Upper Tribunal
(Immigration and Asylum Chamber)

Zulfiqar ('Foreign criminal'; British citizen) [2020] UKUT 00312 (IAC)

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 5 August 2020	
Heard at Field House	
On 27 August 2020	
	....

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

UPPER TRIBUNAL JUDGE MANDALIA

Between

SAJID ZULFIQAR

(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr S Muquit, Counsel, instructed by Turpin & Miller LLP

For the Respondent: Mr T Lindsay, Senior Presenting Officer

1. The meaning of 'foreign criminal' is not consistent over the Nationality, Immigration and Asylum Act 2002 and the UK Borders Act 2007.

2. Section 32 of the 2007 Act creates a designated class of offender that is a foreign criminal and establishes the consequences of such designation. That is, for the purposes of section 3(5)(a) of the Immigration Act 1971, the deportation of that person is conducive to the public good and the respondent must make a deportation order in respect of that person.

3. A temporal link is established by section 32(1) requiring the foreign offender not to be a British citizen at the date of conviction.

4. Part 5A of the 2002 Act prescribes a domestically refined approach to the public interest considerations which the Tribunal is required to take into account when considering article 8 in a

deportation appeal. Unlike the 2007 Act it is not a statutory change to the power to deport, rather it is a domestic refinement as to the consideration of the public interest question.

5. Part 5A establishes no temporal link to the date of conviction, rather the relevant date for establishing whether an offender is a foreign criminal is the date of the decision subject to the exercise of an appeal on human rights grounds under section 82(1)(b) of the 2002 Act.

6. In such a case, the weight to be given to former British citizenship is case-sensitive.

DECISION AND REASONS

A.

Introduction

1.

Both members of the panel have contributed to this decision.

2.

This is an appeal against a decision of Judge of the First-tier Tribunal Feeney ('the Judge') sent to the parties on 13 November 2019 dismissing the a ppellant's appeal against a decision of the r espondent to refuse an application for leave to remain on human rights (article 8 ECHR) grounds and to deport him to Pakistan.

3.

Designated Judge of the First-tier Tribunal McClure granted permission to appeal on all grounds advanced by the a ppellant by a decision sent to the parties on 11 December 2019.

B.

Remote hearing

4.

The hearing before us was a Skype for Business video conference hearing held during the Covid-19 pandemic. On the first day, 5 August 2020, we were present in a hearing room situated in the Birmingham Civil Justice Centre. The hearing was not concluded on the day and resumed with us sitting at Field House on 27 August 2020. On both occasions the hearing room s and the building s were open to the public. Both hearing s and their start ing time were publicly listed . We were addressed by the representatives in exactly the same way as if we were together in the hearing room. We are satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

5.

The parties agreed that all relevant documents were before us . The video and audio link were connected between the representatives and the Tribunal throughout the hearing. At the conclusion of the hearing both parties confirmed th at the hearing had been completed fairly.

6.

No member of the public attend ed the hearing either remotely or in person. Mr. Muquit confirmed at a preliminary hearing in March 2020 that there was no request f or the appellant to be produced from HMP Norwich to attend the hearing. We accept that the appellant was content to rely upon his representative's attendance before us on his behalf and further accept that the appellant has remained thoroughly engaged in his appeal.

C.

Anonymity

7.

The Judge was not requested to issue an anonymity direction. The applicant requested such direction before this Tribunal relying upon the media coverage of the index offence , murder , at the time of his trial and thereafter, particularly on what are identified by the applicant to be far-right anti-immigrant websites. He further relied upon the impact of publication upon his wife and her two children.

8.

We are mindful of Guidance Note 2013 No 1 concerned with the issuing of an anonymity direction and we observe that the starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: Re: Guardian News & Media Ltd [2010] UKSC 1 , [2010] 2 AC 697. Such revelation has an important practical benefit in ensuring public scrutiny of and confidence in the justice system.

9.

In the present case the appellant's private and family life are interests which must be respected. On the other side, publication of our decision and the accompanying identification of the appellant is a matter of general public interest as it accords with the principle of open justice.

10.

At the hearing on 5 August 2020 we refused the appellant's application for anonymity, concluding that the appellant's concern as to the identification of his wife and her children to the wider public could properly be addressed by the less draconian use of referring to them in this decision by initials. In reaching our decision we observe that p aragraph 18 of the Guidance Note confirms that the identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. We are satisfied that there is no requirement to name either the appellant's wife or her children and we have ensured that no reference is made to where the y reside, the ages of the children or what school they attend.

11.

As for the appellant's concern that publication of his name will present a future risk to him from active members of the far-right, he has failed to demonstrate risks to his life and safety such as to require the principle of open justice and the right to freedom of expression protected by article 10 of the ECHR to be outweighed by his article 8 private life rights. In reaching our conclusion on this issue we are mindful that there is a consistent line of authority emphasising the importance of open justice and the permitting of media reporting of judicial proceedings: Khuja v Times Newspapers Ltd [2017] UKSC 49, [2019] A.C. 161.

D.

The appellant

12.

The appellant is a national of Pakistan and is aged 40 . His father was naturalised as a British citizen in 1973 and his mother in 1981. At the time of the index offence the appellant was a dual national . He held British nationality having been born in this country in 1979 and i s a citizen of Pakistan by descent.

13.
He has resided in the United Kingdom since birth and attended primary and secondary school in this country. Upon leaving school he initially worked with Royal Mail and was then self-employed, operating a car dealership in east London .

14.
Prior to the index offence, the appellant had accumulated 5 previous convictions for 8 offences involving taking a motor vehicle without cons ent , driving a vehicle with no insurance, driving a motor vehicle with excess alcohol , obtaining property by deception and possession of drugs.

Index offence

15.
The index offence, murder, was committed in the company of two other men during the early hours of Sunday 7 November 2004. Following the incident, all three men trav elled from east London to a hotel in Pontefract , West Yorkshire, where they were arrested. The appellant admitted to the police that all three men were planning to leave the country and travel to Pakistan to avoid arrest and prosecution. He further adm itted to having been binge-drinking over the weekend of the index offence.

16.
The appellant was convicted by a jury of murder , having previously pleaded guilty to violent disorder and assault occasioning actual bodily harm. He was sentenced to a mandatory term of life imprisonment with a minimum term of 15 years by HHJ Stephens QC at the Old Bailey on 24 November 2005. He was further sentenced to concurrent sentences of 2 years for violent disorder and 2 years for assault occasioning actual bodily harm. By means of his sentencing remarks, HHJ Stephens QC observed, inter alia :

‘ [The victim] ha d the misfortune to come across the three of you at 4.30 in the morning when he had had a good drink, perfectly legitimately, but was in no position to defend himself. Between you, you pu nched and kicked him to the ground. Between you, you then stamped on his face as he lay helpless on the ground. You stamped on his face so viciously and violently that the front part of his face became detached from his head. Witnesses who were not able to see the incident in full tho ught from what they saw and heard that you were playing football with something.

Quite who did what cannot be established with any certainty, but I am perfectly satisfied that you were all in on this attack together as a team. One witness saw three people kicking and I am sure that all three of you were actively physically participati ng in the attack. Not content with what you did, you le f t Mr. Y dead or dying on the ground.

You then went, as a team, to streets nearby where you damaged cars and other property and brought fear to the neighbourhood . You then went on to an Asian curry house where you assaulted a waiter and did more wilful damage t o property. Then you, Zulfiqar, assaulted a gentleman who just happened to be passing by. ’

17.

HHJ Stephens QC accepted that the murder of Mr. Y was not racially aggravated and observed that there were attacks on people of several races:

‘Between you that morning you attacked people of all races: white, black and Asian. These, in my judgment, were random attacks carried out on people and property who had the misfortune to come across you in your drink- fuelled rampage.’

18.
In imposing the minimum term, HHJ Stephens QC concluded:

‘I consider that it can readily be inferred from what you did to that unfortunate man that you intended to kill him. I accept there was no great premeditation, however all in all I consider that I should look at all that you did on that morning, including events after the murder of Mr. Y, and I have concluded that the appropriate minimum sentence in your case, the minimum term, is 15 years ...'

19.
The appellant was arrested for the index offence in November 2004 , He has remained in custody and latterly immigration detention since this date.

Application for a prison transfer to Pakistan

20.
The appellant applied in October 2008 to be repatriated to Pakistan under the terms of the Prisoner Transfer Agreement (‘the Agreement’) signed by the United Kingdom and Pakistan in August 2007 and in force from August 2008 , save for t hree period s of suspension. The Agreement does not confer on an applicant an automatic right to transfer and the consent of both States is required before transfer can take place. The Ministry of Justice refused the application by a decision authored by Jaso n Ruffy, Cross Border Transfers, and dated 24 June 2010, which details, inter alia :

‘The Secretary of State has considered your application and has determined that it should be refused. The Secretary of State has taken into account that you are a dual national that has both British and Pakistani nationality.

The Pakistani authorities confirmed that under the Pakistani Penal Code 1860 they will enforce a sentence of life imprisonment for murder and you would serve a minimum period of 15 years imprisonment following transfer, after which time your automatic release will be directed by the competent authority in Islamabad. However, the Secretary of State has determined that as a British national you could return to the United Kingdom following your release in Pakistan without sanction or supervision, which in view of the serious nature of your offence is not in the public interest ...'

21.
We understand the core the Ministry of Justice’s concern to be that upon release from a prison in Pakistan, the appellant would not have been subject to the supervision requirements necessary for his life licence in this country as required by section 28(5) of the Crime (Sentences) Act 1997 (‘the 1997 Act’) . Although licences for indeterminate sentence prisoners are prepared by the relevant public protection section of the Ministry of Justice , conditions can only be imposed, varied or cancelled in accordance with the recommendations of the Parole Board: sect ion 31(3) of the 1997 Act. In this matter , we understand the Ministry of Justice to be concerned that as a British citizen the appellant could return to this country upon his release from a prison in Pakistan and in so doing would not be subject to life licence conditions imposed in accordance with recommendations of the Parole Board.

Renunciation of British citizenship

22.
On 3 August 2011 the appellant applied to renounce his British citizenship. The respondent approved the renunciation of 21 October 2011 being satisfied that the appellant also held Pakistani citizenship.

23.
The appellant pursued repatriation but was ultimately unsuccessful . During such time the Agreement was suspended on several occasions: by the United Kingdom in 201 0 [1] and 201 9 and by Pakistan in 2015.

Family life

24.
The appellant's first marriage took place in Pakistan and ended in divorce. The appellant married his second wife , Z , a British citizen, by means of an Islamic ceremony on 5 June 2015 . They had first met in 2003 prior to Z 's first marriage in 2004. Consequent to the appellant's arrest and imprisonment the couple enjoyed limited contact until Z visited the appellant in prison in January 2013 and they commenced their relationship in April of the same year .

25.
Z has two children from her first marriage, both of whom are minors and British citizens . At the time of the hearing before the Judge Z 's first husband had secured a Prohibited Steps Order preventing the children visiting the appellant in prison . We were orally informed by Mr. Muquit that this order has now been set aside consequent to an application made by Z , though he accepted that this was a post-decision event and not a matter relevant to our error of law consideration.

Applications to re sume British citizenship following renunciation

26.
In October 2017, the appellant applied to register to resume British citizenship under section 13 of the British Nationality Act 1981 ('the 1981 Act') . The respondent rejected the application by a decision dated 16 October 2017 detailing, inter alia :

'As your client is unable to register his biometrics at this time his application must be considered invalid and therefore rejected in line with current policy.

I should inform you that even had your client's application been valid, it would have still fallen for refusal as your client is unable to satisfy the Good Character requirement.

'Good Character' is not defined in the British Nationality Act 1981, but applicants are expected to have shown due regard for the laws of this country. In exceptional circumstances, we would disregard a recent conviction for a single, minor offence but normally we would not grant citizenship to a person who has been:

1.
Sentenced to a period of imprisonment of four years or more ...

However, as your client is currently serving a lengthy custodial sentence having been convicted of murder, violent disorder and assault occasioning actual bodily harm, it would not be appropriate to allow discretion in your client's favour.'

27.

The appellant did not challenge the decision rejecting his application.

Deportation proceedings

28.

The appellant initially came to the attention of the respondent following his conviction and on 8 January 2007 a decision was made not to pursue deportation because he was a British citizen. Following his renunciation of British citizenship, the appellant was issued with a notice of decision to make a deportation order under section 32(5) of the UK Borders Act 2007 ('the 2007 Act') in October 2016. The appellant submitted human rights (article 8) representations in November 2016. In October 2017 the appellant applied to resume British citizenship which was refused by the respondent later that month.

29.

The respondent concluded that as the appellant was a British citizen at the time of the offence he could not be considered a foreign criminal under the definition set out by section 32 of the 2007 Act and so deportation was to be pursued under the Immigration Act 1971 ('the 1971 Act'). The appellant was therefore issued with a notice of intention to make a deportation order under section 3(5)(a) of the 1971 Act on 16 January 2018 and he served human rights (article 8) representations upon the respondent on 14 February 2018. The respondent issued her reasons for refusing the appellant's human rights claim by her decision of 3 October 2018, which is subject to this appeal.

30.

Following a decision of the Parole Board the appellant was released on life licence in July 2020 , post the hearing before the Judge, and presently remains in immigration detention.

E.

Relevant statutory provisions

31.

Section 3(5) and (6) of the 1971 Act est ablishes the grounds upon which the respondent may order that a person is to be deported under the Act :

' (5) A person who is not a British citizen is liable to deportation from the United Kingdom if—

(a) the Secretary of State deems his deportation to be conducive to the public good; or

(b) another person to whose family he belongs is or has been ordered to be deported.

(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so. '

32.

Section 5 of the 1971 Act is concerned with the procedure for, and further provisions as to, deportation. Section 5(1) provides:

'(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a

deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.’

33.
Section 32 (1) , (2) and (5) of the 2007 Act confirm:

‘ (1) In this section ‘foreign criminal’ means a person -

(a) who is not a British citizen,

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

(c) to whom Condition 1 or 2 applies

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

....

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ’

34.
As to timing of an automatic deportation order, section 3 4 (1) confirms:

‘(1) Section 32(5) requires a deportation order to be made at a time chosen by the Secretary of State.’

35.
Section 59(4)(d) provides a mechanism as to commencement in relation to section 32:

‘(4) In particular, transitional provision -

...

(d) in the case of an order commencing section 32 -

(i) may provide for the section to apply to persons convicted before the passing of this Act who are in custody at the time of commencement or whose sentence s are suspended at the time of commencement ...'

36.
In so far as is relevant to our considerations as to section 32, the UK Borders Act 2007 (Commencement No. 3 and Transitional Pro visions) Order 2008 S I 2008 No 1818 was made on 8 July 2008 and provides at articles 2 and 3:

‘ **2. Commencement**

The following provisions of the UK Borders Act 2007 shall come into force on 1 August 2008

(a)
the provisions set out in the Schedule to this Order [i.e. sections 32 to 38 inclusive] in respect of a person to whom Condition 1 (within the meaning of section 32 of that Act) applies; and

(b)
section 39 (consequential amendments)

3. Transitional Provision

(1)
Subject to paragraph (2), section 32 applies to the extent to which it is commenced in article 2(a), to persons convicted before the passing of that Act who are in custody at the time of commencement or whose sentences are suspended at the time of commencement.

(2)
Paragraph (1) does not apply to a person who has been served with a notice of decision to make a deportation order under s.5 of the Immigration Act 1971 before 1 August 2008.'

37.
From 28 July 2014 section 19 of the Immigration Act 2014 ('the 2014 Act') was brought into force, amending the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') by introducing a new Part 5A which applies where the Tribunal considers article 8(2). By virtue of section 117A, which addresses the application of Part 5A:

' (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) .'

38.
Section 117B is concerned with the application of the public interest consideration in all article 8 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 .'

39.
Section 117C details additional considerations applicable to 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. '

40.
Section 117D provides the interpretation to Part 5A. Relevant to our considerations are:

'(1) In this Part—

' Article 8 ' means Article 8 of the European Convention on Human Rights;

...

(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. ’

41.
Section 82 of the 2002 Act establishes the statutory basis for a right of appeal to the First-tier Tribunal. Relevant to this appeal is section 82(1)(b):

‘(1) A person (‘P’) may appeal to the Tribunal where -

…

(b) the Secretary of State has decided to refuse a human rights claim made by P, …'

42.
Section 84 of the 2002 Act establishes permitted grounds of appeal, including:

‘(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.’

43.
Section 13 of the 1981 Act provides the mechanism by which a person can resume British citizenship where the renouncing of such citizenship took place on or after 1 January 1983:

‘(1) Subject to subsection (2), a person who has ceased to be a British citizen as a result of a declaration of renunciation shall be entitled, on an application for his registration as a British citizen, to be registered as such a citizen if -

(a) he is of full capacity; and

(b) his renunciation of British citizenship was necessary to enable him to retain or acquire some other citizenship or nationality.

(2) A person shall not be entitled to registration under subsection (1) on more than one occasion.

(3) If a person of full capacity who has ceased to be a British citizen as a result of a declaration of renunciation (for whatever reason made) makes an application for his registration as such a citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen. ’

F.
Decision of the FtT

44.

The hearing came before the Judge sitting at Hendon Magistrates' Court on 1 October 2019. The appellant attended in custody and was represented by Mr. Muquit . The appellant and Z gave oral evidence and were cross-examined.

45.
The appellant contended that in 2008 he was advised that he could be repatriated to a prison in Pakistan to serve the remainder of his custodial sentence under the Arrangement. He stated that his only wish for doing so was because his father had returned to live in Pakistan and his health was deteriorating. He hoped t hat his father would visit him in prison in Pakistan and this would aid his father's mental health. He detailed that in March 2010 the Pakistani authorities had agreed to his transfer, but the United Kingdom authorities subsequently refused the application because he held dual nationality. By his witness statement dated 10 September 2019 the appellant asserted, inter alia :

' 24. On the 18 March 2010 I received confirmation that the Pakistan authorities had agreed for me to be repatriated to Pakistan. I thereafter received correspondence on the 24 June 2010 advis ing me that the Secretary of State [for Justice] had noted that I had dual na tionality and I would need to renounce my British Nationality before the request could be authorised. My priority was my parents, their health was deteriorating and to this day I feel responsible for this, with the stress I had placed upon them. I was informed by Immigration Officers that if I r enounced my nationality it would increase the chances of the application being processed successfully. I asked for this to be confirmed to me in writing, however, this request was not forthcoming. '

...

' 2 6 . I can confirm that I would regularly speak with Jason Ruffy at Cross Borders Transfers in respect of my position in relation to repatriation. I was c learly advised by him that in the event that I was not repatriated within a period of three years, then I would be able to regain my British nationality. I was informed by him that if I was not moved by 2013 then I would not be going anywhere. I was told this in 2011. Jason Ruffy stated that my British citizenship would accordingly be reinstated if I was not sent back. We had a direct number for Jason and would speak to him regularly , however in around 2014 he was no longer contactable, and it is my understanding that he left his employment at Cross Border Agency.'

...

'30. I confirm that I was also of the view that my Pakistani citizenship would expire in 2013 and therefore I would not have any form of nationality and would be statel ess. I recall a conversation with an Immigration Officer, it was either Jason Ruffy or Christopher Binns , that informed me that I would not be left stateless and in any event I would revert back to being a British citizen by default.'

46.
It was not asserted before the Judge that the appellant has lost his Pakistani citizenship leaving him stateless.

47.
The Judge concluded, applying the correct burden and standard of proof, that the appellant was motivated to renounce his British citizenship because he wanted to transfer to Pakistan and serve his sentence in that coun try, enabling him to be close to his father. Further, she was not satisfied that the respondent had misrepresented the position as to registering to resume British citizenship or induced the appellant to believe that his British citizenship would be reinstated.

48.
As to the relevant legal framework, the Judge understood that the respondent had conceded that the appellant was not a foreign criminal for the purposes of Part 13 of the Immigration Rules , at [12] and [16] :

‘ 12. There are detailed provisions within the Immigration Rules Part 13 as to when the respondent will consider that a person’s circumstances are such that the public interest is outweighed. The Rules provide a specific framework as to how applicants with crim i nal convictions should be dealt with. However, the Rules do not remove the respondent’s discretionary power under the 1971 Act. Part 13 of the Immigration Rules only apply to cases involving a foreign criminal and as conceded by the respondent this does not apply to the appellant. However, in accordance with the guidance in NA (Pakistan) v. SSHD and ors [2016] EWCA Civ 662 it is sensible to examine whether the appellant could have succeeded under the Exceptions and then go on to consider whether any compelling circumstances exist as this provides a basis upon which to further consider the proportionality of the respondent’s decision. Section 117B of the 2002 Act provides a list of consider ations mandatory in all appeals concerning article 8 proportionality.’

…

‘16. … I do however bear in mind that the appellant does not come within the framework of the deportation rules and so he does not need to provide evidence of a very strong article 8 claim over and above the circu mstances described in the exceptions to deportation. In fact, the appellant can potentially succeed in a freestanding proportionality assessment in circumstances where his claim may be weaker than the exceptions as only Section 117B applies and not Section 117C .’

49.
As to family life, the Judge found that the appellant enjoyed no parental responsibility for Z ’s children and that it was in the best interests of the children to remain in the United Kingdom and reside with their mother. She further found that the appellant enjoyed a genuine and subsisting relationship with Z , though it was formed after the appellant renounced his British citizenship. She concluded that it would be unduly harsh for Z to relocate to Pakistan but that it would not in the circumstances of this case be unduly harsh for her to remain in this country after the appellant ’s deportation to Pakistan . The Judge observed that Z is in good health and has been able to live her life and raise her children in the absence of the appellant.

50.
The Judge undertook a ‘very compelling circumstances’ consideration of the appellant’s article 8 rights outside of the Immigration Rules , though erroneously reducing the weight to be given to the public interest consequent to her misunderstanding as to the responden t’s concession . She adopted the balance sheet approach recommended by Lord Thomas in Hesham Ali v. Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 W.L.R. 4799 . She concluded that such circumstances did not arise, and so the appellant’s deportation would not be a disproportionate interference with his right to respect for his family and private life.

G.
Issues

51.
The appellant relies upon four grounds of appeal , which are advanced as rationality challenges:

I.
The Judge gave unsustainable and/or inadequate reasons for rejecting the appellant’s assertion that he was induced by the respondent t o renounce his British citizenship and further that his citizenship would resume if he were not repatriated to Pakistan.

II.
The Judge raised a doubt as to the appellant having been informed as to the possibility of being repatriated when this was not a fact in issue.

III.
The Judge ‘downgraded’ the weight to be attributed to the appellant’s family life on the basis that it was formed at a time when he had renounced his citizenship .

IV.
The Judge failed to lawfully consider the factors favourable to the appellant when considering his private life rights, such as his having lived his entire life in this country, his extensive rehabilitation and his not being a continuing risk of perpetrating criminal behaviour.

52.
The respondent filed a rule 24 response and grounds of cross-appeal on 21 February 2020. By means of the document the respondent submitted that the Judge materially misdirected herself in concluding that the appellant is not a foreign criminal as defined in Part 5A of the 2002 Act. As the successful party before the First-tier Tribunal, Mr. Lindsay submitted that the document constituted a rule 24 response, with a cross-appeal in the alternative, placing reliance upon para. 46 of EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC), the material part of which confirms:

‘46. … Rule 24 does not create a right of appeal to a party who has not asked for permission to appeal. Rule 24 is not in any way to do with seeking permission to appeal and it is not an alternative to seeking permission where permission is needed. It is to do with giving notice about how the respondent intends to respond to the appeal that the appellant has permission to pursue. If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal.’

53.
On behalf of the appellant Mr. Muquit accepted that the respondent did not require permission from the Tribunal to advance the contention as to misdirection in this matter, in circumstances where the core of the respondent’s argument advanced by the rule 24 response is that consequent to the findings of fact made the Judge was correct to refuse the appeal, but on an issue which she lost before the Judge. S uch approach i s consistent with section 11(2) of the Tribunals, Courts and Enforcement Act 2007 where a right of appeal is enjoyed by any party only against some aspect of the actual order of the First-tier Tribunal: Secretary of State for the Home Department v. Devani [2020] EWCA Civ 612; [2020] 1 W.L.R. 2613 .

54.
The Tribunal orally confirmed to the parties at a preliminary hearing held at Field House on 10 March 2020 that the respondent did not require permission to advance her argument as to misdirection by means of her rule 24 response . It was not ed that n either party asserted that if there was a n error of law as to the Judge’s self- direction concerning the status of ‘foreign criminal’ that it was material. We confirmed that there was no cross-appeal before us.

H.
Decision on error of law

55.
From the outset we are grateful to Mr. Muquit and Mr. Lindsay for their helpful and thorough written and oral submissions.

Renunciation of British citizenship .

56.
We proceed by considering grounds 1 and 2 together. In a passage of her decision that was subject to considerable forensic examination before us by both parties, the Judge concluded as to the appellant's contention that he had been induced to renounce his British citizenship, at [15]:

'15. It may be helpful at this stage to consider the information I have been given regarding the appellant's decision to renounce his British citizenship. The appellant explains that he was advise d in 2008 that he could apply to be repatriated to a prison in Pakistan. He does not explain who advised him. In 2010 the Pakistani authorities agreed to the repatriation. However, the Secretary of State explained that as the appellant was a British citizen he could not be repatriated. The appellant explained that he was told by Immigration Officers that if he renounced his nationality then it would increase the chances of a successful application. I have not been told who he spoke to or when. The appellant states that he had conversation s with Jason Ruffy at Cross Border Transfers in respect of his position and was assured that his citizenship would revert in the event that he was not transferred. He tells me that Jason Ruffy has since left the department and that SAR's [subject access requests] have not been rep lied to. I have seen limited documentary evidence regarding the discussions the appellant is said to have had regarding the renunciation of his British citizenship. Given the significance of such an event, it is not unreasonable to suppose that he would have taken formal advice from a solicitor about the potential consequences. It is not unreasonable that he would have obtained written confirmation from the Home Office that his citizenship would be reinstated in the event that he was not transferred. He is not someone who is unfamiliar with the importance of obtaining and following legal advice having been involved in legal proceedings, albeit in a different context. It was argued that I should consider proportionality against the backdrop that he was told by officials that his citizenship would be reinstated if he was not transferred to Pakistan. However, on the basis of the evidence available to me I am not satisfied that I can reach that conclusion. I find the appellant made the decision to renounce his citizenship as he wanted to be transferred to Pakistan. I find his decision was motivated by the reasons he set out at paragraph 24 of his witness statement. Based on the information before me I am not satisfied that the respondent misrepresented the position to the appellant or that the respondent led him to believe that his citizenship wo uld be reinstated.

57.
She incorporated this finding into her article 8 assessment :

'27. I do bear in mind he was formerly a British citizen and that does carry substantial weight. Although I reject the claim that he renounced his citizenship on the basis of a misrepresentation, or an inducement made by the respondent as there is insufficient evidence before me to make that finding. I note the Home Office letter dated June 2010 but all this states is that as the appellant is a dual national, he will not be transferred to Pakistan to serve the remain d er of his sen tence as a result.'

58.
We asked the representatives to identify the Home Office letter of June 2010 referred to by the Judge , which we could not locate in the respondent's bundle, nor in the two bundles relied upon by the appellant. We were informed that it was the letter from Mr. R u ffy dated 24 June 2010 referred to at [20] above. That is a letter from the Ministry of Justice and not from the Home Office, as erroneously identified in para . [8(i)] of the Judge's dec ision. We note that although the appellant claims at para. 24 of his statement dated 10 September 2019 that the letter he received dated 24 June 2010 advised hi m that he would need to renounce his British citizenship before the transfer request could be authorised , the l e tter does not set out an y such advice or suggestion.

59.
Mr. Muquit accepted before us that his challenge to th ese paragraph s of the Judge's decision was on rationality grounds.

60.
The appellant complains by means of ground 1 that the Judge erred in not accepting both his evidence and the evidence of Z and other family members as to his having been induced to renounce his British citizenship, and so 'wrongly discounted' a highly material factor mitigating the public interest in the appellant's deportation.

61.
Having considered Mr. Muquit's submissions with care we are satisfied that this challenge is simply a disagreement with the Judge's factual findi ngs. At the outset, we observe that the appellant and Z had little, if any, communication with each other at the time the appellant applied to renounce his British citizenship in August 2011. Z's evidence as to such events is reliant upon information provided to her by the appellant. The appellant further relied upon witness statements from eight family members and two friend s at his hearing , of whom eight refer to the appellant having informed them as to events surrounding his renunciation of his citizenship and to his having being informed that he would regain his citizenship after a period of time. We again observe t hat the witnesses, though well-meaning, are simply repeating information provided by the appellant to them. Save for the appellant, the sole direct evidence on this issue is from Z who details that she maintained regular contact with Mr. Ruffy , said in her witness statement to be 'for [the appellant's] British Nationality to be reinstated' and that during a conversation in August 2013 she was advised that the appellant should apply for his British citizenship to be reinstated. She further detailed that Mr. Ruffy informed her that the Agreement between the United Kingdom and Pakistan had been suspended . We observe that Z does not provide explicit evidence that she was informed by an official that the appellant was entitled to resume his British citizenship if he were not transferred within 3 years, i.e. by 2014. Whilst not expressly addressed within the Judge's decision, we are satisfied that it is implicit that the hearsay evidence presented by family and friends could carry no positive weight in circumstances where it relied solely upon information provided by the appellant and his evidence as having been induced to renounce his British citizenship was not accepted.

62.
In considering ground 2 we observe from the outset that the appellant has erred in fact by mistakenly refer ring to Mr. Ruffy and Mr. Binns as being immigration officers. Following discussion between the representatives before us we understand Mr. Ruffy to be have been employed at the relevant time in the Offender Safety, Rights and Responsibilities Group, Cross Border Transfers, Ministry of Justice and Mr. Binns to have been employed in the Equality, Rights and Decency Group, National Offender Management Service, Ministry of Justice. Neither of these men were agents or servants of the

respondent at the relevant time and were clearly not immigration officers. We note that this mistake as to fact is further identifiable within Mr. Muquit's grounds of appeal where , we accept on instruction, Mr. Ruffy is expressly identified as one of the 'immigration officers' t o whom the appellant spoke . The Judge was reasonably entitled to conclude that the documentary evidence said no more than that the appellant would not be transferred to Pakistan because he was a dual national. We are satisfied that the Ministry of Justice letter of 24 June 2010 is not capable of evidencing the appellant's contention that he was induced to renounce his citizenship upon being informed that it would resume if he were not transferred within a specified period .

63.
The burden was upon the appellant to establish that he was materially influenced by the purported representations when deciding to renounce his British citizenship. Upon carefully considering the Judge's reasoning and the evidence before her we conclude that she adopted an exemplar y approach and gave cogent, lawful reasons for her conclusion that the appellant had not been induced by the respondent, or the United Kingdom authorities, to renounce his British citizenship . On the evidence presented it was lawfully open to her to conclude that the appellant had not met the burden placed upon him and that the sole material influence upon his decision was his desire to act in a manner he considered best for his parents. In all the circumstances, the rationality challenges advanced by grounds 1 and 2 cannot succeed and are dismissed.

Is the appellant a 'foreign criminal' for the purposes of Part 5A of the 2002 Act and Part 13 of the Immigration Rules?

64.
There is a threefold framework to deportation in domestic law. By means of section 5 of the 1971 Act , the respondent enjoys a discretionary power to make a deportation order, and such order may only be on the alternative grounds specified in section 3(5) and (6) of the 1971 Act. Section 32 of the 2007 Act designa tes a particular class of offender as a foreign criminal and sets out the consequences of such designation. The implicit amendment to section 3(5)(a) of the 1971 Act by section 32 of the 2007 Act solely relates to the remov al of the respondent's function of deeming a person's deportation to be conducive to the public good, in the case of a foreign criminal within the meaning of the 2007 Act , and substit uting an automatic deeming provision in such a case: Yussuf (meaning of "liable to deportation") [2018] UKUT 00117 (IAC). The final strand to the framework is the expulsion of persons exercising EU Treaty rights or their family members.

65.
The respondent decided that the appellant's deportation would not breach the United Kingdom's obligations under article 8. The appellant's right of appeal against that decision was exercised under section 82(1)(b) of the 2002 Act in relation to a decision to refuse a human rights claim and the ground of appeal advanced was that the decision was unlawful under section 6 of the Human Rights Act 1998 ('the 1998 Act'): section 84(2) of the 2002 Act.

66.
We initially find that the Judge erred in her understanding that the respondent had made a concession that the appellant was not a 'foreign criminal' and that Part 13 of the Rules did not apply in the appeal before her. Consequent to such misunderstanding she did not plac e the considerations in section 117C into her proportional ity assessment. In terms, the decision letter of 3 October 2018 conceded only that as the appellant was a British citizen at the time of his offence, he could not be considered to be a foreign criminal under the definition set out at section 32 of the 2007 Act . It was for this reason

that deportation was pursued under section 3(5)(a) of the 1971 Act. We note that in her decision letter the respondent proceeded to expressly rely upon Part 13 of the Rules as well as sections 117A-D of the 2002 Act.

67.
Mr. Muquit sought to persuade us that the Judge was ultimately correct to find that the appellant was not a foreign criminal and so Part 5A of the 2002 Act did not apply to him and that Part 13 of the Rules was to be applied as in the case of those who are not foreign criminals in the way adumbrated in Bah (EO (Turkey) - liability to deport) [2012] UKUT 00196 (IAC). He submitted that the temporal quality of a criminal conviction in the definition of foreign criminal under the 2002 Act w as the same as under the 2007 Act thereby establish ing that both statutory provisions should be read as being consistent with each other. At our direction, the parties addressed the automatic deportation provisions under section 32 of the 2007 Act, though we recognise that the decision to deport in this matter was under the 1971 Act .

68.
Before us Mr. Lindsay sought to withdraw the concession made in the decision letter as to the automatic deportation provisions under the 2007 Act not being applicable to the appellant on the basis that he did not meet the requirements of being a foreign cr iminal. As the decision to deport was under the 1971 Act the fact that there was a concession as to automatic deportation is ultimately not relevant to our decision and so it was not a concession that determines the appeal before us. We find that the principles established in AK (Sierra Leone) v. Secretary of Stat e for the Home Department [2016] EWCA Civ 999 are not met and consequently the application to withdraw the concession contained in the respondent’s decision is refused.

69.
We are satisfied that the respondent’s initial concession as to the 2007 Act was correctly made in her decision letter . The provisions introduced by the 2007 Act were a statutory change in deportation powers by which an element of the respondent’s discretion was replaced by an automatic requirement as to deportation. The implied amendment to section 3(5)(a) of the 1971 Act by the 2007 Act established that where someone me ets the requirements to be considered a foreign criminal for the purposes of the Act they are so designated, and their deportation deemed conducive to the public good so that they are subject to automatic deportation, save for the ability to rely upon statutory exceptions to deportation. As confirmed by Aikens LJ in RU (Bangladesh) v. Secretary of State for the Home Department [20 11] EWCA Civ 651; [2011] Imm . A.R. 662, at [34] :

‘34. T he effect of sections 32(1)-(3) of the UKBA must be that if a person meets the conditions which bring him within the definition “foreign criminal”, then his deportation is deemed by statute to be conducive to the public good. I therefore agree with Sedley LJ's statement (when sitting in the Upper Tribunal) in SSHD v MK [[2010] UKUT 281, at 23] that what was in the field of “executive policy” (because it was for the SSHD to decide whether it was conducive to the public good to deport a foreign criminal) has now become “legislative policy”. Parliament has stated that it is conducive to the public good to deport “foreign criminals”. I also agree with Sedley LJ's statement, at [24] in the same Determination, that where a “foreign criminal” challenges a deportation order made by the SSHD under section 32(5) of the UKBA , on the basis that his removal would infringe his ECHR rights and it would be disproportionate to deport him, it is not open to that person to argue that his deportation is not conducive to the public good, nor is it necessary for the SSHD to prove that it is. In such cases it will be so: see the proviso to section 33(7) of the UKBA.’

70.

Mr. Muquit placed reliance upon the judgment of Nicol J in R (Hussein) v. Secretary of State for the Home Department [2009] EWHC 2492 (Admin), [2010] Imm AR 320 and his conclusion that section 32 of the 2007 Act, read in the light of the commencement provision at section 59(4)(d) , must have been in tended to cover individuals who had been convicted in the past as well as those who were convicted after commencement. We note para. [20] of Nicol J's judgment:

'20. The statute does use the present tense in the sections to which Mr Husain drew attention, but in my judgment this will not bear the significance which he attributes to it. Section 59(4)(d) uses the past tense — 'persons convicted before the passing of this Act.' I infer from this that the drafter contemplated that s.32 embraced those who had been convicted at the time of the passing of the Act. Section 59(4)(d) expressly allowed the Secretary of State to make a transitional provision in their case so as to confine the application of s.32 to those who were also in custody on the date of commencement, but section 59 is dealing with the mechanics of commencement. It empowered (but did not oblige) the Secretary of State to make certain transitional provisions. It did not itself set the parameters of automatic deportation. That was done by s.32. Thus section 32, read in the light of s. 59(4)(d), must have been intended to cover those who had in the past been convicted as well as those who were convicted after commencement.'

71.

Section 32 applies prospectively. Importantly, Nicol J observes the qualification of section 59(4)(d) as being confined to a limited temporal exception applied in a manner consistent with the general automatic deportation regime. Such qualification does not dislocate the temporal link of the section to the conviction as established by section 32(1). We cannot read the contrary into the Court of Appeal's approval of Nicol J's judgment in AT (Pakistan) v. Secretary of State for the Home Department [2010] EWCA Civ 567, [2010] Imm . A.R. 675, at [9]-[11] .

72.

In this matter, as the appellant was convicted before the passing of the Act, was in custody at the time of the commencement of section 32 and was not subject to deportation proceedings made under section 5 of the 1971 Act before 1 August 2008 his is a conviction that falls within section 32(1)(b) of th e 2007 Act consequent to the relevant Commencement Order. However, neither section 59(4) nor the relevant Commencement Orders establish a limited temporal exception to the requirement that the appellant not be a British citizen at the time of conviction, and so we are in agreement that the respondent was correct to concede that the appellant is not a foreign criminal for the purpose of the 2007 Act consequent to section 32(1)(a).

73.

We turn to Mr. Muquit's submission that the temporal quality of a criminal conviction in the definition of foreign criminal under the 2002 Act is the same as under the 2007 Act.

74.

Sections 117A to 117D in Part 5A of the 2002 Act set out the correct approach to considering article 8 claims. Section 117A(1) of the 2002 Act sets out how the article 8 provisions are to be applied and is clear in terms. In respect of this appeal the Tribunal is to determine whether the respondent's decision made under the Immigration Acts breaches a person's right to respect for private and family life under article 8, and as a result would be unlawful under section 6 of the 1998 Act.

75.

Section 117A(2) is equally clear in terms: in considering the public interest question, the Tribunal must (in particular) have regard in all cases to the considerations listed in section 117B, and in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

76.
Section 117D sets out the interpretation of sections 117A to 117C. The focus of the parties' submissions upon us were directed to section 117D(2) where the definition of a 'foreign criminal' is set out.

77.
Part 5A prescribes a domestically refined approach to the public interest considerations which the Tribunal is required to take into account when considering article 8 in a deportation appeal. Unlike the 2007 Act it is not a statutory change as to the exercise of power to deport, rather it is a domestic refinement as to the consideration of the public interest. The listed considerations are intended to be applied to a 'decision' made under both the 1971 Act, which applies no temporal link to the date of conviction, and the 2007 Act which does. There is no express confirmation as to the relevant time for the consideration of whether an offender is a foreign criminal, though we observe that the present tense is used at section 117D(2)(a) - 'who is not a British citizen' - and the past tense is used in relation to conviction and sentence at section 117D(2)(b),(c) save for in relation to 'persistent offender' at section 117D(2)(c)(iii) which is in the present tense. We observe at section 117D(2)(b) the phrase '... who has been convicted …' is used. That is a different tense to that concerned with the same issue at section 32(1)(a) of the 2007 Act. We are satisfied that Parliament intended to use different tenses in the two statutes and did so because the provisions are for different purposes. The relevant provisions of the 2007 Act are concerned with the automatic deportation of foreign criminals that have been convicted and sentenced to a period of imprisonment of at least 12 months or convicted of a specified offence and sentenced to a period of imprisonment. The relevant provisions of the 2002 Act are concerned with the public interest question that arise when a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life. We further observe that there is no express confirmation within the definition at section 117D(2) that the offender was not to be British at the date of conviction. We therefore conclude that the Judge erred in not considering the appellant to be a foreign criminal under Part 5A of the 2002 Act.

78.
In SC (paras A398-339D: 'foreign criminal': procedure) Albania [2020] UKUT 187 (IAC) the Tribunal confirmed that paragraph A398 of the Rules governs each of the rules in Part 13 that follows it. The expression 'foreign criminal' in paragraph A398 is to be construed by reference to the definition of that expression in section 117D of the 2002 Act. The Tribunal affirmed the approach in OLO and Others (para 398 - 'foreign criminal') [2016] UKUT 00056. Consequently, as a foreign criminal sentenced to a mandatory term of life imprisonment the appellant fell to be considered under paragraph 398(a) of the Rules and could not be considered under either paragraph s 399 or 399A. He is therefore required to establish very compelling circumstances over and above those describ ed in paragraphs 399 and 399A to establish that the public interest in deportation is outweighed. We conclude that the Judge erred in not considering the appeal under Part 13 of the Rules.

79.
In summary we find as to whether the appellant is a 'foreign criminal' for the purposes of Part 5A of the 2002 Act and Part 13 of the Immigration Rules:

(1)
The meaning of ‘foreign criminal’ is not consistent over the 2002 Act and the 2007 Act.

(2)
Section 32 of the 2007 Act creates a designat ed class of offender that is a foreign criminal and establishes the consequences of such designation. That is, for the purposes of section 3(5)(a) of the 1971 Act, the deportation of that person is conducive to the public good and the respondent must make a deportation order in respect of that person.

(3)
A temporal link is established by section 32(1) requiring the foreign offender not to be a British citizen at the date of conviction.

(4)
Part 5A of the 2002 Act prescribes a domestically refined approach to the public interest considerations which the Tribunal is required to take into account when considering article 8 in a deportation appeal. Unlike the 2007 Act it is not a statutory change to the power to deport, rather it is a domestic refinement as to the consideration of the public interest question.

(5)
Part 5A establishes no temporal link to the date of conviction, rather the relevant date for establishing whether an offender is a foreign criminal is the date of the decision subject to the exercise of an ap peal on human rights grounds under section 82(1)(b) of the 2002 Act.

(6)
Paragraph A398 of the Rules governs each of the rules in Part 13 that follows it. The expression 'foreign criminal' in paragraph A398 is to be construed by reference to the definition of that expression in section 117D of the 2002 Act: SC (paras A398-339D: 'foreign criminal': procedure) Albania .

(7)
At the date of the respondent’s decision in October 2018 the appellant was a foreign criminal as defined in section 117D(2) of the 2002 Act, namely that he ‘i s not a British citizen ’ , ‘ has been convicted in the United Kingdom of an offence ’ and ‘ has been sentenced to a period of imprisonment of at least 12 months . ’ He is therefore a foreign criminal for the purposes of section 117A(2)(b) and section 117C. Consequently, Part 13 of the Rules was applicable .

80.
However, as accepted by both parties, the Judge’s error as to the appellant being a foreign criminal was not material because the nature of his sentence means that he cannot rely upon the statutory Exceptions to the public interest and the Judge proceeded to consider whether very compelling circumstances arose. Though she applied a lesser weight to the public interest than should have been applied under section 117C(6) of the 2002 Act and para. 398 of the Rules, this was to the benefit of the appellant who was still unsuccessful before her. Consequently, we find that the error of law was not material.

Article 8

81.
There are three strands to the appellant’s claim that the Judge erred in her assessment of the article 8 claim before her . First, the appellant claims the Judge ‘downgraded’ the weight to be attributed to

the appellant’s family life on the basis that it was formed at a time when he had renounced his British citizenship. Second, the appellant claims that the Judge failed to consider the factors favourable to the appellant when considering his private life rights, such as his having lived his entire life in this country, his extensive rehabilitation and his not being a continuing risk of perpetrating criminal behaviour. Finally, connected to that second strand, although not immediately apparent from the grounds of appeal , Mr Muquit submits that at para . [28] of her decision , the Judge noted the appellant ‘is a very low risk of reoffending in the future ...', but concluded, at para [34], that the removal of the appellant is proportionate to the legitimate end sought to be achieved, namely the prevention of crime. We deal with each in turn.

Did the Judge downgrade the weight to be attributed to the appellant’s family life ?

82.
The Judge accepted the appellant to be in a genuine and subsisting relationship with Z. At para . [22], she observed that the relationship was formed at a time after the appellant had renounced his citizenship and was a citizen of Pakistan with no status in the United Kingdom.

83.
Mr. Muquit submits the appellant was not to be regarded as being in the United Kingdom ‘unlawfully’ at the time his relationship with his partner began because his residence throughout was either as of right through British citizenship or because he was made to stay by the respondent’s direction, having not been permitted to transfer his custodial sentence to Pakistan. Further, Mr. Muquit seeks to pin the commencement of the relationship to the time they became friends, submitting that at the time the appellant and his wife first met, ‘... their relationship began in general they were both in the UK as British citizens.’ It is said in the appellant’s skeleton argument that at the time the appellant and his partner elevated their relationship , a time when the appellant was no longer a British citizen , his presence in the U nited Kingdom was consequent to the respondent ‘... not seeking to repatriate him and he was not then liable to deportation ...'

84.
The development of the relationship between the appellant and Z is set out in their respecti ve witness statements and as addressed above generally accepted by the Judge. We observe that they were, on the ir own account, friends from the end of 2003 to 2013, with contact over time by means of letter and telephone call . The appellant was married when they first met. Z married in 2004 and became a mother to her two children. Following the appellant’s arrest in November 2004, having known each other for approximately one year, the y did not meet until Z undertook a prison visit to the appellant in January 2013. The appellant had by this time renounced his British citizenship.

85.
The appellant claims that there was no justification in law for the Judge d iluting the weight to be attached to the family life established by him with Z . We note that the Judge’s consideration was undertaken through the mistaken understanding that the respondent had conceded that the appellant was not a foreign criminal , but nevertheless she not ed that it wa s sensible to examine whether the appellant could have succeeded under the Exceptions set out in the statutory framework and to then consider whether there we re any compelling circumstances, as a basis upon which to consider whether deportation of the appellant wa s pr oportionate.

86.
The Judge found that it would be unduly harsh for Z to relocate to Pakistan, at para. [23] of her decision. The Judge further concluded that it would not be unduly harsh for Z to remain in this

country in the absence of the appellant, in circumstances where she has been the primary carer of her children, raising them in the absence of the appellant, and there are no concerns as to her ability to do so . She further noted that Z has financial and emotional support to rely upon when the appellant is in Pakistan and whilst weight was to be placed upon the lack of face to face contact, having weighed all factors no undue harshness arose.

87.
In his grounds of appeal the appellant refers to the decision of the Court of Appeal in CL v. Secretary of State for the Home Department [2019] EWCA Civ 1925 ; [2020] 1 W.L.R. 858 with reference to paras. [50] to [66]. The Court in CL held that a judge was wrong to say that section 117B(4) of the 2002 Act required him to attach little weight to a couple's relationship when that relationship has been entered into at a time when the applicant's immigration status is precarious. There i s no rational basis for requiring family life established with a partner who i s a British citizen by a person whose immigration status i s precarious to be given less weight when there i s no such requirement where the partner i s not a British citizen. Furthermore, the Court held that the Strasbourg Court has made it clear that in striking the balance between the right to respect for family life and the State's interest in controlling immigration, it is necessary to consider the particular circumstances of the individuals concerned including their immigration status and history.

88.
We reject the claim that the Judge di luted the weight to be attached to the family life established by the appellant. Broadly stated, although the appellant and Z had known each other since 2003 and h ad remained in contact with each other despite each of them being married to another person at various times over the years , their relationship developed from a friendship, which had grown closer over time, following the visit by Z to the appellant in prison in January 2013. Both the appellant and Z confirm in their respective witness statements that it was in April 2013 th at they discussed their feelings for each other for the first time, each being previously unaware of the other's personal thoughts on the issue. It is clear that the observation made by the Judge at para . [22] of her decision that the relationship between the appellant and Z was formed at a time after the appellant had renounced his citizenship, a time when he was a citizen of Pakistan who enjoyed no status in the United Kingdom, is properly rooted in the evidence.

89.
Pro perly read the Judge does not say at para s. [22] to [34] of her decision that she attaches little weight to the relationship between the appellant and Z because that relationship was entered into at a time when the immigration status of the appellant was in anyway precarious. Neither does the Judge say that the appellant is to be regarded as being in the U nited Kingdom 'unlawfully' at the time his relationship with his partner began. We were not directed to any paragraph within the findings and conclusions in which the Judge stated that the weight to be attached to the relationship was in any way reduced because of the appellant's status at any point . To the contrary, insofar as the appellant 's status is concerned the Judge expressly states at para . [27] that she has borne in mind that the appellant was formerly a British citizen and 'that does carry substantial weight'.

90.
We conclude that the appellant's challenge on this issue simply amounts to a disagreement with the Judge's conclusion.

91.

Before turning to the remaining grounds of appeal, we have considered the submission made by Mr. Lindsay that the Judge appeared to have taken an overly generous approach in para. [27] of her decision that 'substantial weight' should be attached to the fact the appellant was formerly a British citizen. He submits that the Judge provides no reasons or authority to support the claim that the appellant's status as a former British citizen carries 'substantial weight'. The status of an individual as a British citizen prevents their deportation and so the question regarding the weight to be attached to their status as a British citizen will rarely arise. Where the question does arise because the status as a British citizen has come to an end , in our judgment the weight to be attached to such a factor is entirely fact specific. At one end of the spectrum are those who have British nationality, as here, by birth, and who have spent all of their life in the Un ited Kingdom. The fact that they have lived in the United Kingdom as a British citizen for the majority of their life is a factor to which a Tribunal is entitled to attach 'substantial' or 'significant' weight, but that is not to say it is a factor that will be determinative of the proportionality assessment. At the other end of the spectrum are those who secured British citizenship after arrival in the United Kingdon , lived in this country as a British citizen but it subsequently transpires that the status was obtained, for example, by deception. Undoubtedly, such an individual could not rationally contend that 'substantial' or 'significant' weight attaches to their former status as a British citizen. On the facts here, it was in our jud g ment o pen to the Judge to proceed on the basis that the appellant was formerly a British citizen and had been for over thirty years since birth, and that does carry substantial weight.

Did the Judge fail to consider the factors favourable to the appellant when considering his private life rights?

92.
We reject the claim made by the appellant that the Judge failed to lawfully consider the factors favourable to him when considering his private life rights. The Judge noted, at para . [17], that the appellant was a British citizen at birth. The Judge was satisfied that there was evidence before her of the appellant's social and cultural integration in this country, notwithstanding his offending behaviour. In considering whether there are very significant obstacles to the appellant's integration in Pakistan the Judge also noted, at para . [20], that the appellant has spent very little time in that country.

93.
The Judge further noted at para . [20] that the appellant is likely to be familiar with Pakistani culture and traditions. He has possessed a Pakistani passport and was prepared to be repatriated to Pakistan to serve out the rest of his sentence in a Pakistani prison. She observed that the appellant is of working age, of good health and from his experience of working in this country has acquired transferable skills. She noted that the appellant can speak basic Urdu and would be able to acquire greater fluency in Pakistan together with attendant reading and writing skills. The Judge found that the appellant would be able to secure employment within a reasonable timeframe and it is likely that he does have extended family in Pakistan. The Judge accepted that although it may be disruptive at first, the appellant would be able to integrate in Pakistan at a practical level. She acknowledged there would be a period of adjustment, but for reasons set out in para s. [20] and [21] concluded that there are no very significant obstacles to the appellant's integration in Pakistan.

94.
We observe that in her assessment the Judge did not place into the balance the fact that the appellant's intention consequent to having committed murder was to flee to Pakistan and reside there to avoid arrest and prosecution . It would have been reasonable for her to place adverse reliance upon this fact, but she d id not do so .

95.
The Judge assessed whether there were exceptional circumstances which made refusing the appellant leave to remain in this country disproportionate and hence incompatible with article 8 . We again observe that at para. [27] the Judge confirmed that the appellant having been a former British citizen was a factor that carried substantial weight in the proportionality assessment .

96.
In support of the submission that the appellant's previous status as a British citizen weighs heavily in his favour, Mr. Muquit refers to the decision of the Court of Appeal in CI (Nigeria) v. Secretary of State for the Home Department [2019] EWCA Civ 2027; [2020] Imm . A.R. 503. We observe the factual circumstances that arose in that appeal and the confirmation by t he Court that in deportation appeals judges are to be mindful as to the importance of the particular facts surrounding an individual's presence and length of residence in the United Kingdom and features such as whether the appellant is a settled migrant who has spent almost his whole life in the United Kingdom and grown up with a British social and cultural identity. Leggatt LJ addressed the issue of weight to be given to such history , at [113]:

'113. ... although little weight should generally be given to a private life established when a person was present in the UK unlawfully or without a right of permanent residence, it would not (as the Upper Tribunal judge recognised) be fair to adopt this approach on the particular facts of this case, where the grant of indefinite leave to remain was delayed for many years when CI was a child no good reason and through no fault of his. In determining whether it is compatible with article 8 to deport him from the UK, CI should not in the circumstances have less weight according to the fact that he has spent his childhood and youth in the UK than would be the case if he had had a vested right of residence for most of that period.'

97.
Mr. Muquit further relied upon the decision of the Court of Appeal in Akinyemi v. Secretary of State for the Home Department (No. 2) [2019] EWCA Civ 2098 ; [2020] 1 W.L.R. 1843, in which the Court of Appeal held that the correct approach to the balancing exercise is to recognise that the public interest in the deportation of foreign criminals is a flexible one, and that there w ill be a small number of cases where the individual circumstances reduce the legitimate and strong public interest in removal. In Akinyemi (No. 2) the Court held that the Upper Tribunal attached insufficient weight to the fact that the appellant had been lawfully in the U nited Kingdom for his whole life. At para . [39] of his judgment Sir E rnest Ryder set out the correct approach as to a flexible consideration of the public interest :

'39. ... The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a movable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules ...'

98.
At para . [40] , he observed :

'40. In support of that general proposition, it is necessary to go back to the facts of this case and the court's reasoning in the first appeal. First, one has to be careful to identify as a relevant fact that the appellant was in the UK lawfully for the whole of his life. It was a feature of the first appeal to this

court that the UT had wrongly factored into the balance that his residence was unlawful or at least that it had the character of 'the absence of any lawful leave' (see Akinyemi at [30] and [31]). The conclusion of this court was unequivocal: subject to the deportation provisions of the 1971 Act, the appellant was 'irremovable' because 'he was in breach of no legal obligation by being here' (see Underhill LJ at [35]) .

99.
A t para s. [50] and [51] :

'50. In my judgment there can be no doubt, consistent with the Strasbourg jurisprudence, that the Supreme Court has clearly identified that the strength of the public interest will be affected by factors in the individual case, i.e. it is a flexible or moveable interest not a fixed interest. Lord Reed provides the example at [26] of a person who was born in this country as a relevant factor. Applying this approach to the weight to be given to the public interest in deportation on the facts of this case could lead to a lower weight being attached to the public interest.

51. I am strengthened in my view by the conclusion of the ECtHR in Maslow v Austria (supra), one of the cases relied upon by the Supreme Court in Hesham Ali . In that case, the court said at [74]:

"Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Uner cited above, #55), including those who were born in the host country or moved there in early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there (see Uner , #58 in fine). '

100.
We observe that on several occasions during his submissions Mr. Muquit referred to the appellant as being 'super- Akinyemi ' consequent to his having enjoyed British citizenship from birth to the renunciation of his citizenship in 2011, a period of a little over 32 years. In Akinyemi (No. 2) the appellant was born in this country but had not acquired British nationality automatically due to legislative changes that occurred just before his birth. Despite for many years being entitled to British citizenship, he had never taken steps to acquire it and so remained a Nigerian national by virtue of his birth. Mr. Muquit's submissions w ere based upon the previous enjoyment of British citizenship being of significant weight in the proportionality assessment, though he correctly did not seek to go so far a s to say that it was determinative of the issue.

101.
We remind ourselves that the appellant advances this challenge on a rationality basis. As required the Judge was careful to identify as a relevant factor that the appellant was born British and has lived in the United Kingdom for most of his life as a British citizen. The Judge expressly referred to the appellant being a British citizen at birth when she was considering a private life claim at para . [17] of her decision and at para . [27] she expressly stated that his having been formerly a British citizen carried substantial weight in her proportionality assessment. We are satisfied that she lawfully adopted the approach endor sed by the Court of Appeal in CI (Nigeria) as to the weight to be given to his long enjoyment of Bri tish citizenship, and her assessment was in accordance with that subsequently confirmed in Akinyemi (No. 2) which post-dates her decision.

102.
The substance of the complaint advanced, both in the appellant's skeleton argument and orally before us, is that the Judge erred in not treating the appellant's personal history of British citizenship as a s

tronger, special situation beyond that enjoyed by the appellants in CI (Nigeria) and Akinyemi (No. 2) . The Judge's purported failure was to fail to allocate a 'special' weight to t he depth of the appellant's social and cultural integration , secured through his enjoyment of British citizenship, relative to the public interest. We are satisfied that the J udge did consider such integration when placing as a positive fact for the appellant in the balance sheet approach that he had only ever lived in this country . She did not underestimate the importance of the appellant having enjoyed British citizenship for many years, including his formative ones. Ther e is no requirement to forensically detail each individual inherent factor flowing from the long-term enjoyment of British citizenship in the balance sheet when they are reasonably identified by reference to the appellant having enjoyed such citizenship.

103.
The assessment of an article 8 claim such as this is inevitably fact sensitive, as noted by Leggatt LJ when considering the personal circumstances arising in CI (Nigeria) , at [117]:

'117. The first is the severity of the difficulties and suffering that CI would potentially face if sent to Nigeria. There was a material difference between returning an immigrant to a country with which he retains some social and cultural ties and deporting him to a country to which he has none and which, in the words of CI's sister in this case , 'is as foreign to us as China'. The harshness of such deportation is magnified in the present case to the extent that it could be cruel by the evidence of the devastating impact that it would have upon CI's mental health.'

104.
In this matter, the Judge acknowledged that though the appellant has spent very little time in Pakistan, it is not a country that is entirely unfamiliar to him. She found that the appellant was desirous of being transferred to a prison in Pakistan to enjoy gre ater contact with his father and this motivated his decision to renounce his citizenship. Unlike the appellants in CI (Nigeria) and Akinyemi (No. 2) , the appellant has sought over time to relocate to Pakistan.

105.
In our judgment the Judge undoubtedly considered all relevant matters in the round. The public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly. The Judge had proper regard, inter alia , to the appellant's length of residence in the United Kingdom, the ties that he retains with his family in this country, his immigration and offending history, and his family circumstances. In adopting the balance sheet approach, at paras [32] and [33], the Judge carefully considered the matters that weighed in favour of, and against, the appellant. In addition to his only having ever lived in this country she noted that the appellant is remorseful, has accepted responsibility for his previous convictions and that there is extensive evidence in the appeal bundle as to rehabilitation. The Judge gave s ubstantial weight to the personal ties the appellant enjo ys in this country through his long enjoyment of British citizenship . She also gave appropriate weight to the appellant's ability to establish his life in Pakistan and to integrate into the community . The appellant does not challenge the weight the Judge gave to the murder conviction.

The risk of re-offending

106.
In a paragraph subjected to considerable analysis by the parties before us, the Judge detailed, at [28]:

'28. I do note that the appellant has committed, using the terminology in the skeleton argument, a 'historic' offence. I appreciate that he has been recommended for parole which suggests that he is a

very low risk of reoffending in the future. I accept there is no evidence of any pro-criminal attitudes or that the appellant associates with people involved in criminal activities. I also take note of the extensive evidence of rehabilitation in the appellant's bundle.'

107.
Mr. Muquit informed us that he had not sought to downplay the seriousness of the offence when referring to it as a 'historic' offence in his skeleton argument. It was simply a term used to identify that the conviction had occurred several years before and was not meant to imply that such fact alone diminished the public interest in deportation. We understand that the Judge used the term as meant by Mr. Muquit and nothing more is to be read into it.

108.
Mr. Muquit contended before us that the Judge had accepted, at para . [28], that the appellant is a very low risk of re-offending in the future and sought to place reliance upon it as evidencing a difficulty in reconciling such finding of fact with her conclusion that the appellant's deportation is proportionate to the legitimate end sought to be achieved, namely the prevention of crime.

109.
We reject this submission. Upon a natural reading of the paragraph, the Judge is careful to identify when she is making observations as to the evidence before her - 'note' and 'appreciate' - and when she is making a finding of fact - 'accept'. Our conclusion is reinforced by the Judge not placing a finding that the appellant is a very low risk of reoffending into her structured balance sheet at paras. [32] to [33]. The appellant erroneously seeks to elevate a simple observation made upon the evidence into a finding of fact. We are satisfied that the Judge accepted that there is no evidence of any criminal attitudes or that the appellant associates with people involved in criminal activities.

110.
During his oral submission s , in which he relied upon the Judge having made a finding of fact as to the appellant being a 'very low risk' of future reoffending, Mr. Muquit asserted in the alternative that if the Judge had not made such finding, she had erred in not doing so because it was a weighty matter in favour of the appellant . Whilst permission to appeal had not been granted on this ground, we heard submissions from Mr. Muquit and Mr. Lindsay on the issue .

111.
We firstly observe that the risk of reoffending is one facet of the public interest but, in the case of very serious crimes, it is not the most important facet : OH (Serbia) v. Secretary of State for the Home Department [2008] EWCA Civ 694, [2009] I.N.L.R. 109, at [15(a)] .

112.
Before the Judge were several documents prepared by the Ministry of Justice concerned with the appellant's sentence management, including a parole assessment report , National Offender Management Service (NOMS) report and OASys, all dated October 2016. The appellant further relied upon a psychologist's report dated June 2008, a psychological risk assessment dated 2012, a summary of a sentence planning and review meeting held in 2016 and a considerable number of documents attesting to the completion of offender behaviour work, educati onal study and good behaviour in prison. Evidence was also filed as to the appellant working in the community on day release from prison. We note the Judge's observation that there was extensive evidence of rehabilitation before her.

113.

We observe that nowhere in the documentation before us was the appellant identified as being a ‘very low risk’ of future offending. The Offender Manager’s report identified the risk of reoffending as low, which was consistent with that identified at th e time of the sentence, and the risk of serious harm if the appellant reoffended as medium, which also was consistent with the situation at the time of sentence. Such risk assessment was consistent with OA Sys. Both the Offender Manager’s report and the OASys are dated 2016.

114.
The Judge was entitled to observe that there was evidence before her that was suggestive as to risk, but to implicitly conclude that there was insufficient evidence upon which she could make a finding of fact. Such approach was lawful in circumstances where the evidence as to risk relied upon by the appellant dated from between 2008 and 2016 and when the Parole Board had not yet considered this evidence as well as the evidence prepared for its expert assessment in 2020. We note the observation of Underhill LJ in HA (Iraq) v. Secretary of State for the Home Department [2020] EWCA Civ 1176, at [141] that ‘... tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender …'

115.
Further, we are satisfied that by placing the extensive evidence of rehabilitation in the ‘pro’ column in the structured balance sheet, at para. [33(3)] the Judge was mindful as to a body of evidence before her concerned with the appellant’s risk . By its nature, rehabilitation , or desisting from crime and behaviour leading to crime, is indicative of a reduced risk of re-offending and so such evidence could properly considered as relevant to rehabilitation, rather than requiring an express finding of fact to be made as to ‘risk’ in the community, or future risk , and for such finding to be placed in the balance sheet exercise. To that end, we are satisfied that the Judge adopted the approach confirmed by the Court of Appeal in Danso v. Secretary of State for the Home Department [2015] EWCA Civ 596, at [20].

116.
We are fortified in our decision by the recent consideration of rehabilitation in deportation matters by Underhill LJ in HA (Iraq) , at [134] to [142] and agree that the Judge adopted the approach identified by the Court of Appeal. She identified that the appellant has shown positive evidence of rehabilitation, and thus a reduced risk of re-offending, and included it as a positive factor within the overall proportionality exercise. However, she was not required to give it great weight because the public interest in the deportation or criminals is not based only on the need to protect the public from further offending by the foreign criminal but also on wider policy considerations of deterrence and public concern, which in this matter are rooted in the index offence of murder.

117.
Though the Judge erred in the weight that she gave to the public interest, such error was in the appellant’s favour and he was unsuccessful. The challenge to the Judge’s consideration of the article 8 appeal on rationality grounds cannot succeed. We are satisfied that in the circumstances arising in this appeal the appellant could not succeed under section 117C(6) of the 2002 Act or para. 398 of the Rules as no very compelling circumstances arise to lessen the public interest in his deportation.

I.
Conclusion

118.

It is in our judgment clear from her assessment of the appellant’s article 8 claim that the Judge considered the matter very carefully and had regard to all relevant matters. Having done so, she concluded at para. [34] that the decisio n to deport the appellant on conducive grounds struck a fair balance against the appellant’s rights and interests and those of his wife when weighed against the wider interests of society. She found that deportation was proportionate to the legitimate end sought to be achieved, namely the prevention of crime, and therefore the appellant’s removal in pursuance of a deportation order did not constitute a disproportionate interference with his right to respect for his family and private life. We find that it is clear such decision was properly open to the Judge on the evidence before her and was made following a careful assessment of the appellant’s article 8 claim.

119.
As the Court of Appeal said in Herrera v. Secretary of State for the Home Department [2018] EWCA Civ 412 ; [2018] Imm . A.R. 1033, at [18], it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors. The assessment of such a claim is alway s a highly fact-sensitive task. The Judge was required to consider the evidence as a whole and she plainly did so, giving adequate reasons for her decision. The findings and conclusions reached were neither irrational, as asserted by the appellant, or unreasonable in the Wednesbury sense and it follows that our judgment is that there is no material error of law identifiable in the decision of the First-tier Tribunal and the appeal is dismissed.

J. Notice of decision

120.
The decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

121.
The decision of the First-tier Tribunal, dated 13 November 2019, is upheld and the appeal is dismissed.

Signed : D O’Callaghan

Upper Tribunal Judge O’Callaghan

Date : 11 September 2020

TO THE RESPONDENT

FEE AWARD

The appeal has been dismissed and so there is no fee award.

Signed : D O’Callaghan

Upper Tribunal Judge O’Callaghan

Date : 11 September 2020

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[1] Question for Ministry of Justice UIN 159578, tabled on 2 July 2018