Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16484/2017
and RP/00155/2017

THE IMMIGRATION ACTS

Heard at Field House
On 17 March 2020

Decision & Reasons Promulgated
On 28 April 2020

Before

MR JUSTICE JOHNSON
(sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant/Cross-Respondent

and

AA (TURKEY)
(ANONYMITY DIRECTION MADE)
Respondent/Cross-Appellant

Representation:
For the Appellant: Mr S Whitwell (Senior Home Office Presenting Officer)
For the Respondent: Mr T Bobb (Aylish Alexander Solicitors)

DECISION AND REASONS

Both judges have contributed to this decision.

1. This appeal raises questions concerning the removal from the United Kingdom of AA, who had previously been recognised as a refugee and who claims that removal

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would be a breach of the Refugee Convention and articles 3 and 8 of the European Convention of Human Rights ("ECHR").

2. AA had been granted refugee status, but this was revoked by the Secretary of State who also refused a human rights claim. First-tier Tribunal Judge Monson refused AA's appeal against the revocation of his protection status, but allowed his appeal against the refusal of the human rights claim. The Secretary of State appeals against the latter decision; AA cross-appeals against the former decision.

The facts

3. AA is a national of Turkey, born on 10 August 1963. He says that he left Turkey in January 1998. On 23 May 1993 he was recognised as a refugee in France. He entered the UK in September 1990. On 21 December 1990 he married a Turkish national who had been given leave to remain in the United Kingdom as a dependent of her father.

4. AA's refugee status was transferred from France to the United Kingdom. He was granted leave to remain until 13 May 1997.

5. On 22 May 1996 AA was convicted of conspiracy to import almost 200 kilograms of heroin with a street value of about £14M. He was sentenced to 20 years imprisonment, reduced on appeal to 15 years.

6. Following his release two flawed decisions were made to make a deportation order. These were each withdrawn. It was accepted that deporting the Appellant to Turkey would give rise to a real risk of a breach of his rights under article 3 ECHR.

7. On 24 October 2007 the Secretary of State informed AA that deportation action would not be pursued. He was granted discretionary leave for a period of six months. His discretionary leave was subsequently extended until 14 April 2011.

8. On 8 November 2010 AA was interviewed. He said that he feared that if he was returned to Turkey he would be subject to reprisals from his co-defendants and/or those who had been involved in the conspiracy. He also feared imprisonment for being a Kurd, for leaving Turkey for political reasons, and for being imprisoned for drug dealing.

9. On 29 February 2012 AA was granted leave to remain for a year as a businessman under the Turkish EC Association Agreement. A subsequent application to extend his leave to remain as a businessman was refused because of his criminal conviction, but this was overturned on appeal in 2014. The First-tier Tribunal said:

> "The appellant has been convicted of a very serious offence for which he was sentenced on appeal to fifteen years' imprisonment. However, he was previously granted leave to remain under the Turkish European Association Agreement provisions. … it is untenable to suggest that the respondent had previously granted leave in ignorance of the appellant's serious conviction. There is no evidence that the appellant has been in any trouble with the police since he was released from custody in March 2003, now over eleven and a half years ago… We

> have considered the appellant's conviction and note that it is relevant to the outcome of the appeal. However, we are not satisfied that this is a sufficient reason to refuse leave to remain. We have had regard to the appellant's good character since he was released from custody and, further, find that it would be inconsistent and unjust for this appeal to be dismissed on grounds of character when the appellant was previously granted leave on this basis by the respondent."

10. Accordingly, AA was granted further leave to remain as a businessman until 28 February 2016. On 26 February 2016 AA applied for indefinite leave to remain as a businessman. This was refused because of AA's conviction. On 21 September 2017 the Secretary of State revoked AA's refugee status because "there have been fundamental and durable changes in Turkey since you were granted refugee status." It was acknowledged that Turkish citizens of Kurdish ethnicity might face discrimination, but it was said that this did not generally reach the level to amount to persecution or a breach of article 3 ECHR.

11. Having revoked AA's refugee status, the Secretary of State decided to make a deportation order against him. AA responded that his deportation would be contrary to articles 3 and 8 ECHR. By a letter dated 1 December 2017 the Secretary of State rejected AA's contention that his deportation would breach articles 3 or 8. In respect of article 8 it was acknowledged that the decision to deport AA might cause a split to his family (with his wife and children remaining in the UK) but that, having regard to the seriousness of AA's offence, any interference with the right to respect for private and family life could be justified.

12. AA's appeal against these decisions was dismissed by the First-tier Tribunal, but the Upper Tribunal found that the First-tier Tribunal had made an error of law. It overturned the decision and remitted the case to the First-tier Tribunal for re-hearing. That resulted in the decision that is now under appeal.

The legal framework

The Refugee Convention and the Qualification Directive

13. Article 1A(2) of the Refugee Convention provides that a person is a refugee if they are outside their country of nationality owing to a well-founded fear of being persecuted for a prescribed reason and if they are unable or, owing to such fear, unwilling to avail themselves of the protection of that country.

14. Article 1C(5) provides that the Convention ceases to apply to a person falling under the terms of article 1A if they can no longer continue to refuse to avail themselves of the protection of their country of nationality because the circumstances in connection with which they have been recognised as a refugee have ceased to exist.

15. Articles 32 and 33 state:

"**Article 32: Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33: Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

16. Directive 2004/83/EC ("the Qualification Directive") established, within the European Community, a uniform status for refugees and for the protection to be afforded to refugees. Article 2(c) defines "refugee" in terms that mirror article 1A(2) of the Refugee Convention. Article 11(1)(e) mirrors article 1(C)(5) of the Refugee Convention in providing for the circumstances in which a person shall cease to be a refugee. Article 13 imposes a requirement to grant refugee status to those who qualify as a refugee. Article 14 makes provision for the revocation of refugee status.

17. Section 72 of the Nationality, Immigration and Asylum Act 2002 makes provision in respect of the construction and application of article 33(2) of the Refugee Convention. It states:

"**72 Serious criminal**

…

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

…

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

...."

The European Convention on Human Rights

18. Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment.

19. Article 8 provides a right to respect for private and family life and prohibits any interference with that right save as is in accordance with the law and is necessary for, and proportionate to, a prescribed legitimate aim.

20. Part 5A of the Nationality, Immigration and Asylum Act 2002 sets out the approach to be taken when a Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under article 8 ECHR. By section 117A(2), in cases concerning the deportation of foreign criminals, the Tribunal must have regard to the considerations listed in section 117C. That states:

"**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 four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

…

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting 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."

The Immigration Rules

21. Paragraph 334 of the Immigration Rules provides that an asylum applicant will be granted refugee status if the Secretary of State is satisfied that (amongst other matters) they are a refugee within the meaning of regulation 2 of the Person in Need of International Protection (Qualification) Regulations 2006. That regulation defines a "refugee" as someone who falls within article 1A (but not article 1D, 1E or 1F) of the Refugee Convention.

22. Paragraphs 338A, 339A and 339C of the Immigration Rules state:

> "**338A Revocation or refusal to renew refugee status**
>
> A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply. A person's grant of refugee status under paragraph 334 may be revoked or not renewed if paragraph 339AC applies.
>
> **339A Refugee Convention ceases to apply (cessation)**
>
> This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:
>
> …
>
> (v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality; or
>
> …
>
> In considering (v) …, the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.
>
> …
>
> **339C. Grant of humanitarian protection**
>
> A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
>
> (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and

(iv) they are not excluded from a grant of humanitarian protection."

Appeal rights

23. By section 82 of the Nationality, Immigration and Asylum Act 2002 a person may apply to the Tribunal against a decision to refuse a protection and/or human rights claim, and a decision to revoke protection status.

24. By section 84(1) an appeal against a refusal of a protection claim must be brought on the ground that removal would breach the Refugee Convention or the ECHR or the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.

25. By section 84(2) an appeal against a refusal of a human rights claim must be brought on the ground that the decision is incompatible with the ECHR.

26. By section 84(3) an appeal against revocation of protection status must be brought on the ground that the decision breaches the United Kingdom's obligations under the Refugee Convention or in relation to persons eligible for a grant of humanitarian protection.

Decision of First-tier Tribunal

27. First-tier Tribunal Judge Monson found that the Secretary of State's decision to revoke AA's refugee status was a flawed application of article 1C of the Refugee Convention. That was because the Secretary of State's justification was based, to a significant extent, on a change in AA's personal circumstances rather than because the circumstances in connection with which he had been recognised as a refugee in France in the 1990s had ceased to exist.

28. Nevertheless, having regard to the decision in Dang (Refugee – query revocation – Article 3) [2013] UKUT 00043 (IAC), Judge Monson considered that in order to rely on the Refugee Convention to oppose his deportation AA still had to demonstrate that he had a well-founded fear of persecution on return to Turkey for a Convention reason. On the evidence, Judge Monson concluded that AA did not continue to have a well-founded fear of persecution on return to Turkey for a Convention reason. Nor had he shown that he would face a real risk of serious harm. Accordingly, AA's appeal against the revocation of his protection status was dismissed:

> "…the Appellant has not shown that he continues to qualify for recognition as a refugee; or that on return to Turkey he would face a real risk of serious harm at the hands of State or non-State agents. The Appellant has also not shown substantial grounds for believing that he qualifies in the alternative for humanitarian protection under Paragraph 339C of the Rules. So, the Appellant fails in his appeal against the revocation of his protection status, as he has failed to [show that the decision breaches the UK's obligations under the Refugee Convention or in relation to persons eligible for a grant of humanitarian protection, pursuant to section 82(1)(c).]"

29. In respect of AA's claim under article 8 ECHR, Judge Monson referred to the fact that AA had a son who had been born in January 2005 and who had ADHD, suffered from emotional and behavioural problems, and required extra help at school. AA provided him with a high level of support. Judge Monson found that deporting AA would have an unduly harsh impact on his son. He therefore found that "exception 2", as prescribed by section 117C(5) of the 2002 Act, applied. He found that this was not, in itself, enough to tip the balance in AA's favour.

30. Judge Monson referred to AA's work as a businessman, running a chain of restaurants. Further, the Secretary of State had accepted in 2007 that AA could not be deported without breaching his rights under article 3 ECHR. Although that had changed with the decision to revoke AA's refugee status, the factors which had resulted in that decision could have been relied on in 2007. Moreover, in 2014 the First-tier Tribunal had concluded that AA's conviction was not a sufficient basis for refusing leave to remain (see paragraph 9 above) and the refusal to grant indefinite leave to remain because of the conviction was, in the light of this binding conclusion, "manifestly unreasonable and unfair." For these reasons, Judge Monson concluded that there were very compelling circumstances which outweighed the public interest in AA's deportation. The appeal was therefore allowed on the grounds that deportation would amount to an unjustified interference with AA's right to respect for private and family life: "[AA] has a very compelling private and family life claim under article 8(1) such as to render his deportation, more than twenty years after the commission of the index offence, disproportionate to the legitimate aim of the prevention of crime."

Cross-appeal: Finding that removal would not breach article 3 ECHR even though Secretary of State had not lawfully revoked AA's refugee status

31. We consider the cross-appeal first.

Argument

32. AA contends that once Judge Monson found that the Secretary of State had not lawfully revoked AA's refugee status it was not open to him to consider whether removal would amount to a breach of article 3 ECHR. The Judge was wrong to consider that he was bound by the decision in Dang. In any event, Dang was wrongly decided: by reason of article 32 of the Refugee Convention AA, a recognised refugee, could only be only be removed from the United Kingdom if his conduct could be categorised as a threat to national security or public order. The Secretary of State seeks to uphold the reasoning of the Immigration Judge.

Discussion

33. In Dang the appellant had been granted refugee status and was lawfully in the United Kingdom as a refugee (see at [18]). The Upper Tribunal held that the revocation of refugee status under the Immigration Rules did not have any impact on the application of the Refugee Convention. The revocation of refugee status only had effect for the purpose of the Qualification Directive – see at [20]-[39]. The essential

reasoning was that under the Refugee Convention a person is a refugee if he fulfils the criteria prescribed by article 1 of that Convention (here, having a well-founded fear of persecution for a Convention reason). The status of refugee is achieved if and only if the criteria are met. In particular, the status is achieved irrespective of any recognition as a refugee by a host state. There is no provision in the Convention for the status of refugee to be recognised (or for recognition to be revoked). By contrast, the Qualification Directive does require that Member States should grant refugee status to those who qualify. It also makes provision for the grant of residence permits to those recognised as refugees. It therefore "made sense" for there to be provision for the grant of refugee status to be revoked. This affected the individual's status under the Qualification Directive, but has no effect under the Refugee Convention where the individual's status as a refugee does not depend on a grant of recognition.

34. This does not mean that recognition as a refugee has no effect. Quite apart from the consequences of recognition under the Qualification Directive, "[a]ny individual who has been recognised as a refugee under Article 1A(2), and who is not liable to refoulement under Article 33(2), can only be deported if the Convention ceases to apply to him for one of the reasons set out in article 1C" – see Secretary of State for the Home Department v KN (DRC) [2019] EWCA Civ 1665 *per* Baker LJ at [38] (and cf R (Hoxha) v Special Adjudicator [2005] UKHL 19; [2005] 1 WLR 1063 *per* Lord Brown at [65]).

35. The Tribunal further concluded that the fact that a person had refugee status did not give rise to a presumption that their removal would breach article 3 ECHR, see at [41]-[42]:

> "41. The fact that an individual is a refugee or has been recognised as a refugee in the past does not mean that there is any legal or evidential presumption that removal to his or her country will be in breach of article 3. Where an individual's asylum and article 3 claims are decided at the same time and it is found that removal would be in breach of the Refugee Convention, a real risk of article 3 ill-treatment will usually also be found. This will usually be because the factual basis is the same, the risk factors are the same and the feared ill-treatment amounts to both persecution and inhuman or degrading treatment, and not because of the existence of any presumption of article 3 risk arising from the fact that the asylum claim was successful.
>
> 42. However, where an individual was recognised a refugee at some point in the past, the past may be relevant in shedding light on the current situation and the prospective article 3 risk but it remains the case that the question whether there is a real risk of article 3 ill-treatment must be answered at the date of the proceedings before the court and is forward looking."

36. AA's challenge to the reasoning in Dang is based on the difference in language between articles 32 and 33 of the Convention (see paragraph 15 above).

37. Article 32 prohibits a state from expelling "a refugee lawfully in their territory save on grounds of national security or public order."

38. Article 33 prohibits a state from expelling "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

39. The argument is that the additional words "lawfully in their territory" in article 32 indicates that article 32 has a different field of coverage from article 33. It is said that the latter applies to a person who is a refugee "*simpliciter*" (in the language of Dang), whereas the former applies to someone who has been recognised as a refugee. In the case of a person who (like AA) has been recognised as a refugee (whether or not they continue to satisfy the definition of a refugee), article 32 prohibits expulsion save on grounds of national security or public order. Accordingly, the Tribunal Dang was (it is argued) wrong to find that someone who had been recognised as a refugee could in principle be returned if (adopting a forward looking approach) they were not at continuing risk.

40. We accept that there is a difference between the field of coverage of articles 32 and 33 of the Convention, but we do not accept that it is quite as suggested on AA's behalf. Article 33 applies to anyone who is a refugee – ie (for these purposes) anyone who has a well-founded fear of persecution for a Convention reason. Article 32 applies to a narrower category. It applies to anyone who is a refugee but who is also lawfully in the state's territory. If a person ceases to be a refugee (because they no longer have a well-founded fear of persecution for a Convention reason) then they cease to fall within the field of protection afforded by article 32 (and, for that matter, article 33). Nothing in the travaux préparatoires (to which we were referred) suggests otherwise.

41. We do not therefore accept the argument that Dang was wrongly decided. In any event, we note that the essential reasoning in Dang has been adopted and followed by the Court of Appeal – see RY (Sri Lanka) v Secretary of State for the Home Department [2016] EWCA Civ 81 *per* Simon LJ [40]-[43].

42. Nor do we accept that there is any material distinction between Dang and the present case. In Dang the appellant's refugee status had (for the purposes of the Qualification Directive) been lawfully revoked. Here, Judge Monson found that the revocation of refugee status was unlawful. However, in the light of the reasoning in Dang, the revocation (or otherwise, and lawful or otherwise) of recognition as a refugee is not relevant to the question of whether, for the purposes of the Refugee Convention, the person continues to be a refugee. Here, the critical issue was whether AA continued to be at risk on return. Judge Monson found that he did not continue to be at risk on return. That meant that AA did not continue to be a refugee within the meaning of the Refugee Convention and that AA did not continue to be eligible for a grant of humanitarian protection. It follows that none of the grounds for appealing against a removal of protection status (see paragraph 26 above) were satisfied. It therefore follows that Judge Monson was right to dismiss this aspect of AA's appeal.

43. Accordingly, we dismiss AA's cross-appeal against Judge Monson's decision.

Appeal: Finding that deportation would be a disproportionate interference with family life

Argument

44. The Secretary of State appeals against Judge Monson's conclusion that there are here very compelling circumstances which outweigh the public interest in deportation. She contends that having found that the consequences of AA's deportation on his son were not disproportionate and that the "very significant obstacles test is not met", the Judge erred in law in finding that AA's compelling private and family life rendered his deportation disproportionate. Further, it was argued that Judge Monson failed to give proper weight to the public interest in deportation, notwithstanding the period of time that had passed. Reliance was placed on the observations of Newey LJ in Olarewaju v Secretary of State for the Home Department [2018] EWCA Civ 557:

> "The Court of Appeal addressed the significance of rehabilitation in Taylor v Home Secretary [2015] EWCA Civ 845. Moore-Bick LJ, with whom McCombe and Vos LJJ agreed, said (in paragraph 21):
>
>> "I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor: see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256 and PF (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 596. Moreover, as was recognised in SU (Bangladesh) v Secretary of State for the Home Department [2013] EWCA Civ 427, rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation."
>
> With regard to that last sentence, in OH (Serbia) v Home Secretary [2008] EWCA Civ 694, [2009] INLR 109, Wilson LJ (as he then was) derived (in paragraph 15) the following propositions from earlier case-law:
>
>> (a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>>
>> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
>>
>> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
>>
>> (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of

> the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature."

In Ali v Home Secretary, Lord Wilson JSC said (at paragraph 70) that he now regretted his reference in sub-paragraph (c) to society's "revulsion" (that being, he considered, "too emotive a concept to figure in this analysis"), but he adhered to the view that he was "entitled to refer to the importance of public confidence in our determination of these issues".

45. Permission to appeal was granted by Upper Tribunal Judge Coker who observed:

> "It is arguable the First-tier Tribunal judge failed to have specific regard to the deportation of the appellant in the context of the importance of public confidence in criminal deportation."

46. In response, Mr Bobb argues on AA's behalf that Judge Monson fully considered the public interest in favour of deportation. He had said:

> "There is a very strong public interest in the Appellant's deportation in view of the gravity of the offence reflected in the length of the sentence imposed, the Judge's highly condemnatory sentencing remarks, the Judge's recommendation that the appellant should be deported along with the three other convicted co-conspirators, and the public interest considerations advanced by the responded in the Human Rights RFRL. Accordingly, in the normal course of events, it would be very hard to argue that the Appellant's deportation was not proportionate."

47. Moreover, there was no inconsistency between the finding that the impact on AA's son did not tip the balance in AA's favour, and the finding that deportation would be a disproportionate interference with AA's private and family life. That is because the latter finding took account of all the circumstances of the case, including, importantly, the Tribunal's earlier conclusion that the conviction did not justify a refusal of indefinite leave to remain.

Discussion

48. Judge Monson explicitly recognised the strong public interest in favour of deportation (see paragraph 46 above). Nothing in his written decision suggests that he failed to have regard to that strong public interest or to give it appropriate weight. To that extent we agree with Mr Bobb's submissions.

49. Mr Bobb then contends that there was no inconsistency between the finding that the impact on the son was not, in itself, disproportionate and the finding that, assessing all the evidence as a whole, deportation would be a disproportionate interference with AA's right to respect for family life. Having found that the impact on AA's son was, "in itself", insufficient "to tip the balance" it was entirely open to the Judge to find that there was an additional factor which was sufficient "to tip the balance". As a matter of logic, and subject to the legal framework within which the case fell to be considered, we entirely accept those submissions: where a balance falls to be struck then, everything else being equal, any relevant factor may be capable of a decisive impact even if that factor is, in itself, of only modest weight.

50. It is, however, important to assess the balance within the statutory framework of Part 5A of the 2002 Act. Section 117C(6) provides that the public interest required deportation unless there are very compelling circumstances (beyond any unduly harsh impact on AA's partner and child). Accordingly, it was only if there were "very compelling circumstances" that it would have been open to the Judge to find that deportation would be disproportionate.

51. The factors which the Judge considered amounted to "very compelling circumstances" were the Secretary of State's decision in 2007 not to pursue deportation, and the finding of the First-tier Tribunal in 2014, in the context of AA's rehabilitation and lack of re-offending, and his work as a businessman running restaurants.

52. The Court of Appeal and Upper Tribunal have previously considered the weight to be attached to factors such as reformed character, rehabilitation and delay – see Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551 per Hamblen LJ at [84]:

> "…rehabilitation involves no more than returning an individual to the place society expects him to be…. It will generally be of little or no material weight in the proportionality balance:
>
> > '…the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance… Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will never be capable of playing a significant role… Any judicial departure from the norm would, however, need to be fully reasoned.'"

53. Similarly, in RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 330 (IAC) the Upper Tribunal found that even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under article 8(2) ECHR – see at [23]:

> "On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant's case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling

> circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise. We conclude that the Appellant's case fails to surpass the threshold by some distance."

54. In UE (Nigeria) and Others v Secretary of State for the Home Department [2010] EWCA Civ 975 the Court of Appeal accepted that a contribution made to the community could be relevant to the article 8 balance, but that it was likely to "make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant" – see per Sir David Keene at [93].

55. In Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 336 (IAC) the appellant's son was "running a substantial business, employing 40 people, with a turnover of £950,000 a year, and [was], as such, an overwhelming net contributor to the UK economy." After citing UE (and two earlier cases) Lane J, President, said:

> "114. Without in any way intending to be prescriptive, it is likely that one touchstone for distinguishing between instances that lie, respectively, exclusively in the policy realm and in the area of Article 8, is whether the removal of the person concerned will lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.
>
> 115. If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely affected.
>
> 116. The following example is, perhaps, useful. Let us assume a judge is faced with two human rights appeals in respect of individuals whose situations are entirely the same, save for the fact that one is a bus driver and the other a brain surgeon. The judge might have his or her own view as to which occupation is of more value to the United Kingdom. But that view, alone, should not lead the judge to treat them differently under Article 8. Were the judge to do so, he or she would be seriously trespassing upon the respondent's policy realm.
>
> 117. It must be emphasised that UE is binding authority that, in an appropriate case, the weight to be given to the importance of maintaining immigration control can be diminished by reason of the effect that the removal of the appellant from the United Kingdom would have upon the community. I have tried to identify what are the correct criteria for determining if the case is, in fact, an appropriate one.
>
> …
>
> 120. How does the appellant's submission on this issue fit within the case law? The blunt answer is that it does not. There is no prospect of the appellant's son abandoning his business, and the employees who work in it, if the appellant were to be removed to Kenya. What the Tribunal is being asked to do can be distilled into the proposition that someone whose family makes a substantial contribution to this country's economy ought thereby to be subject to a less

> stringent set of immigration controls than a person whose family does not make such a contribution.
>
> 121. Not only is this, in its own terms, an extremely unattractive proposition. It is one which, if allowed to succeed, would inflict grave damage on human rights law. It would introduce an entirely unjustified distinction between the rich, and everyone else. It would also lead to calls for other forms of contribution to be so recognised…"

56. Here, there was undoubtedly very significant delay before the Secretary of State finally decided to make a deportation order. Moreover, there had been the earlier decision not to seek a deportation order, and the earlier decision of the First-tier Tribunal that the Secretary of State had wrongly rejected an application for leave to remain. However, we do not consider that these were capable of amounting to "very compelling circumstances". These factors were not different in nature from those considered in Binbuga or RLP. To the extent that AA has made a contribution to the community, that does not (in the light of UE and Thakrar) come within the category of case that is capable of making a difference.

57. The offence committed by AA was exceptionally grave. The sentence exceeded by a factor of more than 3 the threshold at which it is necessary to demonstrate "very compelling circumstances." The quantity of heroin (200kg) exceeded, by a factor of 40, the indicative quantity set by the Sentencing Council (5kg) for those offences which fall within the gravest category of harm. The public interest in deportation, applying section 117C(1), (2) and (6) of the 2002 Act, was exceptionally strong. As in RLP the factors which weighed against deportation failed "to surpass the threshold by some distance."

58. We therefore find that Judge Monson materially erred in law by finding that there were, here, "very compelling circumstances" and that these were sufficient to outweigh the public interest in favour of deportation.

59. The parties agreed that in the event that we concluded that Judge Monson erred in law we should re-determine the appeal ourselves. We agree. All necessary findings of fact have been made by Judge Monson. On those facts, and for the reasons we have given, the interference with AA's right to respect for private and family life (and that of his partner and child) that will be occasioned by his deportation is amply justified by the public interest in favour of deportation.

Outcome

60. For these reasons AA's cross-appeal against the conclusion of Judge Monson that removal would not be contrary to article 3 ECHR is dismissed. The Secretary of State's appeal against the conclusion of Judge Monson that removal would be contrary to article 8 ECHR is allowed. We find that AA's removal would not be contrary to article 8 ECHR. The Secretary of State's decisions are therefore restored.

Notice of Decision

61. The Secretary of State's appeal is allowed. AA's cross-appeal is dismissed. The Secretary of State's decisions are restored.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

62. Unless and until a Tribunal or court directs otherwise, AA is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to AA and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

PP. MR JUSTICE JOHNSON sitting as an Upper Tribunal Judge. 30/03/20

TO THE RESPONDENT
FEE AWARD

AA's appeal has been dismissed and therefore there can be no fee award.

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is <u>in detention</u> under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 <u>working</u> days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email