



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

Appeal Number: HU/13604/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 14 December 2021**

**Decision & Reasons Promulgated
On 9 February 2022**

Before

**UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE KEBEDE**

Between

**RAC
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico, instructed by Wilson Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of South Africa. He appealed to the First-tier Tribunal against the Secretary of State's decision of 15 June 2018 refusing a human rights claim. The judge who heard the appeal dismissed it, and permission to appeal was refused, initially by a Judge of the First-tier Tribunal and subsequently on renewal by a Judge of the Upper Tribunal. Thereafter the appellant sought and was granted permission to apply for judicial review by Mr Justice Holman on a "Cart" judicial review, as a consequence of which permission to appeal to the Upper Tribunal was granted on 8 November 2021.

2. The appellant first entered the United Kingdom on 12 September 1989 and was subsequently granted indefinite leave to remain, on 16 March 1990. It appears that he subsequently left the United Kingdom in 1995 to work as a chartered accountant in Mexico and most recently entered the United Kingdom on 19 December 2013.
3. On 27 July 2017 the appellant pleaded guilty to a total of nine drugs offences involving possession of a class A drug with intent to supply. He was sentenced to imprisonment for twenty-five months for an offence of possession of a class A drug, MDMA, with intent to supply, and for each of the other eight offences he was sentenced to twelve months' imprisonment, each sentence to run concurrently with the others and with the period of 25 months.
4. In his decision dismissing the appeal, the judge set out the appellant's immigration history and then turned to the applicable legal provisions. He set out the terms of paragraph 399A of HC 395 and the similar provisions in the Nationality, Immigration and Asylum Act at section 117C and section 117D. He noted that Exception 2 did not apply as the appellant has no partner or children. The appellant gave oral evidence at the hearing as did a number of witnesses, and there was a psychiatric report compiled by Dr Sen.
5. The judge was shown a video showing the appellant at a service in his local church where he told the congregation about his drug problems, his offending and what will happen to him after his release including his voluntary work and his attendance at Narcotics Anonymous ("NA"). He still owned property in both Mexico and Brighton. He could earn a rental income from the latter. Though he doubted he would be able to find employment again as a chartered accountant because of his criminal record, he accepted that he would potentially be able to seek some form of employment in South Africa. Oral evidence from the Reverend Garratt referred to the appellant being able to tell a very powerful story which was valuable to his community. Mr Webb, a peer mentor coordinator at Pavilions Adult Drug and Alcohol Service in Brighton, explained that the appellant was the only mentor from within the LGBTQ community and that he ran a peer-led mentored support group for service users in Brighton who identified as LGBTQ. His work enabled the service to be more diverse and inclusive. Mr Fawcett, when asked about what support the appellant would be able to give in the context of NA, explained that he could say where his involvement with drugs had taken him and that he was unusual as he had come from a successful background with a normal life which had fallen apart with addiction, had been to prison and turned his life around.
6. In his findings of fact and conclusions the judge observed that there were few, if any, factual disputes in the case and that the real contention lay in how these facts were to be weighed in the context of the relevant public interest. The appellant was a foreign criminal by virtue of section 117D(2)

(c)(i) of the 2002 Act. On his own account, he had been dealing in drugs from February 2016 until October 2016, and that although initially he sold just to close friends, subsequently he sold to anybody and everybody in the Brighton gay scene who would ask them.

7. The judge described and commented on the seriousness of the appellant's offending, given the nature of drugs offences of this kind and the damage that they do to the health of those who buy the drugs on offer and the damage to the fabric of society. He noted also that the appellant's partner who had been involved in the dealing and had been charged along with the appellant had died suddenly of a brain aneurysm, which, it was accepted, was almost certainly connected to his drug dependency. That death had had very significant and negative consequences for the appellant and underlined in a shocking way quite how serious his offending was.
8. The judge referred to the great deal that had been said in support of the appellant by those who had helped him with his addiction, those with whom he worked, and those who formed part of his community. Save to the extent set out below, he accepted what they said.
9. It was clear from the appellant's witness statement that during 2015, after he had been made redundant from HSBC, his and his partner's drug use became more significant. Though the judge did not accept that the appellant was socially and culturally integrated into the United Kingdom during the period up to his release, he accepted that it was clear that he had taken very substantial steps since then and that he was prepared to accept that the appellant had by now become a socially and culturally integrated person.
10. The judge accepted that the appellant had never worked in South Africa and also that his conviction would make it extremely difficult for him to obtain work of the calibre that he previously had. He was not satisfied, however, that he would not be able to find some kind of employment there, as he had himself accepted. The judge was also satisfied that the appellant would be able to count on a rental income from his property in Brighton. He was satisfied that the appellant would have the means with which to support himself in South Africa.
11. Although he had a strained relationship with his sister, who lives and works in Cape Town, he had accepted that he would be able to stay with her temporarily and that she was now far more supportive of him emotionally. The judge considered it likely that she would currently be willing and able to provide a home for the appellant, at least in the short term.
12. There appeared to be no medical issues of concern as regards the appellant. His HIV is stable and his viral load was undetectable and it had not been contended that he would be unable to obtain the medication and

monitoring that he needed for treating his HIV in South Africa, nor that he would not have access to any treatment he needed for dealing with other aspects of his health. Despite what had been said in representations, fortunately there was no suggestion now that he had cancer. Nor was there any country evidence to show that he would face any ill-treatment on return because of his sexuality.

13. The judge turned to six matters put forward by Mr Chirico, who also appeared below, which were said, taken together, to amount to very compelling circumstances.
14. The first was that the appellant had shown remorse for and was completely rehabilitated from his past criminal behaviour. The judge accepted that. The second matter he also accepted, which was that the appellant is free from drugs and alcohol and has been so since the day he went to prison and has a very strong commitment to his rehabilitation. In this regard, the judge considered it important to bear in mind the extent to which these two factors had come about because of the appellant's own self-motivation and the point which he had now reached in his rehabilitation. He bore in mind that there was never any complete recovery from addiction and that there was always a risk of relapse. The appellant's own witness statement made it clear throughout that he had very clear insight into the threats that drugs posed and the ways to counter those threats. He described himself as a very hard-working, self-motivated and driven individual. He noted evidence from the appellant's cousin Martin Theunissen, who said that the appellant had truly shown remorse for his mistakes in life and was dedicated to maintaining his lifestyle change, regardless of whether he was deported or not, and noted evidence also supportive of the appellant's strong commitment and desire to turn his life around from Marc Sloan, the appellant's care coordinator at the Pavilions Substance Misuse Service, and Lucy Hutchinson, a friend of the appellant's. There was also evidence from the appellant's probation officer, Ms Paul to similar effect.
15. The judge remarked that the appellant's remorse, abstinence and rehabilitation were all things which counted in his favour. He said that whilst he accepted that the appellant's rehabilitation could not by any means be said to have come about by virtue of his personal efforts alone, it was clear that his own determination to change his life had played a considerable part in that process. This was relevant when considering what was likely to happen if he were to be returned to South Africa.
16. The next aspect emphasised by Mr Chirico was the extent of the support network that the appellant has. The judge accepted that all the people who had provided evidence had provided the appellant with considerable support which had enabled his recovery to date. The judge, however, in this regard bore in mind that the substantial support network was not something which created itself but was brought about through the appellant seeking it out. As Mr Sloan had stated, the appellant had utilised

every support avenue available to him, and it was said by the vicar at St Peter's Church, the Reverend Gumbel, that the appellant had worked hard to build up a positive and constructive support network around him, full of people who are a good influence, and activities that he loves and where he has a positive impact on those around him.

17. The judge then went on to consider the appellant's positive contribution to life in the United Kingdom. The judge accepted the argument that what was important was to consider what the value of that contribution was now, and did not accept that the fact that it only began a year ago necessarily of itself diminished that value.
18. The judge accepted what was said in the witness statement of the appellant as to the various voluntary work that he carries out. He also accepted what was said in the witness statements about that, including the passages identifying the value of his work. He noted the appellant's work supporting homeless people, that he is a peer mentor within the Probation Service and at the Pavilions Substance Misuse Service and his facilitation of a recovery check-in chat group for the LGBTQ community and his work with the Samaritans.
19. The judge also accepted that the appellant was the only LGBTQ peer mentor at Pavilions and that his background was such that he had something of a unique selling point within NA and that his professional and communication skills made him especially effective at what he did.
20. The judge also bore in mind that doing this voluntary work was obviously something which benefited the appellant too, noting what was said to that effect in the appellant's witness statement, and the judge observed that doing such work clearly helped maintain the appellant's positivity and formed a part of his own ongoing rehabilitation.
21. The judge went on then to consider what he described as the most controversial aspect of Mr Chirico's argument, namely the likely effect on the appellant if he were removed to South Africa. In his witness statement the appellant said that if he were forced to return to South Africa he would have nobody and he feared he might be driven to relapse. This was a theme which occurred throughout the witness statements. The strongest statement appeared in the report of Dr Sen, who concluded that the appellant remained at high risk of relapse based on the severity of his addiction if any of his treatment networks were disrupted.
22. The judge found that there were three significant criticisms of this argument. The first was that there was an assumption that if the appellant were removed to South Africa each and every element of his current support network would totally disappear. This was true for example in respect of Dr Sen's findings. The judge did not find that to be a realistic basis for assessing what would happen to the appellant. None of the many friends and supporters had addressed in any detail in their witness

statements what support they might be able to continue to provide the appellant by telephone, Skype etc. if he were in South Africa. The judge found it inconceivable that this large body of close friends would simply cut him dead the moment he left the country. The judge noted that even now some of the appellant's support is provided on the telephone: as Peter White, his NA sponsor, said, he and the appellant communicated every single day either by telephone or message and see each other several days a week. It seemed to the judge that insufficient account had been taken of the likelihood that there would be a degree of continuing support available from the appellant's current support network.

23. The judge went on to say that there was some force in the argument made by Mr Chirico that the appellant could not simply swap a trusted and trusting support network in this country for a brand-new one in South Africa. He considered, however, that that ignored the possibility of two things. The first of those was that there would be a degree of ongoing support from that network after the appellant left. The second, and, as the judge described it, another feature which was notable from its absence in the witness statements, was the extent to which those who form part of the appellant's current support network could identify new support for him in South Africa. There was little or nothing in the evidence to show that those who now supported the appellant had taken any steps to identify possible support for him in, for instance, Cape Town where his sister lives. This was despite organisations like NA and the church having global reach.
24. The second criticism of the appellant's case was that the numerous assertions that the appellant would be in danger of relapse if he had no support took no account of what support might be available for him in South Africa, in addition to any continuing support from those in the United Kingdom. No country evidence had been provided showing that there was no support for recovering addicts in South Africa. Mr White, himself a South African, whilst stating that support in South Africa was nowhere near the level in the UK, neither said that there was no support available nor stated what the actual level was. In the absence of evidence to the contrary, the judge could not be satisfied that there was not adequate support available for the appellant in South Africa in order to continue his recovery.
25. The judge also bore in mind that the appellant's own evidence was that the church was central to his whole recovery. Christianity is a major religion in South Africa and there was certainly no suggestion that the appellant would not be able to practise his religion there. It had not been adequately explained why the support he derived from the church here and which enabled him to fight his addiction would not still be available to him in South Africa.
26. The final criticism was that the assertion that the appellant would be liable to relapse on removal to South Africa did not, in the judge's judgment, give sufficient weight to the appellant's own determination to change his

life and his demonstrated ability to find and make use of sources of support around him, as shown in what the judge had set out earlier in his decision. He remarked that within fifteen months of leaving prison, albeit with help from those he met in prison and the various system in place to help offenders, he had developed a broad support network of his own. No sufficient explanation had been provided to explain why, with help from people such as his NA sponsor and his local church, he would not be able to draw on his self-reliance and create a similar network in South Africa.

27. The judge went on to say that doubtless too there would be plenty of opportunity for the appellant to continue to do voluntary work in South Africa and benefit from the positive feelings that such work gives him. He noted that the appellant was no stranger to such work in South Africa, having explained that when he was at university he often went to the townships, illegally, to distribute food and clothes and to teach English.
28. The judge went on to say that whilst he accepted that there was always a risk that a former drug addict would relapse and so there must be a risk that that would happen if the appellant were to go to South Africa, taking the above factors into account, he was not satisfied that the risk was as great as was claimed nor that it was significantly greater than it would be if he remained in the United Kingdom.
29. The judge went on to consider those findings in the context of the relevant legal framework.
30. The judge was prepared to accept that the appellant had been socially and culturally integrated into the UK for the last fifteen months. He did not, however, accept that there were any very significant obstacles to the appellant's integration into South Africa, as set out above in his decision. Taking all the evidence together, in light of his conclusions and also bearing in mind the guidance in Kamara [2016] EWCA Civ 813, he was satisfied that the evidence showed that the appellant was enough of an insider to understand how life in South Africa was carried on and that he would have the capacity to participate in it.
31. He then went on to consider whether there were any very compelling circumstances over and above those described in paragraph 399 and paragraph 399A. Paragraph 398 made it clear that what was required was very compelling circumstances outweighing the public interest in deportation and it was therefore necessary to perform a balancing exercise to determine whether the public interest had been outweighed.
32. The judge observed that there was much that was positive that had been put forward on behalf of the appellant. He accepted that he was a reformed person, that he was rehabilitated from crime and was at low risk of reoffending. He had developed a strong support network around himself. The appellant did a great deal of valuable voluntary work which was set out in considerable detail in the evidence, and that in some

respects his particular background made what he offered a rare commodity. He reminded himself that he did not accept that the consequences of removal would be as serious as claimed.

33. The judge accepted that consideration could be given to the positive contributions that a person made towards life in the United Kingdom and therefore gave full weight to all that had been said on his behalf to show what an important role he played. He accepted that there was a public interest in rehabilitating drug offenders and that the appellant's work furthered that aim.
34. The judge went on to say that nevertheless it did not follow that just because positive weight could be attached to something it must therefore necessarily outweigh the negative elements. There was still a balancing exercise to be performed. The judge reminded himself that as had been said in Olarewaju [2018] EWCA Civ 557, only a claim which is very strong indeed will succeed. Also, it was clear from section 117C(2) of the 2002 Act that the public interest in deportation is greater where the offence is more serious. Also, it had been said in UE (Nigeria) [2010] EWCA Civ 975 that the positive weight to be attached to a person's contribution to UK life would only make a difference in relatively few cases where the contribution was very significant.
35. The judge went on to say, having set out the nature of the appellant's offending and his conclusions as to its seriousness and the fact that these were very serious crimes indeed which could cause very serious harm, that despite attaching as much weight as he could to all the positive factors which had been presented to him, he was not satisfied that even when taken together they amounted to very compelling circumstances which outweighed the public interest in deportation. As a consequence, the appellant did not meet the requirements of the Rules.
36. The judge went on to say that the basis of the appeal was not whether the Rules were met but whether or not the decision appealed against was a disproportionate interference with the appellant's Article 8 rights. The judge set out guidance provided by the Supreme Court in Hesham Ali [2016] UKSC 60 as to the fact that the Rules are not to be regarded as a complete code but are nevertheless a relevant and important consideration for Tribunals determining appeals on Convention grounds.
37. The judge noted the fact that the appellant is a foreign criminal and that under section 32(4) of the 2007 Act, the deportation of foreign criminals is conducive to the public good and section 117C(1) of the 2002 Act makes it clear that the deportation of foreign criminals is in the public interest. The judge considered there to be a very strong public interest in the appellant's deportation and against that public interest he weighed all the matters which had been put forward on the appellant's behalf including everything set out above, and bore in mind the factors set out in Maslov.

38. The judge's conclusion was that taking all the matters urged on behalf of the appellant into account and in the light of his findings above, these factors were not in his judgment sufficient to outweigh the undoubted public interest in deporting the appellant. The appeal was therefore dismissed.
39. In granting permission to apply for judicial review, Holman J observed that he was just persuaded that it was arguable that the judge's decision and reasoning, which he regarded as immensely careful and thorough, required to be reviewed through the prism of the decision of the Court of Appeal in Akinyemi [2019] EWCA Civ 2098, which was handed down a week after the promulgation of the judge's decision. It was arguable that in light of Akinyemi the approach of the First-tier Tribunal Judge might not have been correct. It was stressed, however, that the case for deportation remained a strong one and the claimant, as he was before Holman J, must clearly understand that he remained likely to be deported.
40. In his submissions, building upon the points made in his skeleton argument, Mr Chirico addressed first ground 3 where it was argued that the judge had erred in his approach as to the likely impact upon the appellant himself of his removal from his present support network for particular reasons which were set out in that ground. He argued that it was a question of the weight of the factors in the balancing exercise as being the key issue. The judge had erred with regard to the impact of the appellant's removal to South Africa on him, on his mental health and his ongoing rehabilitation from drug dependency. He was a recovering addict. It was clear from the judge's decision that he had attached weight to this question and factored it into the proportionality decision. If the Tribunal agreed with the submissions made, then new findings of fact would have to be made. Mr Chirico would not seek to preserve the positive findings. It was not argued that there was no amphetamine dependency support in South Africa. The maintenance regime as part of his treatment was resulting in abstinence. In his report Dr Sen referred to the fact that all of the appellant's support activities gave him the sense of stability which kept him currently abstinent from amphetamine use, but he remained at high risk of relapse based on the severity of his addiction, if any of these treatment networks were disrupted. He also referred, at paragraph 5.3, to the likely catastrophic impact on the appellant's recovery of the loss of support networks. He had considered some of the consequences of relapse. The judge had not reached for the alternative conclusion as to what would happen if the appellant relapsed. He had looked at whether the appellant would relapse and concluded that he would not. It was not argued that the judge was bound to agree with the expert, but that to such evidence the normal Rules of procedural fairness applied and the judge had to give notice where the evidence was not disputed so the expert/submissions and evidence of other witnesses could respond to concerns. The attendees were entitled to leave the court knowing what the case against the appellant was and justice was not seen to be done.

41. Paragraph 46 of the skeleton set out where the other support networks were and identified the appellant's vulnerability to relapse. For example, Marc Sloan had referred to his vulnerability to relapse. The work he did gave meaning to what he did. Peter White had been identified by the expert as an important part of the treatment. This included regular face-to-face contact with a named sponsor. It was a question of the impact on the appellant if he did not see the sponsor several days a week and lost the rooms of NA in Brighton and the expert, the appellant and Peter White were not asked that, if it could work in South Africa. It was enough that the answer could be no. At the very least, if removed, there would be a period of vulnerability as could have been said if the point had been raised.
42. Paragraph 47 of the skeleton summarised the appellant's unchallenged evidence about the supportive community and the evidence also showed concerns at having to start again. He had not been cross-examined on it and it had not been challenged. Elsewhere in his statement, pages 170 to 171 of the bundle, he described the support he received from his sponsor. It was a question of what would happen if this particular network were removed. Paragraph 52 of the skeleton referred to the kind of evidence which could have been obtained if there had been any prior indication that the judge was minded to reject Dr Sen's conclusions about the impact on the appellant. As regards the argument in the Secretary of State's skeleton that a statutory appeal hearing is not a dress rehearsal, the respondent had made no concessions to very significant obstacles and the burden of proof remained on the appellant, a person was entitled to know the case they had to meet and if there had to be an adjournment, then so be it. A high level of fairness was required.
43. As regards paragraph 54 of the skeleton and the point that the very significant obstacles test was not conceded, this was nothing to the point. The question was the need to deal with the evidence properly and fairly and this had to be done at the hearing. The judge had gone off on a frolic substituting for the expert's view his own view of how willpower and positive commitment could overcome addiction and that was an expert matter but it was not a medical prognosis by the judge. There was a failure to have regard to material evidence. This point was addressed at paragraph 56 of the skeleton on the point of the support that could be provided to the appellant in South Africa from his friends and supporters in the United Kingdom. There was evidence with regard to NA's rooms in Brighton in evidence from the sponsor. As regards support in South Africa, the appellant had given evidence about that and also, that was not the crucial issue that the expert and witnesses addressed, but it was the lack of a specific support network in Brighton not being able to be replaced by a possible support network elsewhere. The expert's focus was on the breakdown of the treatment plan. He referred to risks of relapse in the United Kingdom also.

44. Also, at paragraph 60 of his skeleton Mr Chirico addressed the judge's point that the evidence of Dr Sen and the other witnesses did not give sufficient weight to the appellant's own determination to change his life and his demonstrated ability to find and make use of sources of support around him. It was argued that this failed to refer to or engage with the appellant's own evidence about the obstacles he would face in beginning the process of building a support network all over again and the irrational and implausible assumption that Dr Sen's diagnosis and prognosis eliminated from their consideration the facts, clearly known to Dr Sen, of the appellant's progress to date. If the judge was going to find that personal motivation was the issue, then he had to look at the appellant's evidence that he would lose his purpose and the expert evidence also if the built-up support network was broken. There had been no regard to the appellant's evidence on this.
45. The judge had erred in presuming that a private life in one place can be simply exchanged for another. Reference was made to EM (Lebanon) [2008] UKHL 64 in this regard. Family life was not just a set of services provided and it was necessary to consider the impact of removal of the current family life or of that private life and it was necessary to ask what would happen in South Africa. There could be telephone calls from the United Kingdom and connection with new support agencies but what would happen in the meantime was a quite relevant question. It was argued that there was a real risk of relapse which had not been engaged with by the judge and proper findings were needed if he was to go behind the expert's conclusion.
46. As regards grounds 1 and 2, the judge had erred in not following the guidance as now set out in Akinyemi and also had failed in regard to the clear and unchallenged evidence of the strength of the appellant's rehabilitation from his criminal offending. It was clear from authorities such as Lowe [2021] EWCA Civ 62 that a judge's correct self-direction would not involve a decision being set aside for failure to apply some sort of subtext. But if it has not applied the law correctly, then it is necessary to consider what a Tribunal properly directed would do. This was relevant to materiality and what would be done if there were a rehearing. It would also make its own findings of fact. In looking at materiality, one could not prejudge what the remaking Tribunal would do, as said in Lowe. Also, when looking at materiality, other cases could not be treated as factual precedents. Thus, the decision in PG (Jamaica) [2019] EWCA Civ 1213 could not be treated as a factual precedent as had been done in MI (Pakistan) [2021] EWCA Civ 1711 by the Upper Tribunal, a point made clear in HA (Iraq) [2021] 1 WLR 1327. The cases referred to in the Home Office skeleton should be treated in this way.
47. It was clear from UE (Nigeria) [2010] EWCA Civ 975, on which the judge had relied, that a positive contribution to the United Kingdom is relevant because it reduces the weight to be attached to the public interest side of the balancing exercise. The judge was required to consider whether the

public interest in the appellant's removal was or was not very significantly reduced as a result of his positive contribution to life in the United Kingdom. The judge was required first to determine the weight to be attached to the public interest in deporting a foreign national criminal in the particular circumstances of the appellant's case and secondly, in determining that question to ask itself whether there are any factors reducing the weight of the particular circumstances of the case, and thirdly, only once that exercise had been conducted, secondly to determine whether the positive elements in the case outweigh the public interest.

48. The position in this regard was made entirely clear in Akinyemi and in particular at paragraphs 50 and 53. The appellant there had been born in the United Kingdom. There was a question of the weight to be attached to the public interest and where to place the fact of being in the United Kingdom since birth as to whether this should go out under the consideration of very compelling circumstances or elsewhere and whether it was only something positive. Ryder LJ quoted from Lord Reed JSC's analysis of the Immigration Rules in Ali [2016] 1 WLR 4799. He stated there the following:

"The Strasbourg jurisprudence indicates relevant factors to consider, and paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at paragraph 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life."

He also said at paragraph 50:

"Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the *general public interest* [emphasis added] ... and also consider all factors relevant to the specific case in question."

49. Ryder LJ went on in Akinyemi to emphasise that there could be no doubt, consistent with the Strasbourg jurisprudence, that the Supreme Court had clearly identified that the strength of the public interest will be affected by factors in the individual case, i.e. it is a flexible or moveable interest and not a fixed interest. One example of this was the case of a person who was born in this country. Applying this approach to the weight to be given to the public interest in deportation on the facts of the case could lead to a lower weight being attached to the public interest.

50. He went on to say at paragraph 52 that the balancing exercise described by the Supreme Court had not been undertaken by the Upper Tribunal. Instead, it had anchored its approach on Lord Wilson JSC's description of the depth of public concern as a factor. The Upper Tribunal's approach to the public interest and the proportionality balance that was to be undertaken was accordingly flawed. The exercise of considering the strength of the public interest by assessing the factors in the case had not been undertaken. In particular, the extent to which a foreign criminal who was born in the UK and had lived here all his life must be considered alongside all the other factors that relate to the public interest in deportation before that is balanced against an assessment of the Article 8 factors. For these reasons, ground one of the appeal succeeded.
51. This was not, Mr Chirico argued, a matter of double-counting. There were two separate things. There was a question of what was the public interest in removing the appellant and that would be reduced if for example there would be fewer drug addicts in Brighton. That went to the moveable public interest and reduce the public interest in removal. It was an internal balancing exercise within the public interest question. Separately was the question of him building up his private life and his internal rehabilitation. As was said in Thakrar [2018] UKUT 00336 (IAC), all the elements of the private life to do with integration such as positive recovery and assisting the community had to be weighed as part of his private life. If all was left on that side there was a real risk of undercounting the broader public benefits/crucial parts of his private life. There was a risk of failing to give proper weight to the public interest and a risk of undercounting and it had to be separately weighed. An example of that might be cases of the impact of criminality on social and cultural integration. There was clear evidence here of the particular community and the benefit and there could have been undercounting of the public interest in keeping the appellant here. Factually, it was a question of whether it was enough to make a difference in the matter for a hypothetical Tribunal to decide what weight to attach. What was set out at paragraph 32 and then thereafter at paragraph 35 in the skeleton were relevant to this. The judge had materially erred by failing to evaluate the significance to the public interest of the loss of the benefits of what was provided by the appellant to the community.
52. As regards the respondent's argument concerning immateriality it was relevant to consider what was said in Unuane [2021] 72 EHRR 24. The warnings by the Court of Appeal against reliance on factual precedent should be borne in mind and the need for all relevant material to be weighed on a case to case basis. In Oludoyi [2014] UKUT 539 (IAC), the first applicant was a qualified nurse without more and the Secretary of State had been entitled to treat that as sufficient, and in Thakrar [2018] UKUT 00336 (IAC) it was the sponsor who contributed to the United Kingdom. It was possible, and for the purposes of materiality the appellant did not need to show more, that a hypothetical Tribunal would treat his contribution as capable of influencing the balancing exercise and

therefore the materiality argument could not succeed. None of those cases considered above established a factual precedent but they could tie in with this case.

53. In his submissions, Mr Melvin relied on the skeleton that had been put forward on behalf of the Secretary of State.
54. As regards ground 3, the judge had considered what the appellant could expect to receive in support on return to South Africa, and addressed the argument made by Mr Chirico. The judge at paragraphs 89 and 90 had considered the expert and other evidence and at paragraph 94 also. It was an argument about weight of evidence, not procedural fairness.
55. The judge considered ability to work in South Africa on return, noting that the appellant would have an income and family support and the ability of the support network in the United Kingdom to assist. The onus was not on the Secretary of State to question witnesses about assistance on return as to why what happened after he left prison in the United Kingdom could not be provided in South Africa. The evidence had been properly considered in the round. The relevant tests under the Immigration Rules and the statutory provisions had been considered by the judge.
56. With regard to the case law, UE was looked at in the prism of the new regime and it needed to be almost exceptional and there was a very strong positive contribution to the community to have a chance of success. It was not a deportation case. If not, then it was necessary to put the right factual finding into the correct test and the judge had done so, looked at it holistically and it would make no difference as argued for in the skeleton.
57. By way of reply, Mr Chirico argued that the onus was not on the appellant to show that there was no medical treatment in South Africa. It was accepted that there was medical treatment there but the appellant had to show his removal from the support network would have to be new and built from scratch and would risk a relapse. It was not a long-term illness case where a person would get worse if there were no treatment but if on return he lost his sense of purpose and hope and on the expert evidence, if he used again all the support would go out of the window. The appellant needed to be put on notice of a different case. There was little room for manoeuvre if the Tribunal got it wrong. The Secretary of State's case was answered by a lot of unchallenged evidence.
58. As regards what the judge said as quoted by Mr Melvin at paragraphs 90, 94 and 95, this crystallised him reaching his own non-expert view about a person's determination to change his own life. A consultant psychiatrist was used to answering that question and it was plainly within the expert's expertise and the judge had failed to consider the expert's conclusion and it was procedurally unfair and he had become his own expert. The judge noted evidence of voluntary work in South Africa but that was 30 years

ago and before the appellant was a drug addict. The judge needed to ask how likely it was that the appellant would use again and have a full relapse and it was argued that it was likely that there would be a catastrophic collapse in his wellbeing. If the judge disagreed the appellant had to be put on notice. If exceptionality was needed this was arguably such a case and reference was made to the probation officer's evidence.

59. We reserved our decision.

60. It is clear from what was said in Akinyemi, borrowing significantly from what had been said earlier by the Supreme Court in Hesham Ali and by the European Court of Human Rights in Maslov [2009] INLR 47, that the strength of the public interest could be affected by factors in the individual case, i.e. that it is a flexible or moveable interest and not a fixed interest. The example in that particular case and also as referred to by Lord Reed in Hesham Ali was the case of a person who was born in the United Kingdom as a relevant factor. As was noted by Ryder LJ at paragraph 39:

“It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few, i.e. they will be exceptional having regard to the legislation and the Rules.”

As was said by Ryder LJ at paragraph 50 of Akinyemi, applying this approach to the weight to be given to the public interest in deportation on the facts of this case could lead to a lower weight being attached to the public interest. Here, it is argued that the judge erred at paragraph 104 of his decision when he said that the relevant public interest to go onto the scales was the public interest in maintaining effective immigration control. It is argued that he failed to take into account the positive benefits of the work done by the appellant subsequent to his conviction and release from prison in the positive benefits he had provided for the community as summarised at paragraph 101 of the judge's decision. In effect, it is argued that the judge treated the public interest in deporting the appellant as a fixity rather than considering these other favourable aspects that relate to the public interest in deportation before that was balanced against an assessment of the Article 8 factors, as he was required to do.

61. Ryder LJ went on to say the following at paragraph 53 in Akinyemi:

“... The exercise of considering the strength of the public interest by assessing the factors in the case has not been undertaken. In particular, the extent to which a foreign criminal who was born in the UK and has lived here all his life must be considered alongside all the other factors that relate to the public interest in deportation before that is balanced against an assessment of the Article 8 factors. For these reasons, ground one of this appeal succeeds.”

62. It is far from clear whether this is indeed one of the “necessarily ... very few ... exceptional” cases referred to by Ryder LJ at paragraph 39 of Akinyemi. But, even if it is, we do not consider that the judge failed to take account of relevant circumstances going to the reduction of the public interest in this case. He was clearly aware of the point that the public interest is not a fixity, having summarised Mr Chirico’s argument to that effect at paragraphs 50 and 51 of his decision. He returned to the point at paragraph 102, in which he accepted the argument that consideration could be given to the positive contributions that a person makes towards life in the UK, gave full weight to all that had been said on the appellant’s behalf to show what an important role he plays, and accepted that there was a public interest in rehabilitating drug offenders and that the appellant’s work furthered that aim. At paragraph 104 he accepted that UE (Nigeria) allowed – or even required – him to give positive weight to the contribution made by the appellant to life in the UK. What he said in that paragraph about the relevant public interest to go into the scales being the public interest in maintaining immigration control was a reference to the facts of UE, which, as he noted, was not a deportation case. In stating as he did at paragraph 106 that the positive factors did not amount to very compelling circumstances which outweighed the public interest in deportation, we consider that the judge did no more than summarise the conclusion he had reached in light of his consideration and application of the guidance in UE to the facts of the case ie, having concluded that even with a reduction of the public interest in light of the positive factors, that remaining public interest was not outweighed by the positive factors. Accordingly, we do not accept that the judge’s decision fell foul of the guidance in Akinyemi in failing to bear in mind the flexibility of the public interest.
63. Also, with regard to grounds 2 and 3 we do not consider that the judge erred, and we entirely agree with Holman J’s commendation of the immense care and thoroughness and painstaking approach of the First-tier Judge. We consider, contrary to Mr Chirico’s submissions, that he was fully entitled to come to the view he did about the various risk factors and risks identified in particular by Dr Sen. In our view, it was fully open to the judge to attach weight to the life experience and transferable skills the appellant has, to the fact of his self-motivation and the point that he has now reached in his rehabilitation, the very clear insight into the threats that drugs pose and the ways to counter those threats which the appellant had identified, the fact that he was a very hard-working, self-motivated and driven individual, by his own description, the extent of the support network he had and the extent to which that could be extended to him from the United Kingdom and also the availability of support in South Africa, and the benefits for the appellant of continuing to do voluntary work.
64. The judge addressed in considerable detail the identified high risk of relapse based on the severity of addiction if any of the treatment networks

were disrupted as referred to by Dr Sen. It was fully open to the judge to note and reject the assumption that if the appellant were removed to South Africa each and every element of his current support network would totally disappear, a failure to take account of what support might be available to the appellant in South Africa and the appellant's evidence as to the church was central to his own recovery. It was open to the judge to find that the assertion that the appellant would be liable to relapse on removal to South Africa did not give sufficient weight to the appellant's own determination to change his life and his demonstrated ability to find and make use of sources of support around him, as shown in what the judge had set out in his decision.

65. We do not consider that the judge was required to adjourn and put these matters to Dr Sen and other witnesses. It was for the appellant to make out his case and for the judge to make findings on the evidence. A judge is not required in the interests of procedural fairness to put every concern that he has about the conclusions that witnesses may come to in reaching his own conclusions on the evidence. There is a risk if this approach were adopted that there would be a series of perpetual adjournments where judges put concerns to witnesses, witnesses put forward further evidence and the judge then had further concerns. We have some sympathy with the view expressed on behalf of the respondent in her skeleton argument that a statutory appeal hearing is not a dress rehearsal. The burden of proof remained on the appellant to discharge. As a consequence, we see no weight to grounds 2 and 3.
66. We also agree with the respondent's argument that, as it was placed in the alternative, there is no materiality to any error in respect of ground 1. The existence of some benefit to parts of the community from the work done by the appellant is not such as to entail that the case is one of the very few exceptional cases as referred to by Ryder LJ. Also, it is clear, reading the judge's decision as a whole, that full consideration was taken of the matters which were not specifically placed on the side of the public interest to be balanced against the other Article 8 factors. The judge was clearly fully aware of the benefits of the appellant to the community as set out for example at paragraph 101 of his decision. The overall conclusion that the positive factors did not amount to very compelling circumstances outweighing the public interest in deportation was fully open to him. Likewise, the findings at paragraph 113 considering Article 8 outside the Rules.
67. As a consequence, we find no error of law in the judge's decision. Like the judge, we have considerable sympathy for the appellant's significant personal loss in the context of the way in which his life turned around for the worse. Likewise, we can only commend the impressive efforts he has made to date to turn his life around. We have to consider however, the appeal as a matter of law, and we do not consider that it has been shown that the judge materially erred in law in any respect. His decision dismissing this appeal is, as a consequence, maintained.

Notice of Decision

The appeal is dismissed.

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 his 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

Date 28 January 2022

Upper Tribunal Judge Allen