



Neutral Citation Number: [2020] EWCA Civ 1425

Case No: C4/2018/2539

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HONOURABLE MR JUSTICE CHOUDHURY
[2018] EWHC 2166 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 October 2020

Before:

LADY JUSTICE KING DBE
LORD JUSTICE NEWY
and
LADY JUSTICE ANDREWS DBE

Between:

THE QUEEN (ON THE APPLICATION OF PETERS **Appellant**
BIMBOLA ABIDOYE)
- and -
THE SECRETARY OF STATE FOR THE HOME **Respondent**
DEPARTMENT

Ms Samantha Broadfoot QC and Ms Deborah Revill (instructed by DJ Webb & Co) for the
Appellant

Mr David Manknell (instructed by Government Legal Department) for the Respondent

Hearing date: 7 October 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on the 30th October 2020.

Lady Justice Andrews:

INTRODUCTION

1. This is an appeal against the decision of Choudhury J [2018] EWHC 2166 (Admin) dismissing the appellant's claim for judicial review. The claim challenged three decisions made by the respondent ("the Secretary of State"), namely:
 - i) a decision of 17 August 2017 to issue a deportation order against the appellant on the basis that, having been convicted of a serious criminal offence and sentenced to five years' imprisonment, his presence within the jurisdiction was not conducive to the public good;
 - ii) a decision of 21 October 2017 to detain him under immigration powers with a view to his removal from the jurisdiction; and
 - iii) a decision of 14 November 2017 refusing to recognise his further submissions as a fresh claim under paragraph 353 of the Immigration Rules.

The focus of the challenge was understandably upon the first of these decisions.

2. The issue at the heart of this appeal is whether it was open to the Secretary of State to make a fresh deportation order against the appellant in circumstances where he had successfully appealed to the Upper Tribunal (IAC) against an earlier deportation order based upon the same criminal conviction. The appellant contends that the decision of the Upper Tribunal, promulgated on 20 July 2012, that his removal would be a disproportionate interference with his rights under Article 8 of the European Convention on Human Rights, gave rise to an issue estoppel regarding the lawfulness of his removal. It could not be departed from in the absence of a material change of circumstances, and there has been no such change.
3. Although he accepts that a change in the law is in principle capable of amounting to a material change of circumstances, the appellant contends that the changes in approach to the weighing of the public interest in the removal of foreign criminals against the right to respect for private and family life under Article 8, brought about by the introduction into the Nationality, Immigration and Asylum Act 2002 of Part 5A by section 19 of the Immigration Act 2014, do not justify the Secretary of State making a fresh decision to deport him on essentially the same facts.
4. The appellant faces the major obstacle that in *MA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 1252, ("*MA (Pakistan)*") on facts which are accepted to be indistinguishable in all material respects, a different constitution of this Court held that the changes in the law brought about by the 2014 Act *did* justify the Secretary of State in reviewing the appellant's position and making a fresh order for deportation based on the application of the provisions of Part 5A of the 2002 Act. That decision is binding upon us unless it was decided *per incuriam*. For reasons that will appear, I am not persuaded that it was, and accordingly the appeal must be dismissed.
5. However, in deference to the arguments that were developed before us by Ms Broadfoot QC, who appeared with Ms Revill on behalf of the appellant, and because

the case has a feature that was not present in *MA(Pakistan)* but which is potentially of wider practical importance in the field of immigration, I shall also briefly address those arguments on their merits and explain why, even if the matter had been free from authority, I would have reached the same conclusions as the judge in the Court below.

BACKGROUND

6. For present purposes, the following simplified summary will suffice. The appellant, who was born in 1960, is a Nigerian national who first entered the UK on 9 June 1996. He became an overstayer in March 2000. In May 2004 he married a British citizen of Nigerian background. They remain married, and have three children, who are all British citizens. The eldest child was born in April 2005.
7. On 23 May 2005, the appellant was convicted of conspiracy to defraud. Over a period of two years he had been responsible for providing false documentation to 27 EEA nationals to substantiate their false claims to have been working in the UK, as part of a wider conspiracy to deceive the Home Office into granting them residence documents. The scale of the operation made it a very serious matter. The offence was committed for financial gain. Although the appellant was not the principal organiser, he played an important role in the conspiracy, which the trial judge described as sophisticated, with a high degree of planning. He acknowledged the appellant's previous good character and that he was a family man, but nevertheless passed what he described as a "deterrent sentence" of five years' imprisonment.
8. The appellant used his time in prison well, obtaining various academic qualifications, and becoming a teaching assistant. Upon his release, the probation service described him as a "model prisoner" and assessed him as being at low risk of harm and reconviction. That assessment proved to be accurate. In the many years since his release on licence, he has not reoffended. His two younger children were born in 2008 and 2010 respectively. In order to enable his wife, who is self-employed, to work full-time, he has taken on many of the caring responsibilities for the children.
9. For reasons relating to the date of the appellant's release from custody on licence, this was not a case to which the automatic deportation provisions of the UK Borders Act 2007 applied. The Secretary of State was not legally obliged to make a deportation order against the appellant, but had a discretion to do so under sections 3(5) and 5 of the Immigration Act 1971 if his deportation was deemed to be conducive to the public good. However, nothing turns on this. That discretion was exercised. For reasons that are immaterial to this appeal the initial decision to deport him, taken in February 2007, was successfully appealed. The relevant deportation decision that was challenged in the proceedings culminating in the decision of Upper Tribunal Judge Peter Lane (as he then was) which is said to give rise to an issue estoppel, (hereafter "the 2012 decision") was made on 8 October 2009.
10. A person who is liable to be deported cannot be removed from the jurisdiction if the removal would breach that person's rights under the Convention. However, the existence of such a legal obstacle to removal does not alter the fact that he is a person whose presence is not conducive to the public good. In such circumstances, any deportation order remains valid unless and until it is revoked, and the revocation of the order will not necessarily preclude the Secretary of State from issuing a fresh one.

As Lord Hughes pointed out in *R (George) v Secretary of State for the Home Department* [2014] UKSC 28, [2014] 1 WLR 1831, at [31]:

“... the legal obstacle is not necessarily, or even usually permanent. If it arises from conditions in the individual’s home country, those conditions may change or he may come into favour with the authorities when previously he was not. If it arises from his family connections in the United Kingdom, those may easily change. If someone in his position cannot at present be deported because to do so would infringe his article 8 rights, and if indefinite leave to remain were thereupon to revive, he would remain irremovable if he turned his back on his family or they on him, as may not infrequently occur.”

11. That case, which concerned an individual who was subject to the pre-2007 Act deportation regime, but who (unlike the appellant) had indefinite leave to remain before he committed the relevant criminal offence, makes it plain that the inability to effect removal because of a legal obstacle of this type does not confer upon the individual any immigration status, let alone a vested right to remain in the UK. His position remains precarious, because in future the legal obstacle to his removal may cease to exist. Whilst in many cases the legal obstacle will depend on the underlying facts, there is no reason in principle why it should not be removed by a change in legislation, policy, or both.
12. At the time of the hearing before Judge Lane, the provisions of the 2012 Immigration Rules which, for the first time, introduced guidance on how the balancing exercise under Article 8 should be undertaken, (and specific guidance in relation to how it should be approached in cases concerning the proposed deportation of a foreign criminal), had not yet come into effect. Unlike the further amendments that were made to the Rules in 2014, those provisions did not apply irrespective of when the notice of intention to deport or the deportation order was served.
13. Judge Lane considered the merits of the appeal, as he was obliged to, on the basis of the law and the Immigration Rules that were then in force. He acknowledged that the public interest in deporting someone who had committed an offence of this nature was very strong. However, having had regard to the appellant’s good behaviour in prison, his lack of reoffending and strong family life, he concluded that his removal from the jurisdiction would be a disproportionate interference with his rights under Article 8, because his wife and children would not accompany him to Nigeria. He declined to speculate on whether the outcome would have been the same had the appeal been determined under the 2012 Rules. However, he presciently observed that it was *“necessary to emphasise that my decision in this appeal is not to be taken by the appellant or his family as any permanent adjudication of the appellant’s ability to resist deportation from the United Kingdom”*.
14. Following the 2012 decision, the Secretary of State granted the appellant short periods of discretionary leave to remain for reasons falling outside the Immigration Rules, the last of which expired on 25 May 2014. On 24 May 2014, the appellant sought further leave to remain on Article 8 grounds. Whilst that application was pending, on 28 July 2014, s.19 of the Immigration Act 2014 came into force. The regulation that brought s.19 (and thus Part 5A of the 2002 Act) into force contained no transitional provisions. On the same date, corresponding changes to the 2012 Immigration Rules took effect, but it is unnecessary to consider them separately, since they replicate the

approach mandated by the statute. The version of the Immigration Rules brought into force in 2014 expressly stipulates that the provisions of Part 5A of the 2002 Act (which include sections 117A-117D) apply to all appeals heard on or after 20 July 2014, irrespective of when the application or immigration decision was made.

15. The relevant provisions of the statute and the Immigration Rules are set out in full in Choudhury J's judgment and there is no need to repeat them here. Sections 117A-117D of the 2002 Act provide for a structured approach to the application of Article 8 in the immigration context, which when it is followed produces a final result which is compatible with Article 8. In the case of a foreign criminal who has been sentenced to a period of imprisonment of 4 years or more, s.117C(6) provides that the public interest requires deportation unless there are very compelling circumstances, over and above the two specific exceptions set out in subsections (4) and (5) of s.117C (which replicate those described in the 2014 Immigration Rules).
16. It is therefore insufficient in such a case to establish that the individual has a genuine and subsisting relationship with his wife and children, and that the effect of his deportation on them would be unduly harsh, whereas that might well have been considered enough to preclude his removal in a similar case decided before the changes to the law. The question whether such "very compelling" circumstances exist will depend on the facts of the individual case.
17. The "very compelling circumstances" test was described by Sales LJ in *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803, [2016] 1 WLR 4203 at [50] as:

"a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of Article 8 to remove them."

That passage, and the analysis of the proper approach to s.117C(6) that followed, was specifically endorsed by Sir Stephen Richards (with whom the other members of the Court of Appeal agreed) in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239.
18. The Secretary of State made a fresh decision to deport the appellant on 12 February 2015 and invited him to make further submissions. In response to this, on 11 March 2015 the appellant made a human rights claim. Unfortunately, there was a considerable delay in dealing with that claim, and it was not until 25 February 2016 that the Secretary of State refused it, deciding that the applicant's case did not meet the "very compelling circumstances" test. The appellant's appeal against the refusal of his Article 8 claim was dismissed by the First-tier Tribunal, ("FtT") and a further appeal was dismissed by the Upper Tribunal (Jeremy Baker J and Deputy Upper Tribunal Judge Latter), whose decision was promulgated on 27 July 2017 ("the 2017 decision").
19. The way in which that appeal was presented is of some significance. Before the FtT it was submitted by the appellant's then counsel that the 2012 decision was the starting point for consideration of his appeal. Reliance was placed on the well-known case of *Deevaseelan v Secretary of State for the Home Department* [2002] UKAIT 702.

Counsel relied on the fact that there had been no challenge to the findings of fact made by Judge Lane in the 2012 decision, and no changes in the appellant's family life, save that the relationships had become more entrenched.

20. However, as the FtT judge observed, there had been a change since the 2012 decision, in that there was what she described as “a new statutory landscape” brought about by the introduction of Part 5A of the 2002 Act and the corresponding changes to the Rules. She found that the Secretary of State was entitled to assess the position in the light of the current Rules, notwithstanding the previous grant of discretionary leave.
21. Before the Upper Tribunal, it was submitted that the FtT had been wrong to dismiss the appeal despite the appellant's previous appeal being allowed, the fact he had committed no further offences, and the fact that his family life had strengthened in the period since the hearing in 2012. In the light of the previous decision by the Upper Tribunal and the fact that the appellant had been granted discretionary leave subsequently, it was argued that the Secretary of State must have accepted that there were exceptional circumstances, and it was hard to see what change of circumstances had taken place to justify dismissing the appeal.
22. The Upper Tribunal rejected those arguments, on the basis that even if it were assumed that the Secretary of State had accepted that the appellant's circumstances were exceptional, as required by the Immigration Rules in force at the time when discretionary leave to remain was granted, the fact remained that the Rules were amended with effect from 28 July 2014, requiring the appellant to meet the higher test of showing very compelling circumstances over and above those described in paragraphs 399 and 399A of the Rules. Moreover, the amendments to the 2002 Act came into force on the same date, and s.117C(6) provided that in the case of a foreign criminal who had been sentenced to a period of imprisonment of at least four years, the public interest required deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2, which reflect the provisions of para 399 of the Rules. The FtT judge had not erred in applying the “very compelling circumstances” test. She had taken into account all material considerations, including the favourable 2012 decision, and reached a decision that was properly open to her.
23. Thus the decisions in the FtT and in the Upper Tribunal were both founded on the premise that the changes in the law brought about in July 2014 legally justified the Secretary of State making a different evaluation of the proportionality of the interference with the appellant's (and his family's) Article 8 rights that would be caused by his removal from the UK notwithstanding that there had been no material adverse change in the underlying factual position since the 2012 decision. That is the very premise that is under challenge in the appellant's claim for judicial review.
24. On 17 August 2017, the Secretary of State made a fresh deportation order. On 30 August 2017 permission to appeal to the Court of Appeal was refused by the Upper Tribunal. The appellant did not seek permission to appeal from the Court of Appeal. His appeal rights were exhausted on 3 October 2017 and he was placed in immigration detention on 21 October. In November 2017, through new legal representatives, the appellant raised for the first time the arguments based on issue estoppel and the presumption against retrospective legislation that arise in this appeal. The claim for judicial review was issued on 17 November 2017 and removal

directions were stayed. On 21 December 2017, the appellant was released on immigration bail. Choudhury J's judgment dismissing his claim for judicial review was delivered on 23 March 2018.

THE DECISION IN MA (PAKISTAN)

25. *MA (Pakistan)* was a direct appeal from the decision of the Upper Tribunal dismissing MA's appeal against the decision of the FtT dismissing his appeal on Article 8 grounds against a decision to refuse his human rights claim. MA was sentenced to 4 years' imprisonment for manslaughter in 2006. He was served with a notice of intention to deport him in October 2007. In 2011, he successfully appealed to the FtT against the refusal to revoke that deportation order on Article 8 grounds. In 2012 the Upper Tribunal dismissed the Secretary of State's appeal. MA was then granted discretionary leave to remain, which was subsequently extended, but in 2015 he was notified that the Secretary of State was minded to issue him with a deportation order and invited to make representations. On 9 August 2016, following consideration of those representations, his human rights claim was rejected by the Secretary of State, and the decision to deport him was maintained. The FtT and the Upper Tribunal both dismissed his appeal.
26. The principal ground of appeal to the Court of Appeal was that the second deportation order was unlawful because it was in respect of a conviction that pre-dated the coming into force of Part 5A of the 2002 Act. It was submitted that it was perverse and unlawful for the Secretary of State to take a second decision to rely on MA's deportation as being conducive to the public good, when she had decided not to deport him following the adverse decisions by the FtT and Upper Tribunal in 2011 and 2012.
27. At paragraph 29 of his judgment, Simon LJ records the argument of counsel for MA as being that those decisions in relation to his Article 8 rights were binding on the Secretary of State absent a material change of circumstances. The Secretary of State could not avoid the consequences of those decisions by relying on a change in the law brought about by the coming into force of ss117A-117C of the 2002 Act. Unless there was some new factor which justified making a deportation order, it was unlawful to rely upon the same material that had already been considered and rejected in the 2011 and 2012 Tribunal decisions.
28. Those submissions were rejected. Simon LJ (with whom Lindblom LJ agreed) correctly pointed out that two material questions arise in relation to a decision to deport a foreign criminal. The first is whether the deportation of the offender is conducive to the public good. The second is whether in the circumstances it is open to the Secretary of State to make a deportation order in respect of that offender. The fact that there was a legal obstacle to the deportation of the offender in 2012 did not prevent the Secretary of State from deciding that his conviction rendered his deportation conducive to the public good. The answer to the second question depended on whether a change in the law provided a proper foundation for the decision to order that deportation.
29. Simon LJ then referred to two previous decisions of this Court, *Secretary of State for the Home Department v TB (Jamaica)* [2008] EWCA Civ 977, and *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292, and to the

approach taken by the Upper Tribunal (IAC) in *Secretary of State for the Home Department v Rexha* (s.117C - earlier offences) [2016] UKUT 335 (IAC) which supported the proposition that it did. In *TB(Jamaica)* having held that the Secretary of State was not entitled to disregard a determination made by the Tribunal on a statutory appeal, Stanley Burnton LJ added at [35]:

“of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the decision”.

That dictum, though strictly *obiter*, has been cited and applied in numerous cases since, and it was expressly approved by McCombe LJ in *Ullah v Secretary of State for the Home Department* [2019] EWCA Civ 550, [2019] Imm AR 1011.

30. In *MA (Pakistan)* Simon LJ described as “persuasive” the reasoning of the Upper Tribunal in *Rexha* that because of the changes in the law in 2014, the Secretary of State was not precluded by an earlier tribunal’s findings from relying on a conviction in 2002 which gave rise to a 4-year custodial sentence as part of the overall appraisal of the appropriateness of deportation. He concluded that the changes in the law entitled the Secretary of State to review MA’s position and form a view as to whether the circumstances fell within s.117C(6), and that the Upper Tribunal judge in that case had summarised the position accurately when she said that:

“the changes in the legislation and immigration rules, and the stricter approach to the public interest mentioned by the FtT at [70] were sufficient in themselves to constitute the said change in circumstances.”

31. Ms Broadfoot submitted that the decision in *MA (Pakistan)* conflicted with the approach taken in the earlier decision of this Court in *Harverye v Secretary of State for the Home Department* [2018] EWCA Civ 2848, which does not appear to have been cited in *MA*. No reference was made to that case in the judgments. She submitted that *MA (Pakistan)* was decided *per incuriam* and should not be followed, because it was decided in ignorance of *Harverye* and was inconsistent with it, and because the Court was not directed to and did not consider the principle that in order for a change in the law to deprive an individual of the benefit of a final judgment or ruling in his favour, the statute must clearly evince an intention by Parliament that the change should operate retrospectively and have that effect, see e.g. *Lemm v Mitchell* [1912] AC 400.
32. Ms Broadfoot further submitted that none of the cases relied on by the Court justified the conclusion reached in *MA (Pakistan)* that the change in the law in 2014 sufficed in and of itself to justify a fresh decision on the same facts. She pointed out that in *YM (Uganda)* and *Rexha* the individuals concerned had re-offended, which meant that in each case the second decision was taken on materially different facts and therefore the observations made about the effect of the 2014 Act were *obiter*. She contended that in *TB (Jamaica)* Stanley Burnton LJ had failed to identify the source of his statement that different considerations may apply where there is a change in the law, and that source was not readily apparent.

33. In order to establish that a previous decision was made *per incuriam* it must be shown that the Court reached the decision in ignorance of relevant and crucial provisions of a statute or of a previous decision that was binding upon it, and which, if considered, would have compelled it to reach a different result: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. It is not good enough to show that particular arguments were not raised, or that the provisions that were overlooked were of marginal or contextual relevance: see the helpful commentary on the scope of the principle by Lloyd LJ in *Desnousse v London Borough of Newham and Others* [2006] EWCA Civ 54 particularly at [71] and [76].
34. That is enough to dispose of Ms Broadfoot's subsidiary contention that the Court was not directed to the principle that clear language was needed for a statute to deprive the appellant of the benefit of an earlier decision in his favour, though it appears from the submissions made to the Supreme Court in support of an application for permission to appeal that an argument based on that principle was raised in *MA (Pakistan)*. The argument may not have been put in quite the same way as it was in the present appeal, but that does not matter. In any event, that principle would not have compelled the Court to reach a different conclusion, as there was and is a strong countervailing argument that it is not engaged in these circumstances.
35. It was the alleged inconsistency between *MA(Pakistan)* and *Harverye* which persuaded Singh LJ to re-open the question of permission to appeal in this case and to grant permission following the initial refusal by Longmore LJ. However, upon examination of the judgments it is readily apparent that there is no such inconsistency.
36. *Harverye* concerned a young man, a national of Zimbabwe, who was sentenced to 5 ½ years' detention for causing grievous bodily harm and thus became subject to the automatic deportation regime under the 2007 Act. He successfully appealed against the first decision to deport him on Article 3 grounds, based upon (i) the heightened levels of violence and associated risks during the election period in Zimbabwe and (ii) various factors relating to him, including an absence of funds, which would force him to remain in Harare where that risk was most prevalent. In that decision, the Upper Tribunal judge said that "*if the elections period passes and violence abates and the position is as per CM [the relevant country guidance case] the Secretary of State will be able to reconsider her position. It is the timing and as [counsel] submitted the combination of Mr Harverye's characteristics, that create the real risk at this time.*" A second decision to deport the offender was taken after the identified risk had abated. The FtT allowed his appeal, but the Upper Tribunal (coincidentally the same judge who had made the earlier decision) reversed that decision.
37. The Court of Appeal dismissed the appeal. Irwin LJ gave the leading judgment, with which Hickinbottom LJ and Haddon-Cave LJ agreed. At [32] he recorded the acceptance by both parties that where a decision to deport has been revoked, there is no requirement for a fresh conviction as a foundation for a subsequent decision to deport, see *R(Antonio) v Secretary of State for the Home Department* [2017] 1 WLR 3431, [2017] EWCA Civ 48, but distinguished the situation in the instant case on the basis that in *Antonio* there had been no adjudication by a properly constituted tribunal allowing an appeal. He said, at [35]:

"it is not a proper implication from Antonio that, where an appeal has been allowed, the Secretary of State can simply take a fresh decision to deport, or indeed a fresh

decision, based upon the proposition that a relevant exception preventing the deportation of a foreign criminal no longer applies, absent a material change of circumstances. That would indeed undermine the finality of judgments. Absent a successful further appeal, and absent a material change in circumstances, such a judgment stands.”

However, he went on to decide that there had been a material change in circumstances, because the Upper Tribunal had found that the danger to the offender which had previously created the legal obstacle to his removal no longer existed.

38. The question whether a change in the law, or the specific changes brought about by the 2014 Act, could constitute a material change in circumstances, where there had been no material change to the underlying facts, did not arise for consideration in *Harverye*. In the context of an Article 3 case, where the impugned decision turned upon an evaluation of whether there was a real risk that the appellant would be subjected to torture or inhuman or degrading treatment if he were returned to Zimbabwe, the Court had no reason to consider that question. Indeed, it is difficult to conceive of circumstances in which changes to the law (at least in this jurisdiction) could make a material difference to the approach to be taken or to the outcome in an Article 3 case.
39. Nothing that was said by Irwin LJ can be interpreted as supporting the proposition that the Secretary of State is not entitled to rely on a change in the law in order to make a fresh decision to deport on essentially the same facts. The reasoning of the Court does not compel that conclusion. *Harverye* is simply an example of a situation in which material changes to the factual circumstances would justify the Secretary of State in taking a fresh decision to deport. Had that case been cited to the Court in *MA(Pakistan)*, far from compelling a different result, it would have taken matters no further. Irwin LJ’s reasons were consistent with the observations of Stanley Burnton LJ in *TB (Jamaica)* and add nothing to them.
40. My conclusion that *MA(Pakistan)* was not decided *per incuriam* is fortified by the fact that after Singh LJ granted permission to appeal in the present case, the Supreme Court refused permission to appeal in that case, on an application relying on essentially the same grounds as are raised in this appeal. Ground 1 was that the Court of Appeal erred in holding that the changes to the law entitled the Secretary of State to review the appellant’s position and form a view that the circumstances fell within s.117C(6). It was contended that the earlier determination of the Tribunal was binding, that the new regime could not apply retrospectively, and that “clear words are required to derogate from the principle of legality”. In a supplementary note, specific reliance was placed on the decision in *Harverye*. In its decision refusing permission, the Supreme Court (Lord Hodge, Lord Briggs and Lord Leggatt JJSC) stated that Ground 1 did not raise an arguable error of law.

THE MERITS OF THE APPEAL

41. In the light of the conclusion I have reached that the decision in *MA (Pakistan)* is binding on us, there is no need to consider the arguments advanced by Ms Broadfoot in depth. To the extent that they replicate the arguments that were advanced in *MA (Pakistan)* I respectfully agree with the reasons given by the Court of Appeal in that case for rejecting them.

42. Whilst some time was spent by counsel in debating the question whether the principles of *res judicata* or, more specifically, issue estoppel can apply in immigration proceedings, that issue did not directly arise, because it was common ground that the 2012 decision was binding on the parties unless there was a material change of circumstances.

43. In *Thrasyvoulou v Secretary of State for the Environment* [1992] AC 273 Lord Bridge said that the principles underlying *res judicata* apply in the field of public law as well as in the field of private law. He spoke of a presumption that where a statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right:

“the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the statutory provisions.”

Choudhury J rightly characterised this as a statement of general principle, rather than a definitive rule applicable in all public law cases.

44. In principle, the requirement that there be finality in litigation is as desirable in the context of immigration disputes as in any other type of case. Nevertheless it has been said on a number of occasions in the Upper Tribunal and in this Court that the principles of *res judicata* are not applicable in immigration appeals, or at least that they do not apply with their full rigour: see e.g. *R v Secretary of State for the Home Department ex parte Momin Ali* [1984] 1 WLR 663 per Sir John Donaldson MR at [31], and *Ocampo v Secretary of State for the Home Department* [2006] EWCA Civ 1276 per Auld LJ at [24]-[25]. The reasons were explained by the Deputy President of what was then the Asylum and Immigration Tribunal in *AS and AA (Effect of previous linked determination) Somalia* [2006] UKAIT 00052 at [60]:

“It is sometimes said that there is no rule of res judicata or issue estoppel in immigration appeals. Technically speaking, that must be right. The fact that there has been a previous unsuccessful application and appeal does not prevent an individual from making a new application for relief, whether by way of entry clearance, leave to enter, leave to remain, asylum or non-removal. In in-country asylum and human rights cases, the possibility of a formal issue estoppel is effectively ruled out by the principle that matters have to be decided as they are at the date of the decision, whether administrative or judicial. That date will, ex hypothesi, be different from any consideration of a previous claim.”

45. Those statements are consistent with, and reflected in the principles adumbrated by Lord Hughes in *George*, and by Stanley Burnton J in *TB (Jamaica)* and the earlier cases to which he referred in that judgment, which have been applied subsequently in cases such as *Ullah* and *Harverye*. This line of authority establishes that, though the doctrine of *res judicata* will not apply with its full rigour, the earlier decision will be treated as final and binding on the parties to it unless there is some legal justification for departing from it.

46. Moreover, as *TB (Jamaica)* itself decided, it is not open to the Secretary of State or the individual to raise fresh points that could and should have been raised before the original Tribunal, or on appeal in the proceedings that gave rise to the first decision,

in order to justify such a departure. There must be fresh evidence which meets the *Ladd v Marshall* test, (see *Ullah*) or a material change in circumstances. If those conditions are not met, any attempt by either party to relitigate the same issues may be treated as an abuse of process, and any fresh decision taken by the Secretary of State which is inconsistent with the earlier decision will be susceptible to judicial review. This is mitigated to some extent by paragraph 353 of the Immigration Rules, since further evidence relied upon in support of a “fresh claim” cannot be disregarded by the Secretary of State simply on the basis that it could have been obtained with reasonable diligence prior to the hearing of the original claim before an immigration tribunal. The decision maker does, however, evaluate whether the claim now being put is substantially the same as the claim that has already been determined.

47. The submission at the heart of the appellant’s case that the legislation operates retrospectively, is fundamentally misconceived. So too is the suggestion that the 2012 decision definitively determined the issue that the removal of the appellant would be a disproportionate interference with his (and his family’s) Article 8 rights. The issue before Judge Lane was whether, *at the time when the determination was made*, the Secretary of State’s decision to effect the appellant’s removal was a disproportionate interference with his (and his family’s) Article 8 rights. The appellant had no vested rights in consequence of the 2012 decision. He could not insist that the Secretary of State grant him indefinite leave to remain. As the judge made clear, he was not deciding that the appellant could *never* be lawfully removed.
48. When the appellant appealed against the 2016 decision to deport him, the FtT and the Upper Tribunal were not called upon to decide the same issue as Judge Lane. They were not concerned with the rights or wrongs of the 2009 decision to remove the appellant. The question for them was whether, on the law and policy which was *then* applicable, the appellant’s removal was a disproportionate interference with his (and his family’s) Article 8 rights. The 2014 Act had no impact on the 2012 decision and the Tribunal was not asked to re-open it. It was correctly treated as the starting point, in accordance with the *Deevaseelan* guidelines.
49. As Mr Manknell, on behalf of the Secretary of State, put it, the legislation provides for the future consequences of past events: here, the criminal conviction. As Choudhury J rightly held at [62] of the judgment below, the 2014 Act was not retrospective legislation in the sense that it adversely affected the status of matters that had already occurred. The appellant’s complaint is not really that the legislation is retrospective, but rather that its application to him deprives him of the benefit of the 2012 decision.
50. By the time of the 2017 decision, the Tribunal was obliged to decide the matter on the basis of the Rules and the statutory provisions that were then in force. If for some reason the Secretary of State had not made a decision to deport the appellant in 2009, but waited until after the 2014 Act came into force, and then made a decision to deport him based upon his earlier criminal conviction, he could have had no complaint, even though his family circumstances in 2009 and 2015 would have been exactly the same. The fact that he had previously been successful in resisting removal on Article 8 grounds was plainly something on which he could rely as a factor in the balancing exercise, but the existence of the 2012 decision did not and could not require the Tribunal to disapply the current law, or to apply it in some different way. If the changes had made it easier for the appellant to satisfy the requirements of the

Rules, he would have been able to rely on them to his benefit; the converse is also true.

51. In the course of his judgment, when addressing the extent to which the applicant could rely on the presumption against retrospective legislation, Choudhury J considered whether the application of the legislation to the appellant's case would result in such unfairness that it should not be applied in that way, and concluded that it would not. He observed at [68] that:

“as there was no vested right and as there would not be any great unfairness in the circumstances of this case to apply the 2014 regime to the claimant, the presumption against retrospective legislation may be rebutted.”

52. Ms Broadfoot took issue with that observation. She submitted that it is obvious that where a person obtains a judicial decision, following a contested hearing, that to remove him would breach his Article 8 rights, to move the goalposts after that decision, notwithstanding the lack of any adverse factual change in circumstances, is unfair. I completely understand and empathise with that characterisation of the situation. From a human perspective, one cannot help but feel sympathy for the appellant and his family, upon whom this decision will have a devastating effect.
53. However, Parliament is responsible for formulating immigration policy; it was entitled to make the changes that it did in terms of how Article 8 claims are to be evaluated in this context, and once it had done so, the Secretary of State was entitled to revisit the view she had already formed that the presence of the appellant in the jurisdiction was not conducive to the public good. However harsh the 2015 decision may have been, it was not unlawful. Since the new regime sets the bar higher than the previous regime did, it is bound to operate in some cases in a manner which many would regard as unfair, but that is no reason to disapply it.
54. The point that I believe the learned judge was trying to make, with which I respectfully agree, is that if a statute arguably operates retrospectively to the disadvantage of an individual, from a legal perspective the type of unfairness that must be demonstrated in order to prevent it from being interpreted in that way is something more than just the removal of a temporal advantage conferred upon the individual by a finding made in his favour by a previous immigration tribunal. That is a high hurdle. Unfortunately for the appellant, even if he had been right in characterising the legislation as operating retrospectively, his case would have fallen short of establishing what was necessary to meet that legal test.

THE COLLATERAL ATTACK ON THE 2017 DECISION

55. There is yet another reason why this appeal must fail, which did not arise in *MA (Pakistan)*. This is the aspect of the case to which I referred at the beginning of this judgment as having a wider practical importance in the field of immigration. The appellant has raised arguments in these judicial review proceedings which he could and should have raised before the FtT and the Upper Tribunal on the substantive appeal against the 2016 decision. No good reason has been put forward for the failure to advance them earlier.

56. The way in which the appellant now puts his case undermines the premise upon which the Tribunal decided his human rights appeal (namely, that the Secretary of State was lawfully entitled to rely on the changes to the law in 2014 when making a fresh deportation decision after they came into force) and therefore amounts to a collateral attack upon the 2017 decision.
57. Although the doctrine of *res judicata* may not apply with its full rigour in immigration proceedings, the rule in *Henderson v Henderson* (1843) 3 Hare 100 does preclude an applicant from waiting until his appeal rights are exhausted, and then raising different legal arguments in a claim for judicial review of the same decision that was unsuccessfully appealed, or of a further decision taken to implement or enforce it, in an attempt to delay or prevent his lawful removal from the jurisdiction. Irrespective of the merits of the new arguments, that is an abuse of the process and the message needs to go out that this type of abuse will not be tolerated. The appellant is not entitled to have endless bites of the same cherry.
58. Matters would be different if fresh evidence came to light, or the underlying factual circumstances had changed in a material respect, but that is the sort of scenario that would generally be covered by Rule 353 (and even in a private law context might justify departure from the full rigour of an issue estoppel). In this case, the Secretary of State correctly decided that the test for a fresh claim under that Rule was not met.
59. Ms Broadfoot explained that the appellant had been served with a notice under s.120 of the 2002 Act (in conjunction with the setting of a new removal window) and that document invited him to tell the Secretary of State if he had new reasons for wishing to remain in the United Kingdom or grounds on which he should not be removed from the United Kingdom. However, that was not an invitation to reformulate the arguments that had already been rejected, or to use new legal arguments to attempt to re-argue the merits of the issues that the Tribunal had already determined against him.
60. Ms Broadfoot contended, as Ms Revill had contended before Choudhury J, that there were special circumstances why the rule in *Henderson v Henderson* should not apply. She submitted that this was an Article 8 case, and the United Kingdom would be in breach of its international obligations under the Convention if in fact the removal of the appellant were a disproportionate interference with his and his family's Article 8 rights. However, human rights claims are subject to the same rules of procedure as any other claim, whether raised in a full appeal or by way of judicial review. Once those rights have been finally adjudicated upon by a competent tribunal or Court, there is no reason why an individual in this particular type of case should be able to re-open the issue and run new arguments in circumstances in which another person would not, merely by dint of the fact that Article 8 is engaged. Choudhury J pointed out that any claimant seeking leave to remain based on personal family circumstances would be relying on Article 8.
61. It would undermine the whole of the Tribunal system if litigants relying on Article 8 or other Convention rights were allowed, as a matter of course, to exhaust their rights of appeal and then bring a fresh indirect challenge by way of judicial review raising points that could and should have been argued before the Tribunal.

CONCLUSION

62. For all the above reasons, as well as those articulated in *MA (Pakistan)*, I would dismiss this appeal.

Lord Justice Newey:

63. I agree.

Lady Justice King:

64. I also agree.