Neutral Citation Number: [2022] EWCA Civ 492

Case No: C5/2021/0341

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge O'Callaghan and Upper Tribunal Judge Mandalia
[2020] UKUT 312 (IAC)

Strand, London, WC2A 2LL

Date: 14/04/2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

SAJID ZULFIQAR	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Richard Drabble QC, Ranjiv Khubber and **Shuyeb Muquit** (instructed by **Turpin Miller LLP**) for the **Appellant**
Rory Dunlop QC and **Rachel Sullivan** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 1 December 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10:30 on Thursday, 14 April 2022

Lord Justice Underhill :

INTRODUCTION

1. The Appellant was born in the UK in 1979. His father had both British and Pakistani nationality; his mother was a Pakistani national (though she acquired British citizenship shortly after he was born). Accordingly from birth he had both British and Pakistani nationality. He has lived in the UK all his life and has only visited Pakistan once.

2. In 2005 the Appellant was convicted of murder and sentenced to life imprisonment with a minimum term of fifteen years. In August 2011 he applied to renounce his British citizenship in order to qualify for consideration for a transfer to Pakistan to serve the remainder of his sentence there: his father had returned to live in Pakistan and was ill, and he wanted to be near him. That application was approved and he ceased to be a British citizen with effect from 21 October 2011. He then applied for a transfer, but the application was refused.

3. In 2013, while in prison, the Appellant married. His wife is a British citizen. She had two children by a previous relationship, but it is not suggested that the Appellant had a parental relationship with them.

4. On 12 October 2016 the Secretary of State issued the Appellant with a deportation notice in reliance on the "automatic deportation" provisions applying to foreign criminals under section 32 (5) of the UK Borders Act 2007. She subsequently withdrew that notice on the basis that he was a British citizen at the time of his conviction; but on 16 January 2018 she served a fresh notice on the basis of the general power of deportation under section 3 (5) (a) of the Immigration Act 1971. I set out the statutory provisions below.

5. The Appellant no longer wishes to return to Pakistan: he wished on his release to be able to continue to live in the UK with his wife. He accordingly claimed that his deportation would be incompatible with his rights under article 8 of the European Convention on Human Rights ("the ECHR") and accordingly unlawful by virtue of section 6 of the Human Rights Act 1998. By letter dated 3 October 2018 that claim was refused. The Appellant was released from detention on 18 September 2020 and has remained on immigration bail since then.

6. The Appellant appealed to the First-tier Tribunal ("the FTT"). By a decision promulgated on 13 November 2019 FTT Judge Feeney dismissed his appeal. The Appellant appealed to the Upper Tribunal ("the UT"). The appeal was heard by a panel comprising Upper Tribunal Judges O'Callaghan and Mandalia. By a decision promulgated on 11 September 2020 the appeal was dismissed.

7. This is an appeal against the decision of the UT, with permission granted by Carr LJ. The Appellant has been represented by Mr Richard Drabble QC, leading Mr Ranjiv Khubber and Mr Shuyeb Muquit; the Secretary of State has been represented by Mr Rory Dunlop QC and Ms Rachel Sullivan. Mr Muquit appeared for the Appellant in both the FTT and the UT: the Secretary of State was represented by Presenting Officers.

8. The issue of general importance raised by the appeal, and which persuaded Carr LJ that the second appeals test was satisfied, is whether the Appellant's case is covered by section

117C of the Nationality, Immigration and Asylum Act 2002, which prescribes the approach to be taken in striking the article 8 balance in the case of decisions whether to deport foreign criminals. That depends on the date at which the question whether he was a British citizen has to be answered. As we have seen, the Secretary of State took the view that for the purpose of the 2007 Act the relevant date was the date of the Appellant's conviction, at which point he was still a British citizen; but it was her case, at least in the UT, that for the purpose of section 117C the relevant date is the date of the deportation decision, by which time he had renounced his citizenship. The UT upheld that contention. By his ground 1 the Appellant contends that it was wrong to do so. I will call this "the ground 1 issue": it raises a pure question of statutory interpretation, and I will take it first. Grounds 2-6 raise various case-specific points on the reasoning of the FTT and the UT.

9. I should mention for completeness that it was part of the Appellant's case before the FTT that he had been led by the Home Office to believe that if he renounced his British citizenship an application to be returned to Pakistan to serve the remainder of his sentence would be granted. The FTT rejected that case as a matter of fact and it was not revived in the UT or before us.

THE GROUND 1 ISSUE

THE STATUTORY PROVISIONS

10. *The Immigration Act 1971*. The Secretary of State's power of deportation derives from section 3 (5) of the 1971 Act, which reads (so far as material):

> "A person who is not a British citizen is liable to deportation from the United Kingdom if—
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) …"

11. *The UK Borders Act 2007*. The effect of sections 32-34 of the 2007 Act is that in the case of a "foreign criminal" as defined the Secretary of State is obliged, subject to certain specified exceptions, to exercise her power of deportation under section 3 (5) of the 1971 Act. Although we are not in this appeal concerned with the substance of the provisions I will have to set out most of both sections because their structure and the tenses employed are material[1]:

> "32. *Automatic deportation*
>
> (1) In this section 'foreign criminal' means a person –
>
> (a) who is not a British citizen,

[1] I quote from the Act as it stood at the date of the impugned decision. There have been some Brexit-related changes since that date.

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that –

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

(6)-(7) …"

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.

(3)Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

(4)-(7) …

> 34. *Timing*
>
> (1)Section 32(5) requires a deportation order to be made at a time chosen by the Secretary of State.
>
> (2)-(4) …"

12. It will be seen that the phrase "automatic deportation" is not strictly accurate: the effect of sections 32-34 is to create a presumption in favour of deportation of foreign criminals as defined, rebuttable if one of the Exceptions under section 33 applies.

Part 5A of the Nationality, Immigration and Asylum Act 2002

13. Part 5A of the 2002 Act (introduced by the Immigration Act 2014) has the title "Article 8 of the ECHR: Public Interest Considerations". Section 117A reads:

> "(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2)In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

14. For present purposes it is unnecessary to set out section 117B, which enumerates the "public interest considerations applicable in all cases". Section 117C is headed "Article 8: additional considerations in cases involving foreign criminals" and reads:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2)The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3)In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4)Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,

> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5)Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6)In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7)...."

15. The definition of "foreign criminal" for the purposes of Part 5A is in section 117D (2), which reads:

> "In this Part, 'foreign criminal' means a person—
>
> (a) who is not a British citizen,
>
> (b) who has been convicted in the United Kingdom of an offence, and
>
> (c) who—
>
> (i) has been sentenced to a period of imprisonment of at least 12 months,
>
> (ii) has been convicted of an offence that has caused serious harm, or
>
> (iii) is a persistent offender."

("Persistent offender" is not defined.) It will be seen that although the definition is similar to that in the 2007 Act it is not identically worded.

16. Part 13 of the Immigration Rules is concerned with deportation. Paragraphs A398-399A substantially reproduce the effect of the provisions of Part 5A relating to foreign criminals. I should quote paragraph A398 because it is referred to in the decision of the UT:

> "These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked."

THE DECISIONS OF THE FTT AND THE UT

17. At this stage I will only summarise the overall approach of the FTT and the UT. I will return to the details of their reasoning so far as necessary when considering the grounds of appeal.

18. At para. 12 of her Reasons the FTT Judge recorded her understanding that the Secretary of State had conceded that the provisions of Part 13 of the Immigration Rules relating to foreign criminals (and thus also section 117C, though she does not expressly refer to that) did not apply. But she continued:

> "However, in accordance with the guidance in NA (Pakistan) v SSHD and ors [2016] EWCA Civ 662 it is sensible to examine whether the appellant could have succeeded under the Exceptions and then go on to consider whether any compelling circumstances exist as this provides a basis upon which to further consider the proportionality of the respondent's decision. Section 117B of the 2002 Act provides a list of considerations mandatory in all appeals concerning Article 8 proportionality."

19. That passage, including the reference to *NA (Pakistan)* (reported at [2017] 1 WLR 207), is arguably rather over-condensed, but its effect can be sufficiently summarised for our purposes as being:

(a) that the Judge appreciated (plainly correctly) that she needed to assess whether the Appellant's removal pursuant to a deportation order would involve a breach of his rights (or, as she subsequently makes clear, those of his wife) under article 8, which in turn required an assessment of whether the consequent interference with his (or her) family or private life was proportionate;

(b) that in making that assessment she believed that she should consider whether there were "compelling circumstances" – which is evidently a reference to the language of section 117C (6) (or the equivalent language in the Rules), the effect of which was authoritatively expounded in *NA (Pakistan)*.

20. The Judge proceeded to consider the proportionality exercise. I will refer to this part of her reasoning so far as necessary when I consider grounds 2-6. She concluded, at para. 34:

> "I remind myself of all my findings. Although the public interest in the appellant's deportation is less than if the appellant was a foreign criminal within the meaning of the statute it is still significant. In my view this tips the balance in the respondent's favour. I conclude the decision to deport the appellant on conducive grounds [i.e. that his deportation would be "conducive to the public good" for the purpose of section 3 (5) (a) of the 1971 Act] strikes a fair balance between the appellant's rights and interests and those of his wife when weighed against the wider interests of society. It is proportionate to the legitimate end sought to be achieved, namely the prevention of crime. I find that the Appellant's removal in pursuance of the deportation order would

> not be a disproportionate interference with his right to respect for his family and private life."

It is to be noted that the Judge followed an approach which she understood to be more favourable to the Appellant but dismissed his appeal nevertheless.

21. The UT found that the Judge had been mistaken in her understanding that the point relating to the inapplicability of Part 13 of the Immigration Rules had been conceded: see para. 66 of its Reasons. At paras. 67-79 it considered the issue at length. At para. 79 it summarised its conclusions as follows:

> "In summary we find as to whether the appellant is a 'foreign criminal' for the purposes of Part 5A of the 2002 Act and Part 13 of the Immigration Rules:
>
> (1) The meaning of 'foreign criminal' is not consistent over the 2002 Act and the 2007 Act.
>
> (2) Section 32 of the 2007 Act creates a designated class of offender that is a foreign criminal and establishes the consequences of such designation. That is, for the purposes of section 3(5)(a) of the 1971 Act, the deportation of that person is conducive to the public good and the respondent must make a deportation order in respect of that person.
>
> (3) A temporal link is established by section 32(1) requiring the foreign offender not to be a British citizen at the date of conviction.
>
> (4) Part 5A of the 2002 Act prescribes a domestically refined approach to the public interest considerations which the Tribunal is required to take into account when considering article 8 in a deportation appeal. Unlike the 2007 Act it is not a statutory change to the power to deport, rather it is a domestic refinement as to the consideration of the public interest question.
>
> (5) Part 5A establishes no temporal link to the date of conviction, rather the relevant date for establishing whether an offender is a foreign criminal is the date of the decision subject to the exercise of an appeal on human rights grounds under section 82(1)(b) of the 2002 Act.
>
> (6) Paragraph A398 of the Rules governs each of the rules in Part 13 that follows it. The expression 'foreign criminal' in paragraph A398 is to be construed by reference to the definition of that expression in section 117D of the 2002 Act: *SC (paras A398-339D: 'foreign criminal': procedure) Albania*.
>
> (7) At the date of the respondent's decision in October 2018 the appellant was a foreign criminal as defined in section 117D(2) of the 2002 Act, namely that he 'is not a British citizen', 'has

> been convicted in the United Kingdom of an offence' and 'has been sentenced to a period of imprisonment of at least 12 months.' He is therefore a foreign criminal for the purposes of section 117A(2)(b) and section 117C. Consequently, Part 13 of the Rules was applicable."

22. The UT went on at para. 80 to make the point which I have already noted at the end of para. 20 above. It said:

> "However, as accepted by both parties, the Judge's error as to the appellant being a foreign criminal was not material because the nature of his sentence means that he cannot rely upon the statutory Exceptions to the public interest and the Judge proceeded to consider whether very compelling circumstances arose. Though she applied a lesser weight to the public interest than should have been applied under section 117C(6) of the 2002 Act and para. 398 of the Rules, this was to the benefit of the appellant who was still unsuccessful before her. Consequently, we find that the error of law was not material."

23. The UT proceeded to consider various particular challenges to the Judge's reasoning on the proportionality exercise required by article 8.

<u>THE APPEAL</u>

24. By ground 1 the Appellant contends that the UT was wrong to hold that he was a foreign criminal for the purpose of Part 5A of the 2002 Act. Mr Drabble submitted that, contrary to the UT's conclusion, the date at which the question whether a person is a foreign criminal fell to be determined must be the same in both sections 32 and 33 of the 2007 Act and Part 5A of the 2002 Act; and, initially, that in both cases the proper reading of the provisions was that the question must be determined as at the date of their conviction. In the course of his oral submissions he accepted that it might be more appropriate to take the date of sentence rather than the date of conviction, but he said that that was an immaterial refinement: the focus, as he put it, was on the person's status in the context of the criminal proceedings.

25. By a Respondent's Notice the Secretary of State seeks to uphold the UT's decision primarily on a different basis. Her position is that for the purpose of both statutes the date for determining foreign criminal status is the date of the relevant decision – that is, under the 2007 Act the decision to make the deportation order, and under the 2002 Act the date of te decision of the court or tribunal on "the public interest question". That involves a departure from the view that she took when she withdrew the original notice (see para. 4 above); but it was not suggested that she was not entitled to change her position in this regard. She reserves the right to argue by way of fallback that the UT was right for the reasons that it gave.

26. In my view the Secretary of State's primary case is correct. I acknowledge the point made by the UT that the functions of section 32 of the 2007 Act and section 117C of the 2002 Act are different, as identified in its reasoning summarised at para. 21 above. But I do not believe that that requires or implies any difference in the approach to the date of determination of foreign criminal status. It would be remarkable for a different approach to be required where the statutory provisions in question clearly fall to be

interpreted as part of a single scheme. I believe that the natural reading of both groups of provisions is that foreign criminal status is to be determined at the date of the Secretary of State's decision to make a deportation order. The effect of section 32 (5) is to require her to make such an order (albeit that she has a discretion as to the time at which it should be made – see section 34 (1)); and section 117A (1) is concerned with a court or tribunal's assessment of the lawfulness of that decision (being "a decision made under the Immigration Acts"). In my view it follows, absent any clear indication to the contrary, that the definitions adopted for the purpose of those provisions fall to be applied as at the date of the decision the lawfulness of which is in question.

27. Mr Drabble's case that the relevant date was nonetheless the date of the Appellant's conviction/sentence had two strands, which I will consider in turn.

28. First, he relied on the tenses used in section 32. He referred specifically to the use of the present tense in element (b) of the definition in subsection 1 ("is convicted") and as regards the two "Conditions" ("applies" in element (c) and "is sentenced" in subsections (2) and (3)). He submitted that the use of the present tense in those cases must refer to the dates of conviction and sentence and that that requires the same approach for the purpose of element (a) in the definition also ("is a British citizen").

29. I do not accept that submission. Element (a) if read on its own could plainly only refer to whether the convicted person is a British citizen at the date of the decision. The use of the present tense in reference to the dates of conviction conviction/sentence cannot justify taking any different approach. As a matter of ordinary English usage, to say that someone "is convicted" of an offence, or "is sentenced" to a particular term, is not confined to a statement about the moment of conviction or sentence: on the contrary, being a convicted person is an ongoing status.

30. That conclusion is reinforced by the fact that in section 117C (3) and (6) and section 117D (2) the drafter used the perfect tense – "has been" – when referring to the conviction/sentence. Since it is common ground, and I agree, that under both the 2007 Act and Part 5A of the 2002 Act the relevant date must be that of the decision in question, it must follow that the phrase "is convicted" in section 32 has the same effect as "has been convicted". There is no difficulty about the two phrases meaning the same thing. Mr Drabble sought to defuse this point by referring us to *OH (Algeria) v Secretary of State for the Home Department* [2019] EWCA Civ 1763, in which the appellant had committed an offence for which he was sentenced to eight years' imprisonment but was not deported at that stage: a deportation decision was only made after his subsequent conviction for a subsequent offence for which he received a lesser term. One of the issues was whether the Secretary of State could rely on the earlier conviction so that the public interest fell to be considered under section 117C (6). This Court held that she could: see per Irwin LJ at paras. 38-50. Mr Drabble submitted that the reason why the drafter had used the language of "has been" was to cover such a situation. I see no reason to believe that that was the case, but I cannot in any event see how it would assist the Appellant's argument if it were.

31. The second strand in Mr Drabble's argument, on which he principally focused in his oral submissions, was that as a matter of policy the Secretary of State must be understood to have been concerned with the typical situation where a person without British nationality comes to this country and takes advantage of their presence to commit serious criminal offences, and not with the situation where a British citizen

commits an offence and subsequently loses their citizenship. He submitted that the two situations are fundamentally different, and that to apply a presumption of deportation in the latter case smacked of – though he accepted that it was not identical to – retrospective penalisation; and that, that being so, the language of the provisions in question should be construed so as to apply only to the former situation.

32. I accept of course that there is a factual difference between the two kinds of case identified by Mr Drabble. I can also accept that Parliament is unlikely to have had cases of the latter kind specifically in mind when enacting section 32 of the 2007 Act: it will be, to say the least, unusual for a person to lose their citizenship in the interval between conviction/sentence and the making of a deportation order[2]. But it does not follow that the public policy underlying the presumption in favour of deportation is confined to the more typical case. In the first place, even the reading advocated by Mr Drabble does not fully correspond to his distinction: the date of the offence and the date of conviction will always be different, and there may be an interval of many years. Thus even on his case a person who was a British citizen at the date of offending may be liable to "automatic deportation". But in any event I do not believe that it is self-evident that Parliament can not have wished the automatic deportation provisions to apply to a person who had been convicted of a serious offence, and sentenced, as a British citizen but who had subsequently (typically, prior to their release from prison) lost their citizenship. I see no reason why it should not have regarded it as contrary to public policy for – say – a murderer to remain in the UK after their release if they had no other right to be here: the important thing might be thought to be that they were not a British citizen at that point, irrespective of whether they had been at the date that they committed the offence or when they were convicted or sentenced. The Court need not itself take any position on what public policy on that question ought to be: what matters is that there is no inherent reason why the policy behind section 32 should not apply to cases of the Appellant's kind, and accordingly no reason to give the statutory language a construction different from that which in my view it most naturally bears.

33. In support of this part of his case Mr Drabble referred us to the Explanatory Notes to the relevant provisions of the 2007 Act and the 2014 Act, and also to paras. 10-14 of Lord Reed's judgment in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, in which he expounds the effect of sections 32-33 of the 2007 Act. But he was constrained to accept that neither the drafters of the Explanatory Notes nor Lord Reed were concerned with the unusual question which arises in this case; and nothing of value can be obtained by examining the particular language which they used.

34. I should record that Mr Drabble was anxious to make clear that it was not the consequence of his submissions that the Appellant would not be liable for deportation at all. Even if he was not a foreign criminal for the purpose of the "automatic deportation" provisions of the 2007 Act or Part 5A of the 2002 Act 2007 Act, it remained open to the Secretary of State in principle to make a deportation order under section 3 (5) (a) of the 1971 Act, as indeed she had done. The issue was only whether his appeal against that decision fell to be decided by reference to the restrictive

[2] Cases like the present, where the convicted person makes a voluntary renunciation of their citizenship, must be extremely unusual. But there will also be cases, as Mr Dunlop pointed out, where they are deprived of their nationality under section 40 of the British Nationality Act 1981.

provisions of those regimes. I acknowledge that (although I am not for myself wholly persuaded that the approach of a tribunal would be very different even if neither set of provisions applied), but it does not seem to me to assist in answering the question of law before us.

35. I would for those reasons conclude that the UT was right, albeit not quite for the reasons it gave, to hold that the Appellant was a foreign criminal for the purpose of Part 5A of the 2002 Act, and thus that the FTT should have applied section 117C when considering "the public interest question". I would accordingly reject ground 1 of the appeal. In doing so, I wish to emphasise that it does not follow that the fact that the Appellant was a British citizen at the date of his conviction and sentence – and, perhaps more importantly, at the date that he committed the offence – is immaterial to the outcome of the appeal: it will be a material factor in conducting the proportionality balance which remains necessary under section 117C (6).

GROUNDS 2-6

36. There is no challenge before us to the UT's conclusion that the FTT Judge's error about the application of the foreign criminal provisions was immaterial because the approach which she took to the proportionality issue was in fact more favourable to the Appellant than the law required. Accordingly, although it has been necessary for me to consider ground 1, the dispositive question in the appeal is whether there was any error of law in her conclusion and reasoning on that issue. That is the subject of grounds 2-6, which were settled by Mr Khubber and Mr Muquit. They read as follows:

> "*Errors of law by the UT*
>
> *Ground 2: error of law – the UT's error in consideration of the 'public interest' question under Article 8(2) on SZ's appeal.*
>
> 2.1. The UT erred in law when identifying the facets of the 'public interest' at play in SZ's appeal by impermissibly placing reliance/undue reliance on 'deterrence' and 'public concern' rather than limiting it to 'prevention of crime' as the FTT had previously correctly done.
>
> *Ground 3: error of law – UT erred in upholding the FTT's consideration of relevant factors when considering the proportionality of deportation under Article 8(2).*
>
> 3.1. The UT erred in law by upholding the FTT's consideration of:
>
> i). The circumstances of SZ's renunciation of citizenship.
>
> ii). The relevance and extent of SZ's private and family life in the UK.
>
> iii). SZ's lengthy period of residence in the UK as a British citizen (since birth).

Ground 4: error of law – UT's error in consideration of SZ's risk of reoffending by reducing its relevance to the public interest/proportionality question under Article 8(2).

4.1. The UT erred in law by wrongly downgrading/reducing the significance of the accepted evidence of SZ's low risk of reoffending and rehabilitation to the strength of SZ's objection to deportation under Article 8(2).

Errors of Law by the FTT

Ground 5: error of law – Failure to properly apply the 'lower' threshold correctly found to be applicable.

5.1. The FTT was correct in law to find that the lower threshold for overcoming deportation applied to SZ's case (i.e. s117C NIAA 2002 (as amended) and the IRs relating to 'foreign criminals' were not applicable) but failed to correctly apply that lower threshold when considering proportionality under Article 8(2) on the facts of SZ's case.

Ground 6: error of law – FTT's decision on proportionality under Article 8(2) unlawful/irrational.

6.1. The FTT erred in law when dismissing the appeal under Article 8(2) by unlawfully failing to properly weigh in the balance all relevant factors under the 'balance sheet' exercise that was required, and in particular, i). SZ's length of residence (including as a British citizen for most of his life), ii). extent of interference with SZ's private and family life in the UK, iii). SZ's post offending positive conduct including low risk of reoffending and rehabilitation. The dismissal of SZ's appeal by the FTT for the reasons it gave was therefore irrational."

("SZ" is of course a reference to the Appellant.)

37. Strictly we should only be concerned with the grounds which are directed at alleged errors by the FTT, i.e. grounds 5-6, but in fact in "Outline Submissions" lodged prior to the hearing the Appellant's counsel reformulated this part of their case as follows:

"(i) The FTT failed to have adequate regard to the impact of A's lengthy residence as a British citizen at the point of conviction when considering proportionality (see by analogy *Akinyemi No.1*, where A's residence required a 'peculiarly sensitive assessment', para 49).

(ii) The FTT failed to clearly apply the relevant legal framework (e.g. see *Essa v UT and SSHD* [2012] EWCA Civ 1718, at [14]-[15]).

(iii) The FTT failed to adequately appreciate the more flexible approach to the public interest in deportation in the highly unusual

circumstances of this case (e.g. *Akinyemi No. 2,* para 50).

(iv) The guidance in *Akinyemi No. 2* regarding the limitation on the relevance of deterrence (see para 52) was clearly applicable to A's case and was not properly appreciated by either the FTT or the UT."

Accordingly, Mr Drabble did not seek to develop grounds 2-6 individually in the course of his oral submissions. He said that they all, in one way or another, reflected a single issue about the nature and weight of the relevant public interest which had to be put into the proportionality balance.

38. In order to explain that issue, I need briefly to recapitulate the state of the authorities about the public interest in the deportation of foreign criminals. The background is that the Immigration Rules have at all material times referred to "the public interest" in the context of the deportation of non-nationals who commit criminal offences; and sections 32 (4) of the 2007 Act and 117C (1) of the 2002 Act have since incorporated the express statutory requirements which I have quoted. (Section 32 (4) refers to "the public good", in order to reflect the language of section 3 (5) (a) of the 1971 Act; but that plainly expresses the same concept.) The effect of the case-law has therefore been not so much to consider whether there is a public interest in the deportation of foreign criminals – which at least since 2007 has been a given – but rather to analyse its nature, in the interests of properly evaluating its weight in the circumstances of a given case.

39. In *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694 Wilson LJ considered the earlier decision of this Court in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094 and at para. 15 of his judgment summarised its effect as follows:

> "(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
>
> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
>
> (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature."

40. That passage – and specifically the threefold analysis under heads (a)-(c) – has been followed in several subsequent cases in this Court. For example, at para. 37 of his judgment in *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544 Rix LJ referred to *OH (Serbia)* – together with *N (Kenya)* and *EO (Turkey)* [2008] EWCA Civ 671 – and said:

> "The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending."

Para. 20 of the judgment of Moore-Bick LJ in *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596 is to the same effect.

41. The issue was considered further in the judgments of Lord Kerr and Lord Wilson in *Hesham Ali* – though not, it should be noted, by the other members of the Court. Paras. 164-168 of Lord Kerr's dissenting judgment are headed "the public interest". At para. 166 he refers to the threefold analysis in *OH (Serbia)*. At para. 167 he questioned whether element (b) – deterrence of other non-nationals – had any application in the case of foreign criminals who had lived in the UK for a substantial period; and at para. 168 he said that "[e]xpression of societal revulsion, the third of the factors applied in the *OH (Serbia)* case, should no longer be seen as a component of the public interest in deportation", for reasons which he went on to give. Lord Wilson responded to those points at paras. 69-70 of his own judgment. At para. 69 he suggested that Lord Kerr's point about deterrence was too narrow, asking:

> "Might not the deterrent effect upon all foreign citizens (irrespective of whether they have a right to reside in the UK) of understanding that a serious offence will normally precipitate their deportation be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to re-offend? See [*DS (India)*] ... para 37, Rix LJ."

And at para. 70, while he acknowledged that his reference in *OH (Serbia)* to "society's revulsion at serious crimes" had been inappropriately emotive, he nevertheless said:

> "I maintain that I was entitled to refer to the importance of public confidence in our determination of these issues. I believe that we should be sensitive to the public concern in the UK about the facility for a foreign criminal's rights under article 8 to preclude his deportation."

He supported that statement by reference to the history of sections 32-33 of the 2007 Act and also, albeit that it had not come into force at the instant appeal, to the passing of the 2014 Act.

42. At paras. 52-53 of his judgment in *Akinyemi v Secretary of State for the Home Department* [2019] EWCA Civ 2098, [2020] 1 WLR 1843, Ryder LJ referred to the judgments of Lord Wilson and Lord Kerr in *Hesham Ali*. He expressed a preference for Lord Kerr's approach to the supposed third component in the public interest, but he

made it clear that that view was not necessary to his reasoning: I quote the relevant passage at para. 46 below.

43. Plainly the judgment of Lord Kerr in *Hesham Ali* cannot unsettle the previous case-law of this Court as summarised above, since none of the other members of the Court endorsed what he said. The Court proceeded on that basis in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 WLR 1327: see para. 139 of my judgment.

44. It remains the law, therefore, that there is a third component in the public interest of the kind identified in *OH (Serbia).* As for exactly how that component is to be characterised, Lord Wilson's self-criticism about the language used in his judgment can be accommodated, as he made clear, without undermining the essential point in the *OH (Serbia)* line of cases. What that comes down to is that the public takes the view that non-UK nationals who have committed serious offences should generally not be permitted to continue to live here (following their release from prison); and that it is in the interests of maintaining public confidence in the system, and thus in the public interest, that that view should be given effect to. It does not of course follow that foreign criminals should be deported in every case. It remains necessary to consider whether, on the facts of the particular case, the public interest (including that component of it) is outweighed by the interference with their private and family lives which deportation would entail, taking the approach prescribed by section 117C.

45. Against that background I can turn to Mr Drabble's submissions. These were based on the extremely unusual facts of the Appellant's case. He had lived in the UK all his life. He committed the offence which rendered him liable to deportation while he was a British national, and he had renounced his nationality only for the very particular family reasons identified above. He was thus in a fundamentally different position from the typical foreign criminal who had come to this country from abroad and had never held UK nationality. Mr Drabble submitted that the third component in the public interest as identified in the cases either had no, or no significant, weight in this kind of case. There was no reason to suppose that the public would regard someone in the Appellant's unusual circumstances as a "foreign criminal" of the kind about whom there was an acknowledged public concern. That being so, some other facet of the public interest had to be shown to be engaged, but the FTT had not referred to any. Although that was his primary case, I think it is fair to say that he had a fallback submission that even if the third component in the public interest continued to have some weight in a case of this kind it was much diminished, and that was something which the FTT failed to appreciate.

46. In support of that submission Mr Drabble relied on the decision of this Court in *Akinyemi 2*, to which I have referred above. In that case the appellant was a Nigerian national who had lived in the UK all his life and had no experience of Nigerian life. For a period he had enjoyed an absolute right to acquire British citizenship, though he had not done so before the right was withdrawn by legislation: Mr Drabble submitted that those features were broadly comparable with those of the present case, although the Appellant's position was *a fortiori* because he had actually been a British citizen. Mr Akinyemi was convicted of causing death by dangerous driving and sentenced to four years' imprisonment. A deportation order was made. When the matter was first considered by the FTT it made an error of law and the decision was re-made by the UT. That decision was overturned by this Court in *Akinyemi 1* ([2017] EWCA Civ 236,

[2017] 1 WLR 3118) on the basis of a different error of law which I need not expound here. The Court rejected a submission that the error in question was immaterial: in that connection I said at para. 49 of my judgment, as Mr Drabble notes in his reformulated case, that the fact that the appellant had lived in the UK all his life made the proportionality assessment "peculiarly sensitive". The case was remitted to the UT, which again dismissed the appeal. Mr Akinyemi appealed against that decision. The decision in *Akinyemi 2* was to allow that appeal. Ryder LJ gave the only substantive judgment. At para. 39 he said:

> "The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a *moveable* rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few, i.e. they will be exceptional having regard to the legislation and the Rules."

He held that the UT had failed to take that flexible approach in the unusual circumstances of Mr Akinyemi's case. At paras. 52-53 he said:

> "52. The balancing exercise described by the Supreme Court was not undertaken by the UT. Instead, the UT anchors its approach (at [25]) of its decision on Lord Wilson's description of the depth of public concern as a factor (at [70] of *Hesham Ali*). Lord Wilson's words were not expressly adopted by the other members of the Court in *Hesham Ali* and are inconsistent with Lord Kerr's analysis at paragraphs [167] and [168] where he disavows any rational connection between 'societal revulsion' and the legitimate aim of preventing crime and disorder. Although I would prefer Lord Kerr's analysis, I can limit my reasoning to saying that Lord Wilson's observation is made in a different context to the facts of this case and that it is either inapplicable to the facts or would not tend to strengthen the weight of the public interest in deportation in this case.
>
> 53. The UT's approach to the public interest and the proportionality balance that is to be undertaken were accordingly flawed. The exercise of considering the strength of the public interest by assessing the factors in the case has not been undertaken. In particular, the extent to which a foreign criminal who was born in the UK and has lived here all his life must be considered alongside all the other factors that relate to the public interest in deportation before that is balanced against an assessment of the article 8 factors. …"

The case was remitted to the UT for a proper assessment to be performed in line with that approach. Mr Drabble told us that the UT's decision on remittal was to allow the appeal.

47. I turn to consider how the FTT addressed the proportionality assessment. As I have explained, although the Judge decided that the Appellant was not a foreign criminal she nevertheless thought it useful to consider the issue by reference to the provisions of

section 117C. Given the limited nature of the issues, I need not attempt a full summary of her reasoning and can focus on the points relevant to Mr Drabble's challenge.

48. I start with para. 6 of the decision, which comes in a part headed "The refusal letter". This reads:

> "There is a public interest in his removal as the public interest in deportation not only includes depriving the offender of a chance to reoffend but also deterring and preventing serious crime generally and upholding public abhorrence of such offending."

That is, to anticipate, the only reference in the decision to the nature of the public interest in the deportation of foreign criminals. Mr Drabble submitted that it cannot be treated as part of the Judge's self-direction because it is simply a recitation of what the Secretary of State had said in her decision letter. That is formally correct, but it is not a point of real significance. The threefold classification quoted is, as we have seen, trite law and could not have been in dispute as far as it goes. I have no doubt that the Judge had it well in mind in her assessment.

49. The Judge's consideration of the proportionality exercise begins at para. 14. It is quite elaborately structured because, following the guidance in *NA (Pakistan)*, she considered in turn the factors raised under "Exception 1" and "Exception 2" in section 117C (and the corresponding Rules). I need not summarise that part of the decision, which runs from paras. 14-25, save to note two points:

(1) At para. 20 she considers with care the obstacles to the Appellant's integration in Pakistan if deported and concludes that they are not "very significant". She finds him to be familiar with Pakistani culture and able to speak basic Urdu. She also says:

> "… [H]e was prepared to be repatriated to Pakistan: he says to join his father who had travelled there as he was unwell. I appreciate that his driving force was to be close to his father but I am also of the view that he must have been prepared to serve out the rest of his sentence in a Pakistani prison. He would have been well aware of what that entailed and this did not deter him from renouncing his British citizenship so that he could move to Pakistan. The respondent states that the appellant did not view his lack of knowledge of Pakistan as a barrier to him going to live there (both to serve out his sentence and on release). There is force in that argument and it has not been adequately addressed by the appellant."

(2) At para. 22 she finds that the Appellant's relationship with his wife was only formed at a time after he had renounced his citizenship.

Neither point is of central importance, given the way that Mr Drabble put his case, but I return to them briefly below.

50. At paras. 26-29, the Judge considers whether there are any "very compelling circumstances" of the kind that would be required under section 117C (6). The first sentence of para. 26 reads:

> "I consider all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation."

In the remainder of that paragraph she recapitulates the points already considered. Paras. 27-29 read (so far as relevant, and with the correction of some typographical errors):

> "27. I do bear in mind he was formerly a British citizen and that does carry substantial weight, although I reject the claim that he renounced his citizenship on the basis of a misrepresentation or an inducement made by the respondent as there is insufficient evidence before me to make that finding. ...
>
> 28. I do note that the appellant has committed, using the terminology in the skeleton argument, a 'historic' offence. I appreciate that he has been recommended for parole which suggests that he is a very low risk of re-offending in the future. I accept there is no evidence of any pro-criminal attitudes or that the appellant associates with people involved in criminal activities. I also take note of the extensive evidence of rehabilitation in the appellant's bundle.
>
> 29. Relying on my findings I find there are no very compelling circumstances in this case."

51. At paras. 30-33 she finally conducts the proportionality assessment. At paras. 30-31 she reminds herself that, given her conclusion that the Appellant is not a "foreign criminal", the conclusions that she had reached in the previous paragraphs are not determinative. In that context she says, at para. 30:

> "Given the nature of the offence, I expressly take account that deportation is conducive to the public good and in the public interest."

She accordingly directed herself that the deportation of a non-national who had committed a murder was in the public interest. She also said, at para. 31, that in making her assessment of proportionality she took into account all her findings. At paras. 32-33 she summarised the factors in her assessment in the form of a balance sheet of the kind recommended by Lord Thomas in *Hesham Ali*. Again, because of the specific nature of Mr Drabble's challenge, I need not set it out in full, but I should record that the first of the "cons", at para. 32 (a), is:

> "The appellant was convicted of a murder. He received a life sentence with recommendation that he serve 15 years. His deportation is conducive to the public good."

Among the "pros", at para. 33 (b), is the fact that "the Appellant has only ever lived in the UK". There is no explicit reference to the fact that he had done so as a British

citizen, but I do not consider that that is a significant omission, given what she had said already. Para. 33 (c) refers again to the Appellant's rehabilitation.

52. The Judge's final conclusion is at para. 34, which I have already set out: see para. 20 above. I should note one point about it. Ground 3 of the grounds of appeal notes that the Judge ("correctly") identified the public interest as "the prevention of crime". The Judge does indeed use that phrase, but it is clear in context that it is simply a shorthand for the list of interests stated in article 8.2 of the ECHR as potentially justifying an interference with private or family life – "national security, public safety or the economic well-being of the country, for *the prevention of* disorder or *crime* [emphasis supplied], for the protection of health or morals, or for the protection of the rights and freedoms of others". She was plainly not disavowing the usual threefold characterisation of the public interest.

53. I do not believe that the Judge's reasoning and conclusion showed any error of law of the kind alleged by Mr Drabble. My reasons are as follows.

54. In the first place, the fact that a foreign criminal has lived in the UK all his life and/or has committed the offence which renders them liable to deportation while they were a British citizen cannot mean that there is no public interest in their deportation. Such a conclusion would be contrary to section 117C (1). The particular circumstances of such a case can only go to the weight to be accorded to the public interest.

55. It is, I accept, necessary for the purpose of that exercise to identify the nature of the relevant public interest. In the present case it appears that the Judge gave little or no weight to the risk of the Appellant re-offending in view of the evidence of his rehabilitation. But there remain the other two components. As to those:

(1) As to deterrence of other non-nationals, although head (iv) in Mr Drabble's reformulation refers to "the limitation on the relevance of deterrence" said to arise from para. 52 of Ryder LJ's judgment in *Akinyemi 2*, that paragraph was in fact concerned with the third component, "public concern". It is true that Lord Kerr had in *Hesham Ali* doubted the relevance of deterrence of other non-nationals in cases where the foreign criminal has been present in the UK for a long time. I cannot myself see why the deterrent effect should be any less in such a case, but it may be that Lord Kerr's point was simply that it should carry less weight.

(2) As to " public concern", I do not accept the submission that the fact that a person committed the offence in question when they were a British citizen would in all cases neutralise public concern at the system allowing them to remain in the country. To take the present case, the Appellant would at the point of his release be someone who had committed a murder and, having renounced their British citizenship, had no right to be here: I have no difficulty accepting that there might be (legitimate) public concern that such a person should be permitted to remain, whether or not he was a British citizen at the time of the offence. (The point is essentially the same, albeit deployed in a different context, to that made at para. 32 above.)

Indeed if at least one of those components were not present it would undermine the clear effect of section 117C (1).

56. In short, the right way to give effect to the particular circumstances of foreign criminals in the very unusual position of the Appellant (and the slightly less unusual position of Mr Akinyemi) is not to deny that there is any public interest in their deportation but to take those circumstances fully into account when carrying out the proportionality exercise. That was the approach taken in *Akinyemi 2*. As Ryder LJ there emphasised, the weight to be given to the public interest in deportation is not fixed, and it is entirely legitimate to reduce the weight to be given to it in a case of this kind. I would, however, add that in many cases it is equally apt to treat the particular features of the case either as diminishing the weight to be given to the public interest or as increasing the weight in the opposite pan of the scales.

57. The question then is whether there was any legal flaw in the way in which the FTT Judge conducted the proportionality assessment in the present case. Mr Drabble argues that she did not conduct the kind of "peculiarly sensitive" assessment required in a case of this kind. Her reference to the public interest at para. 32 (a) was purely conclusory: there was no indication of the particular nature of the public interest involved or assessment of the weight which it attracted. Although the Judge referred to the fact that the Appellant had lived in the UK all his life and had been a British citizen there was no explanation of why those factors were said to be outweighed by the public interest.

58. I do not accept that submission. It is important to recall that the Appellant had committed murder, which is an offence of the utmost gravity. Section 117C (2) provides that the more serious the offence the greater the public interest in deportation; and although the Judge did not believe that Part 5A had any direct application, that is a common sense proposition that she plainly applied – see para. 30 of her decision quoted above. In those circumstances there was no need for an elaborate discussion of the kind that Mr Drabble said was lacking. The nature of the public interest was straightforward, as was the great weight to be attached to it. She correctly identified the particular circumstances on which Mr Drabble relies and said in particular that she would attach "substantial weight" to the fact that he had been a British citizen until he renounced his nationality. The conclusion that those circumstances did not outweigh the public interest in deportation did not require detailed explanation. To put it no higher, it cannot be said to be a surprising conclusion. I would add, though this is very much secondary, that the weight to be attached to the Appellant's family and private life in the UK is diminished by the two factors which I record at para. 49 above.

59. The foregoing discussion covers the points made in Mr Drabble's reformulated Outline as set out in para. 37 above, with the possible exception of (ii), which he did not elaborate in his oral submissions: I am sure that the Judge did apply "the correct legal framework", and there is nothing to suggest to the contrary in the *Essa* decision cited. I confirmed with Mr Drabble at the end of his submissions that in so far as hints of any other points might be found in the original grounds (or the skeleton argument) they were not being pursued.

60. The UT of course likewise found that there was no error of law in the FTT's decision. I intend no disrespect in not referring to its decision, but the Appellant's case before the UT was not put in quite the same way as it was before us, at least at all points; and the ultimate focus is necessarily on the decision of the FTT.

61. I would accordingly dismiss the appeal on grounds 2-6 also. I would not want it thought that I disagreed in any way with the dispositive reasoning in *Akinyemi 2*. The

Strasbourg authorities reviewed and endorsed by Lord Reed in *Hesham Ali* make it clear that the length of time that an offender has lived in this country is a highly material factor, and where they have lived here all their life that is bound to carry great weight in the proportionality assessment. I am not at all surprised by the eventual outcome of Mr Akinyemi's appeal. But each case must depend on its own facts, and the particular circumstances of this case – principally the gravity of the offence – fully justify the FTT's conclusion.

DISPOSAL

62. I would dismiss the appeal.

Arnold LJ:

63. I agree.

Snowden LJ:

64. I also agree.