Neutral Citation Number: [2021] EWCA Civ 693

C5/2020/0902/AITRF

IN THE COURT OF APPEAL
ON APPEAL FROM
THE UPPER TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 11th May 2021

Before :

LADY JUSTICE MACUR
LORD JUSTICE HADDON-CAVE
and
LORD JUSTICE PHILLIPS

- -

Between:

KM

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

David Jones and Lara Simak (instructed by Sutovic & Hartigan Solicitors) for the Appellant
Zane Malik QC (instructed by Government Legal Department) for the Respondent

Hearing date: 21 April 2021

- -

Judgment Approved by the court for handing down

Lord Justice Haddon-Cave:

1. This case raises issues regarding the application of sections 117A, B and C of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") in relation to serious foreign criminals.

2. The Appellant challenged a deportation order by the Respondent ("Secretary of State") before the First-Tier Tribunal ("FTT") and the Upper Tribunal ("UT"). The Appellant appeals two decisions by the UT:

    (1) Firstly, a decision promulgated on 12th July 2019, whereby the UT found that the FTT had erred in law, set aside the FTT decision and ordered a re-hearing of certain issues by the Upper Tribunal ("Error of law Judgment").

    (2) Secondly, a decision promulgated on 18th December 2019, whereby the UT conducted a re-hearing and dismissed the Appellant's appeal from the Secretary of State's decision to refuse the Appellant's human rights claim and deport him from the UK ("Substantive Judgment").

The Facts

3. The Appellant was born on 13th September 1991 and is a Zimbabwean national. He arrived in the UK with his family on 16th September 2002, aged 11. The Appellant was treated as a dependent of his parents. The Appellant was given leave to enter until 28th August 2003. His parents were granted three years' discretionary leave to remain on 15th August 2003. The Appellant and his family members' discretionary leave was subsequently extended until 2013.

4. The Appellant met E in 2008. In 2011, the Appellant and E started co-habiting. The Appellant worked as a decorator, while E studied for a degree in social work. E now works as a social worker. In June 2012, the couple had a son, Y, who is now around 8 years old.

5. The Appellant's criminal activities started in 2005, aged 14. On 12th October 2005, he was cautioned for assault occasioning actual bodily harm. On 12th April 2007, he was convicted for robbery. In July 2008, he was convicted of failure to surrender to custody and in October 2008 for theft of a vehicle. In 2011, he was convicted of various driving offences and possession of Class A drugs. In 2012, he was again convicted of various driving offences, possession of Class B drugs and failing to comply with a community order. These offences resulted in non-custodial sentences.

6. The Appellant's parents and siblings were granted indefinite leave to remain ("ILR") in January and March 2013. However, due to his criminal offending, the Appellant was only granted discretionary leave to remain until 2nd January 2016.

7. On 7th October 2013, the Appellant, aged 21, was convicted after a trial for an aggravated burglary committed with others. The victims were at home and violence was used. They were severely traumatised by the offending. There was

a significant degree of planning. He was equipped with a knife, blindfolds and cable ties. The sentencing judge found the offence was within the highest category of the sentencing guidelines and imposed a sentence of ten years imprisonment. The Appellant appealed his sentence but the sentence was upheld by the Court of Appeal Criminal Division.

8. Whilst in prison, the Appellant married E in 2015. On 30th December 2015, the Appellant submitted an application for ILR based on his ten years' lawful residence in the UK. This application was subsequently refused by the Secretary of State in a Deportation Notice (see further below).

9. On the 17th August 2018, the Appellant was released from prison. He was initially required to reside in a bail hostel on release, but on 17th November 2018 was allowed by the Probation Service to return to the family home. He remains on licence and has been fully compliant.

10. On 30th September 2016, the Secretary of State issued a notice to the Appellant as to his liability for deportation ("Deportation Notice"). As a foreign criminal as defined by s. 32(1) of the UK Borders Act 2007, the Appellant faced deportation under s. 32(5) of the 2007 Act unless one of the exceptions in s. 33 applied (see below).

11. In submissions dated 28th December 2016, the Appellant claimed that deportation would constitute a disproportionate interference with the right to respect for his private and family life under Article 8 of the ECHR.

12. On 24th April 2017, the Secretary of State refused the Appellant's human rights claim and informed him of her decision to proceed with his deportation ("Refusal Decision").

13. The Appellant subsequently appealed the Refusal Decision to the FTT. The appeal was heard on the 9th and 10th October 2018 before First-Tier Tribunal Judge Neville. The FTT dismissed the Appellant's appeal in a judgment promulgated on 27th February 2019 ("FTT Judgment").

14. The Appellant then appealed the FTT decision to the UT. The hearing was held on the 10th June 2019 before Upper-Tribunal Judge Reeds and Upper-Tribunal Judge Plimmer. The UT decision, promulgated on 12th July 2019, found that the FTT had erred in law and set aside the FTT Judgment and ordered a re-hearing ("Error of law Judgment").

15. The re-hearing took place on the 4th December 2019 before Upper-Tribunal Judge O'Connor and Upper-Tribunal Judge Plimmer. By a decision dated the 18th December 2019, the UT dismissed the Appellant's appeal ("Substantive Judgment").

16. The UT refused permission to appeal to the Court of Appeal on 16th March 2020. Permission to appeal was subsequently granted by the single judge on 30th November 2020.

17. It is necessary to set out the three judgments in some detail (see further below). I turn first to set out the relevant statutory provisions.

The Law

The Statutory Provisions

18. Section 32 of the UK Borders Act 2007 ("the 2007 Act") concerns automatic deportation of certain foreign criminals and, so far as relevant, provides:

> "(1) In this section 'foreign criminal' means a person –
> (a) who is not a British Citizen,
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
> …
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to s.33)."

19. Section 33 of the 2007 Act concerns exceptions to automatic deportation and, so far as relevant, provides:

> "(1) Sections 32(4) and (5) –
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
> (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
>
> (2) Exception 1 is where removal of a foreign criminal in pursuance of the deportation order would breach –
> (a) a person's Convention rights, or
> (b) the United Kingdom's obligations under the Refugee Convention.
> …
> (7) The application of an exception—
> (a) does not prevent the making of a deportation order;
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4."

20. Sections 117A-D of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") fall under Part 5A of the Act entitled "ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS" and provide for a series of statutory considerations when considering deportation action.

21. Section 117A of the 2002 Act provides:

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)"

22. Section 117B of the 2002 Act, so far as relevant, provides:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
> …
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. …"

23. Section 117C of the 2002 Act, so far as relevant, provides:

> "**117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where,

(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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. …"

24. Section 117D of the 2002 Act, so far as relevant, provides:

"**117D Interpretation of this part**
…
(2)In this Part, "foreign criminal" means a person—
(a)who is not a British citizen,
(b)who has been convicted in the United Kingdom of an offence, and
(c)who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender."

First-Tier Judgment

25. The FTT made detailed findings of fact in relation to three areas in particular. First, in relation to the consequences for the Appellant in the event he was deported to Zimbabwe, the FTT Judge found he would have very limited financial support, be unlikely to find employment due to cultural and linguistic barriers and his living situation was likely to be a "squalid lodger type". Second, the FTT found the Appellant's family would be significantly impacted by his deportation. The Appellant and his son had an "unusually strong" relationship and, if his father was deported, E was highly likely to return to the disruptive and angry behaviour he had displayed when the Appellant was in prison. Y was a very vulnerable individual and suffered from depression. His mental health was likely to worsen if the Appellant was deported with the risk of an emotional and family breakdown. Third, the FTT Judge found the Appellant's rehabilitation had been "exceptional" and he had changed his ways in prison. The FTT Judge characterised the Appellant's response to his offence as "a model of rehabilitation" and the "appellant's evidence of his commitment to his future

with his family is exceptional, his relationship with his son is exceptional, and he has taken immediate steps to remove himself from the people with whom he previously offended" (FTT Judgment, paragraphs [86]).

26. As regards Article 3, the FTT held that there was no real risk that the Appellant would be subject to inhumane or degrading treatment or punishment in the event of his return to Zimbabwe and his Article 3 rights would not be breached.

27. As regards Article 8, the FTT noted that, since the Appellant was a serious offender and had received a sentence of imprisonment of more than four years, it was therefore required to consider whether there were "very compelling circumstances" over and above Exceptions 1 and 2. The FTT held as relevant: (i) the Appellant's very significant obstacles to integration in Zimbabwe; (ii) the effect of the deportation on the Appellant's partner and child and family life; and (iii) the length of time since offending and conduct during that period. The FTT held that the obstacles to integration were very significant and went "well beyond" the necessary threshold.

28. As regards Exception 1 under s. 117C(4) of the 2002 Act (*i.e.* private life), the FTT found the obstacles to integration in Zimbabwean society were very significant and his deportation could be described as "exile". The FTT also highlighted the Appellant's arrival in the UK as a child, the length of his stay and the depth of his social and cultural integration in the UK.

29. The FTT cited *Maslov v. Austria* [2008] ECHR 546 which held (at [75]) that "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion". The FTT also cited *Rhuppiah v SSHD* [2018] UKSC 58 which recognised (at [49]) that s. 117B(5) could be "overridden in an exceptional case by particularly strong features of the private life in question".

30. The FTT nevertheless went on to hold that the Appellant's private life, and by extension the interference which removal would cause, should carry "little weight" for two reasons. First, the Appellant was not a "settled" migrant in the sense referred to in *Maslov*. Second, the Appellant's immigration status was "precarious" since he never enjoyed ILR in the UK; and, accordingly, the normative guidance in s. 117B(5) of the 2002 Act could not be overridden as suggested in *Rhuppiah*.

31. As regards Exception 2 under s. 117C(5) of the 2002 Act (*i.e.* family life), the FTT held that were the exception formally engaged, deportation of the Appellant would be "unduly harsh" on E and Y but there were a number of factors which reduced the weight of the Appellant's relationship with E such as the fact that it was formed whilst the Appellant's immigration status was precarious and continued in the knowledge of his offending.

32. The FTT's conclusion overall was that the circumstances of the Appellant's case did not outweigh the high public interest in deportation and meet the "very compelling circumstances" test in s. 117C(6). The FTT Judge added, however,

that had he not been obliged to place "little weight" on the private life considerations, he would have allowed the appeal (see paragraph [141]).

UT's Error of Law Judgment

33. The UT found that the FTT erred in law in two important respects. First, the UT held that the FTT had mistakenly concluded that the reference to "a settled migrant" in *Maslov* excluded a person whose immigration status is anything less than "settled" under UK law, for example, those with less than ILR. The UT stated that permanent residence was not a pre-requisite for settled status and the Strasbourg court had used the term "a settled migrant" informally to describe a migrant who has lawfully spent all or most of his childhood in the host country. The settled status of a migrant depended upon the timing, length and lawfulness of that migrant's residence, factors emphasised in *Maslov*. The domestic authorities also supported this interpretation (*see Hesham Ali v. SSHD* [2016] UKSC 60 [25]). Secondly, the UT held that the FTT erred in law in failing to employ the flexible approach to s. 117B(5) which, as Lord Wilson explained in *Rhuppiah*, could be overridden if "particularly strong features of private life" could be shown. The UT held that the FTT's errors of law were material and, accordingly, set aside the decision.

34. The UT rejected the Appellant's submission that it should have allowed the appeal in the light of the FTT's strong findings on private life and its observation in [141] that, but for its conclusion on the law that it was bound to give "little weight" to the Appellant's private life, it would have allowed the appeal. The UT explained as follows:

> "57. Whilst the FTT has highlighted features of the appellant's private life in the UK that might be capable of being viewed as particularly strong when assessed holistically, there has been no clear finding to this effect. We acknowledge that the FTT found Exception 1 to be met by a considerable margin. However, the FTT focused its attention on the third requirement in Exception 1, relevant to the appellant's circumstance in Zimbabwe, and not his private life in the UK. We are satisfied that the FTT's error of law in its approach to *Maslov* and s. 117B(5) has infected its obiter conclusion at [141]. It is unclear whether the FTT attached little weight to the entirety of the appellant's private life, both in the UK and if returned to Zimbabwe. We have already made it clear that s. 117B(5) is directed at the former only. If the FTT properly directed itself to the authorities on the approach to private life in the UK, it cannot be said that it would have inevitably concluded the appeal in the appellant's favour. There are clearly obvious factors in support of the appellant having a particularly strong private life but these must be viewed in context. He remains a young man who has spent a very significant period of his time in the UK in prison, and as such appears to have no employment or community ties (beyond his family) since 2013.
>
> 58. In order to re-make the decision, it is important that we directly address whether in this particular case there is sufficiently strong private life to enable a flexible approach to s. 117B(5), as explained in *Rhuppiah*. This in turn

informs the degree of flexibility to be applied to private life both for the purposes of Exception 1 and s. 117C(6).

59. In addition, we note that when re-making the appeal we must do so on the basis of the circumstances as at the date of the decision. Both representatives made it clear that they were content to rely solely on the FTT's findings of fact and factual evaluations. These should clearly be preserved. However, the appellant was released from prison in August 2018 and at the date of the FTT hearing in October 2018 was residing in a bail hostel. It would assist us to have a clearer picture of his current circumstances and in particular an updated addendum report from the ISW, in relation to his family life.

60. Given the extensive preserved factual findings, and the likelihood that the further evidence will be limited, we are satisfied that in all the circumstances it is appropriate for the decision to be remade by us in the Upper Tribunal ('UT'). We have therefore given directions, which are set out below."

35. For these reasons, the UT decided to remake the decision and gave directions to this effect, which included liberty to the Appellant to serve updated evidence.

UT Substantive Judgment

Law and approach

36. The UT began its detailed and carefully structured Substantive Judgment by setting out a summary of law as to the test in s. 117C(6) in relation to 'serious offenders', *i.e.* foreign criminals sentenced to imprisonment for more than four years imprisonment. Mr Jones and Mr Malik accepted that the UT's summary of the relevant law was accurate. The summary included the following points (at [18]):

    (1) The public interest "almost always" outweighs countervailing considerations of private or family life in a case involving a 'serious offender', although a "very strong claim" will be successful (*Hesham Ali* at [36], [46]).
    (2) The evaluation of the public interest balanced against Article 8 factors requires a "wide-ranging exercise" (*NA (Pakistan) v SSHD* [2016] EWCA Civ 662), applying Strasbourg principles to ensure compatibility with the ECHR.
    (3) The wide-ranging exercise allows a consideration of the extent to which the Appellant satisfied the Exceptions as well as other factors (*NA (Pakistan)* at [32]).
    (4) More than a "little weight" can be given to the private life of a person with "precarious" immigration status where there are "particularly strong features" (*Rhuppiah*).
    (5) The flexible approach in *Rhuppiah* is relevant to the analysis under s. 117C(6). An assessment of both private and family life is necessary.

37. The UT rejected Mr Jones's submission on behalf of the Appellant that if it identified "particularly strong features" of the Appellant's private life the default position was that it must allow the appeal as indicated by [141] of the FTT Judgment. The UT further stated (at [21]):

> "Having erred in law as to the approach in *Maslov* and *Rhuppiah* and therefore to private life more generally, it remains for us to undertake the assessment of private life that it is in accordance with the authorities, and then to weigh this in the balance and re-make the decision."

Public interest ([23]-[31])

38. The UT first considered the public interest. The UT held that the offence committed by the Appellant which carried a sentence of ten years was at the serious end of the spectrum such that there was a *prima facie* "very significant and powerful public interest in his deportation" [23]. The UT also attached weight to the Appellant's prior offending from the age of 14 until his imprisonment at age 21.

39. The UT distinguished *Akinyemi (No. 2) v. SSHD* [2020] 1 WLR 1843 on the ground that Mr Akinyemi had (i) lived in the UK since birth, (ii) had been entitled to acquire British citizenship, and (iii) had no social or cultural links to the country to which he was to be deported. The UT decided that the facts of the present case were materially different, save for (iii). The UT noted that the Appellant arrived in the UK as a child and had remained in the UK lawfully.

40. The UT held that the Appellant must have been aware that his immigration status was precarious and was even more precarious when he became an adult since, unlike his parents and siblings, ILR was unlikely to be given to him because of his criminal offending. The UT held that the Appellant would be acquainted with Zimbabwean culture through his childhood and Zimbabwean parents and siblings. The UT acknowledged the conclusions of the FTT with regard to rehabilitation and reoffending, but stated that the Appellant had not been 'tested' outside of the prison environment for a significant period of time. The UT held that the Appellant's risk of re-offending must be evaluated in the context of the scale and variety of his prior offences. Weight was attached to the Appellant's steps towards rehabilitation. The UT was satisfied overall that the Appellant remained at a "medium risk of offending". The UT held that other s. 117B factors weighed in the Appellant's favour: the Appellant spoke English and has genuine employment offers available to him.

41. Overall, the UT concluded that the public interest in the Appellant's deportation remained "very strong".

Family life (Exception 2) ([32]-[37])

42. The UT recorded the FTT's finding that Exception 2 was met, and went on to consider whether there was any evidence to support the claim that the disruption to family life went "over and above" the level of "undue harshness".

43. The UT concluded that the effect of the deportation on the Appellant's family life would be unduly harsh, but that the threshold was only just met, primarily because E's extended family would be able to play an important role in supporting and assisting both E and Y, in the absence of the Appellant.

44. The UT said it was relevant to note that E engaged in and continued her relationship with the Appellant "when she knew when the Appellant's immigration status was precarious, *and* at a time that he continued to flout the law through criminal offending (with the inevitable result that his immigration status became even more precarious)". The UT continued (at [36]):

> "We fully acknowledge that Y cannot be blamed for any of this and that this history in no way undermines the current strength of the family relationships. However, it is a relevant matter to accord some limited weight to when assessing the effect on family life holistically – *Rhuppiah* at [27]-[35]. However, for completeness, we would have reached the same ultimate conclusion had we left this factor out of account."

45. The UT concluded that the effect of the deportation on the Appellant's family did not go "over and above" the threshold of undue harshness, and only just met the high threshold required by Exception 2.

Private life (Exception 1) ([38]-[55])

46. The UT recognised that the FTT found that Exception 1 was met and stated that it did not seek to go behind this finding. The FTT had focused on condition (c) as (a) and (b) had been accepted by the Secretary of State. The UT noted, however, that the FTT had not been prepared to find that the Appellant's circumstances in Zimbabwe would be such as to breach of Article 3 and highlighted the fact that the Appellant would have the financial support of his parents and thus be able to "obviate destitution" in Zimbabwe. The UT stated that the FTT's reference to "exile" should be placed in the context of the fact that the Appellant had lived in Zimbabwe and in the UK grew up with his Zimbabwean family.

47. The UT stated that it must consider the totality of Appellant's "social ties, including his identity and relationships" ([40]) and cited extensively from the judgment of Leggatt LJ in *CI (Nigeria) v. SSHD* [2019] EWCA Civ 2027 at [57] where he cited from *Uner v. The Netherlands* ([GC], no.46410/99) ECHR 2006-XII) to the effect that the concept of private life was wide.

48. The UT considered the length, lawfulness and surrounding circumstances of the Appellant's residence in the UK. The UT recognised that the Appellant has been in the UK since the age of 11, and therefore fell within the description of a "special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there" as described in *Uner (supra)*. However, the Appellant's private life had been weakened by his criminal offending. The Appellant's immigration status was precarious in fact and in law. His criminal offending meant that he was most

unlikely to obtain ILR. The UT also noted that attention had not been drawn to any secondary school qualifications which suggested that "he did not achieve any worthy of note". The UT recognised that the Appellant's arrival in the UK as a child, his lack of ties to Zimbabwe and difficulties on returning there were very significant matters to take into account when assessing the overall strength of his private life.

49. The UT next considered the nature of extent of his links to the UK. The UT noted the FTT's acceptance that the Appellant was closely socially and culturally integrated to the UK but stated that the FTT did not consider these links in any detail. The UT accepted the Appellant's evidence that he regarded himself as British in every aspect including language, culture and identity developed through 17 years of residence. The UT then stated as follows:

> "47. Whilst we accept that the appellant is clearly socially and culturally integrated in the UK, the nature of his links to the community have not been entirely positive. He began offending and associating with pro-criminal individuals at the young age of 14. The appellant continued to offend during his teenage years. Although he came to the UK at a young age, the strength of his positive connections and social ties have been weakened by his criminal associations from a young age. He demonstrated a disdain for the rule of law and the punishments handed down to him. His offending carried on into his adulthood and he committed a very serious offence when he was 21. By this time, he had been with his partner for a number of years and had a child. Yet this, combined with the support of his extended family and his employment at the time, were insufficient to prevent the commission of a serious offence as an adult. In addition, the appellant has spent a significant part (five years) of his adulthood in prison. As noted in *CI(Nigeria)* at [61], periods of imprisonment represent time spent excluded from society during which the prisoner has little opportunity to develop social and cultural ties. We note that in this case, the appellant's ties to his partner and child have continued throughout his imprisonment and strengthened upon his release. To the appellant's credit, he has severed ties with those associates whom he perceived to represent a negative influence post-conviction and retained positive friendships as set out in witness statements and letters of support in the bundle before the FTT. These friends have shown a belief in the appellant by offering him concrete employment that the appellant is keen to take up, if permitted to do so. The appellant clearly spent significant periods as a juvenile and in early adulthood interacting with negative pro-criminal associates. Whilst the appellant's social and cultural integration has not been destroyed by reason of his lengthy period of offending and imprisonment, we are in no doubt that it has been weakened by these matters."

50. The UT then turned to consider the *Rhuppiah* exception, namely whether the Appellant had a "particularly strong private life" such that the normative guidance that under s. 117B(5) that "little weight" should be given to private life could be overridden. The UT accepted that this was a 'hybrid' case because

family life to some extent blurred into private life. The UT then stated as follows:

> "53. We return to the language of s.117B(5). We are not satisfied that the private life established by the appellant in the UK, when his immigration status was precarious i.e. from the age of 11, contains " particularly strong features" in the sense explained in *Rhuppiah*. The FTT was clear in its assessment that the appellant was able to demonstrate that he met requirement (c) of Exception 1 by a considerable distance. This focuses upon the conditions in Zimbabwe and to a lesser extent on the fact that the appellant will be an outsider there. However, for the purposes of s.117B(5) our attention must focus on the private life the appellant has developed in the UK. In the circumstances, we wish to emphasise that nothing we say here should be interpreted as undermining our acceptance that the three conditions in Exception 1 are met, and that (c) is met by some distance. We entirely accept that this private life has strong features for all the reasons submitted by Mr Jones. When viewed holistically, we consider that the appellant's overall private life in the broadest sense has however been substantially weakened by his long history of criminal offending and imprisonment, and does not have " particularly strong features". To put it bluntly, the appellant has been in the UK for a lengthy period since the age of 11 and developed inter alia, social, cultural, family, relationship and employment ties, but he has been regularly involved in repeated criminal behaviour from the ages of 14 to 21, and was in prison from the ages of 21 to 26. He is now 28.
>
> 54. It therefore follows that we attach "little weight" to the appellant's private life in the UK. If we are wrong, and the appellant's private life as we have set it out above, has " particularly strong features" such that we should apply more than "little weight" to it, we would not be minded to attach great weight to it in the overall balancing exercise, as a result of the inevitable impact of the appellant's significant and protracted period of criminal offending and imprisonment."

51. The UT summarised its overall conclusion on private life as follows:

> "55. Drawing the strands of private life together: Exception 1 is met; requirement (c) of Exception 1 is met by some distance, with the appellant having lawfully lived in the UK since his childhood; we attach "little weight" to the appellant's private life established in the UK, even bearing in mind its 'hybrid' nature, influenced as it is by family life."

Very compelling circumstances over and above Exceptions 1 and 2

52. The UT turned, finally, to the question whether there were "very compelling circumstances" over and above those encompassed by Exceptions 1 and 2. The UT stated as follows:

> "58. We are satisfied that notwithstanding the cumulative impact of the appellant meeting Exceptions 1 and 2 together with all the other 'pros', the

high threshold required by s.117C(6) has not been met in this case. Our conclusion would be the same, even if we concluded that there are " particularly strong features" of private life present such that more than "little weight" could be attached to the private life in question. As the FTT observed at [140] if the appellant had received a shorter sentence or been involved in a less serious offence, the approach may have been more favourable to him. However, the ten year sentence signals a very strong public interest. We have already considered other factors relevant to the public interest in the round and reached the conclusion that the public interest in this case remains very strong. When that is weighed against the nature and degree of the appellant's private and family life (both viewed in their widest sense) on a cumulative basis, we are not satisfied that this is one of those rare cases where the extremely demanding threshold in s.117C(6) is met. The effect on E and Y will be unduly harsh and the appellant will have to give up his British life and family and start a new life in Zimbabwe in very challenging conditions indeed. However, it must also be remembered that the public interest in support of deportation in this case is very strong and each of the main protagonists are currently in good health and will continue to have other committed family members to support them (albeit the appellant from a distance) through the very difficult challenges likely to result from the appellant's deportation."

53. The UT stated its conclusion as follows and dismissed the appeal:

> "59. The appellant is a 'serious foreign criminal' and in order for his appeal on article 8 grounds to succeed he must meet the extremely demanding test in s.117C(6). For the reasons we have provided above, we are satisfied that the public interest in this particular case requires deportation because when all the relevant factors are considered in the round, it cannot be said that there are "very compelling circumstances over and above those described in Exceptions 1 and 2"."

Grounds of Appeal

54. The Appellant's grounds of appeal before us can be conveniently summarised as follows:

Grounds relating to Error of Law Judgment

(1) First, the UT should have allowed the Appellant appeal instead of setting aside the FTT decision and retaining a re-hearing.

(2) Second, the UT erred in setting aside the FTT's decision on the basis of a need to consider whether the Appellant's private life was particularly strong.

Grounds relating to Substantive Judgment

(3) Third, the UT erred in conducting a re-assessment of the facts and issues beyond the issue as to the strength of the Appellant's private life.

(4) Fourth, the UT applied an excessively onerous threshold in relation to section 117B(5) of the 2002 Act.

(5) Fifth, the UT erred in failing to include the Appellant's family ties within the assessment of his private life and arrived at an irrational conclusion or irrationally concluded that the *Rhuppiah* exception was not met were they to be included.

(6) Sixth, the UT took into account immaterial considerations, including a) the Appellant's possession of only limited leave and b) the Appellant's pattern of offending over time, prior to the principal offence of 2013.

(7) Seventh, the UT erred in its assessment of the public interest consideration by (a) distinguishing authorities on the "very compelling circumstances" test such as *Akinyemi* [2020] 1 WLR 1843 and (b) not giving due weight to the Appellant's rehabilitation.

(8) Eighth, the UT erred in its overall approach to the consideration of the Appellant's private and family life in:

(a) Finding that the family life exceptions were only just met;
(b) Failing anywhere to properly appraise the findings of the FTTJ as to the impact on Y of severance of family life;
(c) Concluding that support available to the Appellant's wife and child in the UK would ameliorate the impact of severance of family life;
(d) Assessing the impact on the Appellant's spouse on the basis that she was *well at present*;
(e) Failing to attribute proper weight to the FTTJ's findings as to the conditions in which the Appellant would be compelled to reside on return to Zimbabwe.

Submissions

Appellant's submissions

55. The Appellant's appeal was reconfigured and presented by Mr Jones under three heads:
    (1) Error of Law Judgment.
    (2) The scope of the UT's reconsideration in the Substantive Judgment.
    (3) The rationality of the UT's review in the Substantive Judgment.

(1) Error of Law Judgment

56. Under the first head, the Appellant argued that having corrected the FTT's errors of law, the UT were bound to allow the appeal.

57. First, Mr Jones submitted satisfaction of the s. 117C exceptions and s. 117C(4)(b) in particular rendered s. 117B(5) inapplicable in a case involving 'serious offenders' where s. 117C(6) applied. This approach was, he submitted, consistent with interpreting the legislative scheme in compliance with Article 8

in a similar manner to cases such as *KO(Nigeria) v SSHD* [2018] 1 W.L.R 5273 at [20] – [22] where s. 117B(5) was disapplied in relation to 'medium offenders' who satisfied the exceptions and *Rhuppiah v SSHD* [2018] 1 W.L.R 5536.

58. Second, Mr Jones relied upon the FTT Judges' finding (at [141]) of the FTT Judgment that had he not been obliged to accord the Appellant's private and family life "little weight" due to *Rhuppiah*, he would have allowed the Appellant's appeal. On this basis, Mr Jones submitted that having held that the FTT Judge wrongly applied the *Rhuppiah* exception, the UT should simply have allowed the appeal without further ado.

59. Thirdly, Mr Jones submitted that a court should treat the *Rhuppiah* exception as met in 'serious offender' cases where the condition in s. 117C(4)(b) was met, as *Rhuppiah's* "particularly strong features of private life" test was made out by satisfaction of s. 117C(4)(b). Alternatively, he submitted, the UT should have allowed the appeal as the FTT Judge's findings of fact sufficed to make out the *Rhuppiah* exception was operative.

(2) The scope of the UT's reconsideration in the Substantive Judgment

60. Under the second head, the Appellant argued that the UT acted unfairly and unreasonably in conducting a wide-ranging review of the matter in the Substantive Judgment.

61. First, Mr Jones submitted that any reconsideration by the UT should have been narrow since the UT had only identified two limited errors of law by the FTT (in relation to the *Maslov* principle and the *Rhuppiah* exception) and the UT made clear it would preserve the FTT's findings of fact and factual evaluations. The Appellant understood the parameters of the UT's reconsideration to be directed to the re-weighting of private life ties so as to enable an assessment of the *Rhuppiah* exception, with the focus being on the perceived deficiencies in the FTT's findings on private life with regard to employment and community ties as identified by the UT in the Error of Law Judgment.

62. Second, Mr Jones submitted that the UT impermissibly ranged outside of these parameters in the Substantive Judgment, reappraising the existence of "very compelling circumstances" and reassessing the weight attributable to the public interest, family life and private life ties generally.

63. Third, Mr Jones submitted that the UT's approach was unfair and unreasonable in the light of the Appellant expectations. The UT was not able to hear full evidence on all the material issues and deprived the Appellant of the benefit of findings recorded by the FTT. The UT should have refrained from interfering with the retained findings of fact, absent a material change in circumstances or some other exceptional justification (*LS(Uzbekistan) v SSHD* [2008] EWCA Civ 909 at [15] – [22]). It was unreasonable for the UT to re-cast the FTT's critical findings so as to elevate the public interest element and diminish the Article 8 considerations.

(3) The rationality of the UT's review in the Substantive Judgment

64. Under the third head, Mr Jones argued that the UT's review in the Substantive Decision was irrational.

65. First, Mr Jones submitted that UT erred in reassessing the public interest. He submitted that the UT impermissibly went behind the FTT's findings on the Appellant's rehabilitation and erroneously distinguished and misapplied *Akinyemi v SSHD (No. 2)* [2020] 1 W.L.R. 1327 which held that a person's circumstances in the individual case, such as the length of time spent in the UK, can reduce the legitimate and strong public interest in removal. The UT failed to apply this principle. Further, the UT was wrong to diminish the impact of the Appellant's return to Zimbabwe and re-introduce his immigration status into the public interest assessment.

66. Second, Mr Jones submitted that the UT erred in its re-assessment of the Appellant's private life and treatment of the *Rhuppiah* exception. The UT found that the Appellant's offending history and imprisonment 'weakened' his ability to develop a private life. He submitted that this approach was flawed and irrational. The UT failed to take account of the guidance in *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027 which held that offending and criminal lifestyle without more did not break one's private life. *CI (Nigeria)* required evidence by reference to a case sensitive assessment of private life ties that indicated an actual break in such ties caused by the criminal conduct. Mr Jones submitted that, on any rational view, the evidence and findings establish that the Appellant maintained strong family and social ties outside pro-criminal circles.

67. Third, Mr Jones submitted that the UT failed to apply the *Maslov* principle correctly and require the Secretary of State to show "very serious reasons for justifying expulsion" (as *per CI (Nigeria)* at [111]). The UT's approach was arguably unlawful and caused s. 117B(5) to operate so as to penalise children for the precariousness of their status in circumstances which they could not control.

68. Fourth, Mr Jones submitted that the UT erred in re-assessing the Appellant's family life and it was perverse to conclude that the family life exception (Exception 2) was only just met. The UT's finding was perverse in light of the FTT's findings as to the depth of the relationship between the Appellant and E and Y and the serious impact on their welfare which will likely result from separation with the Appellant.

Respondent's submissions

69. Mr Malik submitted on behalf of the Secretary of State that there was no error of law in the UT's Error of Law judgment.

70. Mr Malik invited the court to reject Mr Jones's construction argument that s. 117B(5) should be dis-applied in all serious cases where the exception in 117C(4) was met, for three reasons: (a) the argument is contrary to the clear language of the statute, (b) the argument was not supported by authorities and (c) the argument was inconsistent with the statutory scheme under s. 117.

71. Mr Malik also invited the court to reject Mr Jones's alternative argument that the UT impermissibly reserved the re-making of the decision to itself and/or failed to determine the matter in the Appellant's favour. Mr Malik submitted that having found that the FTT's decision under section 117C(6) of the 2002 Act was legally defective, the UT was entitled to decide that there should be a fresh evaluative exercise on the basis of the key findings of fact made by the FTT. The Appellant's suggestion that his appeal was bound to succeed is untenable. The UT was right, for the reasons given, to hold that this was not a case where there could only be one result. There was no clear finding by the FTT as to "particularly strong features of the private life" for the purpose of section 117C(6) of the 2002 Act. Further, a careful consideration of the flexibility in section 117A(2)(a) of the 2002 Act was required. The FTT had omitted it altogether. The UT had to re-make the decision on the basis of current circumstances. The UT was entirely justified in expecting the Appellant to provide a clearer picture of his updated circumstances and adduce evidence as to what had happened since the FTT's decision.

72. Mr Malik submitted that the UT's analysis in its Substantive Judgment was correct. He submitted that appeals from the UT should be approached "with appropriate degrees of caution" since the UT administers a complex and specialist area of law (per Lady Hale in *AH (Sudan) v SSHD* [2007] UKHL 49 at [30]). The appellate court should not simply find a misdirection because it would have come to a different conclusion. He made four main submissions.

73. First, Mr Malik submitted that the UT's analysis on the public interest considerations betrayed no error of law. The UT was entitled to recognise that rehabilitation will "rarely be of great weight" as stated by Underhill LJ in *Binbuga v SSHD* [2019] EWCA Civ 551 at [141]. The public interest in the deportation of criminals is based on not only the protection of the public from further re-offending, but public policy concerns of deterrence and public concern.

74. Second, Mr Malik submitted that the UT was entitled to attach "little weight" to the Appellant's private life due to his career of criminal offending. The Appellant's offending was properly a matter that capable of reducing the weight to be given to his private life. Furthermore, the UT did not attach "little weight" simply because the Appellant's immigration status was precarious, but applied the proper flexible approach derived from the Error of law Judgment in the Appellant's favour.

75. Third, Mr Malik submitted that the Appellant's argument that the UT undermined the FTT's findings and did not properly consider his family life was misguided. The UT set out the Appellant's family life in detail and came to its conclusion having appropriately assessed the Appellant's family ties.

76. Fourth, Mr Malik finally submitted that the UT was entitled to conclude as it did in the overall balancing exercise conducted under s. 117C(6). The UT's conclusion was not outside the range of reasonable responses. Mr Malik

contended that the Appellant's submissions were simply robust disagreement with the UT's reasoning and conclusion.

Approach of appeal court

77. I bear in mind the following well-established principles as to the approach of the Court of Appeal when considering a decision of a specialist tribunal such as the UT:

    (1) First, the UT is an expert tribunal and an appellate court should not rush to find a misdirection an error of law merely because it might have reached a different conclusion on the facts or expressed themselves differently (*per* Lady Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30]).

    (2) Second, the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the UT's assessment of the facts (*per* Lord Dyson in *MA (Somalia) v SSHD* [2010] UKSC 49 at [45]).

    (3) Third, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account (*per* Lord Dyson in *MA (Somalia)* at [45]).

    (4) Fourth, experienced judges in this specialised tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so (*per* Popplewell J in *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 at [34]).

    (5) Fifth, judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined and the appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it (*per* Lord Hope in *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 [2013] 2 All ER 625.

Analysis

(1) Error of Law Judgment

Disapplication of s. 117B(5)

78. In my view, Mr Jones's construction argument is untenable. I agree with Mr Malik that it is (a) contrary to the clear language of the statute, (b) not supported by authorities and (c) inconsistent with the statutory scheme under s. 117.

79. As to (a), Mr Jones's construction would involve doing violence to the clear language of s. 117 or inserting further words. Section 117A(2)(a) provides in

mandatory terms that "the court or tribunal must (in particular) have regard… in all cases, to the considerations listed in section 117B". The heading to s. 117B also provides "Article 8: public interest considerations applicable in all cases". On Mr Jones' argument, the words '…save where Exception 1 in s. 117C applies' would have to be inserted. As a matter of basic statutory construction, where Parliament intends to create an exception to a clear rule, clear words are required. Mr Jones' construction represents an impermissible gloss.

80. As to (b), none of the numerous authorities in this area suggest that s. 117B(5) should be disapplied in this context. On the contrary, as Lord Wilson makes clear in *Rhuppiah* at [49], Parliament's instruction is that the "little weight" provision does apply.

81. As to (c), it is wrong in principle to suggest that a persons' ability to meet the 'private life' exception in 117C(4) satisfies the public interest in "the maintenance of effective immigration controls in the public interest" referred to in s. 117B(1) and the additional public interest in the deportation of foreign criminals referred to in s. 117C(1). As pointed out during argument, if Mr Jones's construction is right, foreign criminals would potentially be in a better position than non-criminals, who do not fall to be considered by s. 117C.

82. The fact that a person has been in the UK "lawfully" for most of their life (pursuant to s. 117C(4)(a)) does not mean that their immigration status has not been "precarious" (pursuant to s. 117B(5)), as in the case of the Appellant who has never been granted ILR.

83. Mr Jones sought to argue that his construction had the benefit of clarity and consistency. I disagree. It is clear that Parliament intended to prescribe different approaches to 'medium' and 'serious' foreign criminals. As to the former, s. 117C(4) involves simple threshold questions. As to the latter, s. 117C(6) on the other hand involves an evaluative question and the phrase "very compelling circumstances" shows that Parliament wanted to avoid a hard-edged questions in relation to this potentially more complex category.

Should the UT have remitted rather than remade the decision?

84. Mr Jones argues that the UT should not have remade the decision but remitted it to the FTT. In my view, this point is unsustainable.

85. First, the UT has a broad discretion to remit or remake decisions of the FTT which have been found to involve errors of law. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either— (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or (ii) re-make the decision.

…

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and (b) may make such findings of fact as it considers appropriate."

(emphasis added)

86. Second, the UT's decision to remake rather than remit the matter was in accordance with the guidance in the relevant Practice Statement issued by the Senior President of Tribunals on 13th November 2014. Paragraph 7 of the guidance makes it clear that the "normal approach" is for the UT to re-make decisions of the FTT found to have been vitiated by errors of law:

"**7 Disposals of appeals in Upper Tribunal**

7.1 Where under section 12(1) of the 2007 Act… the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and , if it does so, must either remit the case to the First-tier Tribunal… or re-make the decision.

7.2 The Upper Tribunal is likely on each occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

…

(b) the nature or extent of any judicial finding fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

(emphasis added)

Should the UT have allowed the appeal at the Error of Law stage?

87. Mr Jones argued in the alternative that, having found errors of law by the FTT, the UT should simply have allowed the appeal outright at the Error of Law stage. In my view, this point is unsustainable.

88. The decisions of the UT as to the future conduct of the case were case management decisions within the discretion of the UT. Mr Jones was unable to point to any error of law by the UT in this regard which would justify an appellate court revisiting the case management decisions of the court below.

89. In any event, the UT's reasons for retaining the case and re-making the decision were clear, cogent and unimpeachable (see [56]-[63] of the Error of Law Judgment). First, there was no clear overall (or 'holistic') finding by the FTT as to whether the Appellant's private life in the UK was particularly strong [57]. Second, the UT was satisfied that the FTT's error of law in its approach to *Maslov* and s. 117B(5) had "infected" its *obiter* conclusion at [141] of its judgment. Third, the UT needed to address *directly* the question of whether the Appellant had a sufficiently strong private life to enable a flexible approach to be taken to s. 117B(5), as explained in *Rhuppiah* [58]. Fourth, there would be extensive preserved findings of fact and any further evidence would be limited [59].

(2) The scope of the UT's reconsideration in the Substantive Judgment

Fairness

90. Mr Jones argued that the decision by the UT to conduct a broad evaluation of the case and evidence was 'unfair'. If the Appellant was surprised at the breadth of the UT's analysis in its Substantive Judgment and, indeed, by the fact that the UT might even find against him following a re-making of the decision, he should not have been. The UT could not have been clearer in [56]-[63] of the Error of Law judgment as to both its intention to conduct a proper review of the matter and the need for it (see above).

91. The UT said at [58] that the FTT's findings of fact and factual evaluations should be preserved. But this did not mean that the UT would not or should not carry out the overall evaluation exercise which it clearly indicated was required on a re-making of the decision. Indeed, as is clear from the authorities, that an evaluation of the public interest balanced against Article 8 factors in the context of s. 117 necessarily involves a "wide-ranging exercise" (*NA (Pakistan)* at [32]) (see above).

92. Further, the UT was equally clear that the outcome of any re-making of the decision could not be guaranteed [57]:

> "…If the FTT properly directed itself to the authorities on the approach to private life in the UK, it cannot be said that it would have inevitably concluded the appeal in appellant's favour."

93. Mr Jones further complains that the Appellant thought he was limited in the further evidence which could be adduced. However, the UT gave directions including general liberty to the Appellant to file "updated evidence". It was a matter for the Appellant what further evidence he adduced. Mr Jones did not indicate what further evidence could have been adduced which would have made any difference.

94. For these reasons, I reject Mr Jones's argument that the UT somehow 'shackled' itself to a limited review following which there could only be one (favourable) outcome for his client.

95. Mr Jones further submitted that whilst it is within the UT's discretion to re-open conclusions of fact recorded by the FTT, it may do so only exceptionally. He relied upon statements in *LS (Uzbekistan) v SSHD* [2008] EWCA 909 that a Tribunal would typically only re-open findings in "exceptional cases on the basis of new evidence or new material" [23]. In the present case, there was no new evidence capable of impacting the FTT's retained findings of fact and the Appellant was unfairly not alerted to the UT's intention to re-examine material matters.

96. Mr Jones's reliance on *LS (Uzbekistan)* was misconceived. The case concerned the previous single-tier regime, *i.e.* before the 2007 Act introduced the two-tier system of the FTT and UT. Under the single-tier regime, reconsideration by the same body which had made the original decision was regarded as conceptually difficult and that is why the authorities made it clear that findings of fact should not be re-opened on appeal other than exceptionally (see [17] and [20]). Under s. 12(4) of the 2007 Act, however, Parliament has given the UT full power on a re-hearing to "make any decision which the FT could make if the FT were re-making the decision" and "make such findings of fact as it considers appropriate".

97. In my view, there is no error of law in the UT's Error of Law Judgment and Mr Jones's argument on fairness is without foundation.

(3) The rationality of the UT's review in the Substantive Judgment

Family and private life

98. Mr Jones submitted that the UT had re-opened and undermined the factual findings made by the FTT. In my view, however, on a fair reading of the Substantive Judgment, the UT simply did what it was obliged to do so, namely conduct a careful overall evaluative exercise on the basis of the key factual findings made by the FTT. In the course of so doing, the UT paid careful attention to the FTT's findings of fact and carefully rehearsed them.

99. At the beginning of its detailed analysis of family life at [32] to [37], the UT stated as follows:

> "[32] We bear in mind FTT's detailed findings under the sub-heading 'family situation' from [46] to [70] of the FTT decision. In particular, the FTT accepted Y's relationship with the appellant was "unusually strong" and their separation would lead to "serious adverse consequences on Y's development". E's mental health, her care for Y, and her career would all "seriously suffer". The impact upon E and Y would be "more than would necessarily be involved for any child or partner whose parent or partner was faced with deportation… The

> FTT accepted that it would be unduly harsh for E and Y to live in the UK without the appellant, and also unduly harsh for them to live in Zimbabwe…. Our assessment has taken all these matters into account. We accept that Exception 2 is met as at the date of the hearing before us. We now turn to consider whether there is evidence to support the claim that the disruption to family life goes over and above the level of undue harshness. We are obliged to consider this for s. 117C(6) and we do so now. " (emphasis added)

100. In the course of its detailed analysis of Appellant's private life at [38]-[55], the UT said as follows:

> "[38] The FTT found that Exception 1 was met and there is no reason to go behind this. Mr Jones acknowledged that the updated country background evidence on Zimbabwe is merely consistent with the FTT's findings, and… he made no application to resurrect reliance on article 3.
>
> [39] Although the FTT found that Exception 1 was met… the FTT were not prepared to find that the appellant's circumstances in Zimbabwe would be so serious that there would be a breach of article 3. It is relevant to consider the reason for this: … the appellant would be able to benefit from financial support from his parents… Although likely to be small, the appellant will have adequate financial resources to obviate destitution in Zimbabwe.
>
> [40] We bear in mind the FTT's findings, but must make a decision as to the nature and extent of the appellant's private life and weight to be attached to it for ourselves in the light of the FTT's error of law in its application of *Matsov* and *Rhuppiah* leading to the obiter conclusions from [141] onwards. We must consider the totality of the appellant's social ties, including his identity and relationships. …" (emphasis added)

101. I have carefully considered Mr Jones's numerous complaints about the Substantive Judgment set out in his 24-page 'speaking note' and lengthy schedules. Despite their prolixity, in my view these documents contain nothing which materially advances the Appellant's case. Rather, they bear witness to the essential weakness of the Appellant's case: namely, that it amounts, in truth, to no more than disagreement with the UT's evaluation of the facts and conclusions dressed up as suggestions of irrationality, perversity and errors of law.

102. In my view, the approach of the UT to the issues of family life and private life was orthodox and faithful to the key findings of the FTT. As the UT correctly found, the FTT's approach was vitiated by errors of law. In re-making the decision, the UT was duty-bound to make its own overall assessment of the facts in the light of the s.117C criteria. The fact that the UT came to a conclusion which differed from the outcome indicated by the FTT in the course of the FTT's flawed approach is not a matter of legitimate complaint.

Rehabilitation

103. Mr Jones submitted that the UT had misdirected itself as to the correct approach to the question of rehabilitation and, as a result, had failed to give sufficient weight to the exceptional progress which the Appellant had made in his rehabilitation. Mr Jones criticised the UT's reliance at [29] on the statement by Hamblen LJ in *Binbuga v SSHD* [2019] EWCA Civ 551 that "rehabilitation involves no more than returning an individual to the place society expects him to be…" which continued "… [and] will generally be of little or no material weight in the proportionality balance". He drew attention to *HA (Iraq) v. SSHD* [2021] 1 WLR 1327 in which Underhill LJ disagreed with the view of Hamblen LJ at [134] and [142].

104. However, *HA (Iraq)* does not assist him. As Underhill LJ made clear at [141]:

> "[141] …[T]he weight which [rehabilitation] will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as … 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". (emphasis added)

105. In my view, the UT was entitled to conclude at [29] and [30] that rehabilitation "carries little weight in the overall analysis" of the Appellant's case and that, in all the circumstances, the public interest in the Appellant's deportation remained "very strong".

Relevance of criminal offending and imprisonment

106. Mr Jones took issue with the UT's finding that "[the Appellant's] history of offending and imprisonment has weakened his integrative links and the overall strength of his private life" [48]. This was a theme mentioned several times in the section of the UT's judgment dealing with private life (see also [47] and [53]). Mr Jones submitted that this approach was flawed and irrational and contrary to *CI (Nigeria) v. SSHD.*

107. *CI (Nigeria)* involved an appellant (CI) who had arrived in the UK from Nigeria as a baby and lived in the UK for over 25 years. CI committed a series of criminal offences from aged 15 and aged 20 was sentenced to 28 months' detention in a Young Offender's Institution and to a further sentence of seven months for an assault whilst in prison. CI appealed against a decision to deport him on Article 8 grounds. In assessing CI's private life under Exception 1, the UT found that CI's pattern of offending and his periods in detention had "broken" his social and cultural ties to the UK.

108. The Court of Appeal (Ryder, Hickinbottom, Leggatt LJJ) held that UT was correct that social and cultural integration could be broken by criminal offending and imprisonment but gave no reasons for concluding that that was the effect in this case. It was difficult to see how it could be said on the evidence that the

appellant was no longer socially and culturally integrated in the UK and the case would be remitted to the UT for a re-hearing.

109. In the course of his leading judgment, Leggatt LJ gave this guidance regarding the relevance of criminal offending and imprisonment:

> *"Relevance of offending and imprisonment*
> [60] What then in principle is the relevance to the assessment of the offences committed by a "foreign criminal" and the period(s) of imprisonment to which he or she has been sentenced? In the first place, it is clear that the person facing deportation cannot place positive reliance on associations with criminals or pro-criminal groups to demonstrate social and cultural integration. …
>
> [61] Criminal offending and time spent in prison are also in principle relevant in so far as they indicate that the person concerned lacks (legitimate) social and cultural ties in the UK. Thus, a person who leads a criminal lifestyle, has no lawful employment and consorts with criminals or pro-criminal groups can be expected, by reason of those circumstances, to have fewer social relationships and areas of activity that are capable of attracting the protection of "private life". Periods of imprisonment represent time spent excluded from society during which the prisoner has little opportunity to develop social and cultural ties and which may weaken or sever previously established ties and make it harder to re-establish them or develop new ties (for example, by finding employment) upon release. In such ways criminal offending and consequent imprisonment may affect whether a person is socially and culturally integrated in the UK." (emphasis added)

110. The issue in *CI* was whether or not the UT's finding that CI's history of offending and imprisonment had "destroyed" his cultural and social integration in the UK. As explained above, absent any reasons for the stark UT finding, the matter should be remitted to the UT for a re-hearing. Leggatt LJ commented:

> "[62] … It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK."

111. The facts in the present case are materially different and the issue is different. The UT found that the Appellant's history of offending and imprisonment *weakened*, rather than destroyed, the Appellant's case on private life. And there was no lack of reasons given by the UT for this conclusion (see [53]-[54]). The points being made by the UT are obvious and unexceptional. In this regard, it is worth reprising the reasoning in the second half of paragraph [53]:

> "[53] …. When viewed holistically, we consider that the appellant's overall private life in the broadest sense has however been substantially weakened by his long history of criminal offending and imprisonment, and does not have "particularly strong features". To put

> it bluntly, the appellant has been in the UK for a lengthy period since the age of 11 and developed inter alia, social, cultural, family, relationship and employment ties, but he has been regularly involved in repeated criminal behaviour from the ages of 14 to 21, and was in prison from the ages of 21 to 26. He is now 28."

112. The UT concluded, at [54], on the above basis that the Appellant's private life should be given "little weight"; but even if wrong about this, in the overall balancing exercise, the UT would not have been minded to attach great weight to it. In my view, the UT's approach to the question of private life was consonant with the guidance in *CI* and is unimpeachable.

113. Mr Jones's contention that the UT, in considering the Appellant's private life, did not consider his family ties with his partner and child is unsustainable. The UT had already set out its analysis of the Appellant's family life earlier in its decision. There is no basis for suggesting that the UT, when assessing the Appellant's private life, had not had his family links in mind. In fact, at [55], the UT expressly proceeded on the basis the private life was of "hybrid nature, influenced as it is by family life".

114. Contrary to the Appellant's suggestion, the UT did not attach "little weight" to the Appellant's private life simply on the basis that his immigration status was always precarious. The UT had already decided that the concept of a "settled migrant" for the purpose of the guidance in *Maslov* does not require there to be ILR. The UT applied the necessary degree of flexibility in the Appellant's favour.

115. Mr Jones placed reliance upon *HA (Iraq)* in relation to the issue of "undue harshness". However, the Court of Appeal in *HA (Iraq)* held it was not satisfied that the UT had properly considered the degree of harshness that HA's family would suffer from his deportation and it was for this reason that it remitted the case for reconsideration. The same cannot be said of the present case where the UT gave careful consideration to the "unduly harsh" effect of the Appellant's deportation on E and Y (see above).

116. Further, the UT was entitled to weigh in the balance the fact that the Appellant's family life and relationship with E was created at a time when E knew that the Appellant was entitled to remain in the UK only temporarily and to her knowledge, therefore, the persistence of their family was precarious - and became even more precarious in the light of his criminal offending (see ECtHR in *Jeunesse v. The Netherlands* (2014) 60 EHRR 17; Sales J in *R(Nagre) v. SSHD* [2013] EWHC 720 (Admin); and *R(Agyarko) v. SSHD* [2017] UKSC 11, cited by Lord Wilson in *Rhuppiah* at [34] and [35]).

117. After setting out the wide-ranging factual enquiry, the UT conducted a careful balancing exercise for the purpose of section 117C(6) of the 2002 Act (see [56]-[58]). The balancing exercise included a careful assessment of the factors set out in *Boultif v Switzerland* [2001] 33 EHRR 50, as recently endorsed in *Unuane v United Kingdom* [2020] ECHR 832. After weighing competing considerations, at [59], the UT concluded that there were no "very compelling circumstances over

and above described in Exceptions 1 and 2". This was not the outcome which the Appellant had hoped for. But, in my judgment, this was a conclusion which the UT was fully entitled to reach.

Conclusion

118. In view, for the reasons set out above, the Appellant failed to show any error of law or irrationality on the part of the UT in either the Error of Law Judgment or Substantive Judgment. Further, the Appellant's submissions fell far short of establishing that the UT's overall conclusion fell outside the range of reasonable responses.

119. For these reasons, I would dismiss the appeal.

Lord Justice Phillips

120. I agree.

Lady Justice Macur

121. I also agree.