Deportation case law since *KO(Nigeria)* – a glimmer of light from the Supreme Court, but clouds on the horizon

Sheona York

At a glance

This article provides an update on deportation case law since the introduction of the art 8 ECHR public interest criteria by the Immigration Act 2014, and the consequential changes in the Immigration Rules. I have chosen the 2018 Supreme Court judgment in *KO (Nigeria)*[1] as marking a watershed between cases such as *Hesham Ali*[2] relying on the old rules and those decided under the new regime.

An examination of Supreme Court and Court of Appeal judgments from *KO* onwards shows two clear trends. The first concerns the post-2014 Act interpretations of the terms under which deportees' art 8 rights are to be considered – 'unduly harsh', 'very compelling circumstances', 'social and cultural integration', and 'significant obstacles to reintegration'. These specific guides to the interpretation of art 8 rights have settled on tests that are based on vulnerability, and in practice require deportees and their families to provide expert medical, social work and country reports to stand any chance of succeeding in an appeal against deportation.

The second is the continuation of the wider development of art 8 case law and related jurisprudential issues taking place in immigration through the lens of deportation cases. The last four years have seen deportation cases containing important discussions of retrospectivity, legitimate expectation, delay, removability and fresh claims, with developments in art 3 medical cases also occurring in the context of deportation.[3] I suggest that judges' deference to the public interest in deporting foreign criminals is inexorably affecting legal consideration of those wider issues.

This article does not consider developments in the case law concerning the deportation of EU nationals.

1 *KO (Nigeria) & ors v SSHD* [2018] UKSC 53.
2 *Hesham Ali v SSHD* [2016] UKSC 60.
3 *AM (Zimbabwe) v SSHD* [2020] UKSC 17.

1. Introduction: the new legal regime leads to a clearer approach

The Immigration Act 2014 introduced into the Nationality, Immigration and Asylum Act (NIAA) 2002 a new Part 5A: Article 8 of the ECHR: public interest considerations. Consequent changes to the Immigration Rules amended paras 398 and 399 of Part 13 of the Rules. By art 5A, a tribunal or court 'must have regard' to the public interest considerations. Set out in s 117B of that Part are those applying in all art 8 cases, with special provisions applying to those unlawfully present or where applicants are deemed 'precarious'.[4] I concentrate in this article on the public interest considerations applying to foreign criminals:

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

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

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

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

(4) Exception 1 applies where—

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

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

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

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

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

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

4 The Supreme Court dealt with definition of 'precarious' in *Rhuppiah v SSHD* [2018] UKSC 58; see also Richard Warren, 'Private life in the balance: constructing the precarious migrant' (2016) 30(2) *Journal of Immigration, Asylum and Nationality Law*.

117D Interpretation of this Part

(1) …

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

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

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) …

All these definitions have been litigated since the commencement of those changes.

An early question concerned whether there could now be any consideration of art 8 issues outside the structure set out in s 117C. This was ruled out in *NE-A (Nigeria)*.[5] Referring to *Rhuppiah*, the court said that there was no room for any further consideration under art 8(2) as the legislation provides the analytical structure. The public interest in deporting foreign criminals is no longer just one of several relevant considerations in a proportionality exercise:

> [15] … a finding that 'very compelling circumstances' do not exist in a case to which section 117C (6) applies will produce a final result, compatible with Article 8, that the public interest requires deportation. There is no room for any additional element in the proportionality balancing exercise under Article 8.[6]

This clarifies the previous requirements to carry out the proportionality exercise 'through the lens of the Immigration Rules', and to pay respect to the 'great weight' of the public interest in deportation.[7]

A second issue clarified by the 'structured approach' was how to treat the severity of the appellant's offence when considering whether deportation would be unduly harsh. The Supreme Court in *KO (Nigeria)* stated:

> [23] … What [is not required] … is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor … can it be equated with a requirement to show

5 *NE-A (Nigeria) v SSHD* [2017] EWCA Civ 239 [14–15], cited in *LE (St Vincent And the Grenadines) v SSHD* [2020] EWCA Civ 505.

6 ibid [15].

7 *SSHD v AJ(Angola) and AJ (Gambia* [2014] EWCA Civ 1636.

'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more.

2. Definition of foreign criminal – 'serious harm' and 'persistent offender' (s 117D(2)(c))

In *Mahmood*,[8] a hearing of three judicial reviews against a finding that the applicants were 'foreign criminals' and therefore liable to 'automatic' deportation, the court considered the s 117D definition of 'foreign criminal', and whether the appellants' offences had caused 'serious harm' under ss 117D(2)(c) which defines a 'foreign criminal' as a person who:

(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.

The court emphasised that there is no reason to limit the type of harm, nor to require intent to harm any particular individual, but the harm must be linked causatively to the offence. The burden lies on the Secretary of State to prove this to the civil standard. This does not require any specific types of evidence, such as a victim statement, though a court would expect to see sentencing remarks. The views of the Secretary of State would be a starting point, but would not necessarily prevail. In this case the applicant Mr Estnerie had been convicted of making multiple asylum applications under false names and working under false ID. The 'harm' was alleged to be to the public perception of asylum-seekers – but it was not clear that that 'harm' had been caused by 'an offence'. In contrast, Mr Mahmood's offence of sending explicit photos to a young woman, and Mr Kadir's offence of stabbing someone, were considered clearly to have caused harm.

In Estnerie's case, the SSHD then amended the grounds and won on the basis that he was a 'persistent offender'. This concept had been reviewed in *Binbuga*,[9] in which Mr Binbuga argued that he had ceased to be involved in crime, and that he was supported in this by a close family, and should no longer be regarded as a persistent offender. It was accepted that although a person who had committed an offence remained 'an offender', the status of 'persistent offender' is not permanent. But in his case the court decided that it was reasonable for the Upper Tribunal to have considered him to be a persistent offender.

The ruling in *Mahmood* on 'serious harm' was clearly set out in the headnote in the Upper Tribunal (UT) case of *Wilson*.[10]

3. Consideration of the tests in s 117C(4) – Exception 1

The two tests in s 117C(4)have been swiftly dealt with.

(a) 'socially and culturally integrated'

8 *Mahmood, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Ors* [2020] EWCA Civ 717, cited by UKUT as *R (Yasin Mahmood v SSHD* [2020] EWCA Civ 717.
9 *Binbuga (Turkey) v SSHD* [2019] EWCA Civ 551.
10 *Wilson* (NIAA 2002 Part 5A) [2020] UKUT 350.

Binbuga[11] forthrightly dismissed the appellant's argument that participation in gang culture in north London could amount to social and cultural integration. The court decided that the term must connote acceptance of the need to live by British laws and values. The court also disapproved use of the term 'home-grown criminal' (arguably critiquing the *Uner* and *Maslov* line of cases), emphasising again the need to follow the structured approach mandated by s 117C NIAA 2002.

On the other hand, *CI (Nigeria)*,[12] concerning an appellant with severe mental health problems, noted the need to refer to current Home Office guidance[13] that Home Office staff are required to use in deciding whether the deportation of a foreign criminal would breach art 8. That Guidance advises that:

'If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated.'

A person could easily not be socially and culturally integrated anywhere – see *AM (Somalia)*.[14] That appellant had been in the UK over 30 years, was married and had worked, but his life fell apart. He was considered to have ceased to be socially and culturally integrated.

In the case of *CI*, the Court of Appeal held that the UT had erred in simply assuming that the appellant's social and cultural integration had been broken by his offending. The court also noted at [78] that the UT had placed the burden of proof on CI to prove he had reintegrated after his release from prison. This amounted to double-counting the public interest in deporting him.

(b) 'very significant obstacles to C's integration into the country to which C is proposed to be deported'

The case of *Kamara*[15] set out a test of 'integration' which has not been subsequently challenged:

> [14] In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

This analysis was referred to in *Akinyemi*,[16] referring to the 'wholly inadequate' proportionality exercise carried out by the UT, which had found that Mr Akinyemi, who had been born

11 *Binbuga* (n 9).
12 *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027.
13 *Criminality Version 8 .0 1 Article 8 ECHR cases* 2019, published for Home Office staff on 13 May 2019.
14 *AM (Somalia) v Secretary of State for the Home Department* [2019] EWCA Civ 774, paras 70–75 and 87–94.
15 *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813.
16 *Akinyemi v The Secretary of State for the Home Department* [2019] EWCA Civ 2098.

in the UK to lawfully-present parents and had never been to Nigeria, 'must have some ties with Nigeria'.

In June 2022, the Supreme Court decided *SC (Jamaica)*.[17] This case, in which both sides accepted from the beginning that the appellant was at real risk of harm on return to Jamaica, turned on the approach to internal relocation. However, it is usefully mentioned here as it confirms that, even despite *Binbuga*, gang membership is not fatal to a finding of social and cultural integration. It also confirms that *Kamara* continues to provide the correct approach to significant obstacles to reintegration.

4. Consideration of the tests in s117C(5) – 'unduly harsh'

Section 117C and the subsequent changes in the Immigration Rules retained the 'unduly harsh' test applying to those sentenced to more than 12 months but less than four years' imprisonment. The question was whether, in applying that test, only the impact on the partner or relevant child should be considered, or if this should be weighed against the public interest in deportation. The Supreme Court in *KO (Nigeria)*[18] lamented the disagreement amongst UT and Court of Appeal judges and strove for 'a simpler and more direct approach'.[19] Thus, in para 23 of *KO*, set out in section 1 above, Carnwath LJ held that s117C (5) does *not* require consideration of the relative severity of the offence, since that consideration is dealt with in the structure of the section itself.

But Carnwath LJ also set out how to approach the question of 'unduly harsh':

> [23] … the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. (my emphasis).

It has taken time for that dictum to be challenged. Perhaps because their decision amounted to dissent from a Supreme Court judgment, the Court of Appeal in *HA (Iraq)*[20] presented an exhaustive reprise of recent cases, setting out a series of strong propositions from which to make its small advance. First, from *NA (Pakistan)*[21] and *Akinyemi*,[22] the court confirms that the underlying principles relevant to the assessment of the weight to be given to the public interest and art 8 have not been changed by the introduction of the new regime:

> [37] The most authoritative exposition of the principles underlying the old regime can be found, two years after it had been superseded and even some months later than NA (Pakistan), in the decision of the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, [2016] 1 WLR 4799.

17 *SC (Jamaica) v SSHD* [2022] UKSC 15, 15/6/22.
18 *KO Nigeria* (n 1).
19 ibid [14].
20 *HA (Iraq)* [2020] EWCA Civ 1176.
21 *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207.
22 *Akinyemi* (n16).

Then on 'unduly harsh' the court makes a careful critique of Carnwath's dictum in *KO (Nigeria)* set out in para 23 underlined above:

> [44] … but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would 'necessarily' be suffered by 'any' child.

Underhill LJ further states [50–53] that the test is indeed 'elevated', but it cannot require meeting the s 117C(6) standard of 'very compelling circumstances'. The court was also keen to avoid a situation where, just because the impact on a child might be one commonly experienced, it would be regarded as 'ordinary' and therefore not meeting the *KO (Nigeria)* test. This part of the judgment shows the court's wider concern about the related tendencies to rely on factual precedents and treat dicta of judges as amounting to legal tests:

> [57] Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying KO (Nigeria) in accordance with the guidance at paras. 50–53 above. (my emphasis)

The Secretary of State appealed to the Supreme Court. Handed down on 22 July 2022, the Supreme Court's judgment in *HA (Iraq)*[23] was clearly intended to set out a clear legal position and terminate the unrest, not just in the Tribunal but in the Court of Appeal, on whether *KO (Nigeria)* had laid down a 'notional comparator' or 'average child' test. While the Secretary of State pointed to the acceptance of that reasoning in *PG Jamaica* [2019] EWCA 1213, *PF Nigeria* [2019] EWCA Civ 1139, *OH (Algeria)* [2019] EWCA Civ 1763, *KF Nigeria* [2019] EWCA Civ 2051 and the UT in *HA (Iraq)* itself, arguing that this represented a settled approach, the Supreme Court noted that the critique of that approach, in the Court of Appeal in *HA (Iraq)*, had been followed in *AA* [2020] EWCA Civ 1296, *MI (Pakistan)* [2021] EWCA Civ 1711 and *TD (Albania)* [2021] EWCA Civ 619. The Supreme Court judgment is strong, 'rejecting' the Secretary of State's criticism of those latter cases and stating clearly that Carnwath LJ had *not* intended to lay down a test or a notional comparator. If he had, he would have had to consider how to approach the many factors that would come into play, including that such an approach would fall foul of the requirement to consider the best interests of each particular child. The judgment emphasises the need for 'an informed assessment' of the effect of deportation on the qualifying child or partner – which, for the avoidance of doubt, does not amount to the lowering of the threshold or reinstating any links with the seriousness of the offending.[24]

This is a remarkable judgment for its time,[25] hopefully leading to a more humane approach based on an individual family's situation, taking into account the factors set out and considered in the ECtHR cases of *Boultif*,[26] *Uner*[27] and *Unuane*[28] in relation to the issue of

23 *HA (Iraq)* [2022] UKSC 22.
24 ibid [30–45].
25 Followed without any anxiety in the Court of Appeal case of *Raza v Secretary of State for the Home Department* [2023] EWCA Civ 29 (18 January 2023).
26 *Boultif v Switzerland* (2001 33 EHRR 50.
27 *Uner v Netherlands* (2006) 45 EHRR 14.
28 *Unuane v UK* (2021) 72 EHRR 24.

'very compelling circumstances' (discussed below), and even referring to rehabilitation as something that can be brought to bear, though needing to be 'fully reasoned'.

5. 'very compelling circumstances' – s117C(6)

As written, s 117C(6) applies to those foreign criminals who have received criminal sentences of over four years. The principal issue here concerned whether the requirement for the circumstances to be 'over and above' those covered in Exceptions 1 and 2 permitted an appellant to draw on circumstances of a type covered by those exceptions.

Following Moylan LJ's advice in *AA (Nigeria)*, we need not go further than *Byndloss*:[29]

> [55] ... I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters:
>
> (a) the depth of the claimant's integration in United Kingdom society in terms of family, employment and otherwise;
>
> (b) the quality of his relationship with any child, partner or other family member in the United Kingdom;
>
> (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise;
>
> (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the United Kingdom;
>
> (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case;
>
> (f) any significant risk of his reoffending in the United Kingdom, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.

The judge in *Byndloss* referred to *NA (Pakistan)*:[30]

> [29] ... The phrase used in section 117C(6) ... does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 ... As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraphs 399 or 399A of the 2014 rules), or features falling outside the circumstances

29 *R (on the application of Byndloss) v Secretary of State for the Home Department* [2017] 1 WLR 2380.
30 *NA Pakistan* (n 21).

> described in those exceptions and those paragraphs, which made his claim based on article 8 especially strong. (my emphasis)

It is also possible that the Court wished to discourage attempts to make 'near miss' arguments. However, maybe the Court felt that it was not necessary to spell this out. It has been clear since the 2000s that a 'near miss' is not the same as *de minimis*, and that:

> … the existence of [a] policy does not excuse the decision-maker from due consideration of cases falling outside it. However, the law knows no 'near-miss' principle. There is no presumption that those falling just outside the policy should be treated as though they were within it, or given special consideration for that reason.
>
> … there is not a 'near-miss' penumbra around every policy providing scope for its extension in practice to that which it did not cover …[31]

Thus, for offenders who have been sentenced to over four years in prison, their 'very compelling circumstances' must be 'exceptionally strong'.

It had early been realised that the drafting of s 117(6) appeared to prevent 'medium offenders' (those having received sentences of between 12 months and four years) who could not satisfy Exceptions 1 or 2 from arguing that 'very compelling circumstances' could still rescue them from deportation. In *NA Pakistan* this was accepted as a drafting error, but:

> [33] Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

All this is implicitly approved by the Supreme Court in *HA (Iraq)*.[32]

6. An interlude on the role of the Upper Tribunal

MI (Pakistan),[33] decided in 2021, followed the Court of Appeal in *HA (Iraq)* in emphasising that the UT should refrain from finding errors of law on the basis of disagreement about the FTT's assessment – again warning against using past cases as factual precedents:

> [49] But as Peter Jackson LJ made clear in HA (Iraq), section 31(9) of the Children Act 1989 defines harm as ill-treatment or the impairment of health or physical, intellectual, emotional, social or behavioural development. There is no requirement for such harm to amount to recognised psychiatric injury before it can be considered relevant to meeting the 'unduly harsh' test. …

31 *Rudi, R (oao) v SSHD* [2007] EWCA Civ 1326 [28] and [32], and quoted with approval in *Miah & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 261.

32 *HA (Iraq)* [2022] UKSC 22.

33 *MI [Pakistan]* [2021 EWCA Civ 1711.

> [50] The second way of describing the UT's error is that the UT took the factual situation in PG (Jamaica) together with the holding that that factual situation did not justify the 'unduly harsh' conclusion reached, and elevated it to a legal proposition based on the apparent similarity of the facts of PG (Jamaica) when compared with this case. That is legally impermissible. It is dangerous to treat any case as a factual precedent as HA (Iraq) made clear (at [129]).

Despite these warnings, appellants are not safe in the UT. I have already mentioned the UT's assumptions about Mr Akinyemi's knowledge of Nigeria. In *Lowe*,[34] the UT was criticised for the basis of its decision that there were not significant obstacles to reintegration. The appellant 'had not made any real attempt' to sort out how he might live in Jamaica. The Court of Appeal had this to say about the UT's reasoning:

> [23] … In my judgment, it was not for the UT to assess the Appellant's 'wit' in the light of his 'part in a drug ring enterprise' or to speculate whether he could be regarded as a 'helpless babe' that 'had not learned some street wisdom of a kind that would assist him' from his period in custody.

But Phillips LJ dissented, in terms amounting to agreeing with the UT's views about the appellant.[35]

In *CI (Nigeria)*,[36] heard in 2019, the Court of Appeal had already admonished the UT for making assumptions about an appellant's knowledge of the country of nationality. The UT did not consider extensive psychiatric and witness evidence showing a childhood of severe neglect after having been brought to the UK at age 15 months. As the appellant's older sister put it in her evidence: 'Nigeria is as foreign to us as China. We don't know it and we don't know anyone there.'[37]

Going back to *MI (Pakistan)* and 'unduly harsh', the SSHD accepted that *HA (Iraq)* was binding, but reserved the right to argue against it in the Supreme Court, where at that time a hearing was awaited. In the meantime, Moylan LJ in *AA (Nigeria)*[38] summarised the law as follows:

> [9] … It should usually be unnecessary to refer to anything outside the four authorities identified below, namely KO (Nigeria), Byndloss; NA (Pakistan), HA (Iraq) … It will usually be unhelpful to refer first instance judges to other examples of their application to the particular facts of other cases and seek to draw factual comparisons by way of similarities or differences. [Determining these cases requires] a close focus on the particular individual family and private life …

In *JG (Jamaica)*[39] the Court of Appeal said this:

> [40] The UT's characterisation of the appeal was related to some trenchant observations which it made about what it perceived to be the Secretary of State's practice of appealing

34 *Lowe v The Secretary of State for the Home Department* [2021] EWCA Civ 62.
35 ibid [48].
36 *CI (Nigeria) v The Secretary of State for the Home Department* [2019] EWCA Civ 2027 [84–91].
37 ibid [86].
38 *AA (Nigeria) v Secretary of State* [2020] EWCA Civ 1296.
39 *Secretary of State for the Home Department v JG (Jamaica)* [2019] EWCA Civ 982 (12 June 2019).

> routinely in any case where the FTT allowed an appeal against a deportation order, without any real attempt to identify an error of law as opposed to simply disputing the tribunal's factual assessment. We are not in a position to comment either way about those observations, beyond saying that we hope that that is not the Secretary of State's practice now, if it ever was.

Suspicion that the UT's characterisation is accurate will have crossed the minds of most lawyers acting for appellants in deportation cases.

7. Evidential requirements

A clear trend emerging from the higher court cases considering 'unduly harsh' and 'very compelling circumstances' is the increasing burden being placed on appellants to provide comprehensive professional evidence. Where first-tier tribunals have allowed an appeal, a common error of law finding amounts to irrationality – generally expressed as there having been insufficient evidence for the FTT to make the findings it did. I have shown above that the higher courts have sometimes criticised the UT for simply substituting its own opinion for entirely reasonable findings made by the FTT judge. However, in plenty of cases the Court of Appeal has accepted the UT's criticism of the evidence. Detailed witness statements from appellants and family members have been found by the UT to be not enough, and on occasion even professional evidence faces stringent criticism from the SSHD.

For example, even with Underhill LJ's clearly more reasonable interpretation in *HA (Iraq)*, the 'unduly harsh' test will still require appellants to provide comprehensive evidence of the harshness of the impact of deportation on family members. Remitting HA's appeal, he states:

> [84] For those reasons I would allow the appeal and remit HA's case to the UT for a reconsideration of whether, applying the statutory test as discussed above, the effect of his deportation on his partner and children would be unduly harsh. That will in particular require a careful examination of the impact on the children, as emphasised in Zoumbas. I hope that HA and his advisers will ensure that the tribunal has the fullest possible information for the purpose of that exercise. As I have said, we were not shown all the material that was before it on the last occasion; but I have the impression that it was not as full as it might have been.

In *MI [Pakistan]*[40] a formal report had been commissioned from Social Services. The Home Office criticised this on the basis that it only showed the same type of harm as in *PG Jamaica*, and provided insufficient evidence on the availability of support from the rest of the family. This style of argument was rejected and disapproved, as discussed above, but shows the force with which the SSHD pursues these appeals.

The appeal in *TD (Albania)*[41] was dismissed as having provided insufficient evidence of an 'unduly harsh' effect on his children. There was no social worker evidence as the parents had not told the children about the threat of deportation for fear of upsetting them. Permission to appeal had been granted as it may have been an error of law to have required independent

40 *MI Pakistan* [2021 EWCA Civ 1711.
41 *TD (Albania) v Secretary of State for the Home Department* [2021] EWCA Civ 619.

evidence about the impact on the children, in addition to the evidence of the appellant and his partner. However, the Upper Tribunal decided that the FTT had been entitled to find that there was no reliable evidence of a psychologically significant impact on the children. This finding was upheld by the Court of Appeal.

In *OH (Algeria)*,[42] the UT had criticised the FTT determination as leading:

> ineluctably to the conclusion that the relevant paragraphs are devoid of all but the barest analysis of the consequences of the Claimant's withdrawal from the family home. There are no specific findings made in this regard in relation to Child B, Child C, or Child D and, in particular, there is no analysis of the consequences for Child D of having no male role model in the house. As to Child A, now an adult, it is found that the Claimant's absence will affect her emotional well-being, but there is no particularisation of such conclusion.

This in a household in which four children have had significant health problems, two of whom are described as suffering from chromosomal abnormalities, having autistic spectrum disorder traits and (for the youngest) having to be constantly watched in case she ate something inappropriate.

8. Wider legal issues: delay, legitimate expectation and retrospectivity

I have argued before, both in this Journal[43] and in my recent book[44] that in the context of a control system permanently beset by delays and battered by frequent changes in the law, the related issues of legitimate expectation and retrospectivity assume great importance. Away from the issue of deportation, it is settled law that both asylum and immigration decisions must be made on the basis of the law as at the time of the decision.[45] The courts have explicitly considered (and rejected) the injustices caused by delays in asylum decision-making,[46] holding that it is not for the courts to sanction the Home Office for delay or other aspects of administrative incompetence.

In relation to deportation, the legal issues of delay, legitimate expectation and retrospectivity arise in a different way. I have argued previously[47] that the provision in s 117C(1) that 'the deportation of a foreign criminal is in the public interest' would open the door to judicial decisions which appear to have retrospective effect, and so it has come to pass. But the more serious attack has come from subsequent changes in the Immigration Rules, both in Part 13 Deportation and Part 9 Grounds of Refusal. The terms of the Rules, set out below, now make it clear that anyone meeting the definition of 'foreign criminal', however long ago their offence

42 *OH (Algeria) v The Secretary of State for the Home Department* [2019] EWCA Civ 1763 [5], [26].

43 Sheona York, 'Deportation of Foreign Offenders – a critical look at the consequences of *Maaouia* and whether recourse to common-law principles might offer a solution' (2017) 31(1) Journal of Immigration, Asylum and Nationality Law.

44 Sheona York, *The impact of UK immigration law: declining standards in public administration, legal probity and democratic accountability* (Palgrave Macmillan 2022), chapter 6.

45 *Senathirajah Ravichandran v United Kingdom*: Court of Appeal (England and Wales), 11 October 1995, [1996] Imm AR 97, CA; *Odelola v Secretary of State for the Home Department* [2009] UKHL 25.

46 See eg, *EU (Afghanistan) & Ors v Secretary of State for the Home Department* [2013] EWCA Civ 32, finally disapproving the *Rachid – R(S)* abuse of power arguments; *R(MK) v SSHD* [2019] EWHC 3573 on delay for child asylum-seekers.

47 York (n 43).

was committed, and regardless of whether previously considered by the Secretary of State or before a tribunal or court, faces the strict current regime of mandatory and discretionary refusals, and on appeal must endure the (re-)application of the public interest criteria set out in s 117C(2)–(6).

> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
>
> ...
>
> 399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.

From 1 December 2020, any applicant who (broadly) has not made a family or private life application for leave or entry to the UK is subject to a new Part 9 Grounds of Refusal scheme. For outstanding applications made before 1 December 2020, any applicant who has received 'a prison sentence' is subject to the new scheme. This mandates refusal and referral to the Foreign National Offenders [FNO] Returns Command for deportation consideration. A person with a sentence of less than four years and whose sentence concluded over ten years previously may escape direct refusal, but must still be considered for deportation.

For all non-human rights applications made since 1 December 2020, there is a 'single threshold of mandatory refusal' for anyone who has received a sentence of over 12 months:

> Paragraph 9.4.1. of the Immigration Rules provides that entry clearance or permission [to stay] **must be refused** where the applicant:
>
> (a) has been convicted of a criminal offence in the UK or overseas for which they have received a custodial sentence of 12 months or more
>
> (b) is a persistent offender who shows a particular disregard for the law
>
> (c) has committed a criminal offence, or offences, which caused serious harm.[48]

As well as mandating refusal and thence bringing the applicant into the Part 5A public interest criteria on appeal, the Home Office guidance requires all such applicants already in the UK to be referred for deportation as above.

For those with sentences of less than 12 months, discretion may be exercised on (non-exhaustive) grounds including:

- whether the person already has permission
- ...

48 Home Office guidance, 'Grounds for refusal – Criminality', Version 2.0, published on 9 November 2021 at p 13.

- the length of time passed since the offence was committed, including whether any other entry clearance or permission has been granted since the offence
- the relevance of the offence to the application
- any ties the person has to the UK.

These grounds are not, however, available to applicants with sentences of over 12 months.

These new Part 9 rules do not apply to applicants making human rights claims under Appendix FM (family migration) or Appendix Private Life. But there may well be people who have been in the UK on work or student visas for some time who may be caught by these provisions, but whose situations are not sufficient to found a private life application (where their private life would in any case be given 'little weight' following *Rhuppiah)* and who face no vulnerabilities sufficient on appeal to meet the 'exceptions' contained in s 117C NIAA 2002.

Those with significant family and private life claims certainly face the retrospective effects of the provisions of s 117C NIAA 2002 and Part 13 of the Immigration Rules. The cases of *MA (Pakistan)*[49] and *Abidoye*[50] are the principal higher court authorities on whether the legal effect of Part 5A NIAA 2002 is retrospective, and in particular whether it breaches the common law principles collectively referred to as *res judicata*. In each case, the appellant had committed criminal offences, served their sentence, faced a deportation decision, and was granted leave to remain after an allowed appeal. Then, following further grants of leave, applications decided after the 2014 Act brought refusals and new decisions to deport, despite both appellants continuing to enjoy the family life which formed the basis of their allowed appeal, and despite their having committed no further offences.

The Court of Appeal set out the procedural history of each case. Mr MA had made a successful appeal against deportation in December 2011 (*MA (Pakistan)* para 6) and Mr Abidoye had made a successful appeal in July 2012 (*Abidoye* para 13). In each case the Court explains straight away that those allowed appeals concerned the same offences as under consideration in each current hearing, and each appellant had subsequently been granted leave to remain. In each case the Court of Appeal judgment briefly considers the question of *res judicata* and rejects its application, on the basis of what I will call better or worse explanations. The 'worse explanations' consist of in short references to previous immigration cases which have summarily stated that '*res judicata* does not apply in immigration cases' without providing much argument. The 'better', clearest and most detailed explanation is provided by the High Court judge in Mr Abidoye's case.[51]

In *Abidoye* the Court of Appeal explicitly 'empathised' with the characterising of the new decision as 'moving the goalposts' where there had been no 'adverse factual changes in the circumstances'. However, High Court judge Choudhury J's careful and thorough exposition of the doctrine of *res judicata*, and his careful analysis of how this has been considered in immigration cases, cannot in my view eradicate a suspicion that a trick has been played on Mr Abidoye and the undoubtedly many future applicants with previous convictions long since 'regularised' by subsequent grants of leave. Choudhury J concludes his detailed judgment with a romp through the issues:

On r*es judicata:* [57] '… the short point is that there has been a change in the law.

49 *MA (Pakistan)* [2019] EWCA Civ 1252.
50 *R (Abidoye) v SSHD* [2020] EWCA Civ 1425, especially [41–54].
51 Mr Abidoye kindly gave permission to his solicitors DJ Webb & Co to provide me with his court papers.

> a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. I can see no reason for holding that a subsequent change in the law can never be sufficient to bring the case within the exception …[52]
>
> [60] … [the appellant's counsel] very fairly accepts that the change in the law can preclude the principle of *res judicata* from being applied. But [she argues that] it cannot do so in this case because of the presumption against retrospective legislation …

The Judge then refers to Neuberger LJ in *Odelola*[53] at [58] where he says that that presumption can apply to the Immigration Rules, and that in an appropriate case it can even apply in the absence of a vested right – 'because fairness is ultimately the basis for the presumption against retrospectivity'.

But at [62] Choudhury J holds that the new legislation 'does not affect the status of matters that have already occurred'. For example, 'it does not affect the seriousness with which a past conviction is to be regarded, or the legal status of that conviction'. Alternatively, he says, if the legislation is regarded as retrospective, then that only counts against 'vested' rights.

Choudhury J then refers to UTJ Lane's 2012 determination allowing Mr Abidoye's appeal, in which he made it clear that his decision did not amount to a permanent adjudication. 'What he had was no more than a declaration at a particular point under pre-2012 rules that deportation would be unlawful'[68].

Choudhury J then referred to the wording of rule A362 set out above, and finally referred to *YM Uganda,*[54] in which the court stated:

> So far as the new **Part 5A** of the 2002 Act is concerned, **section 117A** is in force as from 28 July 2014. There is no guidance anywhere as to whether the new provisions are to be applied to cases in which the SSHD has already made a decision and the matter has been appealed through the tribunal system.
>
> -but this is not held to matter, since s 117A itself states that this section must apply whenever a court or tribunal are required to determine the application of art 8 ECHR.

Where then, in this process, has the trick on Mr Abidoye been played? For it simply cannot be argued that Part 5A NIAA 2002 does not ' affect the seriousness with which a past conviction is to be regarded, or the legal status of that conviction'. Every single migrant who has previously won a deportation appeal will face these fresh harsher consequences.

In my view it lies in a combination of political and legal factors. Firstly, it lies in the timeless present-tense terms of s 117C(1) NIAA 2002. The public interest in deporting a foreign criminal is held to apply now and indefinitely into the future, to all and any 'foreign criminal' regardless of when their offences were committed, or what the law said about criminality at the relevant time. And the subsequent changes in the rules, including para A362, para 399C and the changes to Part 9, have all reinforced the timeless nature of that legislation.

The most strikingly similar piece of recent legislation is the imposition of s 13 Welfare Reform and Work Act 2016 which limits universal credit payments to a family's first two

52 *Arnold v National Westminster Bank plc* [1991] 2AC 93 [110].
53 *Odelola* (n 45).
54 *YM (Uganda)* [2014] EWCA Civ 1292.

children. The policy does not apply where a third or further child was born before the date of the policy's introduction if the parent was already claiming benefits at the time. But woe betide the three-child family, comfortably off at the time of the third child's birth but subsequently reduced to claiming universal credit, for whom the DWP can have no morally acceptable suggestion regarding their third child. Similarly, for the person whose criminal offence was committed long before the UK Borders Act 2007, or even before the 2012 rule changes, there is no future act they can reasonably do to avoid falling foul of s 117C NIAA 2002. This in itself demonstrates its retrospective nature – since the purpose of legislation is to direct people's future behaviour, not punish them now for acts done in the past – which 'not even God' can abolish.[55]

Secondly, as noted in *YM (Uganda)*, Part 5A NIAA 2002 was passed with no transitional provisions, unlike the 'automatic deportation' provisions in UK Borders Act 2007, which did not apply to offences whose sentences had been served by the commencement date. The question of whether transitional provisions can be inferred was discussed in *Odelola*, where, because the provisions under discussion were clauses in the Immigration Rules, it was held that the usual rules of statutory construction could not be relied upon. But as *YM (Uganda)* and indeed *Abidoye* made clear, the Part 5A provisions sidestep the question of applicability by applying to tribunal and court determinations of appeals considering art 8 ECHR – which will always take place in the future.

In my view therefore, the trick consists in enabling both the SSHD and the courts to entirely sidestep the existence of previous judicial determinations on what are, strategically, the same issue: whether deportation of this appellant, for reasons of those particular crimes, breaches his art 8 right to family life. Only by (i) enforcing legal mechanisms requiring this same issue to be reconsidered, refused and re-litigated, maybe many times over as further applications must be made every 30 months; (ii) enforcing a concurrent tightening of the criteria for considering how applicants' art 8 rights would be breached; and (iii) excluding any discretion based on previous grants of leave or previous allowed appeals could a government begin to present such a regime as 'what fairness requires'. Of course it is not fair. I am not even sure it would gain public support, if the implications were clearly presented.

Contrastingly, in the year 2000 the SSHD was ordered to promptly provide Mr Mersin's refugee status documents, on the basis that a judicial determination had been made of his refugee status. His case was no longer 'subject to examination' and only a merely bureaucratic process of manufacturing his document was needed.[56] The existence of that judicial determination was accorded proper legal importance – as was recognised when, in the case of *S & Others*,[57] the SSHD was forced to give status documents to the Stansted Afghans after their asylum appeal had been allowed on art 3 grounds. In my view, the timeless legislative construction of the 'structured approach' to deportation of foreign criminals has, as collateral damage, reduced these appellants' previous tribunal and higher court decisions to purely momentary, contingent phenomena.

The issues of delay and legitimate expectation can be dealt with swiftly. The court in *MA (Pakistan)* reiterated that legitimate expectation requires a promise which is 'clear, unambiguous

55 An ancient saying quoted by Kingsley Amis in *Lucky Jim*.

56 *R v Secretary of State for Home Department ex parte Deniz Mersin* [2000] EWHC Admin 348.

57 *S & Ors, R (oao) v SSHD* [2006] EWHC 1111 (Admin) [102], upheld by the Court of Appeal in *S & Ors* [2006] EWCA Civ 1157.

and devoid of relevant qualifications'.[58] Neither Mr MA nor Mr Abidoye were regarded as having received any clear or unambiguous indications about whether they would continue to be granted leave to remain, despite it being clear to most readers that the references in SSHD letters and UT determinations to 'adverse circumstances' were intended to warn them not to commit further crimes. In the face of the public interest in deporting every single foreign criminal, that common-sense interpretation cannot legally ground a legitimate expectation.

The issue of delay can be dealt with even more swiftly. Delay used to be relied on to show that the vaunted public interest in deporting a particular individual had faded. Back in the 1990s, I won an appeal against deportation for someone who had been sentenced to four years in prison for grievous bodily harm, in a case where the harm could barely be classed as such, and where the victim was a member of his family who attended court on his behalf and begged the court not to send him to prison. Ten years after that sentence, a decision to deport was made, and the judge held that if there had been a public interest in deporting this man (a Somali originally granted exceptional leave to remain, who since serving his sentence had led a blameless and even useful life), what can have excused the delay? However, in *Reid*,[59] the Court of Appeal regarded the several years of Home Office delay thus:

> one way of alleviating the harshness of deportation is to delay it until any qualifying child becomes an adult. This is very nearly what has happened here, no doubt through bureaucratic inefficiency rather than design.

Mr Reid's appeal was dismissed.

Two academic articles from outside the UK[60] set out why a statute of limitations should apply in deportation cases. Ellerman presents political and sociological arguments as to why the fact of an individual's long stay in a host community should, after a certain length of time, be recognised as leading to a legal entitlement to remain. Ordonez examines the detailed legal basis of US law providing for the deportation of noncitizen convicted criminals. She shows that current laws provide for the deportation of individuals many years after their crime was committed, contributing to personal and family insecurity including for citizen family members, and stress on the US immigration enforcement agencies and immigration courts faced with processing deportations based on crimes committed sometimes decades previously, about which full records may no longer exist. These 'practical difficulties' (such as those referred to in *Khadir*[61]) should especially resonate here in the UK. While the US succeeded in deporting over 300,000 migrants in 2018 and in 2021 apprehended over 1.6 million, an extract from UK Home Office Immigration Statistics to March 2022[62] shows that:

> In 2021, there were 2,673 FNOs returned from the UK, of which 61% were EU nationals (1,642) and 39% were non-EU nationals (1,031). FNO figures are a subset of the total

58 See Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2009] AAAC 453 at [60].

59 *Reid v Secretary of State for the Home Department* [2021] EWCA Civ 1158 [59].

60 Antje Ellerman, *The Rule of Law and the Right to Stay: The Moral Claims of Undocumented Migrants* APSA 2012 Annual Meeting Paper; Viridiana Ordonez, 'Limiting the use of the categorical approach and setting a statute of limitations for deportation' (2022)73(6) Hastings Law Journal.

61 *Khadir, R v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207.

62 https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2022/how-many-people-are-detained-or-returned.

> returns figures and in 2021 constitute the vast majority of total enforced returns and 28% of enforced and voluntary returns combined.
>
> This figure of 2,673 FNO returns is 9% lower than in 2020 and 48% lower than in 2019, before the pandemic began. Figure 7 shows that FNO returns have shown an overall downward trend since 2016, following a steady increase before this due to more FNOs from the EU being returned in that period.

I provide these figures to underline what I predict will be the poor administrative, legal and social consequences of subjecting every foreign criminal to refusals and deportation proceedings despite the SSHD's diminishing ability to enforce removals. All these consequences are carefully discussed in the UK context in a 2021 University of Bristol/University of Birmingham joint report.[63]

Though addressing issues arising in very different legal landscapes, both Ellerman and Ordonez also emphasise the jurisprudential questions I am raising here – what price do we pay for predictability and finality, if the legislation and rules permit the reconsideration of matters already subject to judicial determination? After all, as the Court of Appeal stated at [36] in *HA(Iraq)*:

> ... the underlying principles relevant to the assessment of the weight to be given to the public interest and article 8 have not been changed by the introduction of the new regime ....[64]

9. Further legal issues: removability, fresh claims and art 3 harm

The questions of removability and fresh claims have each been considered in the context of deportation, each in Court of Appeal judgments treating us to comprehensive reviews of the case law on these issues.

9.1. Removability

Here I am referring to specific legal and practical barriers to removal as treated in the 'limbo' and statelessness cases beginning with *Khadir* [2005–6].[65] The case of *RA (Iraq)*[66] shows that not only the Home Office but the courts remain resolute in not wishing to consider that any rights or even expectations might flow from not being foreseeably removable from the UK. The case concerned an Iraqi born in Kuwait and accepted to be not able to be returned there. He could not be removed to Iraq as had no passport or any other documents. He argued that a deportation order which had no chance of being executed would simply render him unlawfully

63 Melanie Griffiths, Candice Morgan-Glendinning, *Deportability and the Family: Mixed-immigration status families in the UK* 2021 https://www.bristol.ac.uk/ethnicity/projects/deportability-and-the-family-mixed-immigration-status-families-in-the-uk/.

64 *HA (Iraq)* (Court of Appeal) (n 20).

65 *Khadir* (n 61).

66 *RA (Iraq) v The Secretary of State for the Home Department* [2019] EWCA Civ 850 (17 May 2019).

present in the UK, which would perforce breach his art 8 rights. The court found that his claim that his 'limbo' situation breached his art 8 rights was held to be premature – since he still had s 3C leave to remain and was therefore still able to work and otherwise remain protected from the hostile environment.

I have previously discussed removability,[67] concentrating on the plight of failed asylum-seekers whose facts do not quite meet the requirements of statelessness. The Court of Appeal in *RA (Iraq)* confirms that the legal test remains Baroness Hale's dictum in *Khadir* (the 'Hale test'):[68]

> [4]: There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would be irrational to deny him the status which would enable him to make a proper contribution to the community here, but that is another question.

The judgment takes us carefully from *Khadir* through my own case of *AR*,[69] the Legacy cases of *Hamzeh*,[70] *Abdullah*,[71] *BM (Iran)*[72] and a different *Abdullah*[73] to reassert that mere delay in removal does not convey any expectation of leave to remain; that findings of incredibility or lack of cooperation are fatal: and that it is no use arguing that forcible removal is impossible where voluntary departure has not yet been attempted. The court also discussed *AB (Sierra Leone) v SSHD* (Beatson and Davis LJJ, unreported 7 July 2017) in which AB was said to have mental health problems and to have been disruptive. He had been here 14 years, and yet the 'limbo' argument was held to be premature.

The court decided that, where an applicant falls to be deported as a foreign criminal rather than merely removed as unlawfully present, the 'Hale test' of removability (taken from para 4 of *Khadir*, quoted above) must be expected to be tougher.

> [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 …

The court then noted that that appellant had been granted a laisser-passer to enter Iraq – still not enough to permit his entry, but enough for the court to decide that all hope of removing him had not yet been lost.

One must wonder how the public interest in deporting someone can have any practical bearing on the 'practical difficulties' of removal. In 2018, the SSHD did agree to revoke

67 Sheona York, 'Revisiting removability in the "hostile environment"' (2015) 3(2) Birkbeck Law Review 227–257.
68 *Khadir* (n 61).
69 *R (AR and others) v SSHD* [2009] EWCA Civ 1310, (cited in *RA (Iraq)* as *MS and others*) dealing with applicants from Palestine and from mixed Eritrea/Ethiopian heritage, which was settled by granting indefinite leave to remain to all my applicants bar AR himself, who had been disbelieved in his initial asylum claim. He is probably still in the UK 'in limbo'.
70 *Hamzeh and Others v SSHD* [2014] EWCA Civ 956.
71 *Abdullah v SSHD* [2013] EWCA Civ 42.
72 *BM (Iran)* [2015] EWCA Civ 491.
73 *R(Abdullah) v SSHD* (22 March 2016, JR/6393/2013).

a deportation order made against my client born here of stateless Palestinian failed asylum-seekers. The SSHD did not attempt to dispute that my client was not just 'not foreseeably removable' in the Hale sense, but 'not deportable', as there never had been any country of nationality or former habitual residence. That was a shocking case of a child taken into care at the age of 5, where Social Services failed over several years following his 10th birthday to apply for his registration as a British citizen. After his deportation order was revoked, he was granted 30 months' leave to remain with access to public funds – but will be obliged to make repeat applications for the foreseeable future, all subject to s 117A-D NIAA 2002, despite his being accepted as formally stateless and 'not deportable'. In his case (which did not go beyond a pre-action letter) I argued that retaining a deportation order, and therefore leaving a person without leave to remain, without the right to work or claim benefits, in circumstances where removal was indeed remote, would very soon lead to art 3 harm in the way described (again by Baroness Hale) in *Limbuela*.[74] But, as can be seen from the judgments discussed above, this will apply to plenty of undocumentable and unreturnable applicants.

9.2. Fresh claims

In *Robinson*,[75] the Supreme Court reviewed the law on fresh claims in the context of a foreign criminal facing deportation. This case was remarkable in two ways. First, we see Michael Fordham QC arguing (unsuccessfully) that the well-known line of cases from *Onibiyo* onwards did not apply here. Secondly, we have another desperate plea to simplify immigration law:

> [66] Finally, I draw attention to two recent developments. First, in July 2018 Justice published a report on Immigration and Asylum Appeals by a Working Party chaired by Professor Sir Ross Cranston which highlights the pressures facing the current appeals system. Secondly, ... the Law Commission has published a consultation paper on the Immigration Rules which seeks to identify the underlying causes of their complexity, and to identify principles under which they can be redrafted to make them simpler and more accessible ... The Law Commission's initiative is timely and welcome. As will be apparent from this judgment, the structure of both primary and secondary legislation in this field has reached such a degree of complexity that there is an urgent need to make the law and procedure clear and comprehensible. (my emphasis)

10. Conclusion

From a full examination of deportation case law from *KO (Nigeria)* through *HA (Iraq)* (2022) up to February 2023, I have noted the following trends:

- The prevalence of judgments about art 8 ECHR and related issues affecting migrants which are based on cases involving criminals sentenced to over four years in prison – an unloved but relatively small cohort of migrants;

74 *Adam, R (on the application of) v Secretary of State for the Home Department* [2005] UKHL 66 (always referred to as *Limbuela*).

75 *Robinson (formerly JR (Jamaica)) v Secretary of State for the Home Department* [2019] UKSC 11.

- The extent of interference by the Upper Tribunal in deportation appeals, in particular finding First-tier decisions 'irrational' when they simply disagree with the FTT's findings – deplored but sometimes also accepted by the Court of Appeal.

There have been two important developments, one positive and the other wholly detrimental. The Supreme Court in *HA (Iraq)* has set out a clear requirement to carry out a full, holistic examination of the individual circumstances of those to be affected by deportation of a family member, thus returning to the *Boultif, Maslov* and *Uner* world in which people's lives and their relations with their families and their communities were seen to be important. This judicial approach now appears to be settled. But it may be vitiated in the tribunal by the increased expectations expressed by the courts at every level for expensive professional reports to support claims of 'unduly harsh', 'very compelling circumstances' etc, and a concomitant downplaying or even rejection of appellants' and family members' own evidence. Worse still, such an insistence effectively means that any family whose health and social problems ameliorate over time will find it harder, not easier, to remain together.

On the other hand, for any migrant whose convictions and sentences were carried out some time ago, this positive development may be undone by the reinforcement in the recent Rules of the retrospective effect of s 117C NIAA 2002 and the lack of discretion to consider previous grants of leave to remain and previous judicial determinations for those defined as foreign criminals.

My conclusions may in any case enjoy a short shelf life, given the provisions of the proposed s 8 of the Bill of Rights Bill requiring 'manifest' and 'extreme' harm which is 'unable to be mitigated', before a foreign criminal could resist deportation. And, precisely at the time of writing, the prime minister has threatened to leave the European Convention on Human Rights altogether. I may well be virtually alone among colleagues in believing that, if that happened, this country would eventually evolve criteria for considering migrants' legal rights to remain in the UK, whether foreign criminals or not, which would focus directly on the positive aspects of family and private life, community connections and participation rather than being reduced to medicalisation of people's normal emotions and everyday experiences. But it is clear that the prospect for foreign criminals with 'normal' family and private life in the UK is poor, and that the immediate impact of withdrawal from the Convention would be serious indeed, for all migrants and not just for foreign criminals.

Sheona York
Kent Law Clinic