IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: HU/16484/2017

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 June 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

AKSU ALI
(ANONYMITY ORDER SET ASIDE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian, Counsel, instructed by Aylish Alexander Solicitors

For the Respondent: Mr D Manknell, Counsel, instructed by the Government Legal Department

Heard at Field House on 19 January 2023

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant and any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

INTRODUCTION

1. It might by now appear trite to say that the determination of appeals in the context of deportation involves multi-faceted and highly fact-specific assessments of the evidence. It is, however, worth re-iterating the point at the outset of our decision. Whilst we address certain issues of law relating to Article 8 ECHR ("Article 8"), the majority of what follows relates simply to the application of the particular circumstances of this case to uncontroversial guidance derived from the authorities. Our analysis and conclusions should not therefore be taken as a factual precedent. The dangers inherent in relying on the facts in one case to justify an outcome in another have been highlighted in several authorities. At [50] of MI (Pakistan) v SSHD [2021] EWCA Civ 1711, Underhill LJ said as follows:

> "50… It is dangerous to treat any case as a factual precedent as HA (Iraq) made clear (at [129]). In the particular context of an evaluative exercise there is a limit to the value to be obtained from considering how the relevant legal test was applied to the facts of a different (albeit similar) case, especially where there may be questions as to the true level of similarity between the two cases given the almost infinitely variable range of circumstances and subsisting parent/child relationships that might be involved (see HA (Iraq) at [56]). Ultimately it is the statutory test itself that matters and that must be applied by the first instance tribunal making its own evaluation of the facts in the case with which it is concerned."

2. From the legal perspective, the predominant issue with which this case is concerned is that of delay in the context of deportation. In particular, the question arises as to whether the judicial headnote in RLP (BAH revisited - expeditious justice) Jamaica [2017] UKUT 00330 (IAC) is a correct exposition of the law in light

of the Court of Appeal's judgment in SSHD v MN-T (Colombia) [2023] EWCA Civ 893[1].

PROCEDURAL BACKGROUND

3. This is the re-making of the decision in the Appellant's appeal against the Respondent's refusal of his human rights claim. This follows our previous decision, promulgated on 24 October 2022, in which we concluded that the First-tier Tribunal ("the FTT") had materially erred in law when allowing the appeal on Article 8 grounds. Our full decision is annexed to this re-making decision. In summary, we concluded that the judge below had erred by failing to provide legally adequate reasons in respect of the significance attached to: (a) rehabilitation; (b) what might be described as the value to the community factor; and (c) delay by the Respondent.

4. The appeal before the FTT involved not only the refusal of a human rights claim, but also a decision by the Respondent to revoke the Appellant's refugee status. That particular issue was concluded against the Appellant and there was no challenge to this aspect of the FTT's decision. Thus, there are no protection-related issues before us.

5. The Appellant is a citizen of Turkey. He left that country in early 1988 and travelled to France, where he was subsequently granted refugee status. In September 1990 he arrived in United Kingdom and in December of that year he married a Turkish citizen, AA. The couple's daughter, PA, was born in 1991. When it transpired that the Appellant had been recognised as a refugee in France, his status was transferred to this country and he was granted leave to remain from 1993 to 1997.

6. In May 1996 the Appellant was convicted of conspiracy to import almost 200kg of heroin with a street value of approximately £14 million. He was initially sentenced

[1] The neutral citation is erroneous. It might be that the Court of Appeal is able to redesignate a neutral citation number so that the judgment is accessible on, for example, Bailii. As it stands, the judgment is only available on Westlaw.

to 20 years' imprisonment, but this was reduced to 15 years on appeal: R v Kaynak and Others [1998] 2 Cr App R 283.

7. The Appellant was released from prison on licence in September 2003. Shortly thereafter, a decision to deport him was issued, against which an appeal was lodged. Later in 2003 the Appellant's first son, UA, was born. His second son, AY, was born in 2005.

8. The 2003 deportation decision was withdrawn in April 2007 on the basis that the Appellant's refugee status had not been considered. In May of that year a new deportation decision was issued and an appeal lodged against it. A month later that decision was also withdrawn because the Appellant's refugee status had yet again not been properly addressed. In October 2007 the Appellant was informed by the Respondent that deportation would not be pursued at that time. The Respondent accepted that removal from the United Kingdom to Turkey at that time would have exposed the Appellant to a risk of treatment contrary to Article 3 ECHR ("Article 3"). The Appellant was consequently granted 6 months' leave to remain, pursuant to the Respondent's policy on discretionary leave (which included guidance on the granting of shorter periods of leave to foreign national offenders). The Appellant was then granted a further three periods of 6 months' discretionary leave to remain. We understand that leave finally expired in April 2011.

9. Following an application made in November 2011 the Appellant was granted leave to remain as a businessman under the Turkish EC Association Agreement ("ECAA") in February 2012. Another application in the same category was made in early 2013. This was refused by the Respondent, but an appeal to the FTT in 2014 was successful. Implementing that decision, the Appellant was granted a further period of leave under the ECAA from May 2015 until February 2016. Prior to the expiry of that leave the Appellant applied for indefinite leave to remain in the United Kingdom. Whilst that application was pending, the Respondent made the two decisions which formed the basis of the appeal to the FTT. The refusal of

the human rights claim was dated 1 December 2017, and the decision to revoke refugee status was dated 21 September 2017 and served on 1 December of that year.

10. The Appellant's appeal was initially dismissed on all grounds by a decision promulgated on 7 November 2018. An onward appeal to the Upper Tribunal in March 2019 resulted in the decision of the FTT being set aside in respect of both the protection and Article 8 issues. The appeal was remitted to the FTT for a complete re-hearing.

11. The remitted appeal was then allowed on Article 8 grounds, but dismissed in respect of the protection grounds. The Respondent appealed to the Upper Tribunal in respect of the Article 8 outcome and the Appellant cross-appealed on the protection issue. By a decision promulgated on 28 April 2020, the panel (comprising Johnson J, sitting as a Judge of the Upper Tribunal, and Upper Tribunal Judge Kopieczek) allowed the Respondent's appeal and dismissed the Appellant's cross-appeal.

12. The panel's decision was then the subject of an appeal to the Court of Appeal, but only in respect of the Article 8 issue. Permission to appeal was granted by Nugee LJ on 17 November 2020 on the basis that there existed "an evident tension in the authorities" relating to the significance of delay in deportation cases, which raised an important point of principle.

13. The parties subsequently agreed that the panel had erred in its approach to the delay issue, that its decision should be set aside, and that the appeal should be remitted for the Upper Tribunal to consider whether the FTT had erred in law. A detailed statement of reasons to that effect was approved by the Court and an Order giving effect to the parties' agreement was sealed on 3 March 2021.

14. The error of law hearing took place on 4 October 2022 and our decision was promulgated on 24 October 2022. We concluded that due to the passage of time since the FTT's decision, the parties should have the opportunity to produce

further evidence and put forward written and oral argument on the relevant issues. The matter was therefore listed for a resumed hearing and in this way the appeal arrived at the re-making stage.

THE CORE ISSUES

15. As alluded to previously, there are no longer any protection-related issues in this appeal. We are concerned only with whether the Appellant's removal from the United Kingdom, pursuant to the Respondent's refusal of his human rights claim, would be unlawful under section 6 of the Human Rights Act 1998, with specific reference to Article 8.

16. This basis can be narrowed further. It being common ground that the Appellant is a "foreign criminal" within the meaning of section 117D(2) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act") and in light of the lengthy sentence imposed in 1996, the Appellant can only succeed in his appeal by demonstrating that there exist "very compelling circumstances" under section 117C(6) of the 2002 Act.

17. In turn, the assessment of whether very compelling circumstances exist involves an analysis of delay in the context of deportation and the provision of an answer to the question posed at paragraph 2 of our decision.

THE RELEVANT LEGISLATIVE FRAMEWORK

18. In the circumstances of this case, there is no need to set out swathes of the legislative provisions relating to Article 8. Instead, our focus reflects the limited issues before us.

19. Section 117C of the 2002 Act provides, in so far as relevant, as follows:

> "117C Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.

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

(3)...

(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)..."

20. Neither party has asked us to consider the Immigration Rules relating to deportation and we see no need to: Binaku (s.11 TCEA; s.117C NIAA; paragraph 399D) [2021] UKUT 34 (IAC); [2021] Imm AR 653, at paragraph 9 of the judicial headnote.

THE EVIDENCE

21. We have been provided with an agreed consolidated trial bundle, with accompanying annexes containing the bundles produced by the Appellant and the Respondent before the FTT. A supplementary bundle has been provided by the Appellant for the purposes of the resumed hearing. We admitted this in evidence, without objection by the Respondent.

22. The Appellant, his wife, and their three children attended the resumed hearing. The Appellant alone gave oral evidence. Following a pre-hearing discussion between the representatives, Mr Youssefian decided not to call the other family members.

23. In examination-chief the Appellant adopted his three witness statements. He stated that he had last visited Turkey around 35 years ago. He informed us that he has one elderly sister residing in that country and she lives with her daughter, who is in her mid-30s. He has been prescribed medication for blood pressure, diabetes, and panic attacks (Mr Youssefian confirmed that the most recent medical evidence dates back to 2018). In respect of the latter, he last had a panic attack about three months prior to the hearing, which resulted in him feeling faint. The employees at the Appellant's restaurant are all British citizens, although they originated from various countries.

24. In cross-examination the Appellant told us that he speaks Turkish, Kurdish, and English. His children do not understand Turkish. He corrected an error in a previous witness statement, confirming that his younger son, AY, was born in 2005, not 2006. AY had recently turned 18. The Appellant stated that his daughter helps out at the restaurant, but was not formally employed.

THE APPLICATION TO RELY ON UNREPORTED DECISIONS OF THE UPPER TRIBUNAL

25. Mr Youssefian made an application to rely on two unreported decisions of the Upper Tribunal, Jamil Hydar v SSHD (HU/15952/2018) and FB v SSHD (HU/18799/2019). The application was based on the contention that the two decisions supported the argument that the reported decision of RLP was decided *per incuriam* MN-T (Colombia).

26. We refused the application. The reasons for this are threefold.

27. First, as made clear in paragraph 11.3 of the Practice Directions for the Immigration and Asylum Chambers of the FTT and Upper Tribunal, dated 10

February 2010 and amended on 13 November 2014, permission will only rarely be given to rely on unreported decisions.

28. Second, any aspects of the reasoning employed in the unreported decisions could be adopted and relied on in the present case. Indeed, this is precisely what Mr Youssefian proceeded to do following our decision on his application.

29. Third, the question of whether RLP was decided *per incuriam* is solely a question for us to determine and we were of the view that analysis of the unreported decisions themselves would not be of great assistance, with all due respect to the panels concerned.

30. We note in passing that Mr Youssefian was in fact Counsel in the Hydar case and thus was very familiar with the relevant arguments relating to RLP and delay.

THE PARTIES' ARGUMENTS IN OUTLINE

31. We express our gratitude to Counsel for their well-structured submissions. Their written and oral submissions have been of real assistance.

32. We intend no disrespect to Mr Youssefian and Mr Manknell by declining to set out their submissions in any detail here. We have endeavoured to address the core points made within our analysis and conclusions.

33. For present purposes, the following summary can be provided. For the Appellant, Mr Youssefian relied on six factors, which in his submission demonstrated very compelling circumstances when viewed cumulatively. These were: (1) considerations under Exception 1 and Exception 2 within section 117C of the 2002 Act; (2) delay; (3) rehabilitation; (4) the value to the community provided by the Appellant's business; (5) the grants of leave under the ECAA; and (6) family life.

34. Although not expressly stated, the relevance of the Appellant's private life was implicit in Mr Youssefian's overall submissions.

35. Against this, Mr Manknell submitted that the public interest in this case was very strong indeed and outweighed the six factors, even when these were viewed on a cumulative basis.

DISCUSSION

36. Before turning to consider in detail the various competing factors in this case, it is appropriate to set out the overarching principles applicable to the very compelling circumstances exercise under section 117C(6) of the 2002 Act.

37. The threshold is undoubtedly very high. In NA (Pakistan) v SSHD [2016] EWCA Civ 662; [2017] Imm AR 1, Jackson LJ said at [33] that:

> "33. Although there is no "exceptionality" requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare."

38. When considering the very compelling circumstances test in HA (Iraq) v SSHD [2022] UKSC 22; [2022] 1 WLR 3784, Lord Hamblen, JSC, referred at [48]-[49] to other authorities with similar effect:

> "48. In Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203 at para 50 Sales LJ emphasised that the public interest "requires" deportation unless very compelling circumstances are established and stated that the test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them."
>
> 49. As explained by Lord Reed in his judgment in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799 at para 38:
>
> > "… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … 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 the SS (Nigeria) case [2014] 1 WLR 998. 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."

39. The authorities also make it clear that the considerations under Exceptions 1 and 2 in sections 117C(4) and 117C(5) of the 2002 Act can be relevant to the very compelling circumstances test. At [37] of NA (Pakistan), Jackson LJ concluded that:

> "37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6)."

40. That "sensible" approach, which we adopt, necessitates a determination of whether any factors corresponding to Exceptions 1 and 2 will only just make out a case thereunder, or whether they are of an "especially compelling kind", such that they could in principle constitute very compelling circumstances: NA (Pakistan), Jackson LJ at [30].

41. For the avoidance of any doubt, the Respondent quite rightly accepts that the Appellant has established a private life in the United Kingdom and that he enjoys family life with his wife and his children. The interference which would be caused by the Appellant's deportation is plainly sufficiently serious to engage Article 8. There is no dispute as to the legitimate aim pursued and that the decision under appeal is in accordance with the law.

42. Finally, we emphasise the fact that our approach to the very compelling circumstances test has been cumulative in nature. That we have addressed the various factors relied on by the Appellant separately is simply a matter of structure and should not be taken as any indication that we have viewed them in artificial isolation.

FACTORS RELIED ON BY THE RESPONDENT

1: The public interest

43. The Appellant's deportation is in the public interest and that interest has the weight of primary legislation behind it through section 117C(1) of the 2002 Act.

44. Although the constituent elements of the public interest are not spelt out in section 117C, it is undoubtedly the case that they remain as described in the authorities pre-dating the introduction of Part 5A of the 2002 Act: protection of the public; deterrence; society's concern as to the ability of the authorities to deport foreign criminals: see, for example, OH (Serbia) v SSHD [2008] EWCA Civ 694; [2009] INLR 109 and, in a recent judgment reviewing the relevant authorities, Zulfiqar v SSHD [2022] EWCA Civ 492; [2022] 1 WLR 3339, Underhill LJ at [38]-[44].

2: The seriousness of the offence

45. The seriousness of the offence is a matter which we are required to take into account by virtue of section 117C(2) of the 2002 Act. In so doing, we have borne in mind the guidance provided by the Supreme Court in HA(Iraq), at [60]-[71].

46. The offence for which the Appellant received his only conviction was, in our judgment, very serious indeed. The Appellant was knowingly concerned with the importation of almost 200 kg of heroin, at 50% purity. He was described by the sentencing judge as a "mid-ranker" within the conspiracy. The judge remarked that:

> "… hard drugs cause for the addicts mental and physical misery, gross injury to health and sometimes death. Furthermore, addicts resort to a wide range of dishonesty, often accompanied by serious violence to finance their habit. Offences of violence are also committed under the influence of drugs. Drug traffickers fight, intimidate and sometimes kill in pursuit of territory and clientele, and they certainly aim to make themselves very rich.

> Vast resources of the state are required to fight this wave of crime and to try and seize the drugs at importation or as soon as possible thereafter. Vast resources of the state are required to deal with the medical and social problems of addiction.
>
> Trafficking of hard drugs at this level…is, in my view, for the purposes of sentence, in the category of wholly abnormal offences…"

47. Those comments speak for themselves.

48. We acknowledge that the Appellant's sentence was reduced on appeal from 20 years to 15 years. However, the Court of Appeal's judgment made no criticism of the sentencing judge's description of the Appellant as a "mid-ranker" within the conspiracy. The Court concluded that the original sentence imposed was too high in light of the relevant authorities, coupled with the fact that the Appellant had pleaded guilty and offered at least some assistance to the authorities. We conclude that the guilty plea is not relevant to the seriousness of the offence, although it did have a bearing on the sentence imposed.

49. Even in light of the reduction imposed by the Court of Appeal, the revised sentence of 15 years was plainly very significant.

50. We also acknowledge the obvious fact that the offence was committed many years ago. Whilst this is of relevance when we turn to address factors weighing in the Appellant's favour, it does not have an impact on the seriousness of the offence itself.

51. In summary, we conclude that the seriousness of the offence in the present case significantly enhances the already strong general public interest in deporting the Appellant.

FACTORS RELIED ON BY THE APPELLANT

52. We now turn to address the six factors specifically relied on by the Appellant which, he has submitted, when taken cumulatively, go to reduce the public interest to such an extent that it permits him to succeed in his appeal.

1a: The circumstances described in Exception 1

53. Beginning with the private life exception arising under section 117C(4) of the 2002 Act, the Appellant has at the time of writing resided in the United Kingdom lawfully for most of his life (13 May 1993 to date). There is no dispute concerning his social and cultural integration in the United Kingdom, notwithstanding the very serious offence and lengthy term of imprisonment.

54. Having considered factors including the Appellant's Kurdish ethnicity and lengthy period spent away from Turkey, the FTT found that there were no very significant obstacles to the Appellant reintegrating into that country's society. This was based in large part on the fact that the Appellant had relatives residing in Turkey. We expressly preserved the judge's finding in our error of law decision.

55. Mr Youssefian submitted that there would nonetheless be very significant obstacles to reintegration, or at least significant obstacles, and that this was relevant to the assessment of very compelling circumstances. Mr Manknell accepted that the Appellant has a sister living in Turkey and that he suffers from certain medical conditions. However, he submitted that this did not come close to constituting a very compelling circumstance.

56. The preserved finding is a firm starting point for our assessment. Like the judge below, we accept that people of Kurdish ethnicity may still encounter some discrimination within Turkey, albeit that this is highly likely to be less significant than in the past, especially in the western part of the country. We find that the Appellant does have a relatively elderly sister living in Turkey and that she resides with her daughter. There is no evidence from either to indicate a inability to provide any form of meaningful support whatsoever. It is more likely than not that practical and/or emotional support would be forthcoming.

57. Even if such support were to be discounted, on a broad evaluative assessment, we conclude that there would not be very significant obstacles to reintegration. It is of course true that the Appellant has been away from the country for a very

substantial period and that Turkish society is likely to have changed, at least to an extent, since he last resided there. Having said that, the Appellant speaks Turkish, Kurdish, and English. He has experience in establishing and running a viable business, with what might be described as accompanying transferable skills. We accept that he suffers from high blood pressure, diabetes, and panic attacks. The most recent medical evidence comes from 2018 and there is nothing to indicate that any of these conditions, or a combination of the three, has an ongoing significant impact on his day-to-day life. In addition, there is no apparent reason why the Appellant's family in the United Kingdom would be unable or unwilling to provide some form of meaningful support to him were he to be deported.

58. In summary, we accept that there would be significant obstacles to the Appellant re-adjusting to life in Turkey. These would not, however, be very significant and the Appellant is unable to satisfy Exception 1 to the extent that that is relevant to the assessment of very compelling circumstances. We make it clear that the underlying circumstances relating to the Appellant's private life will still be considered as part of the very compelling circumstances exercise.

1b: The circumstances described in Exception 2

59. The circumstances surrounding Exception 2 under section 117C(5) have changed since the error of law hearing. The FTT found that it would be unduly harsh for the Appellant's youngest son, AY, to go and live in Turkey and for them to be separated. This was based on AY's ADHD and behavioural problems, together with the support provided by the Appellant and school. That finding was expressly preserved in our error of law decision.

60. AY turned 18 in early January 2023. Two consequences flow from this. Firstly, AY is no longer a "qualifying child" within the meaning of section 117D and section 117C(5), and the preserved finding no longer applies. Secondly, AY's best interests are no longer a primary consideration in the sense mandated by section 55 of the Borders, Citizenship and Immigration Act 2009.

61. It follows that the Appellant can no longer rely on the satisfaction of Exception 2 as constituting, of itself, a relevant consideration in the very compelling circumstances assessment.

62. We have concluded that AY's current circumstances are best left for consideration when we address the Appellant's family life, that being the sixth and final factor relied on in support of very compelling circumstances.

2: Delay

63. The issue of delay has featured prominently throughout the proceedings in the FTT and now in the Upper Tribunal. Indeed, it is fair to describe the claimed delay as constituting the cornerstone of the Appellant's case before us.

64. On a wider perspective, we remind ourselves that delay and "an evident tension in the authorities" was seen by Nugee LJ as raising an important point of principle when he granted permission to appeal against the decision of the previous panel in these proceedings.

65. The authoritative judicial consideration of the relevance of delay in Article 8 cases is contained in EB (Kosovo) v SSHD [2008] UKHL 41; [2008] Imm AR 713. The well-known passages are set out at [13]-[16] of Lord Bingham's Opinion:

> "**Delay**
>
> 13. In Strbac v Secretary of State for the Home Department [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held Shala v Secretary of State for the Home Department [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I

consider that Shala was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.

14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boultif v Switzerland (2001) 33 EHRR 50, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an

understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone), heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25:

> "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"”

66. It is beyond argument that delay on the Respondent’s part is capable of being relevant to the proportionality exercise, either by way of enhancing and individual’s Article 8 rights, or in reducing the weight otherwise accorded to the public interest (taking care not to inadvertently double-count the relevance of the effect of any delay).

67. The statement of principle set out in EB (Kosovo) was in the context of a case unconcerned with deportation. The public interest in play there was the need to maintain effective immigration control.

68. What then of the situation where the individual relying on the claimed delay is a foreign criminal and the public interest concerns not simply the maintenance of effective immigration control, but also the need to protect the public and the relevant facets thereof?

69. As far as we are aware, the Court of Appeal did not have reason to specifically address this issue until MN-T (Colombia), a judgment handed down on 17 June 2016. Mrs MN-T arrived in the United Kingdom from Colombia at the age of nine, accompanied by family members. As a young adult she became involved in criminality and was eventually convicted of possession with intent to supply a kilogram of cocaine for which she received a sentence of 8 years' imprisonment. Following her release in 2003, the Secretary of State took no action until July 2008, when a decision to deport was issued. A subsequent appeal was dismissed the following year, but the Secretary of State again failed to act. Some three years later, Mrs MN-T applied for leave to remain on Article 8 grounds. That application was refused and an appeal to the FTT allowed in part on the basis of unexplained delay on the Secretary of State's part, and with reference to EB (Kosovo). That decision was then set aside by the Upper Tribunal, who then went on to re-make decision by allowing Mrs MN-T's appeal. With reference to section 117C(6) of the 2002 Act and EB (Kosovo), the Upper Tribunal concluded that there had been "inordinate" and "inexcusable" delays and that this factor, combined with others, demonstrated the existence of very compelling circumstances. Mrs MN-T's appeal was accordingly allowed: [20]-[21].

70. The Secretary of State put forward a number of grounds of appeal, the only one bearing relevance to the present case being the contention that the Upper Tribunal had misdirected itself in law when considering the question of delay: [24]. In his judgment, Jackson LJ (with whom Sales LJ, as he then was, agreed) observed that

this aspect of the Secretary of State's challenge took the Court into "new territory": [38]. Having considered the passages in EB (Kosovo) quoted previously, he rejected the submission that the Upper Tribunal had impermissibly double-counted the impact of delay. Rather, the Upper Tribunal had permissibly found that the lengthy delay operated in the first two of the three respects identified by Lord Bingham: Mrs MN-T's ties to the United Kingdom had strengthened over time and the sense of impermanence had faded: [40]. Jackson LJ then added the following important observations at [41]-[42]:

> "41. I should perhaps add this in relation to delay. As a matter of policy now enshrined in statute, the deportation of foreign criminals is in the public interest. The reasons why this is so are obvious. They include three important reasons: 1. Once deported the criminal will cease offending in the United Kingdom. 2. The existence of the policy to deport foreign criminals deters other foreigners in the United Kingdom from offending. 3. The deportation of such persons expresses society's revulsion at their conduct.
>
> 42. If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses less of a risk or threat to the public. As to (2), the deterrent effect of the policy is weakened if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it hardly expresses society's revulsion at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport."

71. The judgment in MN-T (Colombia) was subsequently discussed in SU (Pakistan) [2017] EWCA Civ 1069; [2017] 4 WLR 175. That case concerned an individual who, following a 42-month sentence of imprisonment for fraud offences, had been deported, but had re-entered United Kingdom in 2000 in breach of the deportation order. In 2003 he sought leave to remain on Article 8 grounds, relying on a relationship established after his unlawful re-entry. The Secretary of State had delayed making a decision on that application until early 2014. The application was refused and Mr SU appealed. The FTT allowed his appeal, placing significant

reliance on the Secretary of State's delay of approximately 10 years. The Upper Tribunal dismissed the onward appeal. Richards LJ (with whom Sir Geoffrey Vos, C, and Asplin LJ agreed), concluded that the FTT had erred in failing to follow the principles set out in EB (Kosovo) and failing to carry out the appropriate balancing exercise, which should have taken account of the fact that Mr SU had re-entered United Kingdom in breach of a deportation order: [53]-[58]. Richards LJ emphasised the contrasting facts in MN-T (Colombia) and deemed the observations of Jackson LJ at [41]-[42] of that case to be "well made", albeit that they did not form part of the reasoning of his judgment. It was important in all cases for a decision-making tribunal to apply relevant provisions and legal principles: [60]-[61].

72. We turn to the decision of a Presidential panel (comprising McCloskey J and Deputy Upper Tribunal Judge Mandalia, as he then was) in RLP, the judicial headnote of which reads as follows:

> "(i) The decision of the Upper Tribunal in BAH (EO – Turkey – Liability to Deport) [2012] UKUT 00196 (IAC) belongs to the legal framework prevailing at the time when it was made: it has long been overtaken by the significant statutory and policy developments and reforms effected by the Immigration Act 2014 and the corresponding amendments of the Immigration Rules, coupled with YM (Uganda) [2014] EWCA Civ 1292 at [36] - [39].
>
> (ii) In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR."

73. Mr RLP had been convicted of grievous bodily harm in 2001, for which he was sentenced to four years' imprisonment. An appeal to the predecessor of the FTT had been dismissed in September 2003. There followed seven years of "unexplained inertia" before the Secretary of State received a further claim by Mr RLP in late 2010. That claim took until September 2012 to be refused. The subsequent appellate history of the case was described by the former President as

"indefensibly lengthy", ultimately spanning almost four years from promulgation of the original FTT decision until the resumed hearing before the Upper Tribunal in March 2017, which itself followed an error of law decision in May 2015: [1]-[7].

74. In re-making the decision in Mr RLP's case, the Upper Tribunal directed itself to Part 5A of the 2002 Act and paragraphs 398-399A of the Immigration Rules. By virtue of the 4-year sentence, Mr RLP had to demonstrate the existence of very compelling circumstances. On his behalf, it was submitted that the "extreme delay" on the part of the Secretary of State was sufficient to meet the very high threshold. The Upper Tribunal disagreed, concluding as follows at [23]:

> "23. We reject this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant's case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise. We conclude that the Appellant's case fails to surpass the threshold by some distance."

75. That analysis and conclusion must be seen for what it was, namely a fact-sensitive assessment of the particular circumstances in that case which the Upper Tribunal were engaged with at the re-making stage of proceedings.

76. Mr Youssefian submitted that RLP was decided *per incuriam* MN-T (Colombia) and that it should no longer be followed. He took no issue with the specific analysis and conclusions set out at [23] of the Upper Tribunal's decision, but contended that (ii) of the judicial headnote was problematic in that it provided a strong and unjustified steer to tribunals with the effect that even very significant delay would not materially assist an individual in deportation cases based on Article 8. Further, he submitted that at least part of Jackson LJ's conclusions on delay had constituted an element of the *ratio* in MN-T (Colombia).

77. Mr Manknell's position on RLP was, to an extent, ambivalent. He submitted that it added nothing to what was said in MN-T (Colombia) because [23] of RLP was consistent with an application of the correct principles to the facts of that case. However, if there was any tension between the two, he urged us to apply Jackson LJ's approach. He remained neutral as to whether (ii) of the judicial headnote in RLP should no longer be followed.

78. In our judgment, there are four considerations of particular relevance to the question at hand.

79. Firstly, it is clear that the Upper Tribunal in RLP was not referred to MN-T (Colombia) (it may be that this was because of the incorrect neutral citation attributed to the judgment and the consequential difficulty for legal practitioners to locate it). We note also that no reference is made in RLP to the underlying principles set out in EB (Kosovo).

80. Secondly, we have sought to resolve the question of whether any aspect of Jackson LJ's judgment formed part of the *ratio* of MN-T (Colombia). Mr Youssefian submitted that it did and Mr Manknell concurred. However, agreement between the parties is not decisive. We are grateful to Counsel for referring us to the case of London Jewellers Ltd. v Attenborough [1934] 2 KB 206, at 222, where Greer LJ confirmed that when considering a decided case, all reasons provided for the *ratio* must be taken into account: it was wrong to pick and choose between them. A

similar point was made by the House of Lords in Jacobs v London County Council [1950] AC 361, at 369.

81. In MN-T (Colombia), the Upper Tribunal had specifically relied on delay in a deportation context when allowing the appeal. The Secretary of State had challenged that aspect of the decision, amongst others, and the Court was obliged to address the ground of appeal. This it did at [38]-[40], describing the issue as "new territory" and going on at [40] to explain why no error had been committed. In our judgment, the resolution of the delay issue at [40] constituted an element of the *ratio*. What was said at [41] and [42] was not strictly necessary to support the conclusion stated at [40] and is properly described as *obiter*, as it was in SU (Pakistan). It follows that RLP was decided *per incuriam* MN-T (Colombia) in terms of the latter's *ratio*. In any event, it was decided in ignorance of what were, on any view, important *obiter* comments from the Court of Appeal on the issue at hand.

82. Thirdly, we acknowledge that what is said at [23] of RLP is unobjectionable. As both parties have rightly acknowledged, the passage simply represents the fact-sensitive exercise required in a re-making decision in which proportionality (in the guise of very compelling circumstances) is in play. The particular conclusion reached was undoubtedly open to the Upper Tribunal. The real difficulty lies in the apparent disjunct between [23] and (ii) of the judicial headnote. The former does not, and in our view cannot, provide the basis for a general benchmark or threshold which an individual relying on delay has to meet in order to succeed (in the great majority of cases, in combination with other factors). The content of (ii) of the judicial headnote does not appear anywhere in the body of the decision and, in our judgment, there is a real danger that it effectively transforms a conclusion on the facts of the case into a general proposition that even (unquantified) "egregious and unjustified" delay on the Secretary of State's part is unlikely to be sufficient to tip the scales in an individual's favour, whether seen in isolation or in combination with other factors. That is inconsistent with the general principle that the balancing exercise in any given case should be fact-sensitive and inconsistent with the unvarnished observations in MN-T (Colombia) as to the relevance of delay. It

is also seemingly in tension with the outcomes of the appeals in RLP and MN-T (Colombia) themselves. On the one hand, the "egregious and unjustified" delay of approximately 9 years in Mr RLP's case was deemed to be "measurably short of the mark", whilst on the other hand it had been open to the Upper Tribunal in Mrs MN-T's case to conclude that a lesser delay (all-told, approximately 8 years) constituted, in combination with other factors which flowed from the delay, a very compelling circumstance. Thus, it can be seen that purported benchmarking, intentional or otherwise, is an approach to be pursued with very real caution.

83. Fourthly, and flowing directly from the preceding point, we respectfully conclude that (ii) of the judicial headnote in RLP is apt to mislead tribunals into approaching the issue of delay in deportation cases on the basis that any delay, however significant, will *always* be unlikely to tip the balance in an individual's favour. That is not the true legal position. Cases are highly fact-sensitive and an assessment of the significance of any delay will fall to be considered with reference to the evidence, the relevant authorities, and the statutory framework contained in Part 5A of the 2002 Act.

84. In light of the considerations set out above, we have concluded that (ii) of the judicial headnote of RLP does not properly reflect the true legal position in respect of delay in the context of deportation, and that it should no longer be followed. The correct approach is to be found in MN-T (Colombia) in combination with EB (Kosovo). That answers the question posed in paragraph 2 of our decision and resolves the "tension" alluded to by Nugee LJ in his grant of permission at an earlier stage in these proceedings.

85. Having addressed the authorities, we turn to the question of whether the burden of establishing delay rests with the person seeking to rely on it. The question arises because Mr Youssefian submitted that it was the Respondent who bore the burden of proving that the appellant was *not* removable to Turkey during at least one period of the claimed delay. In other words, it was for the Respondent to demonstrate that she had not caused any claimed delay.

86. We conclude that the burden of establishing any delay relied on rests with the party making the assertion. This is so for the following reasons.

87. Firstly, it is one of "the most basic rules of litigation that he who asserts must prove": Sadovska v SSHD [2017] UKSC 54; [2017] Imm AR 1473, at [28]. There is no reason in principle why the factual circumstances pertaining to any delay asserted by a party to exist should be treated any differently from other matters commonly arising in Article 8 cases, whether in a deportation context or otherwise.

88. Secondly, we have not been referred to any authorities in support of the contention that it is in general for the Respondent to prove the absence of claimed delay. The cases to which we have already referred proceeded on the basis that the tribunal below had accepted the fact of the delay as claimed by the individuals concerned.

89. Thirdly, locating the burden on the person relying on delay does not cause unfairness or insuperable evidential difficulties. If an asserted period of delay is not met with any reasonable explanation from the Respondent, it may be that a tribunal will be more inclined to accept the fact of the delay. Conversely, if the Respondent positively asserted that a delay had in fact been caused by a person's own conduct (for example, by absconding or using aliases in order to avoid enforcement action), it would be for her to make good that particular assertion.

90. Fourthly, and by way of analogy, we remind ourselves of the settled approach to cessation of refugee status under Article 1C(5) of the Refugee Convention. The burden of showing that the circumstances in connection with which an individual had been recognised as a refugee have ceased to exist (in other words, all other things being equal, they were potentially removable) rests with the Respondent. That is, in essence, an example of the principle of he who asserts shall prove in the context where the consequences to the affected party are likely to be significant. It would be very odd indeed if, having concluded for herself that an individual was not removable because of a risk on return (in the present case, based on Article 3),

the Respondent was then obliged to show that that assessment was in fact wrong for the purposes of a period of delay relied on by the individual concerned. That would be particularly so where, as in the present case, the individual had asserted throughout that he *was* at risk on return (we shall return to this point later in our decision).

91. We now turn to the issue of analysing claimed delay. It is important for tribunals to appropriately interrogate any claimed delay in deportation cases. In the first instance, the individual will need to identify to the tribunal, and establish by evidence, the basic timeframe in question: in other words, the beginning and end of the period(s) relied on. In some cases the general timeframe will be uncontroversial, in others it will be in dispute.

92. It is one thing, however, for an individual to demonstrate that there was, as a simple matter of fact, a prolonged period of time between one event and another. It is something else to establish that this constitutes an operative delay in the sense that it is capable of having a material effect in the assessment of very compelling circumstances. Given that the consequences of any delay will be relied on by an individual to either enhance their private and/or family life or to diminish the weight accorded to the three facets of the public interest discussed by Jackson LJ at [41]-[42] of MN-T (Colombia), in our judgment responsibility for the delay must be attributable to the Respondent for it to have a potentially material impact on - to be operative on - the proportionality exercise under section 117C(6) of the 2002 Act. It is, after all, the Respondent who stands as the guardian of the public interest and its diminution should be causally linked to her conduct. That this is so is at least implicit in the authorities to which we have referred. The delay in MN-T (Colombia) had been described by the Upper Tribunal as "inordinate" and "inexcusable", culpatory terms with which the Court did not demur. We are unaware of any case in which delay unattributable to the Respondent has been held to assist an Article 8 claim.

93. Both Mr Youssefian and Mr Manknell accepted (the latter in more tentative terms) that an individual's knowledge of any delay by the Respondent can be relevant. We agree that this is so, although we reiterate the fact-sensitive nature of such a consideration. Where, for example, the Respondent takes no steps to affect deportation (and there are no barriers to such a course of action), the individual concerned and/or their family members may gain a real sense that their position had become less precarious over time. This is reflective of Lord Bingham's observation at paragraph 15 of EB (Kosovo) as to "an understanding of how, in some cases, minds may work and [delay] may affect the proportionality of removal."

94. Having said that, where delay is said to diminish the weight attributable to the public interest, a subjective element will not be relevant because the focus is on objective considerations rather than the belief of the individual or relevant family members.

95. What is important in all cases is for the decision-making tribunal to avoid the risk of double-counting by clearly identifying on which side of the scales any delay is operative: an enhancement of the individual's private and/or family life; or a reduction of the public interest.

96. A final matter which was the subject of submissions by the parties was whether, in the context of deportation, delay could, in and of itself, constitute a very compelling circumstance permitting of success under section 117C(6) of the 2002 Act. Mr Youssefian contended that it could, although this was tempered by an acknowledgement that such an outcome would be "extremely rare". He recognised that in the normal run of cases, delay would be one factor amongst others. For his part, Mr Manknell did not go so far as to accept that delay alone could meet the very high threshold.

97. Given what we have said on several occasions within this decision about the fact-sensitive nature of the proportionality exercise in deportation cases, we do not intend to provide a prescriptive conclusion on this issue. The weight attributable

to any delay is a matter for the decision-making tribunal, subject to an appropriate interrogation of the delay, clear findings of fact, the avoidance of any double-counting, and the provision of adequate reasons. By way of observation and perhaps simply reflecting common experience in the tribunals, it is somewhat difficult to conceive cases in which no factor other than delay would be in play.

98. That observation sits consistently with two points arising from MN-T (Colombia). When addressing the issue of rehabilitation in the appeal before the Court, Jackson LJ stated at [35] that the "lengthy delay" made a "critical" difference and "is an exceptional circumstance." In context, it is clear to us that the "is" simply reflected the Court's conclusion that the Upper Tribunal had been entitled to find that the delay, *when combined with* the rehabilitation (and other matters relating to Mrs MN-T's private and family life) demonstrated very compelling circumstances. The second point arises from Jackson LJ's *obiter* comment at [42] in relation to the deterrent element of the public interest: "indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all." Again, reading this part of the judgment in context, the presence of "other factors" when considering delay was not being restricted to a consideration of deterrence; we have seen from [35] that an "in conjunction with" approach was taken to the issue of rehabilitation as well.

99. Having set out what we regard as the relevant principles in relation to delay in the context of deportation, we move on to conduct the highly fact-specific assessment in the present case. In so doing, it is important to interrogate the details of the period(s) claimed by the Appellant to constitute what we have described as any operative delay attributable to the Respondent and thus potentially relevant to the diminution of the public interest.

100. The Appellant's overarching submission was that the delay in this case had been "profound and egregious" and, when combined with other factors, was sufficient to demonstrate very compelling circumstances.

101. During the course of argument, we pressed Mr Youssefian to identify the particular periods of claimed delay on which the Appellant relied. He provided two:

    (a) From the Appellant's release from immigration detention on 13 October 2003 (the custodial sentence had been completed on 7 October) until the decision to make a deportation order under section 5(1) of the Immigration Act 1971 and the notice of intention to cease refugee status ("the notice of intention"), both dated 14 November 2016 (Mr Youssefian had originally asserted that the delay ran until the decision to revoke the Appellant's refugee status, dated 21 September 2017, or the decision to refuse his human rights claim, dated 1 December 2017. He realistically stepped back from the position after reflecting on the decisions of 14 November 2016);

    (b) Alternatively, the period from the Appellant's release in 2003 until the Respondent's decision of 1 November 2007 (that the Appellant's removal to Turkey would violate Article 3 and it was therefore appropriate to grant discretionary leave) and then again from the earlier notice of intention, dated 20 April 2011, until the decision to make a deportation order and the notice of intention in November 2016.

102. In addressing the claimed delay, we will analyse the entire period from the Appellant's release from prison until the decision to make a deportation order in November 2016. Following this, we will state our conclusions as to what, if any, period was operative in the sense that it has a material bearing on the public interest.

103. At the point at which the Appellant was released from detention in October 2003 he remained a refugee. This fact appears to have escaped the Respondent's notice when she issued the decision of 10 September 2003, which concluded that he should be deported. The omission was pointed out to her in correspondence from the Appellant's then solicitors. We understand that an appeal against the decision was also lodged. The decision was withdrawn on 30 April 2007, accompanied by a

notice of liability to deportation and a notice informing the Appellant that section 72 of the 2002 Act applied.

104. Pausing there, the following points emerge. It was quite clear that the Respondent intended to pursue deportation action against the Appellant from the outset. This required a particular course of action in light of the Appellant's refugee status. The Respondent overlooked that status between September 2003 and April 2007. This period did involve a delay on the Respondent's part. Whilst it would have been reasonable to permit a certain amount of time for the error to have been appreciated, this did not justify the almost 3½ years that it in fact took.

105. A new decision to make a deportation order was issued on 10 May 2007. This too was flawed: it recorded the Appellant as being a "citizen" of the Turkish Republic of Northern Cyprus and also failed to recognise the fact of the Appellant's refugee status. In contrast to the previous erroneous decision, this one was withdrawn swiftly and a fresh decision made on 16 May 2007. The Appellant lodged an appeal. A month later, the fresh decision was itself withdrawn on 27 June 2007, presumably because it also failed to address the refugee status issue.

106. The decision-making described in the preceding paragraph does not reflect well on the Respondent. Having said that, the Appellant could not have been in any doubt that there was an intention to pursue deportation against him (even though the route to that aim had not yet been properly addressed). In addition, the period of delay was minimal, consisting of only just over a month between May and June 2007.

107. As we understood his submission, Mr Youssefian contended that for some or all of the period 2003 to 2007, the Appellant had been removable and the Respondent had been wrong to believe otherwise. Thus, it was submitted, the Respondent could and should have taken enforcement action to actually deport the Appellant and the failure to do so constituted an operative delay.

108. That submission cannot be right. The Appellant remained a refugee when he was released from detention. In order to comply with her obligations under the Refugee Convention, the Respondent was bound to have followed appropriate steps before attempting to deport the Appellant. The fact that her initial decision-making was defective did not alter that position. It is perverse to suggest (if that indeed was what Mr Youssefian was doing) that the Respondent could simply have ignored her obligations. Indeed, we note that the correspondence from the Appellant's previous solicitors in September 2003 expressly raised non-compliance with Article 33(2) of the Refugee Convention as an objection to the Respondent's (defective) decision to make a deportation order.

109. As regards Article 3, Mr Youssefian was unable to identify any sound evidential basis on which it could properly be said that the Appellant was removable between 2003 and 2007 (if one were to put to one side the Refugee Convention obligations). The situation regarding the risks on return to Kurds who had been politically active, even at a relatively low level, was well-known and had been recognised in country guidance cases such as IK (Returnees – Records – IFA) Turkey CG [2004] UKIAT 00312. There had never at that time been any suggestion from the Appellant's side that he was no longer at risk on return. In fact, correspondence from previous solicitors in 2011 clearly shows that the Appellant asserted the existence of a continuing risk on return, a state of affairs which we infer applied throughout the period 2003 to 2007. Nor does any reliance on the Appellant's 2010 asylum interview assist his case. There is no basis on which the answers provided therein could demonstrate that the Appellant was removable during the period in question.

110. Alternatively, even if a burden rested with the Respondent to demonstrate that the Appellant had not been removable, we are satisfied, based on the evidence then available and the country guidance decisions, that this has been discharged.

111. All-told, we conclude that between October 2003 and April 2007, there was a delay by the Respondent in so far as her decision-making was concerned: the process of

seeking to revoke the Appellant's refugee status could have been put in train sooner. However, we also find that the Appellant was non-removable during the entirety of that period because he was a refugee and at risk of Article 3 ill-treatment if removed to Turkey. Thus, on an objective level, the delay was not operative. On a subjective level, the Appellant knew he had refugee status, had asserted that he continued to be at risk, and could not reasonably have believed that the Respondent was simply acquiescing in his residence.

112. The next relevant act is said to be the Respondent's decision of 24 October 2007 not to pursue deportation action against the Appellant, followed swiftly by the decision of 1 November 2007 to grant the Appellant 6 months' discretionary leave on the basis that his removal to Turkey would violate Article 3. That second decision is important. The decision not to pursue deportation at that time was not made in a vacuum; it was clearly predicated on the basis of an Article 3 risk. In other words, the Appellant was deemed to be non-removable pursuant to an absolute right. It is not, in our view, open to the Appellant to suggest that the Respondent's decision not to pursue deportation action at that time constituted any form of assurance that such action would not be taken up again if/when removal did become feasible. In addition, there was no material delay between the withdrawal of the 16 May 2007 decision and the decision to grant discretionary leave in November of that year.

113. Following the initial grant of 6 months' discretionary leave in November 2007, the Appellant was granted extensions for the same period over the course of time, ending, as we understand it, in April 2011. On 19 April 2011 a notice of intention was sent to the Appellant, with his then solicitors receiving similar notice shortly thereafter. This notice was brief and in essence gave the Appellant the opportunity to provide representations by May of that year. It then appears as though the Appellant changed legal representatives, with his current solicitors taking over conduct of the case in November 2011. There then followed the grants of leave arising out of the ECAA applications (these are dealt with separately later on in

our decision). On 19 October 2013, the Respondent issued the second notice of intention and concluded that there was no longer any Article 3 risk.

114. Mr Youssefian relied on the period 2007 to 2013 as constituting an operative delay. This reliance was predicated once again on the assertion that the Appellant was removable, but that the Respondent failed to take enforcement action.

115. In our judgment, there are insuperable difficulties in the Appellant's path.

116. Firstly, any delays by the Respondent in the decision-making process did not render the Appellant removable from the United Kingdom: he was still a refugee. In addition, on the same basis as set out in paragraphs 109-111, above, we are satisfied that the Respondent was entitled to have concluded that there remained an Article 3 risk during the period which we are now concerned.

117. Secondly, we acknowledge the period of time which elapsed between the defective decisions of 2007 and the issuing of the notice of intention in April 2011. On closer inspection, that timeframe cannot be entirely put down to unexplained inaction on the Respondent's part. We are satisfied that the change in legal representation in November 2011 led to a slight delay in the matter being progressed: an independent social worker's report had been commissioned and this appears to have been completed in January 2012 and then provided to the Respondent in mid-February 2012 (in respect of which an extension of time had been sought and granted). We see that the current solicitors then chased the Respondent for a decision in letters dated 13 March 2012, 21 November 2012, and 17 October 2013. The chronology of events demonstrates that there was a delay in the decision-making process between the receipt of the independent social worker's report in February 2012 and the detailed notice of intention issued on 19 October 2013, but that was not in any way a significant period. Overall, there was no operative delay by the Respondent. In any event, throughout the entire period, the Appellant remained a refugee and was non-removable.

118. Thirdly, the Appellant had had an asylum interview in November 2010 in which he relied not only on his past activities in Turkey as a risk factor, but also a perceived threat from the drugs gang with whom he had been involved as part of the conspiracy which led to his conviction (the latter claim being relied on subsequently by his current solicitors in a letter of 28 November 2016). It strikes us as inconsistent to assert now that the Appellant was removable when the Appellant himself had at the time said quite the opposite.

119. Fourthly, the considerations discussed above are relevant to any assessment of the subjective view which might have been held by the Appellant during this period. We have no reason to doubt that he held a fear of being removed to Turkey. We also find that he was legally represented throughout and that he would have been aware (in essence, if not in detail) of the steps required to have been taken by the Respondent to revoke his refugee status and assert that he would not be at Article 3 risk, and also that the Respondent was intent on affecting deportation when she was legally able to do so. Thus, it is highly likely that his knowledge of the situation would not have led him to believe that he would, as it were, be "left alone" to continue his life in the United Kingdom unhindered by possible future enforcement action.

120. Fifthly, it is right that the Respondent's notice of intention of 19 October 2013 did in part rely on country information dating back to 2010-2012 when concluding that the Appellant would not be at risk of persecution or Article 3 ill-treatment if deported to Turkey. That takes the Appellant's case no further. It is commonplace for decisions to rely on country information which pre-dates them by a period of time. On inspection of the 19 October 2013 decision, we see reports ranging from May 2010 through to an Operational Guidance Note from May 2013. The evidence was from a range of sources, was not of particular vintage, and supported a rational view that the Appellant would no longer have been at risk. In light of this it cannot sensibly be said that the Respondent could and should have found that the Appellant was removable (whether in respect of the Refugee Convention or Article 3) at a materially earlier point in time.

121. We turn to the period from October 2013 until the decision to make a deportation order and the notice of intention, both dated 14 November 2016. We recognise that there were two notices of intention during this time; the first dated 19 October 2013 and the second dated 14 November 2016. No specific submissions were made on this point, but in any event we conclude that there was a reasonable explanation for what might otherwise have appeared to be an unnecessary duplication, which in turn might have gone to disclose a an operative delay. We are satisfied that the November 2016 notice of intention was materially updated from that which had been issued in October 2013. The updated status of this was expressly stated in the deportation decision of November 2016. There was in our view a rational basis for the updated notice of intention: following the October 2013 notice of intention, the Appellant won his appeal in the FTT against the refusal of his second ECAA application and this had resulted in a further grant of leave in that category. It was reasonable in all the circumstances for the Respondent to have issued a new notice of intention in order to consider current country information and other relevant matters.

122. Although the Respondent took the view that there was no Article 3 barrier to return in October 2013, the Appellant nonetheless remained a refugee and was non-removable until the cessation process had been completed (including any appeal related thereto).

123. We note that in response to the intention notice of 14 November 2016, the Appellant's solicitors had provided further representations that same month, followed by more in January 2017. These continued to maintain the claim that the Appellant would be at risk on return to Turkey. Thus, there was no break in the Appellant's assertion that he continued to be at risk and, in consequence, non-removable.

124. On a subjective level, it is highly unlikely that the Appellant believed that the Respondent had changed her stance from that pursued in the period 2007 to 2013,

as discussed earlier. He knew, or certainly should have known, that although matters were protracted, the Respondent remained committed to deporting him.

125. For the sake of completeness, we find that there was no operative delay between the notice of intention dated 14 November 2016 and the cessation decision itself, dated 21 September 2017. As mentioned earlier in our decision, Mr Youssefian did not place reliance on this period.

126. We now draw all of the threads relating to delay together. The overall period between the Appellant's release from detention in October 2003 and the deportation order decision and notice of intention, both dated 14 November 2016, is substantial. However, following the analysis required in cases such as the present, it is clear that the period cannot properly be described as one of "egregious" delay on the Respondent's part. In fact, although we had initially taken the view in our error of law decision that a lengthy delay attributable to the Respondent had occurred, the interrogation of the evidence paints a significantly different picture.

127. For the reasons set out in paragraphs 103-111, above, we conclude that the delay of approximately 3½ years between October 2003 and the first grant of discretionary leave on 1 November 2007 carries some weight.

128. For the reasons set out in paragraphs 114-120, above, we conclude that there was no operative delay between the initial grant of discretionary leave on 1 November 2007 and the notice of intention of 19 October 2013.

129. In respect of the period from the notice of intention, dated 19 October 2013, to the deportation decision and updated notice of intention, both dated 14 November 2016, we conclude that there was no operative delay, for the reasons set out in paragraphs 121-124, above.

130. The period from the two decisions mentioned in the preceding paragraph to the refusals of the Appellant's protection and human rights claims in 2017 plays no

material part in our assessment on the basis of Mr Youssefian's revised position adopted at the hearing.

131. For the sake of completeness, the period from the refusal of the Appellant's protection and human rights claims on 1 December 2017 to date has been a result of the protracted appellate proceedings and cannot in any way be attributable to the Respondent.

132. Ultimately, the delay factor does not in our judgment represent a consideration bearing the significance contended for by the Appellant. Put shortly, the reality is that for the great majority of the time in question, the Appellant was not removable and the Respondent was complying with her international obligations by not proceeding with enforcement action. When the Appellant became removable, relevant steps were taken to enforce deportation.

133. In saying this, we have not lost sight of the fact that the overall period in question was lengthy and that is relevant in general terms to our assessment of the Appellant's family and private life ties in this country. However, that assessment cannot, in light of our conclusions, be augmented to any significant extent by operative delay.

3: Rehabilitation

134. Rehabilitation is a relevant consideration in the assessment of very compelling circumstances.

135. The authoritative statement on this issue is found in the judgment of Lord Hamblen, JSC, in HA (Iraq). Its essence is contained at [53], [54], and [58]:

> "53. Whilst it was common ground that rehabilitation is a relevant factor in the proportionality assessment there was some disagreement between the parties as to the reason for that and the weight that it is capable of bearing in the context of the very compelling circumstances test.

54. That it is a relevant factor is borne out by the Strasbourg jurisprudence. The time elapsed since the offence was committed and the applicant's conduct during that period is one of the factors listed in *Unuane*, drawing on the ECtHR's earlier decision in *Boultif*. This is also supported by domestic authority - see, for example, *Hesham Ali* (per Lord Reed at para 38); *NA (Pakistan)* at para 112 and, more generally, *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596.

…

58. Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case. I do not, however, consider that there is any great difference between what was stated in *Binbuga* and by the Court of Appeal in this case. In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending. Subject to that clarification, I would agree with Underhill LJ's summary of the position at para 141 of his judgment:

> "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."

136. As to the facts, it is common ground that the Appellant has not re-offended (or indeed been engaged in any other form of misconduct) since his release from prison in 2003. As highlighted in Mr Youssefian's submissions, this lengthy period included at least one element where it might have appeared to the Appellant that he was not being directly threatened with deportation following the grant of leave under the ECAA. We accept that the Appellant undertook certain programmes whilst in prison. It is also the case that the Appellant established his business and has generated legitimate income for himself and his family.

137. On the basis of the foregoing, Mr Youssefian submitted that the Appellant's rehabilitation has changed from being "negative" into "positive", is "solid and strong", and should carry "considerable" weight. Against this, Mr Manknell submitted that the absence of re-offending should carry little or no material weight and cannot properly be described as "positive" in the sense contemplated by HA (Iraq).

138. We find that the programmes undertaken in prison, whilst not wholly irrelevant, do not go to establish meaningful "positive" rehabilitation. Whether they were compulsory or voluntary, they took place in the context of incarceration and had no element of engagement with the wider community through, for example, organisations concerned with reducing offending amongst young people. In saying this, we bear in mind the final sentence of Underhill LJ's summary, quoted with approval in the passage from HA (Iraq) set out above.

139. The Appellant has reformed his life since being released from prison. He has raised a family and established himself in business. The period of non-offending is

plainly lengthy and we conclude that the risk of the Appellant committing further offences it is, at most, low.

140. It remains the case, however that the mainstay of the Appellant's argument is the absence of re-offending. Although not of the short duration contemplated by Underhill LJ in the passage cited with approval by Lord Hamblen in HA (Iraq), and even coupled with the establishment of family and the business, we conclude that the rehabilitation factor does not carry the "considerable" weight contended for by Mr Youssefian. This is because the countervailing interest against which it is to be balanced consists not simply of the protection of the public, but also the other two elements: deterrence and society's legitimate concern. Thus, whilst the public protection element is materially reduced, the overall impact of rehabilitation on the balancing exercise is, in our judgment, not particularly significant. We would reach the same conclusion even if we were to have categorised the rehabilitation as in certain respects "positive" in light of the length of the non-offending period.

4: Value to the community

141. It is a fact that the Appellant continues to operate a viable business which, on the evidence before us, currently employs six individuals (the Appellant as a director and five members of staff). We accept that the Appellant's children help out at the restaurant when they can, albeit without renumeration.

142. At the time of the FTT's decision there were apparently 13 employees. The judge found it to be "credible that the viability of [the Appellant's] restaurant is dependent on his day-to-day involvement in its management and operation." That finding was not expressly preserved, nor was it set aside. For the purposes of our assessment, we proceed on the basis that the Appellant's management of the restaurant is an integral element of its operation.

143. Mr Youssefian submitted that the Appellant's deportation would result in the business folding and people losing their jobs. The value to the community

provided by the business should, he submitted, carry real weight. Mr Manknell argued that this factor has no material value in the assessment of very compelling circumstances.

144. In UE (Nigeria) v SSHD [2010] EWCA Civ 975; [2011] Imm AR 1, the Court of Appeal was concerned with whether activities beneficial to the community, and in respect of which that community would be deprived if the individual were removed, were capable of constituting a relevant consideration in the proportionality exercise. Having reviewed the authorities, at [35] and [36] Sir David Keene concluded that they could, albeit to a limited extent:

> "35. For my part, therefore, I conclude that it is open to this court to find that the loss of such public benefit is capable of being a relevant consideration when assessing the public interest side of proportionality under Article 8 and as a matter of principle I do so find. That is where this aspect comes in to the proportionality exercise. Given that conclusion, it is unnecessary for me to deal with Mr Knafler's argument about whether removal would fail to be "in accordance with the law".
>
> 36. I would, however, before concluding, emphasise that, while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in Bakhtaur Singh. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case and in particular on the extent of the interference with his private and/or family life."

145. The examples provided by Lord Bridge in Bakhtaur Singh [1986] 1 WLR 910 and referred to in UE (Nigeria) were limited to: (a) an individual carrying on business in partnership, with removal ruining that partnership; (b) an "essential and irreplaceable" worker for a successful export company; (c) a social worker on whom a community has come to depend and whose services would be difficult to

replace; and (d) an "indispensable member" of a team engaged in scientific research of public importance.

146. The third case of relevance is Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 336 (IAC); [2019] Imm AR 143. For our purposes, the essential facts were that Mr Thakrar's son had been running a substantial business, employing 40 people and with a turnover close to £1 million a year. It was argued that this consideration weighed in Mr Thakrar's favour. The Tribunal considered, amongst other cases, Bakhtaur Singh and UE (Nigeria). At [112]-[115], the former President, Lane J, concluded as follows:

> "112. Accordingly, the warnings contained in the judgments of Sir David Keene and Richards LJ are important. Before coming to the conclusion that submissions regarding the positive contribution made to the United Kingdom by an individual fall to be taken into account, as diminishing the importance to be given to immigration controls, a judge must not only be satisfied that the contribution in question directly relates to those controls. He or she must also be satisfied that the contribution is "very significant". In practice, this is likely to arise only where the matter is one over which there can be no real disagreement.
>
> 113. I am not sure that the list of examples given by Lord Bridge in Bakhtaur Singh are all of this kind. It must be remembered that those examples were given against the background of the former appellate regime which, as I have said, gave adjudicators a foothold in the policy realm that is not shared by their successors.
>
> 114. Without in any way intending to be prescriptive, it is likely that one touchstone for distinguishing between instances that lie, respectively, exclusively in the policy realm and in the area of Article 8, is whether the removal of the person concerned will lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.
>
> 115. If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely affected."

147. The challenges in the path of the Appellant's submission in the present case are readily apparent. On any view of the case-law, the facts will have to be strong in order to support a conclusion that the value to the community should carry anything more than little or no weight: the phrase "very significant" was clearly used advisedly in UE (Nigeria). If we were to take the examples given in Bakhtaur Singh as a loose guide, the Appellant has not engaged in a partnership business, the number of employees is relatively low (much fewer than in Thakrar and fewer even than was the case at the time of the FTT's decision), and, with respect, the Appellant's restaurant business cannot be said to have a significant benefit to the wider community. We note from the accountant's evidence that none of the five members of staff in fact pay tax because their earnings fall below the relevant threshold. We appreciate that if the current business ceased as a result of the Appellant's deportation, the individuals concerned may have to seek alternative employment. Having said that, we are entitled to take account of the fact that there is a high level of employment in the United Kingdom at the present time. Whilst to extent speculative, there is also in our view a distinct possibility of the business being taken over if the Appellant was unable to be physically present on a day-to-day basis.

148. There is a final, and important, factor here which was not present in the cases to which we have referred. In UE (Nigeria), Bakhtaur Singh, and Thakrar, the public interest in play was the need to maintain effective immigration control. By contrast, in the present case that interest concerns the deportation of a foreign criminal and the additional considerations which we have addressed previously.

149. In all the circumstances, we conclude that the value to the community factor holds no material weight in our assessment of very compelling circumstances.

5: The grants of leave under the ECAA

150. The fifth factor relied on by the Appellant is of some consequence. We have summarised the relevant factual background at paragraph 9.

151. There are two aspects of the Respondent's conduct relating to the ECAA which fall to be considered: firstly, the decision to approve the Appellant's application of November 2011 and grant him leave to remain; secondly, the Respondent's further grant of leave to remain by way of implementation of the FTT's 2013 decision.

152. With a particular focus on the first aspect, Mr Youssefian asserted that the grant of leave to remain is "particularly compelling" in that it occurred in the knowledge of the Appellant's offending history. The Respondent could have refused the application, but did not. The grant of leave under the ECAA was part of a "route to settlement" and indicated to the Appellant that he potentially had a long-term future in the United Kingdom. As a consequence, the public interest in deporting the Appellant has been "critically" diminished and that the Respondent's actions should be given "very considerable weight" in the Appellant's favour.

153. Mr Manknell realistically accepted that this factor did weigh in the Appellant's favour, but submitted that its value was nowhere near as significant as that suggested. The Appellant had not been removeable from the United Kingdom at the time because of the Article 3 risk, the grant of leave under the ECAA in no way extinguished the Respondent's intention to try and deport him, and Part 5A of the 2002 Act had not then been in force.

154. We begin our analysis by re-stating our conclusion that the Appellant did in fact have discretionary leave on a restricted basis at the time of the November 2011 application, and had had this for some time previously. We have also concluded when considering the issue of delay that the Appellant was not removable from the United Kingdom by virtue of the Article 3 risk in Turkey.

155. There had initially been some uncertainty as to whether the relevant Immigration Rules pertaining to the ECAA and in force as at 1 January 1973, HC 510, contained any provision which permitted the Respondent to refuse an application on the basis of character, conduct, or associations. Having been provided with a complete version of HC 510, it is clear that there was. Paragraph 4 reads as follows:

> "4. The succeeding paragraphs set out the main categories of people who may be given leave to enter and who may seek variation of their leave, and the principles to be followed in dealing with their application, or initiating any variation of their leave. In deciding these matters account is to be taken of all relevant facts; the fact that the applicant satisfies the formal requirement of these rules to stay or further stay in the proposed capacity is not conclusive in his favour. It will for example be relevant whether the person observed the time limit and condition subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain, whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country."

156. There was undoubtedly a discretion to have refused the Appellant's application based on his conviction and the nature of the offence.

157. Unfortunately, we have not been provided with a copy of the February 2012 decision letter which approved the application. It may be that the Appellant's history had been expressly considered, or it may be that the decision was silent on the point. Whichever of these was the case, we are satisfied that the Respondent was fully aware of the Appellant's offending at the time of the decision.

158. There was no obligation on the Respondent's part to have granted the application in order to prevent him being in "limbo"; the Appellant already had discretionary leave to remain and this could have continued in the same form.

159. Thus, the Respondent could have refused the application, but chose not to. On the face of it, this would appear to have three consequences, all of which weigh in the Appellant's favour. Firstly, the public interest in deterring foreign nationals from committing offences in this country could potentially be reduced because the Appellant had been permitted to stay here on a basis other than the discretionary leave resulting from him being non-removeable. Secondly, the public's concern with the ability of the authorities to deal with foreign national offenders could potentially be diminished where those authorities allowed him to establish a business in this country, thus putting down further roots. Thirdly, an initial grant

of leave to remain under HC 510 put the Appellant on what has been described as a "path to settlement", in that he could have applied for indefinite leave to remain after four years: paragraph 28 of HC 510. All other things being equal, the Appellant might have been forgiven for thinking at that point in time that perhaps the Respondent had decided to forego attempts at deporting him.

160. All other things were not, however, equal. It is plain that the consideration of the ECAA application was not akin to a decision on whether the Appellant should be deported. The approval of the application had still only given the Appellant limited leave to remain, albeit in excess of the 6 months he had had previously and bearing in mind the "route to settlement" issue already mentioned.

161. Of greater importance are the following considerations. When the Appellant made his extension application under the ECAA approximately a year after the initial grant of leave, the Respondent refused it on character grounds under paragraph 4 of HC 510. As a result, the Appellant did not labour for any significant period under any impression that the Respondent did not seek to rely on his conviction. In addition, the legislatively-enhanced public interest provisions under Part 5A of the 2002 Act were not then in force, although we recognise that there was of course a power to deport. That power was, however, subject to the absolute protection provided by Article 3 which, we have found, constituted a bar to removal at the time.

162. In respect of the 2013 FTT decision, it concluded that it would be "inconsistent and unjust" for the appeal to have been dismissed solely on grounds of character, in light of the Respondent's previous grant of leave in 2012. That would appear to be a reasonable conclusion to have reached in so far as it went.

163. Mr Manknell referred us to other passages in the 2013 decision which, in our judgment, are relevant to the questions of what the FTT was and was not purporting to decide. The inconsistency in the Respondent's approach was clearly important as regards the application of HC 510. Having said that, the FTT concluded that the Appellant was at that time still a refugee and so could not be

removed from the United Kingdom (a recurrent theme in this case). In addition, Article 8 was specifically not considered because of the invalid removal decision under section 47 of the Immigration, Asylum and Nationality Act 2006. Therefore, the FTT was plainly not addressing matters relating to deportation, nor was it in any way tying the hands of the Respondent in so far as removal in the future was concerned. It is clear to us, as it would (or should) have been to the Appellant, that the 2013 decision did not represent an indication that he was safely continuing on a "route to settlement".

164. As we understand it, the FTT's decision was not the subject of an appeal. The Respondent was obliged to implement the decision, which resulted in the further grant of limited leave to remain from 5 May 2015 to 28 February 2016. No further leave was granted under the ECAA.

165. Having considered all relevant considerations on this particular issue, we do not accept the Appellant's contention that the grants of leave under the ECAA "critically" reduces the public interest, represent a "particularly compelling "factor, or that they attract "very considerable weight". It is a consideration to which only relatively significant weight is attributable, but no more than that.

6: Family life

166. Our consideration of the Appellant's accepted family life with his wife and children involves assessing not only the impact of separation on him, but also on the other family members: Beoku-Betts v SSHD [2008] UKHL 39; [2008] Imm AR 688.

167. We have no doubt that the Appellant would be distressed by being separated from his wife and children, if they chose not to accompany him (we assume that they would not). He is part of what is clearly a close family unit. The evidence before us does not, however, establish that a separation is likely to render the family life nugatory. There is nothing to indicate that his wife and children could not, for example, visit him in Turkey. In addition, this is not a case in which the

Appellant relies on his immediate family members for essential practical and/or emotional support in respect of any medical conditions.

168. We place a reasonable amount of weight on the impact on the Appellant resulting from a separation.

169. We bear in mind the fact that a significant period during which the Appellant developed and continued family life ties in this country (including the births of the two younger children) involved the Respondent's protracted efforts to deport him. We have previously concluded that only very limited aspects of the period were attributable to delay on the Respondent's part. Notwithstanding that, we place some weight on the underlying uncertainty probably felt by the Appellant, although this itself is tempered by our findings as to his knowledge of the Respondent's intentions throughout.

170. The Appellant has been married to his wife since 1990. It is apparent that AA would be greatly upset by separation from her husband of 32 years and we take that fully into account. This must, to an extent, be balanced against the fact that she would (or at least should) have been conscious of the Respondent's desire to deport the Appellant since his release in 2003, even if that desire has not always been efficiently pursued. We also take account of the fact that AA is likely to have practical and emotional support from not only her adult children, but also the extended family residing in this country. As mentioned in the previous paragraph, AA could visit her husband in Turkey. Overall, we attach a reasonable amount of weight to AA's circumstances.

171. We turn to the Appellant's three children. As a general matter, we take full account of the fact that PA was very young when Appellant offended and the two younger children had not been born.

172. Mr Youssefian has urged us to place "near equal weight" on the impact that separation would have on AY, notwithstanding his recent obtaining of majority. Mr Manknell submits that circumstances have, to an extent, improved for AY and,

at its highest, the strength of the Appellant's case in relation to this particular point is as it was previously.

173. The evidence now before us shows that AY has transitioned from secondary to further education and is undertaking an electrical installations course at college. He continues to live in the family home. Whilst there is no expert evidence post-dating the 2018 independent social worker's report, we are satisfied that there continues to be a strong bond between AY and his father. In light of the evidence, though, we draw what we consider to be a reasonable inference that AY is now generally more mature than he was when the FTT considered his circumstances and has demonstrated an ability to meet certain challenges presented by the combination of pursuing his studies and his ADHD.

174. That is not to suggest that AY would just take the Appellant's deportation in his stride, as it were. We conclude that a separation would have a relatively significant impact on him. We accept that there is no "bright line" drawn at the age of 18 and it would be artificial to assume that the distress felt would be substantially mitigated by virtue only of attaining majority by a short margin. Having said that, it is, in our judgment, likely that AY would obtain strong support from his mother, siblings, and extended family members. It is correspondingly unlikely that he would, for example, give up his studies or suffer long-lasting emotional and/or mental health problems as result of a separation. As with his mother and siblings, AY could make visits to Turkey.

175. Overall, the impact on AY is clearly relevant and we are prepared to place near-equal weight on this consideration as compared with that which would have been attributable to the unduly harsh conclusion reached by the FTT. That conclusion did not, however, disclose particularly significant elements going to Exception 2 and the current evidence does not add anything to the equation.

176. In relation to PA and UA, there was obviously no previous conclusion on undue harshness. Neither suffer from any relevant medical or emotional difficulties. There is no doubt that they would feel real distress by being separated from their

father, but it is clear to us that the impact would be significantly less than that felt by AY. PA and UA would be able to visit their father in Turkey. The weight we attach to this consideration is a good deal less than in respect of AY, but nonetheless material to our overall assessment.

177. The Appellant's granddaughter (PA's daughter) is now aged around 11. She would undoubtedly miss regular contact with him. There is no evidence of any particular dependency by her on him. We conclude that the loving support of her parents and the wider family would ameliorate the distress caused by separation. As with the other family members, visits to Turkey could take place. We place some weight on the impact of deportation on the granddaughter.

178. Although we do not have details, the evidence indicates that there is a large extended family in United Kingdom. They would form part of a supportive network for AA and the children. They too would be upset by the Appellant's deportation, but there is no evidence to suggest that this would have any significant consequences for any particular member of that wider group. Little weight attaches to the impact on extended family members.

Other matters

179. For the sake of completeness and the avoidance of any doubt, we briefly address other matters which are relevant to our task of deciding whether very compelling circumstances exist, but do not fall within the specific factors already discussed.

180. Although we have concluded that the Appellant cannot satisfy Exception 1 under section 117C(4) of the 2002 Act, we take full account of the following related considerations which bear on his private life:

    (a) The very lengthy period of residence in the United Kingdom, amounting to 32 years. The great majority of that residence has been on a lawful basis;

(b) The Appellant's cultural and social integration in society, notwithstanding his offending and time in prison. This includes his social ties and the establishment of a business here;

(c) The time he has been away from Turkey, a period of some 35 years;

(d) The significant (but not very significant) obstacles which the Appellant is likely to face in attempting to reintegrate into Turkish society, including those arising from his time away from that country and, to a limited extent, his Kurdish ethnicity.

181. These considerations must be read in light of what we have already said at paragraphs 53-58, above.

182. The cumulative effect of the private life considerations represent a relatively weighty factor in the Appellant's favour.

183. As regards section 117B of the 2002 Act, the only considerations which need to be mentioned are the English language ability and financial independence. In respect of the former, we are prepared to accept that the Appellant speaks reasonable English. As regards the latter, it is clear that the Appellant supports himself (and in large part, his family as a whole) without recourse to public funds. Thus, these considerations are of neutral effect.

CONCLUSIONS ON VERY COMPELLING CIRCUMSTANCES

184. The assessment of whether very compelling circumstances exist is a highly fact-specific, cumulative exercise, involving an evaluative judgment within the applicable legal framework.

185. The public interest in this case is very strong indeed.

186. The Appellant has not suggested that any one of the factors weighing on his side of the balance could alone meet the very high threshold. On our assessment, that is clearly right.

187. The Appellant has not been able to satisfy either of the two Exceptions contained in section 117C(4) and section 117C(5) of the 2002 Act. Even if he had, this would only have been on a "bare case" basis. In any event, satisfaction of either Exception could not avail him by virtue of his status as a serious offender.

188. We have attributed what we consider to be appropriate weight to the various factors relied on by the Appellant to demonstrate very compelling circumstances and have considered this attribution on a cumulative basis. As discussed at length in this decision, there are undoubtedly matters which disclose strong private and family life elements and others which reduce the public interest.

189. With all of the above in mind, we have arrived at the overall conclusion that the Appellant is unable to demonstrate that there are very compelling circumstances in his case. This is so whether we approach the assessment from the perspective of a reduction of the public interest or an enhancement of the Appellant's Article 8 rights.

190. It follows from this that the Appellant's removal from the United Kingdom pursuant to the Respondent's refusal of his human rights claim would be proportionate and, in turn, lawful under section 6 of the Human Rights Act 1998.

ANONYMITY

191. During the proceedings before the FTT and until now in the Upper Tribunal, an anonymity direction has been in place. As stated in our error of law decision, we assumed that the direction was initially made by the judge below due to the protection-related issues being in play. By the time the case got to the Upper Tribunal, no such issues arose. At the error of law stage, we made an anonymity direction on the basis that the Appellant's youngest son was still a minor and had additional needs. The first of those two considerations has now fallen away.

192. Mr Youssefian urged us to maintain the direction, whilst Mr Manknell adopted a neutral position.

193. We have had regard to the important principle of open justice and the Presidential Guidance Note 2022 No.2 "Anonymity Orders and Hearings in Private", dated 4 February 2022 and amended on 28 April 2022.

194. There is a public interest in knowing the identity of foreign criminals, as there is in respect of British national offenders. In the present case, the Appellant has been convicted of a very serious offence, albeit many years ago. None of his children are now minors. There is no evidence before us to indicate that identifying the Appellant would give rise to a real likelihood of harm to his youngest son, or indeed anyone else. We have not in fact identified any of his children by name.

195. In all the circumstances, we set aside the anonymity direction. Recognising that the Appellant enjoys a right of appeal to the Court of Appeal against our decision, we impose a stay on our decision to set aside the anonymity direction, with the setting aside taking effect 10 working days after the Upper Tribunal has informed the parties of its decision on an application for permission to appeal, with liberty to the parties to request a continuation of the stay if there is an intention by the Appellant to renew an application for permission to appeal directly to the Court of Appeal on receipt of an adverse decision, if made, issued by the Upper Tribunal.

196. If the Appellant does not exercise his right of appeal within the time limit specified under rules 44(3A) and 44(3B)(a)(i) of the 2008 Procedure Rules, the setting aside of the anonymity direction will take effect 20 working days after the sending of this decision to the parties.

197. As the decision to set aside the anonymity direction is an ancillary decision made in relation to an appeal under section 82 of the 2002 Act, it is an excluded decision by reason of article 3(m) of the Appeals (Excluded Decisions) Order 2009 and therefore challengeable only by way of judicial review.

NOTICE OF DECISION

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

We re-make the decision by dismissing the appeal on Article 8 ECHR grounds.

The anonymity direction is set aside, subject to the stay identified at paragraphs 195 and 196, above.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 26 June 2023

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16484/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4 October 2022

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A A
(ANONIMITY DIRECTION MADE)

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Mr D Manknell, Counsel, instructed by the Government Legal Department
For the Respondent: Mr T Bobb, Solicitor, Aylish Alexander Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference, we shall refer to the parties as they stood before the First-tier Tribunal. Thus, the Secretary of State is once more "the Respondent" and AA is "the Appellant".

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Monson ("the judge"), promulgated on 29 November 2019 following a hearing on 20 November 2019. By that decision, the judge (i) allowed the Appellant's appeal against the Respondent's decision, dated 1 December 2017, refusing his human rights claim and (ii) dismissed the Appellant's appeal against the Respondent's decision, dated 21 September 2017 (served on 1 December 2017), to revoke his protection status. The second element of the judge's decision has not been the subject of challenge and it plays no part in our consideration of this appeal.

3. In respect of the first element, the judge concluded that the Appellant had demonstrated the existence of "very compelling circumstances" within the meaning of section 117C(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), such that the appeal fell to be allowed on Article 8 ECHR ("Article 8") grounds.

4. The question for us is whether, in so doing, the judge materially erred in law.

Relevant background

5. As may be inferred from the date of the appeal reference number, this case has a protracted procedural history. Before turning to that, we briefly summarise the Appellant's history.

6. The Appellant is a citizen of Turkey. He left that country in early 1988 and travelled to France, where he was subsequently granted refugee status. In September 1990 he arrived in United Kingdom and in 1991 he married a Turkish citizen. The couple's daughter was born in 1991. When it transpired that the Appellant had been recognised as a refugee in France, his status was transferred to this country and he was granted leave to remain from 1993 to 1997.

7. In May 1996 the Appellant was convicted of conspiracy to import almost 200kg of heroin with a street value of approximately £14 million. He was initially sentenced to 20 years' imprisonment, but this was reduced to 15 years on appeal.

8. The Appellant was released from prison on licence in September 2003. Shortly thereafter a decision to deport him was issued, against which an appeal was lodged. Later in 2003, the Appellant's first son was born. His second son was born in 2005.

9. In April 2007, the 2003 deportation decision was withdrawn on the basis that the Appellant's refugee status had not been considered. In May of that year a new deportation decision was issued and an appeal against it lodged. A month later that decision was also withdrawn because the Appellant's refugee status had not been properly addressed. In October 2007, the Appellant was informed by the Respondent that deportation would not be pursued at that time. The Respondent accepted that removal from United Kingdom would have exposed the Appellant to a risk of treatment contrary to Article 3 ECHR. The Appellant was consequently granted 6 months' leave to remain, pursuant to the Respondent's policy on discretionary leave (which included guidance on the granting of shorter periods of leave to foreign national offenders). The Appellant was then granted a further three periods of discretionary leave to remain. We understand that leave expired in April 2011.

10. Following an application made in November 2011, the Appellant was granted leave to remain as a businessman under the Turkish EC Association Agreement ("ECAA") in February 2012. Another application in the same category was made in early 2013. This was

refused by the Respondent, but an appeal to the First-tier Tribunal in 2014 was successful. The Appellant was granted a further period of leave under the ECAA from May 2015 until February 2016. Prior to the expiry of that leave, the Appellant applied for indefinite leave to remain in the United Kingdom. Whilst that application was pending, the Respondent issued the two decisions which were the subject of determination by the judge: see paragraph 2, above.

11. The current appellate proceedings can be summarised thus. The Appellant appealed to the First-tier Tribunal against the Respondent's two decisions. That appeal was dismissed on all grounds by a decision promulgated on 7 November 2018. An onward appeal to the Upper Tribunal in March 2019 resulted in the decision of the First-tier Tribunal being set aside in respect of both the protection and Article 8 issues. The appeal was remitted to the First-tier Tribunal for a complete re-hearing.

12. The appeal went before the judge with whose decision we are presently concerned. The essence of the Appellant's case rested on the delay occasioned by the Respondent in seeking to deport him, together with the lack of offending and strengthening of ties in United Kingdom during the currency of that delay. Following the judge's decision, the Respondent appealed to the Upper Tribunal in respect of the Article 8 outcome and the Appellant cross-appealed on the protection issue. By a decision promulgated on 28 April 2020, the panel (comprising Mr Justice Johnson, sitting as a Judge of the Upper Tribunal, and Upper Tribunal Judge Kopieczek) allowed the Respondent's appeal and dismissed the cross-appeal.

13. The panel's decision was then the subject of an appeal to the Court of Appeal, but only in respect of the Article 8 issue. Permission to appeal was granted by Nugee LJ on 17 November 2020 on the basis that there existed "an evident tension in the authorities" relating to the significance of delay in deportation cases which raised an important point of principle. The parties subsequently agreed that the panel had erred in its approach to the delay issue, that its decision should be set aside, and that the appeal should be remitted for the Upper Tribunal to consider whether the judge had erred in law. A detailed statement of reasons to that effect was approved by the Court and an Order giving effect to the parties' agreement was sealed on 3 March 2021.

14. By this route, the appeal came before us.

The judge's decision

15. A good deal of the judge's decision was taken up by a consideration of the protection issue, specifically whether the revocation of the Appellant's refugee status was lawful. For reasons set out at [48]-[79], the judge concluded that it was. As alluded to previously, no more need be said about this aspect of his decision.

16. The judge then moved on to consider Article 8. He correctly recognised that due to the length of the sentence, the Appellant could only succeed upon demonstration of very compelling circumstances, pursuant to section 117C(6) of the 2002 Act. The judge nonetheless correctly addressed Exceptions 1 and 2 under sections 117C(4) and 117C(5): see NA (Pakistan) [2016] EWCA Civ 662, [2017] Imm AR 1. The criteria in Exception 1 were not met because there were no very significant obstacles to the Appellant's re-integration into Turkish society: [82]-[83]. In respect of Exception 2, the judge concluded that deportation would have been

unduly harsh on the Appellant's younger son, who was a minor at the time, had ADHD, and suffered from emotional and behavioural problems: [86]-[91].

17. At [92] the judge confirmed the "very strong public interest in the Appellant's deportation in view of the gravity of the offence…" and recognised that it would be "very hard to argue" that deportation would be disproportionate. The Appellant's case was, however, said to be "unusual".

18. At [93] and [94], the judge noted the assessment of the Appellant as representing a "low risk" of reoffending, which went back to 2002, his good behaviour whilst in prison, and the absence of any offending since his release in 2003. The judge observed that the Appellant presented as being "fully reformed and rehabilitated". There followed a finding that the Appellant had been operating restaurant businesses for a considerable period of time and that he had contributed to the economy of United Kingdom to the employment of a "considerable number of staff."

19. What is said at [96]-[99] bears quoting in full:

> "96. However, of much greater materiality to the proportionality assessment are (a) the Respondent's calculated decision in 2007 not to pursue deportation action against him; and (b) the finding of the First-tier Tribunal in the Appellant's successful appeal of 2014.
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> 97. The significance of the 2007 decision is that the Respondent accepted at the time that the Appellant could not be deported without violating his human rights under Article 3 ECHR. The Respondent then let 10 years pass (during which the Appellant led a blameless life and made a positive contribution to UK society) before concluding that the Appellant could be safely deported to Turkey. Although the Respondent sought to justify the revocation of the Appellant's refugee status by reference to a change of circumstances since the Appellant left Turkey in the 1980s, the Respondent never explained what had changed since 2007 such as to justify the withdrawal of the concession made in 2007 that the Appellant continued to face a real risk of serious harm contrary to Article 3 ECHR. The position as to change of circumstances taken in the cessation better, and earlier letters on the same topic such as a notification of intention to cease refugee status letter of 19 October 2013, was a position that could also have been taken in 2007 with broadly equal force.
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> 98. The significance of the First-tier Tribunal decision promulgated on 2 December 2014 is that a panel chaired by Judge Parker held that the Respondent could not rely on the Appellant's criminal conviction to justify the refusal of further leave to remain under the Ankara Agreement on the discretionary ground that "in the light of his character, conduct or associations it is undesirable to permit him to remain". Their reasoning at [27] was as follows:
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> > "The Appellant has been convicted of a very serious offence for which he was sentenced on appeal to 15 years imprisonment. However, he was previously granted leave to remain under the Turkish European Association Agreement provisions. We agree with Mr Bobb that it is untenable to suggest that the Respondent had previously granted leave in ignorance of the Appellant serious conviction. There is no evidence that the Appellant has been in any trouble with the police since he was released from custody in March 2003, now over 11and a half years ago… We have considered the Appellant's conviction and note that it is

> relevant to the outcome of the appeal. However, we are not satisfied that this is a sufficient reason to refuse leave to remain. We have had regard to the Appellant's good character since he was released from custody and, further, find that it would be inconsistent and unjust for this appeal to be dismissed on grounds of character when the Appellant was previously granted leave on this basis by the Respondent."
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> 99. Pursuant to this ruling by the First-tier Tribunal, the Respondent granted the Appellant a further period of leave to remain under the Ankara Agreement. In the Human Rights RFRL, the Respondent invoked Rule 322(5), the material part of which is identical to the provision considered by the First-tier Tribunal in the 2014 appeal, to justify the exercise of discretion to refuse the Appellant's outstanding application for indefinite leave to remain under the Ankara Agreement. This was and is manifestly unreasonable and unfair in view of the earlier finding of the First-tier Tribunal on the same issue, a finding which is binding on the Respondent."

20. At [100], the judge made reference to what had previously been paragraph 399C of the Immigration Rules and found that the Respondent was not able to rely on that provision to justify the attempt to deport the Appellant.

21. The judge concluded at [101] by stating that there existed very compelling circumstances and that the Appellant had a "very compelling private and family life claim" such as to render deportation disproportionate. The appeal was accordingly allowed.

The grounds of appeal and grant of permission

22. The Respondent's grounds of appeal, which have not at any time been the subject of an application to amend, put forward two challenges. First, it was said that the judge had failed to give adequate reasons for his conclusions that there were very compelling circumstances in the Appellant's case. The second ground contended that the judge had failed to adequately consider the public interest.

23. Permission was granted on both grounds, without any additional matters been raised.

The hearing

24. Having read Mr Manknells's skeleton argument and in light of the grounds of appeal upon which permission was granted, we raised the question of whether the Respondent was attempting to introduce an additional ground of appeal based on perversity. Following an initial discussion, we were of the provisional view that we would have to grapple with the proper extent of the grounds.

25. However, in the event, our conclusions on whether the judge erred in law are based on the first ground of appeal as originally drafted, namely the reasons challenge. Thus, it is unnecessary to address the question of whether the grounds of appeal have by implication been, or should now be, expanded to include a perversity challenge. We would, however, emphasise the importance of clear drafting of grounds in the first instance and, if deemed appropriate, applications be made to amend grounds in advance of any hearing. In this regard, procedural rigour is important: see Talpada [2018] EWCA Civ 841, at paragraph 68.

26. Mr Manknell relied on his skeleton argument. Whilst certain aspects of the written arguments suggested a perversity challenge, it is fair to say that the real focus of his oral submissions steered clear of such an assertion (although we record here that the perversity argument set out at paragraphs 37-40 of the skeleton argument was not formally resiled from). In essence, he submitted that the judge had failed to explain by legally adequate reasons why he found the factors relied on to constitute very compelling circumstances. Such reasons as there were had not had regard to the relevant principles established by the authorities. In the absence of adequate reasons, it was impossible to tell whether the judge had applied the correct test to the assessment of the various factors relied on. It was submitted that in respect of rehabilitation, the judge had failed to explain why he was attaching considerable weight to a factor which would ordinarily be of only limited value. As regards delay, again the judge failed to provide adequate reasons as to why, in the circumstances of this case, the factor was accorded significant weight.

27. Mr Manknell submitted that if there was an error in respect of the judge's consideration of rehabilitation or delay, the decision on Article 8 could not stand.

28. Mr Bobb relied on his skeleton argument. The essence of his written and oral submissions was that the judge had been entitled to consider the factors which he did and was entitled to attribute the weight he did to those factors. None of the authorities relied on by the Respondent demonstrated that the judge had erred in law and we should not interfere with his decision.

29. The skeleton argument alluded to a number of factors which, it was said, the judge had taken into account when considering whether very compelling circumstances existed. These included the harshness of deportation on the Appellant's wife; the harshness of deportation on the Appellant's two other children; and the possibility of harassment or discrimination the Appellant would face has occurred returning to Turkey. In addition, it was said that the judge had been correct to attribute "considerable weight" to the fact that deportation would be unduly harsh on the Appellant's youngest child.

30. Mr Bobb submitted that the judge was correct to have identified this case as an unusual one. There had, on any view, been a very significant delay by the Respondent, amounting to, it was submitted, 14 years between 2003 and 2017. It was important to consider what had occurred during the period of delay, namely rehabilitation (by virtue of an absence of re-offending) and a strengthening of private and family life ties in the United Kingdom. The 2014 First-tier Tribunal decision was a relevant factor, as was the Appellant's benefit to the community by virtue of his business and employment of staff.

31. There was no reply from Mr Manknell.

32. At the conclusion of the parties' submissions we rose for a time to consider our decision. On return, we announced our decision that the judge had erred in law and that as a result his decision (insofar as it related to Article 8) should be set aside.

Discussion and conclusions

33. Before turning to our analysis of this case we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent

years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

> "19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:
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> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

34. Following from this, we bear in mind the uncontroversial propositions that the judge's decision must be read sensibly and holistically and that we are neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons. Finally, should the need arise, it may be appropriate to consider the underlying materials before the judge in order to better understand his reasoning: see, for example, English v Emery Reimbold and Strick Ltd. [2002] EWCA Civ 605; [2002] 1 WLR 2409, at paragraphs 11 and 89.

35. As mentioned at paragraph 25, above, our conclusions in this appeal are based on the Respondent's reasons challenge, not on perversity.

36. The adequacy of the judge's reasoning falls to be assessed by us not only with appropriate restraint, but also, and in our view importantly, in the context of the issues with which he was concerned. On the face of the decision (we will return later to the list of considerations set out in Mr Bobb's skeleton argument), the key factors relied on by the judge in his assessment of very compelling circumstances were (a) rehabilitation, (b) benefit to the community, (c) delay, and (d) the 2014 First-tier Tribunal decision. All of these had to be evaluated in the context of the very strong public interest in deportation. In addition, and where appropriate, they required consideration in light of principles and/or guidance derived from the authorities.

37. Perhaps unfortunately, the judge made no reference to any authorities whatsoever. We are unclear as to whether any were brought to his attention. Whilst a failure to make such reference will not, in and of itself, usually amount to an error of law, it may carry with it the danger that relevant matters go unaddressed. We also acknowledge that some of the authorities relied on by the Respondent before us were not in existence at the time the judge made his decision in November 2019. Having said that, it is trite that relevant conclusions of the higher courts are declaratory of the law as it always was.

38. In dealing with the issue of rehabilitation, the totality of the judge's reasoning was that there was, and had been for a considerable period of time, a low risk of the Appellant re-offending

and that he presented as being "fully reformed and rehabilitated." The problem with this is readily identifiable when one considers the authorities, in particular the authoritative statement of Lord Hamblen JSC in HA (Iraq) [2022] UKSC 22; [2022] 1 WLR 3784, at paragraph 58:

> "58. Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case. I do not, however, consider that there is any great difference between what was stated in Binbuga and by the Court of Appeal in this case. In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending. Subject to that clarification, I would agree with Underhill LJ's summary of the position at para 141 of his judgment:
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> > "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."

39. Clearly, HA (Iraq) had not been handed down at the time of the judge's decision. However, both Binbuga [2019] Imm AR 1026 and RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), [2019] Imm AR 780 were in existence and those cases made it clear that rehabilitation (especially when it involved, in truth, nothing more than an absence of re-offending over time) would usually be of little or no material assistance to a potential deportee.

40. Given the state of the authorities even at the time of the judge's decision, but in any event following HA (Iraq), it was incumbent on him to adequately explain why, on the facts of this case, he was attributing what must have been relatively significant weight to rehabilitation, which was based on an absence of re-offending, albeit over a considerable period of time, as opposed to the "little or no material weight" which would ordinarily apply in the context of deportation cases.

41. On a fair reading of the judge's decision, and having full regard to the need to show appropriate restraint, we conclude that the judge clearly failed to provide legally adequate reasons on the issue of rehabilitation. There was, for example, no explanation as to whether the rehabilitation was of a positive or negative nature in the sense contemplated by the authorities. Further, there was no reasoning as to how the weight attributed to rehabilitation was or was not affected by the public interest considerations of deterrence and concern.

42. The error of law committed by the judge is fatal to his decision on Article 8 as a whole. It is readily apparent that rehabilitation constituted a significant factor in his assessment of whether very compelling circumstances existed. If that factor were excised from the equation, it cannot properly be said that the outcome would inevitably have been the same.

43. In light of the above, we set the judge's decision aside.

44. We see merit in Mr Manknell's alternative (or interconnected) argument that the judge failed to apply the correct legal test on rehabilitation, but need not reach a conclusion on this.

45. For the sake of completeness and out of respect for the eloquent arguments put by both representatives, we go on and deal with the other issues in the appeal.

46. The judge relied on the benefit to the community factor as manifested by his employment of a number of staff. It would seem from what was said at the beginning of [96] that relatively limited weight was placed on this. However, the judge failed to explain what value was in fact been attributed and failed to address the clear guidance set out in Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 00336 (IAC), paragraphs 2 and 3 of the judicial headnote of which state:

> "(2) Before concluding that submissions regarding the positive contribution made by an individual fall to be taken into account, for the purposes of Article 8(2) of the ECHR, as diminishing the importance to be given to immigration controls, a judge must be satisfied that the contribution is very significant. In practice, this is likely to arise only where the matter is one over which there can be no real disagreement. One touchstone for determining this is to ask whether the removal of the person concerned would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.
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> (3) The fact that a person makes a substantial contribution to the United Kingdom economy cannot, without more, constitute a factor that diminishes the importance to be given to immigration controls, when determining the Article 8 position of that person or a member of his or her family."

47. In our view, it follows that the judge failed to provide legally adequate reasons for attributing what appeared to be material weight to this particular factor.

48. It is clear that delay occasioned by the Respondent is capable of attracting weight, even significant weight, in the assessment of whether very compelling circumstances exist: see MN-T [2016] EWCA Civ 893 and SU (Pakistan) [2017] EWCA Civ 1069; [2017] 4 WLR 175. For present purposes, we quote the *obiter* observations of Jackson LJ at paragraphs 41 and 42 of MN-T:

> "41. I should perhaps add this in relation to delay. As a matter of policy now enshrined in statute, the deportation of foreign criminals is in the public interest. The reasons why this is so are obvious. They include three important reasons:
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> 1. Once deported the criminal will cease offending in the United Kingdom.
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> 2. The existence of the policy to deport foreign criminals deters other foreigners in the United Kingdom from offending.
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> 3. The deportation of such persons expresses society's revulsion at their conduct.
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> 42. If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses less of a risk or threat to the public. As to (2), the deterrent effect of the policy is weakened if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it hardly expresses society's revulsion at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport."

49. During the course of argument, Mr Manknell sought to clarify that the Respondent was not suggesting that delay could only *ever* constitute a "very weak factor", but that sufficiently good reasons were required from a judge who sought to place significant, or very significant, weight on it. In our view, he was right to adopt that position: the authorities do not lay down a prescriptive "straitjacket" as regards the potential weight attributable to delay. We agree that the reasons provided for attaching significant, or very significant, weight to this factor must be sufficiently cogent, given the very high threshold set by the very compelling circumstances test.

50. In the present case, the judge's reasons are clearly deficient in three respects. First, he failed to adequately explain at [97] how the Respondent's delay significantly affected the three well-known facets of the public interest referred to in the passages from MN-T, quoted above. Second, the delay factor was, on the judge's own analysis, connected with the question of rehabilitation: within [97] there is reference to the "blameless life" led by the Appellant during the relevant period. We have already concluded that the reasons on rehabilitation were inadequate. It follows that an aspect of the reasons underpinning the delay issue is thereby undermined. Third, we cannot understand the reasoning set out at [97] in terms of its criticism of the Respondent's delay between 2007 and 2017. The judge found that the change in the Respondent's position as to the ability to deport the Appellant had not been justified: essentially, what had been concluded in the 2017 decision letters could have been stated in 2007, "with broadly equal force." Yet in 2007 the Respondent had taken a positive decision not to pursue deportation action because of the Article 3 risk and there has never been any suggestion that that conclusion was in some way wrong. Once it was concluded that there was an Article 3 risk, the Respondent was bound to have granted discretionary leave to remain (as she did) and could not have pursued deportation action at that time. We cannot discern from the reasons given why the position adopted in the 2017 decision could have been adopted back in 2007. Certainly, there is no reasoning as to the country information on Turkey, or suchlike.

51. Thus, whilst there was undoubtedly a lengthy delay on the Respondent's part, the judge's reasoning as to why it featured significantly in his overall assessment of very compelling circumstances was not legally adequate.

52. As regards the reliance on the 2014 First-tier Tribunal decision as a significant factor, we agree with Mr Manknell's submission that the judge failed to explain why this was the case, given that the decision related to an entirely different context (an ECAA application, not deportation). The same criticism applies to the judge's reasoning at [99].

53. Having addressed the core factors relied on by the judge for his conclusion that there existed very compelling circumstances, we turn briefly to consider three remaining matters.

54. First, we cannot see that the reasoning set out at [100] had any material relevance to the question of whether very compelling circumstances existed under section 117C(6) of the 2002 Act. Even if the judge had been entitled to take the point into account, it cannot go to save his decision, in light of the errors we have identified, above.

55. Second, Mr Bobb's skeleton argument asserts that the judge placed "considerable weight" on the conclusion that deportation would have been unduly harsh on the Appellant's younger son. This is not borne out on the face of the decision. We see no reference to "considerable weight" being attributed to this factor in the overall assessment of whether very compelling circumstances existed. For this to have been the case, we would have expected both a clear statement and specific reasons.

56. Finally, we have noted the list of factors set out at paragraph 79 of Mr Bobb's skeleton argument. With respect, at least three of these (the harshness of deportation on the Appellant's wife, the harshness of deportation on the two older children, and problems on return to Turkey arising from the Appellant's Kurdish ethnicity) simply do not feature at all in the judge's assessment, even by implication. In respect of the length of residence in the United Kingdom and the passage of time since the index offence, these alone could not conceivably have outweighed the very strong public interest in the absence of sustainable conclusions on the core factors which we have already addressed and in respect of which we have found that the judge erred in law.

57. It follows from the foregoing that the judge's decision cannot stand, at least in respect of the Article 8 outcome. His conclusion on the protection issue remains undisturbed.

Next steps

58. It is clear to us that this appeal should be retained in the Upper Tribunal and the decision re-made in due course. There has already been a lengthy procedural history and it is entirely appropriate that the case be resolved at this level without a further remittal to the First-tier Tribunal.

59. As matters stand, there appears to be little or no dispute as to the essential facts in the case. For the avoidance of any doubt, we expressly preserve the following findings made by the judge, based on the evidence before him:

    (a) that there would not be very significant obstacles to the Appellant's reintegration into Turkish society;

(b) that the Appellant's deportation would be unduly harsh on his youngest son, with the caveat that section 117C(5) of the 2002 Act only applies to qualifying minor children;

(c) that the Appellant has been assessed as a low risk of re-offending.

60. We have considered whether the re-making of the decision could take place without a further hearing. However, it has been close to three years since the judge's decision and, in the interests of justice, it is appropriate to give the parties an opportunity to adduce further evidence if they so wish. The Upper Tribunal is fully able to undertake any further fact-finding exercise.

61. There will be a resumed hearing in this appeal. That hearing, the Upper Tribunal will consider only the question of whether the Appellant can demonstrate that there are very compelling circumstances under section 117C(6) of the 2002 Act.

Anonymity

62. Anonymity direction has been in place throughout the proceedings in the First-tier Tribunal and the Upper Tribunal. Initially, we assume that a direction was made because the Appellant's case involved protection-related issues. As matters currently stand, no such issues arise. However, there has been no suggestion that the direction should be discharged. In addition, we bear in mind the existence of a minor child of the Appellant who has particular additional needs. In all the circumstances, and having due regard to the importance of open justice, we maintain the anonymity direction.

Notice of Decision

63. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

64. We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

65. The appeal is retained in the Upper Tribunal and a resumed hearing will take place in due course.

Directions to the parties

1. **No later than 21 days** after this decision is sent out to the parties, the Appellant shall file and serve in electronic form any new evidence relied on, together with a notice under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, indicating the nature of the evidence and explaining why it was not before the First-tier Tribunal;

2. **No later than 28 days** after this decision is sent out to the parties, the Appellant shall file and serve in electronic form a skeleton argument, including hyperlinks to any authorities not previously provided;

3. **No later than 42 days** after this decision is sent out to the parties, the Respondent shall file and serve in electronic form electronic form any new evidence relied on, together with a notice under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, indicating the nature of the evidence and explaining why it was not before the First-tier Tribunal;

4. **No later than 49 days** after this decision is sent out to the parties, the Respondent shall file and sere in electronic form a skeleton argument, including hyperlinks to any authorities not previously provided;

5. The parties are at liberty to apply to vary these directions.

Signed: *H Norton-Taylor* Date: 12 October 2022

Upper Tribunal Judge Norton-Taylor