Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU/08949/2017**

THE IMMIGRATION ACTS

At **Royal Courts of Justice** Decision signed: **22.01.2018**
On **22.01.2018** On **24.01.2018**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

[M M]

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Reginald Arkhurst* (counsel instructed by Caulker & Co)
For the respondent: Mr Paul Duffy

DECISION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Paul Housego), sitting at Harmondsworth on 19 October, to dismiss a human rights and revocation of deportation appeal by a citizen of the DRC, born 1981. The appellant had come here with his mother in 1991, and been granted indefinite leave to remain with her in 1999. In 2003, contrary to the result for his siblings, he was refused British citizenship on account of convictions he already had. While that criminal record went on over the years, the only serious sentence of imprisonment he received was one of three years' imprisonment for attempted robbery in 2005; but the Home Office wrote to him in 2006 to say they would take no further action over that.

2. Eventually in 2014 the appellant was sentenced to six weeks' imprisonment for breach of a non-molestation order, involving his ex-partner, by then the mother of his two daughters, L, born [ ] 2008, and K, born [ ] 2010, and of a son R, not by him, born in 2001. In 2015 that led to a deportation order, with a certificate under s. 94B of the Nationality, Immigration and Asylum Act 2002. At this point the appellant absconded from his

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

conditions of release, and was not seen again till he was arrested for a public order offence on 15 May 2017. That offence was punished only with a fine; but meanwhile the decision in *Kiarie and Byndloss* [2017] UKSC 42 came out on 14 June, leading to a further decision on 7 August, with an in-country right of appeal. That decision refused the appellant's human rights claim, together with revocation of the deportation order against him.

3. The decision was made on the basis of paragraph 398 (c) of the Immigration Rules: where

> '… the 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 State, … they are a persistent offender who shows a particular disregard for the law, the 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 are very compelling circumstances over and above those described in paragraphs 399 and 399A.'

It followed that it was important for the respondent to establish that this appellant was a 'persistent offender who shows a particular disregard for the law'. If she did so, then he would have to show 'very compelling circumstances' over and above those set out.

4. The appellant appealed, and on 22 August notice of hearing was sent to him in detention, and to his solicitors, for 27 September. On that day the case came before Judge Housego, who did not have the usual appeal bundle from the Home Office in his file; the appellant's solicitors had written in to say they had no bundle either, and asking for an adjournment. The judge adjourned the hearing without waiting for counsel (Mr Arkhurst), who was late, and the presenting officer undertook to serve the bundle within 3 days.

5. As it turned out, the Home Office had served what the judge referred to as the Nexus bundle on the appellant's solicitors on 26 September, and went on to serve the appeal bundle on the 28th. The Nexus bundle was of considerable importance, as it dealt with the appellant's whole history of offending, as required by *Chege* ("is a persistent offender") Kenya [2016] UKUT 187 (IAC): it was over 1800 pages long.

6. On 27 September, the day of the adjournment, notice of hearing was sent again, for 10 October. On 6 October the appellant's solicitors asked for another adjournment, which was granted till the 27th, with notice of hearing sent out on the 9th. On the 10th Judge Housego was told of this; but he had noted that the appellant's current Polish partner was due to give birth on the 28th. So, of his own motion, and without having the appellant's solicitors consulted first, he had the hearing brought forward to the 19th, and notice of that was sent the same day.

7. On 17 October the solicitors faxed the Tribunal to say they needed another two or three weeks to assess the Nexus bundle. On the 18th Judge Housego refused that application, noting that the solicitors had had since 26 September to work on it, and had only been under the illusion that the hearing would not be till 27 October overnight from the 9th to the 10th.

8. On 19 October, Mr Arkhurst appeared before the judge and once again applied for an adjournment, on the basis that he had not been provided with the whole Nexus bundle: he told me that he had had not had any of it, but that is by the way. He said he would be

unable to represent the appellant if the case went ahead that day, and rather unwisely threatened the judge with a further appeal, or an application for judicial review if it did.

9. Nevertheless the judge expressed sympathy for Mr Arkhurst in refusing an adjournment: however, as he pointed out, the solicitors had by then had all the papers since 28 September, giving them three clear working weeks to deal with them, and only briefly being under the illusion that they had till 27 October to do so. Mr Arkhurst withdrew, and the hearing went ahead. As it happened, the appellant's partner was not there: he gave an explanation, recorded by the judge at 46.4-5.

10. It must already be perfectly clear that, so far as the conduct of the solicitors was concerned, the judge's decision was eminently reasonable. They could have immediately provided Mr Arkhurst with the Nexus bundle, when they got it on 27 September, and with his help prepared the case well within the month that would have given them till the original hearing date of 27 October. Nor, when on the 10th Judge Housego brought the hearing forward to the 19th, did they make another application till the 17th.

11. However, Mr Arkhurst relied on *Nwaigwe* (adjournment: fairness) [2014] UKUT 418 (IAC), the *ratio* of which appears in the judicial head-note as follows:

> *Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.*

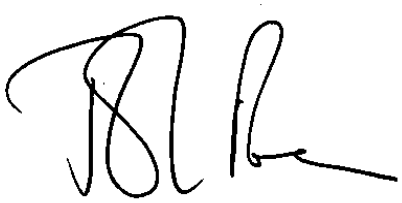
12. *Nwaigwe* was a case of a very different kind, as was *SH*. This appellant, who had been in this country for over 25 years, since he was ten, had a significant record of previous convictions against him; but his longest sentence dated back to 2005, had resulted in no further action by the Home Office, and did not in any case involve the requirement for him to show 'very compelling circumstances' under s. 117C (6) of the Nationality, Immigration and Asylum Act 2002. He had an ex-partner and children, and apparently a current one and a child shortly expected with her.

13. It followed that the appellant had a claim to consideration under both Exceptions 1 and 2, set out at s. 117C (4) and (5), and corresponding parts of the Rules. While it was essential for the Home Office to show he was a 'persistent offender who shows a particular disregard for the law' if he were to be required to show 'very compelling circumstances', the history of his offending was highly relevant to his case on whether the effect of his removal on his present partner would be unduly harsh, as the judge's assessment at 57.7 showed.

14. The judge did not refer to *Nwaigwe* (adjournment: fairness) [2014] UKUT 418 (IAC); but that was not essential. What was essential, in my view, was for him to consider whether the effect of an adjournment would be a hearing which was less than fair to the appellant, who had counsel ready to appear for him, but, through the fault of his solicitors, rather than his own or counsel's unable to do so effectively, for lack of opportunity to consider the Nexus bundle.

15. Very much to my regret, I have to say that, in these particular circumstances, and especially bearing in mind that the hearing had been brought forward from 27 October of the judge's own motion, for however understandable a reason, I do not think it was fair to go ahead with it on the 19th.

Appeal allowed: decision set aside
Fresh hearing in the First-tier Tribunal at Harmondsworth, not before Judge Housego



(a judge of the Upper Tribunal)