Upper Tribunal
(Immigration and Asylum Chamber)

Chege ("is a persistent offender") [2016] UKUT 00187 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 th February 2016	.....

Before

MRS JUSTICE ANDREWS DBE

UPPER TRIBUNAL JUDGE SOUTHERN

Between

GEORGE JOSEPH CHEGE

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Alasdair Mackenzie, Counsel, instructed by Islington Law Centre

For the Respondent: Mr Zane Malik, Counsel, instructed by the Government Legal Department

1. The question whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it.

2. The phrase "persistent offender" in s.117D(2)(c) of the 2002 Act must mean the same thing as "persistent offender" in paragraph 398(c) of the Immigration Rules.

3. A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge M. Whalan promulgated on 22 July 2015 following a hearing on 15 May 2015 , dismissing the appeal of the Appellant, (“ Mr Chege ”) against the Respondent’s decision to deport him , made under s.3(5)(a) and s.5(1) of the Immigration Act 1971, on the basis that his deportation would be conducive to the public good.

2. The decision to make a deportation order was made after Mr Chege’s most recent conviction for affray on 22 April 2013, an offence for which he was sentenced to 9 months’ imprisonment. The deportation order was signed on 13 November 2013 and served on Mr Chege on 15 November 2013.

3. Mr Chege’s case has been considered by the Upper Tribunal once before . T he Respondent (“the Secretary of State”) successfully appealed against a decision by First-tier Tribunal Judge Morgan made on 22 October 2014 allowing Mr Chege’s original appeal against the decision to deport him , under Article 8 of the ECHR under the Immigration Rules and on human rights grounds .

4. The Secretary of State ’s appeal was heard by the Upper Tribunal before a panel comprising Mr Justice Nicol and Upper Tribunal Judge Coker on 15 th January 2015 . T heir decision, promulgated on 5 March 2015, is repo rted at [2015] UKUT 00165 (IAC) (“ Chege (No.1) ”). It contains detailed guidance on the approach to be adopted by the tribunal in respect of Part 5A (ss117A-D) of the Nationality, Immig ration and Asylum Act 2002 (“the 2002 Act”) as inserted by s.19 of the Immigration Act 2014 . The panel conc luded that the assessment by F irst- t ier T ribunal Judge Morgan was legally flawed and set aside the decision to be re-made. The appeal was remitted to the First-tier Tribunal to be re-heard , with no findings preserved.

5. At the time when Chege (No 1) was considered by the Upper Tribunal, as recorded in paragraph 34 of that decision, there was no challenge to the assessment made by the Secretary of State that Mr Chege is a “ persistent offender ” . However, at the hearing of the remitted appeal before Judge Whalan , Mr Mackenzie (who appeared on behalf of Mr Chege, a s he did before us) withdrew that concession. As Judge Whalan stated in paragraph 37 of his decision, Mr Chege’s appeal now turned, at least in the first instance, on the contention that he is <u>not</u> a persistent offender and consequently not a “ foreign criminal ” for the purposes of Part 5A of the 2002 Act .

6. If he is not a foreign criminal, when the First-tier Tribunal came to consider the question whether the decision to deport him was an unjustified interference with his Art 8 rights, the considerations und er s.117C of the 2002 Act would not apply, al though s.117B would apply in any event.

7.
“Foreign criminal” is defined by s.117D (2) as :

“ a person –

(a)
w ho is not a British citizen ,

(b)
w ho has been convicted in the United Kingdom of an offence, and

(c)
w ho –

(i)

h as been sentenced to a period of imprisonment of at least 12 months,

(ii)
h as been convicted of an offence that has caused serious harm, or

(iii)
i s a persistent offender. ”

8.
There is no dispute as to Mr Chege’s criminal record. Over a period of at least 15 years from October 1997 to April 2013 he amassed numerous convictions for a wide variety of offences including crimes of violence, public order, drugs, significant motoring offences and breaches of court orders. He received short custodial sentences of between 4 and 9 months on at least five separate occasions , but he was never sentenced to a period of imprisonment of 12 months or more . His offending history can be summarised as follows:

i.
Between October 1997 and March 1998 he was convicted (on two occasions) for three driving offences, including driving whilst disqualified, for which he was sentenced to three months’ imprisonment.

ii.
Between March 2002 and May 2003 he accumulated three convictions for various offences, including handling stolen goods and failing to surrender to custody.

iii.
On 15 th May 2004, at Highbury Corner Magistrates’ Court, he was convicted for driving whilst disqualified and failing to surrender to bail, for which he was sentenced to a total of five months’ imprisonment (four months of which related to the driving offence) .

iv.
Between May 2007 and September 2008, he accumulated four convictions for various offences, including possession of a Class A drug (heroin) criminal damage, common assault and disorderly behaviour.

v.
On 17 th September 2008 at Blackfriars Crown Court, he was convicted of failing to surrender to custody , for which he was sentenced to 7 days’ imprisonment ;

vi.
On 6 th October 2008 at Highbury Corner Magistrates’ Court, he was convicted for destroying/ damaging property and breach of a suspended sentence (imposed for the earlier assault) , for which he was sentenced to 5 months’ imprisonment . He was issued with a letter from the Secretary of State warning him that he was liable to deportation as a consequence of having offended, but indicating that deportation action was not being pursued at that time.

vii.
Despite that warning, b etween June 2010 and July 2010 he accumulated another three convictions , the last of which was on 30 th July 2010;

viii.
On 20 May 2011 he was cautioned for affray;

ix.
On 22 April 2013 at Wood Green Crown Court he pleaded guilty to what the sentencing judge described as an identical offence of affray. He was sentenced to 9 months' imprisonment and made the subject of a restraining order for a period of 3 years.

9.
Section 56A of the UK Borders Act 2007 exempts certain immigration and nationality decisions from the scope of section 4 of the Rehabilitation of Offenders Act 1974. In practical terms, this means that the concept of a conviction becoming spent does not apply to decisions taken under the Immigration Act or the Immigration Rules relatin g to th e ability of a foreign national to remain in the UK .

10.
Given the length and nature of Mr Chege's offending history, Mr Mackenzie realistically did not dispu te that the Secretary of State was entitled to take the view at the time of her decision to deport him that he was a persistent offender. H is submission rested on the premise that, since Mr Chege had committed no further offences in the period since he was released on bail from immigration detention in June 2013 after serving the custodial period of his latest sentence, he could no longer be characteris ed as a persistent offender.

11.
Both Mr Mackenzie and Mr Malik, who appeared for the Secretary of State, accepted that the question whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the T ribunal as at the date of the hearing before it.

12.
The meaning of the expression " is a persistent offender" in s.117D of the Nationality, Immigration and Asylum Act 2002 is a matter of some impor tance on which there is no settled authority or guidance . That is the reason why permission to appeal was granted. Before turning to the specific facts of Mr Chege's case, therefore, it is necessary to consider that phrase in the specific context in which it arises, bearing in mind the policy expressed by Parliament in part 5A of the 2002 Act and reflected in the Immigration Rules (as amended) .

13.
Section 3(5)(a) of the Immigration Act 1971 provides that a person who is not a British Citizen is liable to deport ation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. The person concerned need not have committed any criminal offence , let alone a criminal offence attracting a prison sentence of any length. The decision that a person is liable to deportation involves the exercise of a discretion, and is not appealable: see Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC) at [32].

14.
If he is liable to deportation, the next question for the Secretary of State is whether he should be deported. That decision is made under s.5(1) of the Immigration Act 1971 and it is also discretionary. At that stage , it will become necessary for the Secretary of State to consider whether a human rights or protection claim precludes his deportation. If it does, no deportation order can be made. That is reflected in paragraph 397 of the Immigration Rules.

15.
If the person concerned has established a private or family life in the UK and claims that his removal would be a disproportion ate interference with his rights under Art 8 ECHR, and he has a criminal

record, the fact of his offending and its nature and extent will be relevant factor s when the question whether he can and should be deported comes to be considered by the Secretary of State . They will also be relevant when that question comes to be considered by a Tribunal on an appeal against the refusal by the Secretary of State of the human rights claim upon which he has sought to rely in order to resist deportation .

16.
At the stage when the person's offending history is conside red by the Secretary of State , it will fall to be considered under the Immigration Ru les, which were amended at the same time as s s.117A to 117D came into effect. By virtue of paragraph A362, where the prospective deportee raises an Art 8 point, the claim under Art 8 will only succeed where the requirements of the Rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order was served. Therefore altho ugh the decision under appeal pre-dated the amendments to the Rules, we are only concerned with the current version of those Rules .

17.
The Explanatory Notes published with the Immigration Act 2014, which introduced the new Part 5A into the 2002 Act, stated at paragraph 21 that " the Act gives the force of primary legislation to the principles reflected in [the Immigration Rules] ". That indicates that Parlia ment intended the Rules and the 2002 Act to be interpreted in a manner that is consistent . Consequently, w here part 5A of the Act repeats a phrase that appears in the Rules, such as "per sistent offender," it must be given the same meaning. We shall address t he meaning of that phrase later in this decision, when we come to consider s. 117D(2) .

18.
The initial assessment which the Secretary of State will be carrying out when deciding whether or not to make a deportation order is an assessment as to whether removal w ould breach the individual's rights under Art 8 ECHR .

19.
Paragraph 396 of the Immigration Rules provides, so far as material that:

"Where a person is liable to deportation the presumption shall be that the public interest requires deportation…"

Paragraph 397 underlines this by providing that where deportation would not be contrary to the UK 's obligations under the Refugee Convention or the Human Rights C onvention " it will only be in exceptional circumstances that the public interest in deportation is outweighed ." However , before that paragraph can apply, a decision has to be made that deportation would not be contrary to the UK 's obligations under those Conventions.

20.
Paragraph 398 of the Immigration Rules states as follows:

"Where a person claims that their deportation would be contrary to the UK 's obligations under Article 8 of the Human Rights Convention , and

(a)
t he deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of im prisonment of at least 4 years;

(b)
t he deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at l e ast 12 months; or

(c)
t he deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of the State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law ,

t he Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there ar e very compelling circumstances over and above those described in paragraph 399 and 399A."

21.
Mr Chege does not satisfy the requirements of sub-paragraphs (a) or (b). So far as sub-paragraph (c) is concerned, the Secretary of State has to form a view that the offending has caused serious harm or that the person concerned is a persistent offender who shows a particular disregard for the law (or conceivably, both) . Once that view is formed, then for the purposes of the Rules the deportation of the individual is taken to be conducive to the public good.

22.
In the decision letter, the official making the decision on behalf of the Secretary of State d id not express the view that Mr Chege's offending had caused serious harm. Instead , a fter describing his convictions in paragraph 52 , and referring to the relevant provisions of the Rules, she concluded in paragraph 55 that it was considered that paragraph 398(c) applied in his case because in the last 15 years he had committed 25 offences resulting in 16 convictions, and was therefore deemed to be a persistent offender. Although the words "who shows particular disregard for the law" do not appear again in paragraph 55, t he decision maker cannot be taken to have ignored them in reaching the conclusion, set out in that later paragraph, that paragrap h 398(c) applied . I n paragraph 53 she had already referred to the fact that the Secretary of State must take the view that the persistent offender shows a particular disregard for the law before she goe s on to consider whether paragraph 399 or 399A of the Rules applies . Read in context , it is clear that the phrase "persistent offender" in the last sentence of p aragraph 55 of the decision letter was being used as shorthand for "persistent offender of the type falling within paragraph 398(c) ". The decision maker was explaining that, in the light of the information set out in paragraph 52, she considered that Mr Chege fell under that limb of paragraph 398 (c) .

23.
For reasons t hat are not explained in the Explanatory Notes , t he words "who shows a particular disregard for the law" do not appear in Part 5A of the 2002 Act. The meaning of that phrase was not a matter that arose directly for consideration in this appeal . Nevertheless , it must have some bearing on the meaning of "persistent offender " in the Act , because in principle the Rules and Part 5A must be interpreted consistently. Whilst th e Tribunal must make up it s own mind about whether the ap pellant is a "foreign criminal" as at the date of the hearing before it, Parl iament cannot have intended that a person who fails to satisfy the requirements of paragraph 398(c) of the Rules c ould nevertheless fall within the scope of s.117D(2)(c) of the 2002 Act. The better view is that only those types of "persistent offender" who have already been held to satisfy paragraph 398(c) qualify for

consideration as to whether they meet the requirements of s.117D(2)(c) if they ap peal against the refusal of their human rights claim .

24.
On the face of it, in order for this limb of paragraph 398 (c) to apply, it is insufficient for the Secretary of State to take the view that the person conce rned is a persistent offender; s he must also form the view that he shows a p articular disregard for the law.

25.
Most offenders could be said to show some disregard for the law by virtue of their commissi on of a crime, unless the offence is one of strict liability . On one view, the " particular disregard for the law" required by the Rule could just be what is demonstrated by the persistence of the offend ing , and the phrase adds nothing of significance to the meaning of "persistent offender" . T hat might explain why it was not repeated in s.117D. The Immigration Rules are not to be interpreted with the same rigour as a statute or a statutory instrument: see Lord Brown in Mahad (Ethiop i a) v Entry Clearance Officer [2009] UKSC 16 at [10].

26.
On the other hand, as Lord Brown went on to say, the Rules should be construed sensibly, according to the natural and ordinary meaning of the words used. One would not rea dily conclude that they include words that are surplus to requirements unless there is no other sensible interpretation that could be placed on them . A s a matter of plain English, to "disregard" something is to take no notice of it . "P articular" can mean "specific" ; it can also mean "especially great or intense." B earing in mind that the offending in question will not have attracted a sentence of imprisonment of 12 months or more, or caused serious harm, we do not consider that the word "particular" was intended to add a requirement that the offending has achieved a certain level of seriousness.

27.
Therefore a "particular disregard" for the law appears to connote a specific, or deliberate, decision to take no notice of it or to turn a blind eye to it. On that basis, the phrase "particular disregard" signifies that the offences committed by the individual concerned must either be of a nature that demonstrates a certain state of mind or attitude to the laws of this jurisdiction – knowledge by the individual concerned that he was breaking the law, or reckless ness as to whether he was breaking the law – or committed in a way that demonstrates that state of mind or attitude . That makes sense in the context of a decision whether or not the removal of that person from the jurisdiction would be conducive to the public good .

28.
This would not necessarily mean that intention or recklessness has to be an ingredient of the offence which the prosecution had to prove . Or, f or example, it could readily be inferred from the fact that someone has committed numerous separate offences of simple possession of drugs on regular occasions over a period of some months that he was well aware that he was breaking the law (and , indeed, that he was determined to go on doing so) . An intention to break the law could also be inferred from the very nature of certain offences – for example, driving whilst disqualified , or breach es of a restraining order. On the other hand, such an inference as to the offender's cavalier attitude to the laws of this country may be more difficult to draw merely from the commission of several strict liability offences, such as certain road traffic offences, even if they are committed over a significant period of time.

29.

Since a person can show th at he has a particular di sregard for the law by reason of his past behaviour, the fact that the Rule is expressed in the present tense does not mean that the person concerned must still be committing offences up to or just before the da te of the decision that his deportation would be conducive to the public good . To import such a re quirement would be likely to preclude the Rule from being operative in the types of case for which it was clearly designed. It must be borne in mind that the twin aims sought to be achieved in deporting a foreign criminal are (a) the prevention of future harm from him and (b) the deterrence of others who might decide to follow his example. The deterrent element may still justify deportation even if there is no longer a risk of future harm. In the present context, the message sent out by way of deterrence is th at foreign offenders who keep on deliberately breaking the law or whose repeated offending involves not caring whether what they are doing is unlawful, will be removed from the jurisdiction , even if they do not qualify for automatic deportation by reason of the imposition on them of a custodial sentence of 12 months or more and even if their offending is not such as to cause serious harm .

30.
That interpretation of “particular disregard” not only fits with the natural meaning of the language used , but is consistent with a policy that thos e foreign nationals who demonstrate by their offending behaviour that they are not prepared to abide by the laws of this country should be removed, unless their removal would breach the UK ’s obligations under international conventions . Where , as in the present case, the nature and pa ttern of the offences committed by the offender over a very long period of time self-evidently demonstrate s the requisite state of mind or attitude , it is unnecessary for the Secretary of State to spell this out in her decision or to give any further explanation of why she has formed the view that th e requirements of this limb of paragraph 398 (c) are met . If the requisite state of mind or attitude to the laws of this country is not self-evidently demonstrated by the nature and frequency of the offences , but reliance is placed on the particular facts of the offending, the Se cretary of State would probably need to explain her reasons more fully.

31.
W here the foreign offender does not fall within sub- paragraph (a) or (b) of Paragraph 398, it is a necessary precondition of the matter b eing considered by the Tribunal under s117C that the Secretary of State has formed a view that he falls within sub- paragraph (c) , as in this case she did. We endorse the view expressed by the Vice-President of the Upper Tribunal in the unreported decision of Secretary of State for the Home Department v Bennett (DA/01409/2014) , promulgated on 2 September 2015 , that if the Secretary of State has not formed that view, it is not open to the Tribunal to substitute its own view on the matter, and the restrictive provisions of paragraphs 399 and 399A of the Rules would not apply in such a case .

32.
Paragraph 398 of the Immigration Rules, as amended, is underpinned by part 5A of the 2002 Act. Sections 117B and 117C of the 2002 Act set out Parliament’s considered view as to the public interest in an Article 8 analysis in respect of foreign criminals.

33.
Section 117D(2) of the 2002 Act provides for three separate routes by which an offender might qualify as a “foreign criminal” for the purposes of section 117C, namely:

a.
A sentence of imprisonment of at least 12 months;

b.

Conviction of an offence that has caused “serious harm”;

c.
Being a persistent offender.

However s ince, in order for s.117D(2)(c) to be engaged , the Secretary of State must already have formed the view that paragraph 398(c) of the Rules applies, the Tribunal would not be applying s117C to anyone, however persistent their offending, that the Secr etary of State has not already considered showed a particular disregard for the law in the sense explained above .

34.
In order to fall within sub-paragraph (c) of s.117D(2) an individual need not have been sentenced to a period of imprisonment at all . The three limbs of that section are independent of, and alternate to, each other. It is clear, however, that the first two limbs would be engaged on conviction of a single qualifying offence, regardless of how old the conviction for the offence causing “serious harm” might be, or how long ago the sentence of 12 months or more was served (if it was served at all) .

35.
Th e lack of time constraint s is understandable because the individual concerned might have absconded, or he might have adopted an alias or taken other steps which prevented his coming to the attention of the relevant authorities until many years later. However, the lack of time constraint s and the inability to argue that the conviction is “spent” means that , at least in theory, someone who committed an offen ce causing “serious harm” many years ago, but who has not offended since, would not only have the prospect of deportation hanging over him indefinitely but be subject to strong adverse presumptions in consequence of the mandatory application of s.117C, albeit that such a person might appear on the face of it to have cogent grounds for argument that his removal would be a disproportionate inte rference with his Art 8 rights.

36.
The third limb of s.117D(2) is not engaged unless the individual “is a persistent offender”. The re was no dispute that an “ offender ” , in this context, mean s a person who has committed a criminal offence (proof of which is established by a conviction or a caution , or a request by him that the offence be taken into consideration when sentence is passed for other offences, which is an admission that he committed it). However, the person concerned must be a “ persistent offender” and the question whether he meets that description must be answered at the time when the Tribunal is looking at the matter, not at some earlier time , because the question is whether he “is” a persistent offender, not whether he “was” a persistent offender .

37.
The two main definitions of “persistent” in the Oxford English Dictionary are “continuing firmly or obstinately in a course of action … especially against opposition” or “continuing to exist or occur over a prolonged period, enduring.”

38.
Mr Malik’s primary argument was that “persistent offender” is a status or label that, once acquired, is never lost. A persistent offender is someone who persists in committing criminal offences. The persistence is, in effect, a characteristic of a certain type of offender. Thus, he submitted, someone will be a persistent offender for the purposes of the Rules and the 2002 Act once he has repeatedly co mmitt ed sufficient criminal offences sequentially over a sufficient ly long period of time to warrant being so described , even if he has not committed a criminal offence for a significant period since the

last such offence. Such a person remains a persistent offender; he is just a persistent offender who is not currently offending. That interpretation of “persistent offender” would also be consistent with the deterrent element of the policy behind the discretionary deportation of foreign criminals, because even if someone could be said to pose no future threat of harm through offending because he had become completely rehabilitated, his removal would serve to discourage other foreign nationals from persistently disobeying the law.

39.
The attraction of that approach is that it would avoid the Tribunal having to consider whether the person concerned has become a reformed character , a consideration which would have no bearing on whether a person qualified as a “foreign criminal” under either of the other two limbs of Section 117(D)(2).

40.
Moreover there will inevitably be some lapse of time between the commission of the last offence and the decision by the Secretary of State, and a further lapse of time between that decision and the decision by the First-tier Tribunal, during which period or periods the individual concerned would be extremely foolish to commit further criminal offences if he is not detained. It seems highly unlikely that Parliament would have intended it to be open to such an individual to argue that he cannot be regarded as a “persistent” offender due to the lack of continuation of his offending behaviour whilst he faces removal from the jurisdiction .

41.
Mr Mackenzie’s response to Mr Malik’s primary argument was that this was an unnatu ral interpretation of the phrase, and in particular of the word “persistent” which, in its natural meaning, involves continuation. He laid stress on the fact that Parliament has deliberately chosen to use the present tense , and submitted that a person cannot be described as a persistent offender if he is no longer continuing to offend .

42.
Moreover, Mr Mackenzie submitted that if the status of “persistent offender” could never be lost, there woul d be no incentive for a petty criminal of the kind likely to be caught by the third limb of s. 117(D)(2) to mend his ways, since the threat of deportation would always be hanging over him r egardless of whethe r he became a wholly respectable and law-abiding member of society . Mr Mackenzie submitted that it cannot be right to interpret the Rules and the Act in such a way that part 5A would operate so as to make it extremely difficult, if not impossible, for a person who had demonstrably reformed to resist deportation. He pointed out that such a person would never be able to acquire British Citizenship , even if he was not deported, and thus the co nsequences of his past criminality would still be visited upon him in a meaningful way .

43.
One problem with the latter argument is that the two other limbs of s.117(D)(2) are capable of operating in precisely that way, as we have already pointed out. If anything, that fact could lend s ome support to Mr Malik’s argume nt , because i t indicates an intention on the part of Parliament that once a person fulfils the requirements of one of those limbs by virtue of his past offending h e will become, and will remain, a “foreign criminal” for the purposes of the 2002 Act . Consistency of interpretation might require a similar approach to be taken to sub-paragraph (c). The fact that it might operate harshly in an individual case is irrelevant.

44.

On the other hand , that begs the question of when the offender woul d fulfil the requirements of that third limb which, by its nature, encompasses o ffending that is unlikely to be a s serious as anything falling under either of the first two limbs. Unlike those other limbs, which would apply after the commission of a single qualifying offence, the third limb requires a pattern of continuing offending over a period of time.

45.
Mr Mackenzie's point on the language has more force. I t would have been open to Parliament to provide a definition of "persistent offender" that conferred that status on a person once they met certain specified criteria, for example, being convicted of or cautioned for three or more criminal offences over a defined period, but Parliament has not done so. Since there is no special definition in the Act , the natural meaning of the words should be adopted.

46.
Mr Mackenzie submitted that , on that basis, a persistent offender is one "between whose offences there is some connection in nature and/or time and/or who displays a degree of obstinacy or refusal to be corrected by punishment" . He sought to draw analogies with other contexts in which the words "persi stently" or "persistent offender" have been used, relying primarily upon the use of such phrases in the c ontext of sentencing for youth offending . He referred to cases such as R v L [2012] EWCA Crim 1336, [2013] 1 Cr.App R. (S) 56 in which earlier authorities on the question of what might or might not amount to a "persistent offender" for the purposes of passing a sentence of a detention and training order on a young offender were considered. In that case , the Court of Appeal (Criminal Division) held , quite understandably, that multiple offences committed on a single occasion within a minute or two of each other could not be characterised as "persistent offending " for the purposes of s.91 of the Powers of the Criminal Courts (Sentencing) Act 2000.

47.
However , it would be very unwise for this Tribunal to import the interpretation pla ced on a phrase used in another statute, in a context to which very different policy co nsiderations apply, into part 5A of the 2002 Act , even if the words used are identica l. In the context of youth offending, where a custodial sentence is regarded as a last resort, there are valid reasons for adopting a narrow approach to the question whether the requirements for exercising the jurisdiction to make such an order have been fulfilled. There are no reasons to justify adopting a similarly restrictive approach in the context of deportation.

48.
In any event, the Court of Appeal stated in R v L that the earlier authorities on s.91 signified that the term "persistent offender" is an ordinary term of the English language and falls to be applied in its clearly understood meaning. They also endorsed the observation in an earlier case by the then Recorder of Liverpool that " the term "persistent offender" is a wide one, allowing for some latitude of interpretation of the facts of particular cases. "

49.
Mr Mackenzie also referred to the case of In Re Arctic Engineering Ltd [1986] 1 WLR 686 in which the central issue was whether a liquidator had been "persistently in default" in sending returns or abstracts to the Registrar of Companies so as to render him liable to disqualification. However , apart from the observation by Hoffmann J (as he then was) at p.692B that the word "persistently" connotes some degree of continuance or repetition , that case also affords us no assistance, particularly as the

Companies Act 1981 contained provisions from which it could be inferred how many defaults would qualify as “persistent” for the purposes of disqualification proceedings .

50.
What, therefore, is the natural meaning of the phrase “persistent offender” in this specific statutory context? It can certainly be said, without unnecessarily straining t he natural meaning of the word that an “offender” acquires that status by virtue of committing a crime, and having once offended he does not lose that status even if he never commits another crime. In other words, once an offender, always an offender. The fact that Parliament has deliberately legislated to remove the concept of spent convictions in this context also lends force to the view that “offender” means someone who has offended in the past, however long ago that may have been.

51.
However , Parliament did not use the phrase “repeat offender” or “serial offender”. It used the phrase “persistent offender”, and persistence, by its very nature, requires some continuation of the behaviour concerned, although it need not be continu ous or even regular. There may be circumstances in which it would be inappropriate to describe someone with a past history of criminality as being a “persistent offender” e ven if there was a time when that description would have been an accurate one.

52.
Take, for example, the case of an individual who in his youth had c ommitted a series of offences between the ages of 14 and 17 which led to a string of minor convictions, but in adulthood had led a blameless exi stence for 20 years . W hilst it would be accurate to describe him a s an offender, the natural response to the question whether he is now a persistent offender would be no . It would still be no if at the end of that long period of good behaviour he committed another minor criminal offence , even one involving proof of intention or recklessness . That is why, both logically and as a matter of the natural meaning of the language, Mr Malik’s proposition that “persistent offender” is a permanent status cannot be correct.

53.
Put simply, a “persistent offender” i s someone who keeps on breaking the law . That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it , or that the continuity of the offending cannot be broken . Whilst we do not accept Mr Malik’s primary submission that a “persistent offender” is a permanent status that can never be lost once it is acquired , we do accept his submission that an individual can be regarded as a “persistent offender” for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whet her he fits that descriptio n will depend on the overall picture and pattern of his offending over his entire offending history up to that date . Each case will turn on its own facts.

54.
Plainly, a persistent offender is not simply someo ne who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence . The re has to be a history of repeated criminal conduct carried out over a su fficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise . How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be th e same, or even of the same

character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence , but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time.

55.
We agree with Judge Whalan that it is unnecessary that the offences be committed within what Mr Mackenzie described as " a reasonably short " space of time. Indeed, the longer the period over which the offending occurs, and the greater the number of offences, the more likely it may be that persistence is established. The offences must be sequential (i.e. not properly regarded as part of the same incident) , otherwise the necessary characteristic of repetition will be absent. T he time over which they are committed will of course be a relevant factor. Sporadic instances of isolated offending over a course of several years are unlikely to suffice. On the other hand, the facts may demonstrate that although he has committed very few offences, the offender's experience of the criminal justice system has provided him with insufficient deterrence a nd that he is plainly someone who is going to keep on re-offend ing .

56.
Mr Mackenzie submitted that offending twice over a period of time would never be enough to establish persistence . However we are not prepared to put a gloss on "persistent" by finding that it necessarily implies that three sequential offences is a m inimum requirement. Whilst it is perhaps unlikely that only two sequential offences would be regarded as sufficient to demonstrate persistence , it is not impossible.

57.
In order to answe r the question whether someone is a pe rsistent offender, the decision- maker (be it the Tribunal or the Secretary of Sta te) must consider the whole history of the individual from the commission of the first offence up to the date of the decision and ask themselves whether he can properly be described as someone who keeps on committing criminal offences . Factors to be tak en into account will include the overall pattern of offending , the frequency of the offences, their nature, their number, the period or periods over which they are committed, and (where relevant) any reasons underlying the offending, such as an alcohol or drug dependency or association with other criminals . This is in line with the guidance given in the Immigration Directorate Instructions, Chapter 13, version 5.0 (dated 28 July 2014) to which Mr Malik referred, which states that a persistent offender is "a repeat offender who shows a pattern of offending over a period of time". The guidance goes on to say "this can mean a series of offences committed in a fairly short timeframe, or which escalate in seriousness over time, or a long history of minor offences."

58.
If the person concerned has been out of trouble for a significant period or periods within the overall period under consideration, then the length of such periods and the reasons for his keeping out of trouble may be important considerations , though of course the decision maker is entitled to bear in mind that the mere fact that someone has not been convicted for some time does not necessarily signify that he has seen the error of his ways . It may simply mean that he has paused in his offending. It is the overall picture of his behaviour that matters.

59.
If during those periods of apparent good behaviour the person concerned was serving the custodial part of a short sentence, or was too unwell to go out and com mit the kinds of offences he is generally p rone to commit, there may be an explanation for the hiatus in offending which is not inconsistent

with his being properly regarded as a persistent offender. Likewise , if he had a very strong incentive not to commit further offences, such as being subject to a community order, or a suspended sentence, or he is on bail, or he has been served with a notice of deportation , the fact that he has committed no further offences during that period may be of little significance in deci ding whether, looking at his history as a whole, he fits the d escription.

60.
On the other hand , we agree with First-tier Tribunal Judge Whalan that an established period of rehabilitation may lead properly to the conclusion that an individual is no longer a persistent offender. D ependding on the particular facts and circumstances, a former drug addict who has ceased shoplifting to feed his habit a fter a period in rehabilitation , and who has been out of trouble for a significant period of time thereafter, might not be capable of being termed a “persistent offender” because when his history is looked at in the round, it can no longer be said that he is someone who keeps on offending.

61.
Mr Malik submitted that, whilst the view of the offender taken by the Secretary of State is not binding on the Tribunal, it is a factor that should carry very great weight when the Tribunal comes to decide whether someone is a “persistent offender” at the time the matter falls for consideration under s. 117(D)(2).

62.
The fact that the Secretary of State has decided that the individual has met the requirements of that limb of paragraph 383(c) of the Rules and that therefore, his deportation is conducive to the public good , is obviously something that the Tribunal is entitled to take into account, and it must be afforded due respect; but the Tribunal cannot substitute the Secretary of State’s decision for its own decision. It would be wrong in principle for the Tribunal to start with the premise that the appellant has been held to be a persistent offender who shows a particular disregard for the law, and then ask whether anything has happened since that decision to change that view of him. The Tribunal must make up its own mind, looking at the entire offending history and not just the period between the Secretary of State’s decision and its own. That is precisely what the First-tier Tribunal Judge did in the present case.

Mr Chege’s Appeal

63.
Mr Mackenzie’s primary contention was that the First-tier Tribunal Judge was not en titled to find that Mr Chege is a “persistent offender” because he had not committed any criminal offences since he had been granted immigration bail in July 2013 (ever since when he has had the threat of deportation hanging over him). Therefore as a matter of natural interpretation of the words it could not be said that he “is a persistent offender” as he was not continuing to offend. For the reasons stated above, we reject that interpretation of “persistent offender,” which would plainly defeat Parliament’s objective by leaving it open to a prospective deportee, even one with a track record as bad as Mr Chege’s, to defeat the application of s.117D(2)(c) merel y by dint of committing no further offences whilst he was challenging the decision to deport him.

64.
T he short answer to Mr Mackenzie’s first ground of challenge is that the Judge wa s not only entitled to make the finding that Mr Chege is a persistent offender within the meaning of the Rules and the 2002 Act, but right to do so. Indeed any other conclusion would have been perverse. If one asked the

question in July 2015 and indeed, if one asks the question now, by reference to his overall history, “is Mr Chege someone who keeps on offending?” the answer is plainly yes. The Judge made his assessment as at the date of the hearing, applied the correct approach , and gave cogent reasons for his finding which cannot be disturbed. There was no error of law. As the Judge said, Mr Chege was sentenced to imprisonment on five occasions between March 1998 and April 2013 and this in itself was sufficient to characterise him as a “persistent offender” as at the time of the determination . The recent break in offending of over two years was not such as to render the description of him as a “persistent offender” inaccurate, when that period was considered within the context of his extensive and varied offending behaviour as a whole.

65.
Mr Mackenzie further submitted that Judge Whalan erred in paragraph 43 of his determination by appearing to find that the onus was upon Mr Chege to provide evidence to change his “current status” as a persistent offender, and that it was irrelevant to the assessment of the situation whether Mr Chege had or had not been a persistent offender at any point in the past. T he J udge did no t reverse the burden of proof. He did not require Mr Chege to demonstrate that he had ceased to be a persistent offender since the Secretary of State’ s decision that he was , or substitute her decision for his own . H e was apply ing his mind to the correct test by taking into account the entire relevant period up to the d ate of his own decision , looking at it holistically, and asking whether (particularly bearing in mind the lack of recent offending, and any explanation given for it) , Mr Chege could still be described as a “persistent offender”.

66.
Mr Mackenzie next submitted that Judge Whalan made a material error of law in paragraph 42 of the determination by defining “persistent offender” as involving “repeated offending such as to bring an individual to the attention of the criminal authorities on more than one occasion. ” He submitted that this indicated that the Judge was wrongly equating persistence with repetition and, moreover, that the Judge appeared to be saying that committing two offences would suffice to constitute “persistence” in this context.

67.
However , those submission s rely up on taking the observation of the J udge out of context. It was made in the course of rejecting Mr Mackenzie’s submission that in order to be characterised as persistent, the offending must “show a consistent pattern over and above that disp layed by a course of recidivism ” (our emphasis). Immediately after the observation relied on by Mr Mackenzie, t he J udge went on to say that he did not see it as necessary for an individual’s history of offending to demonstrate any other form of “consistent pattern” save “that displayed by an antecedent history of repeated offending.” It is therefore quite obvious, when that paragraph is read as a whole, that he was not attempting to define “persistent offender” in that passage, let alone to do so as meaning a person who offends more than once . The phrases “a course of recidivism” and “antecedent history of repeated offending” which appear immediately before and after the sentence relied on by Mr Mackenzie make that plain. The J udge was simply making the valid point in response to counsel’s submission that , whilst persistence necessarily involves repetition, the repeat offending does not have to display any particular pattern. In any event, even if there had been any error of law in setting the bar too low, it was not material. The prolific number of Mr Chege’s offences was more than ample to justify the finding that there was a history of repeated offending sufficient to amount to persistence.

68.

Mr Mackenzie’s final ground of appeal (which he addressed with admirable succinctness in his oral submissions) was that the Judge’s conclusion on the proportionality of deportation was flawed because it played down the evidence of the risk to Mr Chege’s health posed by deportation, and in consequence there was a failure to make proper findings about the consequences for Mr Chege of an enforced return to Kenya.

69.
This ground focused on Mr Chege’s HIV positive status and the alleged risk of his committing suicide. Mr Mackenzie rightly did not contend that the Judge was wrong to find that paragraph 399 and 399A of the Rules did not apply. However , he submitte d that the conclusion under paragraph 398 and paragraph 397 of the Rules that deportation was not disproportionate was not reasonably open to the Judge or lacked adequate reasoning. It was unclear whether the Judge accepted the medical evidence and if he did, why he concluded that it did not amount to “very compelling circumstances”. In order to amount to “very compelling circumstances” it was unnecessary to meet the high threshold that would engage Article 3 ECHR (as Mr Mackenzie very fairly conceded this claim did not) or even that Art 8 should be engaged. The Judge had not properly balanced the public and private interests engaged in this case.

70.
Mr Mackenzie further submitted that although the Judge had set out the problems facing Mr Chege earlier in his determination, when dealing with the submissions made about them, he understated their seriousness by describing Mr Chege (in paragraph 60) as facing “some considerable life challenges”. This alleged understatement was said to disclose an error of law.

71.
Mr Malik referred to Akhula (health claim: ECH R Article 8) Nigeria [2013] UKUT 400 (IAC) and submitted that the challenge was no more than an expression of disagreement with a decision supported by legally sufficient reasoning.

72.
In our judgment t here is no substance in any of Mr Mackenzie’s criticisms. We agree with Mr Malik’s characterisation of them as no more than an expression of disagreement with the result. The Judge carefully considered the evidence and concluded, as he was entitled to, that there were no “very compelling circumstances” for the purposes of Paragraph 398 of the Rules and no “exceptional circumstances” for the purpose of Paragraph 397. He followed the guidance in Chege (No 1) and gave sufficient reasons for his findings. The re was no mischaracterisation of the evidence, including the medical evidence , which is set out extensively in paragraphs 27-31 of the determination; it is quite clear that the Judge accepted the medical evidence , subject to the qualifications he expressed about the psychiatric evidence set out in paragraph 62 of the determination. However, for the reasons that he gav e, he did not consider that Mr Chege satisfied the high threshold set by Paragraph 398 or that there were exceptional circumstances arising outside Art 8 under the residual discretion preserved by Paragraph 397 . The assessment of proportionality was consistent with the First-tier Tribunal’s statutory obligations and the case law.

73.
The Judge was entitled to deal with the Art 8 health claim relatively briefly, because it obviously had no prospect of success. He gave proper and adequate reasons for his rejection of it and his decision cannot possibly be castigated as irrational. As the Judge pointed at paragraph 62 , the appellant is not

presently accessing any treatment in the UK for his HIV . The asserted suicide risk was found to be illusory and not established by the evidence that Mr Chege chose to put before the Tribunal.

74.
We would add that even if, contrary to our conclusions, the First-tier Tribunal made an error of law in reaching the conclusion that Mr Chege was a “persistent offender” and thus that he was a “foreign criminal” to which s.117C of the 2002 Act applied, Mr Chege would have been no better off under s. 117B. His track record of minor criminal offences would not cease to be a relevant consideration in the balancing exercise merely because he did not fall to be treated as a “foreign criminal , ” with all that that entailed . His removal would plainly not be a disproportionate interference with his Art 8 rights , for all the same reasons as were given by the First-tier Tribunal Judge .

75.
On the facts as found, we accept Mr Malik’s submission that, even on a freestanding assessment under Article 8 outside the Rules, the same outcome was inevitable.

Notice of Decision

The first-tier Tribunal Judge made no error of law and his determination is to stand.

Therefore the appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date 9 March 2016

Mrs Justice Andrews DBE