a country in which he has claimed (albeit falsely) to have been educated.

118. Turning then to article 8, which I accept is engaged, even assuming for these purposes that removal would not be "effected" as he would be returned, it does not follow that the decision is not "in accordance with the law".

119. In Gallagher et al v Secretary of State for the Home Department [2019] UKSC 3 at [14] to [41] approval was given to Christian Institute v Lord Advocate [2016] UKSC 51 at [79] to [80]:

> "79. In order to be 'in accordance with the law' under article 8(2) of the ECHR , the measure must not only have some basis in domestic law - which it has in the provisions of the Act of the Scottish Parliament - but also be accessible to the person concerned and foreseeable as to its effects. These qualitative requirements of accessibility and foreseeability have two elements. First, a rule must be formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his or her conduct (*The Sunday Times v United Kingdom* , para 49; *Gillan v United Kingdom* , para 76). Secondly, it must be sufficiently precise to give legal protection against arbitrariness:
>
> '[I]t must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law …for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of

> any discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.' (Gillan , para 77; *Peruzzo v Germany* , para 35)
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> 80. Recently, in *R (T) v Chief Constable, Greater Manchester Police* , this court has explained that the obligation to give protection against arbitrary interference requires that there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. This is an issue of the rule of law and is not a matter on which national authorities are given a margin of appreciation."”

120. On that basis, and applying these principles, I am not satisfied that the appellant has shown that the decision is not “in accordance with the law”. On the contrary, the law is clear; he is not a British National, and may be deported; and, he is a foreign criminal as defined. The lawfulness of the deportation order in question has been confirmed by the Court of Appeal.

121. In assessing proportionality, I accept that were the appeal allowed, the appellant’s conditions of leave could well be restrictive, and that he would remain liable to deportation, as the legislation provides. But I do not accept the submission that maintaining a deportation order serves no purpose. It is, for clear reasons, manifestly in the public interest that he be deported, and the Secretary of State is under a duty to remove foreign criminals.

122. Contrary to Mr Goodman’s submissions 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, and that is clearly part of policy as expressed in s117C of the 20002 Act.

123. I turn next to the principles set out in RA(Iraq) and in R (on the application of AM) v Secretary of State for the Home Department (legal “limbo”) [2021] UKUT 62 (IAC), accepting however that the factual situation in the latter is very different. In doing so I not Ms Anderson’s trenchant criticisms of the latter, but I do not accept her submission that it was per incuriam, insofar as that applies to jurisprudence of the ECtHR. I accept that the European Court of Human Rights has always distinguished between cases in which a state expels a settled migrant, and those in which it either expels, or refuses to admit, a person with no such rights. The former involves an interference with rights protected by article 8, and must be justified under article 8.2. The latter does not. But that is not the end of the matter. The legal question in the second type of case is whether the state has a positive obligation, imposed by article 8. Some of the approach which applies in a negative obligation case can be transposed to positive obligation cases, such as the question whether a fair balance has been struck between the state's interests and those of the migrant. There may well come a point where a positive obligation may arise.

124. As a starting point, I conclude that the appellant is in actual limbo as a deportation order has been made and on the basis of the respondent's concession, the prospects of effecting deportation are remote.

125. With regard to stage 3, in addition to the findings made above, the appellant has not shown that any of the time he has spent here was lawful, either with leave or as an EEA citizen exercising Treaty rights. He has not established any family life, and there is little evidence of a private life, given that he cannot work, run a business or undertake similar activities. I accept he has had relationships in the past and has a network of friendships; and, taking his case at its highest, has no family in the United Kingdom or elsewhere with whom he is in contact.

126. The offences he committed were very serious. That is reflected in the length of the sentence imposed and in the sentencing remarks of HHJ Eades; the offences involved pre-planning, the use of an imitation firearm and the traumatising of the victims who were employed in the sub-post offices at which the appellant perpetrated his offences. Each of the two sets of offences incurred a sentence of nine years' imprisonment to run concurrently.

127. The appellant has, it is clear, been in the United Kingdom for an extensive period, and the attempts to document and remove him have now taken well over 10 years. And, I accept, that any prospect of effecting deportation is remote on the basis of the evidence before me.

128. Under stage 4, I am required to undertake a balancing exercise. In this case, the starting point for assessing the public interest in removal is very high. The appellant was sentenced to 9 years' imprisonment. He has not, I accept, been convicted since his release, but that is not a matter that diminishes to any significant extent the public interest in deporting a criminal whose crimes are of such magnitude as these.

129. The analysis at this stage, and indeed at stage 3, involves an assessment of whether the appellant has been co-operating with obtaining documentation. That, in turn, involves assessing his conduct in providing information. For the reasons set out above, I am not satisfied, the concession notwithstanding, that he has been candid, or that he has told the whole truth about his background or nationality. These are factors which I take into account, and which I consider militate against him, and, accordingly I consider that he is in effect responsible for his situation.

130. Taking all of these considerations into account, I consider that, given the very strong public interest in this case, given the seriousness of the appellant's offending, that the public interest is not so weakened that the decision under challenge was disproportionate.

131. In reaching that conclusion, I have taken fully into account the limited basis on which the appellant would (or could) be permitted to live in the United Kingdom as is submitted. I accept he may not be able to work, or have access to benefits, and all the possible other applicable restrictions identified by Mr Goodman.

132. I do not, contrary to Mr Goodman's submissions, accept that his case is akin to Mendizabal v France [2006] ECHR 34. On the contrary. That case involved a Spanish national (not in dispute) who had been living lawfully in France for 14 years, and who had free movement rights. The facts are entirely different and distinguishable.

133. Accordingly, for these reasons, the appellant has failed to satisfy me that the decision under challenge, is wrong under the grounds set out in s 84 (1)(e) or (g)

Ground (c) "otherwise than in accordance with the law"

134. In considering this ground, it is important to bear in mind the decision under challenge; it is the decision that the appellant is a person to whom section 32 (5) of the UK Borders Act 2007 applies. It is not in dispute that he is a foreign criminal and the only exception that is in play is Exception 1 set out in section 33 (2) of that Act. The immigration decision in question is, by operation of section 82 (3A) not the decision to make a deportation order.

135. Much of the case law on which the parties rely arises from actions brought by way of judicial review which focus on the legality of the deportation order itself, or the decision to make a deportation order; and, consequently, on the legality of detention.

136. What the appellant seeks to do under this ground is to challenge the legality of the making (or maintenance) of the deportation order on the basis either that the order is being used for an improper purpose because it cannot be carried out or is inconsistent with the statutory scheme in place following the implementation of the Immigration Act 2016 and the replacement of temporary admission, he can only be on immigration bail.

137. I do not accept that such a case can be made under this ground, given its narrow scope. Further, even were it arguable within the scope of this grounds, I am not satisfied it is made out in any event. I do not accept the submission that seeking in the circumstances of this case, seeking to deport the appellant is unlawful, either as contrary to s 6 of the Human Rights Act 1998 or otherwise nor do I accept the premise that it is being used as a form of regulating the appellant while he is in the United Kingdom.

138. I am not satisfied that on the facts of this case that the deportation order is, on any view, being used to regulate the appellant; that is done by the operation of the usual immigration rules. He has no leave to be here, and his difficulties and the limitations on what he can do flow from that. Thus, on no proper view does the situation here engage Padfield [1968] UKHL 1.

139. As both parties accept, Kaitey is under appeal. Unless and until it is overturned, I consider it is good law, and while not strictly binding on me, I find no good reason not to follow it. Applying the propositions set out at the end of the decision of Laing J (as she then was), I conclude that, even if this issue were in scope of the appeal, the decision under appeal was in accordance with the law.

Ground s 84 (1)(a) – not in accordance with the immigration rules.

140. Finally, and for completeness, I turn to the provisions of the Immigration Rules at paragraphs 390 to 398. There is no basis on which it could be said that the appellant falls within the exceptions set out in paragraphs 399 or 399A, and he has been sentenced to 9 years' imprisonment. For the reasons set out above in assessing the other grounds of appeal, I conclude that there are in this case no very compelling circumstances over and above those described in paragraphs 399 and 399A. on that basis the decision was in accordance with the Immigration Rules.

Conclusion

141. For the reasons set out above, I consider that the appellant has failed to demonstrate that the decision made was wrong on the basis of any of the grounds set out in section 84 (1) of the 2002 Act, and I dismiss his appeal in its entirety.

Notice of Decision

1. The decision of the First-tier tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing the appeal on all grounds.

3. No anonymity direction is made.

Signed Date 17 May 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/01472/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 September 2019

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

PAULO ANTONIO
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Goodman, instructed by Duncan Lewis solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal promulgated on 11 October 2018.

2. I consider that, in line with Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), the grant of permission made by Upper Tribunal Judge Grubb should be construed as a grant or permission on all grounds, not least because the

purported refusal of permission on ground 3 is, in the light of documents which have now come to light (and to which I turn next) unsafe.

3. While this appeal was still in the First-tier Tribunal, directions were made to the respondent to produce documents which were not in fact disclosed until April 2019, well after the decision was promulgated. These documents include an internal document which appears to show that the appellant had, contrary to the finding of the FtT, been compliant with attempts to document him.

4. I am satisfied that: (1) the material could not have been produced by the appellant until after the hearing; (2) that it would probably have had an important influence of the result; and (3) is apparently credible. Accordingly, the test set out in Ladd v Marshall [1954] 1 WLR 1489 is met and I admit the documents produced and set out in the bundle provided.

5. It was agreed by the parties that the FtT had failed to determine the grounds of appeal set out in section 84 (1) (c) and (e) of the Nationality, Immigration and Asylum Act 2002 as in force at the date of decision in 2013. Mr Jarvis did not oppose the submission that the findings as to whether the appellant had been compliant with attempts to document him were unsafe in the light of the new evidence, and it was agreed that the decision should be set aside in its entirety with none of the findings of fact retained.

6. It was also agreed that in the light of the recent developments, there should be a case management hearing on 13 November 2019 at which further directions will be given. In the interim, the respondent is to produce submissions on (a) the effect of the Immigration Act 2016 and (b) the nature of the public interest in making a deportation order against someone who cannot in practical terms be deported.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The decision will be remade in the Upper Tribunal on a date to be fixed.

DIRECTIONS

1. The appeal will be listed for a case management review on 13 November 2019.

2. The respondent must by 30 October 2019 serve the submissions specified at [6] above.

3. The appellant is excused from attending the case management review so long as he is represented.

Signed Date 2 October 2019

Upper Tribunal Judge Rintoul