



**Upper Tribunal
(Immigration and Asylum Chamber)**

RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC)

THE IMMIGRATION ACTS

Heard at Hill Street, Birmingham
On 17 March 2017

Decision promulgated
On

Before

**THE PRESIDENT, THE HON. MR JUSTICE MCCLOSKEY
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

Between

**RLP
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ANONYMITY

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

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

Representation

For the Appellant: Ms E Rutherford, of Counsel, instructed by Fountain Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

- (i) *The decision of the Upper Tribunal in BAH (EO – Turkey – Liability to Deport) [2012] UKUT 00196 (IAC) belongs to the legal framework prevailing at the time when it was made: it has long been overtaken by the significant statutory and policy developments and reforms effected by the Immigration Act 2014 and the corresponding amendments of the Immigration Rules, coupled with YM (Uganda) [2014] EWCA Civ 1292 at [36] - [39].*
- (ii) *In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR.*

DECISION

Preamble

The provisions of the Nationality, Immigration and Asylum Act 2002 and the Immigration Rules are assembled in Appendix 1 and Appendix 2 to this judgment.

Introduction

1. It is a regrettable truism that from time to time one encounters an appeal which has been in the Tribunal system for an indefensibly lengthy period. Sadly, the present case is a paradigm illustration of this thankfully rare phenomenon. It provides an important reminder of the overarching importance of expeditious justice, the ever present need for robust case management and the avoidance of certain practices which are antithetical to both.

Chronology

2. The chronology speaks for itself:
 - (a) The impugned decision of the Secretary of State, whereby the application of the Appellant for asylum and his human rights claim were refused, in the context of a deportation decision, is dated 04 September 2012.
 - (b) The First-tier Tribunal (the “FtT”) heard the appeal on 09 May 2013 and promulgated their decision some two weeks later. The appeal was dismissed.
 - (c) Prior to the hearing on 09 May 2013, there had been a total of four case management review (“CMR”) hearings conducted by FtT Judges, spanning the period October 2012 to March 2013. On each occasion the decision taken was that the hearing of the appeal should be deferred having regard to ongoing Family Court proceedings involving the Appellant.

- (d) At the fourth of these CMRs the appeal was listed to be heard on 09 May 2013. This hearing did not result in the determination of the appeal. Rather, it yielded a somewhat unorthodox judicial decision purporting to require the Secretary of State to grant the Appellant a period of discretionary leave pending completion of the Family Court proceedings. The FtT has no power to make such an order.
- (e) The Secretary of State appealed against this decision. The Upper Tribunal heard the appeal on 21 August 2013 and, on 27 September 2013, it set aside the decision of the FtT and remitted the appeal to that forum, giving rise to the substantive dismissal of the Appellant's appeal by a decision of the FtT promulgated on 26 November 2013 (*supra*).
- (f) Next, the Appellant's application for permission to appeal, made timeously, was refused by a Judge of the FtT.
- (g) By its decision dated 11 March 2014 the Upper Tribunal granted permission to appeal. Pausing, at this stage the appeal proceedings (in their totality) were of some 18 months' vintage. Regrettably, three further years were to elapse until the listing of the appeal before Deputy Upper Tribunal Judge Mandalia and me.
- (h) The initial listing of the appeal before the Upper Tribunal was on 02 October 2014. The appeal was delisted in somewhat opaque circumstances, one feature of which was that the Appellant and his counsel attended the relevant venue on the scheduled date only to learn of this development.
- (i) The manifestly unjustifiable delay which has characterized this appeal throughout continued. The appeal was not relisted until 30 April 2015. By its decision promulgated on 29 May 2015 the Upper Tribunal set aside the decision of the FtT. The Upper Tribunal did not proceed to remake the decision. No explanation for this is provided in its decision. It directed that the appeal be relisted in the Upper Tribunal "*on the next available date*". It would appear that no proper regard was had to either the Upper Tribunal Practice Directions relating to the remaking of FtT decisions or the vintage of the appeal which, by this stage, was approaching its third anniversary.
- (j) The appeal was next listed in the Upper Tribunal on 07 September 2015. A hearing ensued. However, this did not give rise to a judicial decision. Instead, on 01 October 2015 written directions were issued requiring the parties' representatives to make further written submissions relating to the significance of the decision in Bah (EO-Turkey-Liability to Deport) [2012] UKUT 00196 (IAC) (hereinafter "Bah"). Pausing again, some 1 ½ years later, the appeal remains uncompleted, for reasons which will emerge below.
- (k) Both parties' representatives duly complied with the time limit (29 October 2015) for the provision of further submissions. The terms of the final paragraph of the Upper Tribunal's directions suggest that, following receipt, the appeal

would be decided without further hearing. The next development suggests that an assessment that a further hearing would be convened.

- (l) By further Directions dated 12 November 2015 it was directed that the appeal "... will be set down for oral hearing, **submissions only** on the first available date" and made a further direction regarding possible fresh evidence under Rule 15(2A). [Emphasis added].
- (m) On 15 December 2015 the parties' representatives were notified of a resumed hearing to proceed on 22 January 2016. However, by Notice dated 07 January 2016, the hearing was postponed for reasons which are unclear.
- (n) This was repeated in respect of a rescheduled hearing date of 15 February 2016.
- (o) At this stage, the chronology struggles and staggers on to 14 April 2016 when the appeal was relisted. A hearing ensued. However, once again, this did not yield a decision. Rather, the outcome was a judicially devised and signed "Adjournment and Directions", which included:

"I adjourn this hearing part heard to be relisted before me on the first available date after 07 July 2016."

The reason for this course was recorded as "..... the potential unlawfulness of a decision taken to remove the Appellant under section 10 of the Immigration and Asylum Act 1993 **dated 13 June 2003**" [my emphasis], coupled with a desire on the part of the Secretary of State "to seek further instructions".

- (p) The parties were directed to provide written submissions as to the lawfulness of the June 2003 removal decision and a further hearing was to be reconvened before the same Judge after three months.
 - (q) The Appellant's representatives then made further representations to the Secretary of State.
 - (r) The Secretary of State failed to comply with the aforementioned directions.
3. The appeal was relisted for hearing on 13 October 2016. The decision made on that date records that counsel for the Appellant applied for an adjournment on the ground that (a) the Judge who had adjourned the appeal on 14 April 2016 had directed that it be relisted before them, (b) the Home Office Presenting Officer claimed not to have seen the directions made arising out of the aborted hearing on 14 April 2016 (notwithstanding that they had been pronounced orally in the presence of the parties) and (c) there were ongoing Family Court proceedings relating to the Appellant's daughter (then aged 14) which had given rise to an order dated 24

August 2016 and were progressing to a “contact” hearing listed to be heard on 24 October 2016. The assigned Deputy Judge of the Upper Tribunal stated:

“In these circumstances it is only right and proper that this matter be adjourned.”

and directed that the Upper Tribunal directions of 14 April 2016 “are given full effect.” The Deputy Judge further directed that the relisting would give effect to the convenience of the Appellant’s Counsel.

4. On 17 January 2017 there was a CMR conducted by the medium of telephone. The outcome was the relisting of this appeal for hearing on 17 March 2017.
5. The appeal was eventually relisted before this panel of Judges on 17 March 2017. Significantly, on this occasion there was no suggestion that the hearing should not proceed on the basis that it was retained exclusively by a particular judge.
6. It is necessary to mention some even more distant dates and events. The sole conviction underpinning the Secretary of State’s deportation decision of **September 2012** was a conviction for wounding with intent to do grievous bodily harm dating back to **2001**, generating a 4-year term of imprisonment. This was followed by service of the conventional removal notices on the Appellant, on **13 June 2003**, based on his asserted status of illegal entrant. This gave rise to an appeal, resulting in a decision of the FtT promulgated on 11 September 2003. This decision records that the Secretary of State had **also**, on the same date, decided to refuse to grant the Appellant asylum. This was not a decision on the merits: it was, rather, a decision based on the Appellant’s asserted failure to provide supporting evidence and attend for an interview when requested to do so. The FtT decision of September 2003 records the absence of any conceivable basis for an asylum claim. The only live issue was the Appellant’s case based on Article 8 ECHR. The appeal was dismissed on both asylum and human rights grounds.
7. This was followed by seven years unexplained inertia on the part of the Secretary of State. This somnambulance was disturbed only by a **second** asylum claim made by the Appellant in November 2010. This followed seven years after his unsuccessful appeal to the FtT in **September 2003** against the Secretary of State’s refusal of his first asylum claim. A screening and asylum interview was completed on 30 January 2012. No explanation of the Secretary of State’s failure to interview the Appellant until January 2012 (14 months after his claim) or to determine the Appellant’s second asylum claim until **04 September 2012** has been proffered. At the end of this discrete period of almost two years, the Secretary of State’s decision stated, *inter alia*:

“Your claim is based on your fear of gang violence. These are not reasons for claiming a well-founded fear of persecution under the [Refugee Convention]”

In other words, the claim was quite hopeless. No appeal ensued. Rather, the quite separate decision stimulating the five year appeal documented laboriously above was the Secretary of State's decision to make a deportation order based on the Appellant's conviction of the offence of wounding with intent to cause grievous bodily harm made on 20 September 2001, generating a sentence of four years imprisonment.

8. The completion of this judgment was delayed pending a response by the Appellant's solicitors to the multiple issues raised by the chronology dated in [2] above. That this discrete phase of delay was confined to a handful of days only is attributable to the commendably quick, thorough and comprehensive response which was made. Having considered the further materials thus provided, it is clear that the Appellant's representatives have not been responsible for any of the successive delays noted above.

Lessons

9. The lessons to be learned are the following:
 - (i) Experience has frequently shown that "reserving to self" orders/directions of Upper Tribunal Judges simply do not work efficiently in practice. These are not readily accommodated by this Chamber's work allocation systems and practices.
 - (ii) A part-heard appeal is to be distinguished from one in which a hearing has not taken place at all. That is not to say that there may not be good reason for a "reserve to oneself" order/direction in either case. However, there is a very broad spectrum of part (or incomplete) hearings, many of which do not require a "reserve to self" direction. Where a Judge considers that this course is appropriate, it must always be followed by proactive and assiduous post-direction monitoring.
 - (iii) "First available date" relisting directions are understandable. However, in practice, they rarely deliver efficiency or expedition. Best practice dictates that a concrete rearranged hearing date be specified in directions of this kind.
 - (iv) Strict and rigorous case management timetables are required in every case.
 - (v) A claim by a representative at a resumed hearing, many months later, that previous directions have not been seen might be true: however, it must be vigorously probed, particularly in circumstances where the earlier directions were pronounced orally in the presence of both parties' representatives.
 - (vi) It is entirely unacceptable for a Tribunal to be informed on a hearing date that there are/have been relevant proceedings in some other judicial forum having a possible impact upon the Tribunal proceedings. A failure to proactively and

timeously bring this to the attention of the Tribunal will require a compelling explanation.

- (vii) Tribunals do not conduct rolling appeals. An adjournment of specified and brief proportions may be unavoidable from time to time. However, the guillotine will fall at an appropriate stage as soon as it appears that the overarching values of expedition and finality are being unacceptably threatened, the more so where there are indications of misuse (or abuse) of process.
- (viii) The duty of co-operation with the Tribunal imposed upon representatives by the overriding objective cannot be over - emphasised.

Determining this Appeal

10. It is convenient at this point to reproduce [19] of this Tribunal's rather elderly error of law decision:

"The panel did not take into account in assessing proportionality in respect of Article 8, the respondent's delay of 10 years in issuing the deportation decision after the appellant's conviction on 20 September 2001 in determining proportionality. The panel did not have a discussion as to the consequences of the fact that the appellant claimed asylum in January 2000 and his application was refused on 3 August 2001 and his appeal against that decision was dismissed on 11 September 2003. The appellant reapplied for asylum on 10 November 2010 and his interview did not take place until 30 January 2012. If the panel had taken the respondent's inordinate and unexplained delay into account, they might have possibly reached a different decision."

This sole basis upon which the decision of the FtT was set aside was the Judge's flawed Article 8 proportionality assessment.

11. The most egregious of the multiple incremental discrete periods of delay in the history of this appeal was stimulated by an earlier assessment that further written argument addressing the implications of the Bah decision should be provided. This occurred some 18 months ago. We juxtapose this with a passage in the decision of the FtT which, having recorded that the Secretary of State had ordered the deportation of the Appellant on the "*conducive to the public good*" ground in section 3(5) of the Immigration Act 1971 (in circumstances where the UK Borders Act 2007 did not apply), stated at [21]:

"We are obliged to consider the section 72 Certificate first. Having received a sentence of four years' imprisonment, the Appellant is presumed to be a danger to the community and that [sic] his deportation is conducive to the public good. If it were the case that the Appellant is a danger to the community, it is difficult to see how the public good or public interest is served by waiting for over 10 years before consideration is

given to the issue of deportation. The delay itself suggests that the presumption may not be appropriate or justified in the Appellant's case."

And at [22]:

"The Appellant's offence is a one-off. He has no prior convictions and no subsequent convictions either. This is not a case where the Appellant has spent time seeking to evade deportation or to delay such proceedings. The delays are entirely of the Home Office's own making and there is no explanation for them. The Appellant has kept out of trouble without the threat of deportation hanging over him and so his good behavior cannot be said to have been influenced by the need to make a good impression on that score."

The FtT continued, at [23]:

*"The presumption under section 72 can be rebutted. The Appellant's behaviour against the significant delays, none of his making, in which he has been out of trouble for over 12 years lead us **to find** that the Appellant is not a danger to the community and that the presumption in his case is inappropriate."*

[Our emphasis.]

The FtT continued, at [24]:

*"The presumption is that the Appellant's deportation is in the public interest and under paragraph 398 it is only in exceptional circumstances that the public interest in deportation is outweighed by other factors. **In this case the delays are inordinate, unexplained and entirely the fault only of the Home Office.**"*

[Emphasis added.]

12. At this juncture we must identify the legal framework applicable to the remaking of the decision of the FtT which we hereby undertake. By virtue of the decision in YM (Uganda) [2014] EWCA Civ 1292, we must apply the legal rules currently in force. In this context, we distinguish between legal rules and the Secretary of State's policy. The applicable legal rules are contained in Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). This is reproduced in Appendix 1 to this judgment. The Secretary of State's policy is contained in paragraphs A398, 398, 399 and 399A of the Immigration Rules. These provisions are reproduced in Appendix 2.
13. As noted above, there was earlier consideration of how one aspect of the decision in Bah might impact on the resolution of this appeal. This concerned the exhortation in Bah that the first step in deportation appeals not involving the 2007 Act is to consider whether the Appellant is liable to be deported on the grounds set out by the

Secretary of State, an exercise which normally involves an examination by the Tribunal of:

- (a) whether the material facts alleged by the Secretary of State are accepted and, if not, made out to the civil standard flexibly applied;
- (b) whether on the facts established and viewed as a whole, the conduct, character or associations of the appellant reach such a level of seriousness as to justify a decision to deport; and
- (c) in considering (b), taking into account any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with such policy.

The overtly prescriptive nature of the decision in Bah involves two further steps. First, subject to the outcome of the aforementioned exercise, the Tribunal will then consider any human rights or protection objections to deportation and, finally, will consider whether the “*discretion to deport*” has been exercised in accordance with the applicable immigration rules.

14. The proposition that the decision in Bah was made in the context of a particular legal framework then extant but long superseded seems to us unexceptional. The main constituent elements of such framework were section 3(5) and section 5(1) of the 1971 Act and paragraph 364 of the Immigration Rules. This is not the legal/policy framework applicable to the remaking of the FtT’s decision hereby undertaken by us: see [12] above. The transformation of the legal landscape postdating Bah has been substantial. It has three features in particular. First, the introduction of new primary legislation in the form of Part 5A of the 2002 Act. Second, the repeal of paragraph 364 of the Rules (which took effect on 9 July 2012 coupled with the introduction of the new provisions of the Immigration Rules assembled in Appendix 2, with effect from 28 July 2014. Third, the advent of a series of binding decisions of the Court of Appeal relating to the construction and impact of the new primary legislation provisions and their interplay with the Rules, crowned by the recent decision of the Supreme Court in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 and R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11.
15. Stated succinctly, the decision in Bah was based on a provision of primary legislation and a provision of the Immigration Rules neither of which has any application whatsoever to the exercise of the Upper Tribunal remaking the decision of the FtT. The test enshrined in Bah namely *whether on the facts established viewed as a whole, the conduct, character or associations of the appellant reach such a level of seriousness as to justify a decision to deport* no longer applies. It has been overtaken and extinguished by the significant developments noted above. While we invited Ms Rutherford (representing the Appellant) to formulate a submission to the contrary, she struggled to do so, understandably. The submissions of both representatives were,

unavoidably, directed to the new statutory and policy (ie Rules) regime which we must apply.

16. Next, we would highlight that the main elements of the factual framework to which we shall apply the governing legal rules are largely uncontroversial. We summarize the first elements thereof thus:
 - (a) The Appellant is a citizen of Jamaica, now aged 50 years.
 - (b) His initial presence in the United Kingdom, from April 1997 to December 1999 was lawful, pursuant to visitors and student visas.
 - (c) The Appellant's presence in the United Kingdom has been unlawful since 01 January 2000.
 - (d) He was convicted on 20 September 2001 of wounding with intent to do grievous bodily generating a sentence of four years' imprisonment.
 - (e) The Appellant married a British Citizen on 23 September 2000. He divorced in 2011. There is a child of that relationship and thus the Appellant is the father of a British citizen child now aged 15 years.
 - (f) The previously extant application for contact that was before the Family Court was determined by that Court on 24 October 2016.

17. The factual matrix is augmented as follows. In response to the Tribunal's direction, the Appellant's solicitors have provided, *inter alia*, certain Orders and directions of Family Courts. The most recent Order is dated 24 October 2016. Considered in conjunction with previous Orders and directions, this discloses that the Appellant has had no contact with his daughter during most of her life, neither she nor her mother wishes contact to be established and the only contact permitted by the Court is of the indirect variety by "*letters and cards including gifts twice per year (birthdays and Christmas)*". Furthermore, the Appellant is prohibited from making any further Children Act Application until his daughter leaves school in 2018 without the permission of the Court. This represents the outcome of the third contact application which the Appellant has made since 2011. There is no evidence of anything comparable or, indeed, of any involvement by the Appellant in his daughter's life during the previous nine years, beginning with the year of her birth.

18. The main elements of the period 2002 – 2012 have already been noted. The stand out milestones belonging to this period are:
 - (g) The Secretary of State's decision dated 13 June 2003 to remove the Appellant from the United Kingdom on account of his status of illegal entrant.
 - (ii) The FtT's decision of 11 September 2003 dismissing the Appellant's appeal against refusal of asylum.

- (iii) The Appellant's second application for asylum, dated 10 November 2010.
 - (iv) The deportation notices - evidently stimulated by the asylum application - of 16 September 2011 and 14 February 2012.
 - (v) The asylum interview held on 30 January 2012.
 - (vi) The asylum refusal decision dated 04 September 2012, coupled with an assessment that the deportation of the Appellant would not infringe any of his Convention Rights, consideration having been given to paragraphs 396, 398 and 399A of the Rules, in conjunction with Article 8 ECHR and s55 of the Border, Citizenship & Immigration Act 2009.
19. At this juncture we would highlight another aspect of the "Bah diversion" considered particularly in [13] - [15] above. The belief (or expectation) that the Upper Tribunal, in the context of this appeal, would adjudicate on the lawfulness of the Secretary of State's decision in 2003 to remove the Appellant is evident from everything we have reviewed. It was plainly misconceived. The Upper Tribunal has at no time been seized of any challenge, regular or otherwise, to the 2003 removal decision. That removal decision was the subject of the appeal determined in September 2003. Furthermore, while that decision, now of some 14 years vintage, has at no time been implemented neither the parties' representatives nor the Tribunal have identified any legal rule, statutory or otherwise, suggesting that the 2003 decision has lapsed with the effluxion of time. Absent any such rule, we consider that it remains presumptively lawful, giving effect to the *omnia praesumuntur* principle.
20. Finally, we turn to apply the legal framework to the factual matrix outlined above. As we have made clear, the applicable legal framework is not that in vogue at the time of the Secretary of State's decision or the FtT's determination. Nor is it the legal framework underpinning the decision in Bah. Rather, with the passage of time, the governing legal framework has evolved significantly and now comprises the components set forth in [12] above. This formulation of the legal framework governing the determination of this appeal is dictated by the decision of the Court of Appeal in YM (Uganda) [2014] EWCA Civ 1292 at [36] - [39].
21. We give effect firstly to Part 5A of the 2002 Act, insofar as relevant:
- (i) We begin by acknowledging the public interest in the maintenance of effective immigration controls: section 117B(1).
 - (ii) There is no evidence that the "English speaking" public interest in section 117B(2) is engaged.
 - (iii) There is no evidence that the "*financial independent*" public interest in section 117B(3) is engaged.

- (iv) As regards section 117B(4), the Appellant has been progressively strengthening and expanding his private life in the United Kingdom throughout the entirety of a sojourn which has been unlawful since January 2000. On behalf of the Secretary of State, it was expressly acknowledged that the Appellant's case belongs to the upper level of the "little weight" spectrum: see Kaur (Children's Best Interests/Public Interest Interface) [2017] UKUT 00014 (IAC).
- (v) As regards section 117B(5), the Appellant's immigration status in the United Kingdom has at all times been precarious, dating from his initial entry in April 1997, some 20 years ago. The same "little weight" assessment as above applies.
- (vi) The public interest in the deportation of foreign criminals is acknowledged: section 117C(1).
- (vii) The Appellant's offending belongs to the highest of the categories established by section 117C.
- (viii) The public interest requires the Appellant's deportation unless there are "*very compelling circumstances, over and above those described in Exceptions 1 and 2*": section 117C(6).
- (ix) The Appellant cannot bring his case within the ambit of either Exception 1 or Exception 2.

22. At this juncture we turn to consider the relevant provisions of the Rules, reminding ourselves of the emphasis in Hesham Ali, these have the status of neither statutory provisions nor legal rules of any kind. They are, rather, an expression of the Secretary of State's policy to which substantial weight must be attributed. Paragraphs 398, 399 and 399A are, in a sense, a self-denying ordinance to which the Secretary of State must give effect, subject to and in accordance with established principles of public law, having opted for the mechanism of a published policy in this way. We have reproduced these provisions in Appendix 2 above. In brief compass, these provisions of the Rules yield the following analysis and conclusions in this case:

- (i) Paragraph 398(a) applies, as the sentence of imprisonment was one of four years, with the result that the deportation of the Appellant is presumptive conducive to the public good and in the public interest.
- (ii) Neither paragraph 398(b) nor 398(c) applies.
- (iii) The next question is whether paragraph 399 of 399A applies: this was not, properly, argued and we answer this in the negative in any event.
- (iv) Thus the question becomes, per paragraph 398: is the public interest in deporting the Appellant outweighed by "*other factors where there are very*

compelling circumstances over and above those described in paragraphs 399 and 399A”?

The submission of Ms Rutherford is that this test is satisfied by reason of the extreme delay on the part of the Secretary of State during the period 2002 – 2012, the hallmarks whereof were incompetence and maladministration.

23. We reject this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant’s case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise. We conclude that the Appellant’s case fails to surpass the threshold by some distance.
24. This analysis and conclusion are in no way affected by the findings of the FtT noted in [11] above. The decision of the FtT is locked in the legal time warp in which it was made. The legal landscape within which we remake its decision is the significantly different one which we have outlined.

Decision

25. We remake the decision of the FtT by dismissing the Appellant’s appeal.

Seamus McCloskey

**THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

24 March 2017

APPENDIX 1

Part 5A of the Nationality, Immigration and Asylum Act 2002

117A Application of this Part

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

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

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

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

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

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

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

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

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

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

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

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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

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

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

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

(4) Exception 1 applies where –

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

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

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

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

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

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

117D Interpretation of this Part

(1) In this Part –

“*Article 8*” means Article 8 of the European Convention on Human Rights;

“*qualifying child*” means a person who is under the age of 18 and who –

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

“*qualifying partner*” means a partner who –

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(2) In this Part, “*foreign criminal*” means a person –

(a) who is not a British citizen,

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

(c) who –

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

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

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under –

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.

APPENDIX 2

Immigration Rules

Deportation and Article 8

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A.

This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.