



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05092/2020 (V)

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
Remotely by Microsoft Teams  
On 6 July 2021

Decision & Reasons Promulgated  
On 5 August 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMI SALMAN

Respondent

**Representation:**

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer

For the Respondent: Mr J Holt instructed by TMC Solicitors Ltd

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Sami Salman (the appellant) and the Secretary of State for the Home Department (the respondent).

**Introduction**

2. The appellant is a citizen of Bahrain who was born on 13 June 1966.

3. The appellant claims that he arrived in the UK in 1982, when he was 16 years of age. On 27 June 1990, the appellant was granted Indefinite Leave to Remain (ILR). He claims to have lived in the UK ever since but it is clear he also made a visit or visits to Ireland at times, claiming he last returned to the UK in 2018.
4. The appellant had a brief relationship with an Irish citizen and, as a result of that relationship, on 5 May 1989 the appellant's daughter, Diane ("D") was born in Ireland. He was granted custody of D on 7 April 1990 and returned to the UK with her where he was awarded custody of her by the court in July 1992. D was subsequently registered as a British citizen.
5. During this time, the appellant had a relationship with a British citizen, Grace Cunningham ("G"). They married in Bahrain in 2000. On 14 May 2010, the appellant's son, Rashid ("R") was born in the UK.
6. At some point, the appellant's relationship with G broke down. A non-molestation order was made by the Bristol Family Court on 28 March 2019 in relation to G prohibiting from contacting her.
7. On 8 August 2019, at the Bristol Magistrates' Court the appellant was convicted of breaching that non-molestation order and also of sending threatening and abusive communications to his daughter, D contrary to s.4(1) and (4) of the Protection for Harassment Act 1997. On 17 September 2019, in relation to each offence the appellant was sentenced to six months' imprisonment to run consecutively. As part of his sentence, the Bristol Magistrates' Court also made a restraining order against him valid until 16 September 2022 preventing him from contacting G and D.
8. On 18 October 2019, the appellant's appeal against those convictions was dismissed by the Bristol Crown Court.
9. On 29 October 2019, the respondent made a decision to make a deportation order against the appellant under s.5(1) of the Immigration Act 1971 ("the IA 1971") on the basis of those convictions and that his deportation was conducive to the public good under s.3(5)(a) of the IA 1971.
10. On 14 November 2019, the appellant made a human rights claim based upon his private and family life in the UK seeking to resist his deportation.
11. On 23 March 2019, the Secretary of State rejected the appellant's human rights claim under Art 8 of the ECHR.

### **The Appeal to the First-tier Tribunal**

12. The appellant appealed to the First-tier Tribunal. In a decision sent on 30 October 2020, Judge I D Boyes allowed the appellant's appeal under Art 8 of the ECHR.
13. First, Judge Boyes rejected the appellant's contention that the appellant was not liable to deportation because he was not a "foreign criminal" under the UK Borders Act

2007 (the “UKBA 2007”) due to the fact that he had not been sentenced to a period of twelve months’ imprisonment for a single offence but rather, to consecutive terms of six months’ imprisonment for two offences. The judge concluded that the Secretary of State had not applied the automatic deportation provisions in the UKBA 2007 but rather, had decided to make a deportation order under s.5(1) by reference to s.3(5)(a) of the IA 1971 on the basis that the appellant’s deportation was “conducive to the public good”.

14. Secondly, the judge then went on to apply the provisions in s.117C of the Immigration, Nationality and Asylum Act 2002 (“the NIAA 2002”). The judge found that the appellant did not fall within Exception 1 in s.117C(4) or Exception 2 in s.117C(5).
15. As regards the former, the judge accepted that the appellant was “socially and culturally integrated into the UK” (s.117C(4)(b)) and had lived most of his adult life in the UK. However, the judge concluded that there were not “very significant obstacles” to the appellant’s integration on return to Bahrain (s.117C(4)(c)).
16. As regards the latter, the judge did not accept that there was a “genuine and subsisting parental relationship” between the appellant and his son, R and that, as a consequence, it could not be said that it would be “unduly harsh” for the appellant to be deported.
17. Thirdly, however, the judge went on to apply the test in s.117C(6), namely whether there were “very compelling circumstances, over and above those described in Exceptions 1 and 2” so as to outweigh the public interest. The judge found that there were such circumstances and so the public interest was outweighed and it would not be proportionate to deport the appellant. On that basis, the judge allowed the appellant’s appeal under Art 8 of the ECHR.

### **The Appeal to the Upper Tribunal**

18. The Secretary of State sought permission to appeal on a number of grounds.
19. First, the judge had erred in law in finding that there were “very compelling circumstances” sufficient to outweigh the public interest under s.117C(6) given his findings that the appellant could not meet the requirements of either Exception 1 or Exception 2. The judge had made inconsistent findings, in reaching that conclusion, namely that the appellant both continued to deny his wrongdoing but also concluding that he had shown genuine remorse for his offending. Further, in finding that the appellant was rehabilitated, the judge, in addition to reaching those inconsistent findings, was wrong to take into account that the appellant had not committed any further offences given the short time since his release.
20. Secondly, the Secretary of State contended that the judge had been wrong to find that the appellant was “socially and culturally integrated” for the purposes of Exception 1 (which continued to be relevant in relation to the application of s.117C(6)) because he

had failed to take into account the appellant's offending and had merely looked at the position of his integration retrospectively before that point in time.

21. On 23 November 2020, the First-tier Tribunal (UTJ Martin) granted the Secretary of State permission to appeal.
22. On 6 January 2021, the appellant filed a rule 24 response seeking to uphold the judge's decision.

## **Discussion**

### 1. The "Serious Harm" Argument

23. Before turning to the Secretary of State's grounds, it will be helpful to consider the point raised by the appellant in the rule 24 response which, at least there, contends that the respondent had no power to deport the appellant as he is not a "foreign criminal" within s.32(1) of the UKBA 2007 as he has not been sentenced to a period of "at least twelve months" imprisonment for a single offence (see ss.32(2) and 38(1)(e)).
24. In his oral submissions, Mr Holt accepted that whether or not the appellant was a "foreign criminal" for the purposes of the UKBA 2007 did not affect whether he was liable to deportation. That, in my judgment, is correct.
25. The Secretary of State made a decision to deport the appellant under s.3(5)(a) of the IA 1971 on the basis that, the appellant not being a British citizen, "the Secretary of State deems his deportation to be conducive to the public good". On that basis, the Secretary of State had the power to make a deportation order under s.5(1) of the IA 1971. That much is plain from the respondent's decision letter where it is stated:

"We wrote to you on 29 October 2019 and notified you that because of your criminal convictions and behaviour in the UK the Secretary of State has decided to make a Deportation Order against you under Section 5(1) of the Immigration Act 1971. This is because the Secretary of State deems your deportation to be conducive to the public good".

26. The Secretary of State did not purport to apply the 'automatic' deportation provisions in the UKBA 2007 on the basis that the appellant was a "foreign criminal" because he had been sentenced to a period of at least twelve months' imprisonment for a single offence. Had the 'automatic' deportation provisions applied then by virtue of s.32(4):

"For the purposes of Section 3(5)(a) of the Immigration Act 1971 ..., the deportation of a foreign criminal is conducive to the public good".

27. The Secretary of State would, in those circumstances, be relieved of having to make any decision about whether the individual's deportation was conducive to the public good because it is simply deemed that it is conducive to the public good if he is a "foreign criminal".

28. It follows, therefore, that the point raised in the rule 24 response, which appears to mirror submissions made to Judge Boyes at the hearing but rejected by him at [41]-[42], is legally misconceived.
29. However, the relevance of whether the appellant is a “foreign criminal” did arise, albeit in a different guise. In determining whether the appellant’s deportation breached Art 8 of the ECHR, Part 5A of the NIAA 2002 sets out factors relevant to the “public interest question” under Art 8.2 (see 117A(2) and (3)). As is well-known, s.117B sets out a number of public considerations applicable to all cases and s.117C sets out a number of additional considerations in “cases involving foreign criminals”. Whether the appellant was a “foreign criminal” as defined in the NIAA 2002 determined whether, in particular, s.117C applied in deciding whether his deportation was proportionate under Art 8.2. The definition of “foreign criminal” for the purposes of Part 5A is set out in s.117D(2) as follows:
- “(2) In this Part, ‘foreign criminal’ means a person –
- (a) who is not a British citizen,
  - (b) who has been convicted in the United Kingdom of an offence, and
  - (c) who –
    - (i) has been sentenced to a period of imprisonment of at least 12 months,
    - (ii) has been convicted of an offence that has caused serious harm, or
    - (iii) is a persistent offender.”
30. There, albeit only in part, like under the UKBA 2007, the phrase “foreign criminal” is defined as meaning a person who has been sentenced to a period of at least twelve months’ imprisonment. By virtue of s.117D(4)(b), that period of imprisonment cannot be established if it is only by virtue of being sentenced to consecutive sentences amounting to a cumulative total at least twelve months’ imprisonment. In that, it reflects the definition of “foreign criminal” for the purposes of the ‘automatic’ deportation provisions in the UKBA 2007 in s.3(8)(b) of that Act.
31. However, in the NIAA 2002 a “foreign criminal” has a wider definition so as to include a person who has been convicted of an offence that has “caused serious harm” or where the offender is a “persistent offender”.
32. In this appeal, therefore, the provisions in s.117C – which were applied by the judge – were only applicable to the appellant if he is a “foreign criminal” as defined. He could not be a “foreign criminal” on the basis of his sentence and it has not ever been suggested that he is a “persistent offender”. However, the Secretary of State in her decision letter concluded that the appellant had been “convicted of an offence which has caused serious harm” and, as a consequence, she applied in her decision letter the provisions in the Immigration Rules (paras 398, 399 and 399A) which mirror the provisions in s.117C.

33. Before the judge, the appellant did not contend that this conclusion by the Secretary of State was wrong or, indeed, raise with the judge the issue of whether s.117C could apply as the appellant had not been convicted of an offence which caused “serious harm”. As I have already pointed out, and as the judge dealt with in paras 41–42 of his decision, the argument about whether the appellant was a “foreign criminal” was misdirected towards the issue of whether he was liable to deportation at all. No doubt, as a result of this focus of the submissions, the judge was not alerted to the issue of whether s.117C applied because the appellant was a “foreign criminal” because he had been convicted of an offence that had caused “serious harm”. The appeal seems to have proceeded on the basis that Part 5A, in particular, s.117C applied to the Art 8 claim relied on before the judge.

*“Serious Harm”*

34. The meaning of “serious harm” in the definition of a “foreign criminal” in Part 5A was considered by the Court of Appeal in R (Mahmood v UTIAC) v SSHD [2020] EWCA Civ 717.
35. In his judgment in Mahmood, Simon LJ (with whom Coulson and Males LJ agreed) identified two preliminary points concerning the scope of s.117D(2) as follows:

“35. First, the three categories in subsection (2)(c) have a potential to overlap. Plainly an offender who has received a sentence of more than 12 months may have done so because he committed an offence which caused serious harm. Equally, an offender who persistently offends is likely to receive a longer sentence (and more than 12 months) because of a poor antecedent history.

36. Second, the provision must be given its ordinary meaning informed by its context. The three categories must be read together. This is more than simply a conventional approach to statutory interpretation. It is plain, for example, from the structure of the provision that an offender who has been sentenced to a term of less than 12 months for an offence may nevertheless be treated as a 'foreign criminal' if the offence caused serious harm; and that 'serious harm' will only be relevant when the sentence for an offence is less than 12 months. This throws light on what may be encompassed by an offence which causes serious harm. While it is possible to think of offences which, despite causing the most serious harm, would not typically attract an immediate prison sentence of at least 12 months (causing death by careless driving is an example), in general paragraph (c)(ii) is not concerned with the most serious kind of harm which comes before the Crown Court.”

36. Consequently, it is important to bear in mind that the offending covered by s.117D(2)(c)(iii) arises, by definition and in practice, only in a case where an offender has not been sentenced to at least twelve months imprisonment for a single offence. It may, therefore, be reflective of the fact that offences do not necessarily involve “the most serious kind of harm” in cases coming before the criminal courts.
37. At [39], Simon LJ identified that the harm must be causatively linked to a particular offence and cannot arise from a generic effect upon society connected to the type of offence in general:

“39. So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so. Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be said that such a thief caused serious harm himself, either to the owner or to society in general. Beyond this, we are doubtful that a more general analysis of how the law approaches causation in other fields is helpful.”

38. Then, at [41], Simon LJ concluded that the “harm” includes, but is not limited to, physical or psychological harm to an identifiable individual, it includes also economic harm and a particular offence may cause relevant harm to society:

“41. Mr Biggs argued on behalf of Mahmood that the harm must be physical or psychological harm to an identifiable individual that is identifiable and quantifiable. We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual. Some crimes, for example, supplying class A drugs, money laundering, possession of firearms, cybercrimes, perjury and perverting the course of public justice may cause societal harm. In most cases the nature of the harm will be apparent from the nature of the offence itself, the sentencing remarks or from victim statements. However, we agree with Mr Biggs, at least to this extent: harm in this context does not include the potential for harm or an intention to do harm.”

39. At [42], Simon LJ dealt with the issue of whether the harm was “serious” and he recognised that was not a precise criterion and depended upon evaluation of all the evidence:

“42. The adjective 'serious' qualifies the extent of the harm; but provides no precise criteria. It is implicit that an evaluative judgment has to be made in the light of the facts and circumstances of the offending. There can be no general and all-embracing test of seriousness. In some cases, it will be a straightforward evaluation and will not need specific evidence of the extent of the harm; but in every case, it will be for the tribunal to evaluate the extent of the harm on the basis of the evidence that is available and drawing common sense conclusions.”

40. As regards proof, the burden of proof is on the Secretary of State to the civil standard (see [47] per Simon LJ).

41. At [56], Simon LJ concluded that the ultimately decision whether an offence has caused “serious harm” is for the FtT:

“The views of the Secretary of State are a starting point and the reasoning of a decision letter may be compelling; but ultimately the issues that arise under s.117D(2)(c)(ii) will be a matter for the FtT.”

42. In relation to evidence, Simon LJ recognised (at [48]-[53]) the range of evidence that would (and should) be considered by the FtT in reaching its finding:

“48. Neither the direct victim of a crime (if there is one) nor the prosecuting authority is a party to the tribunal proceedings. The focus of the hearing is whether the deportation decision is a proportionate response to the criminality and the legitimate aims that the Secretary of State seeks to achieve by deporting the foreign national.

49. The relevant criminal file (the contents of the Crown Court Digital Case System) is not produced or made available to the FtT. The record of the conviction, which is rarely in dispute, stands as the authoritative evidence of conviction. Tribunals are often provided with the record of conviction or the sentence order of the criminal court, along with (where available) the remarks of the judge who passed sentence, which may be reproduced in the Home Office decision letter. Under its procedure rules the FtT may admit such evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom (see Rule 14(2)(a) FtT Rules).

50. While an appellant may give and call live evidence, prosecution witnesses do not usually give evidence before the FtT about the criminality. This will have been conclusively established by the conviction that led to the decision to deport.

51. Mr Biggs argued that the Secretary of State must prove the case against the offender by adducing specific items of evidence that would include, if the seriousness of the harm were in issue, evidence from the victim. We see no proper basis for this argument. In many cases, a victim statement will be put before the sentencing judge. This will describe the impact caused by the offence as at the date of the statement. A victim statement adduced in criminal proceedings has the status of evidence which a defendant has an opportunity to challenge before sentence is passed (*R v. Perkins* [2013] 2 Cr. App. R. (S) 72). There is no justification for allowing a second such opportunity in proceedings before the FtT. In cases where the Secretary of State relies on the causing of serious harm alone for treating an offender as a 'foreign criminal', we would expect the sentencing remarks (if available) and the victim statement (if it exists) to form part of the Secretary of State's evidence before the tribunal. However, we recognise that in many cases a victim or those less directly affected by a crime may be reluctant to make a statement as to the harm endured by an offence, and no proper conclusions can be drawn from the lack of such a statement.

52. The suggestion that a victim of crime should have to give evidence of the effect of that crime before a tribunal, with the prospect of cross-examination by or on behalf of the perpetrator can be rejected outright: not least because of the potential for causing additional harm to a victim.

53. While an offender may choose to give evidence about the underlying criminality, the FtT will be aware that this will not necessarily be the whole, or even a truthful, picture....”

43. In Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 (IAC), the Upper Tribunal gave guidance on s.117D(2)(c). Having set out at length passages from the Court of Appeal's judgment in Mahmood and a number of earlier cases, the UT summarised the approach at [53] to the issue of whether an offence caused “serious harm” as follows:

“53. The current case law on "caused serious harm" for the purposes of the expression "foreign criminal" in Part 5A of the 2002 Act can be summarised as follows (drawing predominately from the judgment of Simon LJ in R (Mahmood and others)):-



- (1) Whether P's offence is "an offence that has caused serious harm" within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.
- (2) Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.
- (3) In determining what factors are relevant or irrelevant, the following should be borne in mind:
  - (a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;
  - (b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused "serious harm", as categorised in the Sentencing Council Guidelines;
  - (c) A victim statement adduced in the criminal proceedings will be relevant;
  - (d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;
  - (e) The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;
  - (f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;
  - (g) The mere potential for harm is irrelevant;
  - (h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm."

44. Turning to the present case, there is no doubt that there was evidence before the judge capable of establishing that the appellant's offences "caused serious harm" to his partner, G and also his adult daughter, D. The Memorandum of Entry in the Register of the Magistrates' Court following the appellant's conviction of the two offences is set out in the respondent's decision letter.

45. As regards the offence committed against his partner of breaching the non-molestation order, that records that on 31 March 2019 he "banged on the door and shouted at [G] to cancel the order" in breach of the non-molestation order. He was sentenced to six months' imprisonment consecutive to the offence for which he was also convicted in relation to his daughter. The Register records:

"Reason: offence so serious because persistent nature of offending which caused serious distress and psychological harm to the victim. The breach of the non-molestation order was deliberate and almost immediately on imposition".

46. As regards the offence of sending threatening and abusive communications to his adult daughter (D), the Register records that this occurred between 2 March 2019 and 15 April 2019 and which caused her to “fear that violence would have been used against her” and which “you knew or ought to have known would cause fear of violence” to her. He was sentenced to six months’ imprisonment to run consecutively with the other offence. The reason is stated as follows:

“Offence so serious because persistent nature of offending which caused serious distress and psychological harm to the victim”.

47. In addition, of course, the Magistrates’ Court also imposed a restraining order preventing him from contacting either his partner or daughter until 16 September 2022.

48. There is no doubt that this was the relevant record which the judge had before him as to the nature of the appellant’s offending and which was undoubtedly capable of sustaining a finding that the appellant had caused “serious harm” in relation to both offences and so was a “foreign criminal” as defined in s.117D(2)(c)(ii) of the NIAA 2002.

49. Indeed, Mr Tan submitted that the judge had, in fact, made such a finding. In his skeleton argument, Mr Tan relied upon what the judge had (at para 18) paraphrased the reasons given by the magistrates for imposing the custodial sentences including that the offences were “so serious because of the persistent nature of the offending which caused serious distress and psychological harm to the victim”. Mr Tan also relied on what the judge said at para 57, albeit in the context of proportionality, as follows:

“The appellant has been convicted of two offences. One of them is a breach of a court order which of itself is both *serious* and concerning, secondly the offence which relates to his daughter included threats of physical violence such that would cause her to fear such violence would be used upon her and against her. In their conclusion the magistrates reached the decision that the offence was *so serious* that only a custodial sentence would be justified, a decision which was subsequently upheld by the Crown Court in Bristol”.  
(my emphasis)

50. With respect to Mr Tan’s submission, I do not accept that the judge has made a clear finding that, in effect, s.117D(2)(c)(ii) applied. The judge did not specifically refer to that provision and indeed, as I have already indicated, the point was not taken before him that the application of s.117C of the 2002 Act was contingent on this finding even though it had been the basis upon which the Secretary of State had applied the mirroring provisions in the Immigration Rules in the decision letter. The judge’s attention was simply not drawn to this issue at the hearing. His words are not, in my judgment, a clear enough statement to sustain the submission that he has, in effect, made the required finding in order to be satisfied, and the burden was upon the Secretary of State, that the appellant was a “foreign criminal” and so Part 5A of the NIAA 2002 applied to the appellant.

51. Further, as I have already said, I am in no doubt that the reasons given by the magistrates were capable of establishing that the appellant's offences caused "serious harm". It may well be that such a conclusion would be likely on a full assessment of the facts. However, in order to reach the conclusion that the judge did not err in law in applying s.117C at all, I must be satisfied that it would have been inevitable that he would have concluded that the appellant's offences caused "serious harm" on the material before him. Despite the likelihood that he would, I am not persuaded that it was inevitable.

*Materiality if s.117C(6) Does Not Apply*

52. Mr Holt submitted that the error by the judge was not material because, if s.117C did not apply, the judge would inevitably have found that the appellant's deportation was disproportionate because the high threshold in the test, which the judge in fact applied under s.117C(6) of "very compelling circumstances", would not apply. A lower threshold/test would be applicable: *a fortiori* he would have found the appellant's deportation to be disproportionate.

53. The applicable test if s.117C did not apply to the appellant was not explored in depth before me. The true point of relevance as to whether the appellant was a "foreign criminal" was not identified by the appellant's representatives until the UT hearing. Mr Tan's skeleton argument, although addressed to the relevant issue, rested the Secretary of State's position on the submission that the judge had, in fact, made a finding that the appellant's offences had caused "serious harm".

54. In order to determine the correct approach to proportionality in a deportation case where s.117C (and the mirroring Immigration Rules) do not apply, it is necessary to 'wind back the clock' to the approach set out in the case law prior to July 2012 (when the Immigration Rules first included provisions relating to Art 8 in deportation) and 28 July 2014 (when Part 5A of the NIAA 2002 came into force together with mirroring changes to the Immigration Rules). Likewise, any impact arising from the 'automatic' deportation provisions in the UKBA 2007, must likewise be put to one side as they also cannot apply to the appellant. Those provisions came into force earlier on 1 August 2008 and, to the extent, the weigh to be given to the public interest in deporting under those provisions was inevitably reflected in judicial reasoning even before the Art 8 provisions came into force (see SS(Nigeria) v SSHD [2013] EWCA Civ 550, especially at [54] and [55] per Laws LJ).

55. The approach to proportionality was, definitively, set out in the speeches of Lord Bingham in R (Razgar) v SSHD [2004] UKHL 27 and Huang v SSHD [2007] UKHL 11. At [20] in Razgar, Lord Bingham said that the issue of proportionality:

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention".

56. This statement was approved by Lord Bingham (and the other members of the House of Lords) in Huang at [20].

57. Neither of those cases involved deportation. They involved removal and therefore engaged, principally, the legitimate aim of the “economic well-being of the country”. In the context of deportation, the principal legitimate aims are the “prevention of disorder or crime”, the “protection of the rights and freedoms of others”.
58. As a consequence, as the Supreme Court recognised in Hesham Ali (Iraq) v SSHD [2016] UKSC 60 at [25] (per Lord Reed):
- “... the court has often said that the task of the court or Tribunal applying Article 8(2) consists in ascertaining whether the decision struck a fair balance between the relevant interests, namely the appellant’s right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other”.
59. The approach of the Strasbourg case law in deportation of foreign offenders relying upon Art 8 has been identified in a number of leading authorities including Boultif v Switzerland (2001) 33 EHRR 50; Uner v Netherlands (2007) 45 EHRR 14, and Maslov v Austria [2009] INLR 47. These cases were summarised by Lord Reed in Hesham Ali at [26] as follows:
- “26. In a well-known series of judgments the court has set out the guiding principles which it applies when assessing the likelihood that the deportation of a settled migrant would interfere with family life and, if so, its proportionality to the legitimate aim pursued. In Boultif v Switzerland (2001) 33 EHRR 50, para 48, the court said that it would consider the nature and seriousness of the offence committed by the applicant; the length of the applicant’s stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant’s conduct during that period; the nationalities of the various persons concerned; the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. Two further factors were mentioned in Uner v Netherlands (2006) 45 EHRR 14, para 58: the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of the social, cultural and family ties with the host country and with the country of destination. In Maslov v Austria [2009] INLR 47, paras 72-75, the court added that the age of the person concerned can play a role when applying some of these criteria. For instance, when assessing the nature and seriousness of the offences, it has to be taken into account whether the person committed them as a juvenile or as an adult. Equally, when assessing the length of the person’s stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive.”
60. Of course, when the Immigration Rules in July 2012 and s.117C in July 2014 came into force, the public policy set out by the Secretary of State and latterly by the legislature, became a relevant factor in determining the weight to be given to the “public interest” reflected in an individual’s offending (see Hesham Ali at [50]).

61. Reflecting the phraseology that was introduced by s.117C(6) (and mirrored in Immigration Rule changes at the same time), Lord Reed in Hesham Ali at [50] said this:

“50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. 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 in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed.”

62. However, the public interest in deportation has always required a Tribunal to assess the weight to be given to the appellant’s offending based upon its seriousness and any risk of future offending by the individual, in other words it was for the Tribunal to give due (“strong”) weight to the public interest in deportation (see, e.g. N (Kenya) v SSHD [2004] EWCA Civ 104 and OH (Serbia) v SSHD [2008] EWCA Civ 694). That approach has not changed because of the legislative intervention in Part 5A and, indeed, what is said in s.117C(1) and (2) no more than reflects the position that deportation of foreign offenders is “in the public interest” (s.117C(1)) and as set out in s.117C(2):

“The more serious the offence committed by a foreign national, the greater is the public interest in deportation of the criminal”.

63. That said, however, the specific exceptions set out in s.117C(4) and s.117C(5) were not, in themselves, explicitly part of the legal regime, and would not now be part of the legal regime if Part 5A did not apply to a particular individual. Equally, the structured approach in Part 5A which will, in all cases, determine the outcome of an appeal where Art 8 is engaged, will not apply (see NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [38] and HA (Iraq) v SSHD [2020] EWCA Civ 1176 at [27]).
64. Nevertheless, the phraseology in s.117C(6) that there must be “very compelling circumstances” reflects the case law that emerged after the Immigration Rules changes introduced from 2012 - initially, requiring “exceptional circumstances” and latterly “very compelling circumstances” (see, e.g. MF (Nigeria) v SSHD [2013] EWCA Civ 1192 at [42]-[43]). The undeviating view in the case law is that the statutory provisions (and before them the Immigration Rules) do no more than reflect the Strasbourg Court’s approach to Art 8 and, in particular, the issue of proportionality (see, NA (Pakistan) at [38] and HA (Iraq) at [28]).
65. In HA (Iraq), the Court of Appeal saw not real ‘gap’ in substance in Art 8 assessments made before and after the deportation provisions were introduced in the

Immigration Rules and Part 5A of the NIAA 2002. At [36]-[38], Underhill LJ (with whom Jackson and Popplewell LJ agreed) said this:

“36. I have not so far referred to authorities about the regime which preceded the coming into force of Part 5A in 2014 and the associated changes to the Rules. However, as this Court made clear in *Akinyemi v Secretary of State for the Home Department* [2019] EWCA Civ 2098, [2020] 1 WLR 1843, (*Akinyemi (no. 2)*) the underlying principles relevant to the assessment of the weight to be given to the public interest and article 8 have not been changed by the introduction of the new regime (see per the Senior President of Tribunals at para. 46). The purpose of the new provisions was to give statutory force, accompanied by some re-wording, to principles which had already been established in the case-law relating to the Immigration Rules. That means that cases decided under the old regime may still be authoritative. We have already seen that this Court in *NA (Pakistan)* referred to the important observations of Laws LJ in *SS (Nigeria)* about the weight to be given to the public interest in the deportation of foreign criminals. It also referred on several occasions to the decision of this Court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 544.

37. The most authoritative exposition of the principles underlying the old regime can be found, two years after it had been superseded and even some months later than *NA (Pakistan)*, in the decision of the Supreme Court in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799. It is authoritative on the points of principle underlying both regimes and was so treated in *Akinyemi no. 2* (see paras. 46-50). That being so, I should say that I can see nothing in the judgments of the majority inconsistent with the approach taken by this Court in *NA (Pakistan)* as discussed above. At para. 26 of his judgment Lord Reed summarises the effect of the Strasbourg case-law about foreign criminals, and at para. 33, like this Court in *NA (Pakistan)*, he makes it clear that the factors referred to in those cases need to be taken into account in the assessment of the proportionality of the deportation of foreign offenders (whether or not they are "settled migrants").

38. Reference to the previous case-law is important for the purpose of a particular point made by the Appellants in these appeals. It will be seen that in para. 32 of its judgment in *NA (Pakistan)* this Court expresses the test under section 117C (6) as being whether the circumstances relied on by the potential deportee "are sufficiently compelling to outweigh the high public interest in deportation"; and it uses the same formulation in paras. 33 and 34 (see paras. 36-37 above). The Appellants contend that that is the only correct formulation, and that it is dangerous to refer simply to "very compelling circumstances". It would, to say the least, be surprising if it were wrong to use the very language of the statute; but in any event the position becomes clear when the development of the case-law is understood. This Court in *NA (Pakistan)* took the language of "sufficiently compelling" from the decision in *MF (Nigeria)*. Paragraph 398 of the pre-2014 Rules had used the phrase "exceptional circumstances". At para. 42 of its judgment in *MF* the Court said that that did not mean that a test of exceptionality was to be applied (a point repeated in *NA (Pakistan)* – see para. 36 above) and continued:

"Rather ..., in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something *very compelling* (which will be 'exceptional') is required to outweigh the public interest in removal [emphasis supplied]."

At para. 46 it expressed the same point slightly differently, referring to "circumstances which are *sufficiently compelling* (and therefore exceptional) to outweigh the public interest in deportation [again, emphasis supplied]". The effect is clear: circumstances will

have to be very compelling in order to be sufficiently compelling to outweigh the strong public interest in deportation. That remains the case under section 117C (6).”

66. That was, of course, said about the Art 8/deportation regimes in place before and after Part 5A came into force. It is, however, representative of a continuing thread that, whilst the emphasis upon legislative policy may be reflected in the NIAA 2002 and indeed before it the UKBA 2007, the proportionality assessment has remained in substance that identified by the Strasbourg Court and the “very compelling circumstances” test reflects it. In my judgment, in substance, the approach in s.117C(6) reflects the Strasbourg jurisprudence (see MF (Nigeria) at [39]).
67. Consequently, I am not persuaded that the ultimate test in s.117C(6) is essentially different from the approach that would be applied if a judge were determining the proportionality of an individual’s deportation without the benefit of Part 5A.
68. That said, however, the decision would not be made via the route of determining whether Exception 1 or Exception 2 applied and if they did not, whether there were “very compelling circumstances” which were “over and above” those described in Exceptions 1 and 2. There is certainly, in my judgment, a danger that that structured approach might lead a judge not properly to weigh up the competing factors, the appellant’s individual circumstances against the public interest, as recognised in the Strasbourg case law and in the domestic authorities such as Razgar, Huang and Hesham Ali. Certainly, in a case where Part 5A does not apply, a judge should avoid recourse to the structure imposed by s.117C in reaching a decision on the issue of proportionality. Likewise, the legislative imprimatur given to the public interest in deportation will not apply even if the weight that would be given to the public interest may remain “strong” depending upon the seriousness of the offending (including any risk of future offending).
69. In those circumstances, despite what I have said about the “very compelling circumstances” test, I am persuaded that the structured approach applied by the judge (and not applicable if Part 5A was not applicable) and the absence of legislative imprimatur given to the public interest (if Part 5A and the UKBA 2007 did not apply), may have had an effect on the judge’s assessment of proportionality. I do not, therefore, accept Mr Holt’s submission that, if s.117C(6) did not apply to the appellant, the judge would inevitably have reached the same conclusion.
70. In any event, for the reasons I shall shortly give, I have concluded that the judge’s finding in relation to s.117C(6) is, in itself, unsustainable and so therefore is his decision overall.

## 2. The “Very Compelling Circumstances” Argument

71. Mr Tan submitted that the judge, having found that Exception 1 and Exception 2 in ss.117C(4) and (5) did not apply, had given inadequate reasons to sustain his finding that there were “very compelling circumstances” over and above those exceptions to outweigh the public interest. In particular, Mr Tan submitted that the judge had made inconsistent findings relating to the appellant’s remorse and in taking into

account his ‘rehabilitation’ including that he had not committed any offences since he had been released in March 2020.

72. Mr Holt submitted that the judge’s reasoning at paras 56–60, together with 64–68 had to be read with his earlier findings in paras 56–60. Mr Holt submitted that there was no inconsistency in the judge finding that the appellant was genuinely remorseful despite also finding that he was maintaining some denial of the offences. He further submitted that, in any event, any error here was immaterial as the judge would have found the appellant’s deportation to be disproportionate even if he had not taken into account any remorse by the appellant.
73. The judge accepted that the appellant could not succeed under Exception 1 as there were not “very significant obstacles” to his integration in Bahrain and he could not succeed under Exception 2 as he had not established a “genuine and subsisting parental relationship” with his son (see paras 45–47 and 49–50). The judge also found that the appellant could not establish that his relationship with his adult daughter, D was “any way compelling as [the] relationship is prevented and prohibited by virtue of a restraining order imposed upon conviction” (see para 56). At paras 59–60, Judge Boyes said this:

“59. The appellant has been lawfully resident in the United Kingdom since 1990. A period of some 30 years. He has not offended other than those offences in 2019 and has, I accept, been a positive, honest and genuine member of British society for the period of time he has been in the United Kingdom. He has been gainfully employed in his chosen profession.

60. The Home Office maintains that there is a very significant public interest in deporting him on account of the seriousness of his offending. I think one must examine the actual offences a little more closely before one reaches a conclusion, as of right, that there is a very significant public interest. It is of note that both cases were resolved at the Magistrates’ Court. The appellant has neither offended prior to that conviction nor has he offended since that conviction. Despite threats of the same no person was actually physically harmed in the offending and the appellant has shown, in my view, genuine insight and remorse for his behaviour in committing the offences as he did”.

74. Having then quoted from the case law, including Razgar and Hesham Ali, the judge continued at paras 64–68 as follows:

“64. Taking all the above into consideration I have reached a conclusion that deporting a man who has lived lawfully in the UK, who has lived a near blameless life of hard work and compliance with British values and British society and for whom his only transgression was but a brief period in his life when no doubt there were significant stresses, high emotions and raw feelings is not, in my view, proportionate.

65. The appellant has shown genuine remorse. He has not offended since the index offence. Protective measures are in place to prevent repeat offending. He is engaging with the Family Court with regard to his Son and has shown, albeit limited, some insight into his behaviour.



66. To end the opportunity of him gaining contact with his Son, to end his life in the UK on account of his limited offending does not, in my view, seem proportionate or a rational exercise.

67. I can therefore answer the final two RAZGAR questions as follows; if so is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? No it is not as the appellant's behaviour when placed against all other aspects of his life does not engage principles of national security, public safety or economics.

And, if so, is such interference proportionate to the legitimate public end sought to be achieved? I have concluded the actions of the respondent are not proportionate and as such are unlawful. If the action is lawful it cannot remain.

68. It follows that as the action proposed to be taken by the Home Office is not proportionate in terms of an interference in the appellant's Article 8 rights, it cannot be sustained and the appellant succeeds under Article 8 ECHR".

75. Of course, as Mr Holt submitted, these findings also have to take into account the judge's earlier conclusions. These included that the appellant was "socially and culturally integrated in the UK", but also that there were not "very significant obstacles to his integration to life in Bahrain". The judge also had to take into account that the appellant had no genuine and subsisting relationship with his son nor, indeed, could rely upon his relationship with his adult daughter. Likewise, the judge found that it was in the best interests of his son R to remain in the UK with his mother and that it would not be unduly harsh for his son to remain in the UK if the appellant was deported.

76. There is, in my view, merit in Mr Tan's submission that the judge has failed to give adequate reasons for why the test in s.117C(6) was met. In particular, the judge has given little weight to the public interest evidenced by the appellant's offending. In part, this may arise from the fact that the judge failed (albeit in relation to the applicability of Part 5A of the 2002 Act) to consider whether the appellant's offending had caused "serious harm" to his former partner and adult daughter. But it also stems from the judge's view that the appellant had shown remorse and had not offended since the index offence. As Mr Tan submitted, that latter finding was made in circumstances where the appellant had only been out of prison for a short period (around seven months) by the time of the hearing in October 2020. But the judge's finding in relation to remorse (and any concomitant rehabilitation) is also problematic.

77. Rehabilitation may be a factor in assessing what weight should be given to the public interest in that it casts light upon the risk of a particular individual re-offending.

78. In Jallow v SSHD [2021] EWCA Civ 788 at [26]-[28], Lewis LJ (with whom King and Baker LJ agreed), citing Danso v SSHD [2015] EWCA Civ 596 and HA (Iraq) v SSHD, said this:

"26. Other factors may also bear on the weight of the public interest in the deportation of a particular offender: see *Ali* at paragraph 38, and *Akinyemi* at paragraph 39. Those factors include what has been described as rehabilitation. That, in turn, has been used to encompass a number of different situations. Rehabilitation may be used to describe steps taken to reduce the risk of the particular offender re-offending. That may involve consideration of matters such as courses undertaken in prison to reduce the risk of re-offending or the offender's conduct since release, or any relevant assessment of the risk of the offender re-offending. The fact that an offender presents a low risk of re-offending may be a factor in assessing the strength of the public interest in deporting that particular offender. In practice, however, such factors will not generally carry much weight for the reasons identified by Moore-Bick LJ in *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596. There, a prisoner had undergone courses in prison designed to address aspects of his offending and there were reports indicating that the risk of further re-offending was low. At paragraph 20 Moore-Bick LJ, with whom Underhill and Christopher Clarke LJJ agreed, said:

"20. [Counsel for the appellant] submitted that the tribunal should have placed much greater weight on the appellant's rehabilitation and the fact that he did not pose a significant risk of re-offending. He suggested that far too little importance is attached to factors of that kind, with the result that those who commit offences have little incentive to co-operate with the authorities and make a positive effort to change their ways. I have some sympathy with that argument and I should not wish to diminish the importance of rehabilitation. It may be that in a few cases it will amount to an important factor, but the fact is that there is nothing unusual about the appellant's case. Most sex offenders who are sentenced to substantial terms of imprisonment are offered courses designed to help them avoid re-offending in future and in many cases the risk of doing so is reduced. It must be borne in mind, however, that the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors include the need to mark the public's revulsion at the offender's conduct and the need to deter others from acting in a similar way. Fortunately, rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation."

27. That approach is endorsed by Underhill LJ at paragraph 141 of his judgment in *HA (Iraq)* where, having reviewed the case law, he said:

"141. What those authorities seem to me to establish is that the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as Moore-Bick LJ says in *Danso*, the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of

reform by the offender or the absence of subsequent offending for what will typically be a relatively short period."

28. The reason underlying the approach to the treatment of personal rehabilitation has, on occasions, been said to be that such rehabilitation will "normally do no more than show that the individual has returned to the place where society... expects him to be" (per Hamblen LJ as he then was in *Binbuga v Secretary of State for the Home Department* [2019] EWCA 551, [2019] Imm AR 1026 at paragraph 84). With respect, however, I agree with the observations of Underhill LJ at paragraph 142 of his judgment in *HA (Iraq)* that that:

"does not properly reflect the reason why rehabilitation is in principle relevant in this context, which is that it goes to reduce (one element) in the weight of the public interest in deportation which forms one side of the proportionality balance. It is not generally to do with being given credit for being a law-abiding citizen; as the UT says, that is expected of everybody, but the fact that that that is so is not a good reason for denying to an appellant such weight as his rehabilitation would otherwise carry."

(At [30] Lewis LJ also recognised that "positive contributions to society" may be a relevant factor in assessing proportionality.)

79. In order to take rehabilitation into account as Lewis LJ envisaged at [26]-[28] in *Jallow*, the judge needed to make a clear (and not inconsistent) finding on the appellant's attitude to his offending: he did not.

80. At para 60 and then again at para 65, the judge concluded that the appellant has shown "genuine insight and remorse" for his offending. However, at para 40 the judge made a finding which is, quite plainly, contrary to that. There he said this:

"The appellant is entitled to hold whatever view he so chooses but in doing so he must accept the consequences of the manner in which he expresses himself and for the fact that a refusal to accept the blindingly obvious or for example his conviction does nothing than underline factors which weigh heavily against the appellant. It cannot sensibly be that the appellant is calm, collected and a changed man when his continued denials of wrongdoing, his repeated claims as to being a victim and blame of others belie the very things he claims are present".

81. I do not accept Mr Holt's submission that there is no inconsistency in these two findings. The finding in para 40 is plainly that the appellant has not genuinely come to terms with his offending and shown remorse. The judge's findings at paras 60 and 65 is plainly that he has shown genuine insight and remorse. Both cannot be the case. This inconsistent finding is a clear error of law on an issue that was material to the judge's assessment of the proportionality of the appellant's deportation.

82. I accept that the fact that the appellant had not committed any further offences since being released from prison was a relevant factor but, given the short period of time since his release, that could not be a factor of any great weight.

83. In my judgment, therefore, the judge's finding that the appellant satisfied the test in s.117C(6) such that the public interest was outweighed was, itself, legally flawed and cannot be sustained.

84. That then leaves the final point raised in the Secretary of State's grounds concerning the judge's finding in para 44 that the appellant, for the purposes of Exception 1 in s.117C(4) was "socially and culturally integrated in the UK". That was a finding that, of course, did not lead the judge to find that Exception 1 applied because the requirement in s.117C(4)(c) was not met, namely there were not "very significant obstacles" to the appellant's integration on return to Bahrain. At para 44 the judge said this:

"I accept that the appellant is socially and culturally integrated in the UK. He has worked in the UK for almost all of his adult life and has lived in the UK for almost the same amount of time. The appellant speaks English and considers himself settled in the UK. His lack of offending prior to the index offence strongly supports his claim as to proper integration".

85. It is not clear whether the judge considered (at [44]) that the appellant met the requirement in s.117C(4)(a) of being "*lawfully*" resident in the UK for most of his life.
86. Mr Tan submits that the judge's finding fails to take into account the appellant's offending as potentially affecting his prior integration in the UK. Mr Tan submitted that the commission of criminal offences could result in an individual no longer being properly seen as integrated in the UK and the judge had simply not taken that into account. Mr Tan relied upon the Court of Appeal's decision in CI (Nigeria) v SSHD [2019] EWCA Civ 2027. In that case, Leggatt LJ (with whom Sir Ernest Ryder, SPT and Hickinbottom LJ agreed) said this at [61]-[62]:

"61. Criminal offending and time spent in prison are also in principle relevant in so far as they indicate that the person concerned lacks (legitimate) social and cultural ties in the UK. Thus, a person who leads a criminal lifestyle, has no lawful employment and consorts with criminals or pro-criminal groups can be expected, by reason of those circumstances, to have fewer social relationships and areas of activity that are capable of attracting the protection of "private life". Periods of imprisonment represent time spent excluded from society during which the prisoner has little opportunity to develop social and cultural ties and which may weaken or sever previously established ties and make it harder to re-establish them or develop new ties (for example, by finding employment) upon release. In such ways criminal offending and consequent imprisonment may affect whether a person is socially and culturally integrated in the UK.

62. Clearly, however, the impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature and frequency of the offending, the length of time over which it takes place and the length of time spent in prison, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. In that regard, a person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots in this country than someone who has moved here at a later age. It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK. No doubt it is for this reason that the current guidance ("Criminality: Article 8 ECHR cases") that Home Office staff are required to use in deciding whether the deportation of a foreign criminal would breach article 8 advises that:

"If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated."

87. As the court recognised, periods of time in prison can affect the integration of an individual in UK society, in particular it may lead to the breakdown of relationships, etc. which sustain the conclusion that they were socially integrated before imprisonment.
88. Here, the judge in para 44 of his determination found that the appellant was at least socially and culturally integrated in the UK prior to his imprisonment in 2019–2020. At that point, the appellant had lived in the UK for some 29 years. He was granted ILR in June 1990, and it was through a previous relationship that his adult daughter, D was born on 5 May 1989; the relationship was brief. His relationship with G, resulted them in them being married in 2000 and their son R was born in May 2010. That relationship, obviously, broke down and resulted in the offending which is the basis for the appellant's deportation. The judge, however, plainly took into account that the appellant had been in the UK for 30 years and that he had been gainfully employed and what the judge described as a "positive, honest and genuine member of British society". The judge's finding, therefore, in relation to the appellant's integration into the UK was not based solely upon his relationships with his partner or children in the UK. It was based upon the totality of his life in the UK over some 30 years and that he had ILR in the UK since 1990. Mr Tan did not suggest that the judge was not entitled to find that the appellant was integrated into UK society prior to his offending.
89. Given the circumstances of the offences and that they were focused in a relatively short period of time, and that the appellant was in fact likely to have only served six months' imprisonment (being half of his total sentence), even if the judge had taken those matters into account, I am satisfied that he would inevitably have reached the same conclusion as he did in para 44 of his determination that the appellant was "socially and culturally integrated in the UK" for the purposes of s.117C(4)(c). I do not, therefore, accept Mr Tan's submission that the judge materially erred in law in reaching his finding in respect of s.117C(4)(c).

### 3. Conclusion

90. Where then does that leave this appeal? First, the judge erred in law by not deciding whether s.117C should actually be applied to the appellant's case on the basis that his offences had caused "serious harm". Secondly, in applying s.117C, the judge erred in law in reaching his finding that there were "very compelling circumstances" over and above Exceptions 1 and 2 so as to outweigh the public interest reflected in the appellant's offending. Thirdly, however, the judge did not materially err in law in finding that the requirement in s.117C(4)(c) was satisfied.
91. Taking these matters together, therefore, the judge materially erred in law in allowing the appellant's appeal under Art 8 of the ECHR and that decision cannot stand and must be re-made.

## Decision

92. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.
93. The decision in respect of Art 8 must be re-made. In re-making the decision, the following findings are preserved:
- (a) If Part 5A applies to the appeal, Exception 1 in s.117C(4) does not apply, although the finding that the appellant is socially and culturally integrated in the UK is preserved;
  - (b) If Part 5A applies to the appeal, Exception 2 does not apply for the reasons given by the judge, namely that the appellant has not established a genuine and subsisting parental relationship with his son R and it would not be unduly harsh for R to remain in the UK if the appellant were deported.

Otherwise, none of the judge's findings are preserved.

On re-making the decision, it will be necessary to determine (either by concession or judicial decision) whether Part 5A applies to the appeal on the basis that the appellant is a "foreign criminal" because his offences have caused "serious harm".

94. Given the extent and nature of fact-finding required, including any up-to-date evidence properly relied upon, applying para 7.2 of the Senior President's Practice Statement a proper disposal of this appeal is to remit it to the First-tier Tribunal to re-make the decision under Art 8 subject to the preserved findings set out above. The appeal to be heard by a judge other than Judge I D Boyes.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
26 July 2021