Neutral Citation Number: [2024] EWCA Civ 354

Case No: CA-2023-000488

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UTJJ Hanson and Mandalia
HU/18439/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2024

Before:

LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

KHADIJA AKHTAR	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Alasdair Mackenzie (instructed by **TRP Solicitors**) for the **Appellant**
Tom Tabori (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 12 March 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 16 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. Mrs Akhtar is now 62 and has lived in the United Kingdom since 1985. This is an appeal from a determination of the Upper Tribunal (Immigration and Asylum Chamber) ('the UT') ('determination 3'). As will become clear, it was the UT, rather than the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT') which heard the relevant evidence and found the relevant facts.

2. I considered the application for permission to appeal on the papers. I refused permission to appeal on all grounds, except one. The application for permission to appeal was then listed for hearing on that ground. Having heard the arguments of counsel for Mrs Akhtar and for the Secretary of State, I gave permission to appeal on that one ground of appeal. That ground of appeal was that the UT had failed to consider all the relevant circumstances when reaching its conclusions under section 117C(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

3. As at that oral hearing, Mrs Akhtar was represented on the appeal by Mr Mackenzie, and the Secretary of State by Mr Tabori. I thank both for their careful and helpful written and oral submissions.

4. Paragraph references are to determination 3 unless I say otherwise.

5. For the reasons given in this judgment I would dismiss this appeal.

The facts

6. Mrs Akhtar was born in Pakistan in 1961. The Secretary of State decided, in a decision letter dated 6 September 2018 ('the Decision'), that Mrs Akhtar should be deported to Pakistan. Mrs Akhtar entered the United Kingdom in 1985 and married her husband ('H') that year, when she was 23. She was given indefinite leave to remain ('ILR') in June 2000. Her passports showed that she visited Pakistan in 2002, 2003, 2005, 2013 and 2015. Mrs Akhtar and H have 5 adult children. They are all British citizens. I say more about the difficulties of one of Mrs Akhtar's sons, Altaf, in paragraph 53, below.

7. Mrs Akhtar and H were convicted of criminal offences on 21 April 2016. They were sentenced, respectively, to a total of 4 years and three months' imprisonment and to 14 years' imprisonment (reduced to 11 on appeal) for their roles in a substantial and long-running mortgage fraud.

8. The offences of which Mrs Akhtar was convicted were cheating the public revenue between 1 January 2004 and 26 September 2012, entering into an arrangement to facilitate the acquisition, retention, use or control of criminal property and two counts of conspiracy to obtain a money transfer by deception. For those offences she was sentenced, respectively, to 30 months' imprisonment, 30 months' imprisonment, concurrent, 21 months' imprisonment, consecutive, and 21 months' imprisonment, concurrent.

9. The sentencing judge described the offences as 'a sophisticated and organised series of frauds'. The fraud lasted nearly ten years and involved deceiving mortgage lenders. Many bank accounts and life policies were used to launder the money. H, also known as 'Saint "Pir" Pandiraman', was, in the words of the sentencing judge, 'a spiritual leader, healer and guide'. The money came 'in part through donations given in the context of spiritual leadership', from failure to pay tax which was due, and from repeated deception of lenders. H used the money to amass 54 residential and commercial properties, and substantial homes for himself and his family, with 'lavish furnishings'. Count 7 was committed after Mrs Akhtar's arrest, and when she was on bail.

10. Mrs Akhtar appealed against the Decision to the F-tT. The F-tT dismissed her appeal in determination 1. After an application for judicial review, the UT set aside determination 1, in a determination promulgated on 29 July 2020 ('determination 2'). The UT rightly concluded that the F-tT had erred in law in thinking that Mrs Akhtar had received one sentence of more than four years' imprisonment and had therefore applied the wrong statutory test to her case (see section 117D(4)(b) of the 2002 Act, paragraph 14, below). The UT decided in determination 2 that there should be a further hearing to enable the UT to assess the effect of the evidence and to strike the necessary balance.

The legal framework

11. It may be easier for the reader to understand determination 3 and the arguments if I describe the relevant statutory provisions and the relevant authorities now.

Part 5A of the Nationality, Immigration and Asylum Act 2002

12. Part 5A of the 2002 Act was inserted by the Immigration Act 2014. It applies when a court or tribunal decides whether a decision under the Immigration Acts is a breach of article 8 and therefore would be unlawful under section 6 of the Human Rights Act 1998 ('the HRA') (section 117A(1)). In considering the public interest question, a 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' (section 117A(2)). The 'public interest question' is the question whether an interference with article 8 is justified under article 8(2) (section 117A(3)). 'Foreign criminal' is defined in section 117D(2). So far as is relevant, a 'foreign criminal' is a person who is not a British citizen and who has been convicted in the United Kingdom of an offence and has been sentenced to at least 12 months' imprisonment.

13. Six factors are listed in section 117B. Four are relevant, or potentially relevant, in this case.

    i. The maintenance of effective immigration controls is in the public interest.
    ii. It is in the public interest that people who seek to enter and stay in the United Kingdom are able to speak English because people who can speak English are less likely to be a burden on taxpayers and are better able to integrate into society.
    iii. For similar reasons, it is in the public interest that people who seek to enter and stay in the United Kingdom are financially independent.

iv. Little weight should be given to a private life established in the United Kingdom at a time when a person's immigration status is precarious. The premise of the discussion of the meaning of the word 'precarious' in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 is that a person's immigration status is not precarious if she has ILR. It follows that this factor is of marginal relevance in this case, as Mrs Akhtar has had ILR for many years.

14. Section 117C(1) provides that the deportation of foreign criminals is in the public interest. The more serious the offence a foreign criminal has committed, the greater is the public interest in his deportation (section 117C(2)). If a foreign criminal has not been sentenced to a period of imprisonment of four years or more, the public interest requires his deportation unless Exception 1 or Exception 2 applies (section 117C(3)). Such an offender is often described in the authorities as 'a medium offender'. If an offender has been sentenced to a period of imprisonment of at least four years, the public interest requires his deportation unless there are 'very compelling circumstances over and above those described in Exceptions 1 and 2' (section 117C(6)). Section 117D(4)(b) makes clear that a reference to a person who has been sentenced to a particular period of imprisonment does not include a person who has received 'consecutive sentences amounting in aggregate to that length of time'.

15. Exception 1 applies where C has been lawfully resident in the United Kingdom for most of her life, is socially and culturally integrated in the United Kingdom and there would be very significant obstacles to her integration into the country to which it is proposed that she be deported (section 117C(4)).

16. 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' (section 117B(5)). 'Qualifying child' and 'qualifying partner' are defined in section 117D. The former is a child who is a British citizen and has lived in the United Kingdom for a continuous period of seven years or more. The latter is a partner who is a British citizen or who is settled in the United Kingdom (within the meaning of section 33(2A) of the Immigration Act 1971).

17. Section 117C(6) provides that 'In the case of a foreign criminal who has been sentenced to a period 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'. I will refer to such an offender as a 'serious offender'. Section 117C(7) provides that 'The considerations in subsections (1)-(6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted'.

The relevant authorities on Part 5A

18. Although Part 5A has been considered recently by the Supreme Court (see paragraphs 27-39, below) it is convenient to start with the judgment of Jackson LJ in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207. Four people appealed to the F-tT against decisions of the Secretary of State to make deportation orders. The F-tT allowed their appeals. The Secretary of State appealed to the UT. The UT allowed some of the appeals and dismissed one. There were further appeals to this court. For simplicity Jackson LJ referred to those who had been appellants in the F-tT as 'the claimants', and I will do the same. When the F-tT decided one of the appeals, Part 5A was not in force, but the relevant provisions of the Immigration Rules (HC 395 as amended) ('the Rules') were in similar terms. Jackson LJ said (paragraph 3) that the new legislative regime was relevant in two of the appeals, and that both regimes were relevant in the fourth.

19. This court decided (paragraph 25) that the failure of Part 5A to make any provision by which people who had been sentenced to terms of between 12 months and four years (that is, medium offenders) who were outside Exceptions 1 and 2 could escape deportation if there were 'very compelling circumstances over and above those described in Exceptions 1 and 2' was 'an obvious drafting error'. I will refer to such foreign criminals as 'medium offenders'. Parliament could not have intended to prevent medium offenders from advancing any article 8 claim other than the claims described in Exceptions 1 and 2. Section 117C(6) should therefore be read as if it also applied to medium offenders (paragraph 27). The Secretary of State supported that approach (paragraph 25). Part 5A was intended to be compatible with article 8; any other reading would be incompatible with article 8 (paragraph 26).

20. In paragraphs 28-33, Jackson LJ considered the effect and meaning of the 'very compelling circumstances' test in section 117C(6). He made seven broad points.

21. First, a foreign criminal is not 'altogether disentitled' from relying on matters falling within the circumstances described in the Exceptions when he invokes 'very compelling circumstances over and above' those circumstances. He relied on his reasoning about the Rules in paragraphs 28-30 of *JZ (Zambia) v Secretary of State for the Home Department* [2016] EWCA Civ 116; [2016] Imm AR 781, which he had referred to in paragraphs 19-21 of his judgment in *NA (Pakistan)*. A foreign criminal can rely on such matters, but 'he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 …or features falling outside those circumstances …which made his claim based on article 8 especially strong' (paragraph 29).

22. Second, if a serious offender could point to circumstances corresponding to those described in Exceptions 1 and 2, but could only just succeed in such an argument, it would not be possible to describe those circumstances as 'very compelling'.

23. On the other hand, third, if he could show 'factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an article 8 claim,

going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances…", whether taken by themselves or in conjunction with other factors relevant to the application of article 8' (paragraph 30). Any other interpretation of that phrase would lead to a violation of article 8 in some cases. To illustrate the point, he contrasted the cases of an offender who was 37 and came to the United Kingdom when he was 18 and satisfied section 117C(4)(a), a serious offender who was 80 and came here when he was six months old. The former's claim under article 8 was 'likely to be very much weaker' than the latter's. His circumstances 'might well be highly relevant' to the test in section 117C(6) (paragraph 31).

24. Fourth, if all a medium offender could advance was a 'near miss' case which fell short of Exception 1 and Exception 2, he would not meet the 'very compelling circumstances' test (paragraph 32). 'He would need to have a far stronger case than that by reference to interests protected by article 8 to bring himself within that fallback protection'.

25. Fifth, he might, nevertheless, 'in principle' be able to say that 'features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2'. The decision maker must look at all the factors together and decide whether 'they are sufficiently compelling to outweigh the high public interest in deportation' (paragraph 32).

26. Sixth, although there is no requirement to show an exceptional case, 'it inexorably follows from the statutory scheme' that such cases 'will be rare. The commonplace incidents of family life, such as ageing parents in poor health, or the natural love between parents and children, will not be sufficient' (paragraph 33).

27. Seventh, Part 5A and the rules are a complete code, and are a structure for decisions in article 8 cases (paragraph 35). In paragraphs 36-37, he suggested how the cases of a medium and of a serious offender could be approached. In the latter case, 'it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2'. The Exceptions describe 'particularly significant factors' in relation, respectively, to private and family life. They may therefore provide 'a helpful basis on which an assessment can be made whether there are 'very compelling circumstances…''. It would then be necessary to see whether any of the factors with the Exceptions 'are of such force, whether by themselves, or taken in conjunction with any other relevant factors not covered by the circumstances described [in the Exceptions], as to satisfy section 117C(6)'.

28. In paragraph 58, he considered the appeal in *NA (Pakistan)*. NA was a serious offender who did not meet either Exception. The UT's approach was that NA could not rely on any matters which were relevant to the application of the Exceptions to argue that there

were 'very compelling circumstances…' Jackson LJ held that the UT had erred in law. The Secretary of State accepted that that was so, but argued that, despite misdirecting itself, the UT had nevertheless taken those matters into account. Jackson LJ rejected that argument. He held, nevertheless, that, the error of law was immaterial, because the UT had, in a later paragraph of its determination, assessed the proportionality of NA's deportation globally, and decided that it was proportionate.

HA (Iraq) v Secretary of State for the Home Department

29. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22; [2022] 1 WLR 3784 the Supreme Court dismissed the Secretary of State's appeal against a decision of this court. The issue in *HA (Iraq)* was whether the UT had, in three appeals, erred in law in its application of the 'unduly harsh' test in section 117B(5). Lord Hamblen, giving the judgment of the Supreme Court, recorded in paragraph 4 that it was common ground that the effect of *NA (Pakistan)* was that a medium offender who cannot satisfy the unduly harsh test can, nevertheless, rely on the 'very compelling circumstances' test. Lord Hamblen assumed, but did not decide, that *NA (Pakistan)* was in that respect correct.

30. He cited paragraphs 22-23 and 27 of the judgment of Lord Carnwath in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273. He rejected the Secretary of State's argument that the test involved a notional comparator for six reasons (paragraphs 31-39). The comparison inherent in paragraph 23 of *KO (Nigeria)* is between 'the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which is connoted by the requirement of "unduly" harsh' (paragraph 31).

31. In paragraph 32, he noted that, in paragraph 27 of *KO (Nigeria)*, Lord Carnwath had endorsed the UT's formula in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC); [2015] INLR 563 (at paragraph 46). He said, in paragraphs 41 and 43, that despite the fact that it was a gloss on the statutory language, the best approach was to follow the guidance in *MK (Sierra Leone)*. Having given that self-direction, the tribunal should then 'make an informed assessment of the effect of deportation on the qualifying child or partner and make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it' (paragraph 44). That approach neither involved lowering the threshold approved in *KO (Nigeria),* nor reinstating any link with the seriousness of the offending (paragraph 45).

32. He considered the very compelling circumstances test in paragraphs 46-71. When neither of the Exceptions applies, a full proportionality assessment is required. The starting point is that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2' (paragraph 47). This test is a 'safety valve … for those exceptional cases … 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' (paragraph 48). This could also be expressed as 'a very strong claim indeed' (paragraph 49).

33. He returned to *NA (Pakistan)* in paragraphs 50, citing paragraphs 30, 32 and 33 of the judgment of Jackson LJ in that case.

34. Lord Hamblen added, in paragraph 51, that all the relevant circumstances of the case must be weighed and considered against the strong public interest in deportation. He listed ten relevant factors identified in two decisions of the European Court of Human Rights ('the ECtHR'). Those which are material in this case are

i. the nature and seriousness of the offence,
ii. the length of the applicant's stay in the United Kingdom,
iii. the time which has elapsed since the offence and the applicant's conduct since then,
iv. the nationalities of the people involved,
v. the applicant's family situation; for example, the length of the marriage, and other factors showing the effectiveness of the couple's family life,
vi. whether there are children of the marriage, and, if so, their ages,
vii. the seriousness of any difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled, and
viii. the solidity of social, cultural and family ties with the host country and with the country of destination.

35. In paragraphs 53-69 he considered rehabilitation. Rehabilitation is a relevant factor, as the decisions of the ECtHR and domestic courts show. The weight to be given to rehabilitation was for the fact-finding tribunal. Where the evidence showed no more than that the appellant had not committed any further offences, that was 'likely to be of little or no material weight'. If, by contrast, 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; but it will rarely be of 'great weight'. Moreover, tribunals 'will be properly 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…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'. Lord Hamblen made a caveat in paragraph 59 which is not relevant in this case.

36. Lord Hamblen considered the seriousness of the offence in paragraphs 60-71. Section 117C(2) makes clear that the tribunal has to take that into account when making a proportionality assessment for the purposes of section 117C(6). This was consistent with the decisions of the ECtHR. The length of the sentence is not the sole determinant of the seriousness of the offence, as the length of the sentence will reflect personal factors relating to the offender, such as mitigating factors, most notably an early guilty plea, and not simply an assessment of the seriousness of the offence. If a tribunal has no information about the offence apart from the length of the sentence, then that is the only guide to the seriousness of the offence. Even when a tribunal has the sentencing remarks, it should only depart from sentence length as the measure of the seriousness

of the offence if the sentencing remarks explain what other factors influenced the length of the sentence, and how they did so, for example the credit given for a guilty plea. While care must be taken to avoid double counting, there were cases in which it might be appropriate to give weight to the nature of the offence as well as the sentence (paragraphs 70 and 71).

37. Before considering the individual appeals, Lord Hamblen reminded himself, in paragraph 72, of the caution with which an appellate court should approach arguments that decisions of specialist fact finding tribunals should be set aside. He made three points.

i. They alone are judges of the facts. 'Their decisions should be respected unless it is quite clear they have misdirected themselves in law'. Appellate courts should not 'rush to find misdirections'.
ii. Where a tribunal has not mentioned a relevant point, the court should be slow to infer that it has not been taken into account.
iii. A court should exercise restraint about a tribunal's reasons, and should not assume that it has misdirected itself just because it has not set out fully every step in its reasoning.

Yalcin v Secretary of State for the Home Department

38. In *Yalcin v Secretary of State for the Home Department* [2024] EWCA Civ 74 this court considered the case of a Turkish citizen who was eventually given ILR in 2013 but who pleaded guilty in 2016 to possessing a Glock 17 automatic pistol, which is a prohibited weapon. The length of his sentence (5 years and 4 months) meant that he was a serious offender. His spouse and two sons were British citizens. He was separated from his wife, but, after serving his sentence, lived nearby and helped with the two sons, one of whom had 'serious difficulties'. The Secretary of State decided to deport him. He made asylum and human rights claims, which the Secretary of State refused. The F-tT dismissed the appeal on asylum grounds but allowed it on human rights grounds. The Secretary of State appealed to the UT. The UT decided that the F-tT's decision should be set aside for error of law, decided to re-make the decision, and, having heard evidence, dismissed the appeal.

39. The issue on the appeal to this court was whether the UT had erred in law in detecting an error of law in the F-tT's decision. The UT held, in short, that the F-tT had not expressly followed the structure of section 117C. That was an error of substance, not of form, because it had led the F-tT to ignore relevant factors and to give weight to irrelevant factors, and not to give enough weight to the public interest in deportation. In order to consider whether there were very compelling circumstances over and above those stated in the exceptions, the F-tT should expressly have considered factors relevant to the exceptions, as that exercise was necessary in order to inform a decision about whether there were very compelling circumstances over and above those circumstances.

40. Underhill LJ, giving the judgment of this court, noted that the Secretary of State did not argue on the appeal to this court that the F-tT's decision was perverse (paragraph 49). He quoted paragraph 72 of *HA (Iraq)* (see paragraph 37, above). In paragraph 54, he

said that since Exceptions 1 and 2 'are a "self-contained" short-cut, they have no role to play where a full proportionality assessment is required…'. The 'complicating factor', he said, is that section 117C(6) provides that the public interest requires deportation unless 'there are very compelling circumstances over and above those described in Exceptions 1 and 2'.

41. Underhill LJ then considered paragraphs 28-32 and 37 of *NA (Pakistan)*. He summarised the reasoning in paragraph 57. In a case in which an appellant relies on circumstances specified in the Exceptions, he must show 'something substantially more than the minimum …necessary to qualify' under the relevant Exception, that is, an 'especially strong' article 8 case. That can be because the circumstance in question 'is present to a degree which is "well beyond" what would be sufficient to establish a "bare case" or …because it is complemented by other relevant circumstances, or because of a combination of both'. This was not surprising, at least in the case of a serious offender. Even without the 'over and above' requirement, it was inherent in the structure of section 117C that a serious offender has to meet a higher threshold than a medium offender.

42. The UT in *Yalcin* had thought that *NA (Pakistan)* required the F-tT expressly to consider, and to make findings about, each of the Exceptions, and then to identify 'something more' which meant that the higher threshold in section 117C(6) was met. The UT considered that the F-tT erred in law because it did not do so (paragraph 59). Underhill LJ said that it was not 'necessary as a matter of law for a tribunal in a serious offender case to make explicit findings about the Exceptions' (paragraph 60).

43. Thus, in a case in which the issue is the impact on members of the appellant's family, if a tribunal expressly finds that section 117C(6) is met, and 'has fully identified the particular facts relied on, it adds nothing for it to spell out that the impact is unduly harsh, since that is logically inherent in the overall finding' (paragraph 61).

44. It is also 'logically inherent in such a case' that the tribunal will have found the "something more" which is necessary to satisfy section 117C(6). In principle it is clearer if the tribunal specifically identifies the 'something more', but that is not always straightforward. There are many factors in a proportionality assessment. A tribunal must identify the factors to which it has given significant weight, and it is desirable for it to indicate their relative importance; but there are limits to what is possible. He added that '… the factors are incommensurable and calibrating their relative weights will often be an artificial exercise'. It was too much to expect tribunals 'to decide, and specify, in every case whether the something more consists of the Exception-specific circumstances being present to an elevated degree, or of some other circumstance or circumstances, or a combination of the two'. Such specificity may be necessary in some cases, but there was no universal rule. 'We should not make decision-making in this area more complicated than it regrettably already is' (paragraph 62).

45. He did not consider that that approach was inconsistent with paragraph 37 of *NA (Pakistan)* (see paragraph 27, above). Paragraph 37 did not state a general rule. Nor was

it a consequence of the requirement in section 117C(6) that 'a tribunal is in every case obliged to make an explicit and particularised finding as to how the something more is made up' (paragraph 63). Counsel had referred to paragraph 60 of his judgment in *HA (Iraq)* in which he had said that a tribunal was not required to 'cudgel its brains' into a definitive finding whether one of the Exceptions was met if going directly to the proportionality assessment required by article 8 'produces a clear answer in the appellant's favour' (paragraph 64). This did not deal with 'exactly the same point', and was not the subject of argument in that case, but the 'spirit' was the same.

46. He said, in paragraph 65, that he did not disagree with paragraph 37 of *NA (Pakistan)*. He was only concerned with whether there was a rule that a tribunal must explicitly address the two points identified by the UT in *Yalcin*. There was no such rule. In paragraph 67 he said that he found it difficult to decide whether, in substance, the F-tT had not understood the height of the threshold in section 117C(6). '[T]he focus should be on the way the judge performed the essence of the task required'. He was 'not able to say…that it is quite clear that the F-tT misdirected itself'.

Determination 3

47. After a two-day hearing, the UT dismissed Mrs Akhtar's appeal in determination 3, which was promulgated on 22 October 2022. The UT later dismissed Mrs Akhtar's application for permission to appeal.

48. The UT allowed both parties to adduce further evidence (paragraphs 5 and 6). The hearing was adjourned once for that purpose. About a week before the date listed for the adjourned hearing, Mrs Akhtar's solicitors withdrew, because they were professionally embarrassed. Mrs Akhtar applied for an adjournment because a second firm of solicitors which was willing to act for Mrs Akhtar was not able to prepare for the hearing.

49. The UT refused the application before the listed hearing date, and refused it again when it was renewed at the hearing, for the reasons it gave in paragraphs 10 and 11. It noted, among other things, that there was no suggestion that Mrs Akhtar needed any more evidence. The UT had a skeleton argument settled by counsel for the previously adjourned hearing. The UT referred to the legal framework, as set out in paragraphs 5-17 of that skeleton argument, at paragraph 54. Mr Mackenzie was the author of that skeleton argument. It was provided to this court in the course of the hearing of this appeal and we have read it.

50. Mrs Akhtar attended the hearing, with all the members of her family who had made witness statements. She was 'ably assisted' by one of her sons, who was allowed to address the UT on her behalf (paragraph 9). The UT described the evidence from the lay witnesses in paragraphs 17-44, with a table showing who had made witness statements, and their dates. There were witness statements from ten people. Mrs Akhtar gave evidence with the help of an Urdu interpreter. The four other witnesses who gave oral evidence gave it in English. The UT summarised the expert evidence in paragraphs 46-53. There were three reports from a consultant psychiatrist about Mrs Akhtar and a report from an occupational therapist, which dealt with the needs of Altaf.

51. Mrs Akhtar was said to suffer from depression and obsessive compulsive disorder. The UT recorded an important qualification to the evidence of the psychiatrist, which was prompted by the disclosure to him that the sentencing judge had said that Mrs Akhtar had deliberately exaggerated her symptoms in order to persuade the court that she was unfit to plead (paragraph 49). He had not known this when he wrote his first two reports and conceded in the third that he could not rule out exaggeration, but thought it was highly unlikely.

52. His evidence was that if Mrs Akhtar had family support in Pakistan that would help. If she were to return, her symptoms, in all probability, would get worse. There were only two doctors in Jhelum who had minor specialist qualifications in psychiatry. Her suicide risk would increase 'manyfold' if she were to be deported to Pakistan (paragraph 50).

53. The UT recorded the evidence of an occupational therapist in paragraphs 51-53. Altaf was able to do many tasks for himself and had no obvious organic cognitive impairment which would affect his ability to do everyday tasks, although he could not stand unaided. The UT summarised her conclusions in paragraph 52. Altaf relied very heavily on Mrs Akhtar although much of that was learned behaviour. Her deportation would have a harmful effect on him.

54. The UT summarised section 32 of the UK Borders Act 2007 in paragraph 57. It then considered Mrs Akhtar's Convention rights and Part 5A of the 2002 Act in paragraphs 58-61, before considering Exceptions 1 and 2, in paragraphs 62-87, and 99-91, respectively. It considered section 117C(6) in paragraphs 92-99.

55. The UT accepted that Mrs Akhtar had family life with H. There were 'more than the normal emotional ties' between her and Altaf, in particular. She enjoyed family life with H and with Altaf. Article 8 was 'engaged'. In so far as her relationship with her other children could not be described as 'family life', it pointed to 'a strong private life'. The central issue was whether the Decision was proportionate to what, it was not in dispute, was a legitimate aim (paragraph 59).

56. The UT held that Mrs Akhtar was a medium offender. It considered, first, whether the Exceptions applied so as to make her 'exempt from deportation'. It made detailed findings in relation to each Exception, and held that neither applied.

57. She had been in the United Kingdom for most of her life, but she was not socially and culturally integrated into the United Kingdom (paragraphs 63-68). It is clear from the UT's relevant findings that, on the evidence, that was not a marginal conclusion. Mrs Akhtar had not begun to learn English until she was in prison, and gave evidence at the UT with the help of an interpreter. She was only integrated into her small religious and cultural community, but the crimes in which she was willingly and knowingly involved, and from which she had benefited significantly, were in part financed by donations from that very community. There would not be very significant obstacles to her reintegration in Pakistan (paragraphs 69-87). She would be able, 'within a reasonable period to find her feet and exist and have a meaningful life in Pakistan'. Nothing would prevent her from engaging fully with life there. She would encounter 'some hardship', but 'we do not consider that hardship to approach the level of severity required by section 117C(4)(iii)' (paragraph 87).

58. H was due to be released from prison in 2024. Mrs Akhtar had a 'genuine and subsisting relationship' with H. The UT did not expressly find that H could not move to Pakistan, but my reading of paragraph 90, and its reference to keeping in contact by letter and telephone, is that, by implication, the UT accepted that he could or would not move to Pakistan. The effect of her deportation on H, nevertheless, would not be 'unduly harsh'. They had been separated since their imprisonment. She could keep in contact with him as she had done during his imprisonment (by letters and telephone calls). 'On the very limited evidence before us, [Mrs Akhtar] is a very long way indeed from establishing that the consequences for [H] would be of a sufficiently harsh degree to outweigh the public interest in [her] deportation…' (paragraph 90).

59. The UT considered section 117C(6) in paragraphs 92-99. Mrs Akhtar had failed to meet the statutory exceptions 'in every respect'. In order to 'avoid deportation on Article 8 grounds' she had to show that there are 'very compelling circumstances over and above those in the exceptions to deportation, which suffice to outweigh the public interest in deportation…' (paragraph 92). In paragraph 93, the UT said that the test in section 117C(6) is a proportionality test. The UT had to balance Mrs Akhtar's rights against the public interest in her deportation. 'The scales are nevertheless weighted heavily in favour of deportation'. Although she was not a serious offender, there was 'a cogent and strong interest in her deportation'.

60. Against that interest, the UT was prepared to accept that Mrs Akhtar had 'a strong private and family life' in the United Kingdom. She had a strong relationship with all her children. The focus of the evidence was the impact of her deportation on the care she gave to Altaf (paragraph 94). The UT summarised the evidence about that issue. The UT had no doubt that, as during Mrs Akhtar's imprisonment, the family would rally round to care for him if she were deported, even if it would cause the family some stress and difficulty.

61. The UT took into account Mrs Akhtar's expression of remorse, and that there was no evidence of any further offending. The UT also took into accommodation two letters, and evidence about Mrs Akhtar's activities at the Darbar Unique Centre (paragraph 99). The UT did not say much about this, referring, for more detail, to the evidence of Mr Sagwhat Ul-Haq (paragraph 66). Mrs Akhtar was said to have a 'very significant role' in what, it appears, is a community centre in Stoke on Trent. She was involved in its activities before and after her imprisonment, and was seen as 'a backbone of the "lady's spiritual gatherings" at the centre'.

62. Its conclusion, in paragraph 100, was that Mrs Akhtar's 'protected rights, whether considered collectively with rights of others that she has formed associations with, or individually, are not in our judgment such as to outweigh the public interest in [her] removal having regard to the policy of [the Secretary of State] as expressed in [the Rules] and the 2002 Act. We are satisfied that the decision to refuse leave to remain is not disproportionate to the legitimate aim of immigration control and we are obliged therefore, to dismiss his [sic] appeal on Article 8 grounds'.

The submissions

63. Mr Mackenzie accepted that the UT had not misdirected itself. But it had not given itself an express, correct, direction in law. The fact that the UT had not referred at all, for example, to Mrs Akhtar's long residence in the United Kingdom in its consideration of section 117C(6) showed that it had not taken it into account in that part of determination 3.

64. His submission, 'in a nutshell', was that the UT's full assessment of proportionality did not take into account all relevant matters. Exceptions 1 and 2 were very much 'all or nothing'. They either applied or they did not. There was no scope to give weight to matters under either if they 'missed the target', yet there was scope for a wide range of different fact patterns. The Exceptions were short-cuts which bypass the need for a full assessment of proportionality. Even though she did not meet either Exception, there were points in her favour which were relevant to each. He referred to the UT's error of law described in paragraph 58 of *NA (Pakistan)* (see paragraph 28, above). Those points might be given weight under section 117C(6). Mrs Akhtar's complaint was that the UT did not take account of all the facts 'in combination'. Nor did the UT identify which factors it considered were not material, and why, or to which factors it had given weight.

65. The UT considered various factors in relation to Exceptions 1 and 2, but did not refer to any of them when it considered whether there were very compelling circumstances. The UT did not recognise that those factors could be relevant to whether there were very compelling circumstances. The tests which apply under Exceptions 1 and 2 are different from the tests which apply under section 117C(6). For example, there could be a significant obstacle to integration which, while it did not meet the test for Exception 1, could nevertheless be relevant to section 117C(6). He drew our attention to a number of potentially relevant factors which were identified by the UT when it considered the Exceptions.

66. Contrary to Mr Tabori's argument, paragraph 92 of determination 3 (see paragraph 59, above) was not sufficient. It did not show that the UT had done what, in practice, it was required to do. The UT had left a letter from Mrs Akhtar's probation officer out of account. *HA (Iraq)* showed that this was relevant. Mr Mackenzie listed six factors to which, he submitted, the UT should have referred in its consideration of section 117C(6) and did not. Phillips LJ asked him whether his submission was that the UT had forgotten all the material which it had analysed under the two Exceptions. Mr Mackenzie replied that it was necessary to analyse it in a different context. Nothing in determination 3 showed that the UT had recognised that that material was relevant to section 117C(6).

67. Mr Mackenzie was asked during the hearing of the appeal how the case was put to the UT. Paragraphs 40-58 of his skeleton argument to the UT make submissions about Exceptions 1 and 2. There are four paragraphs of submissions about section 117C(6). He referred to *NA (Pakistan)* for the proposition that Mrs Akhtar could rely on that provision even though she was a medium offender, and to the statements in paragraphs 29 and 32 of that decision (see paragraphs 21 and 24, above). He submitted that the family life of the whole family must be taken into account. There can be family life

between an adult child and his parent. A relationship could qualify as private life, even if it did not amount to family life. The key submissions, in paragraph 63 of that skeleton argument, relied on Mrs Akhtar's family or strong private life with Altaf and with her other children. She was also entitled to rely on the other matters set out under the Exceptions: her mental and physical health, her involvement in the Durbar Unique Centre, and her long residence in the United Kingdom. She also relied on matters relating to her return to Pakistan, which were not accepted by the UT in its findings.

68. Mr Tabori argued the effect of *Yalcin* is that a tribunal is not required to specify what weight it has given to different factors. *Yalcin* was a case about a serious offender. His primary point was that the UT in this case was not required, when considering section 117C(6), to say it had given weight to matters which it had already considered under the Exceptions. The UT had not made the error in this case which the UT had made in *NA (Pakistan)*. Mr Mackenzie had made a key concession by accepting that the UT only had to mention crucial factors; that was what the UT had done. The UT was not obliged to consider everything. This was not a reasons challenge. The effect of the decision in *Yalcin* was that the UT did not need expressly to consider the Exceptions when it dealt with section 117C(6). Determination 3 had to be read as a whole. He referred to paragraphs 62-65 of *Yalcin* (see paragraphs 4-46, above). He also referred to the relevant paragraphs of *NA (Pakistan)* (see paragraphs 21-28, above).

69. He agreed with Phillips LJ's suggestion that circumstances could not be 'over and above' the circumstances in the Exceptions if, on analysis, they were 'beneath and below' them. All the facts are relevant if they fall short of meeting the Exceptions, but there must be 'something more'. Paragraph 92 showed that the UT had taken its earlier reasoning into account; it was not, however, required to re-visit that reasoning when it considered section 117C(6). He also relied on paragraph 94 of determination 3. The UT had to assess the proportionality of Mrs Akhtar's deportation and was not required to repeat material which it had already considered.

70. There was no positive evidence of rehabilitation, and the UT did not err by not referring to Mrs Akhtar's low risk of re-offending. Even if the UT had erred in that respect, any such error was immaterial. The low risk of re-offending was not a circumstance which could bring the case within section 117C(6).

Discussion

71. The first point is that, as Mr Mackenzie accepted, the UT did not expressly misdirect itself. Lord Hamblen's remarks in paragraph 72 of *HA (Iraq)* apply (see paragraph 37, above). In particular, the UT was referred by paragraph 60 of Mr Mackenzie's skeleton to paragraphs 24-27, 29 and 32 of *NA (Pakistan)* (see paragraphs 19, 21 and 25, above). Mr Mackenzie submitted in his skeleton argument for this appeal that the approach of the UT in this case was similar to that of the UT in *NA (Pakistan)*. There is an important difference, however. The UT in that case expressly directed itself that it could not take into account, in its consideration of section 117C(6), the matters relevant to the two Exceptions. The UT in this case did not misdirect itself in that way. It understood that although Mrs Akhtar was a medium offender, she could nevertheless take advantage of

section 117C(6). I also consider that it is clear from the language of the relevant paragraphs of determination 3 that the UT understood that in considering whether there were very compelling circumstances, it was bringing everything into account. The UT was not required mechanically to list everything again in order to show that it had done so.

72. There are five further points.

i. In paragraphs 62-91 the UT considered, and made findings about, Exceptions 1 and 2. It held that Mrs Akhtar did not meet the terms of those Exceptions by some, or by a great, distance (see paragraphs 57 and 58, above). The UT's summary was that she 'failed to meet the statutory exceptions…in every respect' (paragraph 92).

ii. The UT stated the statutory test correctly in paragraph 92.

iii. That statutory test in terms brings in 'the circumstances described in Exceptions 1 and 2', and expressly requires a decision-maker to look for 'circumstances' which are 'over and above' those circumstances. The UT did precisely that.

iv. The UT also clearly understood that, once it had considered the Exceptions, section 117C(6) required it to assess the proportionality of Mrs Akhtar's deportation (see paragraph 93 of determination 3, paragraph 59, above). It had, therefore, understood the basic structure of section 117C. I also consider that it is clear that the UT followed that structure, which is encapsulated in the language of section 117C(6), which the UT quoted in paragraph 92 (see paragraph 59, above; and see paragraph 100 of determination 3: paragraph 62, above).

v. I cannot accept that, in that assessment of proportionality, the UT is to be taken to have forgotten all the matters which it had so carefully analysed when considering the Exceptions.

73. Against that background, I do not accept that the UT was required to list, when considering whether there were very compelling circumstances, all the factors it had taken into account when considering the Exceptions, still less that it was required to list only the factors which were potentially favourable to Mrs Akhtar. The UT had to make the decision about very compelling circumstances against the background of all of its findings about the Exceptions. I consider that it is clear from paragraph 92 of determination 3 that that is what the UT did. I also bear in mind that it is not for this court to make decision-making for the tribunals any more difficult or complicated than it already is, as Underhill LJ said in *Yalcin*.

74. If, contrary to my view, the UT did err in law in some way by not listing, again, in its consideration of whether there were very compelling circumstances, the matters it had already considered under the Exceptions, I consider that any such error of law was immaterial. This is a stronger case, on that point, than *NA (Pakistan)* (see paragraph 28, above). In *NA (Pakistan)*, the UT expressly misdirected itself about the relationship between the Exceptions and the very compelling circumstances test. The Court of Appeal nevertheless accepted a submission that that error of law was immaterial, because the UT had then separately assessed the proportionality of the appellant's deportation.

75. I reject Mr Mackenzie's specific submission that the UT erred in law in not referring to a letter from Mrs Akhtar's probation officer (which said no more than that her risk of re-offending was low). It is clear from *HA (Iraq)* (see paragraph 35, above) that while the weight to be given to evidence of rehabilitation is for the tribunal, evidence that an appellant has not committed any further offences is 'likely to be of little or no material weight'. While, also, a tribunal can give some weight to evidence of positive rehabilitation which reduces the risk of re-offending, that will 'rarely' be 'great'. Lord Hamblen warned that tribunals should also be cautious about making findings that the risk of re-offending is low. There was no evidence of positive rehabilitation in this case, and the UT referred to the lack of evidence of further offences. This was not a marginal case. I do not consider that the UT erred in law in not referring to that letter, but, if, contrary to that view, it did so, any such error was immaterial on the facts.

76. I should make it clear that I have not relied on the reasoning in *Yalcin* for any of this analysis. *Yalcin* is different from this case in two important respects. First, it concerned a serious offender. That meant that the F-tT was not necessarily required to address its reasons expressly to the Exceptions, but could go straight to section 117C(6). Second, the F-tT in *Yalcin* held, in substance, that the test in section 117C(6) was met. I do not consider that the reasoning of this court in that case is a safe analogy for this different case.

Conclusion

77. For those reasons I would dismiss this appeal.

Lord Justice Phillips

78. I agree. I also agree with the further reason for dismissing the appeal set out in the judgment of Males LJ below.

Lord Justice Males

79. I agree that this appeal must be dismissed for the reasons given by Lady Justice Elisabeth Laing. I add one point by way of reinforcement.

80. The essential submission by Mr Mackenzie on behalf of Mrs Akhtar was that the UT had failed to revisit the factors which it had already taken into account for the purpose of Exceptions 1 and 2 when conducting the 'very compelling circumstances' assessment under section 117C(6). I would reject that submission for the reasons given by Lady Justice Elisabeth Laing. In short, the decision of the UT must be read fairly as a whole and it was unnecessary for the UT to repeat for the purpose of section 117C(6) what it had already said when considering the Exceptions. It is not to be assumed that this specialist tribunal overlooked or failed to weigh the matters which it had already addressed when considering the Exceptions when it moved on to consider the issue of 'very compelling circumstances'.

81. However, there is a further reason why Mr Mackenzie's submission must fail. His skeleton argument produced for the hearing before the UT was only provided to us during the hearing of the appeal. Once it was provided, comparison of that document with the decision of the UT demonstrates that the UT did precisely what it was invited to do. Thus there was no suggestion in that skeleton argument that the factors addressed in relation to the Exceptions needed to be revisited for the purpose of the overall proportionality assessment, or that they would affect the overall assessment in ways which had not already been taken into account. Indeed the only matter specifically canvassed under section 117C(6) was the impact of Mrs Akhtar's deportation on the care and assistance provided to her son Altaf. It is therefore not surprising that this is what the UT focused on in this part of its decision.

82. It is not a legitimate ground of appeal to this court that the UT has failed to take matters into account when it was never asked to do so and when it has addressed fully the submissions which were made to it.