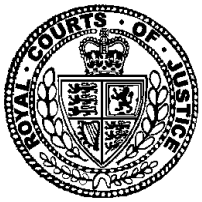

Neutral Citation Number: [2019] EWCA Civ 551

Case No: C5/2017/1184

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
Judge McGeachy
Appeal No HU/07208/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2019

Before :

LORD JUSTICE FLOYD
and
LORD JUSTICE HAMBLEN

- -

Between :

TOLGA BINBUGA	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Christopher Jacobs (instructed by **Ahmed Rahman Carr Solicitors**) for the **Appellant**
Marcus Pilgerstorfer (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date : 19 March 2019

- -

Approved Judgment

Lord Justice Hamblen :

Introduction

1. The Appellant, Mr Tolba Binbuga ("TB"), appeals against the decision of the Upper Tribunal ("UT") of 17 February 2017 which remade the decision of the First Tier Tribunal ("FTT") of 11 April 2016 and dismissed TB's appeal from the decision of the Respondent, the Secretary of State for the Home Department ("SSHD"), of 22 September 2015 which refused his human rights claim and maintained the decision to deport him.

2. The appeal concerns (i) whether TB is a "foreign criminal" as defined in s.117D(2) Nationality, Immigration and Asylum Act 2002 ("NIAA"); (ii) if so, whether Exception 1 in s.117C(4) NIAA applies and (iii) if not, whether the "very compelling circumstances" test is met.

Factual Background

3. TB is a Turkish citizen born on 4 April 1990.

4. TB entered the UK with his father, mother and siblings on 28 September 1999, when he was 9 years old. His family's application for asylum was refused but on 25 June 2004 they were all granted indefinite leave to remain ("ILR").

5. On 17 January 2004, TB received a reprimand for shoplifting (13 years old).

6. On 27 July 2006, TB was convicted at Wood Green Crown Court of robbery, following a guilty plea. He was given a conditional discharge of 18 months (16 years old).

7. On 12 January 2007, the SSHD wrote to TB warning him that deportation may be pursued in the future if he came to adverse notice again.

8. On 9 July 2008, TB received a caution for possession of cannabis (18 years old).

9. On 27 March 2009, TB was convicted at Enfield Magistrates Court of causing criminal damage, fined and ordered to pay compensation and costs (18 years old).

10. On 17 March 2010, the rest of TB's family were granted British citizenship. TB did not make his own application.

11. On 23 August 2013, TB was convicted at Wood Green Crown Court of assault occasioning actual bodily harm, following a not guilty plea. He was sentenced to 4 months imprisonment, suspended for 18 months with an unpaid work requirement of 150 hours (23 years old).

12. On 14 March 2014, TB was convicted at Wood Green Crown Court of burglary and theft (dwelling) and of failing to comply with the requirements of a suspended sentence order, following a guilty plea (23 years old). On 7 August 2014, he was sentenced to 9 months imprisonment for the burglary (with full credit being given for his guilty plea) and to 3 months imprisonment consecutive under his activated suspended sentence order.

13. On 14 November 2014, the SSHD decided to deport TB but the deportation order was revoked on 30 April 2015 following a judicial review challenge.

14. On 5 February 2015, TB was released from prison.

15. On 22 September 2015, the SSHD issued a fresh deportation decision.

16. TB's appeal against the SSHD's decision was heard by FTT Judge Ruth ("the FTJ") on 15 March 2016. By a decision promulgated on 11 April 2016 the appeal was allowed.

17. On 17 November 2016, UT Judge McGeachy ("the UTJ") promulgated an error of law decision, following a hearing on 20 October 2016. There was a final hearing on 26 January 2017. On 17 February 2017, the UTJ promulgated his remaking of the decision, dismissing the appeal from the SSHD's decision.

18. On 19 March 2018, permission to appeal to the Court of Appeal was granted by Arden LJ.

The statutory framework

19. Part 5A NIAA applies where 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 under Article 8 ECHR.

20. In considering the public interest question the court or tribunal must have regard in all cases to the public interest considerations listed in s.117B, and, in cases concerning the deportation of foreign criminals, to the additional considerations set out in s.117C.

21. A foreign criminal for the purposes of Part 5A is defined in s.117D(2) as follows:

> "(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."

22. The additional considerations to which regard must be had in cases involving foreign criminals are as follows:

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

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

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

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

(4) Exception 1 applies where -

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

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

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

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

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

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

The Immigration Rules

23. The relevant Immigration Rules ("IR") applicable at the material time provide as follows:

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

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been

> convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State**,** their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399A. This paragraph applies where paragraph 398(b) or (c) applies if—
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

The SSHD's decision letter

24. The SSHD concluded that TB's deportation was conducive to the public good on the basis that he was a persistent offender. Reliance was placed on paragraphs 398, 399 and 399A of the IR.

25. The SSHD accepted that TB had been resident in the UK for most of his life, but took the view that given his criminality and the lack of evidence of positive contributions, TB had failed to demonstrate that he was socially and culturally integrated into the UK.

26. The SSHD also took the view that there were no very significant obstacles to TB's reintegration into Turkey. He had never resided in Turkey as an adult, but had spent his formative years there, retained familiarity with Turkish customs and language and had family remaining in Turkey.

27. The SSHD considered that TB's criminality outweighed the family considerations in the case and that TB's relationships with his parents and siblings did not go beyond normal family ties and that TB could carry on his relationships from Turkey through modern methods of communication.

The FTT decision

28. The FTJ heard oral evidence from TB, his parents and his brother.

29. The FTJ summarised TB's evidence at [28]-[33], noting as follows:

    (1) TB only speaks Turkish when speaking to his parents. He speaks English to his siblings and all of his friends in the UK.
    (2) TB's only family member in Turkey with whom he is in contact is his grandmother, who is aged 73. He last saw her in 2008 on his only visit to Turkey since arriving in the UK and has not spoken to her since. TB has no friends in Turkey and, apart from when living in prison, has only ever lived with his parents. He is concerned about the effect of his removal to Turkey on his parents and youngest brother.
    (3) TB has committed no offences since October 2013. He feels embarrassed and ashamed of his former behaviour and the effect that it has had on his family, who have been ostracised by others in the Turkish/ Kurdish UK community as a result of his actions. He is no longer associated with those people with whom he committed criminal acts.
    (4) TB regards himself as British, having grown up in the UK. He is unfamiliar with Turkey and Turkish lifestyle. He has lived his entire life in Tottenham, which he regarded as a rough part of London, and has mixed with the wrong people. He is focused on his family now and lives a quiet life with his parents.
    (5) TB acted under pressure from his peer group and stated that he made the biggest mistake of his life in becoming involved with the burglary (index offence). He agreed in cross examination that his family could support him if he went to Turkey. He stated that he would be able to find work in the UK through the Turkish community as a butcher.

30. The FTJ summarised the evidence of TB's brother, mother and father at paragraphs [34]-[39], noting that TB's brother confirmed that the family had been traumatised as a result of TB's actions and that, since he was released from prison, they had spent every single day together and remained close. All witnesses confirmed that TB had changed, was close to his family and did not associate with his former friends.

31. The FTJ found the evidence of TB and his family to be credible. At [81] he stated that:

> " .... I regarded the oral evidence of the appellant and his family members as entirely credible. Their evidence was consistent one with the other, internally consistent, consistent with the documentation presented to me, given most persuasively and was not undermined in any way by the comprehensive cross examination undertaken by the respondent's representative. It was also, in my view, consistent with what one might expect given the family circumstances presented in evidence. I noted also the demeanour of the appellant himself throughout not only his evidence but the evidence of his family members. His evident emotion was clearly not feigned and was, in my judgment, demonstrably in line with the views set out in the probation service report, that he has become remorseful for his previous actions."

32. The FTJ allowed the appeal on three alternative bases:

    (1) TB was not a foreign criminal for the purposes of s.117D NIAA and paragraph 398 of the IR.
    (2) Alternatively, Exception 1 under s.117C NIAA applied as TB had been lawfully resident in the UK for most of his life, was socially and culturally integrated in the UK and there would be very significant obstacles to his integration in Turkey.
    (3) Alternatively, the appeal should be allowed under paragraph 398 of the IR on the basis that there were compelling or exceptional circumstances which would outweigh the public interest in TB's deportation.

The UT decisions

33. In his error of law decision of 17 November 2016, the UTJ held that the FTJ had erred in law in various respects in relation to all three bases of his decision.

34. In his further decision of 17 February 2017, the UTJ remade the decision and dismissed TB's appeal.

The issues on the appeal

35. The grounds of appeal are that the UTJ erred in holding that the FTJ made material errors of law in:

    (1) Holding that TB was not to be categorised as a "persistent offender" for the purpose of s.117D(2) NIAA.
    (2) The consideration of whether TB had been convicted of an offence causing "serious harm" pursuant to s.117D(2) NIAA.
    (3) Deciding that TB was "socially and culturally integrated" in the UK under Exception 1 in s.117C(4) NIAA.
    (4) Relying on TB being a "home grown criminal" when assessing whether he was socially and culturally integrated in the UK and whether there were "very significant obstacles" to his integration in Turkey.
    (5) Holding that TB's status was not "precarious" for the purposes of s. 117B(5) NIAA.
    (6) Finding that TB posed a low rather than medium risk of re-offending.
    (7) Finding that there were very compelling circumstances so as to render TB's deportation a disproportionate interference with his private and family life.

36. TB's case on appeal is that the FTJ made no error of law in his detailed and properly reasoned determination. The UTJ disagreed with the findings that the FTJ made, but erred in characterising those findings as errors of law or findings which the FTJ had not been entitled to reach. As a consequence of this erroneous approach, the UTJ impermissibly remade the findings, effectively substituting his views on the facts for those of the FTJ, who had heard detailed evidence.

Issue (1) – Whether the UTJ erred in holding that the FTJ made a material error of law holding that TB was not to be categorised as a "persistent offender" for the purpose of s.117D(2) NIAA.

37. The FTJ noted that Part 5A NIAA does not define the term "persistent offender" and that there was no relevant judicial authority. He observed that the Oxford English dictionary defines "persistent" as meaning "the course of firmly continuing or obstinately doing something, especially against remonstrances".

38. The FTJ set out TB's criminal convictions and caution during the period from July 2006 to March 2009, following which there was a four year gap. He found that, given this history, TB could not be "fairly described as a persistent offender before 2013". In the light of his convictions in 2013 and 2014 he concluded, however, that by August 2014 he could be so described.

39. The FTJ then considered whether TB remained a persistent offender at the time of the SSHD's decision in September 2015 and the FTT hearing in March 2016 and concluded that he was not. His reasoning was as follows:

> "69. I note that subsections (i) and (ii) include within the definition of a "foreign criminal" a person who has been sentenced to a period of imprisonment for at least 12 months or convicted of an offence which has caused serious harm. It seems to me, in that context, that Parliament would simply have stated that a "foreign criminal" included a person who both "is" and "has been" a persistent offender if the intention was to include reference to periods in the past when the individual had been a persistent offender.
>
> 70. In my judgment, therefore, at the date of the decision and also at the date of the hearing this appellant is not a persistent offender. He was a persistent offender in 2014 because he committed a further offence following the receipt of a suspended sentence in 2013, but the fact that he has committed no further offences since October 2013 leads me to conclude that he is not now such an offender. "

40. Since the FTT decision, guidance as to the meaning of a persistent offender has been provided in the UT decision in *Chege v SSHD* [2016] Imm AR 833, as endorsed by this Court in *SC (Zimbabwe) v SSHD* [2018] 1 WLR 4474. In *SC (Zimbabwe)* the Court at [26] specifically agreed with the following paragraphs from the UT's decision in *Chege* which it said was a sufficient statement of the construction of the phrase for the purpose of the appeal before the Court:

> "50. What, therefore, is the natural meaning of the phrase "persistent offender" in this specific statutory context? It can certainly be said, without unnecessarily straining the natural meaning of the word that an "offender" acquires that status by virtue of committing a crime, and having once offended he does not lose that status even if he never commits another crime. In other words, once an offender, always an offender. The fact that

Parliament has deliberately legislated to remove the concept of spent convictions in this context also lends force to the view that "offender" means someone who has offended in the past however long ago that may have been.

51. However, Parliament did not use the phrase "repeat offender" or "serial offender". It used the phrase "persistent offender", and persistence, by its very nature, requires some continuation of the behaviour concerned, although it need not be continuous or even regular. There may be circumstances in which it would be inappropriate to describe someone with a past history of criminality as being a "persistent offender" even if there was a time when that description would have been an accurate one.

52. Take, for example, the case of an individual who in his youth had committed a series of offences between the ages of 14 and 17 which led to a string of minor convictions, but in adulthood had led a blameless existence for 20 years. Whilst it would be accurate to describe him as an offender, the natural response to the question whether he is now a persistent offender would be no. It would still be no if at the end of that long period of good behaviour he committed another minor criminal offence, even one involving proof of intention or recklessness. That is why, both logically and as a matter of the natural meaning of the language, Mr Malik's proposition that "persistent offender" is a permanent status cannot be correct.

53. Put simply, a "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. Whilst we do not accept Mr Malik's primary submission that a "persistent offender" is a permanent status that can never be lost once it is acquired, we do accept his submission that an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.

54. Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is

> persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time."

41. The Court also said that it agreed "in substance" with the subsequent paragraphs from the decision in *Chege*. These included the following:

> "57. In order to answer the question whether someone is a persistent offender, the decision-maker (be it the Tribunal or the Secretary of State) must consider the whole history of the individual from the commission of the first offence up to the date of the decision and ask themselves whether he can properly be described as someone who keeps on committing criminal offences. Factors to be taken into account will include the overall pattern of offending, the frequency of the offences, their nature, their number, the period or periods over which they are committed, and (where relevant) any reasons underlying the offending, such as an alcohol or drug dependency or association with other criminals. This is in line with the guidance given in the Immigration Directorate Instructions, Chapter 13, version 5.0 (dated 28 July 2014) to which Mr Malik referred, which states that a persistent offender is "a repeat offender who shows a pattern of offending over a period of time". The guidance goes on to say "this can mean a series of offences committed in a fairly short timeframe, or which escalate in seriousness over time, or a long history of minor offences."
>
> 58. If the person concerned has been out of trouble for a significant period or periods within the overall period under consideration, then the length of such periods and the reasons for his keeping out of trouble may be important considerations, though of course the decision maker is entitled to bear in mind that the mere fact that someone has not been convicted for some time does not necessarily signify that he has seen the error of his ways. It may simply mean that he has paused in his offending. It is the overall picture of his behaviour that matters.
>
> 59. If during those periods of apparent good behaviour the person concerned was serving the custodial part of a short sentence, or was too unwell to go out and commit the kinds of offences he is generally prone to commit, there may be an explanation for the hiatus in offending which is not inconsistent with his being properly regarded as a persistent offender. Likewise, it he had a very strong incentive not to commit further offences, such as being subject to a community order, or a

> suspended sentence, or he is on bail, or he has been served with a notice of deportation, the fact that he has committed no further offences during that period may be of little significance in deciding whether, looking at his history as a whole, he fits the description.
>
> 60. On the other hand, we agree with First-tier Tribunal Judge Whalan that an established period of rehabilitation *may* lead properly to the conclusion that an individual is no longer a persistent offender. Depending on the particular facts and circumstances, a former drug addict who has ceased shoplifting to feed his habit after a period in rehabilitation, and who has been out of trouble for a significant period of time thereafter, might not be capable of being termed a "persistent offender" because when his history is looked at in the round, it can no longer be said that he is someone who keeps on offending."

42. The UTJ found that in the light of the guidance provided by *Chege* the FTJ had erred in concluding that TB was no longer a persistent offender by March 2016. He stated as follows:

> "Given that the appellant was in prison until February 2014 and the decision was made eighteen months later, I cannot accept that the conclusions of the Judge were correct. The appellant had committed two crimes in a relatively short period of time. Those crimes should be taken in the context that this was a man who had committed a series of offences at a much younger age. There is nothing to indicate that in such a short period of time he should no longer be considered to be a persistent offender."

43. Mr Jacobs for TB submits that this amounts to no more than a disagreement with the FTJ on the facts and does not amount to an error of law. He says that the FTJ correctly considered the overall picture of TB's offending behaviour and had proper regard to his offending history. As at September 2015 TB had committed no offences since October 2013. This remained the case at the date of the hearing in March 2016. In all the circumstances, the FTJ was entitled to conclude that TB had not persisted in a course of action.

44. Mr Jacobs points out that in *Chege* at [60] it is recognised that a period of rehabilitation may lead to the conclusion that someone is no longer a persistent offender.

45. In this connection Mr Jacobs relies on the findings made by the FTJ later in his decision that TB presents as a reformed character. He stresses, in particular, the findings that TB was remorseful; that there had been a closing of ranks with his family; that this involved an unusually strong connection because of the need to assist TB in his transition to a person who no longer commits crimes, and that he had been rehabilitated by his first experience of custody and was unlikely to commit further offences.

46. In my judgment the UTJ was entitled to conclude that the FJT had made a material error of law in his approach to the issue of whether TB was a persistent offender. In particular:

(1) It is apparent that the FTJ relied on the use of the present tense in the statute: "is" a persistent offender. This led him to focus unduly on the current position rather than the overall picture. As *Chege* and *SC (Zimbabwe)* make clear, a persistent offender is someone who "keeps on breaking the law". An individual may be so regarded even though "he may not have offended for some time". In *Chege*, for example, he was regarded as being a persistent offender, even though he had committed no further offences for two years following release from immigration detention.

(2) The FTJ's erroneous approach is borne out by the fact that he was prepared to regard TB as no longer a persistent offender at the time of the SSHD decision, which was only 7 months after he had been released from prison.

(3) Whilst rehabilitation is a relevant consideration, it is to be noted that *Chege* at [60] refers to "an established period of rehabilitation" and keeping out of trouble "for a significant period of time" which "may" lead to the conclusion that the individual is no longer a persistent offender. In any event, the findings made by the FTJ on rehabilitation were not referred to in relation to his conclusion on this issue. That conclusion was expressly based on "the fact that he has committed no offences since October 2013".

(4) The FTJ was wrong to focus on TB's lack of offending from October 2013. TB was in prison until February 2015 and so any absence in offending in the intervening period could not be said to lead to the conclusion that TB was no longer a persistent offender.

(5) Once TB left prison he would have been on licence for a period of months and throughout was under the threat of deportation. As pointed out in *Chege* at [59], whilst there is a strong incentive not to commit further offences lack of offending may be of little significance "in deciding whether, looking at his history as a whole, he fits the description". Again, this was not a factor taken into account by the FTJ.

(6) In considering the overall picture the FTJ ought to have had regard to the fact that TB had resumed offending in 2013-2014, notwithstanding a significant gap since his prior offending in 2004-2009.

47. In all the circumstances I consider that the UT was entitled to conclude that the FTJ had made a material error of law and to remake that decision. The UT's assessment that TB was a persistent offender involves no error of law or perversity.

48. TB is accordingly a foreign criminal as a persistent offender under s.117D(2)(c)(iii). In those circumstances it is not necessary to address Issue (2) - whether he is also a foreign criminal because he has been convicted of an offence causing serious harm under s.117D(2)(c)(ii).

Issue (3) – Whether the UTJ erred in holding that the FTJ made a material error of law in deciding that TB was "socially and culturally integrated" in the UK under Exception 1 in s.117C(4) NIAA.

49. The FTJ found that TB was socially and culturally integrated into the UK for a number of reasons, including:

(1) TB presented as a "native" North Londoner.

(2) He was remorseful for his previous actions.

(3) His schooling in the UK since the age of 9; his friendships and social contacts;

his periodic work and the fact that English is his normal language of social intercourse.

(4) Letters of support from various members of the community.

(5) Spending so much of his formative years in the UK.

50. One of the reasons for the FTJ so concluding was as follows:

> "83. In my view one of the most telling examples of the fact of the appellant's integration into the UK is the information to be found in the OASys Assessment dated 21 January 2016. It is a sad and unpleasant fact of life that in various parts of London "gang culture" is an accepted and widespread part of life for many young people. According to the probation service report, the appellant is known to have previously associated with a gang called the "Get Money Gang" in North London. It is clear from the report that the probation service accepted that the appellant conducted his previous offending behaviour always in the presence of other young persons.
>
> 84. In my view, although it is a sad and unpleasant conclusion, the likely association of the appellant with this North London gang is a good example of his integration into one of the less savoury aspects of UK life. I take the view that in considering integration into the life of the UK, it is necessary to take into account that life as it is genuinely and honestly lived on the ground. That means not putting out of account aspects of life in the UK which we might regard as unfortunate and unpleasant. Gang culture is sadly a part of life for many young people in this country and the fact that the appellant appears to have involved himself in that culture is, in my judgment, an example of his integration into life in the UK."

51. The UTJ considered that the FTJ had erred in law in accepting TB's argument that integration should not exclude gang culture, holding that:

> "I simply cannot accept that being a member of a gang in North London can possibly be considered to be an example of social and cultural integration. There must be imported into the term 'social and cultural integration' the norms of British society. Indeed, I consider that being a member of a gang is the antithesis of being socially and culturally integrated in the UK. While I consider that the facts in *Bossade* are distinguished in this case, I follow that decision in that I consider that the appellant's criminal conduct broke the continuity of his social and cultural integration in Britain. The time since the last offence is such that it cannot be said that during that time, notwithstanding what I say below relating to the information set out in the OASys Report and the other matters raised by the judge in paragraphs 79 through to 97 of the determination which show that bar his offending the appellant would quite clearly have been integrated into Britain and also placing weight on the statement of Sedley J

> in *HK (Turkey)* [2010] EWCA Civ 583 that the number of years that the appellant has spent as a child and young adult in Britain is of particular importance in a case such as this, I consider that the judge was wrong, taking all the facts into account, to consider that the appellant was socially and culturally integrated into Britain."

52. Mr Jacobs submits that the FTJ acted properly and in accordance with the test in *Bossade* [2015] UKUT 00415 (IAC), in which the UT concluded as follows:

> "24. In our judgment, the gravamen of the new paragraph 399A(b) is integration in the UK. Integration must be shown to exist in two respects: social and cultural. Neither one nor the other is sufficient. The term integration imports a qualitative test: in order to assess whether a person "is" socially and culturally integrated in the UK, one is not simply looking at how long a person has spent in the UK or even at whether that period comprises lawful residence: but the fact that an applicant has spent some or all of his time in the UK unlawfully may be of relevance in deciding whether he has integrated in these two ways. Another difference between the old and the new Rules is that whereas the previous rule required any period of imprisonment to be discounted, the new rule is silent on the matter. As a result we consider that it must remain open to the decision-maker to consider time spent in prison negatively, because it does not bespeak integrative behaviour; but the rule no longer mandates that."

53. Mr Jacobs stresses the reference in this passage to a period of imprisonment and submits that gang culture is removed from behaviour which would exclude an individual from society *per se*, such as incarceration. He further submits that the FTJ was entitled and indeed correct to focus on "life as it is genuinely and honestly lived on the ground". Whilst gang culture may not be particularly pleasant, the FTJ was entitled to conclude that TB's involvement in it demonstrated that he was integrated as a typical north London youth, as opposed to a socially non-integrated Turk. The relevant issue is the fact of integration, not whether that integration is to be regarded positively or negatively.

54. As the FTJ observed, the information relating to TB's association with the "Get Money Gang" is found in the OASys Assessment. This report refers to police intelligence that TB was involved in anti-social behaviour and known to associate with this gang, leading to conditions being placed on his licence. TB's own account of his offending behaviour was that it was due to negative association with pro-criminal peers.

55. In my judgment the UTJ was correct to conclude that the FTJ erred in law in regarding TB's association with pro-criminal peers as part of a gang as a "telling" example of his social and cultural integration.

56. Membership of a pro-criminal gang tells against rather than for social integration. In this context, social integration refers to the extent to which a foreign criminal has become incorporated within the lawful social structure of the UK. This includes various

incidents of society such as clubs, societies, workplaces or places of study, but not association with pro-criminal peers.

57. Similarly, cultural integration refers to the acceptance and assumption by the foreign criminal of the culture of the UK, its core values, ideas, customs and social behaviour. This includes acceptance of the principle of the rule of law. Membership of a pro-criminal gang shows a lack of such acceptance. It demonstrates disdain for the rule of law and indeed undermines it.

58. Social and cultural integration in the UK connotes integration as a law-abiding citizen. That is why it is recognised that breaking the law may involve discontinuity in integration. As was found in the *Bossade* case at [55]:

> "…his history of offending (repeated robbery) betokens a serious discontinuity in his integration in the UK especially because it shows blatant disregard for fellow citizens. ….. We also agree with Mr Jarvis that even when not in prison the claimant's lifestyle over the period when he was committing offences was manifestly anti-social….. We have to decide whether he is socially and culturally integrated in the UK in the present. He is now 29. Whilst his recent acceptance of the reprehensible nature of his criminal conduct is an important factor, we consider the negative factors we have just mentioned indicate that his history of criminal offending broke the continuity of his social and cultural integration in the UK and he has not regained it. This means that currently he has not shown he is socially and culturally integrated."

59. Being part of a pro-criminal gang similarly shows "blatant disregard for fellow citizens" and is "manifestly anti-social".

60. For all these reasons I consider that the FTJ erred in law in treating TB's membership of a gang as a factor pointing towards social and cultural integration. If so, it was realistically accepted that it was a material error of law.

61. The UTJ was entitled to conclude that FTJ had made a material error of law and to remake that decision. The UT's assessment that TB was not socially and culturally integrated involves no error of law or perversity.

62. It follows that TB cannot rely on Exception 1 as he does not fall within s.117C(4)(b).

Issue (4) - Whether the UTJ erred in holding that the FTJ made a material error of law in relying on TB being a "home grown criminal" when assessing whether he was socially and culturally integrated and whether there were "very significant obstacles" to his integration in Turkey.

63. The FTJ found as follows at [87]:

> "….where a person has spent a good deal or most of their life in the UK since childhood they are, in reality, home grown criminals and their long residence as a child can outweigh even

> the most serious kinds of offences including causing grievous bodily harm and dealing in class A drugs".

64. The FTJ then referred to what Sedley LJ had said in the pre-Part 5A decision of this Court in *HK Turkey v SSHD* [2010] EWCA Civ 583 at [35]:

> "….The number of years a potential deportee has been here is always likely to be relevant; but what is likely to be more relevant is the age at which those years began to run. Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. The difference between the two may amount to the difference between enforced return and exile. Both are permissible by way of deportation, but the necessary level of compulsion".

65. The FTJ observed at [89] that:

> "In my view, this guidance is significant not only in examining the extent to which the appellant has integrated into life in the United Kingdom but also when considering whether there would be any significant obstacles to his integration into Turkey taking the holistic approach set out above".

66. The FTJ found that TB could reasonably be regarded as a home grown criminal and that this meant that "the guidance of Lord Justice Sedley is extremely important when considering any obstacles to his integration in Turkey". He concluded as follows at [95]:

> "Having regard to the guidance of Lord Justice Sedley in relation to home-grown criminals, it seems to me that expecting a person such as this appellant to travel alone to live in what is, essentially, a foreign country after a life and childhood growing up and living in this country, would amount to exile rather than return and would represent a very serious obstacle to his integration into that country."

67. The UTJ considered the FTJ erred in law in placing weight on the concept of "home grown criminal", referring to *LW (Jamaica) v SSHD* [2016] EWCA Civ 369. In that case Gross LJ stated as follows at [38]:

> "…the FTT's unhappy reference to LW as a "home-grown offender" (at para 54) is itself revealing. Although, at first blush, there is an attractive ring to this description, it cannot survive analysis. Consider, for instance, the example of a foreign national who first comes to this country at 16 and is then of good character. Over the next 10 years, he commits a string of serious offences in this country. That he is a "home-grown offender" would not for a moment stand in the way of his deportation, absent other and compelling reasons. It is the offending in this country which makes the person in question a "foreign

> criminal"; such offending, in this country rather than elsewhere, is the reason for deporting him, not a reason for not doing so."

68. I entirely agree with the Court in that case that the description "home grown" criminal or offender cannot withstand analysis. It is an unhelpful description and is liable to mislead.

69. Part 5A NIAA is intended to provide for a structured approach to Article 8 so as to produce a final result which is compatible with Article 8 – see, for example, *Rhuppiah v SSHD* [2018] 1 WLR 5536 at [36].

70. When assessing Exception 1, the structure set out in s117C(4) should accordingly be followed and the questions there identified addressed, namely:

(1) The length of time in the UK relative to the foreign criminal's life: (a).
(2) The extent of social and cultural integration in the UK: (b).
(3) The ease of reintegration in the other country: (c).

71. The length of time that the foreign criminal has spent in the UK is primarily relevant to question (1). S.117C(4)(a) requires consideration not only of the number of years, but also those years relative to the age of the foreign criminal: "most of C's life". Whilst these factors may also be relevant to integration under question (2), the focus there is on the extent of social and cultural integration and the fact of such integration rather than what may be the underlying reasons for it.

72. Caution therefore has to be exercised in placing reliance on cases which pre-date the statutory regime, such as *HK (Turkey)*. On any view it is not appropriate to refer to or rely upon the individual being a "home grown" criminal or offender.

73. In my judgment, the UT was correct to conclude that the FTJ had relied on the fact that TB was to be regarded as being a "home grown criminal" in reaching its conclusion on reintegration in Turkey. That was an error of law that entitled the UTJ to remake the decision. The UTJ's conclusion at [39] was that:

> "… Although Mr Jacobs argued that Turkey would essentially be a foreign country for the appellant and that what he would face would be exile rather than return, that is really not the relevant issue when considering the terms of paragraph 399A(c) of the Rules. The reality is that this is a Turkish man who speaks Turkish and has at least one relative in Turkey. He is fit and there appears nothing to stop him building his life in Turkey. Again, the determination of *Bossade* is relevant where it was stated at paragraph 57 that the test is not met by simply showing that a person has no family ties in the country to which they were deported. I would add of course that the appellant is aware of Turkish culture because he has been brought up within the Turkish community in North London – that is clear from the comment that his family have been ostracised because of his criminality – and of course he must speak Turkish to his parents."

74. That conclusion involves no error of law or perversity and indeed is not challenged.

75. It follows that a further reason why TB cannot rely on Exception 1 is that he does not fall within s.117C(4)(c).

Issue (7) - Whether the UTJ erred in holding that the FTJ made a material error of law in finding that there were very compelling circumstances so as to render TB's deportation a disproportionate interference with his private and family life.

76. I propose to address this issue next. I shall do so on the assumption that TB's immigration status was not precarious from the time he was granted ILR in June 2004 and on the basis of the UTJ's findings on rehabilitation and risk of re-offending.

77. In the light of my conclusion that the UTJ was entitled to remake the FTJ's decision on Issues (1), (3) and (4) and to reach the determination which he did, it follows that the appeal can only succeed if TB is right on this issue.

78. To establish "very compelling circumstances" means showing that there are very compelling circumstances "over and above" those described in Exceptions 1 and 2 which outweigh the public interest in deportation.

79. This is the test set out in s.117C(6):

> "… the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

80. Although s.117C(6) applies to foreign criminals sentenced to imprisonment of at least 4 years, that wording has been held by this Court to be equally applicable to those foreign criminals falling within s.117C(3) - see *NA (Pakistan) v SSHD* [2017] 1 WLR 207 at [24]-[27].

81. In the same case Jackson LJ gave guidance as to what the test requires in relation to a medium offender, such as TB. As stated in *NA* at [32]-[33]:

> "32. …in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon

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

82. Although the FTJ refers to paragraph 398 of the IR in his concluding paragraph, he does not identify or set out the requirement to show very compelling circumstances "over and above" those set out in Exceptions 1 and 2. Further, the limited circumstances he identified to found his conclusion on very compelling circumstances suggest that he did not focus on this requirement.

83. The main circumstances identified by the FTJ were:

(1) TB had been rehabilitated and was a low risk of future offending.
(2) His findings that TB had spent most of his life in the UK, was socially and culturally integrated and that there would be very significant obstacles to his reintegration in Turkey.
(3) Although TB was an adult, "there are more than normal emotional ties between him and his nuclear family members".

84. As to (1), rehabilitation involves no more than returning an individual to the place society expects him to be. As explained by the UT in *Secretary of State for the Home Department v RA* [Appeal No: HU/00192/2018], it will generally be of little or no material weight in the proportionality balance:

> "31. Before us, there was debate as to the significance to be accorded to the particular issue of rehabilitation, as part of the section 117C(6) exercise.
>
> 32. As the Court of Appeal pointed out in *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596, courses aimed at rehabilitation, undertaken whilst in prison, are often unlikely to bear material weight, for the simple reason that they are a commonplace; particularly in the case of sexual offenders.
>
> 33. As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see *SE (Zimbabwe) v Secretary of State for the Home*

> *Department* [2014] EWCA Civ 256, paragraphs 48 to 56). Nevertheless, as so often in the field of human rights, one cannot categorially say that rehabilitation will *never* be capable of playing a significant role (*see LG (Colombia) v Secretary of State for the Home Department* [2018] EWCA Civ 1225). Any judicial departure from the norm would, however, need to be fully reasoned".

85. As to (2), the FTJ's findings on social and cultural integration and reintegration in Turkey cannot stand for reasons already given. That simply leaves the commonplace fact that TB had spent most of his life in the UK.

86. In any event, the FTJ's findings on the integration issues do not involve features which have any particular or great force for Article 8 purposes. There is also an element of circularity in placing full reliance upon them, given that this issue arises on the assumption that the Exception does not apply.

87. As to (3), this is no more than a commonplace incident of family life.

88. In all the circumstances, I consider that the UTJ was correct to conclude that the FTJ's decision on this issue involved an error of law and that the factors he identified cannot support the conclusion that there were very compelling circumstances "over and above" those set out in Exception 1. As the UTJ held:

> "43. I take that further factor [medium risk of reoffending] into account when noting the arguments put forward by the Secretary of State that the appellant has not shown that there were very compelling circumstances over and above those described in paragraph 399 and 399A which would mean that the appellant should not be deported. The judge clearly found that there were and indeed I place some weight on the fact that it was he who saw the appellant and his family give evidence. However, he does not identify any such compelling factors other than the length of time that the appellant has lived in Britain and his close relationship with his family. While Mr Jacobs argued that the fact that the appellant's family support him, the reality is that they did not manage to prevent his criminal offending in the past.
>
> 44. I therefore consider that the judge was not entitled to conclude that there were exceptional compelling factors in this case".

89. I would accordingly dismiss the appeal on this issue. In those circumstances it is not necessary to address Issues (5) and (6).

Conclusion

90. For the reasons outlined above, I conclude that the UTJ was entitled to remake the decision of the FTJ and to reach the determination which he did, namely: (i) TB is a "foreign criminal" as defined in s.117D(2); (ii) Exception 1 in s.117C(4) NIAA does not apply and (iii) the "very compelling circumstances" test is not met.

91. I would accordingly dismiss the appeal.

Lord Justice Floyd :

92. I agree.