

Revisiting Removability in the 'Hostile Environment'

Abstract

Evidence shows that there may be more than 800,000 migrants living unlawfully in the UK, of whom a significant proportion, especially those who have been here a long time, may find it difficult to obtain national documents and return to their country of origin. The 2000s saw extended delays in Home Office casework and growing backlogs in several categories of migrant, especially asylum-seekers, but also foreign national prisoners targeted for deportation. However, inspection reports and evidence in leading cases show that the increasingly shrill pronouncements about removing unlawful migrants, and in particular foreign prisoners, is not being matched by any significant increase in numbers removed. The recent Home Office measures aimed at ensuring a 'hostile environment' for unlawful migrants, such that they will make a voluntary departure, cannot achieve that aim unless those migrants can be documented and there is a country willing to accept them. Since the law provides only a limited basis for granting leave to remain in such circumstances, the effect of such measures can therefore only be the further immiseration of those migrants.

Introduction

The best estimates of UK irregular migrant numbers are surprisingly still those from 2007-8, giving between 417,000 and 863,000, of whom over 60% were estimated to have been in the UK for over five years.¹ It is not known how many irregular migrants may be without national documents or realistic means of obtaining any, and who are therefore not able to leave the UK, either to their own country or anywhere else. The year 2013 saw the introduction of a new procedure for applying for leave to remain on the basis of statelessness. However, this formal procedure is open to very few. For the remainder, the legal position has for many years been clear: '*Limbo ... a cold glitter of souls*';² a life on Section 4 support³ or in an exploitative twilight of illegal working and insecure accommodation, was held to be the law, following the 2005 House of Lords case of *Khadir*.⁴ In that case Baroness Hale did say that where removal is 'simply impossible', 'it may be irrational' to deny leave to remain, establishing the 'Hale threshold'. However, the Home Office's position (and that of the courts) is that removal is rarely impossible.

The Home Office's stated policy of creating a 'hostile environment' for irregular migrants is aimed at encouraging more voluntary returns, and the Immigration Act 2014's streamlined removal process and reduced rights of appeal aim to make it easier for the Home Office to remove people without lengthy legal proceedings. However, for those whom it is 'simply impossible' to remove, neither the hostility of the environment nor the lack of legal protection against removal or deportation will facilitate their actual removal.

¹ Ian Gordon et al, *Economic Impact on London and the UK Economy of an Earned Regularisation of Irregular Migrants to the UK* (Greater London Authority, 2009) para 12.

² From *Limbo*, by Seamus Heaney, quoted by Cranston J in *R (Palestine) v SSHD* [2009] EWHC 1044 (Admin).

³ Subsistence support for failed asylum-seekers and previously-detained migrants provided under Section 4 of the Immigration and Asylum Act 1999.

⁴ *Khadir, R v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207.

This paper examines the state of the law on removability, and the likely effect of recent and proposed new measures on this often destitute and vulnerable group. The paper is divided into two sections, the first of which sets out the background to the issue of removability, and examines the state of the law. In the second section I look at the effect of relevant recent changes in legislation and the immigration rules. I draw on long experience of acting for failed asylum-seekers in both their fresh claims and their claims for asylum support, and my involvement in sustained public law challenges to the legality of keeping people indefinitely on temporary admission.⁵

I begin by presenting the background to expectations that an inability to return home may lead to a grant of leave to remain. I then set out the legal definition of temporary admission and make an estimate of numbers of people affected, whether formally on temporary admission or surviving under the radar. Considering the decided legal cases since the High Court judgment in *Khadir*, I show that there has been very little if no movement on how the Home Office and the courts look at the issue of removability. I also examine the legal tests for statelessness and for entitlement to Section 4 support, discussing the burden and standard of proof, and the importance of an applicant's credibility.

In the second part of the paper, looking at the post-2012 immigration rules, I discuss how non-removability might bear on requirements or factors such as 'insurmountable obstacles' and 'where it is reasonable for a child to leave the UK'; as well as, in relation to private life, how non-removability may be relevant in a proportionality assessment, and at what point maintaining 'an intention to remove' would go beyond the 'legitimate aim' of removing irregular migrants.

Finally, for those for whom the issue of non-removability does not provide an argument for leave to remain, whether in relation to legitimate aim or to proportionality, I argue that the 'hostile environment' amounts to the use of destitution as an arm of government policy.⁶

A. Background, Numbers and Current Law

1. Asylum Processing Backlogs and the Creation of Expectations

To claim not to be removable from the UK is generally the last, hopeless, claim of the failed asylum-seeker or foreign national prisoner finally facing deportation. Historically, the possibility of such a claim, and the existence of large numbers thinking to make it, arises from the increase in the numbers of people seeking asylum in the UK from the 80s onwards, and a parallel inability of the Home Office Immigration and Nationality Department and its successors to process applications efficiently, or promptly expel those with no right to remain.

⁵ I worked as a caseworker and then solicitor at Hammersmith & Fulham Community Law Centre, acting in immigration, asylum, asylum support and housing; and then as Principal Legal Officer at the Immigration Advisory Service until its demise. With many clients' cases delayed for years in the Legacy, and many in particular from Palestine and Eritrea, the issues of fresh claims for asylum, removability and de facto statelessness were priorities.

⁶ See, for example, Joint Committee on Human Rights, *Tenth Report* (2006-7) para 67 <<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>> accessed 6 August 2015; Mayor of London, *Destitution by Design* (Greater London Authority 2004) <http://legacy.london.gov.uk/mayor/refugees/docs/destitution_by_design.pdf> accessed 6 August 2015.

Already in the 90s, unprocessed applications were piling up, which the Home Office attacked with several thinly-disguised amnesties. In January 1999, in the face of a nearly 30 per cent increase in asylum applications in one year, a 'backlog clearance exercise' began,⁷ which allowed a number of grants of exceptional leave to be made quickly. Then, in response to the introduction of new administrative removal procedures in Section 10 of the Immigration and Asylum Act (IAA) 1999, a 'regularisation of overstayers' procedure was introduced,⁸ in which anyone who had overstayed their previous leave to remain and who had no criminal convictions could apply for leave. This programme was introduced (ostensibly)⁹ to preserve the appeal rights of any who were refused, but for most applicants the outcome was a grant of indefinite leave to remain. Then, supposedly to resolve the burden on local authority budgets of supporting asylum-seeking families whose support had not transferred to the Home Office under Part VI of the IAA 1999, a 'one-off exercise'¹⁰ (usually referred to as the 'family amnesty') provided for the grant of indefinite leave to asylum-seekers who had applied for asylum before October 2000 and who had at least one dependant under 18 living with them. This scheme lasted until 2006, and a few of these cases had still not been processed by the time the 'legacy', or 'case resolution programme', was introduced.¹¹ This famously followed Home Secretary John Reid's announcement to Parliament of a backlog of 450,000 unresolved cases, and his conclusion that the Home Office was 'not fit for purpose'.¹² At the end of the 5-year 'legacy' programme in July 2011, a substantial number of unresolved cases remained. Other backlogs have since been revealed, such as the 'migration refusal pool'.¹³

The individual experiences hidden behind those statistics have created, and continue to create, expectations of eventually being allowed to remain in the UK. At one end of the spectrum of legal responses we see Collins J's 2007 judgment on the delays experienced by those whose cases fell into the 'legacy'. He decided, in *FH and Others*,¹⁴ that:

The need to deal with so many incomplete claims has arisen as a result of the past incompetence and failures by the Home Office. ... It is not for the court to require greater resources to be put into the exercise ... unless persuaded that the delays are so excessive as to be unreasonable and so unlawful.

⁷ Immigration Service Union Evidence to Home Affairs Committee July 1999.

⁸ Immigration (Regularisation Period for Overstayers) Regulations 2000 SI 2000 no 265.

⁹ In relation to this and subsequent regularisation programmes, the Secretary of State may well argue that the reasons given were indeed the principal reasons for introducing the programme. But the fact remains that for well over a decade the backlogs had appeared intractable and had to be dealt with, while the government had no stomach to propose a straightforward amnesty.

¹⁰ APU Notice 4/2003.

¹¹ Chief Inspector of Borders and Immigration, *An Inspection of the UK Border Agency's Handling of Legacy Asylum and Migration Cases: March-July 2012*, paras 4.1, 4.4 <<http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/UK-Border-Agency's-handling-of-legacy-asylum-and-migration-cases-22.11.2012.pdf>> accessed 6 August 2015.

¹² Chief Inspector of Borders and Immigration, 'Immigration System Unfit—Reid', *BBC News* (2006) <http://news.bbc.co.uk/1/hi/uk_politics/5007148.stm> accessed 6 August 2015.

¹³ The Migration Refusal Pool contained 173,562 cases. See: Chief Inspector of Borders and Immigration, *An Inspection of Overstayers: How the Home Office Handles the Cases of Individuals with No Right to Stay in the UK: May-June 2014*, para 3.6 onwards <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387908/Overstayers_Report_FI_NAL_web_.pdf> accessed 6 August 2015.

¹⁴ *FH & Ors v SSHD* [2007] EWHC 1571 (Admin) [21].

More recently the Court of Appeal decided that there was no legitimate expectation that a person refused but not yet removed would be granted leave to remain.¹⁵

2. *Temporary Admission: Definition and Numbers*

The Immigration Act 1971 sets out the framework of immigration control, based on a system of requirements for entry and remaining lawfully in the UK. Section 4 of the Act provides that, with regard to ‘the examination of persons arriving in the UK ..., the exercise by immigration officers of their powers in relation to entry into the United Kingdom, ... the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully ... and the detention of persons pending examination or pending removal from the United Kingdom...’, the provisions of Schedule 2 shall have effect.

Schedule 2 deals with the administration of immigration control. Para 2 provides that an immigration officer ‘may examine’ a person who arrives in the UK ‘to determine whether they may enter the UK or not’. Para 16 says that a person ‘subject to examination’ may be detained. Para 21 provides that a person liable to detention or detained:

... 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.

The rather convoluted Section 11 of the Immigration Act 1971 provides a definition of temporary admission:

A person arriving in the United Kingdom ... shall ... be deemed not to enter the United Kingdom unless and until he disembarks, and ... shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act ...

With the growth in numbers of asylum-seekers, the numbers of people covered by this status of temporary admission/temporary release have grown. On claiming asylum, an asylum-seeker is notified that they are ‘liable to detention’ but generally is granted temporary admission on condition that they live at a particular address and report to an immigration officer as required. A grant of asylum or other form of leave to remain signals the moment at which that person truly enters the UK and ceases to be ‘liable to detention’ or subject to reporting conditions.¹⁶ On refusal of asylum, the status of temporary admission with reporting conditions continues, through any appeals or further applications, until removal. Those discovered overstaying a visa, those discovered with no leave and declared to be illegal entrants, and those refused leave to remain who have exhausted all rights of appeal, will, if not detained, be placed on temporary admission. Because of the inability of the Home

¹⁵ *SH (Iran) v SSHD* [2014] EWCA Civ 1469. In the case of *Che v SSHD* [2013] EWHC 2220 Admin, the court was even clearer: at [29] the court stated ‘removals are effected not by decision maker but by aeroplane’. ... [31] [once a person has received a notification that he is not to be granted leave] ... for the purposes of the legacy, he is being removed’ [underlining in original].

¹⁶ Though the conditions of holding a biometric residence permit include a continuing duty to report changes of address and other changes of circumstances.

Office to remove more than a few of those liable to removal,¹⁷ many remain on temporary admission for long periods, and others, whether through failure to notify a change of address or through Home Office failure to contact them, may never have been served any formal notice of this.

The 2014 Chief Inspector of Borders and Immigration report dealing with overstayers,¹⁸ and other recent inspection reports, give figures for different categories of irregular migrant. A simple total of those in each of the tables who have not either been granted leave, removed or otherwise departed, gives nearly 800,000 files not yet concluded, arguably providing a reasonable estimate of numbers on or liable to be on temporary admission.¹⁹

Table 1

'Legacy' cases identified in 2006	400,000-450,000
Additional pre-2003 cases	40,000

Table 2

Total cases reviewed in the legacy cohort	500,500
Of which given leave to remain	-172,000
Of which removed	-37,500
To be granted subject to security check	-3,000
Not either granted or removed (including duplicates, errors or controlled archive)	288,000

Table 3

Migration refusal pool 2014	173,562
Additional pre-2008 migration refusal pool as at January 2014	168,300

Table 4

¹⁷ The most recent Home Office statistics show total enforced removals per year falling from 15,252 in 2009 down to 12,460 in 2014. *Immigration Statistics, October to December 2014* (2015) <<https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2014>> accessed 6 August 2015.

¹⁸ Chief Inspector of Borders and Immigration (Overstayers) (n 11) para 3.5.

¹⁹ Table 1: Chief Inspector of Borders and Immigration (legacy cases) (n 11) paras 4.4, 4.9. Table 2: *ibid* figure 2; Table 3: Chief Inspector of Borders and Immigration (n 13) figure 1 and para 3.9; Table 4 *ibid* figure 10.

Total cases 'outcomed' by Capita	256,506
Of which had departed	-55,409

Clearly, many of the individuals represented by these case numbers may face difficulties beyond their control in returning home. A person without any national documents or any other formal ID, whether through having destroyed those on entry, not having had any, or having lost documents while living in the UK, may not be able to establish their identity to the satisfaction of their embassy so as to obtain new travel documents. Some, because of war, unrest or environmental catastrophe, may have spent most of their lives outside their country of origin, or find that their 'country of origin' is now part of some other country and that they are unable to establish what their nationality is. Others have their nationality disputed by the Home Office on the basis of language analysis, alleged inconsistencies in their asylum claims or their own changed stories. Others may have been out of their country of nationality for so long as to have lost their citizenship. Some states routinely do not cooperate either with their claimed nationals or with the UK authorities to assist in providing documentation. Then there are countries that the UK courts deem safe for failed asylum-seekers to return to, but the journey from the national airport to their home area is not practicable. For any or a combination of these reasons, many who are in the UK on temporary admission are unable to leave, sometimes for years.

3. *Challenges to Temporary Admission: The Law*

In the early 2000s, partly driven by the reality of living on Section 4 support,²⁰ the status of temporary admission itself was challenged. Crane J's High Court decision on 29 July 2002 in the *Khadir* litigation²¹ held that since there was no safe route of return for the applicants, who were Iraqi Kurds, they could not be held to be 'liable to detention', as removal was not imminent. Therefore, detention was found to be unlawful, following *Hardial Singh*,²² and *Tan Te Lam*.²³ Thus the power to hold on temporary admission falls away.

Soon after this judgment, a new clause was drafted and became law as Section 67 of the Nationality, Immigration and Asylum Act (NIAA) 2002. It aimed to deal with the '*Khadir* problem' by deciding that in any reference to a power to detain, that power will continue to apply to 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

²⁰ Shared no-choice accommodation and vouchers for £35 per week provided to failed asylum-seekers if they are destitute and can show one of five factors, including 'taking all reasonable steps to return home'. See discussion below.

²¹ *R (Hwez & Khadir) v SSHD* [2002] EWHC 1597 (Admin). The litigation concluded in the House of Lords: see (n 4).

²² *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704.

²³ *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

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

For the avoidance of doubt, subsection (3) states:

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

However, the House of Lords decided Mr Khadir's case on a different ground, determining that 'pending' removal or deportation meant no more than 'until', and there was therefore no limit on the power to hold on temporary admission:

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 'impending'. 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 (i.e. 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 [my emphasis].

Baroness Hale, agreeing, stated at [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 further stated at [36] that the enactment of Section 67 NIAA 2002 was 'unnecessary' since parliament had clearly provided for temporary admission pending removal.

However, in *S & Others* in 2006,²⁴ the Secretary of State's power to hold a person on temporary admission was analysed as 'parasitic on the power to detain'. Relying on that analysis, I applied for judicial review of a failure to grant leave to a number of clients, for whom, on their facts, removal was as 'remote' as suggested by Baroness Hale in *Khadir*. Proceedings were issued in 17 cases,²⁵ and the High Court eventually heard the case of *Rabah and Others*,²⁶ concerning two Palestinians—AR from the West Bank of the Occupied Territories, and MS who was born in Saudi Arabia—and FW, of mixed Eritrean/Ethiopian origin. Cranston J decided that Para 21 of Schedule 2 was to be interpreted entirely by reference to Section 67, NIAA 2002. Thus, according to Cranston J, the 'practical difficulties' referred to in Section 67(2)(b) must be read to include legal difficulties asserted to arise from the operation of foreign law; and that 'some prospect' of removal meant simply that, and could not be interpreted to mean 'some realistic prospect' of removal.²⁷ Finally, to say that the power to grant temporary admission is 'parasitic on the power to detain' is unhelpful, since considerations which may make it unlawful to *exercise* the power of detention do not remove the *existence* of that power.

²⁴ *R (S & Others) v SSHD* [2006] EWHC 1111 Admin (the so-called Stansted Afghans case) [83] in which Sullivan J (as he then was) set out an analysis of temporary admission which prevented the Secretary of State from delaying a grant of leave to the applicants after their appeals against refusal of leave to remain were allowed on art 3 grounds.

²⁵ I had more clients waiting behind these, but once the court listed the first few for a hearing, we could not justify spending the legal aid on issuing further cases until we knew the answer to those.

²⁶ *Rabah & others* (n 2).

²⁷ Though he does say that FW's removal to Eritrea was 'at the borderline of being fanciful' (ibid [53]).

Permission to appeal was granted since there were hundreds of Palestinian and Eritrean/Ethiopian asylum-seekers, and others, with no or no real prospect of removal, surviving on temporary admission. In *MS, AR & FW*,²⁸ Sedley LJ considered the meaning of 'practical difficulties' in relation to the facts of the three appellants and found, as Cranston J had, that any of the 'difficulties' cited by the appellants, whether strictly practical or arising in some way out of foreign law, amounted to 'practical difficulties' under Section 67. He then stated:

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 Article 8 jurisprudence. Sedley LJ continues:

28. It is, however, not inconceivable that in two of the three cases before us this will turn out to be the case.

The Court adjourned for a further hearing of the facts, but made it clear that a settlement was expected. A few days before the restored hearing, the two appellants (and the applicants in the stayed cases) were granted indefinite leave. So the 'Hale threshold' set out in *Khadir* remained the test for when Section 67 NIAA 2002 would no longer apply.

4. *Removability and Asylum Claims on Grounds of Statelessness*

The leading cases considering asylum claims of those accepted to be or claiming to be stateless tangentially considered the issue of removability, though none of them considered the *effect* of not being removable. The case of *MA (Palestinian Territories)*²⁹ discussed whether the exclusion of a stateless person from his last country of former residence amounted to persecution, and decided that it did not. The Court also noted the Asylum and Immigration Tribunal's decision that it would not matter if the planned return of that appellant to the West Bank via the King Hussein Bridge did not succeed, since he would finish up stuck in Jordan, where the most recent country guidance case had determined that Palestinians would not suffer persecution.³⁰

Interestingly, at [32] the Court said:

It is pertinent to observe that, before the AIT, there was something of an evidential vacuum in relation to the logistics of returning the appellant via Jordan and the King

²⁸ *MS, AR & FW v SSHD* [2009] EWCA Civ 1310.

²⁹ *MA (Palestinian Territories) v Secretary of State for the Home Department* [2008] EWCA Civ 304.

³⁰ *NA (Palestinians—Not at general risk) Jordan CG* [2005] UKIAT 00094.

Hussein Bridge. Since the hearing in this Court we have been informed *that no such arrangement has yet been made in this or any similar case* [my emphasis].

But the Court did not go on to consider what the status of such an appellant would be if such an arrangement were never made.

In *MS (Palestinian Territories)*,³¹ the Supreme Court considered whether a person's appeal against refusal of asylum should consider whether it was practicable to return him to the place named in the removal directions. The Court decided that the legislative scheme providing for rights of appeal³² could not be interpreted to require consideration of any aspect of the removal directions,³³ and, referring to *MS, AR & FW*,³⁴ noted that, at the time of any appeal against asylum (or other substantive refusal), 'it may be difficult, if not impossible for the Secretary of State or the Tribunal to determine when, if at all, it will be practicable to give [the removal directions].' Again, there was no reference to what the effect might be on the appellant's temporary admission.

A concurrent series of cases considered the asylum claims of those of mixed Eritrean/Ethiopian origin, in which the Court and Tribunal had been obliged to consider the details of the nationality laws of each of those countries and their practices in processing applications for passports from their claimed citizens living overseas.³⁵ Especially once it was decided in *EB (Ethiopia)*³⁶ that a deprivation of nationality could amount to persecution, many applicants of mixed Eritrean/Ethiopian origin, both current asylum applicants and those whose cases had already been refused, began to present claims based on deprivation of nationality and/or inability to establish nationality. And, reluctantly, courts and tribunals had to consider the relevant embassies' responses to applications for documentation, whether from an applicant in person or from the Home Office. In *MA (Ethiopia)*³⁷ the appellant had conceded that if she were provided with Ethiopian travel documents by the embassy she would not be persecuted on return. Her claim was that she would not be so provided, and that such a failure by the embassy to provide her with documents would be persecutory. In line with decided authority,³⁸ the Court determined that a person asserting that she would not be able to obtain the protection of her home state had to act in good faith and make efforts to obtain such protection:

25. The Tribunal recorded in its decision some of the steps which had been taken to determine directly from the Ethiopian embassy what its attitude to her application to return would be. ... The Tribunal also noted that the appellant herself went to the

³¹ *MS (Palestinian Territories) v Secretary of State for the Home Department* [2010] UKSC 25, [2010] WLR 1639.

³² The Immigration Act 2014 introduced a new structure of appeal rights, but this issue is unaffected.

³³ *MS (Palestinian Territories)* (n 31) [27].

³⁴ *MS, AR & FW* (n 28).

³⁵ Those issues arose from the 1998-2000 war between the two countries, during which some 67,000 people of Eritrean or mixed origin were summarily deported from Ethiopia to Eritrea, and the continuing postwar hostility of each country to those who are potentially citizens of the other. See Eritrea Ethiopia Claims Commission, Partial Award, *Civilians Claims: Eritrea's Claims 15, 16, 23 and 27-32 between the State of Eritrea and the Federal Democratic Republic of Ethiopia* (The Hague, December 17, 2004) [2005] 44 ILM 601.

³⁶ *EB (Ethiopia) v SSHD* [2007] EWCA Civ 809 3 WLR 1188.

³⁷ *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289.

³⁸ *Lazarevic (Adan, Nooh, Lazarevic and Radivojevic) v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1126; *Bradshaw* [1994] Imm AR 359.

embassy but told them she was of Eritrean nationality. Not surprisingly, she apparently did not get beyond reception.

Effectively the appeal was dismissed because the appellant had not taken all reasonable steps to obtain national documents. The Court stated that if she did so in good faith and found that she was unable to obtain any, it would be open to her to make a fresh claim for asylum. What is relevant to our discussion on removability is what the Court said about the *process* of documentation and removal:

26. ... *It is true that the Tribunal will not generally be concerned about the process of removal; it must determine asylum status without regard to that issue, which is a matter for the Secretary of State. So the fact that it may, for example, prove to be impossible in practice to return someone seeking asylum has no relevance to the determination of their refugee status.* But where the applicant contends that the denial of the right to return is part of the persecution itself, the Tribunal must engage with that question [my emphasis].

5. The Current Legal Position

The most recent case referring to asserted statelessness and problems of removability is *BM (Iran)*.³⁹ This was an asylum appeal, but it was also considered whether it was possible for him to return to Iran. On this, Lord Justice Richards said:

20. The most directly relevant authority is that of *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42. The appellant in that case had been in the United Kingdom since 2005. It was held that he had been born in Saudi Arabia but was of Palestinian origin and, as such, could not be returned to Saudi Arabia. It was argued that article 8 was engaged and required him to be granted leave to remain, at least pending any further attempts to obtain Saudi agreement to his return there, since he would otherwise be in a state of limbo. Sir Stanley Burnton, with whom the other members of the court agreed, rejected the argument:

‘19. I reject the submission that because the Secretary of State was at the date of the decision of the Upper Tribunal unable to enforce the return of the Appellant to Saudi Arabia, article 8 required her to grant him leave to remain. Article 8 does not confer a right to reside in the country of one’s choice. The Appellant chooses to reside in this country, but was not compelled to come here by any threat of persecution. Mr Jacobs accepted that if the Appellant could be returned, he could have no article 8 claim to remain here. That is doubtless because there was no evidence before the Upper Tribunal that he had established any personal or family life here.’

Earlier in the *Abdullah* judgment itself,⁴⁰ Sir Stanley Burnton had also said:

16. ... In my judgment (with which Mummery LJ agreed) in *MA (Ethiopia)*⁴¹ at paragraph 78, I said that, in contrast to the question of risk of persecution on return, inability to return is to be proved on the balance of probabilities.

Also in *Abdullah*, Beatson LJ referred at [26] to the appellant’s submissions based on the statement of Baroness Hale in *Khadir*’s case, and Sedley and Toulson LJ in *MS, AR & FW* at

³⁹ *BM (Iran)* [2015] EWCA Civ 491.

⁴⁰ *Abdullah v SSHD* [2013] EWCA Civ 42.

⁴¹ *MA (Ethiopia)* (n 37).

[2], [27] and [45], claiming that 'leaving the appellant without status and consequently with limited access to healthcare, no right to work and no right to social security benefits deprived him of the ability to have a private life and left him in a sort of "limbo".' Beatson LJ made two points. First, that if the 'limbo' issue ever did come into play, it certainly had not done so in that appellant's case, because, 'given the limited information provided by the Appellant and the inconsistencies in the accounts he has given, the Secretary of State was entitled to further time to make inquiries'. The judge also emphasised at [27] that '... the time after which the "limbo" argument can come into play may depend on the attitude of the individual concerned to efforts to establish his or her nationality or to obtain documentation'.

In *SH (Iran)*,⁴² the Court referred to the lower Court's finding that 'no general policy or practice had been identified or established by the claimants to the effect that persons whose removal from the UK could not be effected should for this reason alone be granted leave.'

In *Hamzeh*,⁴³ dealing with the judicial reviews of five applicants of a failure to grant leave under the 'legacy', Sir Stanley Burnton says:

41. I add one comment. The submissions for the appellants tend to treat irremovability by the Secretary of State as inevitably resulting in the migrant being compelled to remain in this country, the migrant being unable voluntarily to return to his or her country of nationality or to go anywhere else. That is a plain non-sequitur.

The issue of removability underlying the power to detain often arises in unlawful detention cases. In *MA & TT*,⁴⁴ the Court reviews the history of the power to detain and reiterates that it is for the Court to decide when, in the light of likelihood of removal, detention has become unlawful. This case also emphasised the issue of the credibility of an applicant, whether concerning a previous failed asylum application or an applicant's current attempts to obtain national documents. However, unlike claims for the grant of leave by those on temporary admission, a determination that detention is unlawful may be obtained by a detainee even if the issues preventing their removal are of their own making.⁴⁵

The legal position is therefore abundantly clear. From *Khadir*, the power to keep someone on temporary admission is without limit of time, but, if it becomes '*simply impossible*' to remove someone, '*it may be irrational*' not to grant leave (the 'Hale threshold'). From *MA (Ethiopia)* (and *Lazarevic* and *Bradshaw* before that),⁴⁶ an applicant must take all reasonable steps in good faith to establish her nationality, in relation to any and all potential countries of nationality; and the test of inability to return is to be proved on the balance of probabilities. From *MS, AR & FW*, the 'practical difficulties' referred to in Section 67(2)(b) NIAA 2002 comprise any and all problems an applicant may face in attempting to establish her nationality, obtain documents and return home; and 'some prospect' of removal does not mean 'some realistic prospect' (but, arguably, must mean a more than fanciful prospect).⁴⁷ This remains the only case in which the Court suggested that, in particular factual circumstances, it may 'not be inconceivable' that the 'Hale threshold' has been reached.

⁴² *SH (Iran)* (n **Error! Bookmark not defined.**) [38].

⁴³ *Hamzeh and Others v SSHD* [2014] EWCA Civ 956.

⁴⁴ *MA & TT v SSHD* [2010] EWHC 2350 (Admin).

⁴⁵ *ibid* [22], referring to *R (FR(Iran)) v SSHD* [2009] EWHC 2094 (QB) [70-72].

⁴⁶ *Lazarevic* (n 38); *Bradshaw* (n 38).

⁴⁷ In *Rabah & Others* (n 2) [53].

6. Applicants' Credibility and the Good Faith of the Secretary of State

The above cases show the importance of the specific factual matrix—not just the details of the steps taken to obtain documentation and the objective evidence about the difficulties of obtaining documentation, but also the applicant's own history, and the credibility of the applicant, both in relation to the steps taken, but also in general. Looking at the applicants in the reported cases, it was hardly likely that Mr Abdullah would be accepted as having reached the 'Hale threshold', since his own story of his origin had not been found credible.⁴⁸ Similarly, in *MS, AR & FW*, the applicant AR's appeal was dismissed despite its being accepted that he was from the West Bank of the Occupied Territories, and despite detailed objective evidence about the difficulties of returning there. He had not been found credible in his own asylum claim, and so the Court would not believe there was no one in the West Bank who could help him obtain a travel document.⁴⁹ In *MA (Ethiopia)* the appellant MA's claim that she would be deprived of her Ethiopian citizenship was not accepted, since she had, in the view of the authorities, effectively stymied her own application by telling the Ethiopian Embassy that she was Eritrean. Correspondingly, the applicant BM's removability argument foundered in *BM (Iran)* because the objective evidence showed that voluntary return to Iran had always been possible, and because it had been found as a fact in his asylum appeal that he had family remaining in the family home in Iran and that he would be able to contact them to confirm his identity and support an application for a travel document.

Such a demanding credibility threshold is likely to exclude a great many failed asylum-seekers from ever being able to challenge temporary admission, since, as with a fresh claim for asylum, only cogent new evidence can displace such findings.

On the other hand, the Home Office is famously reluctant to accept that removal is impossible when it manifestly is. In *MS, AR & FW*, the claimant MS, a Palestinian born in Saudi Arabia to Palestinian refugees, held an expired UN Convention travel document that had been issued to him as a Palestinian refugee by the Government of Egypt, which stated: 'the bearer would not be permitted to enter, remain or transit the Arab Republic of Egypt without a further visa.' The claimant also possessed a letter from the Consulate General of the Arab Republic of Egypt confirming this. The Home Office had been aware of that evidence for several years. In addition, for the Court of Appeal hearing, the author⁵⁰ produced a letter from the Saudi Embassy, stating:

- (a) Visas cannot be granted on an expired passport or travel document, a requirement of validity must be not less than 6 months.
- (b) The person with no legal right of residence in any other country would not be granted entry to Saudi Arabia on any visa.
- (c) A male who requires an entry visa to join his family, should not exceed 18 years old.

⁴⁸ *Abdullah* (n 40) [10-11, 16-18].

⁴⁹ Practitioners with Palestinian clients will know the real 'practical difficulties' of obtaining a travel document from the Palestinian Authority (PA) in Ramallah. There is great suspicion there of those who have fled abroad. A client of the author sent his brother to do this for him, and the brother was detained by the PA for two weeks and then told to get out of his village. The brother was then homeless and destitute with his family—and still no travel document was obtained.

⁵⁰ By then I was employed at the Immigration Advisory Service, having taken all my 'not removable' cases with me from the Law Centre.

- (d) The person who requires a work visa must be coming from his own country or have legal residence in another country.

There were no credibility issues, and MS had not lived in any other country. It was 'simply impossible' to remove him. However, this was never accepted. The Home Office stated that they had 'written to the Saudi Embassy to ask them to change their minds', and eventually told the Court that indefinite leave had been granted 'for pragmatic reasons'.

More generally, Home Office decisions in particular cases are often at odds with what is shown in published statistics and in inspection reports. For example, in *MA (Palestinian Territories)*,⁵¹ Maurice Kay LJ referred to the 'evidential vacuum' regarding returns to Palestine across the King Hussein Bridge. Over the years, statistics have shown that not only are there no enforced removals to Eritrea, but precious few voluntary returns; and further that enforced returns to Iran and China among other destinations have not been possible. A Freedom of Information request from the independent charity Bail for Immigration Detainees produced the publication of Home Office information about which redocumentation processes are required by each foreign country, and the approximate time taken to process applications for emergency travel documents, etc.⁵² With such statistics and such information it should be legally and evidentially straightforward to deal at least with those found credible; but in general, as in the case of MS, this has not been so.

7. *Removability in Other Legal Contexts: Leave to Remain as a Stateless Person*

On 6 April 2013 new immigration rules were introduced providing for an application for leave to remain as a stateless person.⁵³ Article 1(1) of the 1954 Convention states: 'For the purpose of this Convention, the term "stateless person" means a person who is not considered a national by any State under the operation of its law'.⁵⁴ Leave to remain as a stateless person will be granted if the person,

- (a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
- (b) is recognised as a stateless person by the Secretary of State in accordance with [the definition in the Convention];
- (c) *is not admissible to their country of former habitual residence or any other country; and*
- (d) *has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless* [my emphasis].

⁵¹ *MA (Palestinian Territories)* (n 28) [32].

⁵² Home Office and UK Visas and Immigration, *Country Returns Documentation Guide* (2014) <<https://www.gov.uk/government/publications/country-returns-documentation-guide-august-2014>> accessed 6 August 2015.

⁵³ UK Visas and Immigration and Immigration Enforcement, *Statement of Changes in Immigration Rules*, HC 1039 14 March 2013.

⁵⁴ UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol 360, 117.

The Home Office Guidance relating to statelessness applications⁵⁵ effectively follows the legal position as set out above, and considers a number of the ‘practical difficulties’ which vexed the appellants in *MS, AR & FW* and similar cases.⁵⁶ Findings of fact made in an asylum claim may be relied upon in any subsequent application for leave as a stateless person. The Guidance explicitly covers cases where the national authority continues to request further evidence, ‘combined with long delays, amounting to a denial of [nationality]’. If an applicant is from a place with no public services and has never applied for any national documents, it will be important to note that state’s attitude to such people. If people in a similar group are routinely discriminated against, this may indicate that the person is not a national. The possession of false or fraudulent national documents ‘will not necessarily support a finding of nationality, as in many cases they will be unconnected to any nationality mechanism ... which was actually applied in respect of the individual’.

This is the Home Office’s stance in relation to ‘enquiries made of foreign embassies [which] may be met with silence or a refusal to respond’:

The emphasis should be on progressing cases to a conclusion and no time should be wasted waiting for a response particularly if the State’s representatives have a general policy or practice of never replying to such requests. *No inference can be drawn from a failure to respond* in these circumstances. Conversely, when a State routinely responds to such queries, a lack of response will generally provide strong confirmation that the individual is not a national [my emphasis].⁵⁷

A Freedom of Information Request response stated that up to 30 September 2013 there were 171 applications for leave to remain as a stateless person, of which 63 applications had been decided and, of these, two were granted leave to remain.⁵⁸ That there should be so few should not be surprising, since the legal requirements for leave on the grounds of statelessness arguably exceed the ‘Hale threshold’. However, a person found credible and who probably is stateless (such as a Palestinian, or a Kuwaiti Bidoon, or an Eritrean born before Eritrean independence and therefore too old to have a birth certificate or any living witnesses to his birth) might consider making a statelessness application, so as to benefit from the shared burden to establish the facts.⁵⁹ The Guidance confirms that the determination of statelessness requires a mixed assessment of fact and law: while the burden of proof lies on the applicant to establish, to the standard of the balance of probabilities, that she is not considered a national of any state, ‘caseworkers should make reasonable efforts to assist the applicant in establishing the necessary evidence, whether by research or enquiry.’ This acceptance of a shared burden of establishing the facts is unprecedented.⁶⁰

⁵⁵ Home Office, *Applications for Leave as a Stateless Person* (1 May 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/258252/stateless-guide.pdf> accessed 6 August 2015.

⁵⁶ *ibid* 10-12.

⁵⁷ *ibid* 11-12.

⁵⁸ FOI request 30028.

⁵⁹ See *ZA (Kuwait) v SSHD* [2011] EWCA Civ 1082.

⁶⁰ The only other reference to a shared burden for establishing the facts in a migration context is in the *UN Handbook on Procedures and Criteria for Determining Refugee Status*, para 196, which in the author’s experience is virtually never observed, even in children’s cases.

8. *Removability in Other Legal Contexts: Section 4 Support*

The same legal and practical issues arise in claims by ‘failed asylum-seekers’ for asylum support under Section 4 of the Immigration Act 1999, on the basis of being destitute and unable to return home.

Under Regulation 3(1) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, Section 4 support may be provided to a failed asylum seeker who appears to be destitute and who satisfies one or more of the five conditions set out in Regulation 3(2). The first of these conditions—Regulation 3(2)(a)—is that:

he is taking all reasonable steps to leave the UK or place himself in a position in which he is able to leave the UK, which may include complying with attempts to obtain a travel document to facilitate his departure.

Official statistics show that the number of failed asylum seekers and their dependants receiving Section 4 support at the end of December 2014 was 4,994, a reduction from the 12,019 supported at the end of September 2009.⁶¹ The criteria for receiving support under Regulation 3(2)(a) are very strict. Since 2007, support under this condition must be reviewed every 3 months, and since 2009 it is to be provided for one three-month period only,⁶² as it is officially expected that any failed asylum-seeker will be able to arrange their return within that time.

However, the Chief Inspector’s Report on the emergency travel document (ETD) process speaks of ETD application forms poorly-completed by Home Office officials; applications sent to the wrong embassy or an embassy which had closed down; and ‘non-compliant’ embassies.⁶³ In relation to the embassies, the ‘key challenges’ were ‘the protracted, complex returns processes ... and difficulties in resolving individual cases’.⁶⁴ Caseworkers confirmed that the non-availability of embassy officials (for telephone interviews, etc) was a major cause of delay in progressing applications.⁶⁵ No data is collected from embassies on why applications are unsuccessful.⁶⁶

Applicants for Section 4 support face an uphill struggle in accessing support under Regulation 3(2)(a), despite so many causes of delay being beyond their control. The 2014 report of the Asylum Support Appeal Project (ASAP)⁶⁷ examined over 50 Regulation 3(2)(a) asylum support appeals. Over 75% of decisions to discontinue support were overturned or reconsidered, of which over 82% were from the top three nationalities applying under this

⁶¹ Home Office (n 17).

⁶² Apart from those who had been in receipt of support prior to that particular change.

⁶³ Chief Inspector of Borders and Immigration, *An Inspection of the Emergency Travel Document Process: May-September 2013* <<http://icinspector.independent.gov.uk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf>> accessed 6 August 2015.

⁶⁴ *ibid* paras 5.30, 5.24 and 6.5.

⁶⁵ *ibid* para 5.17.

⁶⁶ *ibid* para 5.34.

⁶⁷ Asylum Support Appeals Project (ASAP), ‘The Next Reasonable Step: Recommended Changes to Home Office Policy and Practice for Section 4 Support Granted under Reg 3(2)(a)’ (September 2014) <<http://www.asaproject.org/wp-content/uploads/2014/11/The-Next-Reasonable-Step-September-2014.pdf>> accessed 6 August 2015; ASAP, ‘Unreasonably Destitute?’ (2008) <http://www.asaproject.org/wp-content/uploads/2013/03/unreasonably_destitute.pdf> accessed 6 August 2015.

criterion: Iran, Palestine and Somalia. ASAP's principal recommendations are that applicants should receive tailored advice from the Home Office about what specific steps would genuinely be reasonable in their particular case, and that applicants should not be refused support for not carrying out a 'step' which cannot, in reality, facilitate a return to her country.

The case of *ZA (Kuwait)*,⁶⁸ concerning a claimed Bidoon, shows the wide gap between the 'Hale threshold' and the test under asylum support law, which requires only that the person 'is taking' all reasonable steps and 'is complying' with attempts to document him, at the time of the support application. ZA's asylum claim had previously been dismissed on the basis that it was not believed that he was a Bidoon (a member of an ethnic group to which Kuwait denies citizenship). His Section 4 support was stopped twice on the basis that he was not taking all reasonable steps to return, and each time he won his asylum support appeal. The Court of Appeal eventually dismissed his appeal against the refusal of his fresh claim, largely because the appellant had made no attempt to contact anyone in Kuwait to obtain any supporting evidence. However, it was noted that steps were (finally) being taken by the UK government to establish with the Kuwaiti government what the applicant's status was— maybe an example of the shared burden belatedly at work.

B. Removability, Article 8 and the 'New Rules': The Immigration Act 2014 and the 'Hostile Environment'

1. The New Legal Landscape

The 9 July 2012 introduction of 'new rules' on family migration, deportation and private life, and the new provisions on removal and Article 8 ECHR in the Immigration Act 2014,⁶⁹ have changed the legal landscape with regards to the issue of removability. Chapter 53 of the Enforcement Instructions and Guidance (EIG)⁷⁰ still refers to the need to consider prospects of removal, and still suggests that, in exceptional cases of delay by the Secretary of State, or circumstances beyond an applicant's control, leave may be granted where a child has been in the UK over three years or where an adult without children has been in the UK over six years. However, setting this guidance against the timescales now required in the 'new rules', the factors bearing on Article 8 in the rules, the new Act, recent cases, and the case law on removability, any delay by the Secretary of State, or any circumstances beyond the control of the applicant, would have to be indisputable for an applicant to be granted leave after such a short time.

The case of *Abdullah* made it clear that Article 8 is not engaged simply by its being difficult to return home: there is no positive right 'to live somewhere'. It is important to note that the Court refers to that applicant's having come to the UK, or being here, by their own choice.⁷¹ This case shows how a tribunal finding of fact that an asylum claim was not credible can effectively transform that appellant into someone who was never an asylum-seeker, but always some other kind of migrant; or can determine that their family are definitely still in their home country.

⁶⁸ *ZA (Kuwait)* (n 59).

⁶⁹ Immigration Act 2014 s19, introducing new ss117A-D into the NIAA 2002.

⁷⁰ Home Office, *Enforcement Instructions and Guidance: Chapter 53 Exceptional Circumstances* (Version 16: 11/3/2015).

⁷¹ *Abdullah* (n 40) [19].

However, in *MS, AR and FW*, the Court was in agreement that the circumstances of two of the appellants made it 'not inconceivable' that the 'Hale threshold' might apply, and considered that this could be part of an Article 8 consideration.⁷² I now examine how this might work under the post-2012 'new rules' and the new Immigration Act 2014.

2. Applications under the Rules

For a person unlawfully in the UK to be granted leave under the 'family life with a partner' rule, they must be married, or have lived together for at least two years, and (in addition to the other requirements) they must meet the 'insurmountable obstacles' test of Paras EX.1 and EX.2 of Appendix FM of the rules. Clearly, problems of removability may in practice amount to an 'insurmountable obstacle'. Para EX.2 defines 'insurmountable obstacles' as:

the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and *which could not be overcome* or would entail very serious hardship for the applicant or their partner [my emphasis].

For 'family life as a parent', where the relevant child is not British, the rules require that the child has lived in the UK for at least seven years and that 'it would not be reasonable to expect the child to leave the UK.' Clearly, a claim that an applicant is not removable must form part of any consideration of reasonableness. For a person who is otherwise credible but whose removability problems stem from a 'non-compliant embassy' or Home Office failure to provide relevant assistance, arguably it would not be in the best interests of the child to delay a decision on leave to remain until conclusive proof of non-removability. In other words, a person with a qualifying child under the rules arguably should not be required to meet the 'Hale threshold' conclusively, still less meet the requirements for an application for leave as a stateless person.⁷³

The requirements for an application based on private life are set out in Para 276ADE in Part 7 of the rules. For a person aged 18 years or above, who has not lived continuously in the UK for over 20 years, the rule requires 'very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.' Evidence that he cannot be removed does not fall easily into this framework, but must be relevant. Interestingly, the part of the rule dealing with persons under 18 does not give any room *inside the rule* for considering 'significant obstacles' for those who have not lived in the UK for over seven years. Arguably, applicants either over or under 18 who have been found credible and with evidence of consistently taking 'reasonable steps' should be considered for a grant of leave after the six years' residence mentioned in EIG Chapter 53, rather than the 20 years required under the rule, on the basis that refusal would be disproportionate, or

⁷² *MS, AR & FW* (n 28) [28].

⁷³ The author has a case under judicial review of a refusal of a Nigerian applicant in the UK since 1996 with two children, of whom one is over seven. Her Home Office file revealed Home Office attempts in 2013 to document her at the Nigerian Embassy. There are no issues of national identity—the Home Office holds her three expired passports. The Nigerian Embassy's 2013 reply to the Home Office was that 'the Home Office should look at integrating her into the UK'. The Home Office has taken no further steps, but I do not expect them to accept that she is not removable.

alternatively that continuing to claim an intention to remove such a person would go beyond the 'legitimate aim' of expecting unlawful migrants to leave the UK. Furthermore, the credible, diligent applicant could hardly fall foul of s117B of the Nationality, Immigration and Asylum Act 2002, which, since 2014, says:

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

Giving 'little weight' to that very non-removability would place such an applicant in a catch-22—even though their remaining in the UK cannot be described (as is often stated in refusal letters) as a 'flagrant breach of the immigration laws', nevertheless 'little weight' is to be given to any private life they attempt to enjoy here. Conversely, where an applicant has been found not credible, or has not taken all reasonable steps, a claim not to be removable cannot add any weight to their claim, whether in relation to the requirements of the rule or in any proportionality assessment, unless the applicant can provide cogent new evidence, analogous to the requirements for a fresh claim.

In an application under the rules, the non-removability aspects of such a claim would have to be proved by the applicant to the requisite standard, and, unlike in the statelessness procedure, there is no recourse to a shared burden for establishing the facts.

3. *Removability and Loss of Appeal Rights*

For a foreign national criminal facing deportation, the new Act introduced Section 94B of the NIAA 2002, which provides that an appeal will be heard outside the UK unless the applicant, or a member of his family, would face 'a real risk of serious irreversible harm' if removed before the appeal process is exhausted.⁷⁴ This is an extraordinarily high test, arguably harder to meet than the Article 3 ECHR test of 'real risk of serious harm', and deliberately so, judging by the examples providing in the Home Office guidance.⁷⁵ The Court of Appeal in *Kiarie* has now clarified that the *test* of certifying an appeal to be lodged from outside the UK is simply that the appellant's removal would not breach his human rights: and one *ground* for so deciding would be if there were not a 'real risk of serious irreversible harm'.⁷⁶ A person unable to obtain national documents, who cannot leave the UK, will arguably never reach the appeal stage, unless their claim to not be removable approaches the 'Hale threshold', in which case a judicial review of a failure to grant an in-country right of appeal might succeed.

4. *The 'Hostile Environment' and Removability*

⁷⁴ Nationality, Immigration and Asylum Act 2002 s 94B (3).

⁷⁵ Home Office, *Section 94B Certification Guidance for Non-European Economic Area Deportation Cases* [3.4 and 3.5].

⁷⁶ *R (on the application of Kiarie) v SSHD* [2015] EWCA Civ 1020

Measures introduced in the Immigration Act 2014 include a root-and-branch reform of the removal process, eliminating the need for a further separate 'removal decision' or any right of appeal against the removal itself. The appeals architecture has also been simplified. However, where a person simply cannot be removed, whether forcibly or on a voluntary departure, a simpler removal process will not avail the Home Office. For such a person, the 'hostile environment' measures kick in. The Act prohibits an unlawful migrant from opening or holding a bank account, or holding a driving licence, and those who were enjoying such facilities found their licences quickly revoked and measures taken to close their accounts. The Act contains measures prohibiting an unlawful migrant from renting, or living in, private rented accommodation, and, after piloting this in the West Midlands but not waiting for the result, is to be introduced countrywide in the Immigration Bill, which also includes fast-track evictions and criminal penalties for landlords. Unlawful migrants no longer have access to hospital treatment except in emergencies, and it is becoming more difficult for them to find GPs who will register them. Finally, ostensibly to make it easier to detect sham marriages, all weddings require a longer notice period, and all proposed marriages involving an unlawful migrant will be investigated, risking detention.

Following the May 2015 general election, the government proposed withdrawing appeal rights from all irregular migrants until they have left the UK (whether on a test of 'real risk of serious irreversible harm' or otherwise). This, together with existing and forthcoming features of the 'hostile environment', such as preventing irregular migrants from holding bank accounts or driving licences, living in private rented property or accessing the NHS except in emergencies, will inevitably result in a large and growing 'underclass' of people on or liable to be on temporary admission, and whose only outlook is deepening destitution. Legal case law and casework experience, whether in challenging temporary admission directly, applying for leave as a stateless person, applying for Section 4 support, or simply attempting to assist redocumentation and voluntary return, suggests that the Home Office is reluctant to accept that even those who are credible and whose facts clearly reach the 'Hale threshold' cannot go home. Only in a small proportion of cases does the Home Office provide practical, tailored and effective assistance towards redocumentation.

Consequently, the backlog of arguably unremovable failed asylum-seekers, overstayers and foreign criminals facing deportation will grow.⁷⁷ Paradoxically, those very migrants whom the government most wishes to remove and upon whom the 'hostile environment' bears down heaviest, will be those least able to respond. Those who are destitute and/or working long hours in an exploitative situation will neither have money nor time to carry out the 'reasonable steps'. And for those who have been found not credible, it is objectively difficult to see what 'steps' would be effective, if no new evidence is available. It is already the case that a significant proportion of foreign national criminals, whether in prison or in immigration detention, will not be removable precisely because of their poor credibility, whether generally in relation to their immigration history, or in relation to 'taking reasonable steps' to obtain national documents. Two examples: 'Mustafa', who ten years ago claimed to be from country 'A', has now given a different country of origin B. 'Yassin' originally stated he was from East

⁷⁷ And so will Home Office desperation to deal with it. See Martin Beckford, "'Bounty Hunters' Hired to Track Down Illegal Immigrants", *Telegraph* (London, 18 September 2012); Christopher Hope, 'Home Office's "Go Home" Immigration Vans', *Telegraph* (London, 31 October 2013).

Jerusalem, to which it is effectively impossible for a Palestinian to return, then after several years stated he was from Gaza, and then said he was from Lebanon.⁷⁸ Without evidence, there is no legal or practical solution, not just for the individual, but for the Home Office—who cannot approach any foreign embassy for national documents, nor require an approach to the Red Cross for family tracing—since a negative answer will just be ascribed to the applicant’s lack of credibility.

The situation of this type of applicant raises starkly the likely outcome of the ‘hostile environment’. As described above, failed asylum-seekers claiming not to be removable may apply for Section 4 support if taking reasonable steps to return home. Those in and out of jail for petty crimes (as with ‘Mustafa’ and ‘Yassin’ above), and in fact any irregular migrant on temporary admission, may ‘in truly exceptional circumstances’ apply for accommodation and support under Section 4(1) IAA 1999.⁷⁹ However, neither of these categories of support is intended to last, and they require the repeated taking of ‘reasonable steps’ along with repeated applications and appeals. Currently this, a life on Section 4 support, will be both the worst and best that can happen for someone whose claim not to be removable can never meet the ‘Hale threshold’.

⁷⁸ These changed stories, for both of these clients and many others, arguably arose from their own desperation at not obtaining leave to remain, and they and many such clients now have mental health problems and are unable to cope with life on s4 support.

⁷⁹ Asylum Support Appeals Project Factsheet 16: Section 4(1)(a) & (b), ‘Support for People on Temporary Admission’ <<http://www.asaproject.org/wp-content/uploads/2013/03/Factsheet-17-Section-41a-41b-April-2014.pdf>> accessed 7 December 2015. See also UK Visas and Immigration, *Asylum Support, Section 4 Policy and Process* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438472/asylum_support_section_4_policy_and_process_public_v5.pdf> accessed 7 December 2015.