Neutral Citation Number: [2025] EWCA Civ 1452

Case No: CA-2024-001157

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Norton-Taylor
UI/2022/003687

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 November 2025

Before:

LADY JUSTICE ANDREWS
LORD JUSTICE NUGEE
and
LADY JUSTICE ELISABETH LAING

- -

Between:

HIEP XUAN NGUYEN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mark Symes (instructed by **AKM Quamruzzaman of Londonium Solicitors**) for the **Appellant**
Julia Smyth KC and Natasha Jackson (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 22 October 2025

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Approved Judgment

This judgment was handed down remotely at 2 pm on 13 November 2025 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. This is an appeal by the Appellant, Mr Nguyen. Mr Nguyen was convicted of a drugs offence in the United Kingdom. The Secretary of State for the Home Department ('the Secretary of State') made a deportation order against him on 30 August 2007 ('the Order'). In 2007 Mr Nguyen was deported from the United Kingdom to Vietnam.

2. On 7 February 2019 Mr Nguyen applied for the Order to be revoked. The Secretary of State refused that application in decision 1 (dated 31 December 2020). Mr Nguyen also applied for entry clearance on 15 December 2019. The Entry Clearance Officer refused that application in decision 2, dated 6 July 2022, in short, on the grounds that the Order was a reason for refusing entry clearance.

3. Mr Nguyen appealed against decision 1 and decision 2 to the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT'). The F-tT allowed both appeals (in determinations 1 and 2). The Secretary of State then appealed against determinations 1 and 2 to the Upper Tribunal (Immigration and Asylum Chamber) ('the UT'). In determination 3 the UT found that the F-tT had erred in law in appeal 1 and in appeal 2. In determination 4, the UT re-made both decisions, and allowed the appeals of the Secretary of State. Mr Nguyen now appeals to this court, with the permission of Arnold LJ.

4. The main issue on this appeal is whether the Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') applied in whole or in part to Mr Nguyen's appeals. The argument that it does not apply is based on a suggested distinction between cases in which an appellant has already been deported at the date of an appeal, is outside the United Kingdom, and applies for an existing deportation order to be revoked, and cases in which an appellant has not yet been removed and is still in the United Kingdom at the time of his appeal to the F-tT. For the reasons I give in this judgment, I accept that there is such a distinction. The argument that the effect of this distinction is that section 117C (or section 117A, or section 117B) of the 2002 Act does/do not apply to Mr Nguyen's case is, however, misconceived. I would therefore dismiss his appeal.

5. Mr Symes, who did not appear in the F-tT or in the UT, represented Mr Nguyen. Ms Smyth KC and Ms Jackson represented the Secretary of State. They did not appear below either. We thank counsel for their helpful written and oral submissions. We thank Ms Jackson for drafting the Secretary of State's skeleton argument. She also made oral submissions on ground 3 (see paragraph 82, below).

The statutory framework

6. This is a case in which it is somewhat easier to understand the arguments against the background of the relevant statutory provisions, and of the most significant authorities on their interpretation.

The Immigration Act 1971

7. Section 3 of the Immigration Act 1971 ('the 1971 Act') is headed 'General provisions for regulation and control'. Section 3(5)(a) provides that a person who is not a British

citizen is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good. Section 5 is headed 'Procedure for, and further provisions as to, deportation'. 'Without prejudice to the operation of section 3(5)', section 3(6) provides that a person who is not a British citizen is also liable to deportation if, after he reaches the age of 17, he is convicted of an offence for which he is punishable with imprisonment and, on his conviction, is recommended for deportation by a court which has power under the 1971 Act to make such a recommendation. Section 6 is headed 'Recommendations by court for deportation'. Section 6 makes further provision about such recommendations.

8. Section 5(1) provides:

> 'Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say, an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force'.

Section 5(2) gives the Secretary of State power at any time to revoke a deportation order.

The Nationality, Immigration and Asylum Act 2002

9. Part 5 of the 2002 Act is headed 'Appeals in respect of Protection and Human Rights Claims'. Part V (as it was originally) was significantly amended, including its heading, by the Immigration Act 2014 ('the 2014 Act'). Section 81 defines 'the Tribunal' as the F-tT. Section 82 is headed 'Right of appeal to the Tribunal'. Section 82(1)(b) gives P a right of appeal to the F-tT where the Secretary of State has decided to refuse a human rights claim by P. Section 84 is headed 'Grounds of appeal'. Section 84(2) provides that an appeal under section 81(2)(b) 'must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998' ('the HRA'). This is a significant reduction of the earlier rights of appeal. Before the amendments made by the 2014 Act, section 86(3) of the 2002 Act required the Tribunal to allow an appeal in so far as it thought that '(a) a decision against which the appeal is brought is or is treated as being brought was not in accordance with law (including immigration rules)' or '(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently'. Section 86(3) was repealed by the 2014 Act.

10. Part 5A was inserted in the 2002 Act by section 19 of the 2014 Act. Section 19 and Part 5A are headed 'Article 8 of the ECHR: Public Interest Considerations'. Section 117A is headed 'Application of this Part'. Section 117A(1) provides that Part 5A applies where 'a court or tribunal is required to determine whether a decision made under the Immigration Acts (a) breaches a person's right to respect for private and family life under Article 8, and (b) as a result would be unlawful under section 6 of' the HRA. By section 117A(2) a court or tribunal must, when it considers 'the public interest question' have regard '(in particular)', in all cases, to the considerations listed in section 117B, and 'in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C'. Section 117A(3) defines 'the public interest question' for the purposes of section 117A(2). It is 'the question whether an interference with a person's right to respect for private and family life is justified under Article 8(2)'.

11. Section 117B is headed 'Article 8: public interest considerations applicable in all cases'. Section 117B(1) provides that 'The maintenance of effective immigration controls is in the public interest'. Section 117B(4)(b) provides that 'Little weight should be given to…a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully'.

12. Section 117C is headed 'Article 8: additional considerations in cases involving foreign criminals'. The deportation of foreign criminals is in the public interest (section 117C(1)). The more serious the offence, the greater is the public interest in the deportation of a foreign criminal (section 117C(2)). In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies (section 117C(3)). Exception 1 is not relevant. Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner and the effect of C's deportation on the partner would be unduly harsh. If C has been sentenced to more than four years' imprisonment, 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2' (section 117C(6)). The considerations listed in section 117C(1) to (6) 'are to be taken into account where a court 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' (section 117C(7)).

13. Some of the terms used in Part 5A are defined in section 117D. 'Article 8' means article 8 of the European Convention on Human Rights. A 'qualifying partner' is a partner who is a British citizen or who is settled in the United Kingdom within the meaning of section 32(2A) of the 1971 Act. A 'foreign criminal' includes a person who is not a British citizen, who has been convicted in the United Kingdom of an offence, and who has been sentenced to a period of imprisonment of at least 12 months'.

The UK Borders Act 2007

14. Section 32(5) of the UK Borders Act 2007 ('the 2007 Act') imposes a duty on the Secretary of State to make a deportation order in relation to a foreign criminal, subject to the exceptions in section 33 of the 2007 Act. It came into force on 1 August 2008, after the Order was made (and, indeed, after Mr Nguyen left the United Kingdom). It does not, therefore, apply to Mr Nguyen's case. It is part of the deportation regime which was in force when Part 5A came into force, however, and is, therefore, relevant to the construction of Part 5A. Section 32(6) prevents the Secretary of State from revoking a deportation order made under section 32(5) unless he thinks that an exception under section 33 applies, the application is made while the foreign criminal is outside the United Kingdom, or section 34(4) applies.

The Tribunals, Courts and Enforcement Act 2007

15. Section 11(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 ('the TCEA') give '[a]ny party to an appeal' a right of appeal to the UT on 'any point of law arising from a decision of' the F-tT '(other than an excluded decision)'. 'Excluded decision' is defined in section 11(5). That right may only be exercised with permission (section 11(3)). That permission may be given by the F-tT or by the UT (section 11(4)).

16. Section 12 of the TCEA is headed 'Proceedings on an appeal to the [UT]'. By section 12(1) and (2), if the UT finds 'that the making of the decision concerned involved the making of an error on a point of law', the UT '(2)(a) may (but need not) set aside the decision of the [FTT], and, (b) if it does, must either –(i) remit the case to the [FTT] with directions for its reconsideration, or (ii) re-make the decision.'

The authorities on Part 5A

NA (Pakistan) v Secretary of State for the Home Department

17. The first authority which is relevant to this appeal is *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207. In that case, this court held that the failure to provide in section 117C that medium offenders (that is, those who had been sentenced to between 12 months and four years' imprisonment) could escape deportation if there were very compelling circumstances over and above Exceptions 1 and 2 was an obvious drafting error and would be incompatible with their article 8 rights in some cases. On its true construction, section 117C(3) means that the public interest does not require the deportation of medium offenders who do not meet the conditions of Exceptions 1 or 2 if their case falls within the terms of section 117C(6).

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

18. The second authority is *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22; [2022] 1 WLR 3784 ('*HA (Iraq')*). In paragraphs 1-5 of a judgment with which the other members of the court agreed, Lord Hamblen summarised the effect of the regime in Part 5A. He recorded in paragraph 4 that it was common ground that *NA (Pakistan)* was correct; and he therefore assumed that it was. A similar approach was taken by the Supreme Court in paragraph 36 of *Secretary of State for the Home Department v AM (Belarus)* [2024] UKSC 13; [2025] AC 629. Again, the correctness of *NA (Pakistan)* was not in issue. This court is, in any event, bound by *NA (Pakistan)*.

19. The principal issues in *HA (Iraq)* were the meaning of the 'unduly harsh' test in Exception 2, and, in particular whether it involves a comparison, and, in relation to the very compelling circumstances test, what weight if any should be given to rehabilitation and how the seriousness of the relevant offending should be assessed. Lord Hamblen summarised *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273 ('*KO (Nigeria)*') in paragraphs 18-22. In paragraph 18, he listed five points about the interpretation of Part 5A which he derived from *KO (Nigeria)*. Part 5A was part of a series of attempts by the Government to 'clarify the application of article 8 in immigration cases. The purpose of the changes was to promote consistency, predictability and transparency in decision making and to reflect the Government's and Parliament's view of how as a matter of public policy the balance should be struck'. The purpose of the scheme was to 'narrow rather than widen the residual area of discretionary judgment for the court to take into account public interest or other factors not directly reflected in the wording of the statute'.

20. He gave seven reasons for rejecting an approach to the unduly harsh test based on a comparison (paragraphs 31-40). He preferred this formula: 'unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore,

the addition of the adverb "unduly" raises an already elevated standard still higher' (paragraph 41). That is to say, the threshold is 'a highly elevated threshold or standard'; but not as high as 'very compelling circumstances' (paragraph 42). In cases where neither Exception applies, 'a full proportionality assessment is required'. The decision-maker is required to give effect to the principle that 'the public interest requires deportation unless there are' very compelling circumstances as described in section 117C(6) (paragraph 47). That test applies where the private and family life considerations are 'so strong that it would be disproportionate and in violation of article 8 to remove' the foreign criminal (paragraph 48).

21. In paragraph 51 Lord Hamblen said that all the relevant circumstances of the case will be considered and weighed against the 'very strong public interest in deportation'. He explained by reference to the judgment of Lord Reed in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 that the relevant factors will include those 'identified by the European Court of Human Rights as being relevant to the article 8 proportionality assessment'. He then listed them. The weight to be given to them in an individual case is for the decision-maker (paragraph 52).

22. Rehabilitaion was relevant in the proportionality assessment. Lord Hamblen summarised the relevant authorities in paragraphs 54-57. His conclusion was that the weight to be given to rehabilitation on the facts of a particular case was for the fact-finding tribunal, so that it was not possible to make a definitive statement about that weight. If the only evidence of rehabilitation was that no further offences have been committed, that would be likely to be of little or no material weight. Positive evidence of rehabilitation might be given more weight, but it will rarely be of great weight, since the public interest in the deportation of criminals is not only based on the need to protect the public, but also on wider considerations of deterrence and public concern (paragraph 58).

23. That was subject to a caveat in paragraph 59. After considering the authorities, he concluded that while the length of the sentence passed was often a guide to the seriousness of the offence, that was not an absolute rule, because such a rule would not take account of a discount for pleas of guilty (paragraph 68). It might also be legitimate, provided there is no double counting, to give weight to the nature of the offending (paragraphs 70 and 71).

IT (Jamaica) v Secretary of State for the Home Department

24. We were referred to several other authorities, but none is a binding decision on the issue in this case made against the background of the current legal provisions. The closest relevant guidance on the issue is a passage in the judgment of Arden LJ (as she then was) in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932; [2017] 1 WLR 240. The appellant was sentenced to 42 months' imprisonment for a drugs offence in 2009. He was deported to Jamaica in 2010. His case was therefore one to which the automatic deportation provisions in the 2007 Act applied.

25. In 2013, three and a half years later, he applied for the deportation order to be revoked so that he could return to the United Kingdom and live with his wife and son, who were British citizens. The Secretary of State refused the application. The F-tT allowed the

appellant's appeal and the UT dismissed the Secretary of State's appeal from the F-tT's determination. The F-tT found that it would be unduly harsh for the appellant's son if the deportation order continued.

26. This court allowed the appeal. In paragraph 2 of a judgment with which the other members of this court agreed, Arden LJ recorded that it was 'effectively common ground that, under section 117C…the deportation order may only be revoked if its retention is determined to be "unduly harsh"'. That point was not, therefore, the subject of argument on the appeal. Arden LJ added that the parties' disagreement was about 'the weight to be given in that determination to the public interest in deporting foreign criminals who have committed serious offences…' She said in paragraph 3 that she had decided that the unduly harsh test in section 117C could only be met if the appellant could show that there were 'very compelling reasons for revoking the deportation order before it has run its course'.

27. In paragraphs 50-57 she explained why she had decided that the unduly harsh test required the respondent to show that there were very compelling circumstances. In the course of that exposition, she observed, in paragraph 52, that the word 'deportation' in section 117C(1) and elsewhere in section 117C was 'being used to convey not just the act of removing someone from the jurisdiction but also maintaining the banishment for a given period of time: if this were not so, section 117C(1) would achieve little'. In paragraphs 55 and 57 she equated undue harshness and very compelling circumstances.

28. *IT (Jamaica)* was one of the four appeals considered by the Supreme Court in *KO (Nigeria)*. In paragraph 41 of a judgment with which the others members of the court agreed, Lord Carnwath noted, without comment, Arden LJ's remark in paragraph 2 of her judgment that it was common ground that section 117C applied to the revocation of a deportation order (see paragraph 26, above). It seems, therefore, that, in the Supreme Court, IT did not challenge that part of this court's reasoning; and it follows that the Supreme Court did not decide this point. In paragraph 42, Lord Carnwath held that the reasoning of this court could not stand because Arden LJ had relied on the very compelling circumstances test, which was not relevant. IT's case was nevertheless remitted to the UT because there were other errors of law in the approach of the F-tT (paragraphs 44 and 45).

The Immigration Rules (HC 395 as amended)

29. The Rules are the 'rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode…' (section 1(4) of the 1971 Act). Section 1(4) of the 1971 Act gives a general indication of the sorts of provisions which the Rules must include. Section 3(2) of the 1971 Act requires the Secretary of State from time to time to lay before Parliament statements of the Rules, and of changes to the Rules. If either House of Parliament disapproves such a statement by a resolution of that House, the Secretary of State must, 'as soon as may be make such changes or further changes as appear to him to be required in the circumstances' and lay a further statement before Parliament. The Rules are not delegated legislation (*Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230).

30. It was common ground in *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292, and was common ground in this case, that on an appeal the UT (but not this court) must apply (if they are relevant to the issues in the appeal) the provisions of the Rules which apply at the date of its decision, rather than the provisions of the Rules which applied at the date of the decision which is the subject of the appeal (see paragraphs 39 and 40 of the judgment of Aikens LJ with which the other members of this court agreed).

The facts

31. It is not necessary to say much about the facts. The UT summarised them briefly in the determination. Mr Nguyen was born in Vietnam in 1966. He is a Vietnamese citizen. He married his wife ('W') in 1992. He came to the United Kingdom in 2002, using a false identity. He soon claimed asylum. The Secretary of State refused that claim. Mr Nguyen appealed, unsuccessfully. On 25 May 2007 he was convicted of producing cannabis. He was sentenced to two years' imprisonment. The sentencing judge made a recommendation for his deportation. The Secretary of State made a decision to deport Mr Nguyen. The Secretary of State then made the Order. Mr Nguyen did not exercise his right of appeal against the decision to deport him. He was deported to Vietnam on 30 October 2007.

32. The UT listed 'The agreed facts' in paragraph 14 of determination 4. There was family life between Mr Nguyen, and W, and their adult son. There was a low risk of re-offending if he returned to the United Kingdom. He was genuinely remorseful. He had only ever been convicted of one offence. The relevant requirements of Appendix FM were met. The UT made further findings of fact in paragraphs 28-33. Mr Nguyen and W had worked hard to maintain their relationship despite their long separation. W had travelled to Vietnam each year (apart from during the pandemic). They had also taken holidays together in third countries. Mr Nguyen had family in Vietnam and owned a house there. He was employed in a tourism company there. There was nothing to suggest he had any health problems. W and the son had a strong relationship in the United Kingdom. They had lived together for a long time. The son had a job, and a son of his own, who was born in July 2022. There was nothing to suggest that either had any health problems.

Decision 1

33. In paragraph 11 of decision 1 the Secretary of State referred to paragraphs A362 and A398-399D of the Rules which were said to 'set out the practice to be followed by officials acting on behalf of the Secretary of State when considering an Article 8 claim, made in the context of an application to revoke a deportation order, from a person who has been deported on the basis of criminal convictions. These rules reflect Parliament's view of what the public interest requires for the purposes of Article 8(2)…set out at sections 117A-117D in Part 5A of [the 2002 Act]…'

34. The Secretary of State summarised Mr Nguyen's article 8 claim in paragraph 12 of decision 1. The maintenance of the Order was conducive to the public good and in the public interest because of Mr Nguyen's conviction. Paragraph 398 required the Order to be maintained unless an exception to deportation applied (paragraph 13). The Secretary of State set out the exceptions (in paragraphs 399(a) and 339(b)).

35. Neither applied, for the reasons given in paragraphs 15-16 and 20-25, respectively. In particular the Secretary of State did not accept it would be unduly harsh for W to live in Vietnam with Mr Nguyen. She had entered the United Kingdom as an illegal entrant with an 8-year old boy, when she was 32 years old. Nor did the Secretary of State accept that it would be unduly harsh for her to stay in the United Kingdom without Mr Nguyen.

36. The Secretary of State noted in paragraph 21 that Mr Nguyen claimed to have entered the United Kingdom in 2003, after W and their son claimed to have entered (2002). He had nevertheless claimed asylum as a sole applicant on 11 July 2003, the very day on which W had separately claimed asylum. He had claimed to have no family in the United Kingdom.

37. For the reasons given in paragraphs 27-34, the Secretary of State did not accept that Mr Nguyen met the private life exception. In particular, there were no insurmountable obstacles to his reintegration in Vietnam.

38. In paragraphs 35-36, the Secretary of State said that for there to be 'very compelling circumstances' Mr Nguyen would need to provide evidence of a 'very strong' article 8 claim. In paragraphs 37-46 the Secretary of State considered the public interest factors supporting Mr Nguyen's deportation. The Secretary of State concluded that Mr Nguyen's deportation would not breach his article 8 rights.

39. The Secretary of State then considered the framework in the Rules for revoking a deportation order (paragraphs 390, 390A, 391 and 391A). The conclusion was that Mr Nguyen had not provided evidence of the 'very strong' article 8 claim which would be necessary to outweigh 'the significant public interest in maintaining' the Order.

Determination 1

40. In determination 1, the F-tT allowed Mr Nguyen's appeal against decision 1, on article 8 grounds. The F-tT found that he had maintained family life with W, despite their long separation. W had stayed in the United Kingdom when Mr Nguyen was deported to Vietnam. They had kept in contact and W had visited Vietnam regularly. The F-tT accepted that Mr Nguyen was remorseful and that there was little risk that he would offend again were he to return to the United Kingdom.

41. The F-tT referred to *TZ (Pakistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at paragraph 34. It started by considering whether Mr Nguyen met the relevant provisions of the Rules, noting that the Secretary of State had failed to apply the relevant provision, which the F-tT identified as paragraph 391. It said that the assessment in paragraph 390 must be made 'against the correct standard'. It referred to paragraph 28 and 29 of *EYF (Turkey) v Secretary of State for the Home Department* [2019] EWCA Civ 592; [2019] 4 WLR 69.

42. Paragraph 29 of *EYF* says that once ten years has elapsed from the making of a deportation order, it is easier to argue that the balance has shifted in favour of revocation 'on the facts of a particular case…but that does not mean that revocation thereafter is automatic or presumed…[it] will depend on the facts of the particular case'.

43. The F-tT thought that paragraph 398 'on which the other paragraphs mentioned hang' implies that it only applies where a deportation has not yet happened (paragraphs 27 and 28). The F-tT also thought that it faced 'a rather difficult circular argument'. It resolved that in favour of the conclusion that if the relevant provisions of the Rules are satisfied, that reduced the public interest in immigration control (paragraphs 28-30).

44. That led to a further issue. The public interest in immigration control was not the only public interest in issue: there was also the public interest in deportation. The F-tT quoted section 117C of the 2002 Act (paragraph 31). Mr Nguyen's primary submission was that he met Exception 2. After an exchange with the F-tT, Mr Nguyen's counsel submitted that 'perhaps section 117C simply does not apply to revocation of deportation orders'.

45. This was a question of statutory construction. The F-tT quoted section 1117A. For section 117C to apply, the appeal would need to be a case 'concerning the deportation of foreign criminals within the meaning of subsection (2)(b)'. The F-tT quoted a pocket dictionary definition of the verb 'deport'. If a person has been the subject of a deportation order and has left the United Kingdom, 'the act of forcing them to leave has already happened'. It would be different if they were still in the United Kingdom. The F-tT considered that this meant that an application to 'come back' is not covered by section 117C. That approach was supported by the words of section 117C, which 'clearly' suggest 'that a deportation has not yet occurred'. The F-tT referred to section 117C(3) and (6) did not refer to the continuation of a deportation order. Section 117C(7) referred to 'a decision to deport'. That was not the subject of the appeal, which was against a decision not to revoke a deportation order (paragraph 39).

46. This was also supported by the lack of any reference to section 117C in *EYF (Turkey)* (paragraph 41). The upshot was that the Rules contain the Secretary of State's assessment of the public interest in not revoking a deportation order. 'Her view, expressed in her policy, is that consideration will be given on a case-by-case basis to whether the deportation order should be maintained. There is no presumption either way' (paragraph 42). Ms Smyth told us that she had taken instructions, but had not been able to find out why there is no reference to Part 5A in *EYF (Turkey)*, despite the fact that it was in force at the relevant time.

47. The Secretary of State had applied the incorrect threshold in decision 1. The key factor was that she had not considered the time which had passed since Mr Nguyen was deported. She had applied a presumption and not a case-specific analysis. Decision 1 took points against Mr Nguyen as if he had not been deported (the references to the exceptions in paragraph 399 of the Rules, which apply to deportation in the future; the reference to a 'significant public interest in deporting you'; and a reference to the regime in the 2007 Act which did not apply to Mr Nguyen (paragraph 45).

48. The Secretary of State had not considered the effect of the passage of time on the public interest. Mr Nguyen had been 'in a sense, a model deportee'. He pleaded guilty. He did not challenge his deportation. He supported himself in Vietnam and had not committed any more crimes. He waited for ten years before applying for the revocation of the Order. If he could not succeed, it was hard to see who could (paragraph 46).

49. The F-tT then tried to remedy those errors. In paragraph 49 it accepted that there was 'clearly a public interest in deporting foreign criminals. Deportation would be meaningless without a period of exclusion afterwards'.

50. The F-tT accepted that there was still a public interest in deportation even when there is no risk of re-offending. But paragraph 391 clearly implied that that interest 'must reduce over time'. There would otherwise be a presumption that a deportation order would be maintained after ten years which was not the Secretary of State's policy. If conduct after deportation was not relevant, that would have 'the perverse effect of encouraging illegal entry to the UK by people subject to a deportation order' (paragraph 51).

51. 'Weighing against the interest in maintaining the deportation order' (paragraph 52) was the life which Mr Nguyen would prefer to live with W and their son in the United Kingdom. The F-tT acknowledged that the interference had not been 'grave'. There had been regular visits. A had a house and close family in Vietnam. A's son had had an unhappy childhood but 'These are the sad but justified consequences of the need to deport foreign criminals' (paragraph 53).

52. The F-tT then considered the points listed in paragraph 390 of the Rules (paragraphs 56-64).

53. The F-tT acknowledged in paragraph 56 that 'none of this is very compelling'. Mr Nguyen's deportation had not been 'unduly harsh' within the meaning of section 117C. But that was not the question. The question was whether the Order should be maintained.

54. The F-tT had already considered 'the level of public interest in maintaining' the Order because it was made as a result of A's crime (paragraph 58). The effect of the relevant representations was that A and W and their son would like to be reunited. The interests of the community did not relate to the maintenance of effective immigration control because of Mr Nguyen's compliance. The community interest in public concern and deterrence was tempered by the public interest in allowing people's conduct 'after deportation to improve the prospects of the deportation order being revoke [sic]. It is in the interests of the community for that to happen as well'.

55. The F-tT concluded that Mr Nguyen satisfied the Rules and that the Order should not be maintained under paragraph 391 (paragraph 61). It referred again to *TZ (Pakistan)*. The fact that Mr Nguyen met the provisions of the Rules meant that the public interest in immigration control 'in the present case is zero because the rules are satisfied' (paragraph 63). In paragraph 64 the F-tT acknowledged that *TZ (Pakistan)* was not a deportation case. There was therefore an additional factor against Mr Nguyen; the public interest in deportation. The F-tT found that that was 'significantly reduced'. The F-tT added, 'Looking at the overall balance, between that weak public interest and level of interference with [Mr Nguyen's] family life, I find the maintenance of [the Order] not to be proportionate' (paragraph 64).

Determination 2

56. The F-tT heard appeal 2 after the F-tT's decision in appeal 1, but before the Secretary of State's appeal against determination 1 had been decided.

57. In determination 2, the F-tT allowed Mr Nguyen's appeal against decision 2. It held, in short, that the effect of determination 1 was to set aside the Order and to remove the suitability grounds for refusing entry clearance on which the Entry Clearance Officer had relied in refusing entry clearance.

The grounds of appeal from the F-tT to the UT

58. The grounds of appeal complained that the F-tT had not had regard to paragraphs 390A, 399 and 399A of the Rules. Section 117C is primary legislation and mirrors those provisions, and, said the grounds of appeal, the F-tT was bound by section 117C. The F-tT, the grounds continued, by holding that section 117C does not apply in a case where deportation has already happened was 'seeking to rely on semantics'. The Secretary of State did not understand this reasoning, given the terms of section 117A(2)(b). The Secretary of State said that the F-tT's reasoning was 'nonsensical'. The grounds supported this argument by quoting the relevant paragraphs of the Rules, and repeated that they mirrored section 117C. Paragraph 11 of the grounds added that the F-tT had had no regard to the principle that article 8 does not give people a choice about where they should enjoy their family life.

Permission to appeal from determination 1

59. In an order dated 26 July 2022, the F-tT gave the Secretary of State permission to appeal against determination 1 on all grounds.

Permission to appeal from determination 2

60. In an order dated 13 November 2023, the F-tT extended time for appealing against determination 2, despite what it regarded as significant delay by the Secretary of State, and gave the Secretary of State permission to appeal against determination 2 on all grounds.

The UT's error of law determination

61. In determination 3, the UT held that the F-tT erred in law in determination 1 and in determination 2. In paragraph 5, the UT said, of determination 1, that the F-tT's approach was 'set out at considerable length'. It was not necessary to 'rehearse that in detail'. The UT, reducing that analysis to 'its bare bones', described the F-tT as having decided that Part 5A of the 2002 Act, 'as amended (specifically section 117C thereof) did not apply to [Mr Nguyen's] case: paragraphs 42 and 56. Instead' the F-tT had decided that paragraph 390 of the Rules governed its approach if a person applied for revocation of a deportation order from abroad '(paragraph 56)'.

62. The grounds of appeal argued, 'in essence that [the F-tT] had been wrong to disapply section 117C of the 2002 Act' (paragraph 7). The UT held, in paragraph 14, that the F-tT was wrong to have concluded that Part 5A of the 2002 Act '(which of course included section 117C)' did not apply to 'cases concerning the revocation of a deportation order'. The UT referred to a decision of a Presidential Panel of the UT in *Binaku (s.11 TCEA: s.117C NIAA; paragraph 399D)* [2021] 00034 (IAC) ('*Binaku*'). The headnote of

Binaku made clear that Part 5A applies to the whole 'deportation regime', including revocation applications from abroad.

63. Mr Nguyen's counsel accepted that the F-tT had made a mistake (paragraph 15), but submitted that the error was immaterial. The UT disagreed, for two main reasons.

64. First, the 'clear inference' from the findings in paragraph 56 (see paragraph 53, above) was that if the F-tT had applied section 117C, it would have found against Mr Nguyen (paragraphs 16 and 17).

65. Second, the question which the F-tT asked itself, whether deportation should be maintained by reference to paragraph 390 of the Rules, was 'materially different from' any question under section 117C (paragraphs 18 and 19). There was no express 'monetary' [this must be a mistranscription of 'mandatory'] 'consideration of the public interest in deportation, or the need to show very compelling circumstances if neither of the two exceptions are satisfied' (paragraph 19).

66. The UT preserved the F-tT's findings of fact about the existence of family life, Mr Nguyen's remorse, and his low risk of re-offending (paragraph 22).

67. The error of law in determination 2 was that the F-tT had treated determination 1 as the last word on the existence of the Order and on the related suitability issues for the purposes of entry clearance. When determination 2 was promulgated, permission to appeal had been granted against determination 1.

The UT's re-making of the decision

68. The UT re-made the decision in determination 4. Mr Nguyen was represented by the counsel who had represented him in the F-tT. The Secretary of State was represented by a Senior Home Office Presenting Officer. In paragraph 8, the UT recorded a concession by Mr Nguyen's counsel that the F-tT had erred, and her submission that the error was immaterial. The UT listed the evidence it had considered in paragraph 17. W and Mr Nguyen's adult son gave evidence. There were three witness statements from each. The UT recorded the parties' submissions in paragraphs 19-23.

69. The UT described the relevant legal framework in paragraphs 24-26. It set out sections 117A and 117C of the 2002 Act and, in paragraph 25, the relevant part of the headnote of *Binaku*. The UT held in *Binaku* that in article 8 appeals the tribunal must apply Part 5A of the 2002 Act rather than the provisions of the Rules. It also held that a foreign criminal who has entered the United Kingdom in breach of a deportation order is subject to the same regime as those who have not yet been removed and those who have been removed but have applied for a deportation order to be revoked. The phrases 'cases concerning the deportation of foreign criminals' in section 117A(2) and 'a decision to deport a foreign criminal' in section 117C(7) are to be interpreted accordingly. Paragraph 339D of the Rules is irrelevant to this exercise, which begins and ends with Part 5A of the 2002 Act. In paragraph 26 it referred to *HA (Iraq)*.

70. The UT considered, first, the application of the test in Exception 2 (section 117C(5) of the 2002 Act). Mr Nguyen and W had now lived apart for a long time. The UT had no doubt that that had been emotionally and practically difficult, in part because they had

seen their son grow up without a father in his daily life. The UT took 'full account of the cumulative history of the separation' (paragraph 34). It concluded, nevertheless, that if W were to stay in the United Kingdom, that would not be unduly harsh. She was 'maintaining a reasonable life in the United Kingdom'. She had a job, was well and had adapted to life without Mr Nguyen. They were in frequent telephone contact and they had kept in regular direct contact. She had her son for support (paragraph 35).

71. The UT acknowledged that W had been in the United Kingdom for a long time and that she had strong family ties with her son and with his child. The UT took her British citizenship into account and its associated rights and privileges. W was 'clearly familiar with Vietnamese society and culture'. She speaks the language and had no health problems which could not be accommodated in Vietnam. She would lose daily contact with her son and grandson but would 'gain the presence and support of' Mr Nguyen. There was no evidence that she would not be able to live with him in Vietnam. It would not be unduly harsh for her to move to Vietnam and live there with Mr Nguyen (paragraph 38). Mr Nguyen could not, therefore 'bring himself within the exception under section 117C(5) of the 2002 Act (paragraph 39). Section 117C(5) did not apply to the adult son (paragraph 40).

72. In paragraphs 41-56 the UT considered whether the very compelling circumstances test was met. That test was hard to meet. The UT had taken all the circumstances into account. It made an assessment of the relevant considerations, in no particular order. The deportation of foreign criminals is in the public interest (section 117C(1)). That public interest applies before and after removal.

73. The UT gave 'some weight' to Mr Nguyen's long separation from W and their son, but it was 'limited'. Such a separation was inevitable in a revocation case. The separation had been mitigated by the meetings between W and Mr Nguyen in the meantime. The UT took into account its conclusions on the application of the unduly harsh test. A foreign national who commits offences in the United Kingdom makes himself liable to deportation. Accepting the consequences of the deportation order and not appealing against it is not a matter of 'doing the right thing' because leaving the United Kingdom whether before or after an appeal is to be expected. There is no absolute right to be re-admitted. The foreign criminal must apply for revocation. An appeal against a refusal to revoke a deportation order engages the tests in section 117C. Although on one view Mr Nguyen could be commended for waiting before applying for revocation, that factor did not attract much weight in the UT's assessment. It was not a 'very compelling circumstance' either on its own or cumulatively.

74. The effect of the legislation which applied to appeal 1 was that deportation (including maintaining exclusion once a deportation has taken place) is 'in the public interest as a matter of immigration control'. It is not a 'punishment'. The order would not be maintained indefinitely. An order can be revoked, albeit subject to 'stringent tests'. The UT gave no weight to the argument that Mr Nguyen would always be prevented from re-entering the United Kingdom.

75. The UT took into account that Mr Nguyen satisfied nearly all the requirements of Appendix FM. The UT gave that no material weight because the suitability requirement (which was linked to the success of appeal 1) was 'highly relevant'. The provisions of the Rules dealing with the revocation of deportation orders were for the Secretary of

State's caseworkers to apply. *Binaku* made clear that if there is an appeal against the refusal to revoke a deportation order, Part 5A, rather than the Rules, governs 'the judicial decision-making process'. In any event, the provisions of the Rules which were current at the date of the UT hearing 'essentially reflect' section 117C(5) and section 117C(6). The UT referred to section 4 of Part 13. In this case, the outcome under the Rules would be no different.

76. The UT acknowledged the low risk of re-offending posed by Mr Nguyen and his genuine remorse. It gave some weight to the former, but none to the latter. The former was but one factor among many, and not the most important. 'Deterrence and public confidence in giving effect to the deportation process are significant factors'.

77. The UT also took into account the rights of Mr Nguyen's adult son and his grandchild. The UT accepted that the son could not be expected to move to Vietnam, given his ties to the United Kingdom. He had nevertheless been able to visit Mr Nguyen in Vietnam 'fairly regularly'. Those visits could continue and the grandson could also visit. The best interests of the grandchild could be met by frequent indirect contact and by visits to Vietnam. The rights of the members of Mr Nguyen's family in the United Kingdom did not on their own, or together, amount to very compelling circumstances.

78. The Secretary of State's guidance on revocation added nothing to Mr Nguyen's case (paragraph 54). The UT commented, in paragraph 55, that the F-tT had found that there were no very compelling circumstances. It followed that, if the F-tT had applied *Binaku*, it would have dismissed appeal 1.

79. The UT's overall conclusion (paragraph 56) was that there were no very compelling circumstances: in other words, the strong public interest in maintaining deportation was not outweighed 'by factors weighing in' Mr Nguyen's 'favour'. The UT had sympathy with Mr Nguyen and with the members of his family, but was 'obliged to apply the facts to the appropriate legal framework. The framework is demanding for [Mr Nguyen], as it is for anyone else in his situation' (paragraph 57).

80. The UT had also said, earlier in determination 4, that the immigration health surcharge (£1560) should be refunded immediately (paragraphs 32 and 33).

This appeal

81. Section 5 of the Appellant's Notice is headed 'Other information required for the appeal'. Under that heading, the form asks the appellant to 'set out the order (or part of the order) you wish to appeal against'. The text identifies determination 4 by its date and continues 'whereby [the UT] set aside the previous [the F-tT] decision and remade the decision dismissing the appeal'. Counsel helpfully agreed a note after the hearing. One of the topics it deals with is which decisions of the UT are appealable. The effect of the authorities to which the parties referred (*VOM (Error of law – when appealable) Nigeria* [2016] UKUT 00410, *AA (Iraq) v Secretary of State for the Home Department* [2017] EWCA Civ 944 [2018] 1 WLR 1083 and *Terzaghi v Secretary of State for the Home Department* [2019] EWCA Civ 2017) is that an appellant cannot appeal to this court against a determination of the UT which identifies an error of law in a determination of the F-tT if the UT retains the decision in order to re-make it. An

appellant can only appeal against such a determination if the decision is remitted to the F-tT, as, at that point, the UT is functus officio. If the UT retains the case and has re-made the decision, the error of law decision and the re-making merge in one decision for the purposes of any appeal to this court. Having considered the text of section 5 in the light of those authorities, I consider that Mr Nguyen appeals to this court against determination 3 and against determination 4.

The grounds of appeal

82. The first ground of appeal is based on two suggested errors of law by the UT. The first is the UT's conclusion that section 117C applied to Mr Nguyen's case. The second, linked to the first, is the UT's decision to set aside determination 1. The second ground of appeal is that the UT failed to give 'any substantial weight' to the passage of time between the date of the Order and the date when Mr Nguyen applied for the Order to be revoked. The third ground of appeal is the Rules are relevant to any article 8 assessment, and the fact that Mr Nguyen met the provisions of the Rules was 'arguably' a 'very compelling circumstance' for the purposes of section 117C(6).

The submissions

83. Mr Symes argued, under ground 1, that the concession recorded by the UT in paragraph 8 of determination 4 was wrong. I accept that if the UT did err in law, counsel's concession in the UT does not enable us to ignore or condone any error of law by the UT. By the end of the submissions, it became clear that the issues on this appeal included what error of law the UT identified in determination 1, and depending on what that error was, whether the F-tT had erred in that way, and, if so, whether that reasoning was wrong in law.

84. In answer to a question from Nugee LJ, Mr Symes accepted that this is a case 'concerning the deportation of a foreign criminal' and that, as a consequence of the words in section 117(A)(2)(b), Part 5A does apply to this case. He submitted, nevertheless, the language of section 117C is 'future-looking' and cannot apply to a case in which an appellant has already been deported. He relied in particular to section 117C(4)(c) and to section 117C(5), and on the reference to 'a decision to deport' in section 117C(7). In answer to a further question from Nugee LJ, he accepted that section 117C would apply to an application to revoke a deportation order by a person who had not yet been deported. He submitted that the UT had misunderstood the F-tT's reasoning. The F-tT had not held that Part 5A did not apply to this case; rather, it had held that section 117C did not apply.

85. After some further questions from the court, it became clear that Mr Symes's case on the Rules was that the provisions of Rules which deal with the revocation of deportation orders are also forward-looking, and do not apply if a person has already been deported. They apply only to an application to revoke a deportation order made while an applicant is still in the United Kingdom. He referred to two authorities which concerned applications to revoke deportation orders before ten years had elapsed.

86. He submitted that the F-tT was right to conclude, applying the factors in paragraph 390 of the Rules, that the length of time between the Order and the application for its revocation was a decisive factor. He was asked whether, even if the weight to be given

to the Order was reduced by the lapse of time, what factors there were to balance against the deportation order. He did not answer that question.

87. Ms Smyth submitted that it was open to the UT to identify the error of law in determination 1 which it had identified. In paragraph 14 of determination 3 (see paragraph 62, above), the UT had said that the F-tT was wrong to have concluded that Part 5A '(which of course included section 117C)' did not apply. To suggest that something turned on whether the F-tT had applied some of Part 5A (but not section 117C) was unrealistic. She argued that Mr Symes was trying, with 'considerable ingenuity' to suggest that the UT had wrongly set aside determination 1 because the F-tT had held that Part 5A did not apply, rather than because section 117C did not apply.

88. She drew our attention to the similarities in the language of Part 5A and the appeal provisions in the 2002 Act. The appeal provisions were amended by, and Part 5A was inserted by, the 2014 Act. Section 117A applies Part 5A when a court or tribunal has to decide whether an immigration decision breaches a person's article 8 rights and is therefore unlawful under section 6 of the HRA.

89. The effect of Mr Symes's construction was to offend all the principles described by Lord Hamblen in *HA (Iraq)*: (see paragraphs 18-23, above). Both 'concerning' and 'deportation' in section 117C(2)(b) are wide words. 'Deportation' does not only mean the act of removing a person from the United Kingdom. It includes the whole statutory deportation regime, and the maintenance of the deportation order once a foreign criminal has left the United Kingdom (as envisaged by section 5(1) of the 1971 Act). The construction also produced perverse results which could not have been intended by Parliament. If it was right, section 117C would apply on 30 December 2024 to a person who had not yet been deported, but would cease to apply the very next day if he were then removed.

90. Part 5A does not apply to the Secretary of State and did not apply to an application to revoke a deportation order which was not made on human rights grounds. If an applicant disagreed with the Secretary of State's approach to an application made under the Rules (but not on human rights grounds) his remedy was not a human rights appeal to the F-tT but an application for judicial review of the relevant decision.

Discussion

91. Section 12 of the TCEA (see paragraph 16, above) gives the UT power to set aside a decision of the F-tT if it finds that the making of the decision concerned 'involved the making of an error on a point of law'. Those are general words. They do not require the UT to identify every error of law in the F-tT's determination; just to find that the determination involved the making of an error of law. An appeal from the UT to this court lies on a point of law only. This court can only interfere with the assessment made by the UT pursuant to section 12 of the TCEA if the UT's assessment is itself wrong in law.

92. It does not matter whether the F-tT held that part of Part 5A applied to appeal 1; whatever else the F-tT held, it clearly did hold that section 117C did not apply. The thrust of the UT's reasoning is that the F-tT erred in law in not applying Part 5A and in

particular, in not applying section 117C. The whole includes its parts. The core of that error is that the F-tT erred in not applying section 117C. This is clear from the reasoning which I summarised in paragraphs 61-65, above. I consider that it is wrong in principle minutely to parse the error of law identified by the UT if, in substance, it did correctly identify an error of law: and I consider that it clearly did so in determination 3.

93. The next question is whether the F-tT did err in law in not applying section 117C. The mirror image of that question is the question whether or not the UT erred in law in applying section 117C to this case. I accept Ms Smyth's submissions that the only sensible meaning which can be given to the word 'deportation' when it is used in Part 5A is that it includes each stage of the statutory deportation regime. Thus any court which considers a case 'concerning deportation' is required to apply Part 5A when considering a human rights appeal based on article 8. It is required to apply Part 5A, as the case may be, to a decision to deport a person who is in the United Kingdom, to a decision to refuse an application for the revocation of deportation made by a person who applies for the revocation from inside the United Kingdom, and to a refusal of an application made by a person who applies for revocation from abroad. The extent to which different provisions of Part 5A do, or do not apply, however, will depend on the issue before the court or tribunal, and on the facts.

94. The general rule in section 117C(3) for medium offenders is that the public interest requires their deportation unless one of the Exceptions applies. It must be borne in mind that the Exceptions in section 117C are just that. They are exceptions to that general rule. If a person can bring himself within an exception, he wins his human rights appeal against deportation, without more ado. The general rule in section 117C(3) is further qualified by the reasoning in *NA (Pakistan)*. That reasoning enables a medium offender to rely on section 117C(6) as also, potentially, displacing the rule in section 117C(3).

95. I accept that the language in section 117C(4)(c) and (5) is forward-looking. But it does not displace the meaning of 'deportation' in Part 5A. Some of the F-tT's reasoning tacitly acknowledges that 'deportation' has this wider meaning: see for example paragraphs 49, 52, and 64 (paragraphs 49, 51, and 55, above) in which the F-tT apparently accepted that there is a public interest in maintaining a deportation order after removal.

96. This forward-looking language does not, however, show that wherever the word 'deportation' is used in Part 5A it refers to a future removal. All it shows is that a person who applies for the revocation of a deportation order from abroad may well not be able to bring himself within Exception 1 or Exception 2. Since that person, has, ex hypothesi, been deported, that should not be a great surprise. It does not follow from those two points, however, that section 117C(1), (2), (3) and (6) do not apply to an appeal against the refusal of an application to revoke a deportation order made from abroad. The Exceptions in part use forward-looking language and they are likely to be invoked before the deportation order has been given effect; but they do not displace the wide meaning of 'deportation' in Part 5A, and in particular, in sections 117A(2)(b) and in section 117C(1), (2), (3) and (6). There is nothing in the words of those provisions which supports that view. On the contrary, they all apply to an appeal against the refusal of a foreign criminal's application to revoke a deportation order made from abroad. Such an appeal can only succeed if the appellant can meet the test in section 117C(6).

97. It follows that the F-tT erred in law in not applying section 117C(6) to Mr Nguyen's appeal, and purporting to allow an appeal on human rights grounds when, on its own approach to the facts, 'None of this is very compelling'. It follows that the F-tT was also wrong to decide the appeal under the Rules; and by reference to an interpretation of the Rules which departed from the statutory scheme which the Rules are intended to, and do echo (except to the extent that they also give the Secretary of State power to revoke a deportation order on grounds other than human rights grounds).

98. I can deal very shortly with grounds 2 and 3. If section 117C(1)-(3) and (6) apply to this case, as they do, it is hopeless to contend that the mere passage of time could amount to a very compelling circumstance sufficient to displace the public interest in maintaining the deportation order, when Mr Nguyen's article 8 claim is as weak as it is. The contention that the 'fact' that Mr Nguyen met the provisions of the Rules is a very compelling circumstance is, if anything, even more hopeless. It depends on a misreading of the Rules, as I have explained, and, as with ground 2, the weakness of Mr Nguyen's article 8 case is a decisively large hole beneath the waterline.

99. The UT rightly identified the F-tT's error of law, and was entitled to set determination 1 aside. It was also entitled to reach the decision which it did reach, applying section 117C(5) of the 2002 Act. That decision echoed the observation of the F-tT which I have quoted in the previous paragraph. The fate of appeal 2 wholly depended on the outcome of appeal 1, as the parties agreed. If the UT was entitled to re-make determination 1, as it was, it was also entitled to find an error of law in, and to re-make, determination 2.

Conclusion

100. For those reasons, I would dismiss the appeal on all grounds.

Lord Justice Nugee

101. I agree.

Lady Justice Andrews

102. I also agree. For all the reasons given by my Lady, particularly in paragraphs 93-96 above, the UT was right to hold that the provisions of Para 117C apply whenever a "foreign criminal" who has been deported to another country, such as this appellant, makes the application from abroad for revocation of the deportation order which is a necessary precondition to their obtaining entry clearance to return to the UK.

103. I would add a short postscript. I have observed from reading the parties' written submissions in a number of recent applications for permission to appeal that the important decision of this Court in *NA (Pakistan)*, referred to by my Lady in paragraph [17] above, does not appear to be as familiar as it should be to lawyers who practise in this area.

104. Despite the fact that this authority on the construction of s.117C(3) is now almost 10 years old, and the fact that it has been subjected to consideration by the Supreme Court at least twice without adverse comment, I am still seeing submissions to the effect that in a case of a medium offender, who does not meet Exceptions 1 and 2, section 117C(6)

does not apply and the tribunal or the court should look instead at the Rules. It is a matter of great concern to me that those submissions have not been confined to counsel acting on behalf of individual appellants; I have recently seen them being advanced on behalf of the Secretary of State. I hope that paragraph 94 of my Lady's judgment and this short concurring judgment will help to heighten awareness of an important decision which appears, for whatever reason, to have dropped under the radar.