



IAC-AH-KRL-V1

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

Appeal Number: PA/02890/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House
On the 4th May 2021**

**Decision & Reasons Promulgated
On the 17th June 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**M P G
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Nathan, Counsel, instructed by Averroes Solicitors

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal. His date of birth is 8 October 1996.
2. A panel comprising Mrs Justice Moulder sitting as an Upper Tribunal Judge and Upper Tribunal Judge Reeds set aside the decision of the First-tier Tribunal (Judge Eldridge) to dismiss the Appellant's appeal against the decision of the Secretary of State refusing his claim on protection grounds and humanitarian protection grounds.

By the time of his appeal the Appellant no longer relied upon the Refugee Convention. The Appellant's appeal was dismissed on Article 8 grounds.

3. The Appellant arrived in the UK at the age of 18. He was granted indefinite leave to remain, since when he has continued to live with his parents and older disabled sister, RG. Since 2015 the Appellant's partner, PB, a British citizen, has resided with the family.
4. The record of the Appellant's criminality is not entirely consistent in the documents before me. A PNC printout discloses the Appellant's criminality. The first offence was committed on 1 December 2015 and the last offence on 20 September 2018. There is one offence of burglary of a non-dwelling. There are 11 convictions for theft (shoplifting), one conviction for attempted theft (shoplifting), two convictions for failing to comply with the requirements of a community order and one conviction for committing a further offence during a suspended sentence. The Appellant was cautioned for possession of heroin in 2017.
5. On 29 January 2019 (the date of the last conviction) he was convicted at Basingstoke Magistrates' Court of an offence of theft to which he pleaded guilty. He was committed to prison for four weeks and a suspended sentence order was activated giving him an overall length of sentence of twenty weeks' imprisonment. Following the Appellant's criminal activity, on 12 February 2018, the Secretary of State decided to deport him. A deportation order was made pursuant to Section 5(1) of the Immigration Act 1971. I have not seen a copy of that order. The Respondent states that it was sent to the Appellant on 7 February 2019. There is no issue taken by the Appellant that a deportation order was made and served on the Appellant.

The error of law decision

6. The error of law decision reads as follows.
 - “35. We are satisfied that the FtTJ fell into error in his assessment of the issue of whether the Appellant was a 'persistent offender'. As the summary of the relevant law sets out, the phrase set out is 'persistent offender' are not 'repeat offender' or 'serial offender' and the phrase 'persistent offender' requires some continuation of the behaviour concerned, although it need not be continuous or even regular.
 36. At [1] in Chege the Tribunal stated that there may be circumstances in which it might 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.
 37. Furthermore, the Tribunal rejected the Secretary of State's submission that a 'persistent offender' is a status that can never be lost once it is acquired although it is correct to observe that the Tribunal at [53] did accept that an individual may be regarded as a 'persistent offender' even though he may not have offended for some time.
 38. Whilst Mr Melvin has relied upon the factual circumstances of Chege, we do not consider that those assist us. In Chege the Appellant had been

convicted of a series of offences in the period 1997 to 2013. The offences include a driving while disqualified, handling stolen goods, failing to surrender to bail, possession of class A drugs, assault, and public order offences. It was not argued on his behalf that the Secretary of State had not been entitled to reach the decision that Chege was a persistent offender at the time at which she had taken her decision. However, it was submitted that since he had committed no further offences since release from immigration detention in June 2013, he could no longer be regarded as such an offender at the time of the FTT decision in his case in July 2015. On the facts of the case, the appeal was dismissed. Chege, it was held, was properly to be regarded as a persistent offender.

39. Plainly each case depends on its own individual facts and the overall picture and pattern of offending over the entire offending history to date.
40. We consider that the FtTJ did not apply the approach set out in Chege to the particular factual matrix of this Appellant. Whilst the FtTJ set out the Appellant's criminal history, (although we are not satisfied that it was completely accurate as the Appellant had not been convicted of possession of heroin but had received a caution), the FtTJ fell into error by determining that the Appellant was a persistent offender between December 2015 and January 2018 and 'this means that he fulfilled the criterion set out in paragraph A398(c)' (at [28]). In our judgment the FtTJ erred in law by focusing on the position as it stood in January 2018 and not by considering the Appellant's position as it stood as at the date of the hearing and that a 'persistent offender' is not a permanent status.
41. The FtTJ when addressing this was required to consider the overall picture and pattern of the Appellant's offending as at the date of the hearing. The evidence before the FtTJ included the medical reports which demonstrated that in January 2018 (we think whilst on remand) that his drug addiction was documented (at [36 AB]). At [40 AB] his drug use is reported as heroin and that he had arrived in custody as an addict. It is unclear from the chronology that we have been provided with by the parties, but it appears that by April 2018 he had served his short custodial sentence of twenty weeks and was then detained on immigration grounds until his release on bail in February 2019.
42. In April 2018, it is recorded that he had completed his detox treatment (see [54 AB]).
43. There was also evidence of the Appellant having undertaken courses whilst in custody, including attending the SMART recovery on 17 and 20 April 2018 and in May 2018. Following this he underwent drug testing on 13 June and 15 July, both tests were negative for drugs.
44. The Appellant's evidence before the FtTJ was that his criminal offending which consisted of shoplifting was as a result of his drug dependency. We note that the Respondent did not provide any details of the nature of the shoplifting including the items stolen or their value. Beyond the Appellant's PNC there was no evidence adduced by the Respondent concerning the convictions nor any sentencing remarks.

45. We are satisfied that there is no reference to that evidence when considering the Appellant's overall circumstances when reaching a conclusion as to whether he was a 'persistent offender'. Whilst Mr Melvin submits that the FtTJ at [27] did not take account of the fact that he had not committed further offences, this was based on the FtTJ's erroneous assessment that it was because he had been in custody for fifteen months. However, the Appellant had been released in February 2019 and therefore at the date of the hearing he had not been in custody for fifteen months but had been in the community without committing any offences since his release. Whilst we consider that this was a short period of five months, the FtTJ was required to consider as part of the overall picture the Appellant's circumstances which included the nature of his offending, which was shoplifting, and that it was all related to his addiction to drugs but also that there was evidence that demonstrated that he had successfully addressed the cause of his offending, not only the negative drug tests but the progress made from his initial entry into custody, his successful detoxification, his attendance at the SMART courses which refer to his 'positive engagement' in addition to the negative drug tests. There was also no reference to the OASys's Report which referred to the low risk of reoffending.
46. As the FtTJ focused his assessment on the position as it was in February 2018 without assessing the Appellant's overall circumstances as set out above and not assessing the Appellant as at the date of the hearing, we are satisfied that the FtTJ fell into error and that had he not done so, that this was material to the decision reached.
- ...
51. We are satisfied that the FtTJ fell into error when making an assessment as to the nature of the Appellant's family life. The FtTJ observed at [31] that the decision letter did not address the issues of family life and that the case of the Appellant had been advanced on 'exceptional circumstances' (see [16]).
52. At [21] the FtTJ referred to the law he considered applicable to the Appellant on the basis that he was a persistent offender and that if he could not meet paragraphs 399 or 399A he was required to demonstrate 'very compelling circumstances'.
53. The wide ranging evaluative exercise required by s.117C(6) necessarily includes an application of the public interest considerations in s.117B and a balancing of the public interest, including the seriousness of the offending (see the clarification provided by Lane L in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122.
54. That exercise also clearly includes an application of the principles in the Strasbourg authorities. As NA (Pakistan) holds, the s.117C(6) exercise is required to ensure compatibility with the UK's obligations under Article 8 of the ECHR. In addition, the judgment in NA (Pakistan), given by Jackson LJ, reads:
- '29. ... the phrase used in Section 117C(6), in para. 398 of the 2014 ... does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling

within the scope of the circumstances described in exceptions 1 and 2 when seeking to contend that there are very compelling circumstances, over and above those described in exceptions 1 and 2 ... [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 Rules), or features falling outside the circumstances described in those exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the circumstances of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in exceptions 1 and 2. One might describe that as a bare case of the kind described in exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in exceptions 1 and 2, they could in principle constitute “very compelling circumstances, over and above those described in exceptions 1 and 2”, whether taken by themselves or in conjunction with other factors relevant to the application of Article 8’.
55. On the case advanced before the FtTJ the Appellant relied upon the family life with his sister and this was not a matter falling within either exception.
56. The FtTJ’s assessment of the strength of family life and the consequences of the Appellant’s deportation at paragraphs [36-38] in our view failed to address the evidence set out in the ISW report relating to the vulnerability of the Appellant’s sister and her consequential care needs.
57. In his assessment the FtTJ accepted that there was family life between the Appellant, his parents but importantly between the Appellant and his sister. There was no dispute from the evidence that the Appellant’s sister was a vulnerable young woman with considerable and significant care needs and relied upon the Appellant and his partner to meet them. Whilst she was an adult she had a mental capacity of a young child (the FtTJ made reference to her IQ being formally assessed at 42 and that she had been assessed as functioning at aged 5 to 6 years); the ISW report made reference to her learning difficulties. In addition, she was awaiting a kidney transplant and was undertaking dialysis three times per week.
58. The ISW report, which was unchallenged before the FtTJ, was that her care needs were such that she had to attend hospital three times a week and that she had communication problems which were met by the Appellant and his partner. Once per month she had an overnight stay in hospital for the purposes of dialysis which the Appellant assisted with and whilst at home

she was required to be cared for overnight due to problems with her breathing. This had led to her admission to hospital on an emergency basis. The Appellant's mother and father were unable to meet her care needs due to their own circumstances and disabilities and their lack of ability in communicating with medical professionals. The ISW concluded that his sister was completely dependent upon the Appellant and his partner who always lived at the family home and that the Appellant's sister herself did not have the insight as to the many risks present if she did not have assistance throughout the day and night (at [76 AB]).

59. The ISW concluded that in the light of her care needs she required assistance throughout the day or night and that because of the cultural difficulties alongside her care needs that it was not realistic that a package of care could be commissioned to meet her needs (at [77 AB]). At [78 AB] the ISW concluded that the Appellant's removal or deportation and his partner no longer living with them would mean that it would be unlikely that her needs could be met without her moving into a residential care home.
60. Whilst the FtTJ recognised that the Appellant had played a part in meeting her care needs, we are satisfied that in his assessment at paragraphs [37-38] he failed to take account of the unchallenged evidence that if the Appellant was deported or removed from the United Kingdom it would be unlikely that her needs could be met without her moving into residential care home. We do not accept the submission made by Mr Melvin that during the period when the Appellant was in custody his sister's care needs were appropriately met and therefore his removal would not impact on the Appellant's sister. That submission fails to take into account the evidence before the FtTJ that in the absence of the Appellant, his sister's care needs were met by the Appellant's partner who lived with the family and that if the Appellant was deported or removed that his partner would no longer be at the family home.
61. Whilst the FtTJ did make reference to the prospect of some type of state assistance at [38] that part of the reasoning failed to address the evidence in the ISW report that in view of her care needs (which required overnight and day care) alongside the cultural difficulties identified, that it was unlikely that a package of support would be able to meet the Appellant's sister's needs.
62. We are satisfied that the FtTJ fell into error in his assessment of the nature and strength of family life between the Appellant and his sister who was a vulnerable person with considerable care needs and that the FtTJ failed to take account of material evidence relevant to the assessment of whether it would constitute 'very compelling circumstances'.
63. Mr Nathan sought to amend his grounds at the hearing by relying on a new ground based on a challenge to the FtTJ's finding that it would not be unduly harsh for the Appellant's partner to travel and live in Nepal. In view of our assessment of grounds 1 and 2 and that the FtTJ erred in law it is not necessary to reach a decision on that ground as we have reached the conclusion that the FtTJ erred in law and that the decision should be set aside."

7. At the hearing before the panel the representatives made brief submissions. The panel identified that in order to consider whether the Appellant is a persistent offender, it was necessary to consider the circumstances at the date of the hearing and they did not have up-to-date evidence. The panel also expressed at [65] that there was other information that they required, which was lacking from the papers before them, namely information regarding the nature of the offences beyond the references to shoplifting.
8. The panel stated that the FtTJ referred to a deportation order made in February 2019 and there was also reference to a decision of 7 February 2019 annexed to a bundle marked "W". The panel stated that it did not appear that the decision was before the FtTJ. It was unclear to the panel whether the decision that they had and which is exhibited as "W" is the decision of 7 February 2019.
9. The error of law decision was promulgated on 6 March 2020 following a hearing at Field House on 21 January 2020. There have been a series of directions issued since then (on 6 March 2020, 17 April 2020 and 27 May 2020) reflecting the information that the panel considered lacking. There have been responses to these directions from the parties, including a response from the Appellant dated 28 April 2020. In respect of any lack of understanding about the nature of offences the Appellant's representative submits that:-

"It has always been stated without demur from the Respondent or the FTT Judge that the Appellant's offending was directly related to the need to fund his then drug addiction. The Appellant's representatives struggle to see what further evidence they can adduce in this respect beyond the Appellant's previously unchallenged witness statement".

10. It is stated that the Appellant will adduce a further witness statement which they envisage will confirm the unchallenged evidence before the FTT remains the same and which was summarised in the Appellant's skeleton argument for the error of law hearing as follows:-

"The Appellant is a Nepalese national who arrived in the UK aged 14 and was granted ILR. Now 23, since being in the UK has continued to live with his parents, elder disabled sister [R], and his partner, [PB] a Thai national. In his late teens the Appellant developed an addiction to heroin which took over his life. He was convicted of a number of offences over a two year period, culminating in imprisonment for twenty weeks in January 2019. Even prior to his conviction, while on remand, the Appellant began drying out from his addiction, a successful process documented in his prison medical records and confirmed following his release from immigration detention in 2019 by two clean drug tests obtained by his solicitors prior to the hearing.

The Appellant, his father and partner all gave oral evidence before the FTTJ. Further documentary evidence, in particular an expert report of an independent social worker, Mr Crisp, explained the physical difficulties faced by the Appellant's mother, and the mental and physical difficulties faced by his sister [R], who though aged 31 is said to have the mental development of a 6 year old

while also requiring kidney dialysis, three times a week. Mr Crisp documented that in the Appellant's absence (and his partner's if he were to be removed from the family) and given the parents' physical and linguistic difficulties,

'It is ... unlikely that her needs could be met without moving into a residential care home. Having a care home placement forced upon her would be unduly harsh upon her and the family, where caring for family members at home is central to their cultural values. It would also fall short of the wellbeing and personal centred principles that run through adult social care and the Care Act 2014'.

Mr Crisp further observed that the Appellant's mother's physical ailments likely also warranted eligibility under the Care Act 2014, but that the family had not availed themselves of such care".

11. The Appellant's case is that his situation remains the same and he has continued to abstain from drug taking.
12. There is correspondence from the Secretary of State of 22 May 2020 claiming that the disclosure required in response to the directions creates a "fairly considerable burden" and that the Presenting Officer Mr Melvin was content for the panel to have determined the appeal without any further oral evidence at the error of law hearing.
13. There is on the file a letter from Chris Avery (Presenting Officer from the Special Appeals Team, on behalf of the Secretary of State responding to the directions which were sent on 27 May. The salient part of the correspondence reads as follows :-

"The issues of whether the Appellant is a persistent offender and Article 8 will require careful analysis of the evidence **at the time of the resumed hearing**. The original First-tier hearing took place over ten months ago and the evidence will now be considerably out of date. The view of the Secretary of State is that it is therefore unavoidable that further evidence will be required, at the very least to update the evidence that was previously before the First-tier Tribunal. That will include evidence from the Appellant on, for example, his current relationship with drugs, which seems to have been the driver behind his criminality. It is anticipated that the Secretary of State will wish to cross-examine the Appellant on this, his current circumstances and the current situation with regards to his sister and wider family."

The Resumed Hearing

14. The matter came before me for a resumed hearing on 4 May 2020. There was still no copy of the signed deportation order which was the subject of a direction made by UTJ Reeds. It was not produced before me. However, the failure to produce this has never been an issue raised by the Appellant at any time. It can reasonably be inferred that this decision was made and served on the Appellant.
15. There has been no further evidence relied on by the Respondent in accordance with the directions concerning the Appellant's criminality. However, I accept that there

will not be any sentencing comments because the offences were dealt with in the Magistrates' Court, all but one being summary only offences. I will consider the sentences given as indicating the seriousness of the crimes committed. One of the offences is a theft/shoplifting from Tesco Supermarket.

16. There was no schedule of agreed facts. From the documents served, it seems that the Respondent's position is that they want to cross-examine the witnesses concerning whether the situation has changed since the hearing before the First-tier Tribunal. Ms Isherwood relied on the most recent written submissions prepared by Mr Avery. However, she also said that the Appellant and witnesses are not credible and that the expert evidence should not be relied on. She indicated at the start of the hearing that the evidence of the ISW was challenged. However, I brought to her attention the error of law decision. There had been no challenge to this evidence to date. This had not been raised in any document prepared by the Secretary of State in respect of the resumed hearing. There was nothing in the written submissions relied on by the Secretary of State which would seek to challenge that evidence or undermine the positive findings made by the First-tier Tribunal.
17. Mr Nathan submitted that it was not open to the Secretary of State to raise this as an issue so late in the day. I agreed with Mr Nathan. A proper reading of the error of law decision did not envisage that the positive findings in respect of the Appellant (namely that his parents and his sister receive a great deal of assistance from him and his partner and that there would be no doubt that if the Appellant was deported his partner would not stay, therefore sharing responsibilities would fall to the state) should not be preserved. I indicated that the ISW's evidence reflected the position at the date of the hearing before the First-tier Tribunal. The thrust of the evidence from the Appellant and witnesses is that the position has remained the same. I indicated that it was open to Ms Isherwood to cross-examine the Appellant concerning the present situation.
18. The salient parts of the evidence that was before the First-tier Tribunal have been set out by the panel in the error of law decision and there is no necessity for me to set them out again. I heard oral evidence from the Appellant, his partner and the Appellant's father. The Appellant had prepared a more recent witness statement the thrust of which was that the position had remained the same as it was before the First-tier Tribunal.
19. All the witnesses were cross-examined by Ms Isherwood. The Appellant stated that he had not obtained an up-to-date drugs test because he is unable to do so in the light of the pandemic. He remains living in the same area in which he lived in when he was committing criminal offences. He became drug free when he was in prison and has remained so. He has two sisters in the United Kingdom, apart from RG. One lives with her daughter in Guildford, and she is employed as a care worker. The other lives in Farnborough, Hampshire. The Appellant is not sure whether she is presently working in the light of the pandemic; however, her husband is from Hong Kong and there is a possibility that they may relocate there.

20. The Appellant's partner was cross-examined. Her evidence is that she was in a relationship with the Appellant when he was taking drugs. She tried to help him. He was taking a large quantity of heroin. He tried hard to come off the drugs. At that time, he was giving some help to his family. Neither of the Appellant's healthy sisters resides with the family. They do not help. It might be possible to obtain their help, but they would have to be realistic and see when they are available. She does not have any relatives here in the UK.
21. The Appellant's father adopted his witness statement as his evidence-in-chief and he was cross-examined in the main about his understanding of the English language.

Submissions

22. Ms Isherwood urged me to approach the evidence with caution, particularly in the light of the discrepancies in respect of speaking and understanding the English language. In respect of the persistent offender issue the Appellant committed the crimes and there is no clear evidence that he is drug free. The evidence is that his family was unable to prevent him from committing crimes. Ms Isherwood relied on Chege ("is a persistent offender") [2016] UKUT 00187 and the more recent case of Binbuga v SSHD [2019] EWCA Civ 55, specifically paragraph 40. She asked me to consider everything together before reaching a conclusion.
23. She relied on TD (Albania) v SSHD [2021] EWCA Civ 619 in which the Court of Appeal decided that the judgment in HA (Iraq) v Secretary of State [2020] EWCA Civ 1176 does not lessen the unduly harsh test. It is still a high hurdle. The evidence shows that the situation has moved on since the ISW report and that reliance on the Appellant by family members is not as strong as it was. He is not always around. Whether the Appellant's partner would remain in the family home is her choice. There is no clear picture of the current circumstances and his partner understands a little bit of Nepalese (ISW at para 5.1.7 of the expert report). There is no up-to-date evidence in relation to the Appellant's sister. The Appellant does not meet the Rules and deportation does not breach his rights under Article 8.
24. Mr Nathan urged me to allow the appeal. He relied on paragraph 60 of the case of Chege. The Appellant has not been able to obtain a drug test, but he gave evidence. It is clear that he is back on track and taking his responsibilities to care for his parents and sister. He urged me to postpone promulgation of my decision to enable the Appellant to take a drug test after June 2021 if in doubt.
25. The Appellant's criminality is as a result of his drug addiction. He referred me to the evidence of the ISW and submitted that there are real difficulties quite far apart from the father's command of the English language. The Appellant's sister has the mental age of a 5-year-old. She will end up in a home should the Appellant be deported. The Appellant's parents are not getting any younger and they will become weaker and frailer as time goes on. It is unduly harsh to expect her to go into a home. She has lived with her family all her life. She has sufficient capacity to know who her parents are. Mr Nathan submitted that the impact of deportation on the Appellant's partner is unduly harsh. If she stays or returns to Nepal with the Appellant, it is

likely the child will have to at some stage go into a home. She does not have any Nepalese language skills. The Appellant's most recent statement of 8 June 2020 says that nothing has changed since he made his first witness statement except that his disabled sister's condition has deteriorated. About three months ago she underwent a second dialysis related surgery at a local hospital and developed complications. She was at that time hospitalised.

26. Mr Nathan relied on his skeleton argument of 8 June 2020. The date of the ISW report is 15 July 2019. There is no up-to-date evidence from Mr Crisp, but his evidence was not challenged before the First-tier Tribunal. Mr Crisp's conclusions are contained at paragraph 6 of his report and can be summarised. His evidence is that the Appellant's sister, RG, has learning disabilities, autistic spectrum disorder and undergoes kidney dialysis. She is waiting for a kidney transplant and attends hospital three times a week. She stays in hospital overnight once per month to have the dialysis tube replaced. She has shortness of breath and often at night the family has to call an ambulance for her. She has what appears to be a severe learning disability. She relies on others to anticipate and provide all her care needs. She does not appear to have an insight into the many risks that would be present if she did not have assistance throughout the day and night. She relies upon others to ensure that her hospital visits are attended and an emergency ambulance if she experiences shortness of breath at night. The Appellant's mother has undergone an operation on her back and her mobility is significantly reduced, she walks with a stick and finds it difficult to stand without assistance, she cannot undertake daily living tasks, such as cooking and cleaning the house, without a great deal of difficulty and pain.
27. The Appellant's father does not have any specific health or care needs however he described himself as an old man and said that increasingly he relies upon others to help him. RG relies on others to anticipate all and meet all of her health and care needs. Those needs are currently largely met by the Appellant and his partner. Due to the extent of her care needs and the cultural considerations it is not realistic that a package of care could be commissioned to meet her needs. The only realistic option is for the Appellant and his partner to continue with their caring role.
28. RG's family can continue to meet her needs although this is completely dependent on the Appellant and his partner remaining living there with her. The Appellant and his partner also assist his parents in their day-to-day living, including translating for them and assisting with household duties.
29. The Appellant's partner would no longer stay with the family should the Appellant be removed and therefore she would no longer be able to provide care for RH or continue to cook and clean for the family. The family would therefore be left unable to care for RG. In the Appellant's absence his parents would be completely isolated from others. They would no longer be able to communicate with their neighbours and the Appellant's mother would not be able to communicate with health and social professionals without an interpreter which would be very difficult over the phone.

30. If the Appellant and his partner did not live in the family home, it is unlikely that RG's needs would be met without her moving into a residential care home. Having such placement forced upon her would be "unduly harsh upon her and her family" where caring for family members at home is central to their cultural values. RG appears to be well managed at home largely by the Appellant and his partner with the assistance of her parents.
31. Mr Nathan relies on Mr Crisp's evidence. He conceded that there was some understanding of English within the family, but they simply did not have the physical capability to take care of the Appellant's sister.

Findings and Reasons

32. The panel set out the law in respect of the definition of persistent offender. It is not necessary for me to set it out again; however, I have read it in the light of the more recent case of Binbuga v SSHD [2019] EWCA Civ 55. Ms Isherwood asked me to have regard to paragraph 40.¹ However, this is an endorsement by the Court of

¹ In Binbuga v SSHD [2019] EWCA Civ 55, the Court of Appeal stated:

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

Appeal of the decision in Chege and sets out paragraphs from that Upper Tribunal decision. I have applied the principles expounded therein to the facts in this case. I have considered the overall picture and not focused on the current position. Each case turns on its own facts. I find that the Appellant was a persistent offender. The underlying reason for his criminal conduct was his addiction to illegal drugs. I find that there has been an established period of rehabilitation. I accept that the Appellant no longer takes drugs. I accept his evidence on the issue. I take into account that he has not produced an up-to-date drugs test. I accept that he has not been able to do so because of the pandemic. He was cross-examined about this. I had the benefit of hearing oral evidence which I find to be straight forward and credible.

33. The Respondent has not produced any further evidence regarding the nature of the offences. They were, all but one, summary-only offences and they were all dealt with in the Magistrates' Court and therefore there are no sentencing remarks. Considering the sentences, I am satisfied that they are at not particularly serious offences.
34. From the PNC printout the first offence was committed on 1 December 2015 and the last offence 20 September 2018. There is one offence of burglary of a non-dwelling, eleven convictions for theft (shoplifting), one conviction for attempted theft (shoplifting), two convictions for failing to comply with the requirements of a community order and one conviction for committing a further offence during a suspended sentence. The Appellant was cautioned for possession of heroin in 2017. The Appellant was imprisoned in 2018. He entered prison as a heroin addict (he tested positive for drugs on 30 January 2018); however, I find on the evidence including a negative drugs test when he left prison, that he came out of prison drug free. I am satisfied that he has remained drug free since then. I have reached that conclusion on the basis of a negative drug test post his release from prison, the Appellant's credible oral evidence, the OASYS assessment that he presents of low risk of offending and the fact that he has not been convicted of any further offences. The latter point is of significance in the context of a recovering addict. I accept that a period of three years is not in itself a significant time to remain out of trouble. However, this must be considered in context. There is no doubt that the Appellant's criminality was fuelled by his drug addiction. While the Appellant is not taking drugs, he is unlikely to commit offences. He has remained out of trouble for a longer

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."

period of time than the duration of his criminal conduct. He was during that time a persistent offender. Had the hearing come before me at an earlier stage, I may have found that he remained a persistent offender; however, the overall picture at the time of the hearing before me, is that this Appellant is not someone who keeps on offending. The fact that criminality ceased in 2018 cannot be considered simply a pause in offending. There has in my view been an established period of rehabilitation. While Ms Isherwood said that there was no clear evidence that the Appellant is crime free, I do not accept this. While the Appellant's partner was at the time of his offending unable to prevent him taking drugs (a point raised by Ms Isherwood), he has clearly managed to do so now either of his own accord and/or with the support of his family.

35. The Appellant is not a persistent offender. Therefore, he is not a foreign criminal for the purposes of s.117D NIAA 2002 (and paragraph 398 of the IR).² On this basis it follows that his deportation would breach his rights under Article 8 and his appeal should be allowed.
36. In any event, if he were a persistent offender, in this case, I would conclude that deportation would breach his rights under Article. 8. The Appellant does not rely on s.117C (4) of the 2002 Act (Exception 1).³ He relies on s.117C (5) (Exception 2).⁴ In

² 117D Interpretation of this Part

(1) In this Part –

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

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

(a) is a British citizen, or

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

“qualifying partner” means a partner who –

(a) is a British citizen, or

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

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

(a) who is not a British citizen,

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

(c) who –

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

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

(iii) is a persistent offender.

³ 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.

respect of family life, I accept that nothing has changed since the hearing before the First-tier Tribunal. The main point taken by Ms Isherwood was that I should exercise caution when assessing the credibility of the witnesses because of discrepancies in the evidence concerning the Appellant's father's English language ability.

37. I have to consider the impact of deportation on the Appellant's partner in the context of unduly harsh. They do not have children here. While she may not be able to speak Nepalese to any meaningful level, I am not satisfied that there is anything properly identified in the evidence before me that would support a finding that the harshness would reach the unacceptable threshold.⁵ However, this is not the end of the story because I must consider whether there are very compelling circumstances over and above in the context of s117C (6).⁶ I have taken into account what the Court of

(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."

⁴ *ibid*

⁵ In HA (Iraq) v Secretary of State [2020] EWCA Civ 1176 the Court of Appeal at [56] stated:

"The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an "ordinary" level of harshness, and I note that Lord Carnwath did not jibe at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

⁶ *ibid*

Appeal said in NA (Pakistan) v SSHD [2016] EWCA 662⁷ in the context of what Underhill LJ said at paragraph 60 in HA (Iraq) v Secretary of State [2020] EWCA Civ 1176.⁸ When considering very compelling circumstances, I take into account that if the Appellant is a persistent offender, he is a foreign criminal, and his deportation is in the public interest. The Appellant is at low risk of reoffending and rehabilitated. This is, however, one facet only of the public interest.

⁷ In NA (Pakistan) v SSHD [2016] EWCA Civ 662 the court stated:-

“32. Similarly, 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.

...

35. The Court of Appeal said in *MF (Nigeria)* that paras. 398 to 399A of the 2012 rules constituted a complete code. The same is true of the sections 117A-117D of the 2002 Act, read in conjunction with paras. 398 to 399A of the 2014 rules. The scheme of the Act and the rules together provide the following structure for deciding whether a foreign criminal can resist deportation on Article 8 grounds.

36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in *MF (Nigeria)*), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.”

⁸ In HA (Iraq) v Secretary of State [2020] EWCA Civ 1176 Underhill LJ stated:-

“60. Although the two-stage exercise described in *NA (Pakistan)* is conceptually clear, it may occasionally make the analysis unnecessarily elaborate. There may be cases where a tribunal is satisfied that there is a combination of circumstances, including but not limited to the harsh effect of the appellant's deportation on his family, which together constitute very compelling reasons sufficient to outweigh the strong public interest in deportation, but where it may be debatable whether the effect on the family *taken on its own* (as section 117C (5) requires) is unduly harsh. (An equivalent situation could arise in relation to Exception 1: there might, say, be significant obstacles to the appellant's integration in the country to which it is proposed to deport him, but it might be questionable whether they were *very* significant.) In such a case, although the tribunal will inevitably have considered whether the relevant Exception has been satisfied, it is unnecessary for it to cudgel its brains into making a definitive finding. The Exceptions are, as I have said, designed to provide a shortcut for appellants in particular cases, and it is not compulsory to take that shortcut if proceeding directly to the proportionality assessment required by article 8 produces a clear answer in the appellant's favour.”

38. Ms Isherwood urged me not to accept the evidence of the ISW, Mr Crisp. However, hitherto this had not been subject to challenge. I could see no good reason why that evidence should not be relied on to represent the position at the date of the hearing before the First-tier Tribunal. Moreover, there was no good reason to conclude that the position had changed since then. RG does not have a health condition that is likely to improve over time. There is no reason to believe that her condition and her dependence on the Appellant has changed. The Appellant's parents are aging. I find that the impact on, RG, following the Appellant's deportation would be very serious indeed. I am satisfied that there is *Kuguthas* dependency (*Kugathas v SSHD* [2003] EWCA Civ 31) between the Appellant and RG. I accept that the Appellant and his partner shoulder a considerable amount of responsibility for RG's care and this is likely to increase as the Appellant's parents age. I must take into account the impact of deportation on those with whom the Appellant shares family life (*Beoku-Betts v SSHD* [2008] UKHL 39). Furthermore, I accept that there is a level of dependency between the Appellant (and his partner) and his parents.
39. The cross-examination of the witnesses was an attempt to undermine their evidence about their understanding of English and the different languages they speak in order to establish that the Appellant's parents can speak English and thus are not dependent on him. I have no doubt that there is some understanding of English and each other's respective languages, but I find that this is not sufficient to enable the Appellant's elderly parents to cope easily without him. I am also satisfied that the Appellant's partner may be able to speak some Nepalese; however, I am satisfied that she and the Appellant's parents (and RG) do not share a common language so as they can communicate to any significant extent and that this creates difficulties. I am not persuaded that it is of significance in any event, considering the credible evidence, to which I attach weight, that she would not remain in the home if the Appellant were deported. Thus, the language issue is not material. Nothing in my view turns on the language ability of any individual.
40. The ISW's opinion is that if the Appellant is deported, it will be unlikely that his sister's care needs will be met without her moving into residential care. I attach weight to his evidence. The salient parts of the evidence of the ISW concerning the condition of the sister, her care needs and the impact of deportation is clearly set out by the panel in the error of law decision. It was not challenged at the hearing before the First-tier Tribunal. While Ms Isherwood attempted to challenge this evidence before me, there was simply no proper basis to do so. She said that the position had moved on; however, in my view, there is no reason to believe that the needs of the Appellant's sister or her dependency on him had changed. I am satisfied that the Appellant's elderly parents would not be able to care for their daughter in the absence of the Appellant and his partner. The consequences of deportation for her would be very severe and bleak. In addition, there is a level of dependency between the Appellant and his elderly parents, which needs to be put into the mix. The evidence is that there are two other sisters who are able bodied but they have their own families and do not form part of the family unit.

41. The likely consequences that would flow from the Appellant's deportation concerning RG is, in my view, the primary reason why the decision to deport him would be a disproportionate interference with his rights under Article 8. All in all, considering evidence in the round, I conclude that there are properly identified very compelling circumstances. A fair balance lies in allowing this appeal.

Notice of Decision.

The appeal is allowed under Article 8 of the European Convention on Human Rights.

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

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

Signed *Joanna McWilliam*

Date 7 June 2021

Upper Tribunal Judge McWilliam