



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12285/2016

THE IMMIGRATION ACTS

Heard at Field House
On 09 January 2018

Decision & Reasons Promulgated
On 30 July 2018

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUNIOR OTITE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms I Sabic, instructed by David Benson Solicitors.
For the Respondent: Mr Clarke, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Herbert OBE) allowing the appeal of the respondent against a decision to deport him made on 10 May 2016. The respondent, whom I shall call "the claimant", is a national of Nigeria. He was born in 1972. He has been in the United Kingdom since 2003. He is married and has three children, born in April 2003, September 2005 and November 2010.
2. On 15 October 2015, at the Central Criminal Court, the claimant was sentenced to a term of four and a half years' imprisonment, together with a term of twelve months imprisonment to run concurrently. The relevant parts of the judge's sentencing remarks are as follows:

"You have been convicted by the jury on the most overwhelming evidence of conspiracy with others unknown between January 2010 and January 2014 to make articles for use in fraud.

In addition, on 24 November of last year you pleaded guilty to conspiracy with your cousin, Jeffrey Obule, between March 2010 and March 2012, to make articles for use in fraud.

...

Between January 2010 and January 2014, a period of four years, I am satisfied that you operated a document factory, producing extensively articles for use in fraud. The articles you produced which were all in electronic form, and no doubt produced on your computers, were passports, driving licences, utility bills, payslips and bank guarantee documents. When your email address and computers were examined they revealed lists of thousands of names and addresses of real people throughout the world which I am satisfied were what has been described as sucker lists, that is lists of people who are considered by you to be potential victims of advanced fee frauds.

As you were the manufacturer of these false documents which would normally be used by others to commit fraud, it is not easy to determine the full extent of losses suffered by others as a result of these fraudulent documents. However, I am satisfied of losses of well over £100,000 if not several hundred thousand pounds, must have been suffered in this case.

We have heard of just two victims who have been identified who suffered losses as a result of documents which I am satisfied were manufactured by you.

The Dutch gentleman called L K, lost 140,000 Euros in an advanced fee fraud in which you had produced the relevant documentation.

And a Mr S lost just over £500 as a result of a fraudulent letter, again produced by you

In the middle of the period of this conspiracy was the conspiracy between you and your cousin, Obule As I regard the conspiracy with Obule as part of the larger conspiracy of which you have now been convicted, I shall deal with both conspiracies by way of concurrent sentences.

... This offence falls into the category of high culpability. You performed a leading role in what was in effect group activity and this fraudulent activity was conducted over a sustained period of time, namely four years. I am also satisfied that it falls into the category of greater harm; a large number of articles were created. These articles had the potential to facilitate fraudulent acts affecting large numbers of victims and involving significant sums and there was the use of third party identities.

You have a previous conviction in 2007 for making ... a statement on oath that you were somebody else in relation to a driving offence ... which is an aggravating feature in respect of this case.

The sentence which I impose would be longer but for the fact that you are a married man with three children, which I take into account."

3. The claimant's sentence having been of more than four years, s 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) applies:

"117C. Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

Paragraphs

4. The relevant part of the Statement of Changes in Immigration Rules, HC 395 (as amended) is paragraphs 398 to 399A, which are as follows:-

"398. 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) the 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 at least 4 years;
- (b) the 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 least 12 months;

or

- (c) 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, their offending has caused serious harm or 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.

399. This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

5. It is to be noted that, because of the opening words of paragraph 399, neither that paragraph nor paragraph 399A have any direct application to a person who has been sentenced to a term of more than four years imprisonment: it is therefore necessary for such a person to show "very compelling circumstances over and above" those described in those paragraphs. Thus, the effect of these paragraphs is, as would be expected, the same as the effect of s 117C.
6. Judge Herbert heard evidence from the claimant. There was written evidence from a number of others, including his wife, two of his children, his mother and other relations; there was a report from Dr Rozmin Halari, a clinical psychologist, and Professor Aguilar, Director for the Centre of Study of Religion and Politics at the University of St Andrews. Having reminded himself of the legal framework, the judge said (twice, at paragraphs 107 and 116) that this was a "finely balanced case". After analysing the evidence, and making his findings, his conclusion, for reasons given in the determination, was that the appeal was to be allowed.

7. The Secretary of State's grounds assert that in reaching the conclusion that he did, Judge Herbert made a number of errors of law. The bulk of the grounds is directed to the judge's striking of the balance: it is argued that the material before the judge was not sufficient to show sufficiently exceptional circumstances to outweigh the public interest in deportation in this case. Two other matters, to which I shall shortly refer, are also identified as errors of law.
8. It appears to me that a number of errors of law are apparent from the face of the determination. More come to light when the determination is compared with the evidence that was before the judge.
9. I begin with the most troubling. As noted above, the claimant's sentence was one of four and a half years, which, the trial judge remarked, would have been longer but for the claimant's family circumstances. The statute and the Immigration Rules draw a distinction between sentences of at least four years and shorter sentences. Neither the Act, nor the rules provides any mechanism for treating a sentence of more than four years imprisonment as anything other than what it is. Further, although the claimant's sentence of four and a half years imprisonment was imposed on one occasion in 2015 and on conviction of one charge, as the judge's sentencing remarks observed, the evidence had established that the claimant was involved in offending, on a large scale, for the period from January 2010 to January 2014. In that context, the judge thought it appropriate to write as follows (which is intended to be an exact transcription of what the judge wrote):

"98. A factor to consider in the assessment as to whether Exceptions 1 and 2 can be considered is the fact that I take judicial notice of the fact that the Appellant did not commit any offences between 2007 and 2014 although I note that the active period of this conspiracy was between 2010 and 2014 so that comment must bear in mind that chronology.

99. I also take into account as a peripheral factor, taking judicial notice of the report that is currently being undertaken by the Right Honourable David Lamy M.P. into the disproportionality of sentencing in bail conditions throughout the criminal justice system as between those who are African Caribbean origin and those who are white and Asian. There is no direct evidence this impacted on the sentence length of this appellant but equally it cannot be assumed that the sentence is automatically fair given the Government's stated concern about these long standing statistics. Where a sentence is over four years there is a possibility that disproportionate sentencing may have been a factor, however slight.

100. There has been an abundance of evidence produced by the Home Office under Section 95 of the Criminal Justice Act 1991 that a person of African Caribbean origin committing the same offence as a white counterpart is likely to receive on average a jail term of seven months longer for the same or similar offence.

101. This ongoing problem has been thought sufficiently serious that it has been referred for Parliamentary scrutiny by the previous Prime Minister David Cameron and endorsed by the current Prime Minister Theresa May. David Lammy MP's report review on this situation is to be produced in June 2017 but the basic underlying evidence has been in existence since 1991 and has been produced on a biannual basis ever since. The current difference in length of sentences is on average a sentence of imprisonment of a length of 17 months for

a white offender and a sentence length of 24 months for an offender of African Caribbean origin.

102. This may or may not be explained by a number of socio economic factors but there is a prima facie case that a factor in determining the length of the sentence was is the Appellant's ethnic or national origin.

103. The Appellant's sentence was four years and six months and therefore there is a measure of proximity to the four year period if for whatever reason his sentence appears to be longer than it otherwise would have been.

104. I am aware that although the Appellant did not appeal his conviction but he has appealed his sentence and that sentence is due to be reviewed by the Court of Appeal in June of this year."

10. Paragraph 98 is very difficult to understand. As the judge was aware, the clear evidence before him was that the claimant was committing offences for over half of the period between 2007 and 2014, not that he "did not commit any offences between 2007 and 2014". The judge goes on to note the true fact, but seems to be treating that as a mere appendix to his assessment that no offences were committed in that period.
11. Paragraph 98 is also troubling in its opening words "a factor to consider in the assessment as to whether Exceptions 1 and 2 can be considered". As noted above, both the statute and the rules provide that those exceptions do not apply in the case of a person who is sentenced to more than four years' imprisonment, even if the person in question did have a period of non-offending for seven years before his conviction. It is the length of the sentence that counts.
12. Paragraphs 99 and following appear to show why the judge thought that it might be appropriate to do the opposite of what the statute and the rules say in the case of this claimant. The judge appears to be relying on his own knowledge, without discussing it with the parties. He appears to be developing some rule under which a sentence of four and a half years imposed on a Nigerian man should not automatically be assumed to be "fair"; and that, apparently in the judgment of this judge, "there is a prima facie case that a factor in determining the length of the sentence was the claimant's ethnic or national origin".
13. In making those remarks, the judge wholly exceeded his jurisdiction. Further, he overtly applied a racial factor in reaching his conclusions. Quite apart from that, there was no evidence before him of any sentence, other than that imposed on the claimant, which would have been "fair" in the light of the claimant's offending. He cites no material indicating that a sentence of four years and six months, already reduced because of the claimant's family circumstances, was one of over four years only because of the claimant's "ethnic or national origin". For these reasons, as it appears to me, even if the judge had been entitled to consider these matters, his reasoning is so lacking in evidence that it gives rise to very serious concerns about his approach to the judicial task.
14. Paragraph 105 begins as follows:

"Placing that matter completely to one side...."

15. As in relation to paragraph 98, it is far from clear what is intended here. If the judge's conclusions in paragraphs 98 to 104 were not relevant to the case, that is another reason why they should not have appeared in his decision. Despite what the judge says at the beginning of paragraph 105, it is difficult to see why the previous passage is there unless to indicate some of the matters that he proposed to take into account, even if doing so only from a basis of background. It does not appear to me that the opening words of paragraph 105 save the decision as a whole from the defects I have already indicated. In my judgment, paragraphs 27 to 28 of the Secretary of State's grounds, which raise this issue, are made out.
16. The future of the claimant's children is considered, in part, in the following passages of the decision:
 - "94. Whilst there are currently no proceedings ongoing to institute any form of care proceedings or to place these children's names on the "at risk register" under the Children's Act 1989 there are very strong signs that this is a distinct possibility.
 95. The interests of children are not for such an eventuality to actually occur but for there to be a remedy to prevent that occurrence.
 - ...
 111. There is a higher likelihood that children who are estranged from their fathers, not through any fault of their own, or any breakup of marriage but of some third party's intervention are more likely to be more susceptible to not only failing academically, but also being more prone to mental illness and being in care. There is a real risk that these children may at some point in the future fall into delinquency or be the subject of care proceedings which of itself would amount to very compelling circumstances.
 112. Whilst I cannot foresee the future, I certainly can foresee the risk and I find that there is real risk that on a balance of probabilities that the combination of these factors both the health, educational, welfare and emotion of these children and the Appellant's wife, their primary carer, would place this family at risk of facing public law proceedings whereby the welfare of the children would pass the threshold test that would trigger some form of public intervention by the State.
 113. It cannot be in the interests of the State to have on the one hand a foreign criminal removed with the benefits that would bring, but on the other hand having a far greater deleterious detriment to this society by having four individuals who are then susceptible to falling into the care system in one way or another and becoming a far greater burden not only to themselves and wider society, but impacting upon future generations."
17. There appears to have been no evidence before the judge supporting the assertions in paragraph 111, and in particular no evidence that the effects alluded to arise from deportation but not from the father's imprisonment. There is, of course, no assessment of any harm done to the children by the presence of a father so much of whose recent life has been spent in committing frauds or paying the penalty for doing so. There is no evidence that the children are, or any of them is, at risk of being taken into care. This factor in the judge's decision appears to be wholly based on ill-informed

speculation: speculation which was particularly out of place in the context of this case, where there was before the judge a quantity of considered individual evidence which he regarded as carrying weight, and which did not raise this risk. Paragraphs 29 to 31 of the Secretary of State's grounds of appeal, which raise this issue, are made out.

18. As I have indicated, the burden of the Secretary of State's grounds of appeal relate to the judge's weighing up of the various factors and his conclusion. I do not need to consider this matter in great detail, because the factors I have already dealt with are sufficient to establish error of law. It is, however, worth setting out paragraphs 115 to 118 of the decision, in which the judge sums up his final conclusions:

"115. I therefore find that it would be unduly harsh that the Appellant be removed to Nigeria. I do not envisage the prospect of the family relocating to Nigeria given the reports I have read about and their significant progress and the fact that they are for all intents and purposes British.

116. I therefore find bearing in mind this factors listed that there are very compelling circumstances which in this finely balanced case just override the necessity of removing this foreign criminal.

117. I take into account if Parliament had meant anyone that was sentenced over four years imprisonment to be deported without any right of appeal, Parliament would have said so. The fact that it did not, and that the authorities have set out what very compelling circumstances may include that the circumstances of this case taken together fall into that category for the reasons I have set out above.

Notice of Decision

118. I therefore allow this appeal against deportation under the Immigration Rules."

19. The decision itself in paragraph 118 is, of course, an excess of jurisdiction: the judge was concerned only with whether the removal of the claimant from the United Kingdom would be unlawful under s 6 of the Human Rights Act 1998. The ground of appeal that the decision would not be in accordance with the Immigration Rules was removed by amendments made under the Immigration Act 2014. Those amendments apply to this appeal.
20. Paragraphs 115 and 116 appear to indicate that the judge did not consider it necessary to identify "very compelling circumstances, over and above those described in Exceptions 1 and 2", as s 117C(6) requires. Perhaps that was because he still had it in mind that the claimant's sentence should be regarded as one which did not exceed four years. I do not know. But what is clear is that the reasoning of paragraph 115 and 116 is that because it would be "unduly harsh that the claimant be removed to Nigeria", an apparent reference to Exception 2 in s 117C(5), "therefore" (paragraph 116) there are very compelling circumstances that override the necessity to deport the claimant. That is not the correct test. The correct test, in the case of a person sentenced to a term of more than four years imprisonment, does not allow a transition from the application of Exception 2 to the allowing of an appeal by the simple word "therefore".

21. For that reason it seems to me that, without going deeply into the evidence before the judge and his analysis of it, this ground, which occupies paragraphs 1 to 26 of the Secretary of State's grounds, is also made out.
22. For the foregoing reasons, in my judgment, the decision of the First-tier Tribunal erred in law. Given that the judge thought that the case was finely balanced, but took into account inadmissible speculation on the claimant's side of the case and applied a test which did not recognise the difficulty the claimant had to face, the decision cannot stand. In any event, bearing in mind the judge's comments about the length of the claimant's sentence, it would be right to set it aside to avoid any suspicion of a judgment being based on considerations of race.
23. I turn then to the task of re-making the decision. The relevant provisions in the 2002 Act and in the Immigration Rules are set out at paragraphs 3 and 4 above.
24. In the light of the vigour with which Ms Sabic made her submissions, the evidence supporting the claimant's case is remarkably sparse, and in some respects does not in my judgment bear the reading Ms Sabic put on it. Ms Sabic relied particularly on the report from Dr Rozmin Halari that was before the First-tier Tribunal. I raised a number of queries about the contents of that report which would be apparent on any careful reading of it, and the hearing was adjourned so that Dr Halari could attend and give oral evidence. A date was duly fixed in accordance with her diary, but shortly before it she indicated that she had other things to do and would not be attending. As a result, the queries remain largely unanswered.
25. Professor Aguilar's report, which helpfully sets out some of the differences between living in Nigeria and living in the United Kingdom, is before me. I have also the written evidence, in the form of letters, from the claimant's wife and children: that is also limited to what was before the First-tier Tribunal, and there was no application to supplement it before this Tribunal, or for oral evidence from any member of the family to be heard.
26. Ms Sabic submitted that the claimant had been assessed as at low risk of reoffending. She relied for that submission on the OASys Report, which was before me. I indicated that the report did not appear to me to say that, and that it was in any event of some age. She obtained permission to submit, after the close of the hearing, an updated report, and I made arrangements for the respondent to reply to anything she said about it. Despite the passage of time since the last occasion that the matter was before the Tribunal, no such report has been served. Instead, there is what appears to be a reprint of the same report as had been before the Tribunal at both levels from the beginning. When this new printing was sent to the Tribunal, it was accompanied by a number of papers relating to the claimant's time in prison.
27. I look first at the circumstances of the claimant himself. He was born in 1972 and is now 45 years old. The offences he committed, the sentencing remarks, and the sentence he received, are a matter of public record, were taken into account by Judge Herbert, and I have set them out above. The OASys Report provides further information, as follows:-

"The activities of [the appellant and his co-defendant] were discovered in February 2013 after a victim of an Advanced Fee Fraud made a complaint to the City of London Police. It transpired that Mr Otite had supplied a fake UK passport to an unknown fraudster who used the passport to dupe the victim out of €142,000 Euros.

Advance Fee Fraud is when fraudsters target victims to make advance or upfront payments for goods services and/or financial gains that do not materialise.

Police found emails with both men in regular discussion about the production of fraudulent passports and fake documents including the fake UK Passport used by the unknown fraudster.

[The appellant's co-defendant] would regularly send a list of fictitious names and photos from the Bournemouth area to Mr Otite so he could create fake passports and utility bills to be used fraudulently. Each fake document would cost in the region of £50.00.

Other evidence was gathered from laptops, computer devices and mobile phones which included an email exchange with a woman sent to Mr Otite requesting a fake payslip so she could take out a tenancy agreement."

28. At paragraph 2.6 of the OASys assessment, in answer to the question "Does the offender recognise the impact and consequences of offending on victim, community/wider society?" The answer "no" is entered. Moving on, the form does not record the claimant's cooperation in any self-assessment. The assessment as to the future is on pages 15 and 16 of the report. Questions R10.1 to R10.5, and the answers to them, are as follows:

"R10.1. Who is at risk?
Members of the public.

R10.2. What is the nature of the risk?
To financially gain from the offences.

R10.3. When is the risk likely to be greatest? Consider the timescale and indicate whether risk is immediate or not. Consider the risks in custody as well as on release. Whilst in custody there is no risk as no access to internet computers is permitted.

R10.4. What circumstances are likely to increase risk? Describe factors, actions, events which might increase level of risk, now and in the future.
Access to internet computers and associating with his pro-criminal peers.

R10.5. What factors are likely to reduce the risk? Describe factors, actions, and events which may reduce or contain the level of risk. What has previously stopped him/her?
Restricting access to internet computers and not associating with his pro-criminal peers."

29. There is no further reasoning in the report: on the basis of the information I have just set out, the risk of serious harm to any group of individuals if the claimant were released on the date of the report is assessed at "low". The report contains no summary assessment of the risk of further offences.

30. It appears to me that the writer of the report, having noted the nature of the claimant's offences, and that he was apparently unable or unwilling to recognise their impact on others, made an assessment indicating that, on release, there was a noticeable risk that the claimant would continue to behave in the way that he did before he was found out. That, as it seems to me, is the clear message to be derived from the answers to the questions R10.1 – R10.5, even if the risk of serious harm (as distinct from the risk of further offences) is regarded as low. It may be of some importance in the latter context to note that the person making the assessment indicated at 2.5 that the impact on the claimant's victims would be that they "will have suffered hardship and emotional distress at realising they had been a victim of fraud", which does not appear to place very much weight on large financial losses.
31. As, despite the ample opportunity offered to the claimant, the report has not been updated since its production on 30 June 2016, there is no basis for me to conclude that the claimant's attitude to his offences, and his propensity to reoffend, is anything other than that set out in the OASys assessment.
32. The other documents submitted with the reprinted assessment indicate that the claimant has, whilst in prison, undertaken three courses, was described as a "model worker" in the café and that he is a "talented philosopher", on the basis of a 10-week course. He has a number of "positive behaviour" case notes, has undertaken training in peer mentoring, and has been active in the chaplaincy.
33. I turn now to the claimant's family. As already indicated, he has a wife and three children, born in 2003, 2005 and 2010. As I have also indicated, there is written evidence from them. There is no doubt that that evidence, when read superficially, indicates a close relationship between the claimant and the other members of his family, although, I think it would be fair to say, nothing exceptional. Difficulties become apparent when the material is looked at more closely, because much of it appears not to recognise the fact that the claimant had not been with his family since the date when his imprisonment began. For example, at paragraph 25 of the claimant's witness statement he says the following:

"I cry everyday whenever they ask me dad when are you coming home. I took my children to school, football practice, funfairs, restaurants and holiday visits together with my nieces and nephews. I help them with maths."

34. I take no point on the tense in the last sentence of that paragraph; but the claimant's wife's evidence to Judge Herbert was that the children have not been in contact with the claimant since his incarceration. There has, as it appears from the rest of the evidence, been no opportunity for the children to ask everyday "when are you coming home". At paragraph 30 of the claimant's statement he says this:

"My elder daughter is suffering with Type 1 diabetic [sic] and she is in insulin dependant. She always need attention. I take her to GP and hospital for assessments and my presence with her is important for her healthy future life."

35. The claimant's eldest daughter was diagnosed with diabetes in January 2016. Nothing that the claimant has done can have had anything to do with that, because of his

imprisonment since October 2015. Certainly since that time, she has not had the claimant's assistance with going to the GP. The limited medical evidence available confirms the diagnosis and indicates that the specialists met the claimant's daughter with her mother, at which time the claimant was evidently described as being in Nigeria. There is no suggestion in the material relating to that diagnosis that the claimant's return to the United Kingdom or to the family was important for his daughter's welfare.

36. The children's letters indicate that they missed their father. They asked for him not to be deported. I do not think there is anything in them which might be regarded as going beyond the norm for a nuclear family with children. Statements by the claimant's mother and his two sisters are essentially to the same effect. His mother, in particular, describes the children having become withdrawn following their father's imprisonment. One of the sisters (who says that she is aware of the difficulties because her cousin was deported to Nigeria) says that she has had an opportunity to visit him in prison. The other says that she will definitely "fall into deep depression" if he is deported.
37. I do not need to take specific notice of the report from Professor Aguilar: it is not seriously suggested that the claimant's wife and children, all of whom are British citizens, would accompany him to Nigeria. The question is whether the "very compelling circumstances" required by s 117C(6) will arise in the case of his permanent separation from his family by his deportation.
38. As I have said, Ms Sabic places particular weight on the report of Dr Halari, and it is to that that I now turn.
39. The report was prepared following instructions from the claimant's solicitors. The letter of instruction is dated "26th of December 2017". That date was, of course, a public holiday, and in any event the year must have been 2016. The report itself begins by setting out the instructions and then there is a section entitled "Relevant Background", which reads (in full) as follows:
 - "7. A comprehensive summary to the background can be found in the documents provided.
 8. Mr Otite has Indefinite of Leave to Remain (ILR) in the United Kingdom. He is currently in detention at HMP Maidstone Kent and a deportation order has been served on 10th May 2016 by the Secretary of State for the Home Department together with the decision of his Human Rights Claim. Mr. Junior Otite was sentenced to 4 years and 8 months for his criminal conviction.
 9. Mr Otite's wife and children have been away from Mr Otite for more than 15 months and the mental health condition of his wife and children is deteriorating. The elder daughter is currently on insulin for her diabetic condition."
40. There is then a section headed "Psychological Assessment", which indicates that the report is based on a single interview of the claimant's wife and his three children "at a clinica"; the date of the interview is not stated. Each of the interviewees is stated as having been quiet and having found it difficult to engage with Dr Halari. The report

sets out their self-reported difficulties. The claimant's wife said that she was not coping well and that her children were also struggling to function on a day to day basis because they miss their father. In detail, the claimant's wife's factual assertions are reported as follows:

"16. She explained that she has always been dependent on her husband for everything. He has been a great source of emotional and practical support for her and the family. She stated that all the children have a strong bond with their father.

17. She reported that her has been struggling to cope. He has been crying, suffering from low mood, he does not eat or sleep well and he often talks about not wanting to be alive. She said that he is very close to his father as are her other children.

18. Mrs U reported that [V] was diagnosed with diabetes Type 1 in 2016. The doctors told her that she developed diabetes because of stress and environmental factors. Mr Otite's absence was sudden and it had a shocking impact on [V].

19. Mr O reported that around the same time that Mr Otite was sentenced in 2015, she lost her mother and this was "extremely" difficult for her emotionally. She also had to ensure that she was monitoring [V]'s diabetes; [V] needs to have insulin injections 4 times a day.

20. She said that husband would look after the house and make sure it's tidy. He would drop off and collect the children from school, take them out, help them with their homework, prepare their food and spend quality time with them.

21. She said that it breaks her heart to see that her children have to take on the responsibility and burden having to care for her and themselves at this age."

41. There follows an account of the interaction of each of the children with Dr Halari. The claimant's wife's comments are intermingled with what the children said. All the children describe their relationship with their father as very good and give an indication of activities they undertook with him. All of them say that they do not want their father to be sent to Nigeria. The eldest child said that she is helping her mother look after the other children, because her mother is "struggling to cope". The daughter's words are reported as that she "can take a caring role towards her siblings" because she does not like her mother being stressed. She mentions her diabetes, but does not indicate any particular problems with managing it. The claimant's son said that he gets upset and does not want to be without his father. At paragraph 35, the claimant's wife is reported as saying the following:

"[S] has been displaying concerning behaviours and he has clearly been negatively affected".

42. This is expanded a little at paragraph 40, when the claimant's wife is recorded as saying that her son has become quick-tempered and gets angry over small things, feels picked on and is very sensitive. The youngest child said that she misses her father and used to spend a lot of time with him. All the children reported having a very close attachment to their father and missing his cooking, conversations, advice and support. They would fight for his attention. Reverting to the claimant's wife, Dr Halari records

that she said that her work had been “very stressful for her since her husband has been away”; and continues as follows:

“53. She told me that when she was at work, her husband would look after the children. He would get them ready, take them to school, pick them up, feed them and help them with their homework. Since he has been away, she has to do everything and she is struggling practically and emotionally. She said that she is finding it difficult to cope and she has been feeling very depressed.

54. Mrs U reported that she has high blood pressure, thyroid problems and she is also taking sleeping pills since her husband has been away.

55. She explained that her children would go to their father for school work, he would take them to doctors’ and dentists appointments. He was “the strong one”. He would give her and the children good advice and guidance. He would be the one who took the children to social events and parties. She said that her husband would always engage in activities with [S], help [V] with her drama work and he would take [O] to gymnastics.

56. She told me that she was unable to provide the children with the same level of care, attention and guidance because “there is too much going on”.

43. There follows a brief statement of the circumstances of other family members, and at paragraphs 60 to 61, there is this:

“60. Mrs U that Mr Otite plays an instrumental role in his children’s lives. He ensured that they are looked after, safe and happy. When Mr Otite was a home, he would help the children with their homework, feed them, put them to sleep, get them ready for school and do the school runs.

61. As a family they would cook, play games together have fun discussions and go out to restaurants, cinema and for the family outings.”

44. Turning specifically to the impact of deportation, the children are recorded as saying that they would miss their father a lot: “they would miss their dad making them breakfast and joking with them in the mornings”. Their mother would be sad. At paragraph 65 the eldest daughter is recorded as saying that “the situation is causing significant stress to her and the family, and she finds it difficult to cope on a day to day basis”. The claimant’s wife is recorded as saying that she could not think about her husband leaving the United Kingdom: she would not be able to cope, and “is very worried about her children’s education and their emotional well being”. Her husband “has always supported her with the children, he has always been there for her emotionally and practically”.

45. The next section is headed “Psychometrics”. It is as follows:

“Family Global Health and Wellbeing (Family Functioning) (FGHW)”

69. The FGHW is a screening tool to aid in the assessment of global health and wellbeing in the family. The measure requires the respondents to circle whether a series of statements pertaining to the general health and wellbeing of the family is either a: ‘serious problem’, ‘poor’, ‘adequate’, ‘good’ or ‘excellent’.

70. The FGHW was completed by [V] with his [sic] mother. The responses on this tool revealed that the family's health and overall wellbeing were below average level of functioning. There were concerns noted around family stress and anxiety. This is likely to be as a result of the current situation.

Beck's Youth Inventories (BYI-II for children and adolescents – Second Edition)

71. The BYI-II consist of five self-report scales to assess a child's experience of depression, anxiety, anger, disruptive behaviour and self-concept. The inventories are intended for use with children and adolescents between the ages 7 and 18 years.
72. The BYI-II was completed by [V] and [S]. The inventories were administered to screen for any signs of depression, anxiety, anger, disruptive behaviour and poor self-concept.
73. The scores on the inventories showed that [V] and [S] showed clinically significant levels of depression and anxiety. They also scored between the average - high average on the self-concept scales. This demonstrates that he has a positive self concept.

46. Dr Halari then proceeds to her conclusions, which she gives by reference to the questions in her instructions.

"Issues that I have been asked to address

1.A. A detail assessment of the mental health on our client's wife and children.

- 2. Evidence of any emotional trauma or psychological difficulties that wife and children of our client having as a result of detention and deportation order issued to our client.**

...

76. Mr Otite's absence in the family home has been extremely difficult for Mrs U and the children. The resultant stress has precipitated significant emotional distress for her, [S] and [V]. [V] has had to adopt the role of a carer and the consequent stress of this and the situation as a whole is causing a breakdown in the family system.
77. Both [V] and [S] are displaying clinical symptoms of depression and anxiety and I believe is likely to be due to their father's absence in the family home. In addition, as a result of their father being away, the children's social, emotional educational development has been significantly impacted; they are not able to have their emotional needs met adequately, or to concentrate at school, mix with friends or to engage in extra curricular activities.
78. Mrs U is also displaying symptoms of depression. She is not coping with working full time and caring for the children as well as ensuring that she meets their social, educational and emotional needs. In addition, around the same time that Mr Otite went into detention, her mother passed away and she was struggling emotionally. She is not getting any emotional and practical support at the present time because she was dependent on Mr Otite for this.

79. The positive progress that that the children have made educationally and occupationally is being significantly disrupted thus leading to emotional distress and feelings of fear and uncertainty for the children.
80. The children and their mother are experiencing significant emotional distress, anxiety and feelings of uncertainty and insecurity because of the current situation. They are fearful of the future and desperate to have Mr Otite back in the family home. Mr Otite's absence has been very destabilising for the children, their routines and their overall psychological development. They are very attached to their father; his ongoing absence is disrupting the strong bond they have with him causing them to feel anxious and insecure.
81. The mother's work and home pressures and the consequent impact on her emotional presentation is likely to be having a detrimental impact on the children's emotional wellbeing.
3. **What are the long term psychological effects for wife of Mr. Junior Otite in the event of deportation of him to Nigeria. She suffering with stress and anxiety due to the current status of her husband and under medication from her GP.**
83. Mrs U will struggle significantly on a practical and emotional basis if Mr Otite were to be deported from the UK. She is already suffering from depression and associated anxiety which is affecting her ability to cope with the care of the children. If her husband were not with the family, she would certainly deteriorate in her mental health.
84. I would be very concerned about the children's social and emotional wellbeing if Mr Otite were to be deported to Nigeria because as a family they would struggle to cope. Mrs U is already struggling to cope to work and having to do the basic care tasks for the children and not having support from her husband would worsen her symptoms of depression and anxiety and this would have a negative consequent impact on the children's emotional wellbeing.
85. An improvement in Mr U's mental state and the children's overall well being is likely to be achieved if Mr Otite was present with the family. He would be able to support his wife and provide practical and emotional support for the children.
86. The children are currently living in a traumatic environment where they are having to witness their mother's stress and depression, a change in her mental state and they are living their day to day life without the positive influence of their father. If the children had to endure yet another traumatic event (i.e. if Mr Otite were to be removed), this would have significant negative impact on their overall psychological (social, emotional, educational and behavioural) wellbeing. I believe that they would be extremely vulnerable, low in mood, and they would not be able to experience a healthy social, emotional and education development.
87. Based on the information made available to me, my clinical assessment and observation, I am of the view that Mrs U will experience a significant deterioration in her mental state if Mr Otite were to be deported from the UK. Any recovery or positive progress will be dependent on her husband's support and encouragement, without which she would feel helpless and this would be a maintaining factor to her poor and deteriorating mental health.

- 4. What are the long term psychological effects for the children of Mr. Junior Otite in the event of deportation of him to Nigeria.**
- 5. What is the future impact on diabetic medical condition for the elder daughter of Mr. Junior Otite in the event of deportation of her loving father Mr. Junior Otite to Nigeria as she is currently in insulin.**

88. Please also see my responses to questions 1-3.

89. It is evident that Mr Otite plays a significant role in the lives of all the children. He plays an important role in caring for and spending time with all children. He has been instrumental in providing the children with social, emotional and intellectual stimulation and praise. He has been involved in helping them with their school homework, social activities as well as providing all the children with a degree of practical and emotional support.
90. Based on my assessment and objective signs of distress observed in all the children, I believe that the children would experience significant emotional distress if their father were to leave the country. The breakdown of their family system and a disruption of their attachment with their father is likely to have detrimental impact on their social, emotional, cognitive and intellectual development.
91. The increased stress and uncertainty in the family home is impacting on the children's motivation levels at school and her social and emotional wellbeing.
92. In my opinion, removing Mr Otite from the UK would have a significant detrimental impact on all the children's social emotional, academic and behavioural wellbeing. [V] is struggling to cope as is evidenced in her low mood and [S] is also struggling to manage on a day to day basis, as was evidenced in his unpredictable behaviours, anger, low mood and anxiety.
93. The children having to deal with the absence of their father and their low mood. This is likely to have a detrimental impact on the children's social and emotional wellbeing.
94. It is evident that the children would miss their father and they would be yearning his attention, direction and guidance if he were to be removed from the UK. They would struggle to cope without him. [V], [S] and [O] talk about their father with friends at school and the absence of their father is also likely to impact on the children's sense of self, their family identity and their social relationships. In my opinion if Mr Otite were to be deported, this would have significant negative impact on the family system and the attachments within it.
95. Removal of Mr Otite from the UK is likely to have a detrimental effect on all the children. It is particularly important because after Mr Otite left the family home, [V] developed Type 1, insulin dependent diabetes and she has been feeling very low and anxious in her mood. [S] has also been feeling very low, angry and irritable. The children are showing clear signs of social isolation and deterioration in their academic performance as well as significant emotional distress on a day to day basis.
96. [V] misses her father and her diabetes is yet another compounding factor which contributes to her low mood. Having to have insulin injections 4 times a day is

unpleasant and upsetting for [V] and not having her father with her is likely to contribute to her low mood and adjustment to the condition.

97. In light of [V]'s age and stage of development, having to adopt a caring role for her mother and the resultant impact on her social and intellectual progress and development is going to have a detrimental effect on her psychological well being. The children are not having the opportunity to experience a healthy family life, enjoy a healthy adolescent life or to progress academically without pressures that are inappropriate and to their ages and unnecessary. This can be potentially damaging to them in terms of their own mental state, self identity and self confidence.

98. In my opinion, removal of Mr Otite from the UK would have a highly disruptive impact on all the children. They all have a secure and positive attachment to their father. Disruption of this attachment and relationship would have a significant negative impact on the children's overall psychological development and wellbeing.

99. It would be detrimental to the children's social, emotional, cognitive and behavioural development if Mr Otite were to be removed from the UK. The children would not be able to have anywhere near the same level (nature, degree or consistency) of contact via social media. This is no substitute for their happy, secure, loving and positive relationship, which is characterised by quality time spent together (e.g. engaging in joint activities) and positive reciprocal communication both physical and verbal.

[Paragraphs 100 and 101 contain general statements derived from sociological and psychological research].

102. In my opinion, if Mr Otite were to be deported from the 'UK, the sequential increase in levels of stress in the children's home environment could predispose them to develop mood difficulties and disruptive behaviours. [V] and [S] are already suffering from symptoms of depression and anxiety and removing their father would cause a significant deterioration in their mental state. The children would miss the social and emotional stimulation that Mr Otite provides through engaging them in meaningful activities after school."

47. Dr Halari then adds, in response to the final question, that she does not believe the children would resort to self-harming.
48. I have had to set out passages of the report at length, because it seems to me that when the report is read as a whole, it shows a number of matters of considerable concern.
49. The first is, obviously, that it has not been read through. There are a number of points where it appears to indicate that Dr Halari was unsure of the sex of the children, particularly in the passage headed "Psychometrics". Paragraph 17 appears to make no sense at all. The report is also very repetitive, paragraphs 20, 53 and 60, for example, containing essentially the same information.
50. Secondly, the report evidences a wholly uncritical attitude to all the information received, with no signs of any investigation of it, or any attempt to place the information received in the context of other facts which were either known to Dr Halari

or could easily have been discovered. My principal reasons for saying that are as follows:

- (a) Dr Halari states as “relevant background”, and as though it were part of her own assessment, merely what is asserted by the claimant’s solicitors. Paragraphs 7 and 8, including the assertion that “the mental health condition of [the claimant’s] wife and children is deteriorating” is taken directly from the letter of instruction, preserving in the original report even the typeface of that letter. A small matter, but indicative of the same attitude, is that, writing in February 2017, Dr Halari asserts that her instructions were dated in December 2017, without suggesting any correction.
- (b) The report draws no real distinction between the absence of the claimant owing to his imprisonment, and prospective absence that might result from his deportation. Although it is clear that Dr Halari was aware that the claimant had been absent from the family home for over 15 months when she interviewed the family, and referred on a number of occasions to the consequences of the claimant’s absence so far, in the section on the impact of deportation she is content to set out, without any query or assessment of their relevance, material which would be relevant to the claimant’s absence generally. Much of that section reads as if the children were being asked to access what the position would be if their father left them in the immediate future, rather than recognising that he has been away for some time.
- (c) Despite the diagnoses that Dr Halari, a chartered consultant psychologist makes, there is no medical evidence of any sort, other than the bare diagnosis of the oldest child’s diabetes. There is no investigation of the claimant’s wife’s assertions in relation to her drugs regime; although there are diagnoses of clinical depression for the children, there is no suggestion that they might need to seek any medical help.
- (d) Although assertions are made about the children’s academic progress and the affect of their father’s absence (whether in prison or in Nigeria), it does not appear that Dr Halari considered any academic evidence to support her conclusions.
- (e) In general, there is no evidence of any questioning approach to anything said that might support the claimant’s case in line with the solicitor’s instructions.
- (f) It is also somewhat surprising that at least three points (paragraphs 28, 35 and 65), the claimant’s wife and eldest daughter are reported as using terms that might suggest more than a little knowledge of Dr Halari’s own specialist field. It may be that Dr Halari has inaccurately transcribed her own diagnosis into the note she was taking of what the family said; or it may be that, without any response or enquiry from Dr Halari, the claimant’s wife and eldest daughter were saying things which they had been told would help the claimant’s case.

51. As I have said, Dr Halari did not make herself available to give oral evidence. There is, however, an email response to questions put to her by Ms Sabic. The questions and Dr Halari's answers, given on 8 January 2018, are as follows:

- "1. Was the assessment of effects on the family made on the assumption that the deportation is imminent or that the deportation will take place 4 years and 6 months after the offence?

The assessment was based on the assumption that deportation was imminent. The focus of the assessment was on how the children would feel if their father were to be deported from the UK and that they would not be able to have a stable and consistent relationship with him.

2. Did the report distinguish between the effects of the separation that has already happened as a result of criminal offending and the continued separation that will result from the deportation?

The report did not specifically distinguish between the effects of the separation that has already happened as a result of the criminal offending and the continued separation that will result from the deportation. Although the mother spoke of the difficulties that the children and herself experienced when Mr Ottite was not in the family home, the report focuses on the impact on the children of the continued separation and further the impact on them if their father was no longer in the UK.

52. As it seems to me, those answers do little to resolve the difficulty identified in point (b) above. In particular, it is clear that, despite Dr Halari's evident acceptance of the family statements of their closeness to their father and the damage that separation from him was doing, she made no investigation of the possibilities of contact with him during the time he had already been absent.

53. In summary, as it seems to me, despite the 'expert's declaration' with which it concludes, Dr Halari's report is unquestioning, uncritical and prepared without regard to the context. I give it very little weight.

54. The truth of the matter is that the claimant's input into the children's life was nothing other than that which any other unemployed father might offer. The family income was derived from the claimant's wife: her assertion that she used to depend on the claimant "for everything" is obviously incorrect. Dr Halari's need to repeat the claimant's activities in the family serves only to underline how limited they were. Despite the claimant's absence already for a considerable period of time, the asserted mental difficulties of both his wife and his children had not, on the evidence before me, required any medical intervention. Despite what the claimant's wife asserted, there is no evidence that the eldest child's diabetes was caused or triggered by the claimant's absence: indeed he himself states that he was taking her to hospital for assessment before his imprisonment.

55. Further, there is no record of visits to the claimant in prison by any of them, despite their claimed closeness and their claim to be emotionally dependant upon him.

Conclusion

56. I return, as I must, to s 117C(6). The evidence before me, which is, in essence, the evidence which was before the First-tier Tribunal, shows only that the family is an ordinary family which will, like any other family, be affected by the absence of the father. The effect of his absence has already been seen whilst he has been in prison, and although the members of the family have reported difficulties, they are in essence limited to missing him.
57. In these circumstances, the evidence falls well short of establishing the claimant's case. Exception 2 to the principle that the public interest requires deportation, as set out in s 117C(5), applies where the affect of a person's deportation on his partner or child "would be unduly harsh". On the evidence before me it would in my judgment be extremely difficult to establish even that. It is perfectly clear that the requirements of subsection (6), that there be "very compelling circumstances over and above those described in" that exception, are not established, by a considerable margin.
58. I therefore substitute a determination dismissing the claimant's appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 23 July 2018.