Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of AM) v Secretary of State for the Home Department (legal "limbo") [2021] UKUT 00062 (IAC)

THE IMMIGRATION ACTS

Heard at Field House by Skype
On 11 November 2020

Decision & Reasons Promulgated

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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE QUEEN ON THE APPLICATION OF AM
(ANONYMITY ORDER MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr M Karnik, Counsel, instructed by Paragon
For the Respondent: Mr R Fortt, Counsel, instructed by the Government Legal Department

(1) A person whose removal from the United Kingdom has become an impossibility in the sense identified by the House of Lords in R (Khadir) v Secretary of State for the Home Department [2005] UKHL 39 cannot be subject to immigration bail (formerly temporary admission). Such "Khadir" Impossibility is, however, a high threshold to surmount.

(2) Applying the four-stage analysis of Haddon Cave LJ in RA (Iraq) v Secretary of State for the Home Department [2019] EWCA Civ 850, an individual who is subject to immigration bail may still succeed in a human rights challenge, based on ending his state of legal "limbo" in the United Kingdom, where the case is of a truly exceptional nature.

JUDGMENT

A. THE APPLICANT AND HIS HISTORY

1. We have both substantially contributed to what follows.

2. The applicant is a citizen of Belarus who entered the United Kingdom in January 1998, when it appears he was about 21 years old. He claimed asylum in January 1998. On 12 December 2000, his asylum claim was refused, and he appealed unsuccessfully to an adjudicator (Mr Andrew Jordan). The applicant had made his asylum claim in a name which we abbreviate as AM. His claim before the adjudicator was that he was a sympathiser of the Belarusian Popular Front. He had been detained on a number of occasions and beaten. He was warned not to attend anti-government meetings. The adjudicator said he was not satisfied that the applicant was of any interest to the authorities. The objective evidence regarding Belarus drew a clear distinction between participants and organisers of BNF demonstrations. The adjudicator concluded the applicant would not be at any risk whatsoever if he were returned to Belarus.

3. In June 2001, the applicant was deported to Belarus. However, he was refused entry on arrival and returned by the authorities to the United Kingdom the following day. We shall have more to say about this in due course.

4. Upon his return to the United Kingdom, the applicant contends that he was encouraged by an official of the respondent to make a fresh asylum claim. He did so on an admittedly false basis, giving his patronym as A******, and claiming that he had left Belarus in 1986.

5. On 12th January 1998, the applicant gave the respondent a document, which we shall call a Factory ID, purporting to show the applicant as having been employed in a book-binding factory in Minsk. The British Embassy there undertook investigations. In November 2001, the Embassy informed the respondent that the Factory ID was considered to be a forgery because the claimed company did not exist in Belarus. Although there was a factory with a similar name, upon being contacted, its representative stated that nobody with the applicant's surname had ever worked for them; nor did they have identification cards. The embassy official also called the Ministry of Health who confirmed that the company did not exist. The applicant says about this that it is unclear what was asked, and no explanation was given about why the Ministry of Health would know about the applicant's employer.

6. In February 2002, the applicant provided instructions to his then solicitor. The applicant was detained at Yarl's Wood, where he had attempted suicide. The applicant retracted his false claim, made, so he said, because he was scared and did not want to be deported to Belarus for a second time. He now also said that on his way to the United Kingdom, he had claimed asylum in Belgium but failed to attend an interview because he felt unsafe in that country. He provided details of a person called Robert Berk, a Belarusian journalist who had subsequently been granted asylum in the United Kingdom. The applicant said he had seen Mr Berk in Belarus in September 1997.

7. On 14 June 2002, the applicant's second appeal hearing took place before an Adjudicator, Mr Edwards. The adjudicator dismissed the applicant's appeal. Although Mr Berk had made a witness statement, he did not attend the hearing in order to give oral evidence. The applicant's case before Mr Edwards was now that he was not just a supporter of the BPF but a member of it. He had been distributing leaflets for the BPF, and as he had also told Mr Jordan, the applicant had been secretly printing them as well.

8. Mr Edwards noted the adverse credibility findings of Mr Jordan. Mr Edwards then went on to make his own independent adverse credibility findings regarding the applicant having admitted lying to immigration officials, both in Belarus and in the United Kingdom. He had told the officials in Belarus that he was not a citizen of that country. Mr Edwards concluded that there was no evidence to show that the applicant had any fear of persecution in Belarus.

9. In October 2002, the respondent sought extensive and specific biometric information from the applicant. The applicant gave detailed evidence, *inter alia* asserting that the family home was situated on an insignificant side street in a named small town or village in a named Administrative Region, subsequently shown to exist. The applicant's last asserted address in Minsk was on a minor street, which objective evidence showed to exist. The respondent also had the applicant's fingerprints, taken on 12th January 1998, noteworthy in that the tips of several of the applicant's fingers are missing.

10. The British Embassy undertook further enquiries. It found that the school that the applicant said he had attended in his "false claim" did not exist. There were several technical institutes in Minsk, though not one with the name given by the applicant as that at which he studied.

11. In January 2003, the British Embassy reported that there were no records of the applicant at the Number 1 School in the town in which he claimed to have studied at that level. The applicant points out that it is unclear whether what was being searched was the Number 1 school in the town or the Number 1 school in a particular city. The embassy confirmed that there was no school at the address given by the applicant, nor residence records in Minsk or the town for AM, with the patronym A… . The applicant points out that there was nothing to suggest a search was undertaken for him with the patronym I********.

12. The respondent observes that in the applicant's first asylum claim, he said he moved to Minsk when he was 18. He worked in a book factory until 1997. By contrast, the asylum claim of June 2001 contained the assertions that the applicant had left Belarus in 1986 and had attended school prior to that in Minsk. He said he arrived in the United Kingdom in 1996, not 1998.

13. In February 2003, the respondent arranged for the applicant to attend the Belarusian Embassy with a travel application form and three photographs, together with biometric information. The Belarusian Embassy later informed the respondent that the applicant had categorically denied being a Belarusian citizen; that some Russians pretended to be Belarusian; and that he said he was giving the officials false details and that it was "all a game". The Belarusian Embassy also said that the applicant had two broken front teeth and that he had an indistinct accent. The applicant points out that his teeth are not, in fact, broken.

14. On 7 March 2003, Ms Temani, an official of the respondent, interviewed the applicant in detention in Harmondsworth. She noted that his account of the interview at the Belarusian Embassy "greatly differs" from that given by the First Secretary. Interpol had already made searches in Minsk, Kiev and Vilnius (Lithuania) on the applicant and had closed their files, given that the results of the searches had been negative. Checks had also been made with Russia.

15. Ms Temani noted the applicant as being cooperative and polite in interview. He felt he had been "forgotten" by the respondent. At this point, the applicant had been in immigration detention for 810 days.

16. Ms Temani noted that the applicant was described as violent and that he had served a sentence in 1999 of three and a half years' imprisonment for actual bodily harm and unlawful imprisonment. His report from the Governor of HMP Liverpool was, however, positive, saying that he was well behaved and no problem to staff or other prisoners.

17. Ms Temani concluded that, on the information held by the respondent, the applicant would appear to be a national of Belarus. She recorded the checks with the embassy in Minsk and with the British Embassy in Moscow. She noted that the checks in Kiev, Minsk and Vilnius had produced negative results.

18. So far as the visit to the Belarusian Embassy in London was concerned, Ms Temani spoke to one of the three escorts who had taken the applicant to the embassy. The escort reported the applicant as remaining handcuffed during the interview because of the open nature of the room in which the interview was conducted. The interview was conducted "in their own language". The applicant answered questions and there appeared to be "no grimaces or particular facial expressions made by either party during the interview". The interview was said to be very short and the applicant well behaved.

19. Having noted the description of the interview by the First Secretary, including what the applicant said, Ms Temani recorded the applicant as saying that he felt

humiliated and frightened going to the embassy in handcuffs. He had answered questions about his home and his parents. According to the applicant, the First Secretary said that it was not up to him to decide whether the applicant would be sent to Belarus; but, if the answer was negative, "then I should not mention again that I am from Belarus or that I had something to do with Belarus".

20. The applicant then gave Ms Temani more details about Minsk, going into detail also about his course at the Secondary Technical Institute in that city and his job as a press operator at the book factory. She then recorded his information about places in Minsk and customs in Belarus.

21. The interview ended with the applicant telling Ms Temani that he was indeed a member of the BPF and that he worked under the leadership of Rusian Vasilevich.

22. In March 2003, the British Embassy in Minsk provided the respondent with further information. The embassy confirmed the information given by the respondent that there was a market in Minsk called Komarovskiy and the main street in Minsk with government buildings on it is called Francisk Skoriny Prespect. V town was near the River Pripiat which was 30 to 40 kilometres from Chemohyl. A Secondary Technical College existed in Minsk, but not quite at the address the applicant had given.

23. By contrast, there was no Viktory Park in Minsk, as the applicant had claimed, though there was a Viktory Square. The applicant had said that the River Berezna runs through Minsk. This was incorrect. The embassy said that the River Berezina "is at least 100 km far from Minsk". The name of a metro station, given by the applicant as being in Minsk, was incorrect. There was no such station. Also, Krasnotkatskaya Street did not exist in Minsk. In April 2003, the embassy informed the respondent that according to a telephone conversation with the authorities of ZAGS in Gomel, a person under the name [surname of applicant] has never been registered in Gomel ZAGS.

24. On 6 November 2003, the applicant was interviewed at Dover IRC. The applicant gave a great deal of detail about himself and his family in Belarus. The interview recorded the applicant as giving the information that the River Dnieper runs through the region, which was said to be correct. The applicant said that, in some respects, he could not remember information but it is said on his behalf that no attempt was made later to check whether he had been able to recall the relevant details.

25. On 14 November 2003, a report was prepared for the Minister of State for Immigration, Beverley Hughes. This recorded that the applicant had been detained since 30 June 2001, when he returned from Belarus, having been refused entry by the authorities there. It noted that he had been sentenced to three and a half years' imprisonment in March 1999 for the offences described earlier. It recorded the Belarusian Embassy as saying that if the applicant left Belarus before 1991 (when Belarus achieved independence from the Soviet Union) he would have lost his claim to Belarus citizenship. It was, however, not substantiated that the applicant had no entitlement to Belarusian nationality, as he had subsequently withdrawn his

assertion that he left Belarus in 1986 and reverted to his original claim to have left the country in 1997. Evidence was now required to support any attempt to remove the applicant on a European Union letter, to corroborate his claim that he was born in Belarus and lived there until 1997.

26. The report stated that the respondent was unable to confirm that the applicant was a national of Belarus. He had provided conflicting information at interview. The report continued:-

> "The removal of uncooperative nationals of former Soviet Union states has become very difficult due to the nationality laws of Russia and the emerging former satellite states and we shall be discussing with the appropriate embassies how best to overcome these problems. Notwithstanding this, in the absence of evidence to confirm that [the applicant] was in Belarus after independence it is unlikely that the Belarus authorities will be persuaded to accept [him]".

27. The report then turned to advice from the respondent's legal branch:-

> "11. Advice from Legal Advisers Branch is that the power to detain pending removal is subject to implied limitations. In particular, a person may only be detained for a period that is reasonable in all the circumstances; if, before the expiry of that period, it becomes apparent that removal cannot be effected [within] a reasonable period, the power of detention cannot lawfully be exercised. Factors that are relevant include:
>
> - The length of detention (currently in excess of 27 months).
> - The nature of the obstacles which stand in the path of removal.
> - The level of cooperation given by [the applicant].
> - The diligence, speed and effectiveness of the steps taken by the Immigration Service to overcome the obstacles to remove as evidenced by the progress that has been made to document or establish [the applicant's] nationality.
> - The likelihood of absconding.
> - The conditions in which [the applicant] is being kept and the effect of detention on him."

28. The report continued:-

> "12. We have reached an impasse with the Belarus Embassy. The Immigration Service Documentation Unit has advised that a further interview with the Belarus authorities is not appropriate in the absence of any new evidence. Enquiries through the National Criminal Investigation Service, Interpol and British Embassies in Moscow, Kiev, Minsk and Vilnius have all failed to find any trace of [the applicant]. In this particular case, Legal Adviser's Branch have taken the view that a court would be likely to conclude that removal within a reasonable time is not a realistic prospect and that detention is no longer therefore lawful.

13. The area of non-cooperation by detainees and its relevance to the length of reasonable detention under immigration powers is subject to legal proceedings in other cases at present. The constancy and accuracy of information provided by [the applicant] is open to question; despite extensive enquiries nothing that will assist with documentation has been substantiated, leading to the conclusion that he may have provided false information.

…

15. This is a difficult case to balance and there are arguments for and against releasing [the applicant]. Release may send out the wrong message to other undocumented detainees. Moreover, [the applicant] has been convicted of a serious criminal offence. His deportation was recommended by the court and is now the subject of an extant deportation order. There is potential for embarrassment if he were to commit a further offence on release. While there are issues about the level of cooperation provided by [the applicant], he has now been detained under Immigration Service powers for 27 months beyond the end of his custodial sentence. Despite extensive enquiries the Immigration Service has made little progress in establishing his nationality for the purpose of obtaining a travel document from the Belarus authorities. It follows that removal within a reasonable time is not a realistic prospect and continued detention is therefore likely to be deemed unlawful. Prior to his [detention] [the applicant] was on bail for nine months and adhered to the bail conditions. On balance and despite the risks identified above, we consider that release is appropriate in the current circumstances.

16. [The applicant] applied for humanitarian protection in the United Kingdom. He is not eligible for humanitarian protection or discretionary leave and his application was refused on 31 May. On release he will be subject to temporary admission with stringent reporting restrictions and the Immigration Service will continue to make efforts to document [the applicant] for removal."

The recommendation for release was accepted. The applicant was released on 2 December 2003 on temporary admission. Prior to release he had been detained for 1080 days. At this point, it may be helpful to record that at the date of the hearing in the Upper Tribunal (11 November 2020), the applicant had been subject to temporary admission/bail/immigration detention for 7360 days, excluding periods of imprisonment, amounting to a period of over twenty years. It is thought by those acting for the applicant that this is the longest use of such powers by the respondent "by a substantial margin". The respondent does not demur.

29. In January 2004, the applicant sought support under section 4 of the Immigration and Asylum Act 1999 (so-called "hard cases" support). This was refused on the basis that the respondent considered the applicant to be removable and so not entitled to support.

30. The applicant made a fresh claim, the refusal of which was unsuccessfully challenged by judicial review proceedings in 2004. In connection with that challenge, the applicant provided an expert report by Robert Chenciner, together with a signed witness statement from Mr Berk. Mr Chenciner stated that false internal exile had

been a favoured tool in Soviet times for oppositionists and others. As a small country, Belarus could no longer use this device and so was relying instead on external exile. The Belarusian authorities were intent on crushing opposition. For this purpose, they had the benefit of KGB apparatus. Mr Chenciner believed that merely seeking asylum would be sufficient to make a person liable to be regarded by the Belarusian authorities as an oppositionist and thus amount to a good reason for non-admission.

31. On 10 February 2008, the applicant was arrested for possession of a false Lithuanian identity document. It is the applicant's case that, lacking any means to support himself, he obtained the false document in order to work.

32. On 1 May 2008, the applicant was sentenced to ten months' imprisonment for possession of a false instrument. On 26 August 2008, he was detained again under immigration powers but bailed on 21 September 2009.

33. In an interview conducted at HMP Nottingham in September 2008, the applicant told the respondent that he had an internal passport, which had been taken from him by the Belarusian authorities in 1997. This repeated a claim made five years earlier.

34. On 15 October 2008, the respondent took the applicant to the Ukraine Embassy, providing the same biometric details as earlier described. Nothing came of this visit.

35. On 8 December 2008, the applicant's current advisers, Paragon Law Solicitors, wrote to the Belarusian Embassy, providing the applicant's biometric information. On 6 January 2009, the embassy replied that there were no records of the applicant and that he could not be considered a citizen of Belarus.

36. In September 2011, the respondent agreed to reconsider the applicant's further submissions as a fresh application for asylum. The respondent refused that application and the applicant appealed to the First-tier Tribunal. His appeal was heard on 16 March 2012 by First-tier Tribunal Judge Pooler. The applicant gave evidence, as did Mr Berk. Again, the applicant told the judge that he had not merely been distributing leaflets for the BPF but had been secretly printing them at his place of work. He also said that he had been beaten and interrogated and that his hands had been jammed in a door, breaking two of his fingers. This was a new detail.

37. Judge Pooler considered that the evidence of Mr Berk was supportive of the applicant's claim but that this could not be the end of the matter in relation to the applicant's credibility. Clear adverse findings have been made in this regard in the two earlier determinations. Judge Pooler applied the guidance in Devaseelan in respect of those earlier findings. He considered the evidence as a whole.

38. The applicant had before him expert evidence from Mr Chenciner. It was, however, not apparent that Mr Chenciner had been provided with the two earlier determinations of the adjudicators.

39. Judge Pooler recorded that at the hearing before him it was said that the applicant had lied on arrival in Belarus by telling the authorities that he had not been resident in that country since 1986 and was therefore unable to show any period of residence since Belarusian independence. The judge considered that factor would have been of considerable importance in assessing the applicant's nationality. At the hearing the applicant denied having lied to this effect; but Judge Pooler did not accept his evidence. He found the applicant had not given a credible account. He also found as a fact that the applicant was not refused entry to Belarus because he was regarded as a political opponent. The fact that he had admitted lying previously to the Belarus authorities was a significant factor that had to be taken into account by those authorities in 2001 when the applicant was refused entry. Judge Pooler found that the refusal of the Belarus authorities to recognise the applicant as a citizen or issue him with a travel document was not based on his political opposition. On the contrary, "it is likely that the [applicant] has failed to provide accurate information to enable the Belarus authorities to trace him or to find any record of him" (paragraph 47).

40. Judge Pooler dismissed the applicant's appeal. The applicant obtained permission to appeal to the Upper Tribunal. His appeal was heard on 17 April 2013 by Upper Tribunal Judge Southern. No error of law was found in Judge Pooler's determination, with the result that the appeal to the Upper Tribunal was dismissed.

41. The applicant obtained permission to appeal to the Court of Appeal. In AM (Belarus) v Secretary of State for the Home Department [2014] EWCA Civ 1506, the court rejected the applicant's submission that Judge Pooler had "wrongly treated the Devaseelan Guidelines as a straitjacket" (paragraph 34). The court then turned to the applicant's Article 8 argument. It was said that the applicant had more ties to the United Kingdom than to Belarus and that the United Kingdom was the only place in which, for the future, he could develop a private life. Giving judgment, Lewison LJ held as follows:-

> "43. At the heart of [Mr Karnik's] submission is the factual proposition that the [applicant] would still be refused entry to Belarus if he told the truth to the authorities there. But the judge decided that question against him, as did the judge in the Upper Tribunal. Mr Karnik says that that in itself was a misapplication of Devaseelan. But at paragraph 45 of the decision of the FTT, the judge considered evidence which the [applicant] gave to him in the course of that hearing. He said in terms that he did not believe it. That is clearly an independent and third adverse credibility finding made against the [applicant].
>
> 44. Whether something is or is not proportionate, which was the question which the FTT had to decide, is essentially a value judgment on which different people can reasonably disagree. We can only interfere if the value judgment which the FTT made is one that no reasonable tribunal properly instructed could have reached. In my judgment, the FTT was perfectly entitled to reach the conclusion that it did on the question of proportionality.
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> 45. I would, therefore, dismiss the appeal."

42. On 25 February 2015, the applicant applied again to the Belarusian Embassy, providing his biometric details. It appears that the response was, again, negative. On 11 October 2015, the applicant provided further information to the embassy and on 19 January 2016 the respondent sent another travel document application to the Belarusian authorities. A year later, the respondent informed the applicant that the Belarusian authorities were requesting a version of that application in Russian. It then appears that the respondent arranged a telephone interview between the applicant and Belarusian officials. Nothing appears to have come of this.

43. On 11 September 2018, the applicant was sentenced to 42 weeks' imprisonment for possession of an offensive weapon. The sentence comprised 26 weeks for the offence, together with the activation of a suspended sentence of sixteen weeks.

44. The applicant suffers from hepatitis C and psoriasis. According to a medical report of 10 June 2020, the applicant "is under the psychiatric team for drugs misuse. He uses Cannabis, Cocaine and Heroin. He is on Methadone, Olanzapine and Mirtazapine". He was assaulted in 2018 but a test showed no brain abnormality. The applicant told Dr Falah, Consultant Neurologist, that, following the head injury, he started having attacks suggestive of generalised seizures. The doctor concluded that the "episodes are strongly suggestive of epileptic seizures. I am arranging an EEG. I would have done an MRI brain [sic] but in view of the current epidemic, we will delay that for now".

45. At paragraph 58 of his skeleton argument, Mr Karnik says that, except for the periods when the applicant has been detained or imprisoned or was working illegally –

> "he has been destitute, he remains so, he has relied upon charity and support from friends, he has no place of his own to reside, and relies upon the goodwill of friends and others for accommodation, he spends time street homeless and has been subject to violence during these periods."

46. This, together with his medical position, leads Mr Karnik to submit that those involved in the applicant's care see a pressing need for him to obtain some formal status. That last submission appears to be based upon a letter of 16 October 2018 from Nottinghamshire Healthcare (Debra Goode CPN). This stated that, prior to his detention in Nottingham Prison in August 2018, the applicant "had presented as physically and mentally unwell whilst in the community". He was hearing voices, believing he was being controlled, "was paranoid, and presented as dissociative and disconnected". The letter stated that it was believed this presentation was linked to the applicant's legal status in this country and the length of time it was taking to resolve the issue.

47. When Debra Goode visited the applicant in prison in October 2018, she found his physical and mental health "were much improved … I believe that this improvement in [the applicant's] health is as a result of the stability that prison life has offered". The applicant was taking advantage of learning opportunities in prison

and was taking an English course. He seemed motivated to learn new skills. Ms Goode opined as follows:-

> "I believe that given legal status in this country [the applicant] would maintain his present good health, and that he would be motivated to work and make positive changes in his life, and have the potential to be a valuable asset to society.
>
> Should [the applicant's] lack of status continue when he is released from prison, I feel it is highly likely that his physical and mental health will once more deteriorate.
>
> Given this, I would strongly advocate for [the applicant] to be granted legal status in this country."

48. In his reply of 9 November 2020 to Mr Fortt's skeleton argument, Mr Karnik says that, currently, the applicant –

> "survives on NASS "short-term" support and lives in NASS provided accommodation, neither are designed for a state of permanency, the former providing £35.39 per week on a payment card for food, clothing and toiletries, and the latter a place to shelter at the direction and discretion of the SSHD and not a home."

B. THE APPLICANT'S STATELESSNESS APPLICATION

49. On 9 February 2017, the applicant applied for leave to remain in the United Kingdom as a stateless person. On 27 November 2019, that application was refused by the respondent.

50. Paragraph 403 of the Immigration Rules provides that the requirements for leave to remain in the United Kingdom as a stateless person are that the applicant:-

    (a) has made a valid application to the respondent for limited leave to remain as a stateless person;

    (b) he is recognised as a stateless person by the respondent in accordance with paragraph 401;

    (c) he is not admissible to his country of former habitual residence or any other country; and

    (d) he has obtained and submitted all reasonably available evidence to enable the respondent to determine whether he is stateless.

51. Paragraph 401 of the Immigration Rules defines a stateless person as a person who:-

    (a) satisfies the requirements of Article 1(1) of the 1954 United Nations Convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any state under the operation of its law;

(b) is in the United Kingdom; and

(c) is not excluded from recognition as a Stateless person under paragraph 402.

52. Paragraph 402 contains certain exemptions, which are not relevant for the present purposes.

53. The respondent's refusal letter make reference to the biometric data provided by the applicant, as described earlier. The decision concluded that there were problems with the applicant's inconsistent claims for asylum, besides other discrepancies. It was, in particular, noted that the applicant appealed against the refusal of asylum on 27 September 2001 "on the grounds that my second application for asylum which was made on 30-Jul-2001 is a complete fabrication". The respondent also observed that, on being deported on 29 June 2001, the applicant had convinced the Belarus authorities that he was not entitled to citizenship as he had not lived there since 1986 and that he admitted lying about this matter to those authorities.

54. Reference was then made to the attempts which the respondent had made to validate information given by the respondent and to the difficulties which those investigations had disclosed.

55. Reference was also made to the interview at the Belarusian Embassy in 2003, when the applicant categorically denied being a Belarusian citizen and said it was "all a game". The letter noted, in this regard, the adverse credibility findings of the adjudicators and the First-tier Tribunal Judge.

56. The respondent observed that the applicant was in possession of a photocopy of a Republic of Belarus passport in the name AM but that confirmation had been received that this was "a valid passport, and used by its Belarusian national owner" (not the applicant). The applicant had not offered an explanation as to how he acquired a copy of this passport. Nor had he explained how he obtained the Lithuanian passport, which he had subsequently falsified. The Belarus Factory ID card had also been exposed as a forgery.

57. In addition, the applicant had "utilised alternate patronymic middle names, I… and A…, thereby generating additional aliases to confuse and obscure your true identity". The authorities could find no trace of his birth in G city in 1976.

58. Furthermore, whilst held at HMP Liverpool, it was noted that the applicant had given the nationality "Russian – Urals", claiming that he described himself as Russian as people had never heard of Belarus. The applicant claimed to know nothing about the Urals.

59. Notwithstanding all this, the respondent considered that there was "a level of consistency across Home Office records of your claim to be from Belarus". The applicant had generally maintained that claim. However:-

> "…that the Belarus authorities have refused to confirm your Belarus nationality, and that applications for an ETD had been unsuccessful, does not provide the necessary weight of evidence to support your stateless claim. That the Belarus authorities are unwilling to issue an ETD is, in the consideration of the Home Office, due solely to the fact that your identity cannot be verified – and it is a further consideration of the Home Office that you have deliberately adopted a strategy of lies and deceit to frustrate the removal process and to obscure your identity."

60. The respondent concluded that, although the applicant claimed to be AM, he had provided no substantive proof that this was his name. If that were the case, and the applicant was AM, the Belarusian authorities would be able to provide a trace of his schooling, work or healthcare, even if his birth was not registered in Belarus. In the circumstances, therefore, "it is only rational that the Belarus authorities would fail to verify your identity based on the objective evidence discussed above".

61. The decision continued:-

> "Importantly, that the Belarus authorities have thus far refused to issue an ETD or verify your Belarus nationality is not, in itself, proof that you are not a citizen of the country, or that you have had your Belarus citizenship revoked. Significantly, the Belarusian authorities have not refused to accept you as a citizen of the country, merely that they are unable to identify you based on the information you have provided. Indeed, the authorities have themselves been explicit in stating they believe you are being dishonest about your true identity having failed to provide a trace of you with regards to your birth, family, schooling, place of work or health records (based on the claims you have made).
>
> Taking these factors fully into account, and in acknowledging the inconsistencies in the information and details you have provided with regards to your identity, it is the consideration of the Home Office that you have failed to demonstrate, to the required standard of proof and balance of probabilities, that you are stateless as claimed."

62. The decision concluded by stating that the applicant had "adopted a wilful strategy of lies, obfuscation and deceit to confuse and obstruct endeavours to confirm your identity". It was not accepted that the applicant was inadmissible to Belarus and the application failed therefore to satisfy the provisions of paragraph 403(c) of the Immigration Rules. The application also failed to provide the necessary weight of proof of evidence, thereby failing to satisfy the terms of paragraph 403(d).

63. In addition, it was noted that on 11 September 2018, the applicant had been convicted of possession of an article which had a blade or was sharply pointed in a public place, for which he was sentenced to 26 weeks' consecutive imprisonment on each count. Accordingly, the application was refused under paragraph 322(5) of the Immigration Rules. This provides that an application for leave should normally be refused where it would be undesirable to grant leave, in the light of the conduct (including convictions) character or associations of the person concerned.

C. THE JUDICIAL REVIEW

64. The procedural history of these proceedings is somewhat elaborate. For present purposes, it is sufficient to recount that in 2018, the applicant applied for judicial review of the respondent's continuing failure to grant the applicant leave to enter or remain in the United Kingdom, as opposed to maintaining his status of immigration bail. Permission to bring judicial review proceedings on this ground was granted; and on 21 July 2020 the applicant was given permission to amend the grounds of challenge in order to challenge the decision of 27 November 2019 in which the respondent refused the application based upon alleged statelessness. A "rolled-up" hearing of the challenge to the statelessness decision was ordered, to take place at the same time as the hearing in respect of the original ground. That original ground is now described as ground 1 and the challenge to the statelessness decision is ground 2.

D. THE LIMITS OF IMMIGRATION BAIL

65. The applicant's case under ground 1 is that the respondent is not legally empowered to keep the applicant on immigration bail (formerly, temporary admission) and that she must consequently grant the applicant leave to enter or remain in the United Kingdom. In order to comprehend ground 1 it is, therefore, necessary to examine the relevant legislation.

66. Paragraph 16 of Schedule 2 to the Immigration Act 1971 concerns the detention of persons liable to examination or removal. Paragraph 16(2) of Schedule 2 provides as follows:-

> "If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs [8 to 10A] or 12 to 14, 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."

67. Paragraphs 8 to 10A, and 12 to 14 make provision for the respondent or an immigration officer, as the case may be, to give directions, in certain circumstances, for the removal of a person from the United Kingdom. Section 16(2), therefore, makes a person liable to detention pending a decision whether or not to give such directions or the person's removal in pursuance of them.

68. Until it was repealed by the Immigration Act 2016, paragraph 21 of Schedule 2 to the 1971 Act provided as follows:-

> "17(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.

(2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

69. Section 11(1) of the 1971 Act provided that a person on temporary admission was not deemed to have entered the United Kingdom so long as they were subject to temporary admission. The practical effects of being on temporary admission, as opposed to having some form of leave, were profound. There were severe restrictions on the person's ability to work; they were disqualified from access to all but emergency NHS treatment; and they were subject to other significant restrictions, not faced by those having some form of (albeit limited) leave under the 1971 Act.

70. The Immigration Act 2016 abolished the concept of temporary admission. Paragraph 21 of Schedule 2 to the 1971 Act was, as a result, repealed. Instead, Schedule 10 to the 2016 Act made comprehensive provision for immigration bail. Paragraph 1(5) of Schedule 10 provides as follows:-

"(5) 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), or

(b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1) of the Immigration Action 1971."

71. The provisions mentioned in paragraph 1(1) of Schedule 10 include paragraph 16(1), (1A) and (2) of Schedule 2 to the Immigration Act 1971.

72. As can be seen, the relevant touchstone for whether an individual may be subject to immigration bail is the same as that which applied to determine whether a person could be made subject to temporary admission; that is to say, that he or she is "liable to detention" (old paragraph 21 of Schedule 2 to the 1971 Act/paragraph 1(5)(a) of Schedule 10 to the 2016 Act).

73. The practical consequences of being subject to immigration bail, without leave, continue to be significant. Paragraphs 360 to 360E of the Immigration Rules set out a narrow range of circumstances in which a person who is an asylum applicant may be granted permission to take up employment. The circumstances do not encompass those of the present applicant. Furthermore, the effects of the Immigration Acts 2014 and 2016 are that a person without leave is disqualified from entering into a tenancy agreement and from opening a bank account. As before, they only have available to them emergency NHS treatment.

74. There are, of course, powerful policy reasons behind the treatment of those who are not in possession of leave to enter or remain. They are intended to prevent abuse of the United Kingdom's system of immigration control. The question in the present

case is whether the point has nevertheless been reached, whereby there is no legal alternative to ending what has been described as the applicant's state of "limbo" (see R (AR and Others) v Secretary of State for the Home Department [2009] EWCA Civ 1310).

75. It is now time to examine the relevant case law. The first case is R (Khadir) v Secretary of State for the Home Department [2005] UKHL 39; [2006] 1 AC 207. The claimant was an Iraqi Kurd who arrived in the United Kingdom in 2000. He was given temporary admission. He contended, however, that given the respondent's long-term failure to find a safe means for the claimant to return to the Kurdish Autonomous Area of Iraq, he should be granted exceptional leave to enter.

76. In his opinion, with which the other members of the House of Lords agreed, Lord Brown summed up the claimant's position as follows:-

> "7. The status of ELE has very considerable advantages over that of temporary admission. The benefit regime is altogether more favourable: those on temporary admission obtain only benefits in kind, never cash. Those with leave will ordinarily be permitted to work; those temporarily admitted will not. Those with leave can live where they want; those temporarily admitted only where they are directed to live. There are other important differences too. Because of these disadvantages the appellant sought to challenge the Secretary of State's refusal of ELE. He did so on two grounds. First and principally he contended that because of the continuing inability to find a safe route for his return to the KAA, there was no longer power to authorise his temporary admission under Schedule 2 so that the Secretary of State had no alternative but to grant him ELE. Alternatively he contended that, even assuming that the Secretary of State had a discretion in the matter, he had not exercised it lawfully."

77. The Khadir litigation had begun in 2002, when Crane J concluded that, as at 3 May 2002, Mr Khadir's "temporary admission was no longer lawful" and that the respondent's refusal letter in any event contained "wholly inadequate reasoning".

78. Very shortly after Crane J's decision, and before the case reached the House of Lords, Parliament enacted section 67 of the Nationality, Immigration and Asylum Act 2002, in order to put beyond doubt that, whatever might previously have been a true ambit of paragraph 21 of Schedule 2 to the 1971 Act, it was to be construed as extending to a case such as that of Mr Khadir. There was concern that if a person could not be lawfully detained, he could not be lawfully granted temporary admission.

79. Section 67 provides as follows:-

> "**67 Construction of reference to person liable to detention**
>
> (1) This section applies to the construction of a provision which—
>
> (a) does not confer power to detain a person, but
>
> (b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.

(2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that—

(a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement,

(b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or

(c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.

(3) This section shall be treated as always having had effect."

80. At paragraph 20 of his opinion, Lord Brown, discussing section 67, held that "the section recognises that it is one thing to detain a person during what may be a long delayed process of removal, quite another to provide for his temporary admission during such delays" (paragraph 20). That distinction fell to be made because in R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704, it was held that the power of detention under the Immigration Act 1971 cannot actually be exercised where, in all the circumstances, the respondent cannot effect removal of the person concerned within a reasonable period.

81. Discussing Hardial Singh and other cases where the same approach had been taken, Lord Brown said:-

"25. … I doubt it crossed the minds of anyone involved in those cases that the applicants on release might not have been properly made subject to such restrictions but instead should have been released unconditionally. Yet that necessarily must be the effect of Mr Blake's argument.

26. That argument can now be summarised I think essentially as follows:

(1) The power to detain under paragraph 16 exists only when removal is "pending".

(2) Removal cannot be said to be "pending" unless it will be possible to effect it within a reasonable time.

(3) That is why the applicants in the above series of cases had to be released (and why it would be unlawful to detain the appellant in the present case): since removal was not "pending", they were not liable to be detained. The limitation was upon the existence and not merely the exercise of the detention power.

(4) By the same token that they were not liable to be detained, so too they were not subject to the restrictions provided for by paragraph 2(5) of Schedule 3 and so too this appellant is not now able to be temporarily admitted under paragraph 21 of Schedule 2."

82. When Khadir was in the Court of Appeal, Mance LJ had drawn a distinction between the circumstances in which a person is potentially liable to detention (and can properly be regarded as temporarily admitted), and the circumstances in which the power to detain can in any particular case properly be exercised. Lord Brown agreed, saying:-

> "31. … It surely goes without saying that the longer the delay in effecting someone's removal the more difficult will it be to justify his continued detention meanwhile. But that is by no means to say that he does not remain "liable to detention". What I cannot see is how the fact that someone has been temporarily admitted rather than detained can be said to lengthen the period properly to be regarded as "pending … his removal".
>
> 32. The true position in my judgment is this. "Pending" in paragraph 16 means no more than "until". The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be "pending", still less that it must be "*im*pending". So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (ie throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains "liable to detention" and the ameliorating possibility of his temporary admission in lieu of detention arises under para 21.
>
> 33. To my mind the *Hardial Singh* line of cases says everything about the *exercise* of the power to detain (when properly it can be exercised and when it cannot); nothing about its *existence*. True it is that in *Tan Te Lam* the Privy Council concluded that the power itself had ceased to exist. But that was because there was simply no possibility of the Vietnamese Government accepting the applicants' repatriation; it was effectively conceded that removal in that case was no longer achievable. Once that prospect had gone, detention could no longer be said to be "pending removal". I acknowledge that in the first passage of his judgment set out in paragraph 24 above, Lord Browne-Wilkinson, having correctly posed the question whether detention was "pending removal," then used the expression "if removal is not pending." That, however, can only have been a slip. He was clearly following *Hardial Singh* and no such error appears in Woolf J's approach.
>
> 34. None of this, of course, is to say that the regime governing temporary admission as presently administered is other than harsh. But that harshness has been sanctioned by Parliament and cannot affect the true construction and application of paragraphs 16(2) and 21 of Schedule 2. Its only possible relevance would be to the exercise of the Secretary of State's undoubted discretion, irrespective of the legal position under Schedule 2, at any time to grant ELE."

83. Lord Brown dismissed the challenge to the respondent's decision as being inadequately reasoned. He said:-

> "I would do so less by reference to section 67 than because it must require an altogether stronger case on the facts than this to impugn a refusal of ELE in

circumstances where Parliament has expressly provided for temporary admission as the alternative to detention. ELE means what it says: it is exceptional. The Secretary of State's discretion is a very wide one and it is hardly surprising that he found nothing exceptional about this case when he refused to grant ELE a mere 18 months after the appellant's unlawful entry into this country. Nor should the fact that the appellant has now been here for a further five years occasion any particular optimism for the future: by section 67 Parliament has manifested its clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime."

84. Lord Brown concluded by stating that section 67 of the 2002 Act was an unnecessary enactment. What it said had always been the law.

85. Although agreeing with Lord Brown, Baroness Hale gave a short opinion, which has featured in the subsequent case law:-

> "4. I agree that this appeal should be dismissed for the reasons given by my noble and learned friend, Lord Brown of Eaton-under-Heywood. A person is 'liable to be detained' within the meaning of Schedule 2 to the Immigration Act 1971 where there is power to detain him even if it would not be a proper exercise of that power actually to do so. There is some parallel here with the expression 'liable to be detained' in, for example, sections 17 and 20 of the Mental Health Act 1983. A person who is liable to be detained in a hospital by virtue of an application or order under that Act may either be actually detained or given leave of absence. While on leave of absence it may well be that the patient's disorder is not such that he needs to be detained in hospital. But he remains liable to be detained, and may be recalled to hospital, unless and until the application or order authorising his detention lapses or he is discharged: see *B v Barking etc Healthcare NHS Trust* [1999] 1 FLR 106, CA. Under Schedule 2 to the Immigration Act 1971, there is power to detain 'pending removal'. 'Pending' in this context means no more than 'until'. There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here, but that is another question. It certainly did not arise on the facts of this case."

86. In MS and others v Secretary of State for the Home Department [2009] EWCA Civ 1310, the Court of Appeal applied the law, as set out in Khadir, in the case of three claimants who were subject to temporary admission but who for particular reasons could not be removed.

87. Having noted, in one of the cases at first instance, Cranston J's use of the expression "limbo", Sedley LJ described the practical effects of temporary admission:-

> "2. … They have £5 a day to live on, cannot take work, must live where they are required to, have access only to primary healthcare, can obtain no social security benefits or social services assistance and can study only in institutions that require no payment. In these respects, which are determined by law and are not simply discretionary conditions imposed by the Home Office, they may be no worse off than asylum-seekers (which all three of the present appellants initially

were) but are markedly worse off than if they had formal leave to remain. Their case is that they are entitled to the latter."

88. Discussing section 67 of the 2002 Act, Sedley LJ noted the finding in Khadir that it "was and had always been the law that temporary admission was not time-limited but could last as long as there was "some prospect" of removal. A terminal point would come, correspondingly, if and only if it became clear – as it had in Tan Te Lam [1997] AC 97 – that there was "simply no possibility of repatriation" (paragraph 23). Sedley LJ continued:-

> "24. Mr Supperstone has felt obliged by *Khadir* to abandon a potentially interesting argument (albeit one which he accepts was not advanced to Cranston J) that s.3 of the Human Rights Act 1998 requires s.67 to be interpreted so as not to permit temporary admission to become a disproportionate interference with private life by keeping someone on temporary admission for excessively or indefinitely long – conceivably, if the Home Secretary is right, even decades. It may be that this will require consideration in another case or context.
>
> 25. Instead it is argued for the appellants
>
> (a) that legal difficulties fall outside s.67(2)(b) altogether; and
>
> (b) that a point may come, short of sheer impossibility, when the prospect of removal is too remote to be regarded as merely a practical difficulty impeding or delaying removal.
>
> 26. The first of these submissions I would reject without hesitation. As Cranston J pointed out, foreign law is in legal principle a matter of fact. It is also the case that the obstacles to return are commonly an amalgam of fact, governmental practice and policy, international law and local law, often in a form which is impossible to disentangle. The present cases illustrate this. I would hold that any difficulty, whatever its nature or origin, which has the effect of impeding return is a practical difficulty within the meaning of s.67(2)(b).
>
> 27. If we were construing s.67 afresh, I would have much sympathy with a construction which gave value to the verbs "impede" and "delay", neither of which suggests a more than temporary difficulty. But in my judgment the decision in *Khadir* puts this beyond our reach. It compels us to treat s.67(2)(b) as embracing all circumstances in which there remains, in Lord Brown's words, some prospect of removal, ending only when there is "simply no possibility" of it. The corollary, as Baroness Hale put in a short concurring speech, is that the legal situation may change only "when the prospects of the person ever being able safely to return … are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here" (one notes the echo of Art. 8 jurisprudence).
>
> 28. It is, however, not inconceivable that in two of the three cases before us this will turn out to be the case. We have not yet heard argument on the facts. Mr Supperstone has realistically accepted that in the case of AR a tipping point has

not been reached. He reserves his position in the other two. In one of these cases, that of FW, the outcome of the interview with the embassy may prove decisive one way or the other. If not, it will be for counsel to decide whether it is appropriate to restore her appeal or that of MS in order to argue that the facts are such as to carry the case outside the twin powers of detention and temporary admission and make it incumbent on the Home Secretary (as Jason Beer on his behalf accepts would follow) to give conscientious consideration, if asked, to a grant of discretionary leave to remain."

89. Toulson LJ said:-

"33. Lord Brown went on to say that the *Hardial Singh* line of cases were for the most part relevant only to the question when the power to detain might properly be *exercised* and not to the question whether the power had ceased to *exist*. An exception was *Tan Te Lam* [1997] AC 97, where the Privy Council had held that the power itself had ceased to exist. But Lord Brown explained that this was because in that case there was "simply no possibility" of the applicants' repatriation and it had been effectively conceded that removal was no longer achievable. Once that prospect had gone, detention could no longer be said to be "pending removal".

34. It is an integral part of this reasoning that the existence of the power of detention under paragraph 16, and consequential eligibility for temporary admission under paragraph 21, requires there to be "some prospect" of the person's removal.

35. I agree with Laws LJ that this "residual requirement" requires no more than the possibility of removal. The prospect of removal may be distant, but must not be so remote as to be unreal. In *Khadir* Lady Hale referred, at paragraph 4, to the possibility of a time coming "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". She clearly had in mind an exceptional case. Similarly Lord Brown observed, at paragraph 35, that "by section 67 Parliament has manifested its clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime".

…

43. In a case where there is no prospect of the person ever being removed, the reason why he cannot be detained under paragraph 16 is more fundamental than the fact that he cannot practicably be removed "at that precise moment". Applying the reasoning in *Khadir*, the absence of any possibility of his future removal negates the very existence of any power to detain.

44. For those reasons, which I believe accord in substance with those of Laws LJ, I agree with Mr Supperstone's submission that it was necessary for the judge to consider whether there was some prospect of the appellants being removed, once that issue was raised, although my reasons differ from the way in which Mr Supperstone presented his argument. But in considering whether there is "some prospect" of a person's removal, the test is of an entirely different nature from

that which arises in the *Hardial Singh* line of cases, where the court is concerned with the reasonableness of the exercise of the power to detain. I would also not accept Mr Supperstone's argument to the effect that s 67 in some way narrows the power which the Secretary of State would otherwise have to grant temporary admission under paragraph 21.

45. I can deal briefly with the Article 8 argument. Sedley LJ has referred to the far reaching restrictions on those who are temporarily admitted. I would not exclude the possibility that there might be a case in which the combination of a decision of the Secretary of State to grant temporary admission on the usual conditions and other statutory or bureaucratic provisions might result in a breach of Article 8; but I am not persuaded that such a stage has arisen in any of these cases, and the possibility that it might arise does not make s 67 or paragraphs 16 and 21 of themselves incompatible with the ECHR." (our emphases)

90. Laws LJ concurred with Toulson LJ, giving reasons for arriving at the "unanimous" conclusion that differed somewhat from those of Sedley LJ. He said:-

48. S.67(1)(b) makes reference to paragraph 21(1) of Schedule 2 to the 1971 Act. The opening words of s.67(2) also cross-refer to paragraph 21(1). S.67 was enacted because it was thought, after Crane J's judgment in *Khadir* [2002] EWHC (Admin) 1597, that a person who was *prima facie* liable to detention pursuant to paragraph 16, but could not lawfully be so detained because of *Hardial Singh* considerations ([1984] 1 WLR 704), could not lawfully be granted temporary admission either. The reasoning was that such a person was not "liable to detention" within paragraph 21(1), and so the temporary admission power could not be applied to him.

49. On that footing, what s.67 did was to preserve the temporary admission power in such a case, in effect by deeming ("[t]he reference shall be taken to include…" – s.67(2)) the person to be "liable to detention". Thus someone whose case fell within the *Hardial Singh* principle could still be subject to temporary admission. All the matters in s.67(2)(a) – (c) are *Hardial Singh* considerations. Their language does not in my judgment imply any substantive test or limitation of temporality; they merely recognise that the practical possibility of detention, while ruled out for the present, may be reinstated.

50. Had the matter been free from authority that is the approach which with great respect I would have taken to the relationship between s.67 and paragraph 21(1). It treats "liable to detention" as importing the possibility of a lawful detention, and not merely the existence of the power to detain; accordingly the phrase had to be stretched to cover the case, for the purpose of temporary admission, where (because of *Hardial Singh*) there was no such legal possibility. It is, however, not consistent with the analysis advanced by Lord Brown of Eaton-under-Heywood in *Khadir*. Lord Brown (their other Lordships assenting) held that "liable to detention" refers merely to the *existence* of the power to detain, not its *exercise*, and so applies even in a *Hardial Singh* case. Thus a person whose case falls within the *Hardial Singh* principle may be lawfully detained under paragraph 21 without the aid of s.67, which is therefore surplusage.

51. Lord Brown acknowledged, however, that "liable to detention" requires that there remain "some prospect" of removal. That requirement applies both to paragraph 16 (detention) and to paragraph 21 (temporary admission). But in my judgment it means no more than that the possibility of removal is not altogether ruled out; and that is also reflected by the language of s.67(2)(a) – (c).

52. In the result the temporary admission power is subject only to that residual requirement, whether available through paragraph 21 without more (the *Khadir* approach) or, were it open to us to go down this route, through paragraph 21 qualified by s.67. In either case the underlying issue of law in these appeals falls to be resolved against the appellants."

91. The judgments in MS are important. They make it clear that the respondent's ability to subject a person to temporary admission (now immigration bail) turns upon whether that person "is liable to detention" (see paragraph 72 above). The House of Lords in Khadir interpreted that phrase broadly. There nevertheless is a limit to the power, which is expressed by Lord Brown in Khadir by reference to the need for there to be "some prospect" of removal. That limit is not, however, easily reached. At paragraph 43 of the judgments in MS, Toulson LJ spoke of there being "no prospect of the person ever being removed." In the same vein, Laws LJ held the possibility of removal needs to be "altogether ruled out" before a person is no longer "liable to removal" and, thus, no longer to be dealt with by way of temporary admission or (now) immigration bail (paragraph 51). Sedley LJ described the endpoint of the power as being where there was "simply no possibility" of the individual being removed by the respondent (paragraph 23). It is also implicit, from Sedley LJ's rejection of the argument for the appellants set out in paragraph 25(b) of the judgments, that nothing short of "sheer impossibility" will suffice. There is no indication that the other members of the court disagreed with this part of his judgment.

92. Although Sedley LJ, at paragraph 24, considered that it was unnecessary to engage with the appellants' submissions regarding human rights, Toulson LJ did so at paragraph 45. In view of the way in which the case law has developed, that paragraph is, in our view, significant. It emphasises that there is an crucial difference between, on the one hand, an individual escaping "limbo" by demonstrating that he or she is no longer "liable to detention", by reason of the impossibility of removal in Khadir terms; and, on the other hand, the ability of that individual to succeed on the basis that, although this jurisdictional endpoint may not have been reached, he or she must be released from "limbo" because the respondent's continuation of that state of affairs – though lawful on the face of the 1971 Act – would constitute a disproportionate interference with the individual's Article 8 ECHR rights.

93. Although, in MS, Sedley LJ detected an echo of Article 8 jurisprudence in Lady Hale's concurring opinion in Khadir, she did not make any reference to Article 8. The correct way of interpreting her opinion is, we suggest, that she was doing no more than to point out the consequence of there being an objective endpoint to the liability of an individual to detention and, thus, to temporary admission. Ultimately, the identification of that endpoint is for the courts to determine.

94. In any event, it is the words of Lord Brown, with which Lords Bingham, Hope and Roger concurred, that must be determinative of how courts and tribunals identify the endpoint of the power in paragraph 16 of Schedule 2 to the 1971 Act and the power in paragraph 1(5) of Schedule 10 to the 2016 Act, with their identical phrase "liable to detention". That was the approach taken by the majority in MS.

E. RA (IRAQ) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2019] EWCA Civ 850

95. With these observations in mind, we turn to the important recent case of RA (Iraq) v Secretary of State for the Home Department [2019] EWCA Civ 850. This was an appeal by an individual who enjoyed leave to remain but who faced the prospect of losing that leave and assuming "limbo" status, described by Haddon-Cave LJ as:-

> "… a continuing *stasis*, whereby a person is prevented by continuing circumstances from being deported, but also prevented by lack of leave to remain from working, receiving normal State benefits, renting or buying property, or accessing a full range of NHS benefits …" (paragraph 1).

96. RA's situation was, accordingly, one of "prospective" as opposed to "actual" limbo. It is also important to observe that the appellant in RA was appealing against a decision of the Upper Tribunal that it would not be a disproportionate interference with his Article 8 rights for the respondent to place him in "limbo" at the end of his (statutorily extended) period of leave.

97. Haddon-Cave LJ dealt with eight domestic authorities concerning the "limbo" ground, beginning with Khadir. In addressing MS (there called AR and Others), Haddon-Cave LJ set out paragraphs 27 and 28 of the judgment of Sedley LJ and part of paragraph 45 of Toulson LJ's judgment where, as we have seen, the latter expressly raised the possibility of an Article 8 challenge in a "limbo" case.

98. In SH (Iran) and Others v Secretary of State for the Home Department [2014] EWCA Civ 1469, the Court of Appeal approved the judgment at first instance of Simler J that although there may have been times when it had not proved possible for undocumented Iranians to be removed to Iran, "it does not follow that will always remain the case; and, as found as a fact by Simler J, there at no stage has been in existence a policy that those whose removal from the United Kingdom cannot be enforced should for that reason alone be granted leave" (paragraph 38). A similar result was reached in BM (Iran) v Secretary of State for the Home Department [2015] EWCA Civ 491, where the claimant had been in "limbo" for only five months and the Court of Appeal held that the respondent was entitled to expect the claimant to return voluntarily. The claimant had not attempted to obtain documentation to effect his return.

99. In R (Abdullah) v Secretary of State for the Home Department 2016 (unreported), an Iraqi national who had been in "limbo" for potentially five years was held not to be

entitled to relief. Lady Hale's words in Khadir were held to be "focussed on the future prospect of removal, not on the historical inability to remove the claimant to Iraq" (paragraph 38).

100. The last domestic authority cited by Haddon-Cave LJ was AB (Sierra Leone) v Secretary of State for the Home Department (unreported, 7 July 2017). The appellant in that case had been in the United Kingdom for fourteen years. The Court of Appeal nevertheless considered that "limbo" had not yet become a live issue. The appellant had been "non-cooperative, disruptive and … inconsistent", albeit probably on account of his poor mental health" (paragraph 16). The respondent, meanwhile, had not ceased to make efforts to obtain a travel document or been so dilatory in her efforts that it would be disproportionate or unreasonable not to give the claimant some form of leave (paragraph 20).

101. Of the two cases from Strasbourg cited by Haddon-Cave LJ, reference should be made to Aristimuno Mendizabal v France (2010) 50 EHRR 50. The claimant in that case had arrived in France from Spain in 1975 and was given asylum; but that status was withdrawn in 1979. Between 1979 and 1989, the claimant lived lawfully in France on a series of temporary residence permits, valid for one year each. From 1989 to 2003, the French authorities granted her only temporary receipts for her application for renewal of her EU residence permit, each only valid for three months. There did not appear to have been any question of her being removed to Spain. The claimant challenged the refusal to regularise her status on Article 8 grounds. The ECtHR held that the claimant's precarious situation and the uncertainty as to her fate has had a significant moral and financial impact on her, including having to take causal and unskilled jobs and the impossibility as a result of not having a residence permit of renting premises and carrying on professional activity.

102. Under the heading "Discussion on the authorities", Haddon-Cave LJ held:-

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

103. Haddon-Cave LJ then set out the following four-stage analysis where a limbo argument is raised in the context of Article 8:-

> "(1) *Stage 1: Distinguish between prospective 'limbo' and actual* 'limbo'

63. The term 'limbo' is a convenient shorthand for describing the position of a person whom the SSHD wishes to deport or remove, but there is a limited prospect of ever effecting his deportation or removal (for the purposes of this judgment, the terms deport and deportation should be viewed interchangeably with remove and removal). The term 'limbo' is loosely used to cover individuals who may be in one of two discrete states: (i) first, someone in respect of whom a decision to deport has been taken, but no deportation order has in fact been made; or (ii) second, someone in respect of whom a deportation order has already been made but who has not yet been deported. In many cases, an individual in the first state (such as this Appellant to date) may have suffered little or no day-to-day impact on his or her private or family life. Thus, for a person in the first state, the effect of possessing leave to remain under s. 3C of the Immigration Act 1971 (*i.e.* pending appeal) will have been that they are free to work and to enjoy private and family life. This may be described as *prospective* 'limbo'. Where, however, in the second state, a deportation order has in fact been made, there will normally be no leave to remain, and the individual will be unable to work, claim benefits or receive more than basic GP care under the NHS. This may be described as *actual* 'limbo'.

64. In approaching any claim based on 'limbo' grounds, therefore, it is necessary first of all to distinguish between these two different situations, namely prospective 'limbo' and actual 'limbo', when assessing the balance between (a) the public interest in making or sustaining a decision to deport and then a deportation order on the one hand, and (b) the impact on Article 8 and other Convention rights of an individual on the other. The former state of prospective 'limbo' is likely to weigh less heavily in the balance in the interests of the individual than the latter state of actual 'limbo', but each case will depend on its own facts and the periods involved.

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

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

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

(3) Stage 3: Fact-specific analysis

67. Where those criteria are satisfied, a court or tribunal must next engage in a fact-specific examination of the case. This will typically comprise both a retrospective and prospective analysis, including: (i) an assessment of the time already spent by the individual in the UK, his status, immigration history and family circumstances; (ii) the nature and seriousness of any offences of which the individual has been convicted; (iii) an assessment of the time elapsed since the decision or order to deport; (iv) an assessment of the prospects of deportation ever being achieved (see above); and (v) whether the impossibility of achieving deportation is due in part to the conduct of the individual, *e.g.* in not co-operating with obtaining documentation.

(4) Stage 4: Balancing exercise

68. The fourth stage is the balancing exercise to be carried out between (a) the public interest in maintaining an effective system of immigration control, and in deporting those who ought not to be in the United Kingdom and (b) an individual's Article 8 and other Convention rights.

69. This will involve an assessment of (i) whether the individual remaining in a state of 'limbo' (or prospective 'limbo') will have an impact on the individual's Article 8 or other Convention rights and, if so, the extent of that impact; and (ii) how far that impact is proportionate when balanced with the public interest in the decision to make an order, or to sustain the same.

70. The public interest in question is principally the public interest in maintaining an effective system of immigration control, and in deporting those who are in the UK illegally. There is no separate public interest in preventing such individuals from *e.g.* working or relying on benefits or gaining the full range of free health care. Parliament has, however, decreed by statute that such benefits and opportunities are to be withheld from those here illegally. Parliament must be taken to have intended that the lack of such benefits and opportunities will form a disincentive to coming or remaining here illegally. The statute has to be read in accordance with s.3 of the Human Rights Act 1998. It is compatibility with Article 8 and other Convention rights which is relevant - not 'criminalisation' of the Appellant's presence in the UK as Mr Chirico would suggest. Further, the parallels he seeks to draw with the *Hardial Singh* principles are of marginal assistance since they arise in the different context of release from temporary detention (*c.f. R (Hardial Singh) v. Governor of Durham Prison* [1983] EWHC 1 (QB)).

71. The principal basis on which it might be said that the public interest in continued 'limbo' may be so weakened, such that Article 8 rights or other Convention rights might tip the balance, will normally only arise in cases where it is clear that the public interest in effective immigration is extinguished because, in practical terms, there is no realistic prospect of effecting deportation within a reasonable period (see above).

72. Further, as Simler J said in *R (Hamzeh and others)* (*supra*) at [50]:

> "[50] There is no policy or practice whereby persons whose removal from the UK cannot be enforced, should, for this reason alone, be granted leave

> to remain. It is not difficult to see why this should be the case. A policy entitling a person to leave to remain merely because no current enforced removal is possible, would undermine UK immigration law and policy, and would create perverse incentives to obstruct removal, rewarding those who fail to comply with their obligations as compared to those who ensure such compliance. Moreover, in the same way as immigration law and policy may change, so too the practical situation in relation to enforcing removal may change or fluctuate over time so that any current difficulties cannot be regarded as perpetual."[1]"

F. KHADIR IN THE LIGHT OF RA (IRAQ)

104. If, as we consider it to be the case, the decision of the House of Lords in Khadir is authoritative as to the extent of the power to keep an individual on temporary admission or (now) immigration bail, stage 2 of RA (Iraq) (prospects of affecting deportation must be remote) falls for careful consideration. There would seem to be only two ways of interpreting stage 2. Either the language used in paragraph 65 is intended directly to correspond with that used by Lord Brown in Khadir, as interpreted by the Court of Appeal in MS; or that language is intended to identify a threshold, lower than that of "Khadir impossibility", as part of the argument – foreshadowed by Toulson LJ in MS – whereby a person who may, in law, still be liable to immigration bail can nevertheless contend that the continuation of that state of affairs represents a disproportionate interference with Article 8 rights.

105. The first interpretation is possible only if the legal cessation of an individual's liability to detention in "Khadir" terms could lawfully result in the respondent still not granting the person concerned leave to enter or remain. That does not seem to be possible. In this scenario, the individual would cease to have any legal basis whatsoever for being in the United Kingdom. It is very hard to see how the respondent could rationally accede to that state of affairs, given the present form of the Immigration Acts. Certainly, in Khadir, there was no suggestion that, if a person's liability to temporary admission were lost, he or she would not, as a result, become effectively entitled to exceptional leave to remain. Legislation would be needed to alter this position (as to which, see S and others v Secretary of State for the Home Department [2006] EWCA Civ 1157).

106. It seems to us, therefore, that the second scenario described above is the only proper way of interpreting stage 2 of the four-stage RA (Iraq) process. In other words, the applicant must show serious and potentially long-lasting difficulties in the respondent's ability to have the individual removed, falling short of "Khadir impossibility". That is the approach we adopt.

G. APPLYING THE LAW TO THE FACTS OF THE APPLICANT'S CASE

(a) Is removal impossible?

107. We look first at whether the applicant has shown that the respondent's legal ability to keep the applicant on immigration bail has ceased to exist, with the result that (pursuant to what we have just said), there is no legal alternative but for the respondent to grant the applicant leave to enter or remain in the United Kingdom. In determining this question, the fact that the applicant has been in the United Kingdom for 22 years is of less relevance than in the RA (Iraq) four-stage Article 8 analysis. The sheer length of time may, nevertheless, be indicative of the permanent impossibility of removal.

108. Mr Karnik contends that this is, indeed, the position. The protracted history of the respondent's interactions with the Belarus authorities and the United Kingdom Embassy in Minsk shows, Mr Karnik says, that permanent *stasis* has been reached.

109. In support of this submission, Mr Karnik pointed to the fact that the applicant has for many years maintained a consistent account in respect of a number of matters concerning his past in Belarus. As a result, the Belarus authorities have had sufficient to go on, if they were in any way willing to facilitate the return of the applicant to Belarus. Having regard to the evidence of Mr Chenciner, however, it is plain that they are not.

110. Alternatively, even if the applicant is continuing to rely upon an account that is, in fact, false and/or incomplete, Mr Karnik submits the time has long passed when it can be reasonably assumed that the applicant might change his stance and give the respondent completely true information, which might enable her to secure the relevant documentation from the Belarusian authorities.

111. Mr Karnik also relies upon the following passages from the respondent's detailed grounds of defence:-

> "11. Without prejudice to the contention that the limbo period to date was lawfully maintained having regard to his deliberate non-cooperation and prospect of removal, the [respondent] does not at the present time advance a positive case that there is at present a realistic prospect of effecting deportation until the applicant's identity and background have been resolved so as to be capable of confirmation by the Belarus authorities. The [respondent] is carrying on enquiries.
>
> …
>
> 25. In relation to Ground 1, the [respondent] is unable to advance a positive case to show that removal is possible within a reasonable timescale."

112. In similar vein, in his skeleton argument, Mr Fortt says:-

> "6. The respondent is not able at present to assert that there is any prospect of removing the applicant in a reasonable timescale due to his entrenched position of not cooperating with establishing his true identity. Given the very long period during which he has maintained this tactic, the respondent is unable to conclude that he is likely to change his position in that respect."

113. For the reasons we have given earlier, we do not consider that, in determining the Khadir issue, Article 8 proportionality has a part to play. There is no suggestion in the House of Lords' opinions in Khadir that the immigration history of the individual in question has any relevant bearing, in the sense that – the worse that history and/or the stronger the public interest in removal – the higher the threshold becomes for concluding that the relevant legal limit has been reached.

114. Furthermore, a person who contends that his or her removal has become impossible because of their own refusal to disclose their true identity to the Secretary of State faces the obvious problem that it lies within their power to change that state of affairs. For this reason, an argument of Khadir impossibility that is based upon such a stance is highly unlikely to succeed. It will be open to the respondent to respond that it is perfectly possible for the applicant to change their mind.

115. In some cases, we accept that such a response may not carry the day. For example, the individual in question may have become so mentally ill as to be permanently incapable of recollecting who they are. In the present case, however, the evidence does not disclose such a state of affairs. As we shall see, however, the applicant does have a number of medical issues which, whilst not of such apparent severity as to render him incapable of exercising freewill or discerning the difference between truth and falsehood, or as to have irrevocably have destroyed his memory, nevertheless impact upon the practical ability of the respondent to remove the applicant to Belarus.

116. We do not accept that the applicant has been candid in the past about sufficient aspects of his personal information, as to enable the respondent to effect his return, were the Belarusian authorities to be cooperative in this regard. We accept Mr Fortt's submission that no proper basis has been shown for us to go behind the adverse findings of the two adjudicators and the First-tier Tribunal Judge. Although certain of the documentation, including the interview at the Dover Removal Centre, has only been adduced relatively recently in the course of the current proceedings, the relevant interview records relied on were supplied to the applicant's previous advisers or were otherwise available to them.

117. So far as concerns the submission that the Belarusian authorities would not re-admit the applicant, even if he told the truth, the Court of Appeal at paragraph 43 of AM (Belarus) in 2014 specifically rejected this aspect of the applicant's case, on the basis that the First-tier Tribunal Judge decided that question against the applicant, as did Upper Tribunal Judge Southern. Again, no satisfactory case has been made for us to re-open this matter.

118. For these reasons, we find the applicant has not shown that the respondent cannot continue, in law, to exercise the power to keep the applicant on conditions of immigration bail, pursuant to Schedule 10 to the 2016 Act. To the extent that ground 1 relies on Khadir impossibility, it accordingly fails.

119. That is, of course, not the end of ground 1 because we must now embark upon the four-stage analysis set out by Haddon-Cave LJ in RA (Iraq).

(b) Stage 1

120. Stage 1 requires us to distinguish between prospective "limbo" and actual "limbo". That is straightforward. The applicant has unarguably been in "actual" limbo for over twenty years, whether as a person subject to temporary admission or immigration bail. The period far exceeds the fourteen years, which led the Strasbourg Court to conclude that Ms Mendizabal should have her status regularised on Article 8 grounds (see above).

(c) Stage 2

121. We turn to stage 2. We apply the interpretation of it which we have described above. In essence, the test in paragraph 65 of RA (Iraq) comes down to whether the prospects of removal are "remote". This compares with the "simply no possibility"/ possibility "altogether ruled out" language of the Court of Appeal in MS, when considering the Khadir endpoint.

122. Here, the applicant is on stronger ground. On the facts as we have set them out earlier in this judgment, the position that has been reached, after over two decades, is that the prospects of the applicant's removal to Belarus are, indeed, remote. The fact that this is because the applicant has maintained an entrenched position will be relevant when we come to stages 3 and 4 of the analysis. Nevertheless, the passages from the respondent's detailed grounds of defence and Mr Fortt's skeleton argument, which we have set out above, constitute what we regard as a concession by the respondent in respect of stage 2. In any event, we find the stage 2 question falls to be answered in the applicant's favour. It is not *impossible* that the applicant may change his mind. The possibility of him doing so, however, is *remote*.

(d) Stage 3

123. Stage 3 requires a fact-specific analysis. The time spent by the applicant in the United Kingdom and his status during that time have already been addressed. The applicant's immigration history is also manifest from what we have said earlier. The applicant has no family in the United Kingdom, but we accept he has some, albeit minimal, private life through friendships. He is subject to a deportation order because he has committed serious criminal offences, including an offence of violence. The GCID notes identify that:-

> "Between 16 April 1999 and 11 September 2018 Mr M… acquired 7 convictions for 11 offences.

> These offences include 2 x offence against the person, 1 x offences against the property, 1 x fraud and kindred offences, 1 x offences relating to Police/Courts/Prisons, 1 x drug offence, 4 x "firearms/shotguns/offensive weapons and 1 miscellaneous".

And

> "15/03/99 - Charged with ABH and false imprisonment.
>
> 16/04/99 - Convicted of both charges and sentenced to 3 years and 6 months. Court recommended for deportation".

…

> "Mr M… was arrested on 13 March 2005 for possession of a class C drug and possession of an offensive weapon for which he was sentenced to 18 months conditional discharge.
>
> He was arrested again on 10 February 2008 for harassment and found to be in possession of a forged Lithuanian passport. He was sentenced to 10 months imprisonment on 23 July 2008 for possession of the passport".

And in 2018 it was recorded:-

> "On 11 September 2018 at Nottingham Crown Court, Mr M… was convicted of 2x on 31 July 2018 at Nottingham had with you, without good reason or lawful authority, in a public place Roden Street an article which had a blade or was sharply pointed, a Knife- Stanley knife and Kitchen Knife and you were sentenced to 26 weeks consecutive for which he was overall length of sentence 42 weeks imprisonment".

124. We shall address later the issue of the applicant's criminal offending and the deportation order.

125. The time the applicant has spent in the United Kingdom is very great, probably the longest spent by anyone in immigration "limbo" in this country. The present prospects of the applicant changing his mind about his identity are, as we have said, remote. Although the respondent's difficulties in this regard stem from the applicant's entrenched stance, we take into account the fact that – had he been proffered to give evidence - the applicant would have fallen to be treated as a vulnerable witness, owing to his physical and mental health problems.

126. We turn to the evidence of these problems. In June 2020, Dr Felah, Consultant Neurologist, had a telephone consultation with the applicant. Dr Felah noted that the applicant is "under the psychiatric team for drugs misuse." The applicant is on Methadone, Olanzapine and Mirtazapine. As well as having hepatitis C and psoriasis, the applicant "had a CT head [scan] following an assault in 2018 and this showed no brain abnormality. There was a left frontal bone osteoma". The applicant said that, following the head injury, he started having attacks suggestive of generalised seizures; and that these had been happening on almost a weekly basis. "He gets a flashback of the person who hits him at the time and following back he feels dizzy. He does lose consciousness but wasn't told for sure if he does have body

jerking or not." The attacks did not seem to coincide with taking the recreational drugs or withdrawal from them. The applicant said he had been told by his parents that he had seizures during his childhood. The doctor recorded : "Family history is unremarkable".

127. Dr Felah prescribed Levetiracetam, since this does not cause liver dysfunction. A blood test of the applicant in 2014 had been "abnormal, likely related to the diagnosis of hepatitis. I do not have access to his recent blood test." Dr Felah considered that the "episodes are strongly suggestive of epileptic seizures."

128. The professional opinion of Debra Goode of Nottinghamshire Healthcare, writing in 2018, was that the applicant benefited from the stability which life in prison offered him and that he took advantage of learning opportunities whilst incarcerated. We also have regard to Ms Goode's view that, if the applicant were given legal status, "he would be motivated to work and make positive changes in his life and have the potential to be a valuable asset to society". By contrast, if his lack of status continued after release, Ms Goode considered it "highly likely that his physical and mental health will once more deteriorate".

129. We have been careful not to put undue emphasis on Ms Goode's professional opinions. The applicant's criminal offending is serious. Since at least 2009, the GCID notes on the applicant contain references to his psychosis, alcoholism and drug addiction. Against this background, it is plainly unlikely that, if he were to be given leave to remain, the applicant would become a model member of society. We do nevertheless place certain weight on Ms Goode's evidence, which shows that the applicant retains capacity for self-improvement.

(e) Stage 4

130. We move to stage 4 (the balancing exercise). When considering whether deportation is justified as an interference with the appellant's private life under Article 8(2) we are required by section 117A(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to have regard to the considerations under sections 117B and 117C (the latter relating to foreign criminals). Section 117C of the 2002 Act, so far as relevant, provides:-

> "(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.
> …
> (5) 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.

(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".

131. The applicant has been sentenced to a period of imprisonment of less than 4 years but at least 12 months. Although at first sight, section 117C(6) would therefore not appear to have any application to him, that is not, in fact, the case for the reasons given by Jackson LJ at paragraphs 24 to 27 of NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662. The position is, therefore, that the applicant will succeed if he can satisfy Exception 1 (the same requirements occurring in paragraph 399A of the Rules); or if he can show there are very compelling circumstances, in terms of section 117C(6).

132. The applicant cannot satisfy Exception 1. He has not been lawfully resident in the UK and is not socially and culturally integrated (on the facts we have found). The public interest therefore will only be outweighed by other factors where there are very compelling circumstances over and above those described in section 117C(4).

133. So far as concerns the weight to be attributed to the public interest in maintaining immigration control, despite what is said in paragraph 71 of RA (Iraq) and notwithstanding we have given a positive answer at stage 2, we do not consider that, in the present case, the public interest can be said to have been extinguished. It is the applicant's refusal to be candid about himself that has led to him being still in the United Kingdom in 2020, having arrived here in 1998. During his irregular presence in this country, he has committed criminal offences of a serious nature.

134. We note, however, that, in paragraph 71 of RA (Iraq), Haddon Cave LJ was careful to say that it would "normally" be the case that the balance will tip in favour of the individual only when the public interest is extinguished. In the present case, the residual public interest resulting from the applicant's problematic actions and his criminal offending has to be seen in the overall context of the highly unusual circumstances of this case.

135. An important element of the public interest concerns the effect on public confidence in the system of immigration control, if the applicant's limbo were now to be ended by the grant of leave. As Haddon Cave LJ said at paragraph 70 of RA (Iraq), Parliament has decreed that working and relying on benefits should be withheld from those who are in the United Kingdom illegally, in part as a disincentive to coming or remaining here illegally. The stark question in the present case is whether that principle of deterrence is likely to be damaged by the grant of leave to this applicant.

136. It seems to us that a dispassionate member of the public, considering the applicant's history, would not conclude that the applicant has gained any real benefit from his

presence in the United Kingdom over the past two decades and more. He has not forged any family life. On the contrary, his life has been one lived at the outer margins of society. He has been legally unable to work. We accept that he has had periods of street homelessness. He has become addicted to drugs and alcohol. Although one does not, of course, know what kind of life the applicant might have led, had he remained in Belarus, a hypothetical member of the British public would be likely to conclude that, if the applicant did come to the United Kingdom for a better life, he has conspicuously failed in that aim. Accordingly, a grant of leave to the applicant at this point is unlikely to encourage others to follow his example, thereby leading to a general weakening of the immigration system.

137. In striking the overall balance and deciding whether very compelling circumstances exist, we are guided by paragraph 69 of RA (Iraq), which speaks of an assessment of (i) whether the individual remaining in a state of 'limbo' will have an impact on the individual's Article 8 or other Convention rights and, if so, the extent of that impact; and (ii) how far that impact is proportionate when balanced with the public interest.

138. As we have already said, the respondent effectively concedes the prospects of removing the applicant are remote. Despite the fact that this situation has been generated by the applicant, it would be wrong to ignore the reality of the matter, when assessing the proportionality balance to be struck in respect of Article 8.

139. Mr Karnik points to paragraph 276ADE of the Immigration Rules. This sets out the requirements to be met by an applicant for leave to remain on the grounds of private life. Paragraph 276ADE(1)(iii) requires the applicant to have "lived continuously in the UK for at least 20 years (discounting any period of imprisonment)".

140. As held in Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC), in order to be able to fulfil Paragraph 276ADE, the person concerned must meet the suitability requirements of Paragraph 276ADE(1). In effect, the application must 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. We also note that Appendix FM of the Immigration Rules states:-

> **"Deportation and removal**
>
> "Where the Secretary of State or an immigration officer is considering deportation or removal of a person who claims that their deportation or removal from the UK would be a breach of the right to respect for private and family life under Article 8 of the Human Rights Convention that person may be required to make an application under this Appendix or paragraph 276ADE(1), but if they are not required to make an application Part 13 of these Rules will apply" (our emphasis).

141. Although leave must be refused by reason of Part 13 of the Immigration Rules and general unsuitability, we consider that Mr Karnik is still entitled to point to the applicant's twenty years' continuous life in the United Kingdom as representing a material Article 8 private life factor.

142. In approving the Rules, Parliament has acknowledged that a period of 20 years spent in the United Kingdom is an important yardstick in determining the right to respect for a person's private life. Whilst the commission of criminal offences may, depending on the circumstances, result in the refusal of leave on the basis of 20 years' presence, it is plain that imprisonment is not, *per se*, a disqualifying factor, since paragraph 276ADE(1)(iii) speaks of having lived in the United Kingdom continuously for at least 20 years "(discounting any period of imprisonment)".

143. We do not have details of the actual time spent by the applicant in prison but, assuming he served half of the sentences imposed on him, he would be still have accrued 20 years, or be very close to doing so.

144. Whilst we note that the applicant is 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, the applicant would begin to turn his life around, building on the efforts he made whilst last in prison. We refer to the evidence of Ms Goode and the fact that the applicant has been able to secure employment (albeit illegally). Ms Goode's conclusion that the applicant was taking steps towards self- improvement suggest that there is reason to think that the appellant would continue in this vein, if given the stability of a period of leave.

145. We factor into our assessment the medical condition of the applicant, particularly as detailed by the Consultant Neurologist, which we have mentioned earlier. Although there was no brain abnormality, the Consultant did identify a left frontal osteoma (bone-forming tumour), following a head injury from an attack in 2018, epilepsy and generalised seizures (not associated with recreational drugs). The applicant reported that he had had seizures from childhood. We also note that the applicant is taking Olanzapine, which is an anti-psychotic drug.

146. It is possible that, in saying what we have at paragraph 144 above, we may be accused of taking an overly-optimistic view of the applicant's capacity for self-improvement. It may the case that, to use Mr Karnik's description of the applicant, his medical state means he is at this point a "broken man". The stark question nevertheless remains whether there is a sufficient public interest at this point to justify what is likely now to be the continuation of limbo status for the remainder of the applicant's life, since such would appear to be the logic of the respondent's position, as articulated before us.

147. We take into account the considerations mentioned in section 117B of the 2002 Act. We are fully aware that the applicant has only ever been in detention or had, at best, precarious immigration leave through temporary admission which affords little weight to his private life. He can speak English but is currently not financially independent.

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.

150. Ground 1 accordingly succeeds. We propose to make a declaration to the effect that continuing to refuse to grant leave would be a disproportionate interference with the applicant's Article 8 rights.

H. STATELESSNESS

151. The burden of proof lies on the applicant to show that he is, on the balance of probabilities, stateless: AS (Guinea v Secretary of State for the Home Department [2018] EWCA Civ 2234.

152. In Nhamo v Secretary of State for the Home Department [2012] EWHC 422, it was held that a country's refusal to recognise that a person claiming its nationality is in fact one of its nationals is not determinative of the question of whether that person is, thereby, stateless. Amongst other things, the country in question "may not have the full range of evidence bearing on that question" (paragraph 35).

153. As Mr Fortt points out, in the present case, the applicant faces the insurmountable obstacle that the refusal of the Belarus authorities to recognise him as one of its citizens is due to his persistent failure to tell the truth as to his identity. We adopt, in that regard, the findings we have set out above.

154. We reject Mr Karnik's submission that the mere fact the applicant arrived in Belarus from the United Kingdom in June 2001 as a failed asylum seeker meant that – whatever he might have told them about his identity – they would not have accepted him. As we have already held, the applicant cannot re-open the finding of the First-

tier Tribunal – upheld by the Court of Appeal at paragraph 43 of AM (Belarus) – that the applicant would still have been refused entry, even if he had told the truth to the authorities in Belarus. In any event, having due regard to all the evidence, including that from Mr Chenciner, the applicant has failed to show on balance that the Belarusian authorities know who he is, but are nevertheless refusing to acknowledge him as one of its citizens; or that they had no intention of cooperating with the United Kingdom government to so recognise the applicant, even if the latter were to change his stance and provide the respondent with wholly true information about his identity.

155. Although we grant permission in respect of ground 2, that ground fails.

156. We shall hear counsel on the form of the order, if the same cannot be agreed. We also invite written submissions on whether, in the light of our decision, the applicant should be the subject of an anonymisation order.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *Mr Justice Lane*

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber