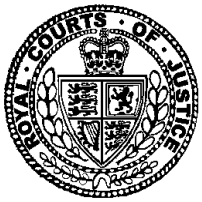

Neutral Citation Number: [2019] EWCA Civ 774

Case No: C5/2017/1989

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2019

Before :

LORD JUSTICE HAMBLEN
LORD JUSTICE MALES
and
DAME ELIZABETH GLOSTER DBE

- -

Between :

AM (SOMALIA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Manjit Gill QC and Anas Khan (instructed by **Thompson & Co**) for the **Appellant**
Claire van Overdijk (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 17 January 2019

- -

Approved Judgment

Dame Elizabeth Gloster :

Introduction

1. This is an appeal by the appellant ("AM" or "the appellant") from the decision of the Upper Tribunal (Immigration and Asylum Chamber) ("UT") dated 12 July 2016, by which the UT dismissed AM's appeal against the decision of the First Tier Tribunal ("FTT") dated 29 January 2016. Both the UT and the FTT upheld the decision of the respondent Secretary of State ("the respondent"): (i) to revoke AM's status as a refugee and (ii) to make an order for his deportation. That decision was made following a series of criminal convictions on the part of AM, the most recent of which resulted in a sentence of imprisonment of two years.

2. The present appeal concerns, first, whether the decision of the FTT to refuse an application by AM for an adjournment pending service by the respondent of an Offender Assessment System ("OASys") report was unfair and thus unlawful; and, second, whether the FTT was entitled to find that AM was not socially and culturally integrated in the UK for the purposes of considering, and rejecting, AM's attempt to resist deportation on the basis of his rights under Article 8 of the ECHR.

Legal framework

3. The legal framework in relation to deportation comprises three levels:

   i) international conventions: namely the Refugee Convention 1951 ("the Refugee Convention") and the European Convention on Human Rights ("ECHR");

   ii) national legislation: namely the Immigration Act 1971 ("IA 1971"); the Human Rights Act 1998 ("HRA 1998"); the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"); and the UK Borders Act 2007 ("BA 2007"); and

   iii) the Immigration Rules.

The Refugee Convention

4. Article 32(1) of the Refugee Convention provides that contracting states may not expel a refugee lawfully in their territory save on grounds of national security or public order, and then only in pursuance of a decision reached "in accordance with due process of law" (Article 32(2)).

5. Pursuant to Article 33(1), contracting states may not return a refugee to

> "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

But

> "[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a

> particularly serious crime, constitutes a danger to the community of that country" (Article 33(2)).

6. Moreover, Article 2 of the Refugee Convention provides:

> "**General obligations** Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

National legislation - relevant statutory provisions

7. Articles 32 and 33 of the Refugee Convention are implemented in the provisions dealing with the deportation of foreign criminals in the IA 1971, NIAA 2002, and BA 2007.

8. Section 72 of the NIAA 2002 applies "for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)"; see section 72(1). Thus section 72(2) of NIAA 2002 provides that:

> "A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is (a) convicted in the United Kingdom of an offence, and (b) sentenced to a period of imprisonment of at least two years".

Section 72(6) provides that that presumption is rebuttable:

> "A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person."

9. Section 3(5)(a) of the IA 1971 provides that:

> "A person who is not a British citizen is liable to deportation from the United Kingdom if—
>
> (a) the Secretary of State deems his deportation to be conducive to the public good".

10. Section 32(4) of the BA 2007 explains that:

> "For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.";

and, so far as material, sections 32(1) and (2) define a "foreign criminal" for the purposes of the section as meaning a person who is not a British citizen, who is convicted in the United Kingdom of an offence, and is sentenced to a period of imprisonment of at least 12 months.

11. Section 32(5) of the BA 2007 ("automatic deportation") imposes on the Secretary of State a duty, subject to the exceptions in section 33, to make a deportation order in respect of a "foreign criminal" as defined. Thus the relevant sub-sections provide:

> "32 ……
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
>
> (6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—
>
> (a) he thinks that an exception under section 33 applies,
>
> (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or
>
> (c) section 34(4) applies.
>
> (7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State."

12. Section 33 of the BA 2007 sets out several exceptions to the automatic deportation duty under Section 32(5). So far as is material for present purposes, it provides:

> "Exceptions
>
> (1) Section 32(4) and (5)—
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
>
> (b) ……..
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
>
> (a) a person's Convention [i.e. ECHR] rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention.
>
> (3) ……
>
> (4) ……
>
> (5) ……
>
> (6) ……
>
> (6A) ……

(7)The application of an exception—

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4."

13. Part 5A of the NIAA 2002 (as inserted by section 19 of the Immigration Act 2014) informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must "(in particular)" have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

14. So far as is material to the present case:

i) Section 117A provides as follows:

"Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a)breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a)in all cases, to the considerations listed in section 117B, and

(b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

ii) Section 117B provides that:

"**Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) ……

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society

……."

15. Section 117C provides that:

"**Article 8: additional considerations in cases involving foreign criminals**

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

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

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

(4) Exception 1 applies where—

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

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

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

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

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

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

16. As may be seen, exception 1 reproduces the same conditions as those set out in paragraph 399A of the Immigration Rules, as to which see below.

The Immigration Rules

17. The Immigration Rules set out the approach to be followed by the Secretary of State in relation to the revocation of refugee status and in applying the exception in section 33(2)(a) in relation to a breach of a foreign criminal's Convention rights.

18. So far as relevant to the present case:

i) paragraph 338A of the Immigration Rules provides that a person's grant of refugee status shall be revoked if the Secretary of State is satisfied that the person:

"(v) … can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality" (paragraph 339A);

ii) paragraph 363 of the Immigration Rules provides that the circumstances in which a person is liable to deportation include:

"(i) where the Secretary of State deems the person's deportation to be conducive to the public good";

iii) paragraph 397 provides that:

"A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. **Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.";**

iv) paragraphs 398, 399 and 399A, are grouped under the heading "Deportation and Article 8"; paragraph 398(b) identifies a category of foreign offenders, namely those sentenced to between 12 months' and 4 years' imprisonment, in relation to whom the public interest in deportation may be outweighed if the conditions set out in paragraphs 399 or 399A are met; if those conditions are not met, the public interest in deportation will *only* be outweighed if there are very compelling circumstances; paragraph 399A, the paragraph relevant to the present appeal, applies where the foreign offender falling within the category identified in paragraph 398(b) has been lawfully resident in the UK for most of his life; is socially and culturally integrated in the UK; and would face very significant obstacles to his integration into the country to which it is proposed he be deported;

v) the relevant provisions of paragraphs 398 and 399A provide as follows: (the passages highlighted in bold are particularly relevant)

"A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) **the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months**; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. ……

399A. **This paragraph applies where paragraph 398(b)** or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported. (All bold emphasis supplied.)

Factual and procedural background

19. AM was born on 13 August 1975 in Hargeisa, Somaliland, and entered the United Kingdom with his stepmother and two half siblings on 26 June 1987 when he was nearly 12 years old. He was granted asylum as his stepmother's dependant on 4 May 1989,

and was granted indefinite leave to remain on 7 December 1994. The following narrative is largely taken from the FTT's judgment.

20. AM has thus lived in the UK for over 30 years. He was educated in the UK and has had several jobs, apparently working for the Post Office, at a fast-food restaurant and as a security guard. He got married in 1992 or 1993 and had three daughters, in 1993, 1995 and 1997 respectively.

21. In 2000, AM separated from his wife. He moved into a hostel and has not seen his daughters since 2001. He then developed an alcohol addiction. Between 2001 and 2014, he engaged in criminal behaviour resulting in 27 criminal convictions for offences including racially aggravated criminal damage, assault including assaulting a constable, racially aggravated harassment, theft and shoplifting. Almost all AM's convictions occurred when he was under the influence of drink.

22. On 20 February 2014, in the early hours of the morning, AM snatched a mobile phone from a young woman walking home and sought to make his escape, but was apprehended by a member of the public. On 6 March 2014, AM pleaded guilty to the offence of robbery.

23. On 20 April 2014, AM was sentenced to two years' imprisonment.

24. On 20 January 2014, the respondent notified AM that, as he had committed a particularly serious crime and was regarded as a danger to the community, he was liable to deportation. AM responded, asserting he had not been in Somalia since coming to the UK; that he had no connections in Somalia; that all his family were in the UK; and that his offences had been committed while he was addicted to alcohol and seeking help.

25. On 17 Feb 2015 the respondent notified AM of her intention to cease AM's refugee status.

26. On 20 February 2015, AM was released from prison and held in immigration detention.

27. On 8 July 2015, the respondent served on AM (i) a letter setting out her decision to deport AM and to revoke AM's status as a refugee; and (ii) a Deportation Order dated 2 July 2015.

28. The decision to deport letter set out the duty on the respondent, pursuant to section 32(5), BA 2007, to deport foreign offenders, such as AM, who had been sentenced to imprisonment for a term of at least 12 months. According to the views of the respondent, as stated in the letter, none of the exceptions in section 33 BA 2007 applied; in particular the respondent expressed the view that:

    i) AM could not rely on his status as a refugee under the Refugee Convention 1951 because, applying section 72(2) of the NIAA 2002, AM had been convicted by a final judgment of a particularly serious crime and constituted a danger to the community of the country for the purposes of Article 33(2) of the Refugee Convention;

    ii) AM could not rely on his right to a private life under the ECHR because the respondent did not accept, applying paragraph 399A of the Immigration Rules,

that AM was socially and culturally integrated in the UK, nor that AM would face very significant obstacles to his integration in Somalia; and

iii) AM could not rely on his right to humanitarian protection because he would not be at risk of unlawful killing or inhuman and degrading treatment if returned to Somalia. In any event, he was excluded from humanitarian protection by operation of paragraph 339D of the Immigration Rules.

29. The decision to revoke AM's status as a refugee appears to have already been made, and communicated to AM, in a letter dated 4 June 2015. The letter served on 8 July 2015 recorded that, applying paragraph 339A(v) of the Immigration Rules, the circumstances in connection with which AM had initially been recognised as a refugee had ceased to exist such that AM could not continue to refuse to avail himself of the protection of Somalia.

30. On 22 July 2015, AM lodged an appeal against the respondent's decisions under section 82 of the NIAA 2002.

31. In August 2015, the tribunal served directions on AM and the respondent in advance of a forthcoming Case Management Review Hearing. The directions required service by AM of documents including any relevant Pre-Sentence Report and any Parole Report or other document relating to AM's period in custody and/or release. AM apparently failed to serve any such documents.

32. On 29 September 2015, the tribunal served further directions in relation to the full appeal, set to be heard on 8 January 2016. The directions required the Secretary of State to:

> "make enquiries and produce forthwith to the Tribunal, copies (if any) of:
>
> *Judge's Sentencing Remarks
>
> *Pre-Sentence Report
>
> *OASyS Report.
>
> If such documentation is not available, then Designated Judge Peart is to be advised by email".[1]

33. By 5 January 2016, the respondent had not served the OASys report nor advised the Designated Judge as to the availability or otherwise of the report. As described in the judgment of the UT, what happened was as follows:

> "23. The Secretary of State produced some of these documents, including the sentencing remarks, but not all. The OASys report was not one of those produced. Nor, it appears, was the Designated Judge advised by email or at all that the

[1] The OASyS Report was described by the Upper Tribunal in the present case as "*a familiar tool used to assess the reasons for offending and offender risk. Its conclusions commonly form part of the pre-sentence report*".

documentation was not available. The best explanation that has been offered to us is that those responsible on her behalf were unaware of the direction. But evidently nothing was done about it by the appellant or his advisers either, until very shortly before the appeal hearing in this matter. On 6 January 2016 the appellant's solicitors emailed the Secretary of State's representatives seeking a copy of the OASys report. The reply, on 7 January 2016, was from the Probation Service. It said that the officials were prohibited from disclosing the full report, but they did provide a risk assessment. This contained the following:

> "... His addiction to alcohol appears to have been the overriding factor in his pattern of offending behaviour. In my assessment when Mr Mohamed is under the influence of alcohol he acts on impulse without thinking about the consequences of his behaviour on himself or others."

24. At the hearing the following day the FTTJ was provided with copies of the email correspondence and the risk assessment. He did not have the full OASys report. An application to adjourn was made, on the basis that the content of the OASys report might be critical to the Judge's conclusions on the issue of danger to the community. It was refused. In his Determination the FTTJ gave reasons at [4] and [5]. He said this:

> "4. At the beginning of the hearing, and after the appellant was identified, Mr Khan for the appellant applied for an adjournment. Directions had been issued on 29 September 2015 for various documents to be served by the respondent "forthwith". These were the judge's sentencing remarks, which are in the respondent's bundle, and the pre-sentence report and OASys Report which are not. According to the email exchange, probation offers were not permitted to disclose an OASys Report but the risk assessment could be sent to a secure email address (such as CJSM.) A Samson Adewole, a probation service officer, sent a risk assessment report to the appellant's solicitors on 7 January (the day before the hearing) ...
>
> 5. I considered that application for an adjournment but refused it. Although the directions were sent out on 29 September 2015 the appellant's solicitors did not seek the missing documents until a matter of days before the hearing. It was not known what the OASys Report would disclose, nor whether it would be favourable to or harmful to the appellant. The application for an adjournment was in my judgment both too late and speculative so I refused it. I am satisfied that I have all the information before me to enable me to determine this appeal justly."

25. The FTTJ went on to say:

> "19 ...Even though I do not have sight of the OASys Report the prospects of further offending by this alcoholic offender must surely be rather more than negligible. When the appellant is drunk he does not seem to be in full control of himself and there is obviously the potential for considerable harm to the public...

> 23. .... Although I do not have the OASys Report I am satisfied on the evidence before me that this appellant, who was sent to prison for two years for robbery, has been convicted of a particularly serious crime and does still constitute a danger to the community of the United Kingdom. The appellant has not succeeded in rebutting that statutory presumption..."

The decision of the First Tier Tribunal

34. The FTT (FTJ Ievins) heard AM's appeal on 8 January 2016. He dismissed that appeal in a decision promulgated on 29 January 2016. Three main issues fell to be decided:

    i) first, whether to grant AM's application, made at the hearing, for an adjournment pending service by the respondent of the full OASys report;

    ii) second, whether the respondent's revocation of AM's refugee status was lawful; and

    iii) third, whether the respondent's decision to deport AM was lawful.

35. In relation to these issues, the FTT decided as follows:

    i) First, as already referred to above, the FTT refused AM's application for an adjournment on the basis that the application was "too late", the application was "speculative", and the FTT was satisfied that it had sufficient information before it to enable the tribunal "to determine this appeal justly".

    ii) Second, the FTT dismissed AM's appeal against the respondent's revocation of AM's refugee status. In particular:

        a) as to the application of paragraph 339A(v) of the Immigration Rules, the FTT was satisfied that circumstances in Somaliland had changed in such a significant and non-temporary nature that AM's fear of persecution could no longer be regarded as well-founded); and

        b) as to the application of Article 32(2) of the Refugee Convention and s.72 of the NIAA 2002, the FTT held that the presumption in s.72(2) applied and that AM had failed to rebut that presumption, and as such was to be regarded as a danger to the community of the UK; it reached that conclusion notwithstanding the fact that the OASys report was not before the tribunal.

    iii) Third, the FTT dismissed AM's appeal against the respondent's decision to deport AM. It took the view that AM was a "foreign criminal" for the purposes of s.32(5) BA 2007, and thus qualified for automatic deportation subject to the exceptions in s.33(2) BA 2007 and that none of those exceptions applied. In particular it held that:

        a) the exception in section33(2)(b), whereby the Secretary of State was prohibited from breaching any obligation under the Refugee Convention 1951, did not assist AM because his refugee status had been revoked;

b) the exception in s.33(2)(a), whereby the Secretary of State was prohibited from breaching a person's rights under the ECHR, did not assist AM either. That was because:

i) AM's reliance on Articles 2 and 3 was not sustainable in light of the tribunal's findings in the context of AM's refugee status, in particular in relation to the change of circumstances in Somaliland and consequent lack of danger to AM should he be returned;

ii) AM's reliance on Article 8 was likewise not sustainable; paragraph 398(b) of the Immigration Rules applied to AM; paragraph 399 did not apply to AM, because he "is not in a genuine and subsisting relationship with anyone"; paragraph 399A did not apply to AM either, because, despite living in the UK for most of his life, he was not socially and culturally integrated in the UK; and there would not be very significant obstacles to his integration in Somaliland;

iii) applying Part 5A of the NIAA 2002 in accordance with the guidance in *Bossade (supra)* there were no very compelling circumstances over and above those set out in paragraphs 399 and 399A; AM did not enjoy any family life, and any interference with his private life would comprise a proportionate means of achieving legitimate aims.

Permission to appeal to Upper Tribunal

36. On 16 February 2016, AM applied for permission to appeal to the Upper Tribunal on the grounds that the FTT had erred in law in: refusing to grant an adjournment, failing to consider evidence from the UNHCR indicating that changes in Somalia were not fundamental or durable; and failing to apply the Immigration Rules properly, in particular in relation to the finding that AM was not socially or culturally integrated in the UK.[2]

37. AM's application for permission to appeal was refused by the FTT (FTJ Frankish) on 24 February 2016. AM renewed his application to the UT on 11 March 2016. On 25 April 2016, the UT (UTJ Finch) granted permission to appeal on all grounds. On the issue of adjournment, UTJ Finch noted that:

> "The Offender Risk Assessment… was not a substitute for a full OASys report. The full report was also directly relevant to the question of whether, as asserted by [AM], he had completed an alcohol dependency course and was determined not to drink again. In turn, this went to the question of whether [AM] was a "serious criminal" for the purposes of section 72 of the [NIAA 2002]. On this basis the refusal to grant an adjournment was

[2] A fourth ground of appeal, to the effect that the FTT had erred in reaching conclusions in relation to the return of AM that were beyond the case put by the respondent, was abandoned at the hearing before the UT.

> unfair. (See *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284). ……
>
> The refusal to grant an *adjournment* could also not be reasonably justified by any delay on the part of [AM] when it was the Respondent who had been directed to provide the Report".

The decision of the Upper Tribunal

38. The UT heard AM's appeal on 5 July 2016, and dismissed the appeal on all grounds in a decision promulgated on 12 July 2016.[3] In summary the UT held as follows.

*Refusal of adjournment******

39. As to the FTT's refusal of AM's application for an adjournment, the parties agreed, and the UT appeared to accept, that the issue was whether the refusal was unfair. AM submitted that the refusal was unfair for two reasons

    i) First, it was unfair to blame AM for the late request for the OASys report, as the obligation fell on the respondent to produce the Report pursuant to the FTT's directions; and

    ii) Second, it was unfair to treat the application as speculative, because an OASys report was capable of determining the outcome of an appeal, as in *Mugwagwa (Zimbabwe)* [2011] UKUT 338.

40. The UT rejected AM's arguments that that the FTT's refusal to grant an adjournment was unfair. It held, first, that the FTT had not proceeded on the basis that it was the responsibility of AM to obtain the OASys report, but rather on the basis that AM "*had left it too late to complain and pursue the matter*", and that AM's delay was "*unacceptable, and at variance with the view that the document was crucial*". The UTJ further noted that AM had himself failed to serve the Pre-Sentence Report as directed, which would likely have contained "*the substance of the OASys assessment*".

41. Second, the UT rejected AM's submission that it was unfair to treat the application as speculative. The UT considered that the FTT's conclusion was effectively that there was "*no realistic prospect that production of the OASys report would have any bearing on the issues for his decision*" and that that conclusion was sound. The underlying issue was whether AM could rebut the presumption in section72 NIAA 2002, namely that he represented a danger to the community, by showing that "*despite his bad record of offending linked to substance abuse he was now reformed*". There was "*no good reason to think that the OASys report would have supported that contention*", and "*every reason to think that it would not*". In particular the UT held that:

    i) The contents of the Risk Assessment provided by the Probation Service on 7 January 2016 were indicative of what the OASys report would have said, and, given that the Risk Assessment did not assist AM's case, the Report would not have assisted AM either. This reasoning, which the UT attributed to the FTT, was reinforced by the UT's assumption that the Risk Assessment was more 'up

[3] Issues marked with a '*****' are those issues on which permission to appeal to the Court of Appeal has been granted.

to date' than the OASys report such that it was "*inconceivable… that the OASys report would have been more supportive of [AM's] case than the subsequent risk assessment*".

ii) The contents of the Pre-Sentence Report before the court at the time AM was sentenced were also indicative of what the OASys report would have said. The UT inferred that the PSR did not suggest that AM was a reformed man, because if it had done so such an observation would have been reflected in the court's sentencing remarks. The (presumed) contents of the PSR thus indicated that the OASys report was unlikely to have been supportive of AM's case. and

iii) The case of *Mugagwa* was not authority for the proposition that an OASys report must in all cases be obtained in order to conduct a proper assessment of whether an individual is a danger to the community, but rather was simply "an illustration of one set of circumstances in which an OASys report made a difference".

42. The UT thus held that the FTT's refusal of AM's application for an adjournment was not unfair. Notwithstanding that conclusion, it expressed concern at the respondent's failure to comply with the direction to serve the OASys report, and held that "the reasons for that non-compliance… should be investigated".

Failure to consider evidence as to conditions in Somalia

43. AM submitted that the FTT had failed to consider evidence from the UNHCR indicating that changes in Somalia were not fundamental or durable. The UT rejected that submission on the basis that the FTT clearly took the evidence of the UNHCR into account (when deciding that the Respondent's decision to revoke AM's refugee status was not open to challenge) and adopted the correct approach in relation to that evidence. There is no appeal against that decision as permission was refused by Underhill LJ.

*Failure properly to apply Immigration Rules**

44. AM submitted that the FTT had erred in finding that AM was not socially or culturally integrated in the UK for the purposes of paragraph 399A of the Immigration Rules[4] because that finding was not open to the FTT in light of the factual findings it had already made. AM relied in particular on the finding that AM had lived in the UK since the age of 11, and had gone to school, worked, got married and had three daughters in the UK.

45. The UT rejected this submission on two grounds. In particular, it held that:

i) such submission ignored important findings of fact made by the FTT, in particular those to the effect that AM's marriage had broken down and he had lost contact with his family; he had turned to drink; he had become a persistent criminal offender; and, in general, he was "on his own" ([19]) and had "few ties in this country" ([29]); and

[4] As set out above, paragraph 399A of the Immigration Rules sets out the approach to be taken in determining whether a person who would otherwise be liable for 'automatic deportation' pursuant to section 32(5) NIAA 2002 might benefit from the exception provided by section 33(2)(a) NIAA 2002 (protection of ECHR rights) in relation to that person's rights under Article 8.

ii) failed to take account of the fact that the question of whether a person was socially and culturally integrated in the UK was, per *Bossade* [2015] at [24], a "qualitative test" that goes beyond "simply looking at how long a person has spent in the UK".

46. The UT further held at [41] – [42] that, even if AM's challenge to the finding that he was not socially or culturally integrated in the UK were successful:

> ". ……he would need in any event to meet the third of the conditions specified in paragraph 399A. The Judge found at [29]: "On the evidence before me I am not satisfied there would be very significant obstacles to his integration into the country to which he is proposed to be deported…" That is a conclusion which is not challenged by the appellant and was clearly open to the Judge.
>
> By the same token, Exception 1 in s 117C(4) does not apply, and by virtue of s 117C(3) the appellant is a 'medium offender' whose deportation is required by the public interest. There was no tenable case of 'very compelling circumstances'."

47. In other words, in the last sentence of [42] the UT was rejecting any claim by AM under the final paragraph of paragraph 398 of the Immigration Rules that, even if he did not meet the conditions specified in paragraph 399A, there were very "compelling circumstances over and above those described in paragraphs 399 and 399A" which outweighed the public interest in deportation..

Grounds of appeal

48. On 14 July 2016, the UT (UTJ Rimington) refused AM's application for permission to appeal the decision of the UT to the Court of Appeal. By an Appellant's Notice dated 19 July 2017, AM applied to this court for permission to appeal on the grounds therein set out. On 19 April 2018, Underhill LJ, on the papers, granted permission to appeal on two grounds only, viz:

i) that it was not open to the FTT on the evidence before it to find that AM was not "*socially and culturally integrated in the United Kingdom*" and that he was thus unable to bring himself within the terms of para 399A(b) of the Immigration Rules and/or limb (b) of Exception 1 in section117C(4) of NIAA 2002 ("Ground 4"); and

ii) that the decision of the FTT to refuse AM's application for an adjournment rendered the decision of the FTT procedurally unfair ("Ground 1").

The hearing in the Court of Appeal

49. At the start of the hearing, Mr Manjit S. Gill QC and Mr Anas Khan, counsel appearing on behalf of the appellant, applied to amend the grounds of appeal and introduce further evidence. The Court regarded the application as, in effect, an attempt to re-argue ground 3 in the Notice of Appeal (namely the issues relating to the removal of AM's refugee status; in particular the alleged risk to AM if he were to return to Somalia and the alleged failure of the FTT/UT properly to consider the UNHCR evidence) which

Underhill LJ had characterised as unarguable. Accordingly, the Court dismissed the application.

Ground 1: Alleged procedural unfairness

Submissions of AM

50. Mr Gill QC, on behalf of AM, submitted that the principle of fairness required the tribunal to consider the OASys report. It was thus unfair on the part of the FTT to have refused to have adjourned the hearing with a view to obtaining the report, regardless of who was at fault for the absence of the report. That was because the report was of great importance to the matters in issue, and, in particular, AM's ability to rebut the presumption in section 72 NIAA 2002 that AM represented a 'danger to the community'. As to this:

    i) the potential importance of an OASys report in this connection was demonstrated by the case of *Mugagwa v SSHD (section 72 – applying statutory presumptions) Zimbabwe* [2011] UKUT 00338 (IAC), in which the contents of an OASys report had been sufficient to rebut the s.72 presumption (see [34]-[36]);

    ii) In the present case, the FTT had acknowledged that the contents of the report might be favourable (or might be unfavourable) to AM.

51. Mr Gill QC further submitted that, in any case, the respondent, not AM, was at fault for the fact that the OASys report was not before the FTT. The directions issued on 29 September 2015 placed the burden on the respondent to produce the OASys report. Thus, both the FTT and the UT erred in "seeming to put the burden of non-compliance of the direction by the respondent, on the appellant", and AM had been "unfairly penalised for failing to report [the respondent's non-compliance] in timely fashion" in circumstances where there was no obligation on AM to report at all. The result of this error on the part of the FTT and the UT was that AM suffered a disadvantage, and the respondent obtained a benefit, from the failings of the respondent. Moreover, the UT had erred in taking into consideration the fact that AM had himself failed to produce certain documents he had been ordered to produce pursuant to directions issued in August 2015, in particular the Pre-Sentence Report. The August directions had been superseded by the September directions, in which the respondent had been ordered to produce the PSR.

Submissions of the respondent

52. Ms Claire van Overdijk, counsel on behalf of the respondent, submitted that there was no procedural unfairness in the decision of the FTT to refuse AM's application for an adjournment, and the UT did not err in dismissing AM's appeal on this ground for the reasons which it gave.

53. She informed the court that the respondent's position at the time of the hearing before the FTT and UT was that it was not permitted to disclose AM's OASys report in the proceedings. This reflected the position of the National Offender Management Services ("NOMS"), which had informed the appellant that its officials were prohibited from disclosing the full OASys report (see [23] of the UT determination). The Senior

Presenting Officer representing the respondent before the UT relied on the policy, as set out in an internal email to presenting officers dated 10 July 2012, when explaining the position to the court. However, since filing the Respondent's Notice and skeleton argument, the existence of Criminality Policy Guidance Process Communications PC 3/2014 (31 July 2014) had come to light. That policy was apparently in place when the matter was before the FTT and UT, but, as a result of an internal oversight, it was not referred to by the respondent until the appeal. The significance of the policy was that it provided the basis for agreement between NOMS and Home Office Immigration Enforcement that, where it was necessary to consider detailed risk assessment information held about a foreign national offender, Criminal Casework would be provided with a full OASys report on request, rather than the derivative NOMS1 and NOMS1 EEA forms. Further, guidance provided as follows:

> "Cases where an Immigration Judge requests an OASys report that was not included in the appeal bundle
>
> In cases where an OASys report has been obtained and used in making the decision (set out earlier in this PC), but for some reason the report was not included in the bundle for an onward appeal or bail hearing and an IJ requests it, the CC Casework Team must ensure that a copy of the report is made available to the IJ via appropriate channels.
>
> Where an IJ requests an OASys report for a hearing where one has not been obtained and used in making the decision (i.e. in non-EEA deportation cases), the CC caseworker must request a copy from NOMS, using the RRI form. Where a report is not available because NOMS have not compiled one for that FNO, CC must ensure that the IJ is notified of this in writing, and via the presenting officer where appropriate."

54. The respondent requested a copy of the Appellant's OASys report from the Offender Management Unit at HMP Highpoint on 20 January 2015 by email. On the same day an OASys assessment "summary sheet" (comprising two pages) and "Offender Management Information Exchange" were provided in reply. The respondent did not subsequently obtain a full copy of the OASys report when the matter was before the FTT and UT. It does not appear that the OASys "summary sheet" and "Offender Management Information Exchange" were before the FTT or the UT. The only information contained therein relevant to the risk posed by the appellant was that he posed a medium risk of harm to the public and low risk of harm to children and MAPPA level 3.

55. However, Ms van Overdijk submitted that, rather than assisting the appellant in rebutting the statutory presumption (by showing that, despite his bad record of offending linked to substance abuse, he was now reformed), the full information, now obtained and before the Court of Appeal, compounded the conclusion reached by the FTT and the UT. Accordingly, it could not reasonably be inferred that such documents would have impacted on the decision of the FTT or UT.

Discussion and determination in respect of alleged procedural unfairness

56. Largely for the reasons given by the UT, and for the reasons submitted by Ms van Overdijk, I conclude that the FTT did not act in a procedurally unfair way by refusing

AM's application for an adjournment with a view to obtaining the OASys report. It was common ground that the issue as to whether the FTT should have granted an adjournment was a question of law, for which the test was whether the decision was unfair: *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284, per Moses LJ at [13]-[14]. My reasons for my conclusion may be summarised as follows.

57. First, although Mr Gill submitted that the OASys report was relevant to whether AM was able to rebut the presumption in section 72 NIAA 2002 that, as a result of his conviction and sentence, he was a 'danger to the community' of the UK and thus, pursuant to Article 33(2) of the Refugee Convention 1951, could not invoke the Refugee Convention to prevent his deportation by the exercise of section 33(2)(b) BA 2007, the fact is that AM's refugee status had, in any event, been revoked under paragraph 339A of the Immigration Rules. Since that revocation is not now subject to appeal, AM would not be able to benefit from the section 33(2)(b) BA 2007 exception in any event. Accordingly, any content of the OASys report which might have supported AM's contention that he was not a 'danger to the community', would have no effect on the outcome of AM's case in so far as it depended on the Refugee Convention exception.

58. Second, nor do I consider that there was any realistic likelihood the OASys report would have supported AM's alternative case under Article 8, to the extent that it relied on the assertion that his criminal offending was no more than the product of an alcohol addiction, and was thus only a temporary aberration; and that, having overcome his addiction or was in the process of conquering his addiction, he was once again culturally and socially integrated in the UK.

59. In that context, the content of the risk assessment report provided by NOMS the day before the hearing before the FTT that AM's addiction to alcohol "appears to have been the overriding factor in his pattern of offending behaviour" and causes him to "act on impulse without thinking about the consequences of his behaviour on himself or others" clearly did not support such an assertion. Moreover, the only relevant information in the OASys "summary sheet" and "Offender Management Information Exchange" (which were not before the FTT and the UT, but were in evidence before us) relevant to the risk posed by AM was that he posed a medium risk of harm to the public and a low risk of harm to children and that, so far as Multi-Agency Public Protection Arrangements ("MAPPA") were concerned, he qualified for MAPPA "Tier level 3" arrangements. These apply to "Category 3 - Other dangerous offenders who have committed an offence in the past and are considered to pose a risk of serious harm to the public." They involve (at least according to the current MAPPA Guidelines) the most active level of offender management requiring "senior representation from the Responsible Authority and Duty-to-Co-operate agencies."

60. Thus, in my judgment the UT cannot be faulted when, at [29] – [32] of its judgment, it concluded that:

> "29. ……. the Judge was saying that he saw no realistic prospect that production of the OASys report would have any bearing on the issues for his decision. We do not accept Mr Khan's submission that this approach deprived the Tribunal of relevant and potentially crucial evidence on the basis of nothing more than speculation. The Judge himself addressed the substance

> of that submission at [23] when he said "the offender risk assessment which has been provided by Samson Adewole does not take matters much further. The information given is surely incontestable." By this we understand him to mean that the risk assessment itself indicated what the OASys report would have said, and that it was not helpful to the appellant. We agree.
>
> 30. We note that the sentencing remarks of 2014 do not suggest that the appellant's then Counsel submitted that he was a reformed man. If the OASys report had supported that view, it would have been reflected in the PSR, and doubtless Counsel would have made play of the point. We note also that the risk assessment refers to events in 2015, and would therefore seem to post-date the PSR. It is inconceivable in our judgment that the OASys report would have been more supportive of the appellant's case than the subsequent risk assessment that was before the Judge.
>
> 31. The case of *Mugagwa* is no more than an illustration of one set of circumstances in which an OASys report made a difference on appeal. As Mr Khan was constrained to accept, the case is not authority for the proposition that an OASys report must in all cases be obtained and put before the Tribunal in order to inform the decision on danger to the community. The decision on whether such a report is needed will be fact-sensitive. We do not believe the FTT Judge's assessment in this case can be faulted.
>
> 32. The real issue on this aspect of the case was whether the appellant could rebut the statutory presumption by showing that despite his bad record of offending linked to substance abuse he was now reformed. There was, in the event, no good reason to think that the OASys report would have supported that contention. There was every reason to think that it would not."

61. Accordingly, although the UT rightly criticised the respondent at [33] of its judgment for failure to disclose the OASys report, and although, likewise, criticism can be levelled at the respondent for not knowing, as at the respective dates of hearings in the courts below, what its own internal policy was in relation to disclosure, that does not, in my judgment, render the hearing before the FTT necessarily unfair. Apart from the fact that both the FTT and the UT were entitled to conclude on the material before them that the OASys report was unlikely to support the appellant's case, the material before this court clearly demonstrated that it was not.

62. Third, in my judgment, the UT was undoubtedly correct in its conclusion that AM had left it too late to complain of procedural unfairness (see [27] of its judgment), and that AM had to bear considerable responsibility for the late request for the OASys report. As referred to in [28] of the UT's determination, it remained AM's own obligation pursuant to the directions of August 2015 to produce the PSR. Further, these directions also required AM to provide any parole report relating to AM's period in custody and/or release. Had he complied with these directions, it is likely that he would have placed before the Tribunal the substance of the OASys assessment such that further disclosure would not have been necessary.

63. Fourth, as the UT correctly pointed out, the case of *Mugagwa* is not authority for the proposition that an OASys report must in all cases be obtained in order to conduct a proper assessment of whether an individual is a danger to the community. Rather, it is

simply "an illustration of one set of circumstances in which an OASys report made a difference". The specific circumstances of this case did not require the obtaining of such a report in order for there to have been a fair hearing.

64. Accordingly, I would dismiss the appeal on ground 1.

Ground 4: Social and cultural integration and Article 8 analysis

Submissions of AM

65. Mr Gill's primary submission in relation to Ground 4 was that the UT had erred in its application of the Immigration Rules, because it was not open to the UT on the basis of the FTT's findings to hold that AM was not socially and culturally integrated in the UK. He submitted that both the FTT and the UT had failed to assess whether AM was socially and culturally integrated in the UK "*in the right context*". AM had spent 31 out of 42 years of his life in the UK, during which time he developed a family and worked to contribute to society. The level of integration was extremely high. In prison he had continued to be integrated by attending courses and having stable jobs within the prison environment for little pay. By so doing he contributed to the wider public interest. His criminal conduct was a product of his addiction to alcohol, following depression as a result of his divorce and loss of contact with his children. But he had now controlled his addiction and was a reformed man. In any event, having spent the formative years of his life in the UK, "*[g]ood or bad, whatever he is, is the product of this society*".

66. He further submitted that the UT had failed properly to understand the relationship between the Immigration Rules and ss117A-D of the NIAA 2002 and to apply them in a manner consistent with national and Strasbourg law. In particular:

    i) The FTT and UT had applied the rules inconsistently with the approach taken in cases such as *NA (Pakistan)* [2016] EWCA Civ 662, *Kamara* [2016] EWCA Civ 813, *Hesham Ali* [2016] UKSC 60, *MM (Lebanon)* [2017] UKSC 10 and *Rhuppiah* [2018] UKSC 58, which, apart from *NA (Pakistan)*, had not been decided by the time of the UT's decision.

    ii) This failure had led the FTT and UT inter alia:

        a) to misunderstand the weight to be attached to the public interest in deportation (see *Hesham Ali*);

        b) wrongly to view the Rules as a complete code (see *Hesham Ali*);

        c) not to appreciate that, even if one of the automatic exceptions to deportation was not satisfied, a case which had very strong features, which were not necessarily different from the factors relied upon for the purposes of trying to fall within the exceptions, could still succeed under Article 8 (see *NA (Pakistan)*); and

        d) not to appreciate the particular importance to be attached to section 117A(2) - as explained in *Rhuppiah* - for the purpose of carrying out a holistic Article 8 assessment; and

        e) to fail to make a holistic Article 8 assessment.

iii) The FTT/UT wrongly proceeded on the basis that the appellant could not satisfy the automatic exception to deportation in paragraph 399A and in Exception 1 in s117C(4).

iv) In so doing, they failed to understand and to apply the correct meaning of integration for the purposes of paragraph 399A(b) and s117C(4)(b). The decision in *Bossade supra* was wrong to the extent that it made broad generalisations to the effect that persons were very unlikely to be integrated into the UK whilst in prison. The error inevitably had a knock-on effect in relation to the UT's consideration of paragraph 399A(c) and on s117C(4)(c).

v) The FTT/UT essentially proceeded as if the failure to satisfy paragraph 399A and Exception 1 in s117C(4) was dispositive of an Article 8 assessment. They failed to approach the case on the basis that, even where the requirements of those provisions were not met, it remained possible on a holistic assessment to succeed under Article 8.

Submissions of the respondent

67. Ms Overdijk, on behalf of the respondent, submitted that the FTT and UT were entitled to rely on several factors strongly indicating that AM was not socially and culturally integrated in the UK. She contended that there appeared to be no dispute that a qualitative test applied when assessing social and cultural integration. In the present case, however, the factors against integration dominated, specifically: the length, persistence and type of offending, and the fact that AM's family and social ties were almost non-existent following his divorce.

68. In particular she submitted that:

i) The FTT and UT were entitled to place weight on the history, length, persistence and type of AM's criminal offending. The weight placed on AM's criminality was consistent with the case law. In particular, in *Bossade supra* (at [55]), a history of robbery offences was taken to indicate a disregard for fellow citizens and a serious discontinuity in integration; and in *Akinyemi v SSHD* [2017] EWCA Civ 236 the court considered (per Underhill LJ at [53]) that presence in the UK from a young age was "*not a trump card*" and might be outweighed by serious and persistent criminal offending Accordingly, AM's criminal offending "*broke the continuity of his social and cultural integration in the UK and he has not regained it*".

ii) Therefore, whilst it was relevant that AM moved to the UK at a young age and had been in the UK for many years before committing his first offence in 2001 shortly after divorcing his wife, the Tribunal was entitled to place greater weight on AM's long history of offending (27 convictions for 45 offences over 13 years) and the impact of this period on his quality of integration. Further, the sentences imposed on AM included a range of non-custodial measures, which had little impact on stopping future reoffending. That was one factor leading to the imposition of custodial sentences.

iii) The FTT and UT were entitled to place weight on the lack of quality in AM's relationship with his family living in the UK; see *MN-T (Columbia) v SSHD*

[2016] EWCA Civ 893) and *AH (Jamaica) v SSHD* [2017] EWCA Civ 796. On his own evidence, AM was estranged from his entire family, and there was no evidence that he had taken any steps to rekindle his relationship with his daughters. The FTT was thus entitled to find that AM had no meaningful family life.

69. In relation to the issue of obstacles to AM's integration in Somalia, she submitted that FTT's analysis was entirely in line with *Bossade* where the respondent could not speak the language, and had no experience of living in the country of deportation as an adult or young person. However, the appellant in that case failed to meet the "very significant obstacles" threshold: he could learn the language; had not rejected his cultural origins; and could use the skills he had gained in prison to make a living. Further he had no physical or mental handicap that would prevent him from integrating. Although, reintegration might be easier for AM in the UK, *Bossade* and *Olarewaju* make clear the threshold was high, and culture shock or unfamiliarity with the country of deportation would not amount to a very significant obstacle.

Discussion and analysis

70. Logically, the first issue in the analysis is whether it was open to the FTT on the evidence before it to conclude that AM was not "socially and culturally integrated in the United Kingdom" and that he was thus unable to bring himself within the terms of paragraph 399A(b) of the Immigration Rules and/or limb (b) of Exception 1 in section 117C(4) of NIAA 2002. This was Ground 4 in the appellant's notice of appeal.

71. The argument had some support from the comments of Underhill LJ, when granting permission to appeal, that he was not sure that the factors mentioned at paragraph 29 of the UT's determination – namely that AM has more recently developed a history of drink-related offending and has lost touch with his family and is now "homeless and jobless" – meant that AM had ceased to be integrated.

72. In my judgment, however, notwithstanding that it might be argued that AM had culturally integrated into the UK, in the 13 years prior to the start of his period of persistent offending in 2000, both the FTT at paragraphs 28-29 and the UT at paragraphs 39-40 were entitled to conclude that, by the time he had left prison, he was no longer socially and culturally integrated in the UK. They were entitled to rely on the fact that, given his pattern of criminality, his very few social ties in this country and the fact that he had had no contact with his children (or indeed other members of his family) for many years, any social and cultural integration in the UK which he might have had, had been broken.

73. Such a conclusion is consistent with the decision in *Bossade supra*. Mr Gill urged us to conclude that *Bossade* - a decision of the Upper Tribunal (Upper Tribunal Judges Storey and Dawson) - was wrongly decided in so far as it purported to decide that a non-serious crime could break the continuity of an offender's social and cultural integration in the UK or that time spent in prison itself might not count as part of an offender's social integration: see paragraph [55] of *Bossade.* I disagree. It was common ground that a qualitative test applied when assessing social and cultural integration. The mere fact that an appellant has been present in the UK from a young age and the absence of any family or other connections with the country of return is not a trump card; such factors are unlikely to be outweighed by any serious and persistent offending: see *Akinyemi v*

SSHD [2017] EWCA Civ 236 at paragraph [53]. Every case has to be looked at on its own specific facts.

74. The facts of the present case, as in *Bossade,* showed that the appellant's history of criminality (27 convictions for 45 offences over 13 years) demonstrated a blatant disregard for his fellow citizens and a serious discontinuity in his integration. Moreover, the Tribunal was entitled to give appropriate weight to the fact that the appellant's social and family ties were virtually non-existent - as the FTT found, he seemed to know very few people in the UK. There was no evidence to support the appellant's asserted intention of re-establishing his relationship with his daughters - he had certainly taken no steps to do so. His own evidence showed that he was estranged from his entire family and had not spoken to his daughters for over 10 years. In addition he had not had a job for many years and appeared unable to earn a living - other indicators of lack of integration. Time spent in prison will not necessarily result in a break in an offender's social and cultural integration but, in the present case, where the evidence demonstrated that AM's links were tenuous in any event, I see no reason why the FTT and the UT were prevented from reaching the conclusion which they did.

75. Contrary to Mr Gill's submissions, nothing in authorities such as *NA (Pakistan)* and those decided after the decision of the Upper Tribunal in the present case (such as *Hesham Ali* and *Rhuppiah)* in my judgment prevented the FTT or the UT from reaching the decision which they did - on the evidence before them - in relation to social and cultural integration. It follows that, in my judgment, that this ground of appeal must fail.

76. Even if the FTT and the UT had been wrong in their conclusion in relation to social and cultural integration, however, AM would still have been unable to satisfy the requirements of paragraph 399A and/or Exception 1 because both provisions contain a requirement that the applicant "face very significant obstacles to his integration into the country to which it is proposed he be deported": see paragraph 399A(c) and section 117C(4)(c)). The decision of the FTT that AM would not face very significant obstacles to his integration in Somaliland is, as I have already said, not under appeal. In this context it is relevant to note that, as the FTT found, the appellant can speak the language prevailing in Somaliland and would have the benefit of such majority clan support as might be available in that country.

77. At this stage of the analysis, Mr Gill's second line of attack under Ground 4 was that, irrespective of the correctness of their decision in relation to social and cultural integration, the FTT and the UTT had failed to conduct an adequately holistic assessment of the appellant's claim under Article 8 in accordance with recent authority and had proceeded as if the failure to satisfy paragraph 399A and Exception 1 in section 117 was dispositive of the Article 8 assessment: see the summary of Mr Gill's arguments as set out at paragraph 66 above.

78. The approach to be taken by courts in reviewing the compliance of decisions made by the Secretary of State with a subject's Article 8 rights has been recently set out in the judgment of Lord Reed (with whom Lords Neuberger and Thomas, Baroness Hale and Lords Wilson and Hughes agreed, and with whom Lord Kerr partially agreed) in *Hesham Ali supra* at paragraphs 36 - 53. The passage is worth citing at some length:

> "*Administrative decision-making*

36. Considering the new rules in the light of the guidance given by the European court, rule 397 makes it clear that a deportation order is not to be made if the person's removal would be incompatible with the ECHR. Where Article 8 claims are made by foreign offenders facing deportation, rule 398 explains that the Secretary of State will first consider whether rule 399 or 399A applies. Those rules, applicable where offenders have received sentences of between 12 months and four years, provide guidance to officials as to categories of case where it is accepted by the Secretary of State that deportation would be disproportionate. **The fact that a claim under Article 8 falls outside rules 399 and 399A does not, however, mean that it is necessarily to be rejected. That is recognised by the concluding words of rule 398, which make it clear that a claim that deportation would be contrary to Article 8 will not be rejected merely because rules 399 and 399A do not apply, but that "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".**

37. How is the reference in rule 398 to "exceptional circumstances" to be understood, compatibly with Convention rights? That question was considered in the case of *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. The Court of Appeal accepted the submission made on behalf of the Secretary of State that the reference to exceptional circumstances (an expression which had been derived from the *Jeunesse* line of case law) served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who did not satisfy rules 398 and 399 or 399A, and that it was only exceptionally that such foreign criminals would succeed in showing that their rights under Article 8 trumped the public interest in their deportation (paras 40 and 41). The court went on to explain that this did not mean that a test of exceptionality was being applied. Rather, the word "exceptional" denoted a departure from a general rule:

"The general rule in the present context is that, in the case of a foreign prisoner (sic) to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'." (para 43)

The court added that "the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (para 44). As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.

38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under Article 8 by countervailing factors. **Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria)***. The **countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State**. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 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. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule.

Appellate decision-making

39.The nature of appellate decision-making in the context of immigration cases involving Article 8 was authoritatively considered in the case of *Huang.* The appellants in that case had entered the UK and were seeking leave to remain on the basis that their removal would violate their rights under Article 8. They did not qualify for leave to remain under the Rules as they then stood.

40. The opinion of the Appellate Committee, delivered by Lord Bingham of Cornhill, made five important points. First, Lord Bingham recognised the importance of the Rules for administrative purposes, noting "the general administrative desirability of applying known rules if a system of immigration

control is to be workable, predictable, consistent and fair as between one applicant and another" (para 16). He acknowledged that the Rules, and the supplementary administrative directions, must draw a line somewhere in order to be administratively workable. The rule under which Mrs Huang failed to qualify was unobjectionable.

41.Secondly, appellate decision-making was not governed by the Rules, but the Rules were nevertheless relevant to the determination of appeals:

"[A]n applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under Article 8. The terms of the rules are relevant to that consideration, but they are not determinative." (para 6)

42. Thirdly, an appeal under the 2002 Act was not equivalent to an application for judicial review:

"[T]he task of the appellate immigration authority … is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it ...

[T]he appellate immigration authority ... is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up-to-date facts." (paras 11 and 13)

43. Fourthly, the first task of the appellate immigration authority was to establish the relevant facts, which might well have changed since the original decision was made, and which the authority was in any event much better placed to assess than the original decision-maker (para 15).

44.Fifthly, in considering the issue arising under Article 8 in the light of its findings of fact, the appellate authority should give appropriate weight to the reasons relied on by the Secretary of State to justify the decision under appeal. In that connection, Lord Bingham gave as examples a case where attention was paid to the Secretary of State's judgment that the probability of deportation if a serious offence was committed had a general deterrent effect, and another case where weight was given to the Secretary of State's judgment that the appellant posed a threat to public order. He continued:

"The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed." (para 16)

45. It may be helpful to say more about this point. Where an appellate court or tribunal has to reach its own decision, after hearing evidence, it does not, in general, simply start afresh and disregard the decision under appeal. That was made clear in *Sagnata Investments Ltd v Norwich Corpn* [1971] 2 QB 614, concerned with an appeal to quarter sessions against a licensing decision taken by a local authority. In a more recent licensing case, *R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] PTSR 868, para 45, Toulson LJ put the matter in this way:

"It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

46. These observations apply a fortiori to tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved**. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a**

custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above.

47. The approach adopted in *Huang* has been followed in later decisions of the House of Lords and of this court ……..,

48. The structured approach to proportionality which has been adopted in the domestic law of the UK makes provision for consideration of the elements involved in an assessment of fair balance in the context of immigration and deportation, whether the assessment arises in relation to a potential positive obligation or in relation to an interference. It can be said that the first of the four stages of the analysis, as described in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74 ("whether the objective of the measure is sufficiently important to justify the limitation of a protected right"), and in similar language in *Aguilar Quila* and other cases, is not entirely apt where the question is whether a positive obligation is imposed, since the language used presumes that the right in question is being limited. But the point is of no practical importance where, as in the context of immigration and deportation, there is no doubt as to the importance of the objective.

49. What has now become the established method of analysis can therefore continue to be followed in this context. The adoption of that method does not, of course, determine the outcome of the assessment. **It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context, and, where a court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate. In that way, relevant differences between, for example, cases where lawfully settled migrants are facing deportation or expulsion, and cases where an alien is seeking admission to a host country, can be taken into account.**

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.

A complete code?

51. In *MF (Nigeria)* [2014] 1 WLR 544 the Court of Appeal described the new rules set out in para 23 above as "a complete code" for Article 8 claims (para 44). That expression reflected the view that the concluding words of rule 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the Article 8 criteria and all other factors which were relevant to proportionality (para 39). On that basis, the court commented that the result should be the same whether the proportionality assessment was carried out within or outside the new rules: it was a sterile question whether it was required by the rules or by the general law (para 45).

52. The idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules, and the Rules alone, govern appellate decision-making. …….

53. As explained at para 17 above, the Rules are not law (although they are treated as law for the purposes of section 86(3)(a) of the 2002 Act), and therefore do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules: see para 7 above. The policies adopted by the Secretary of State, and given effect by the Rules, are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. **In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case before them, as explained at paras 37-38, 46 and 50 above. It remains for them to judge whether, on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate**." [Emphasis supplied.]

79. In my judgment, applying the approach set out in *Hesham Ali*, Mr Gill's submissions (i) that neither the FTT nor the UT carried out an adequately holistic Article 8 analysis; and (ii) that they wrongly assumed that, in the absence of AM satisfying the relevant paragraph 399A requirements, his claim was bound to fail, are ill-founded. The FTT rehearsed the relevant factors, concluded that there were no compelling circumstances over and beyond those falling within paragraphs 399 and 399A and expressly carried out the necessary balancing exercise, affording appropriate (but not undue) weight to the views of the Secretary of State: see paragraphs 29 – 31 of the judgment. Likewise, although with greater brevity, the UT in paragraph 42 of its judgment came to the same conclusion that there was "no tenable case of "very compelling circumstances".

80. Insofar as it is incumbent upon this court to carry out the relevant balancing exercise in order to decide whether deportation is proportionate in this case, I would come to no different conclusions from those reached by the FTT and the UT. Even if (contrary to my view) AM could be regarded as having met all the requirement of social and cultural integration, I am satisfied that, balancing the strength of the public interest in the deportation of AM against the impact on his private and family life, and giving 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, and taking account of all other evidential factors relevant to the case in question – and, in particular, the fact that, from the age of 11, AM lived in this country, married and had children here - his Article 8 claim is not sufficiently strong to outweigh the public interest in his deportation. Put another way, there are no compelling circumstances that overbalance the public interest.

Disposition

81. It follows that I would dismiss this appeal.

Lord Justice Males:

82. I agree that this appeal must be dismissed. I add a few comments on the two principal issues argued before us.

The OASys Report

83. I agree that the FTT was right to refuse an adjournment to enable the OASys report to be produced. There was no reason to suppose that the report would assist the appellant in any way and every reason in view of the material which was produced to conclude that it would not.

84. However, I would not decide this issue on the basis that AM had left it too late to complain (see [62] above). The obligation to disclose the report lay firmly on the SSHD who had been ordered to disclose it.

85. The way in which the SSHD dealt with this issue was unsatisfactory. She failed to comply with an order by the FTT to disclose the report for reasons which even now are not clear. If, as was suggested, those responsible for the matter on her behalf were not aware of the order, that would appear to represent an unacceptable breakdown in communications. If, however, the real reason for the non-disclosure was because of a policy that OASys reports should not be disclosed, that was doubly unacceptable – first,

because the Tribunal had made an order and, if the SSHD wanted to withhold the report on policy grounds, it was incumbent on her to go back to the Tribunal and seek a variation of the order; and second, because it transpires that although it was believed that the National Offender Management Service did not permit the use of OASys reports in tribunal proceedings, this belief was mistaken. In fact there is a procedure for NOMS to provide a full OASys report on a foreign national offender to the Home Office Criminal Casework Directorate.

86. Nevertheless, it is clear that production of the report in this case would not have assisted AM's case and accordingly there was no procedural unfairness to him as a result of the refusal of an adjournment.

Social and cultural integration

87. The FTT found that AM was not socially and culturally integrated in the United Kingdom. The Upper Tribunal held that this conclusion could not be faulted.

88. It appears that for much of his life AM was so integrated. He has lived here since the age of 11 (he is now 43), attended secondary school, worked, married and had three daughters. However, it is possible for an individual to lose that integration or, as it was put in *SSHD v Bossade* [2015] UKUT 415 (IAC) at [54], for the continuity of an individual's social and cultural integration in the United Kingdom to become broken. The requirement in section 117C of the NIAA 2002 and in paragraph 399A of the Immigration Rules is that a person "is" socially and culturally integrated in the United Kingdom, not that he has been so integrated in the past.

89. In the present case AM's marriage broke down in or about the year 2000 or 2001 and he separated from his wife, leaving the family home to live in a hostel. At that time his eldest daughter can have been no more than seven or eight years old. The youngest was only three. He has had no contact with his wife or daughters since that time. Unfortunately the breakdown of AM's marriage led him to turn to drink which in turn resulted in a long history of persistent drink-related offending, with 27 criminal convictions for 45 offences between 2001 and 2014. He was both homeless and jobless. There was no evidence of any ties of friendship or other indications of any private life. He knew very few people here. He had a brother, but had no contact with him or with any other member of his family. It appears that some of his offences involved taking money from other family members.

90. Although the FTT described AM's offences as being what "some might say [were] low-level criminal convictions", it is notable that they included racially aggravated offences as well as an assault on a police officer. Those features of his offending are significant in that they indicate an alienation from important values of our society which has at least some bearing on the issue of social and cultural integration.

91. AM was dealt with for this offending by a series of community orders, offering him the chance to reform, but he proved unable to do so. Eventually he committed a more serious offence, a street robbery involving the snatching of a mobile phone from a young woman late at night, for which he was sentenced to two years imprisonment (reduced from three years to give credit for his guilty plea). He was sent to prison in April 2014 and since his release in February 2015 has been in immigration detention. Nobody attended to support him at the hearing before the FTT.

92. As the FTT put it, the appellant "has been at the very least a thorough nuisance to the community of the United Kingdom".

93. In these circumstances the FTT was entitled to find that the appellant was not socially and culturally integrated in the United Kingdom. That was so not merely because of his conviction for a serious offence and the time which he had spent in prison as a result, but also because of the long period of anti-social criminal behaviour leading up to that conviction, the complete absence of any family life in this country for what was at the time of the hearing before the First Tier Tribunal the last 14 years, and the absence of any evidence of social or other connections here other than the mere fact of his lawful presence in this country. This was no doubt an unhappy life, particularly as there are some indications that AM wanted to reform, but it cannot be described as a life of social or cultural integration in this country.

94. Accordingly the Upper Tribunal was right in its conclusion on this issue.

Lord Justice Hamblen:

95. I agree that the appeal should be dismissed for the reasons given by Gloster LJ and Males LJ.

96. Given that all members of the court are agreed that the production of the OASys report would not have assisted AM and that there is no procedural unfairness, I do not consider that it is necessary to choose between the different views expressed in relation to [62] of Gloster LJ's judgment. I agree with Males LJ that the way that the SSHD dealt with the matter was unsatisfactory. On the other hand, I consider that UT was entitled to take into account the fact that AM had left it so late to complain of procedural unfairness.