THE COURT ORDERED that that no one shall publish or reveal the name or address of the Respondent who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or of any member of his family in connection with these proceedings.

Easter Term
[2024] UKSC 13
On appeal from: [2022] EWCA Civ 780

JUDGMENT

R (on the application of AM (Belarus)) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lord Lloyd-Jones
Lord Sales
Lord Hamblen
Lord Stephens
Lady Simler

JUDGMENT GIVEN ON
24 April 2024

Heard on 6 and 7 December 2023

Appellant
Rory Dunlop KC
Tom Tabori
(Instructed by Government Legal Department (Immigration))

Respondent
Richard Drabble KC
Mikhil Karnik
(Instructed by Paragon Law (Nottingham))

LORD SALES (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Stephens and Lady Simler agree):

1. The respondent, AM, has been convicted of various offences in the United Kingdom and qualifies as a foreign criminal for the purposes of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"). The appellant Secretary of State wishes to deport him to Belarus, which is his state of nationality. However, AM has not been cooperative in relation to this and has successfully managed to thwart the Secretary of State's efforts to remove him. The result has been that AM has continued to be present in the United Kingdom, but without any grant to him of leave to remain ("LTR").

2. As convenient shorthand I will refer to this as AM's "limbo" status. He is present in the United Kingdom without LTR to entitle him to be here, but is able to reside in the community because he has been granted immigration bail under paragraph 1(5)(a) of Schedule 10 to the Immigration Act 2016 ("the IA 2016"). So far as is relevant, that provision stipulates:

> "A person may be granted and remain on immigration bail even if the person can no longer be detained, if –
>
> (a) the person is liable to detention under a provision mentioned in sub-paragraph (1) …"

3. AM is within the scope of paragraph 1(5)(a) because he is "liable to detention" under paragraph 16(2) of Schedule 2 to the Immigration Act 1971 ("the IA 1971"), which is one of the provisions mentioned in subparagraph 1(1) of Schedule 10 to the IA 2016. Paragraph 16(2) of Schedule 2 to the IA 1971 provides that "if there are reasonable grounds for suspecting that a person is someone in respect of whom [removal directions] may be given …, that person may be detained under the authority of an immigration officer pending- (a) a decision whether or not to give such directions; (b) his removal in pursuance of such directions." AM is such a person.

4. This appeal is concerned with AM's rights under article 8 of the European Convention on Human Rights ("article 8" and "the Convention", respectively). Article 8 is given effect in domestic law as one of the Convention rights under the Human Rights Act 1998 ("the HRA"). Under section 6(1) of the HRA the Secretary of State is required to act in a manner that is compatible with the Convention rights, including article 8.

5. Article 8, headed "Right to respect for private and family life", provides:

> "(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."

6. Incidents of AM's limbo status are that (1) he has no permission to work in the United Kingdom (as some, but not all, persons with LTR would have); (2) he does not have full access to the services of the NHS (as a person with LTR would have), but is only entitled to receive emergency NHS treatment; (3) unlike a person with LTR, he is disqualified from entering into a tenancy agreement and from opening a bank account; (4) he receives only very limited social welfare benefits at the same level as any failed asylum seeker awaiting removal from the United Kingdom receives by way of what is called "short-term" support from the National Asylum Support Service ("NASS"), comprising a payment card for food, clothing and toiletries at a subsistence level and accommodation provided by NASS. The availability of these welfare benefits and access to emergency NHS treatment mean that AM is protected against destitution and from violation of his rights under article 3 of the Convention (protection against inhumane treatment). However, AM contends that, in order to comply with his right to respect for his private life under article 8, the Secretary of State is obliged to issue him with LTR for so long as his removal to Belarus is not possible, with permission to seek employment. He says that this would enable him to obtain work lawfully and be a productive member of society while also having access to better healthcare services and welfare benefits.

Factual background

7. AM is a citizen of Belarus. He arrived in the United Kingdom in 1998, aged 21, and claimed asylum.

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

9. AM was interviewed for his asylum claim in 2000. The Secretary of State refused that claim in December 2000. AM appealed to an adjudicator (Mr Jordan) in accordance with the system then in place. In January 2001 his appeal was dismissed.

The adjudicator made adverse credibility findings in respect of AM and found that he was of no interest to the authorities in Belarus and would not be at risk if returned there. In March 2001 AM's appeal against the adjudicator's decision was dismissed.

10. On 29 June 2001 AM was removed to Belarus. However, when examined upon arrival, AM provided false information which led the Belarussian authorities to believe that he was not, in fact, a citizen of Belarus. The result was that he was refused entry and was returned to the United Kingdom.

11. AM was held in immigration detention pending further efforts to remove him to Belarus. While in detention, AM made efforts to harm himself and attempted suicide.

12. For reasons which are not clear due to the passage of time, AM was permitted to bring a second appeal to an adjudicator (Mr Edwards) against the refusal of his asylum claim by the Secretary of State. The adjudicator issued his decision in June 2002. The adjudicator made his own adverse credibility findings in respect of AM as regards AM having admitted lying to immigration officials in Belarus by telling them that he was not a citizen of Belarus and also lying to immigration officials in the United Kingdom. The adjudicator found that AM is a citizen of Belarus and that he had no genuine fear of persecution there.

13. The Secretary of State continued to make efforts to gather information about AM's origins which would persuade the Belarussian authorities that he is a citizen of Belarus, so that he could be removed there. However, the impasse with the Belarussian authorities created by AM was not overcome. In February 2003 the Secretary of State arranged for AM to attend the Belarussian embassy to apply to travel to Belarus. The embassy informed the Secretary of State that AM had denied being a citizen of Belarus. The Belarussian authorities did not accept that AM was a citizen of Belarus and again refused him entry.

14. In view of the period AM had spent in immigration detention and the practical impediments to his removal, in December 2003 the Secretary of State released him from immigration detention on bail (or temporary admission, as it was called at that time), without LTR.

15. AM made a further claim for asylum, which was again refused by the Secretary of State in 2004. AM's attempt to challenge that decision in judicial review proceedings was dismissed.

16. On 1 May 2008 AM was convicted of possession of a false identity document and sentenced to 10 months' imprisonment. When due for release in August 2008, AM

was again placed in immigration detention with a view to his removal from the United Kingdom. The Secretary of State made further efforts to obtain information which would persuade the Belarussian authorities that AM is a national of Belarus. However, problems remained which prevented AM's removal to Belarus and he was again granted bail in September 2009.

17. On 15 September 2010 AM filed an application for judicial review of the Secretary of State's failure to provide him with LTR or permission to work in the United Kingdom. AM was granted permission to apply for judicial review. However, upon the Secretary of State agreeing to reconsider the question whether AM should be granted asylum, the judicial review proceedings were stayed.

18. In September 2011, after reconsidering AM's case as a fresh claim for asylum, the Secretary of State again refused that claim. AM appealed to the First-tier Tribunal ("the FTT").

19. In March 2012 the FTT dismissed the appeal, finding that Belarus's refusal to admit AM was due to AM's failure to provide accurate information about himself and his links to Belarus to enable the Belarussian authorities to trace him and confirm his nationality, rather than because of his being identified as a political opponent of the Belarussian authorities. The FTT made its own adverse credibility findings in respect of AM. In the proceedings in the FTT, AM agreed that he was a citizen of Belarus. The FTT found that if AM told the truth to the Belarussian authorities and provided them with accurate information, he would be accepted to be a citizen of Belarus and would be admitted.

20. AM appealed to the Upper Tribunal. His appeal was dismissed in April 2013. His further appeal to the Court of Appeal was also dismissed: [2014] EWCA Civ 1506.

21. In May 2015 AM was suffering from mental ill health and was seen by the mental health crisis team in his area.

22. In 2017 AM made an application for LTR as a stateless person.

23. In July 2018 AM successfully applied for permission to restore the judicial review proceedings which had been stayed, in order to challenge the Secretary of State's continuing failure to grant him LTR.

24. On 11 September 2018 AM was sentenced to 42 weeks' imprisonment for possession of an offensive weapon. While in prison he was treated for physical illnesses

(hepatitis C and psoriasis) and mental ill-health and his condition improved. Ms Debra Goode CPN, the community psychiatric nurse who was visiting him, recommended that AM be granted LTR in order to provide him with stability to help maintain his improved physical and mental health. When AM had served the requisite period of time in prison, he was released on immigration bail.

25. AM has remained on immigration bail in limbo status since then, without LTR or the right to work in the United Kingdom and with access to only the limited range of welfare assistance described in para 6 above.

26. I note, however, that in the Upper Tribunal AM asserted that in the past, when he was not in detention or working illegally, he suffered periods of destitution. The agreed statement of facts and issues prepared for the appeal does not say that AM suffered any period of destitution. It does not appear that this was pleaded by AM. The Upper Tribunal was prepared to accept that AM had experienced periods of street homelessness (para 136) but it made no detailed findings about this, as regards when or the circumstances in which it occurred. It was not a central part of the Upper Tribunal's reasoning and did not figure in the reasoning of the Court of Appeal. Nor did Mr Richard Drabble KC, who appeared for AM on the appeal, base his submissions on any contention that he did experience destitution in the past. In the circumstances, for the purposes of determining this appeal, this assertion of fact by AM cannot be treated as established to any significant degree and can have no material bearing on the outcome of the appeal. It certainly has not been established that AM has been subjected to inhumane treatment by the state in the past, nor is it suggested that as a result of such treatment he ought to be granted LTR at the present time.

27. In January 2019 the Secretary of State reviewed AM's case, noted that AM had thwarted his removal to Belarus by being uncooperative and by telling lies to the Belarussian authorities and concluded that it was reasonable to continue to treat him as liable for removal to Belarus and to continue to make efforts to try to secure that result. The Secretary of State applied to the Belarussian authorities for an emergency travel document for AM and provided further evidence about him.

28. In August 2019 the Secretary of State arranged for AM to be interviewed by Belarussian officials by telephone. Their conclusion, however, was that AM gave false information about himself and sought to hide his identity, with the result that they could not identify him as a citizen of Belarus. They therefore declined to issue AM with a travel document which would allow his admission to Belarus.

29. By decision letter dated 27 November 2019 the Secretary of State refused AM's application to be granted LTR on grounds of statelessness. The Secretary of State accepted the statement of the Belarussian authorities that AM had lied to them. In the

Secretary of State's view, AM is a citizen of Belarus who had adopted a wilful strategy of lies, obfuscation and deceit to confuse and obstruct endeavours to confirm his identity. The Secretary of State further considered that AM should be refused LTR on the ground that he did not satisfy the suitability requirements in the Immigration Rules for a grant of LTR and did not merit the grant of LTR outside the rules.

30. It appears from a medical report prepared in June 2020 that at this stage AM was abusing drugs and was receiving treatment for mental ill-health, including being prescribed anti-psychotic medication. He appeared to be at risk of suffering epileptic seizures.

31. In July 2020 the Upper Tribunal granted AM permission to amend his judicial review claim to challenge the Secretary of State's decision of 27 November 2019 to refuse to grant him LTR on grounds of statelessness. AM's judicial review claim to challenge the Secretary of State's decision regarding statelessness and to maintain that her failure to grant him LTR violated his rights under article 8 then proceeded to a determination in the Upper Tribunal.

32. By a decision dated 11 February 2021 the Upper Tribunal (Lane J and Upper Tribunal Judge Rimington) dismissed AM's challenge to the Secretary of State's determination that AM is not stateless and so is not entitled to a grant of LTR on grounds of statelessness, but upheld AM's claim that refusal to grant him LTR (with permission to work) violated his rights under article 8.

33. The Secretary of State appealed to the Court of Appeal in relation to the finding of violation of article 8. AM has not appealed in relation to the issue of statelessness. The Court of Appeal dismissed the Secretary of State's appeal. The Secretary of State now appeals to this court.

The legislative framework and the Immigration Rules

34. The provisions of the legislative regime in the NIAA 2002 apply in relation to immigrants seeking to claim an entitlement to remain in the United Kingdom based on article 8, in particular with respect to foreign criminals. So far as is material for present purposes, a "foreign criminal" is defined in section 117D(2) to mean a person who is not a British citizen, who has been convicted in the United Kingdom of an offence and who has been sentenced to a period of imprisonment of at least 12 months.

35. Sections 117A-117C of the NIAA 2002 provide in relevant part:

“**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

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

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

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

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

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

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

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

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

…

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

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

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

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

(4) Exception 1 applies where—

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

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

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

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

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

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

36. These provisions of the NIAA 2002 were mirrored in corresponding provisions of the Immigration Rules (paragraphs 398-399A). An issue previously arose regarding the interpretation of section 117C, in that subsection (6) referred to the assessment of the public interest being modified in favour of foreign criminals at the most serious end of the spectrum (ie those who had been sentenced to a period of imprisonment of four years or more) but subsection (3) did not allow for this in favour of foreign criminals falling in the less serious bracket of those who had been sentenced to a period of imprisonment of 12 months up to four years. That issue was resolved by an interpretation arrived at by the Court of Appeal in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207 ("*NA (Pakistan)*"), at paras 24-27, and followed ever since, which reads subsection (3) as applying in addition the same test in relation to foreign criminals in the less serious bracket as in subsection (6) is applied to foreign criminals in the most serious category. That interpretation was followed in the Upper Tribunal and the Court of Appeal in the present proceedings and is likewise followed by this court.

37. The Immigration Rules, as applicable at the relevant time, set out the basis on which the Secretary of State will grant LTR on the grounds of private life in the UK. (The relevant rules are now in an Appendix to the Immigration Rules dealing with private life and have been slightly modified). Paragraph 276ADE provided in material part:

> "276ADE(1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2 and S-LTR 3.1 to S-LTR 4.5 in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); …"

38. Paragraph 276BE(2) of the Immigration Rules provided:

> "Where an applicant does not meet the requirements in paragraph 276ADE(1) but the Secretary of State grants leave

to remain outside the rules on Article 8 grounds, the applicant will normally be granted leave for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the Secretary of State considers that the person should not be subject to such a condition."

39. Section S-LTR in Appendix FM to the Immigration Rules set out detailed provisions in relation to the suitability requirements an application for LTR should satisfy, including as follows:

"S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.8. apply.

S-LTR.1.2. The applicant is currently the subject of a deportation order.

…

S-LTR.1.4. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months.

…

S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

S-LTR.1.7. The applicant has failed without reasonable excuse to comply with a requirement to-

(a) attend an interview;

(b) provide information;

(c) provide physical data; or

(d) undergo a medical examination or provide a medical report.

S-LTR.3.1. When considering whether the presence of the applicant in the UK is not conducive to the public good any legal or practical reasons why the applicant cannot presently be removed from the UK must be ignored.

S-LTR.4.1. The applicant may be refused on grounds of suitability if any of paragraphs S-LTR.4.2. to S-LTR.4.5. apply.

S-LTR.4.2. The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim; or did so in order to obtain from the Secretary of State or a third party a document required to support such an application or claim (whether or not the application or claim was successful).

S-LTR.4.3. The applicant has previously made false representations or failed to disclose material facts for the purpose of obtaining a document from the Secretary of State that indicates that he or she has a right to reside in the United Kingdom. …"

40. The Secretary of State has a wide residual discretion under the IA 1971 to grant LTR outside the Immigration Rules: *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192, para 44; *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 ("*Ali*"), para 18. There is a duty to exercise that power where a failure to do so is incompatible with a Convention right, such as article 8: section 6(1) of the HRA 1998; *Ali*, para 18.

The judgments of the Upper Tribunal and the Court of Appeal

41. The Upper Tribunal, having rejected AM's claim that he is entitled to LTR on the ground that he is stateless, turned to consider a distinct submission made by AM that

there is no basis in domestic law for the Secretary of State to continue to maintain his limbo status and that the Secretary of State therefore had no option but to grant him LTR. Applying the decision of the House of Lords in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39; [2006] 1 AC 207 ("*Khadir*"), the Upper Tribunal rejected this submission. Since AM is "liable to detention" according to paragraph 16(2) of Schedule 2 to the IA 1971, within the meaning of paragraph 1(5)(a) of Schedule 10 to the IA 2016, and remains so despite the difficulties in removing him, the Secretary of State had the legal power to release him on immigration bail, with limbo status, without having to grant him LTR. There has been no appeal against that part of the Upper Tribunal's decision.

42. This left AM's claim based on article 8. The Upper Tribunal directed itself by reference to the guidance given by Haddon-Cave LJ in relation to challenges to limbo status based on article 8 in *RA (Iraq) v Secretary of State for the Home Department* [2019] EWCA Civ 850; [2019] 4 WLR 132 ("*RA (Iraq)*"), considered below. The tribunal sought to follow the four-stage analysis set out by Haddon-Cave LJ.

43. The matters particularly emphasised by the Upper Tribunal were as follows. AM had been in actual (rather than prospective) limbo for over 20 years. The prospect of his removal to Belarus was remote, as it was very unlikely he would change his entrenched position of non-cooperation with the authorities. Although the difficulties in removing AM to Belarus stemmed from this entrenched position, he should be regarded as being vulnerable because of his physical and mental health problems. AM had no family life in the United Kingdom but he had "some, albeit minimal, private life" through friendships he had established here. He was subject to a deportation order because he had committed serious criminal offences, including an offence of violence. AM benefited from the stability of life and the care he received while in prison. The tribunal had regard to Ms Goode's view that he would benefit if given legal status when released as "he would be motivated to work and make positive changes in his life and have the potential to be a valuable asset to society", whereas it was highly likely that his physical and mental health would once more deteriorate after release if it was not granted to him. The tribunal explained that, whilst it was plainly unlikely that AM would become a model member of society if given LTR, and they did not put "undue emphasis" on Ms Goode's professional opinions, they did nevertheless place "certain weight" on her evidence, which showed that AM retains capacity for self-improvement.

44. In conducting the balancing exercise at stage four of the *RA (Iraq)* analysis, the Upper Tribunal referred to sections 117A-117C of the NIAA 2002. AM did not satisfy the requirements to fall within Exception 1 as set out in section 117C(5). Therefore, following the interpretation of section 117C(3) adopted in *NA (Pakistan)*, the public interest would require his deportation unless there were very compelling circumstances as described in section 117C(6): see para 36 above.

45. The Upper Tribunal, referring to *RA (Iraq)*, para 71, considered that there was only a "residual" (albeit not wholly extinguished) public interest in maintaining immigration control by the removal of AM, stemming from his "problematic actions" and his criminal offending, and even the force of this residual public interest fell to be qualified by what it described as "the highly unusual circumstances of this case".

46. The Upper Tribunal recognised that significant aspects of the public interest concerned the effect on public confidence in the system of immigration control and whether the intended disincentive to illegal immigrants coming or remaining in the United Kingdom by withholding from them the right to work and to receive full welfare benefits might be undermined, if AM's limbo status were to be ended by the grant of LTR. They considered that public confidence would not be significantly affected, because as events had transpired AM had not gained any real benefit from his presence in the United Kingdom. He had lived at the outer margins of society, had experienced periods of street homelessness and had become addicted to drugs and alcohol; he had "conspicuously failed" in his aim (if such it was) of achieving a better life by coming to the United Kingdom: paras 133-136. The tribunal added (para 136): "Accordingly, a grant of leave to [AM] at this point is unlikely to encourage others to follow his example, thereby leading to a general weakening of the immigration system." In the view of the Upper Tribunal, therefore, the public interest in the removal of AM was highly attenuated.

47. The Upper Tribunal then directed itself by reference to *RA (Iraq)*, para 69, and, in order to decide whether "very compelling circumstances" existed (section 117C(6) and *NA (Pakistan)*: see para 36 above), considered the questions of the extent to which leaving AM in a state of limbo would interfere with his rights under article 8 and whether such interference would be proportionate when balanced with the public interest. It found that very compelling circumstances did exist and that the Secretary of State's continued refusal to grant LTR would constitute a disproportionate interference with AM's right to respect for his private life under article 8:

> (1) The tribunal reiterated (para 138) that the prospects of removing AM were remote and said that "despite the fact that this situation has been generated by [AM], it would be wrong to ignore the reality of the matter" when considering the issue of the proportionality of any interference.
>
> (2) In that regard, although AM failed to satisfy the suitability requirements for a grant of LTR, the tribunal placed weight on paragraph 276ADE(1)(iii) of the Immigration Rules (para 37 above) which referred to an applicant for LTR having "lived continuously in the UK for at least 20 years (discounting any period of imprisonment)". In the tribunal's view (para 142), that provision, approved by Parliament as part of the Immigration Rules, "is an important yardstick in determining whether the right to respect for a person's private life"

requires a grant of LTR, even when the applicant has (like AM) spent time in prison. Although the tribunal did not have accurate figures for time spent in prison by AM, it was prepared to assume that he would have accrued 20 years of continuous living in the UK apart from the time spent in prison, or would "be very close to doing so" (para 143).

(3) The tribunal said (para 144) that, although AM was not at present street homeless, "it must be asked whether the public interest would be served by perpetuating, in all likelihood indefinitely, his present unstable and fragile existence, when there is, on the evidence, some (albeit modest) reason to think that, if given leave, [AM] would begin to turn his life around, building on the efforts he made whilst last in prison"; and it reiterated this framing of the issue at para 146. It referred again (para 144) to the evidence of Ms Goode and the fact that AM had managed to work illegally. The tribunal also factored in (para 145) the medical condition of AM, that he was at risk of suffering seizures and was taking an anti-psychotic medication.

(4) At para 147 the tribunal referred to section 117B, and noted that AM had only ever, at best, had a precarious right to be in the United Kingdom, so that little weight should be attached to his private life. It noted that he could speak English but was not currently financially independent.

(5) The tribunal summed up its reasoning at paras 148-149:

> "148. The combination of the remoteness of removal; the fact that taking the applicant out of limbo in 2021 would not materially damage the principle of deterrence inherent in the statutory scheme; and regard to the overall rationale of paragraph 276ADE, lead us to conclude that, whilst not extinguished, the public interest in effective immigration control is weakened to the point where it is capable of being outweighed by the very compelling circumstances of the applicant's Article 8 case. The public interest, albeit described as 'high' and 'strong' in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, is not a fixity and in this case is reduced in strength. We are aware that facts can be usual but exceptional but also unusual and at the same time unexceptional. We consider the facts of the present case to be both highly unusual and exceptional.

> 149. Balancing all relevant factors and reiterating that we are mindful of the applicant's criminality, we conclude that the applicant's case is exceptional, in the true sense of the word. Anyone reading the applicant's history cannot reasonably regard our conclusion as any 'green light' for others to attempt to withhold material relevant to the establishment of their true identity. The alternative to granting leave to the applicant would be to remove any prospect of effecting the positive changes in his life described by Ms Goode, without any commensurate benefit to the public interest."

48. The Secretary of State appealed to the Court of Appeal. The appeal was dismissed. Dingemans LJ gave the sole substantive judgment, with which Moylan and Nicola Davies LJJ agreed. It was common ground that the guidance in *RA (Iraq)* was applicable and that the Upper Tribunal had correctly directed itself by reference to that guidance. The Court of Appeal considered that the Upper Tribunal had correctly taken into account relevant factors and had been entitled to balance the public interest and AM's interests in the way it did. The assessment of the Upper Tribunal could not be said to be wrong.

49. The Secretary of State now appeals to this court. In view of the way in which the Court of Appeal determined the appeal at that level, the question for this court is whether the Upper Tribunal erred in law in its approach to determining the issue whether AM's right under article 8 to respect for his private life has been violated by the refusal of the Secretary of State to grant him LTR or whether the tribunal's determination of the issue whether the interference with AM's article 8 rights by the withholding of LTR was disproportionate was wrong, in the sense of being outside the range of assessments properly open to the tribunal to make on such a question.

50. The Secretary of State relies on three grounds of appeal: (1) he says that relevant European case-law establishes that there is no violation of article 8 where the individual concerned creates the situation complained of by refusing to exercise their right to return to their country of origin, relying in particular on the judgments of the European Court of Human Rights in Strasbourg ("the European Court") in *Dragan v Germany*, judgment of 7 October 2004 ("*Dragan*"), and *Gillberg v Sweden*, GC, judgment of 3 April 2012 ("*Gillberg*"); (2) the Upper Tribunal erred at para 136 of its judgment by focusing on the extent of the benefits to AM of his time in the United Kingdom rather than considering the way in which immigration controls in relation to other persons would be undermined if AM were perceived to be rewarded with the grant of LTR as a result of his persistent dishonesty and recalcitrance in thwarting his removal to Belarus; and (3) the Upper Tribunal erred at paras 142-143 of its judgment by treating the 20 year residence period in paragraph 276ADE(1)(iii) as an "important yardstick" in the proportionality assessment, when AM did not satisfy the suitability criteria in the

Immigration Rules, and in holding that AM should benefit from it on the grounds that he was "very close" to reaching that period of residence.

Analysis

(1) The approach to article 8 and the question of proportionality

51. The approach to the application of article 8 and the question of proportionality under that provision is well established in the jurisprudence of this court and of the European Court. For present purposes it is appropriate to focus on private life, since interference with family life is not in issue in these proceedings.

52. In cases concerning settled migrants, namely persons who have been granted a right of residence in the host country, withdrawal of that right may constitute an interference with the right to respect for private life within the meaning of article 8; if there is an interference, it must be justified under article 8(2) as being "in accordance with the law", as pursuing one or more of the legitimate aims set out in article 8(2), and as being "necessary in a democratic society", which is to say justified by a pressing social need and proportionate to the legitimate aim pursued: *Ali*, para 25. *Mendizabal v France* (2010) 50 EHRR 50 illustrates the fact that interference with an individual's right to respect for private life under article 8 can arise where their immigration status is left uncertain by the host state, so that they are left in a precarious situation, experiencing uncertainty and significant disruption to their life over a long period: paras 70-72.

53. A four-stage test of proportionality applies, as explained in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill), and *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45 (Lord Wilson), among many other authorities: (i) is the aim sufficiently important to justify interference with a fundamental right? (ii) is there a rational connection between the means chosen and the aim in view? (iii) was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others?

54. In the case of a person who is not a settled migrant, but an alien seeking admission to a host country, which includes a person who has been unlawfully resident in the host country for many years, the question is whether the state has a positive obligation to grant the necessary permission to reside in order to afford the requisite respect for their private life: *Ali*, para 27, referring to the leading judgment of the Grand Chamber of the European Court in *Jeunesse v The Netherlands* (2014) 60 EHRR 17,

("*Jeunesse*"). Foreign criminals who are residing in the United Kingdom unlawfully, like AM in the present case, who resist their deportation on the basis of article 8, are in substance asserting that their right under article 8 to respect for their private life imposes a positive obligation on the United Kingdom to permit them to continue to reside here, and are in that respect in a similar position to the non-settled migrants in *Jeunesse*: *Ali*, para 31.

55. However, whether the situation is analysed in terms of positive or negative obligations is unlikely to be of substantial importance, since similar factors come into play and "[w]hether one poses the question whether, striking a fair balance between the interests of the individual in his private or family life and the competing interests of the community as a whole, his right to respect for his private and family life entails an obligation on the part of the state to permit him to remain in the UK; or whether, striking a fair balance between the same competing interests, his deportation would be a disproportionate interference, one is asking essentially the same question … Ultimately, whether the case is considered to concern a positive or a negative obligation, the question is whether a fair balance has been struck": *Ali*, para 32; also see *Gül v Switzerland* (1996) 22 EHRR 93, para 38; *Jeunesse*, para 106; *Hoti v Croatia*, judgment of 26 April 2018 ("*Hoti*"), para 122. In examining that question both from the perspective of a positive and from the perspective of a negative obligation on the state, the legitimate aims identified in article 8(2) are relevant (see also, in that regard, *Rees v United Kingdom* (1987) 9 EHRR 56, para 37).

56. The arguments presented by the parties in these proceedings have covered the question whether the Secretary of State is entitled to maintain her decision to deport AM to Belarus in the circumstances which have arisen. The Secretary of State could not deport AM if she grants him LTR, at least pending revocation of that LTR, so in that respect the questions of the maintenance of the deportation order and the grant of LTR go together. However, a distinct question also arises, whether it is an unjustified interference with AM's article 8 rights for him to be denied full access to the NHS and welfare benefits and to the employment market which a person with LTR would have, or (which amounts to the same thing) whether the state has a positive obligation under article 8 to provide him with those things, or some of them, during the period when for practical reasons he cannot be removed from the United Kingdom. That could be done by way of a grant of LTR, since the other benefits would flow from that. But, in principle, at least so far as giving permission to seek employment is concerned, presumably that could be granted by the Secretary of State as part of the package of conditions attached to the immigration bail granted to AM pursuant to the IA 2016. Similarly, the Secretary of State could provide additional money to meet at least some of AM's welfare needs out of general funds, if there was an obligation to do so under article 8, without necessarily granting him LTR.

57. It is relevant to draw out these aspects of AM's claim, since he remains in a position to stymie attempts to remove him to Belarus indefinitely, if he is determined to

do so. While AM is successful in blocking his removal to Belarus he remains in the United Kingdom and the responsibility of the United Kingdom as a state is engaged in relation to how he is treated while he is here. The case is therefore not about whether AM will in fact be sent to Belarus, since he cannot be, but rather is about what support he is entitled to be provided with while in the United Kingdom. The status of the deportation order made in relation to him is relevant to that question. So is the wider issue regarding the state's interest in maintaining an effective system of immigration control and in creating disincentives against circumvention of that system.

58. Where deportation is a realistic possibility, the legitimate aim pursued by deportation is typically the "prevention of disorder or crime": *Ali*, para 25. However, in the context of the present case, where AM cannot be removed and it is not appropriate to subject him to immigration detention, the legitimate aims pursued by the Secretary of State in declining to grant him LTR (or permission to seek employment or additional funds apart from a grant of LTR) are "the economic well-being of the country" (by limiting the social welfare available to persons in AM's position and by controlling the extent to which such persons may have access to the employment market, in competition with citizens and persons lawfully present in the country), "the prevention of disorder" (in the sense of discouragement of circumvention of the system of immigration control) and "the protection of the rights and freedoms of others" (by limiting the burden on taxpayers to support persons in AM's position and by protecting citizens and persons lawfully in the country from competition in the employment market from illegal entrants).

59. The general background for the proportionality analysis which is required is that:

> (1) "a state is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there": *Gül v Switzerland*, above, para 38; *Jeunesse*, para 100; *MA v Denmark*, judgment of the European Court of 9 July 2021, GC ("*MA v Denmark*"), para 131. "The Convention does not guarantee the right of a foreign national to enter or reside in a particular country": *Jeunesse*, para 100; *MA v Denmark*, para 131, also para 142. Article 8 does not impose on a state a general obligation to respect a person's choice of country in which to reside: see, by analogy, *Jeunesse*, para 107, and *MA v Denmark*, para 132 (where this point is made with reference to family life).
>
> (2) In considering whether a fair balance has been struck between the interests of the general community and the rights and interests of the individual in relation to admission of an immigrant, the state has a margin of appreciation: *Gül v Switzerland*, para 38; *Jeunesse*, para 106; *Hoti*, para 122. The European Court acknowledges that "immigration control serves the general interests of the economic well-being of a country in respect of which a wide margin [of

appreciation] is usually allowed to the state": *MA v Denmark*, para 143, also see para 161. In that context, the provisions of the NIAA 2002 and the Immigration Rules express the views of Parliament and the Secretary of State regarding the strength of the public interest in removal of a foreign criminal and in relation to standards of suitability for admission of an immigrant. It is not suggested that those provisions are incompatible with AM's Convention rights. The court is obliged to apply them. They are the prism through which the court has to assess the strength of the public interest in relation to AM's claim to remain in the United Kingdom.

(3) Adapting from the statement of principles in *Jeunesse* in relation to family life, the extent of a state's obligations to allow an illegal immigrant to remain on its territory will vary according to the particular circumstances of the person concerned and the general interest; relevant factors include the extent to which the individual's private life will be made impossible if removed and whether "there are factors of immigration control (for example a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion": *Jeunesse*, para 107. Another important consideration is whether the relevant aspects of private life were created at a time when the individual concerned was aware that their immigration status was such that the persistence of private life in the host state would from the outset be precarious; where that is the case, it is likely only to be in exceptional circumstances that the individual's removal will constitute a violation of article 8: *Pormes v The Netherlands*, judgment of 28 July 2020, para 58; and see, by analogy, *Jeunesse*, para 108, and *MA v Denmark*, para 134(i) (where the point is made with reference to family life).

(4) There is no right under article 8 for anyone to be provided with a minimum standard of living by way of provision of social welfare: see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 ("*SC*"), para 25, citing *Petrovic v Austria* (1998) 33 EHRR 14, para 26; see also *Chapman v United Kingdom* (2001) 33 EHRR 399, para 99 (article 8 does not impose an obligation on the state to provide a person with a home: "[w]hether the state provides funds to enable everyone to have a home is a matter for political not judicial decision"). In the present case the state has met AM's most pressing needs by provision of support through NASS, so that he is neither destitute nor subject to violation of his rights under article 3 of the Convention: cf *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396.

(5) Generally, the state enjoys a wide margin of appreciation in striking the balance between the general interest of the community and individual rights and interests in relation to general measures of economic or social strategy: *SC*, paras 115(2) and 161; *Carson v United Kingdom* (2010) 51 EHRR 13, GC, para 61.

Cases concerned with welfare benefits fall within this category: *SC*, paras 129(2) and 151. In the field of social welfare policy courts should normally be slow to substitute their view for that of the decision maker who has the democratic authority to make the relevant judgment, whether Parliament or a Secretary of State: *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, para 56; *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746, paras 83-84. The objective of protecting the economic well-being of the country is a legitimate aim generally for the purposes of the Convention, as well as being mentioned explicitly in article 8(2), and may justify restrictions being placed on the availability of social welfare benefits: *SC,* paras 192 and 202. Parliament is the body which has the democratic authority to decide how the limited resources of the state raised through taxation should be allocated in terms of provision of welfare benefits and is to be accorded a wide margin of appreciation in making those decisions.

(6) A state's interest in controlling immigration and its interest in promoting the economic well-being of the country through limiting welfare benefits and demands on the public purse may run together. When they do, then in light of the combination of the points above the state generally enjoys a wide margin of appreciation in deciding how to strike the balance between the interests of the general community and the rights and interests of the individual.

(2) The guidance in *RA (Iraq)*

60. In the context of this appeal it is necessary to refer to the guidance given by Haddon-Cave LJ in *RA (Iraq)* in relation to cases concerning persons in the United Kingdom with limbo status. The Upper Tribunal directed itself by reference to this guidance and, unsurprisingly at the level of the Court of Appeal, it was common ground in that court that the tribunal was right to do so. However, in this court the question has been raised whether this guidance is helpful or an appropriate basis on which to approach the relevant legal questions which arise under the HRA and article 8.

61. *RA (Iraq)* concerned an appellant who was a national of Iraq who had entered the United Kingdom in 2003 as a minor, with no passport or other documentation. It transpired that this created practical difficulties in deporting him to Iraq. In 2007 the appellant was sentenced to three years' detention in a young offenders' institution for robbery. The Secretary of State made a deportation order against him in 2008 but it was not possible to execute it. Upon release the appellant remained in the United Kingdom without LTR with limbo status arising from what was then called temporary admission (which later, under the IA 2016, became immigration bail), unable to work and with only limited access to welfare benefits and NHS services. He fathered two children while here. His application to the Secretary of State for LTR was refused. In 2013 the Upper Tribunal considered the appellant's asylum claim, his claim under article 8 to be

allowed to remain on the basis of his private and family life in the United Kingdom and his complaint that it was incompatible with his rights under article 8 to be left in a permanent state of limbo. The first two claims were dismissed and appeals in relation to them failed. However, the third claim was not determined at that stage but, by reason of a procedural error, was only determined by the Upper Tribunal in November 2016. In the meantime, in 2014, the appellant had been convicted of further offences and sentenced to 20 weeks' imprisonment. By 2016 the appellant was in employment (apparently with the acquiescence of the Secretary of State) and providing support for his children, who lived with their mother; but he would lose his employment if not granted LTR. The Upper Tribunal dismissed the appellant's challenge to his limbo status and he appealed to the Court of Appeal. His appeal was dismissed.

62. Haddon-Cave LJ set out guidance regarding the approach to be adopted in limbo cases, dividing it into four stages. First, cases involving persons in respect of whom a decision to deport has been taken but no deportation order has yet been made (which he labelled prospective limbo) should be distinguished from cases where a deportation order has been made but not yet executed (which he labelled actual limbo), since in the latter category it was more likely that there would be no LTR, so the impact on the individual would be likely to be greater: paras 63-64. Second, an assessment is required that the prospects of effecting deportation are remote; if in fact steps can be taken to effect their removal, the argument that the public interest in deportation should be overcome by article 8 rights or other Convention rights is likely to face formidable obstacles: paras 65-66. Third, a tribunal must then "engage in a fact-specific examination of the case", including the time already spent by the individual in the United Kingdom, their status, immigration history and family circumstances; the nature and seriousness of any offences of which they have been convicted; the time elapsed since the decision or order to deport; the prospects of executing such an order; and whether the impossibility of achieving deportation is due in part to the conduct of the individual, eg in not co-operating with obtaining documentation: para 67. And fourth, a balancing exercise is to be carried out between the public interest in maintaining an effective system of immigration control and in deporting those who ought not to be in the United Kingdom, on the one hand, and the individual's article 8 and other Convention rights on the other: paras 68-72.

63. In relation to the balancing exercise, Haddon-Cave LJ said (para 70) that the public interest in question is principally the public interest in maintaining an effective system of immigration control; that there is no separate public interest in preventing individuals subject to immigration control from working or relying on benefits or gaining access to full NHS services; but that Parliament must be taken to have intended that the lack of such benefits and opportunities will form a disincentive to them coming here illegally. He added (para 71) that the principal basis on which the public interest in allocating limbo status to an individual might be so weakened such that the article 8 rights or other Convention rights of the individual outweigh it "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". At para 72, Haddon-Cave LJ approved a statement by Simler J in *R (Hamzeh) v Secretary of State for the Home Department* [2013] EWHC 4113 (Admin), another limbo case, at para 50:

> "… no general policy or practice has been identified or established by the Claimants to the effect that persons whose removal from the UK cannot be enforced, should, for this reason alone, be granted leave. 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."

64. The guidance in *RA (Iraq)* represents a gloss on the usual approach to be adopted for analysis under article 8. In my view, although following the guidance will often result in a tribunal or court arriving at the right conclusion, this layering of guidance on top of the usual approach to be adopted under article 8 is unhelpful. It is unduly rigid and is capable of distracting from the proper analysis which is required. Indeed, as appears from the discussion below, following it seems to have contributed to the Upper Tribunal falling into error in this case. Tribunals and courts should not try to follow that guidance in future.

65. The distinction introduced at the first stage between prospective limbo and actual limbo seems unnecessary and can mislead. What is required in both types of case is to examine what are the effects upon the individual associated with the type of limbo in which they are placed and then to assess if they are serious enough to qualify as an interference with the right to respect for private life (or family life, as the case may be) or as a matter potentially engaging the positive obligation of the state under article 8.

66. As regards the second stage, remoteness of removal will be a relevant factor in the balancing exercise required for the proportionality analysis and it is right to say that if there is a realistic prospect of deportation within a reasonably short period of time it is unlikely that subjecting an individual to limbo status pending their removal will result in violation of article 8. But the prospects and timetable for removal are points which bear upon the proportionality balancing exercise and it is not helpful to treat them as something distinct from it. Indeed, in this case, having reached a separate conclusion at

the second stage, the Upper Tribunal had to qualify it at paras 133-134 when undertaking the balancing exercise which was central to determination of AM's claim.

67. Nor is it helpful, in my respectful opinion, to separate the third and fourth stages. Any proportionality analysis in this area inevitably has to be fact-specific, and the factors identified at the third stage are likely to be significant at the fourth stage. They are not separate from it. In fact they overlap with the first and second stages as well as the fourth stage. In my view, the potential problems inherent in separating the third stage from the fourth stage are illustrated by the Upper Tribunal's judgment in this case. It dealt with AM's entrenched stance in withholding cooperation from the authorities regarding his return to Belarus in its discussion of the factors at the third stage, but this featured hardly at all in its balancing exercise at the fourth stage, despite the importance it should have had as a factor at that stage.

68. I also respectfully think that Haddon-Cave LJ erred at paras 70-71 in eliding the distinct aspects of the public interest which may be engaged in cases of limbo in terms of maintaining an effective system of immigration control and in targeting limited resources in relation to provision of welfare and other benefits (see paras 58 and 59(5)-(6) above). His account also leaves the relationship with the point made by Simler J in *Hamzeh*, para 50 (para 63 above), which he endorsed at para 72, unclear. Simler J pointed out that even if removal were not possible, it would not necessarily follow that LTR should be granted since that would "create perverse incentives to obstruct removal, rewarding those who fail to comply with their obligations as compared to those who ensure such compliance". This is a consideration which has force even when there is no realistic prospect of effecting deportation within a reasonable period. In following Haddon-Cave LJ's guidance on this aspect of the case the Upper Tribunal was led into error by focusing on what it regarded as the "residual" (that is, considerably diminished) public interest left after recognising that it was unlikely that AM could be deported to Belarus, and then as treating that public interest as outweighed by AM's right to respect for his private life – and, in its view, clearly so, to the level that there are "very compelling circumstances" indicating that this right outweighs the public interest: paras 148-149. In following the approach in the guidance set out in *RA (Iraq)*, the Upper Tribunal both gave insufficient weight to the former aspect of the public interest and no weight at all to the latter. It is striking that the tribunal reached its conclusion about "compelling circumstances" in favour of AM as against the public interest even though it had found that AM had "minimal" private life in the UK (para 123) which was formed while he was present here unlawfully, so that section 117B(4) required that "little weight" should be given to it.

69. A further issue is that in the guidance Haddon-Cave LJ gave he refers not just to article 8, but to "other Convention rights" which, according to him, fall to be balanced with the public interest in the same way. I respectfully think that this too is unhelpful. It is by no means the case that other Convention rights fall to be balanced in a proportionality assessment in the same way as article 8 rights. For example, the

application of rights under article 3 of the Convention does not depend upon a similar balancing exercise. It is better that the analysis appropriate for other Convention rights should not be mixed up with the analysis appropriate for article 8.

(3) Ground 1: reliance on the *Gillberg* principle

70. In both the Upper Tribunal and the Court of Appeal the Secretary of State emphasised the fact that AM had thwarted his removal through dishonesty and obstructive behaviour. In the Court of Appeal, the Secretary of State relied on *Dragan* to submit that, by reason of this behaviour, there was no obligation to grant LTR to AM. On the appeal to this court, Mr Dunlop KC has referred in addition to *Gillberg* and other authorities and submits that there is an established principle in the Strasbourg jurisprudence, referred to as the *Gillberg* exclusionary principle, that article 8 cannot be relied upon to complain about the foreseeable consequences of one's own actions. Application of this principle should have the effect that AM cannot rely on article 8 to establish a right to be granted LTR.

71. In *Gillberg* the applicant was a professor of psychiatry who was involved in a study of children with certain disorders and their families for which private and sensitive information was gathered and stored in the university department where he worked. The applicant felt that he was bound by promises of confidentiality he had made to the children and their families. Two other researchers applied for access to the data and, after this was refused, obtained a court order granting such access under certain conditions. The applicant refused to comply with this and blocked access to the data for the other researchers. As a result criminal proceedings were brought against the applicant, who was convicted of misuse of office and received a sentence of a suspended period of imprisonment and a fine. The applicant complained to the European Court that his conviction amounted to an interference with his private life under article 8 by damaging his reputation and detrimentally affecting him personally, socially, psychologically and economically. The Grand Chamber rejected this contention. It reiterated that article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence: para 67. The same was true for the other detrimental effects of which the applicant complained: "there is no Convention case-law in which the Court has accepted that a criminal conviction in itself constitutes an interference with the convict's right to respect for private life … such repercussions [the detrimental effects] may be foreseeable consequences of the commission of a criminal offence and can therefore not be relied on in order to complain that a criminal conviction in itself amounts to an interference with the right to respect for 'private life' within the meaning of article 8 of the Convention" (para 68). The position may be different if the criminal law itself criminalises conduct which attracts protection under article 8: an example would be *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (criminalisation of homosexual activities). But this was not the case in *Gillberg*: para 70. The repercussions for the applicant of which he complained were all foreseeable

consequences of his commission of the offence for which he was convicted: paras 70-73. Therefore, the court found that his rights under article 8 had not been affected and that provision had no application: para 74.

72. Mr Dunlop also placed particular reliance on *Denisov v Ukraine*, judgment of 25 September 2018, GC ("*Denisov*"). In that case a senior judge was charged with disciplinary offences involving failing to carry out his administrative duties properly. The charges were found proven in court proceedings against him and he was dismissed. He successfully complained to the European Court of a breach of his rights under article 6 of the Convention in that, among other complaints, the domestic court lacked the guarantees of independence and impartiality. He also complained under article 8 that his right to respect for his private life had been violated by his dismissal, because his career, reputation and social and professional relationships had been damaged by this. The European Court referred to the *Gillberg* principle (para 98) and said that it "should cover not only criminal offences but also other misconduct entailing a measure of legal responsibility with foreseeable negative effects on 'private life'". It considered that the principle was capable of being applied in a disciplinary case; in the event, however, since the applicant had contested the disciplinary charges against him (unlike in *Gillberg*, where the conduct in question had largely been undisputed), the measure involving his legal liability - his dismissal - could not have been a foreseeable consequence of his conduct in the judicial position he held, so the *Gillberg* principle was not applicable: para 121. A similar analysis was also adopted in *Bingöllü v Turkey*, judgment of 22 June 2021, para 54.

73. In my view, the judgment in *Gillberg* is specific to the particular circumstances of the case and does not lay down an overarching principle that an individual can never complain of an impact upon their private life in relation to matters which arise as a foreseeable consequence of deliberate action they have taken themselves. Clearly, if an individual takes a step of their own volition in the public domain which has a foreseeable detrimental impact on their reputation, that consequence will usually have nothing to do with state interference in their private life (so no requirement of justification arises) and nor will the state have any positive obligation under article 8 to protect the individual from the consequences of their own actions: see *Gillberg*, para 67. As *Gillberg* also makes clear, that principle extends to other detrimental impacts on an individual's private life in terms of personal, social, psychological and economic effects associated with how they are treated by others which are the foreseeable consequences of conviction for an offence (where the nature of the offence itself has no bearing on the interests protected by article 8). Such detrimental impacts are the natural result of engaging in criminal conduct, and (where the nature of the offence itself does not bear on the interests protected by article 8) an individual has to take the criminal law as they find it, as everyone does, and cannot complain under article 8 when it is applied to them. The modest extension of the principle in *Denisov*, para 98, to cover other forms of misconduct, including disciplinary misconduct, does not affect its fundamental nature.

74. In *Evers v Germany*, judgment of 28 May 2020, the wider formulation of the *Gillberg* principle in *Denisov*, para 98, was applied so as to preclude reliance on article 8 at all. The applicant lived with his partner and her daughter, V, who suffered from a mental disability. The public prosecutor initiated criminal proceedings against the applicant for sexual abuse of V, as a person who was incapable of resistance. The prosecution was discontinued in December 2009. In September 2010, after a medical clinic gave notice that V had been made pregnant by the applicant, a District Court made an interim order placing V in a residential home with a professional guardian, in place of her mother. The public prosecutor was notified and commenced further criminal proceedings against the applicant. The District Court obtained expert reports about V's capacities, which confirmed that she was incapable of resistance and needed protection; so the interim order was made permanent in March 2011. In May 2012 the relevant criminal court proposed to discontinue the criminal proceedings on condition that the applicant pay a fine, on the footing that it was possible he had been mistaken about V's capacity to consent to their relationship; but at the same time the court drew his attention to the findings of the District Court that V did not have capacity. In September 2012 the applicant visited V, which left her distressed. Her guardian wrote to the applicant to ban further contact between him and V and asked the District Court to make an order to confirm the ban. The applicant made it clear that he intended to pursue his relationship with V. The District Court made an order to confirm the contact ban and stipulated penalties if it were breached. The applicant's appeal against that order was dismissed.

75. The applicant applied to the European Court complaining, among other things, of a violation of his rights under article 8 since the contact ban interfered with his private life. The court referred (para 55) to the formulation in *Denisov*, para 98. It held (para 56) that since V demonstrated no interest in having contact with the applicant and such contact was detrimental to her, he could not rely on article 8 to challenge the contact ban order. The court added (para 57) that the criminal court had in May 2012 expressly pointed out to the applicant that V was to be considered incapable of resistance, so "the decision to issue the contact ban and its consequences could therefore be seen as a foreseeable consequence of the applicant's intention to continue frequenting V". As a result, the applicant's challenge to the contact ban did not fall within the scope of article 8. The European Court treated the contact ban as equivalent to a penalty for conduct in violation of an express warning by a court, effectively equivalent to an injunction, that the applicant should not seek to pursue his relationship with V and would be taken to be violating the criminal law if he did.

76. However, in my view the *Gillberg* principle, as slightly extended in *Denisov*, does not apply in the case of AM so as to prevent him, as a threshold condition, from raising any complaint under article 8. He has not been convicted of any recent criminal offence nor of any equivalent unlawfulness, such as a breach of disciplinary rules or a court injunction. The effects about which he complains, resulting from denial of LTR, are not consequences in terms of how others perceive and react to him which arise from a criminal conviction or court order; nor are they direct penal effects flowing from

breach of a legal rule, such as the punishment linked to breach of a provision of the criminal law or an injunction (*Evers v Germany*) or the sanction of dismissal at issue in *Denisov*. AM is complaining about how the state, as represented by the Secretary of State, has decided to treat him when exercising discretionary administrative powers in light of the conduct in which he has engaged. In that context, there is no sound reason to rule out all possibility of a breach of article 8 on the part of the state as a point of principle, no matter what the circumstances of the case might be. In the immigration context an individual might have reasons of their own to use lies about their personal circumstances to try to protect themselves, based on fears which they think might not be understood or accepted by the state authorities with which they have to deal. This is capable of at least explaining, even it does not entirely excuse, their behaviour and should not automatically preclude them from seeking to rely on the protection afforded them by article 8.

77. Mr Dunlop submits that *Dragan* is an authority preceding *Gillberg* which illustrates in an immigration context the principle later articulated in *Gillberg*. In *Dragan* the applicants were a family of Romanians living in Germany unlawfully without a residence permit who renounced their Romanian nationality to make themselves stateless, to prevent their removal to Romania. Their stay was tolerated for a period, after which the applicants applied for a residence permit for humanitarian reasons. The German authorities refused this request on the grounds that their abandonment of their Romanian nationality was attributable to them and the authorities were entitled to require them to take steps to apply to reinstate that nationality. The applicants failed in their appeal against this decision. The German authorities then ascertained that Romania had agreed to receive the applicants and so ordered them to be deported there, and their appeals against that order were also dismissed. The applicants complained to the European Court that their deportation to Romania would violate their rights under articles 3 and 8 of the Convention. In the court's admissibility decision of 7 October 2004 these complaints were found to be manifestly ill-founded. As regards article 8, the European Court referred to the same basic principles as were reiterated in the authorities referred to in para 59(1)-(3) above. It appears that the family could be removed to Romania and continue their family life together there. In the dispositive part of its reasoning on article 8 the court did not suggest that the applicants were deprived of their right to complain under that provision by reason of their earlier action in renouncing their Romanian nationality. Accordingly, this authority does not bear the weight which Mr Dunlop sought to place on it so far as the *Gillberg* principle is concerned.

78. Mr Dunlop also relied on *Ramadan v Malta* (2017) 65 EHRR 32. In that case the applicant married a Maltese woman and on the basis of that marriage was granted Maltese citizenship, renouncing his Egyptian citizenship. The marriage broke down and was annulled by a court, which found that he had behaved fraudulently in that he only married in order to acquire citizenship and not in order genuinely to establish family life. The applicant then married a Russian woman and continued living in Malta, where he had two children. The Maltese authorities became aware of the annulment of the first

marriage and revoked his citizenship. Since the applicant was then stateless he could not be removed from Malta, so the European Court found that he was not under threat of expulsion. However, he was entitled to complain under article 8 about the revocation of his Maltese citizenship: para 58. He complained, among other things, that citizenship was the gateway to several rights, including a right to unrestricted residence, a right to establish a family in Malta, a right to work there, to receive a pension and so forth: para 69. The European Court noted that an arbitrary denial of citizenship upon an application to acquire it or an arbitrary revocation of citizenship might in certain circumstances raise an issue under article 8 because of the impact of such a denial on private life: paras 84-85.

79. The European Court held that the revocation of the applicant's citizenship had been in accordance with the law and had been accompanied by necessary procedural safeguards allowing him to challenge the decision. The court found that the decision was not arbitrary, noted that he was aware after the annulment of his marriage that he was in a precarious situation and stated that it could not "ignore the fact that the situation complained of came about as a result of the applicant's fraudulent behaviour and any consequences complained of are to a large extent a result of his own choices and actions": para 89. In practice, he had been allowed to reside and continue his life and business in Malta. Article 8 did not guarantee a right to a particular type of residence permit; if an applicant had been allowed to reside and exercise freely the right to respect for his or her private and family life, the court was not empowered to go further "and rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone": para 91. Also, various possibilities were open to the applicant, but were not pursued by him, such as to apply for a work permit as a path to a residence permit and ultimately citizenship, which could have prevented any adverse impact on his private and family life, "and no valid explanation has been given for his inaction": para 91. He had not established that he could not reacquire Egyptian citizenship and the court said, citing *Dragan*, that "in any event, the fact that a foreigner has renounced his or her nationality of a state does not mean in principle that another state has the obligation to regularise his or her stay in the country": para 92. In the circumstances, the court held that an assessment of the state's negative obligations under article 8 was not warranted (meaning that matters did not amount to a sufficient interference with the applicant's right to respect for his private or family life) and the court did not need to assess the state's positive obligations, because the applicant ran no risk of being deported: para 94.

80. This was a decision on very specific facts. It does not establish that a person is disqualified from seeking to rely on article 8 because of their own actions. In fact, the background of the applicant's fraudulent conduct was only one factor to be taken into account, alongside others. The case illustrates the point that, in accordance with a conventional article 8 analysis, one should start with the question whether there is an interference with the right to respect for private or family life, or a sufficient engagement of such individual interests, before the question of justification of such interference or of the implication of a positive obligation to intervene to ameliorate the

situation that arises. It also illustrates the basic point that usually article 8 does not give rise to an obligation on the part of the state to provide welfare or other benefits, which is why the European Court stated at para 91 that it was for the host state to decide which form of legal status should be granted to the applicant, notwithstanding the differences in welfare and other benefits which were associated with that issue. That point was reiterated by the European Court in *Hoti*, para 121.

81. A further authority relied on by Mr Dunlop in support of his submission that the *Gillberg* principle applies in relation to AM was *Shevanova v Latvia*, judgment of 7 December 2007 (GC). In that case the applicant, who was born in Soviet Russia in 1948, settled in Latvia in 1970 and married and had a son there (she later divorced). She came to be in possession of two Soviet passports. Upon the dissolution of the Soviet Union in 1991 she became stateless, but was registered in Latvia as a permanent resident. In 1994 the applicant was offered a job in the territory of the Russian Federation and to facilitate her travel there her employer advised her to obtain Russian nationality and formal registration of residence there. She consulted a broker who put a false stamp in one of her passports stating that registration of her residence in Latvia had been cancelled. She then obtained Russian nationality and registered as being resident in Russia and worked there for extended periods in 1995 and 1996. In 1998 the applicant applied to the Latvian authorities for a Latvian passport based on her status as a permanently resident non-citizen and submitted her second (unstamped) Soviet passport with her application in accordance with the relevant regulations. Upon examination of her application the Latvian authorities discovered that she had registered a second residence in Russia and completed various formalities on the basis of her first Soviet passport. As a result they removed her name from the Latvian register of residents and issued a deportation order which prohibited her from re-entering Latvia for five years. Her appeals were dismissed by the Latvian courts. It was determined that the applicant had been illegally resident in Latvia since her return from Russia. The applicant was unsuccessful in further proceedings in which she and her son asked for the deportation order to be rescinded and for the applicant to be granted a permanent residence permit on the basis of her private and family life in Latvia.

82. In 2000 the applicant lodged an application with the European Court relying on article 8. In 2001 the applicant was arrested with a view to her deportation; however her removal was suspended because of her ill-health. As a result she continued to reside illegally in Latvia. In 2005 the Latvian authorities wrote to the applicant to explain how she could obtain a permanent residence permit by submitting relevant documentation, but she took no steps to do this.

83. In 2006 the First Section of the European Court issued a judgment in the applicant's favour. Although the Latvian authorities had taken steps in 2005 to regularise her position, that did not erase the long period of about seven years of insecurity and legal uncertainty she had undergone in Latvian territory. The interference with her private life had not been proportionate so there had been a violation of article 8

for which compensation was payable. However, at the request of the Latvian government the case was referred to the Grand Chamber. The government submitted, among other things, that the insecurity and legal uncertainty the applicant had suffered was the consequence of her own unlawful and fraudulent conduct. The Grand Chamber decided that there was no longer any justification for examining the merits of her case because she did not currently face any real risk of being deported and, contrary to the view of the First Section, the proposed regularisation of her residence in Latvia would be sufficient to address the effects of the situation of which she complained to the court. As regards the latter point, the Grand Chamber observed that the measures taken by the Latvian authorities against the applicant were prompted by her own conduct, using her two Soviet passports to perform a number of fraudulent actions and concealing the fact of her Russian citizenship in her dealings with the Latvian authorities, even though, as a Russian citizen, she could have regularised her stay in Latvia by applying for a residence permit in a lawful way; so the ordeals she complained of resulted largely from her own actions: para 49. Her case could therefore be struck out of the court's list. Latvia was not required to pay her compensation.

84. In my view, *Shevanova v Latvia* is not an authority which shows that the *Gillberg* principle applies in a case like the present. The European Court was applying the law regarding sufficient redress in the context of application of the test for striking out a claim and did not hold that the applicant should have been ruled out from presenting any complaint under article 8 in the first place. It did not refer to *Gillberg* or suggest it was applying the principle in that case.

85. There are further reasons why it is not appropriate to apply the *Gillberg* principle in immigration cases. Mr Dunlop accepted that the principle has no application in relation to interference with family life. But it is often very difficult to separate out private life and family life in immigration cases. They may well overlap. Where a measure interferes with both these aspects of the rights conferred by article 8, it would be odd to say that article 8 does not apply at all in relation to private life but applies with full force and effect in relation to family life. There is nothing in the case-law of the European Court which suggests that immigration measures are to be subjected to a form of bifurcated analysis in this way. The problems involved in adopting such an approach would not be merely practical, but also conceptual. The concepts of private life and family life overlap, and if courts were required to separate out interferences with them the likely outcome would be a high degree of arbitrariness in the application of article 8 depending on into which category different tribunals might think a particular consequence should be placed. It would also be a recipe for extended arguments which were not capable of resolution by reference to any clear metric or standard.

86. For these reasons, I reject Mr Dunlop's submission that the *Gillberg* principle applies and gives the answer on this appeal.

87. However, although I dismiss the extreme variant of the submissions presented on behalf of the Secretary of State by reference to the *Gillberg* principle, I accept Mr Dunlop's alternative submission, which was put to the Upper Tribunal and the Court of Appeal, that AM's own conduct in thwarting the attempts by the Secretary of State to deport him to Belarus is a highly material factor for the purposes of the relevant proportionality analysis under article 8. In my view, this is an inevitable consequence of the fact that the object of the proportionality analysis is to ensure that a fair balance is struck between the interest of the general community and the rights and interests of the individual. To the extent that the individual has brought particular detrimental consequences on himself or herself, or contributed to the situation in which they arise, the state's responsibility is liable to be diminished and the fair balance between the public interest and the individual interest is likely to be affected as a result. That will be so all the more where the individual, by their action, has deliberately and deceitfully sought to undermine or circumvent some clearly identified and strong public interest, as AM has done in this case.

88. These points of basic principle are supported in broad terms by the reasoning of the European Court in *Dragan*, *Ramadan v Malta* and *Shevanova v Latvia*, above, and by domestic authorities, below.

89. In *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42 the Secretary of State believed that the appellant was a national of Saudi Arabia and wished to remove him there. The appellant supplied false and contradictory information about his identity which had the result that the Saudi Arabian authorities did not accept that he was a national. He applied for asylum and also for LTR on article 8 grounds pending any removal, both of which were refused. His appeal to the Upper Tribunal was dismissed. His further appeal to the Court of Appeal on the question of LTR was also dismissed. Sir Stanley Burnton gave the lead judgment, with which Beatson and Kitchin LJJ agreed, and Beatson LJ gave a short supplementary judgment, with which Sir Stanley Burnton and Kitchin LJ agreed. The appellant had lied about his identity and nationality, so it was difficult to assess whether he could be removed to Saudi Arabia as the Secretary of State wished. There remained a prospect that the appellant's removal might be achieved after further inquiries were made and further evidence was obtained. If he could be returned it was accepted that he could have no article 8 claim to remain in the United Kingdom, because he had not established any private or family life here; in the interim, while the question of return was addressed, it was treated as relevant that the appellant's situation was "of his own doing" (para 20, per Sir Stanley Burnton); and in the circumstances, if article 8 was engaged, "there could only be one answer to the balancing exercise required by article 8(2), namely that the Secretary of State's refusal to grant leave to remain was justified by the need to maintain a system of sensible immigration control" (para 22, per Sir Stanley Burnton). Beatson LJ said (para 28) that the claim under article 8 for grant of LTR to put an end to the appellant's limbo status was unarguable at the relevant time of the tribunal's decision, since the Secretary of State was entitled to further time to make inquiries; and (para 29) that the time after which such an article 8 claim to bring an immigrant's limbo status to an end might gain

force "may depend on the attitude of the individual concerned to efforts to establish his or her nationality or to obtain documentation".

90. In *Hamzeh* Simler J dismissed a claim under article 8 by undocumented Iranians illegally present in the United Kingdom that the Secretary of State was obliged to end their limbo status by granting them LTR, on the basis that the claimants had not established that their voluntary departure was so remote as to be practically impossible: para 74. She relied on the *Abdullah* case and observed (para 77) that the claimants had not shown they had private or family life in the United Kingdom which would outweigh the factors in favour of removal; the mere fact that their removal could not be enforced did not make the Secretary of State's decision a disproportionate interference with such rights under article 8 as they might establish; there was nothing compelling the claimants to remain in the United Kingdom; the Secretary of State held the rational view that voluntary departure was still possible "and accordingly any state of limbo that they find themselves in is self-induced".

91. In *Antonio v Secretary of State for the Home Department* [2022] EWCA Civ 809; [2022] INLR 531, the appellant was a foreign criminal in respect of whom a deportation order was made. He failed to provide the Secretary of State with information to enable his nationality to be established. Attempts to deport him to Portugal and Jamaica failed. The Upper Tribunal followed the approach set out in *RA (Iraq)*. There were no "very compelling circumstances" to lead to a conclusion that his removal would violate his rights under article 8. In the absence of any foreseeable change in circumstances there was no prospect of effecting his deportation. However, although the appellant had limbo status, with the disadvantages associated with that, he was responsible for his own situation as he had not told the truth about his background and accordingly there was no disproportionate interference with his rights under article 8 by maintaining that status. The appellant's appeal to the Court of Appeal was dismissed. William Davis LJ (with whom Warby and Moylan LJJ agreed) said (para 40) that "where a person has suppressed information or lied about their background, it is not unreasonable to assume that the position could change"; therefore removal of the appellant could not be regarded as impossible or as too remote. In the context of the balancing exercise at the fourth stage as set out in *RA (Iraq)* he referred (para 44) to para 50 of Simler J's judgment in *Hamzeh* and emphasised that the appellant "was the author of his own misfortune".

92. I add one comment about this case. Since William Davis LJ was following the approach in *RA (Iraq)* he was at pains to say (para 44) that, as he interpreted the Upper Tribunal's findings, removal was not impossible (that is, because the appellant might change his mind). However, in my view, it may distort the proper approach under article 8 to place such critical emphasis upon the possibility of removal in a limbo case. There are cases where the individual concerned may have made their settled determination to obstruct their removal completely obvious, so that there is in fact no real prospect of that occurring. Indeed, there is a strong case to be made that this is the position arrived

at by AM in the present case, as his counsel argued on his behalf in the courts below. For the purposes of analysis under article 8 there is no sound reason to ignore that reality. (I should point out that for the purposes of the different question under domestic legislation as interpreted in *Khadir*, an individual may be "liable to detention" and so amenable to being assigned to limbo status when it is their own continued obstructive conduct which is making their removal impossible, as the Upper Tribunal correctly observed at paras 114-115).

93. The position in such a case under article 8 is that the tension between the rights and interests of the individual and the interests of the general community in maintaining an effective system of immigration control becomes more acute, in that the limbo status of the individual is likely to continue indefinitely. But this is just to pose the question: what is the state's responsibility in such a situation? If there is a real prospect of removal that will be a highly relevant feature of the case, since it tends to reduce the tension between the individual's interests and the public interest and the maintenance of the individual's limbo status is more readily justified by the Secretary of State. But it does not follow that where the individual is capable of thwarting his or her removal indefinitely and is plainly intent on doing so the Secretary of State becomes obliged under article 8 to grant them LTR. The public interest in maintaining an effective system of immigration control and in containing welfare costs remain relevant considerations, the article 8 proportionality balancing exercise has to be carried out and the contribution of the individual to creating the situation in which they find themselves with limbo status will continue to be a highly material factor.

94. I note that all these domestic authorities, including *RA (Iraq)*, proceeded entirely naturally on the footing that a conventional article 8 analysis is required where a claimant is complaining about the absence of LTR in a case involving a self-induced state of limbo. There is no suggestion that anything resembling the *Gillberg* exclusionary principle is necessary or appropriate for resolving such complaints.

95. Reverting to the present appeal, in my view the Upper Tribunal failed to give any significant, let alone proper weight, to the deliberate actions of AM in contributing to the situation in which he had limbo status as a material factor in its proportionality analysis. I would therefore uphold this alternative version of the first ground of appeal.

(4) Ground 2 (significance of paragraph 276ADE of the Immigration Rules) and Ground 3 (incentivisation of circumvention of immigration controls)

96. It is convenient to consider the second and third grounds of appeal together, which both involve the countervailing, public interest side of the article 8 proportionality analysis. I would uphold both these grounds of appeal. In my view, as well as erring in its evaluation of the strength of AM's interests as set out above, the

Upper Tribunal erred in its assessment of the strength of the public interest that AM should be removed and, if that was not possible, that he should be maintained by the state with limbo status rather than granted LTR.

97. The Upper Tribunal was correct to begin by framing its analysis under article 8 by reference to the statutory regime in sections 117A-117D of the NIAA 2002. However, in carrying out the proportionality balancing exercise the tribunal went wrong by downgrading the force of the public interest legitimate aims which the Secretary of State sought to promote by maintaining AM in limbo status. This involved three errors.

98. First, in following the guidance in *RA (Iraq)* the Upper Tribunal had regard to the fact that it was unlikely that AM could in practice be removed to Belarus because the chance that he would suddenly change his mind and begin to cooperate with the Secretary of State to achieve that result was remote. According to the tribunal's analysis, this meant that there was only a weakened "residual" public interest to be weighed against AM's interests. I do not agree with this. The public interest in promoting the effectiveness of immigration controls remained the same as it always was. The point is explained clearly by Simler J in *Hamzeh*, para 50 (para 63 above). If LTR were granted to an illegal immigrant because no current enforced removal is possible, that "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". Also, as a related but distinct point, the public interest in focusing expenditure of scarce public funds and allocation of scarce public resources and access to the employment market to meet the needs of United Kingdom citizens and persons lawfully in the country, and correspondingly in limiting the use of such resources and access to such opportunities for illegal immigrants, remained and remains the same.

99. Secondly, the Upper Tribunal misanalysed the public interest in relation to maintaining the effectiveness of immigration controls. For present purposes this can be taken to have two significant aspects: (i) the creation of incentive and disincentive effects to encourage immigrants to comply with the United Kingdom's immigration laws when seeking to come and to stay here; and (ii) maintenance of public confidence in the system of immigration controls and its proper operation. These are related, though distinct.

100. With respect to the Upper Tribunal, it is obvious that if an illegal immigrant in the position of AM is granted LTR as a result of the success of his efforts to obstruct his removal, others who are supposed to be removed will be incentivised to do their best to obstruct their removal as well, thereby directly undermining the due operation and enforcement of the United Kingdom's immigration controls. The fact that AM might not have lived an especially enviable life while present here will not detract from the perception of others that they can benefit in their own lives from being obstructive in

the way that he has been. (I also observe that, looking at the matter from AM's own perspective, he clearly has wished and continues to wish to be in the United Kingdom, with all that this entails, since he could have opted to cooperate with the Secretary of State and go to Belarus at any stage). This point will not be lost on the general public either. If the due operation and enforcement of immigration controls can be seen to be placed, in effect, in the hands of an illegal immigrant who does not want to be removed, public confidence in the system of immigration controls will be undermined.

101. Thirdly, the Upper Tribunal was wrong to place the weight it did on paragraph 276ADE of the Immigration Rules in assessing that the public interest in AM's removal was now diminished. The tribunal treated the 20 year residence condition in paragraph 276ADE as "an important yardstick" (para 142) in determining whether the right to respect for private life under article 8 requires a grant of LTR and in using that yardstick to evaluate and diminish the weight to be given to the public interest in the proper application of immigration controls in AM's case. This is to misunderstand the role which the 20 year condition in paragraph 276ADE plays in the immigration system.

102. Paragraph 276ADE is a statement of the Secretary of State's policy regarding the grant of LTR where a number of conditions are fulfilled. If an immigrant fulfils the conditions set out in paragraph 276ADE they will be entitled to the grant of LTR as a matter of that policy, without having to debate whether they would or would not be entitled to be granted LTR by reason of their rights under article 8. Paragraph 276ADE is not a statement regarding the weight to be attached to the public interest in the due enforcement of immigration controls for the purposes of the general application of article 8. The Secretary of State is not somehow estopped by reason of paragraph 276ADE from asserting that public interest after someone has been in the country for 20 years, or nearly 20 years; nor is the weight to be attached to that public interest reduced by reference to this immigration rule.

103. Quite apart from these general points, the reliance by the Upper Tribunal on paragraph 276ADE was not appropriate, because it did not give proper consideration to the operation of the whole scheme of paragraph 276ADE. As explicitly stated in paragraph 276ADE(1) (para 37 above), the Secretary of State's policy is to grant LTR after 20 years' residence in the United Kingdom only if the individual does not fall for refusal under the specified suitability requirements. AM clearly could not satisfy those requirements (see para 39 above). He was currently the subject of a deportation order (S-LTR.1.2). His presence in the United Kingdom was not conducive to the public good because he had been convicted of an offence for which he had been sentenced to imprisonment for more than 12 months (S-LTR.1.4; see also S-LTR.1.6). He had failed without reasonable excuse to comply with a requirement to provide information (S-LTR.1.7(b)). He had made false representations and failed to disclose material facts in his applications for LTR and his human rights claim (S-LTR.4.1 read with S-LTR.4.2). The 20-year condition in paragraph 276ADE does not stand apart from these other conditions. It only becomes relevant if those other conditions are satisfied.

(5) Analysis under article 8 by this court

104. By reason of the errors in the Upper Tribunal's decision, which were not identified and corrected by the Court of Appeal, it falls to this court to decide whether article 8 obliged the Secretary of State to grant LTR to AM.

105. In *Khadir*, at para 4, Baroness Hale of Richmond made the following obiter comment which is referred to in several of the cases:

> "There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would [be] irrational to deny him the status which would enable him to make a proper contribution to the community here …"

That is put in terms of the domestic standard of rationality, rather than in terms of article 8. None of the other members of the Appellate Committee adopted this statement. In terms of rationality, this statement should be treated with caution in so far as it is relied upon in a case like the present, where the illegal immigrant has limbo status and is taking effective action to thwart his or her removal. If an illegal immigrant's most basic needs are being taken care of, so that they are not destitute, it might be said that it could still be rational for the Secretary of State to refuse to grant them LTR, on the basis that this would indicate to that individual and to others that immigration controls will be strictly enforced and that there is no advantage to be gained in terms of getting access to LTR and all the benefits associated with that status by lying or withholding cooperation to defeat steps which the Secretary of State wishes to take to remove them. For the purposes of article 8, however, the proportionality standard is applicable, rather than a rationality standard.

106. The first question is whether AM's right to respect for his private life under article 8(1) is engaged to the extent that interference with it is required to be justified under article 8(2) or that it may potentially give rise to a positive obligation of protection under article 8. If the Secretary of State's argument based on the *Gillberg* principle failed, as it does, Mr Dunlop did not deny that AM's private life rights under article 8 are sufficiently engaged in this case. Article 8 protects the right to establish and develop relationships with others and can sometimes embrace aspects of an individual's social identity, so that the totality of the social ties between a migrant and the community in which they live constitutes part of the concept of private life under article 8: see, eg, *Hoti*, para 119; for the wide ambit of the concept of private life see also *Denisov*, para 95, among other authorities. So, when a certain level of disruption in those social ties occurs, the private life limb of article 8 will be engaged. As was stated in *Hoti*, para 122, "measures restricting the right to reside in a country may, in certain

cases, entail a violation of article 8 of the Convention if they create disproportionate repercussions on the private or family life, or both, of the individuals concerned" and "in some cases … article 8 may involve a positive obligation to ensure an effective enjoyment of the applicant's private and/or family life". In order for the consequences for an individual of state action to constitute an interference with the right to respect for private life, or for a situation to give rise to a positive obligation of protection, a threshold of seriousness or severity of impact has to be crossed: see, eg, *Denisov*, paras 110-114.

107. In my view, the right to respect for private life under article 8 is engaged and may be interfered with or may potentially become the basis for a positive obligation where an immigrant is subject to an extended period with limbo status, without a grant of LTR to enable them to have a more enhanced opportunity to participate in ordinary life, including by being able to foster self-respect and form relationships with others through seeking employment. That is so even if that situation has been brought about by the actions of the immigrant rather than by the force of external circumstances. Accordingly, without the need to explore further what are the exact parameters for engagement of an illegal immigrant's rights under article 8, I consider that AM's right under article 8(1) to respect for his private life is engaged in this case. That means that it is necessary to proceed to conduct a conventional article 8 analysis, weighing the private rights and interests of the individual against the general interest of the community.

108. The allocation of limbo status to AM was in accordance with the law, in that temporary admission without LTR but with immigration bail was a status which was lawfully applicable in his case: see paragraph 1(5)(a) of Schedule 10 to the IA 2016, *Khadir* and the decision of the Upper Tribunal following *Khadir* and applying that provision, which is not under challenge on this appeal. The decision of the Secretary of State that AM should not be granted LTR, but should be restricted to the more limited benefits associated with temporary admission and limbo status, pursued the legitimate objectives referred to at para 58 above.

109. It is appropriate to approach the proportionality analysis by first addressing the application of sections 117A-117D of the NIAA 2002 in AM's case. This is for two reasons. If an illegal immigrant who is subject to a deportation order is able to show that, by reason of their article 8 rights, they ought not to be deported at all, that will indicate that they should be granted LTR instead. On the other hand, if the analysis under those provisions shows that there is a public interest in their removal, which public interest is being defeated by their own deliberate actions to thwart that removal, that will be relevant to the fair balance to be struck between the interests of the immigrant and the interests of the general community. If the immigrant has managed to defeat a clear public interest that they be removed, that will affect the extent of the obligations which the state may owe them under article 8. The fair balance to be struck between the individual's interests and the interests of the general community may then

be to protect the immigrant in relation to satisfaction of their most basic needs, as has happened in AM's case, while not according them all the benefits and privileges available to citizens and persons lawfully present in the United Kingdom with LTR. The stronger the public interest in an illegal immigrant's removal, which the immigrant has managed to defeat by their actions, the more readily will the Secretary of State be able to defend allocating them limbo status as a fair balance between the competing interests.

110. The analysis under these provisions of the NIAA 2002 in this case is straightforward and clear. AM is an illegal immigrant who is also a foreign criminal for the purposes of this legislative regime.

111. The maintenance of effective immigration controls, which is in issue in AM's case, is in the public interest: section 117B(1). The Upper Tribunal has found that he has minimal private life in the United Kingdom. Little weight should be given to this private life because it has been established at a time when AM was in the UK unlawfully: section 117B(4). A further reason that little weight should be given to this private life is that it was established by AM at a time when his immigration status was precarious: section 117B(5), and see *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536, para 44. (Mr Dunlop suggested that section 117B(5) had no application because section 117(B)(4) applied, but I see no reason why these provisions should be regarded as mutually exclusive rather than overlapping; however, it makes no significant difference in this case). In exceptional circumstances, where there are particularly strong features of private life, this is capable of establishing that significant weight might be given to private life established in conditions of precariousness despite the general guidance in section 117B(5): *Rhuppiah*, para 49. But no such exceptional circumstances apply in AM's case.

112. Additional considerations of the public interest are applicable to AM as a foreign criminal by virtue of section 117C. The deportation of foreign criminals is in the public interest: section 117C(1); and see the discussion in *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694; [2009] INLR 109. The more serious the offence committed, the greater is the public interest in deportation: section 117C(2). AM's offending has been serious, even if not at the most serious end of the spectrum. AM is a medium offender, falling within the scope of section 117C(3). He does not fall within Exception 1 or Exception 2 (section 117C(4)-(5)), therefore by virtue of section 117C(3) the public interest "requires" his deportation. As that provision was interpreted in *NA (Pakistan)*, the qualification in section 117C(3) applies and the public interest will not be taken to "require" his deportation if there are "very compelling circumstances" over and above those described in Exceptions 1 and 2. However, it is clear that there are no such circumstances which apply in AM's case to justify a departure from the injunction in section 117C(3) that his deportation is required. AM's case is very far from being an exceptional case involving "very compelling circumstances" such that he ought not to be deported. Parliament's evaluation of the public interest in this area is to

be accorded great weight and, subject to the qualification read into section 117C(3), the requirement stated in that provision is binding.

113. Even if AM had not been a foreign criminal, the factors pointing in favour of his removal would have been overwhelming. He is an illegal immigrant with no family life and minimal private life to which little weight is to be attached. The Secretary of State was plainly entitled to decide that he should be removed, and that decision involved no violation of article 8. The position is even clearer when the analysis under section 117C is added to this. The public interest in AM's deportation is very strong.

114. It is that public interest which AM has succeeded in completely undermining by his deliberate and fraudulent actions. These have been effective in thwarting his deportation. By doing so, he has forced the Secretary of State to arrange for him to remain in the United Kingdom and thereby has imposed obligations on the United Kingdom to provide for his needs out of public funds, at least to the extent of protecting him from destitution and from being subjected to inhumane conditions contrary to article 3 of the Convention. The question then is whether the United Kingdom, which has been forced by AM to act as his involuntary and unwilling host in this way in violation of its own very strong public interest, is subject to a greater obligation under article 8 to make further provision for him out of public funds and to allow him access to the employment market, so that he can compete for jobs with citizens and lawful immigrants. It is that question which lies behind the specific question in this case of whether the Secretary of State is obliged to grant LTR to AM as a passport to those further benefits.

115. In that context, Parliament has unsurprisingly indicated that it wishes the burden on United Kingdom taxpayers in relation to supporting immigrants to be minimised so far as possible: see section 117B(2)(a) and (3)(a); also paragraph 276BE(2) of the Immigration Rules (para 38 above). In deciding that AM should not be granted LTR the Secretary of State was clearly entitled to treat the minimisation of the cost of provision of welfare benefits and the protection of the employment market as legitimate objectives: paras 58 and 59(5)-(6) above. He was also entitled to place great weight on the need to maintain effective immigration controls as a legitimate aim, the importance of which was expressly emphasised by Parliament in section 117B(1): para 35 above.

116. It is not suggested that AM is unable to carry on any effective private life in the United Kingdom while accommodated here with limbo status. The Upper Tribunal found that he has established aspects of private life while he has been here. His opportunities for developing his private life further are more restricted than they would be if he were granted LTR, but as the case-law of the European Court makes clear the level of welfare and other support to be provided to help individuals live their lives is a matter for decision by Contracting States, not the court: para 59(4) above. AM has not sought to contend that the difference between the benefits he receives as an illegal

immigrant with limbo status and those received by legal immigrants who have LTR constitutes unjustified discrimination contrary to article 14 of the Convention; and it seems very doubtful any such claim could succeed in light of the legitimate objectives of maintaining effective immigration controls and focusing scarce resources on citizens and lawful immigrants.

117. As explained in the European authorities, the state has a margin of appreciation in deciding how immigrants should be treated in relation to according respect for their private and family lives. In my view, in the circumstances of the present case, the Secretary of State was clearly entitled to decide that AM should not be granted LTR. Allocating limbo status to AM, with the benefits associated with that, rather than granting him LTR and the more extensive benefits associated with that, was a proportionate measure in pursuit of the legitimate aims of maintaining effective immigration controls and focusing state benefits and other resources on citizens and lawful immigrants. The position arrived at in relation to AM struck a fair balance between his individual rights and interests and the general interest of the community which fell within the margin of appreciation to be accorded to the United Kingdom and to the Secretary of State as its representative.

Conclusion

118. For the reasons given above I would allow the Secretary of State's appeal and dismiss AM's claim under article 8 to be granted LTR.