



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/27224/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 28 June 2018

Decision & Reasons Promulgated  
On 30 July 2018

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

O H L

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer  
For the Respondent: Mr S Saeed, Counsel, Aman Solicitors Advocates

DECISION AND REASONS

INTRODUCTION

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 it is ordered that the claimant's (the respondent in these proceedings) family members should not be identified. They may only be referred to by reference to the initials and letters used by UTJ O'Connor in his decision promulgated 15 December 2017 whereby the claimant's wife is referred to as HL and the children as A born 1998, B born 2002, C born 2011, D born 2012 and E born 2014. It is considered in the interests of justice to make this order. Any breach may lead to contempt proceedings.

2. This is an appeal against a decision dated 24 November 2016 refusing a human rights claim by the claimant which had been made in response to notification by the Secretary of State on 31 May 2016 of his decision to deport the claimant.
3. The claimant is a national of Algeria who has lived continuously in the United Kingdom since 29 September 1995. He had previously entered in July 1998 and left a year later and in May 1991 when he admitted to using a false passport to gain entry. It is not established when he left before his return in 1995. His appeal against an unsuccessful asylum claim was dismissed in May 1998. The claimant successfully applied for leave to remain based on his marriage to HL in January 2000 for which he was granted twelve months' leave to remain in July that year leading to a grant of indefinite leave to remain on 10 July 2003.
4. The claimant has a long history of criminal offending and there was no dispute to the detailed record in the decision refusing the human rights claim as follows:
  - “25. On 16 March 2015 at Kingston-Upon-Thames Crown Court, you were convicted of assault occasioning actual bodily harm, for which you were sentenced on 18 May 2015 to 12 months imprisonment.
  26. You also have previous convictions:
    - On 13 December 1988, you appeared before Bow Street Magistrates Court where you were convicted of criminal damage. You were ordered to pay a fine of £30, costs of £10 and pay compensation of £50.
    - On 10 October 1996, at Marlborough Street Magistrates Court, you were convicted of failing to provide a specimen for analysis. You were disqualified from driving for 15 months, and ordered to pay a fine of £300 and costs of £30.
    - You appeared before Bicester Magistrates Court on 11 October 1996, where you were convicted of driving a motor vehicle with excess alcohol, driving without due care and attention and failing to stop after an accident. In total you were ordered to pay fines of £440, disqualified from driving for 12 months, driving licence endorsed with a total of 10 penalty points and costs of £40.
    - On 6 May 1998, at Richmond-Upon-Thames Magistrates Court, you were convicted of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence and common assault. You were ordered to pay a total of £160 in fines, £60 costs and £50 compensation.
    - On 18 May 1998, at West London Magistrates Court, you were convicted of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. You received a conditional discharge of 12 months and fined £30.
    - At Richmond-Upon-Thames Magistrates Court, you were convicted on 26 August 1998, of destroy or damage property at a value unknown, and two counts of assault on police. You received 1 month imprisonment to run concurrent, and a fine of £150.

- On 25 February 2000, at Isleworth Crown Court, you were convicted of two counts of assault occasioning actual bodily harm and two counts of common assault. You received a total of 8 months imprisonment.
  - On 26 February 2002, at Richmond-Upon-Thames Magistrates Court, you were convicted of destroy or damage property and using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. You were ordered to take part in a community rehabilitation order for 18 months, a community punishment order of 120 hours, pay costs of £55 and compensation of £412.70.
  - On 14 June 2002, at West London Magistrates Court, you were convicted of using disorderly behaviour or threatening/abusive/insulting words likely to cause harassment alarm or distress. You were given a £100 fine.
  - On 12 September 2002, you were convicted at East Dorset Magistrates Court of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence, two counts of assault a constable, indecent assault on female 16 or over and battery. You received a total of 6 months imprisonment.
  - On 28 November 2003, at Richmond-Upon-Thames Magistrates Court, you were convicted of common assault and using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. You were sentence to 5 months imprisonment.
  - On 28 January 2004 at Kingston-Upon-Thames Crown Court, you were convicted of causing grievous bodily harm with intent to do grievous bodily harm for which you were sentenced to 8 years' imprisonment."
5. Following the conviction on 28 January 2004, the claimant was served with a notice of intention to make a deportation order against which he appealed. That appeal was dismissed on 2 July 2007. The claimant unsuccessfully applied for permission to appeal that decision to the First-tier Tribunal which he renewed unsuccessfully to the Upper Tribunal. Judicial review of the latter decision was refused and the claimant was served with a deportation order on 24 June 2008. Representations were made why the claimant should not be deported in 2009 and on 30 April that year, the Secretary of State refused to revoke the deportation order. The claimant appealed that decision which was dismissed by the First-tier Tribunal. Permission to appeal was refused however the claimant successfully applied for judicial review of the refusal. The Upper Tribunal dismissed the ensuing appeal on 20 April 2010 against which permission to appeal was sought and refused on 13 July 2010. Permission to appeal to the Court of Appeal was granted on 5 October 2010 whereby the appeal was remitted to the Upper Tribunal. Following a hearing on 19 September 2011 the appeal was allowed. This led to grants of discretionary leave to the claimant for limited periods until 25 May 2014. Before expiry, the claimant applied for further leave to remain and whilst consideration of that was pending the offending leading to the conviction on 16 March 2015 took place, on 11 December 2014.
6. This conviction led to the decision currently under appeal. First-tier Tribunal Judge Mays allowed the appeal for reasons given in his decision dated 10 July 2017.

Permission to appeal was granted by the First-tier Tribunal and on 15 December 2017 Upper Tribunal Judge O'Connor promulgated his decision setting aside the decision of the First-tier Tribunal. A copy of that decision is annexed. Further to a transfer order dated 1 May 2018, the matter came before me.

7. I heard evidence from the claimant and HL. Following oral submissions supplementing skeleton arguments that had been lodged I reserved my decision.

#### THE EVIDENCE

8. There is essentially no dispute as to the facts in this case which, subject to the reservations below, are as follows:
- (i) The claimant resumed living with the family unit in February 2017, some three months after discharge of a non-molestation order.
  - (ii) In recent times the claimant was away from the family for three months on two occasions when he was in Algeria in 2012 and after the birth of E in 2014. The sentencing remarks in respect of the 2014 assault reveals that the claimant was on remand for five and a half months prior to sentencing on 18 May 2015 and was released in June 2016. Thereafter he lived with his brother. Between August 2016 and February 2017, he lived alone at an address provided by the probation service. HL and the children visited Algeria in the summer of 2017 for five weeks.
  - (iii) A number of doctors and health care professionals have referred or treated D and some of the children. The bundle contains a number of letters dated between 9 March 2016 and 18 June 2018. These include Dr Sudipta Sen, Locum Consultant in Paediatric Neurodevelopment and Named doctor for Safeguarding, Dr Matthew Lee, Consultant Paediatrician and Dr Shwetha Ramachandrapa, Katie Varney from the Community Healthcare Children Speech and Language Therapy Services, Doctors Morris and Scott and Dr Palmqvist. The claimant did not attend any of the meetings with these doctors in 2016 attributed to the non-molestation order nor in 2017 and 2018 because he explained that his wife dealt with the medical side of things; her English was better and she understood more than he did. In addition, he needed either look after or pick up the youngest child from nursery who finished at mid-day and others between 3 and 3.15. He had either dropped his wife off with the child concerned and she had made her way back by public transport or she had travelled to the meeting or consultation by public transport.
  - (iv) HL is a paid carer for those of her children who are paid disability living allowances
  - (v) The family network who have assisted from time to time includes HL's father who lives in Ham where HL also has a number of aunts, uncles and cousins, and her sister who is a full-time police officer living in Ashford with her family and in addition, her brother who lives in Exeter. The claimant's brother and sister-in-law live in Brentford and they too have their own family.

- (vi) As to the children, the eldest is due to start university in Guildford this year. B is awaiting results of her GCSEs and will go to a college in Egan which she will travel to by train. Her current school has been a ten minute walk away from her house. Of the other three children, the youngest, E will start in the reception unit across the road from where the family live, D will be going to an infant school some five minutes away and C will be moving from infants to the junior school in the same location, some five minutes away. The reception unit begins at 9.05 and the infant and junior schools at 8.45.
- (vii) During the claimant's absences, HL explained that she had not received any support in relation to the children's schooling and their collection. She has had promises but nothing has happened. She acknowledged the two oldest provide help but when this was not possible she would need to take the children with her to appointments. She clarified that since the claimant's return he had stayed with the other children when she took one to an appointment. Both had attended parents' evenings. The claimant's brother and wife are "there to help" but not as much as HL would like as they have their own family. She needs full-time help especially at night. Visiting the claimant in Algeria would be inhibited by the cost.
9. The documentary evidence is unchanged from that before the First-tier Tribunal but for more recent reports on the children to which Mr Kotas readily consented be taken into account. The bundle before the First-tier Tribunal contained statements by the claimant, HL and their oldest daughter which I summarise the key points as follows:
- (a) The claimant made an application for the non-molestation order to be discharged which his wife had supported. The order had been applied for by Social Services and not by his wife or his children. Supervised contact took place from August 2015 and had increased from one to two hours a week. The children were happy to see him. Thereafter unsupervised contact with the community was allowed. The claimant had worked as a filler preparer for a period until the deportation order was made and he is currently not working. He had attended Triple P course where he was taught how to deal with teenagers' behaviour and this had improved his relationship with the two eldest. Because of the children's medical issues they are more dependent upon him and his wife than would normally be the case. Contact with the family from Algeria would be problematic where the internet is not good and unreliable. A visit once every two or three years would only be likely. His parents' house in Algeria is occupied by them, his brother and his wife and his sister and her husband and their two children as well as another sister. The house has only four bedrooms. There is generally a problem with housing in Algeria, a country which has changed a lot and a place he hardly recognised when he returned in 2012. He does not know whether the skills he has acquired in this country would help there, taking account of his age.
- (b) In her statement, HL refers to the medical conditions relating to the children. B has had hearing issues since she was 4 years old. There is uncertainty about her long term future in terms of her hearing which makes her anxious. She is being assessed for autism at the time the statement was made in June 2017. She needs

constant reassurance and guidance. Neurological problems are reported for C. D was suspected to be autistic and he is also epileptic as well as having a rare genetic disorder. The epilepsy is an absent seizure type resulting in him freezing for some 30 seconds and then returning to what he was doing. He also has a thickened corpus callosum which is linked to his behavioural issues which could cause learning and other neurological difficulties for which he was under observation. The youngest child E was to be assessed for a condition associated with autism and for PICA, a condition whereby she will eat non-edible items for which she requires supervision. HL's evenings are taken up with trying to get the youngest to sleep for which she relies on the claimant. He helps out whilst she is making dinner by taking the children to the park. She could not cope without him because she needs time to herself just to cope with everything.

- (c) As to HL's relatives, her father has health issues indicated as emphysema in the letter support that he provided. He lives twenty minutes' away by car in Ham but does not drive and so it takes 45 to 60 minutes by bus to reach his house. HL's brother in Devon lives too far away to help out and rarely visits. HL's sister works shifts so she does not have much free time. She has four children. The claimant's brother and wife can provide help but it is unfair to keep on asking them to drop everything to come over. HL had no support from the local authority whilst the claimant was in prison.
- (d) A refers in her statement to her strong affection for the claimant and her forgiveness for what he has done. She had been advised against working by her parents for fear that she would change her mind and not go to university. She had seen a counsellor once or twice but considers she can express her own feelings and did not have trouble doing that. It was not a counsellor that she needed but her father.

10. The claimant's brother provided a letter of support to the FtT explaining that he is more than happy to help HL with the children but this is limited by his work and having three children himself. He refers to the devastating impact if deportation were to take place. Likewise HL's father has provided a letter. He is aware of the children's needs as he has looked after them on a few occasions. He is able to visit sometimes depending on how he is feeling and they visit him.
11. Additional evidence in the bundle before the First-tier Tribunal includes a number of medical letters which I have referred to above of varying kind on interventions and steps being taken in relation to D and E. The more recent medical evidence indicates that the youngest child was due to be seen in the Child Development Clinic on 25 June. A letter dated 18 June 2018 by Dr Palmqvist relates to the referral of C for neurodevelopmental assessment. She had been referred to the emotional health service by her GP due to HL's concerns over angry outbursts and "meltdowns" as well as a reluctance to engage socially with others. Correspondence from Kingston Hospital confirms an appointment on 3 September 2018 for B in the Audiology and Ear, Nose and Throat Department.

12. As to the earlier medical letters and reports, a Neurodevelopmental Disorders Team assessment report dated 13 October 2017 on B concludes with an opinion that she meets the diagnostic criteria for autism spectrum disorder. B was referred in August 2015 after she witnessed domestic violence between her parents and an incident in which her sister was assaulted by her father. Recommendations included an aim to foster the development of social skills and for these to be practised. Her parents were recommended to arrange a meeting with the SENCO and school authorities to discuss ongoing support in view of the diagnosis of autism.
13. A recent report by Dr Ramachandrappa on D and E is dated 13 January 2017. He is a specialist registrar in clinical genetics and he notes problems by child D to be absence seizures, frequent falls and features of autistic spectrum disorders. In respect of E, the problems noted are recorded as features of autism spectrum disorder and PICA. The results of genetic investigations reveals (in respect of both children) an aspect of unknown clinical significance and in respect of D, a deletion of chromosome likely to be clinically significant. D is reported to have adequate motor skills, is under speech and language therapy and speaks in short sentences; there are no concerns about his hearing or vision. His sleep problems are noted as well as his repetitive and obsessive behaviour. A formal assessment for autism spectrum disorder was awaited and HL's concerns that he can sometimes become angry and aggressive were also noted. HL is reported not to have any concerns about child E's development but she was concerned she may have seizures and was eager to have an EEG to explore this possibility. Dr Ramachandrappa promised to write when he had the results of the genetic testing. A report dated 26 May 2017 by a speech and language therapist reports that she is making good progress but her language skills remain mildly delayed.

#### THE DECISION LETTER

14. The Secretary of State explained in her decision refusing the human rights claim that there was a significant public interest in the claimant's deportation. Despite the warning given in a letter dated 27 February 2012 following the successful appeal against the refusal to revoke the deportation order dated 24 June 2008, the claimant had been convicted again. It was noted that his children were subject to child in need plans and that there was a non-molestation order against him. These were considered a variation to the circumstances that prevailed in 2011. The sentencing remarks for the 2014 conviction are quoted in the decision as follows:

"36. Within his sentencing remarks, the Judge commented upon the circumstances of your most recent offence:

*"You have been before the courts on a good number of previous occasions, including matters for offences of violence. You are in your middle 40s and you have pleaded guilty not at the earliest opportunity but a fairly early opportunity to assault occasioning actual bodily harm on one of your daughters. You pleaded guilty at the plea and case management hearing. The incident involved banging the head of your daughter against the bedframe in her bedroom and it included squeezing her, pushing her to the wall, pulling her hair, hitting the back of her neck on several occasions. She received a number of injuries, fortunately none of them particularly serious but a number of injuries to the hands, neck and top of the head, left and right shoulder.*

*I give you a quarter reduction for that guilty plea. You have been before the courts on one occasion for a matter of inflicting grievous bodily harm for which you received 8 years' imprisonment. That sentence was passed in 2004. I am told you were released into immigration detention after you had served the appropriate part of that custodial sentence. You have convictions for common assault, for assault on the police, indecent assault on a female, assault occasioning actual bodily harm, a number of matters. Clearly, this is not the most serious piece of violence that you have been involved in – you were sentenced to 8 years' imprisonment – but nonetheless it was a nasty piece of violence against somebody within your care, within your family.*

*I have looked at the guidelines and it is clear that this was a sustained attack because it wasn't just an isolated incident that evening. The child is particularly vulnerable in the sense that she is in her teens, living in the household. The Crown say that hitting somebody's head against a bedhead is much the same as using a weapon to hit their head, so something to be taken into account in relation to culpability. In my judgment, this matter does creep into the bottom category 1 although at first appears to fulfil the upper end of category 2. There are your previous convictions to deal with, the location of the offence, at home, abuse of a position of power in being her father, aggravating features that slide the matter up the range and, in my judgment, into the lower part of category 1."*

15. It was not accepted that the claimant had a genuine and subsisting parental relationship with the four children under 18 noting that he had not been resident in the family home since December 2014 and the making of the non-molestation order. It was not accepted that the limited contact the claimant had with the children through contact amounted to a genuine and subsisting relationship. The Secretary of State's view was that the best interests of the children were to remain in the United Kingdom with their mother where her immediate family are resident with the result that she has a wide network of support on which she could rely. She was also being currently supported by the local authority. Concerns from HL set out in a letter dated 23 February 2016 over deportation were noted and although the Secretary of State acknowledged that deportation and subsequent separation from the children may be considered harsh, it was not considered unduly harsh when balanced against the serious and violent nature of his offending and the potential risk he presented to the children. Reference is made to a letter from Social Services dated 22 February 2016 indicating that the claimant had engaged well with a parental programme and that he was in the process of completing a domestic violence perpetrators' programme. It was also noted that the social worker had asserted through contact that the children have been able to experience a positive relationship and that the claimant was a key male role model. Nevertheless, the Secretary of State considered the claimant had failed to take into account their best interests when committing his most recent offence. In his absence, the children can continue to be exposed to their Algerian culture and heritage through contact with their paternal uncle and other family members resident in the United Kingdom. In respect of the anticipated distress and guilt B might encounter professional assistance through counselling services could be provided to assuage that. The children will continue to be able to have access to the medical facilities and treatment they are entitled to as British citizens. The Secretary of State concluded that taking into account the circumstances there was no evidence to suggest that the safety and wellbeing of the children would be so severely impacted upon as to outweigh the public interest in his deportation. It was not accepted that there are very compelling circumstances surrounding the family enough to outweigh the public interest. Any



private life the claimant had established in the United Kingdom could be carried on outside the UK in Algeria where he had spent his youth and formative years. There was no evidence to suggest that the claimant was now in a position of being estranged from Algeria to the extent that reintegration into family or private life there would create a very significant obstacle. Any delay in making the immigration decision did not outweigh the public interests in the claimant's deportation.

16. The refusal letter also deals with concerns expressed by the claimant's representative as to his own health in the light of tests regarding his memory and other brain function. It was considered there would be available medical facilities and treatment in Algeria and deportation would not breach Article 3.

## SUBMISSIONS

17. I had the benefit of written skeleton arguments from Mr Kotas and Mr Saeed which as I observed above, were supplemented at the hearing with oral submissions. Mr Kotas refers to a seismic shift in terms of public policy when considering foreign national offenders since the previous appeal was allowed in 2011 by reference to the changes in Immigration Rules in 2012 and 2014 and the enactment of the statutory public interest considerations in Sections 117A – 117D of the Nationality, Immigration and Asylum Act 2002. It is submitted that the previous decision is of limited probative value and does not take into account the reoffending. Reliance is placed on *NE-A (Nigeria) v SSHD* [2017] EWCA Civ 239 for the comprehensive and structured approach now required in dealing with Article 8 claims within the context of deportation proceedings. The 2002 Act and the Immigration Rules are consistent with one another with reference to the decision in *SSHD v SC (Jamaica)* [2017] EWCA Civ 2112. It is argued with reference to an Upper Tribunal decision in *Johnson (Deportation – four years' imprisonment: Sierra Leone)* [2016] UKUT 282 (IAC) by reference to the conviction in 2004 when the claimant was sentenced to eight years' imprisonment he was precluded from relying on paragraphs 399 and 399A of the Immigration Rules or the exceptions under Section 117C(4) and (5) of the 2002 Act.
18. In terms of the claimant's relationship with the children, reliance is placed on *LC (China) v SSHD* [2104] EWCA Civ 1310 in which it was observed that the fact of children having British nationality or that they may be separated from their father for a long time will not be sufficient to constitute exceptional circumstances of a kind which would outweigh the public interest in deportation. With reference to the Court of Appeal decision in *SSHD v AJ (Zimbabwe)* [2016] EWCA Civ 1012, it is argued that the effect of separation of the children did not come close to establishing such a detriment that would attain what could truly be described as a very compelling or exceptional case. It is argued that the claimant is entirely the author of his own misfortune. With reference to his numerous offences, the conviction for a serious offence in 2004 and that he would have been aware that his presence in the United Kingdom would be jeopardised were there further adverse attention from the criminal justice system.
19. Mr Kotas accepted that the best interests of the children lay with having both parents present and for the children to remain in the United Kingdom. He referred to the

lengthy periods of absence of the claimant away from the children between February 2003 and 2010 during which the claimant was serving his sentence and then in immigration detention and a further period of separation that ensued after the most recent conviction of over two years. He contended that HL had been able to cope on her own. He invited me to draw an adverse inference from the readiness of the claimant to go away to Algeria for three months after the birth of E. It was not an unplanned visit and there was no evidence it was opposed. Whilst Mr Kotas did not pretend that the task for HL was easy, nevertheless she was able to cope, taking account also of her wider extended family. He also referred to the absence of any role by the claimant in the various medical interventions and the proximity of the schools to the family house with reference to the claimant's evidence over the need to collect the children and drop them off. The claimant has a house to go to in Algeria and although it may be crowded and is not ideal, he would not be destitute.

20. Mr Saeed's skeleton argument helpfully sets out the relevant law and key chronology. He argues that the starting point must be the decision of the Tribunal in 2011 with reference to *Devaseelan* [2004] UKIAT 00282. The Secretary of State's current decision was out of date by the time it was made and since that decision, the circumstances have changed with reference to the family living together again. It is argued that family life was not broken whilst the claimant was in prison or living away from the home and the evidence overwhelmingly shows that he has a genuine and subsisting relationship with all of his children and his wife as well as a long established private life in the United Kingdom. The view of the social worker is that it is in the best interests for the children that he should remain with reference to a report sent by email on 15 June 2017. HL did not wish for her husband to be deported and his daughter who had been the victim had forgiven him. There will not be enough support available to HL were he to be deported and the medical conditions of the children were relevant considerations. Their extended family members have their own commitments and it is unreasonable to expect those family members either individually or collectively to support HL to the extent that she requires. The social worker had promised no more than an assessment if the claimant were deported in the same report and, in reality therefore, no meaningful support was available from the local authorities. As recently as 13 October 2017 B had been diagnosed with autism. This factor needed to be added to the conditions of the other children and the time and attention they required.
21. In his oral submissions Mr Saeed did not dispute the law as stated by Mr Kotas in his submissions. It was his contention however that very compelling circumstances had been established in this case with reference to factors above and beyond the relationship between the claimant and HL and with the children with reference to their medical conditions and the additional responsibilities. HL had struggled to cope whilst the claimant was absent from the family between 2014 and 2017 and that she needed full-time support day and night. He reminded me of the evidence regarding the limitations on the help that the extended family could provide and the support that the claimant provided. When all the evidence was put together, it pointed to very compelling circumstances and the consequent risk to the children if something went wrong. He referred me to the authorities relied on by Mr Kotas in support of his contention that the circumstances of this case were more compelling than those before the Court of Appeal in *AJ (Zimbabwe)*, *CT (Vietnam)* and *NE-A (Nigeria)*. He argued

that the public interests should be assessed in the light of the conclusions in the Upper Tribunal decision in *Johnson* and emphasised the claimant's success on his appeal on human rights grounds against the refusal to revoke the deportation order.

## LEGISLATION

22. The rules and legislation relevant to this case are as follows:

"A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

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.

In addition to the rules, section 117A to 117E of the Nationality, Immigration and Asylum Act 2002 also states that:

*“117A Application of this Part*

- (1) *This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –*
  - (a) *breaches a person’s right to respect for private and family life under Article 8, and*
  - (b) *as a result would be unlawful under section 6 of the Human Rights Act 1998.*
- (2) *In considering the public interest question, the court or tribunal must (in particular) have regard –*
  - (a) *in all cases, to the considerations listed in section 117B, and*
  - (b) *in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.*
- (3) *In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).*

*117B Article 8:public interest considerations applicable in all cases:*

- (1) *The maintenance of effective immigration controls is in the public interest.*
- (2) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
  - (a) *are less of a burden on taxpayers, and*
  - (b) *are better able to integrate into society.*
- (3) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*

- (a) *are not a burden on taxpayers, and*
- (b) *are better able to integrate into society.*
- (4) *Little weight should be given to –*
  - (a) *a private life, or*
  - (b) *a relationship formed with a qualifying partner,*  
*that is established by a person at a time when the person is in the United Kingdom unlawfully.*
- (5) *Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.*
- (6) *In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –*
  - (a) *the person has a genuine and subsisting parental relationship with a qualifying child, and*
  - (b) *it would not be reasonable to expect the child to leave the United Kingdom.*

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.*

117D *Interpretation of this Part*

- (1) *In this Part –*  
*“Article 8” means Article 8 of the European Convention on Human Rights;*  
*“qualifying child” means a person who is under the age of 18 and who –*
  - (a) *is a British citizen, or*

- (b) *has lived in the United Kingdom for a continuous period of seven years or more;*

*“qualifying partner” means a partner who –*

- (a) *is a British citizen, or*  
 (b) *who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).*

- (2) *In this Part, “foreign criminal” means a person –*

- (a) *who is not a British citizen,*  
 (b) *who has been convicted in the United Kingdom of an offence, and*  
 (c) *who –*  
     (i) *has been sentenced to a period of imprisonment of at least 12 months,*  
     (ii) *has been convicted of an offence that has caused serious harm, or*  
     (iii) *is a persistent offender.*

- (3) *For the purposes of subsection (2)(b), a person subject to an order under –*

- (a) *section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),*  
 (b) *section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc),*  
 or  
 (c) *Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),*

*has not been convicted of an offence.*

- (4) *In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –*

- (a) *do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);*  
 (b) *do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;*  
 (c) *include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and*  
 (d) *include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.*

- (5) *If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.”*

## DISCUSSION

23. Amongst the issues in this case is the effect of the Upper Tribunal allowing the appeal against revocation of the deportation order in 2011 on the approach to be taken under the Rules and Part 5A of the 2002 Act. Neither Mr Kotas nor Mr Saeed believed that the point had been considered in the Court of Appeal. The headnote to *Johnson* is in the following terms:

“When a foreign offender has been convicted of an offence for which he has been sentenced to imprisonment of at least 4 years and has successfully appealed on human rights grounds, this does not prevent the Secretary of State from relying on the conviction for the purposes of paragraph 398(a) of the Immigration Rules and Section 117C of the 2002 Act if and when he reoffends even if the later offence results in less than 4 years’ imprisonment or, indeed, less than 12 months’ imprisonment.”

With respect I consider this to be the correct approach. As observed by the Tribunal at [28]:

“28. In most circumstances, however, a successful appeal on human rights grounds, notwithstanding a period of imprisonment of four years, can only have been predicated upon the appellant satisfying the Tribunal that he has turned the corner and that he no longer represents a risk to society. In many cases it will have been accompanied by an express warning from the Secretary of State or the Tribunal that further offending would not be tolerated. ...”

And at [30]:

“30. Finally, the appellant's contention that, for the purposes of paragraph 398(a) the offence that triggers deportation can only be the most recent offending is nowhere to be found in the words of the paragraph and the expression 'they have been sentenced'. Had it been the intention to limit the operation of the subparagraph in the manner suggested, it would require drastic rewriting.”

24. The claimant received an express warning when he was granted leave of what might happen should he reoffend. I am satisfied that the effect of the eight year sentence imposed in 2004 coupled with the twelve month sentence imposed in 2015 brought the appellant’s squarely within the ambit of paragraph 398(a) with the result that the public interests in deportation would only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. Similarly the effect of the earlier sentence brings the claimant within the scope of Section 117C(6). Both provisions require very compelling circumstances in order for the public interests to be outweighed. The Court of Appeal in *MM (Uganda) & Anor v SSHD* [2016] EWCA Civ 616 gave a clear summary of how the scheme was intended to work as per Laws LJ at [16] and [17]:

“16. It is well settled that the Immigration Rules constitute a "complete code" for the assessment of Article 8 claims by foreign criminals faced with deportation (MF (Nigeria) [2014] 1 WLR 544, LC (China) [2014] EWCA Civ 1310). Such claims are therefore to be determined within the framework of the rules and not by way of a freestanding assessment under Article 8 (AJ (Angola) [2014] EWCA Civ 1636, MA (Somalia) [2015] EWCA Civ 48).

17. The scheme given by the terms of section 117C of the 2002 Act and the amended Immigration Rules has the following features:

- (1) Foreign criminals are classified in three groups: (a) those sentenced to terms of imprisonment of four years or more, Rule 398(a); (b) those sentenced to between twelve months and four years, Rule 398(b); (c) those whose offending in the Secretary of State's view has caused serious harm or who

are a persistent offender who shows a particular disregard for the law, Rule 398(c).

- (2) The provisions of paragraphs 399 and 399A and the exceptions set out at section 117C(4) and (5) have no application to a criminal in the first of these three categories. Such a criminal must therefore be deported unless there are very exceptional compelling circumstances over and above the circumstances mentioned in exceptions 1 and 2 at section 117C(4) and (5).
- (3) Rules 399 and 399A apply where the facts fit to the other two classes of foreign criminal. Where the facts do not fit so that neither rule in fact applies, then again the criminal is to be deported unless "there are very compelling circumstances over and above those described in paras 399 and 399A" (see the closing words of Rule 398)."

25. Although concerned with an earlier version of the Rules, the decision of the Supreme Court in *Hesham Ali v SSHD* [2016] UKSC 60 is relevant to the approach to be taken where offending results in lengthy sentences. As per Lord Reed at [38]:

“The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria)*. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve “exceptional circumstances” in the sense that they involve a departure from the general rule.”

26. A further question to be considered is the extent of the relevance of the decision in 2011. That was in accordance with the Rules and law at the time when there was a freestanding assessment under Article 8. The change described by Mr Kotas that has taken place since may be an exaggeration but nevertheless it can be said that the law now has a greater precision and parliament has decided through primary legislation how the public interest is to be assessed. Accordingly, the decision in 2011 is of no real assistance because of this change and because, significantly, the circumstances have changed in the light of the more recent conviction and not least, the lengthy periods of



absence of the claimant from the family. That absence takes two forms. The longer was because of the claimant being on remand and at the same time being subject to a non-molestation order. Even so it is significant that he did not return to the family unit until some three months after the discharge of that order. The second feature is the readiness of the claimant to have been away for three months on each occasion in 2012 and 2014. It is surprising that with a newborn baby there is no evidence of objection by HL despite the difficulty she has claimed in managing the children.

27. HL has taken the lead on all medical interventions for the children. Whilst the claimant's absence from any of these appointments in 2016 will be explained by the non-molestation order, nevertheless, I think it significant he did not participate in any of the appointments that took place after the household was reunited. The claimant was able to speak English fluently at the hearing and this did not therefore strike me as a plausible explanation for his absence. The tenure of the reports and letters indicate that HL has taken the lead on the medical health of the children and has been able and content to do so. The explanation by the claimant that he was required to remain to look after the children does not explain how HL was able to manage during the currency of the non-molestation order when there were several appointments for the two youngest. The need for the claimant to be on hand to collect the children from school is undermined to an extent by the proximity of the schools to the family home. I note in particular a letter from the manager of [ ] Pre-school dated 15 June 2017 which refers to the attendance of child D and E since 12 September 2016. The author Miss R explains that the children get dropped off by their mother and picked up by her.
28. Turning to the medical health of the children, the evidence demonstrates that D and E have behavioural problems which inevitably will make additional demands. In particular HL explains the troubles she encountered in the evenings in getting the children off to sleep and their poor sleep patterns. It is significant that none of the children has been diagnosed as autistic. D and E are described by Dr Ramachandrappa as having features of autism spectrum disorder. I have no doubt that this nevertheless does mean they require more attention than children who are not on the spectrum. The evidence does not demonstrate however that the children deteriorated during the lengthy period of absence concluding in February 2017. It is significant that the eldest child has successfully obtained a place at university and there is no evidence that B despite her hearing impairment and potential autism spectrum disorder has been unable to do well at school. This indicates to me that despite the vicissitudes this family has been through, the children have been able to flourish. According to a letter dated 20 March 2017 Achieving for Children, formal notice is given that the cases of B to E had closed. It is correct that the social worker's report sent in June 2017 notes a concern as to the emotional impact should the children be separated from the claimant. It is noted that in the long term the children will be deprived of his support who despite having lived away from home for such a long time has been "... very present figure in their life". The author acknowledges that HL could manage the adverse impacts although this would be with great difficulty given that she has responsibility for caring for all five children.

29. The evidence taken in the round shows that it would be harsh for the children and their mother to revert to a life without the claimant. The family life has developed whilst he has had settled status. He clearly has the affection of his children and plays an appropriate parental role in their lives. Family life to the extent that it was fractured has been resumed. Given the difficulties the family has been through, the forgiveness by A, the attempts at reform by the claimant together with his length of time in the UK point to his deportation having harsh consequences particularly on the children still under 18 years. This is inevitable in the light of the acknowledged best interests. The possibility of regular contact by visits to Algeria will be determined by the household budget which the evidence suggests is modest and so such contact will be infrequent. Nevertheless, contact by skype and similar media will be possible and although second best, it can be daily. I do not find however that it would be unduly harsh having regard to the seriousness of his offending history including his reoffending after the warning given with the grant of leave following his successful appeal.
30. I accept also that the claimant will have difficulties in readjusting to life in Algeria from where he has been absent for some time. Even so, this does not make a significant contribution to the overall picture. His parents are alive and he has family there. He has accommodation available although it may not be ideal. The family will be able to visit. He speaks Arabic and he has been content to visit Algeria for two lengthy periods in recent times.
31. The Court of Appeal reiterated the very strong public interests in cases involving children even where sentences of one of less than four years in *SSHD v AJ (Zimbabwe)* [2016] EWCA Civ 1012. As Elias LJ at [17] observed after reviewing the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4 and *CT (Vietnam)* and *LC (China)* as well as in *A (Pakistan)*:

“These cases show that it will be where for the best interests for the children to outweigh the strong public interests in deporting foreign criminals. Something more than a lengthy separation from a parent is required even though such separation is detrimental to the child’s best interests. That is common place and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine this specific exception to the Rules if the interests of children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interests in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully conditions in Rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interests in deportation, there must

be some additional feature or features affecting the nature and quality of the relationship which takes the case out of the ordinary.”

32. The public interest in the case before me is even stronger and legislation requires very compelling circumstances over and above those in the exceptions. There are aspects of this case which are out of the ordinary but in my judgment fall short of the very compelling. I find that HL has been able to cope in the past and will be able to cope in the future. She has others to turn to for support even if that is qualified. She will not be alone. It is accepted that the best interests of the children are for the claimant to remain. Their interests together with all the other factors that weigh in the claimant’s favour are not however strong enough to outweigh the strong public interest in deportation in the light of his criminal offending. His deportation will be a proportionate interference with the article 8 rights engaged in this appeal.

#### NOTICE OF DECISION

The decision of the First-tier Tribunal has been set aside. I remake that decision and dismiss the claimant’s appeal against the refusal of his human rights claim

Signed

Date 20 July 2018

*UTJ Dawson*

Upper Tribunal Judge Dawson

**Annex**



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/27224/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 9 November 2017

Decision & Reasons Promulgated

.....  
Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O H L

(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr S Kotas, Senior Presenting Officer

For the Respondent: Mr S Saeed of Aman Solicitors Advocates (London) Ltd

**DECISION AND REASONS**

**Introduction**

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. O H L is referred to herein as the claimant.
2. The claimant is a national of Algeria, born 8 September 1968. He initially arrived in the United Kingdom on 4 July 1988, holding six months' leave to enter as a visitor. It

appears that he then left the United Kingdom because on 2 September 1991 he came to the attention of the police, admitting at that time that he had used a false passport to gain entry to the United Kingdom on 1 May 1991. On the 6 October 1995 the claimant sought asylum but this application, and a subsequent appeal brought in relation to it, were refused. In April 1998, the claimant married a British citizen ("HL"). Thereafter, he was granted leave to remain as a spouse of a settled person and, on 10 July 2003, was granted indefinite leave to remain.

3. The couple now have five children, all of whom are British citizens. The children were born, respectively, in November 1998 ("child A"), July 2002 ("child B"), August 2011 ("child C"), November 2012 ("child D") and June 2014 ("child E"). Child D is the only male child.
4. The claimant has amassed a significant portfolio of criminal convictions during his time in the UK which, for the most part, have been dealt with by way of fines. There have, however, been several convictions for more serious matters.
5. On 25 February 2000, the claimant was convicted of assault occasioning actual bodily harm and two counts of common assault, for which he was sentenced to eight months' imprisonment. On 12 September 2002 he was convicted of using threatening abusive behaviour and insulting words or behaviour with intent to cause fear or provocation of violence, plus two counts of assault on a constable as well as indecent assault on a female 16 or over. For this he was sentenced to a term of six months' imprisonment. On 28 November 2003, the claimant was again convicted of assault and using threatening abusive insulting words or behaviour with intent to cause fear or provocation of violence. On this occasion he was sentenced to five month's imprisonment. Then, in January 2004, the claimant was convicted of causing grievous bodily harm with intent to do grievous bodily harm and was sentenced to eight years' imprisonment.
6. This latter conviction prompted the Secretary of State to serve the claimant with a notice of intention to deport him. An appeal against this decision was unsuccessful and a deportation order was signed in the claimant's name on 24 June 2008. On 4 March 2009 the claimant made a request for the deportation order to be revoked. This was refused by the Secretary of State and the appeal against such decision was unsuccessful before the Asylum and Immigration Tribunal and, thereafter, before the Upper Tribunal on 20 April 2010. However, the claimant pursued this appeal to the Court of Appeal, which remitted the matter back to the Upper Tribunal to be re-determined. That appeal came before a panel of the Upper Tribunal on 29 September 2011, and was allowed on the basis that the claimant's deportation would lead to a breach of Article 8 ECHR.
7. The claimant was, thereafter, granted several tranches of discretionary leave, each tranche being for a period of six months with last expiring on 25 May 2014. The claimant made an in-time application for an extension of such leave; however, on 18 May 2015 - prior to the application being considered - he was sentenced to twelve months' imprisonment for assault occasioning actual bodily harm. This related to an assault on his eldest child (A). Upon release from prison the claimant was precluded, because he

was the subject of a non-molestation order, from living in the family home. He was, however, was able to see his children for one to two hours per fortnight in a formal setting, until the non-molestation order was discharged on 18 November 2016. Thereafter, the claimant visited the children and his wife at their residential address and eventually moved back in to the family house on 20 February 2017.

8. To complete the picture, the respondent wrote to the claimant on 31 May 2016 seeking representations as to why he should not be deported. The claimant's response was treated as a human rights claim, which was subsequently refused in a decision of the 24 November 2016.
9. The First-tier Tribunal heard the claimant's appeal against such decision on 16 June 2017 and, by way of a decision promulgated on 12 July 2017, allowed that appeal on the basis that the claimant's deportation would lead to a breach of Article 8 ECHR.
10. Permission to appeal to the Upper Tribunal was granted by Judge Shimmin on 2 August 2017, thus the matter comes before me.

### **First-tier Tribunal's Decision**

11. To set the FtT's decision in context it is prudent to recall the terms of section 117C of the Nationality, Immigration and Asylum Act 2002 (which in its material part mirrors provisions contained in the Immigration Rules):  
  
“ (1) The deportation of foreign criminals is in the public interest.  
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.  
(3) In the case of a foreign criminal (C) who has not been sentenced to a period of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.  
(4) Exception 1 applies where -  
(a) C has been lawfully resident in the United Kingdom for most of C's life; and  
(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.”
12. The FtT correctly identified that the claimant's eight-year prison sentence takes his case into the most serious of the three levels of offending behaviour catered for by section 117C [50 & 59]. It, nevertheless, considered whether, all the things being equal, the claimant satisfied either of the exceptions provided for in sections 117C(4) and (5).

13. As to the former, the FtT found that: (i) the claimant had not been resident in the United Kingdom for most of his life; and, (ii) there would not be significant obstacles to his integration back into life in Algeria.
14. As to *Exception 2*, the FtT considered this within paragraphs 61 to 66 of its decision, concluding that the claimant's wife is a qualifying partner and that the claimant's children are qualifying children [62]. It is necessary to observe, however, that a qualifying child is defined in section 117D of the 2002 Act, as a child who is under the age of 18 and who is a British citizen or has lived in the United Kingdom for a continuous period of seven years. Child A is not under the age of 18 and consequently, for the purposes of section 117C of the 2002 Act, is not a qualifying child. The FtT erred in so concluding otherwise. Moving on, the FtT accepted that the claimant and his wife are in a genuine and subsisting relationship and that the claimant has a family life with each of his five children. It was also observed that the claimant has now completed two courses relating to parenting skills and that witnesses had noticed a change in him since his release from prison – the claimant appearing to be calmer and more able to deal with disputes involving his children.
15. In giving consideration to the issue of whether it would be unduly harsh to require the children to remain in the United Kingdom without the claimant, the FtT correctly directed itself in law as to the meaning of the phrase "*unduly harsh*" (in its context within section 117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules), further identified that "*... the more pressing the public interest in [the claimant's] removal, the harder it will be to show the effect on his child and partner will be unduly harsh*" and directed itself that the more serious the offence committed the greater the public interest in deportation.
16. Applying its mind to the circumstances of child A, the FtT concluded:
  - (a) Child A feels responsible for the claimant's current situation and her level of responsibility and guilt is likely to increase if the claimant is deported;
  - (b) Child A is likely to be particularly badly affected if her father is deported as a result of the offence he perpetrated against her;
  - (c) Child A loves her father and wishes him to be a part of her life and to support her;
  - (d) Child A's relationship with her father is much improved and is currently probably the strongest it has been throughout her childhood;
  - (e) Child A states that she would not be able to cope if her father is sent to Algeria;
  - (f) Child A is likely carry the guilt and blame with her for the rest of her life if her father is deported. This would affect her emotional wellbeing;
17. This led the FtT to conclude at [66] that the effect of the claimant's deportation on child A would be unduly harsh.

18. The FtT then turned its considerations to the claimant's other four children (at [67] to [71]), identifying the following:
- (a) The social worker involved with the family confirms that the claimant provides parenting support in the day to day care of the children, for example, by taking child D to a football club;
  - (b) The social worker is of the view that it is in the best interests of the children to live with both parents;
  - (c) Four of the claimant's children have health conditions;
  - (d) There is not a great deal of information in the papers relating to child B's health condition and how it affects her currently. The claimant's wife states that child B has suffered from anxiety for the last six or seven months, has been having appointments with an emotional health worker and has been withdrawn and unresponsive. Child B is now being assessed for autistic spectrum disorder. This assessment will not take place until September.
  - (e) Child C has experienced a recent episode of Bell's palsy, although this is not expected to have any long-term effects.
  - (f) Child D has a number of autistic spectrum disorder traits. He has been diagnosed with ASD. He can be aggressive towards his siblings and is difficult to handle. He is also epileptic. Child D experiences absence seizures and is on medication for his epilepsy. He also has a chromosome disorder and a thickened Corpus Collosum. This may cause learning difficulties and other neurological issues. He can be a very demanding child, is active and a poor sleeper.
  - (g) Child E has been diagnosed as having a chromosome disorder. She has PICA, a condition that means she eats things that are not edible such as mud and cat litter. She has to be constantly watched to ensure she does not eat anything dangerous. She can be quite aggressive at times. She is also being assessed for ASD.
19. Having set out the circumstances of these children, the FtT made the following findings:
- "72. The health condition that the appellant's children suffer from make parenting the children a more difficult experience than it would be to parent children without those health conditions and behavioural issues. The children need more input from their parents than would otherwise be required.
  - 73. The respondent is of the view that the adverse impact on the appellant's children if he was deported could be managed by [the claimant's wife] and her wide network of support in the UK including extended family members, friends, teachers and the local authority. I do not find this to be the case. I accept that [the claimant's wife's] family could provide her with some support as could the local authority. I do not however accept that they could provide the kind of support that the [claimant] could provide. [The claimant's wife's] family would not generally be available



to provide her with support during the night or in putting the children to bed. The social work department can offer some support but again they are not going to be able to put in support which will be available 24 hours a day. Such support could not match the physical and emotional support which is provided to the children by both their parents residing together in the family home. It is very likely that [the claimant's wife] would struggle to cope with demands that five children will place on her particularly given the fact that a number of the children have significant health conditions and behavioural issues. The children have a very strong relationship with the [the claimant] and I find that the emotional wellbeing of the [claimant's] children would be compromised if the [claimant] was deported. I find that the effect of the [claimant's] deportation will be unduly harsh on the appellant's children. For the same reasons I also find that the effect of the appellant's deportation on [the claimant's wife] would be unduly harsh."

20. The FtT then lawfully directs itself that:

"74. 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."

21. The FtT's decision then continues:

"75. I have had regard to the length of time that the appellant would face being excluded from the UK. This is a factor which requires to be taken into account as a result of the exclusion will be that the appellant could not come to the UK to visit his wife and children. Paragraph 391 of the Immigration Rules makes provision in relation to the revocation of a deportation order. It provides that in the case of a person who has been deported for a conviction for a criminal offence the continuation of a deportation order against that person will be the proper course in the case of a conviction for an offence for which a person is sentenced to a period of imprisonment of less than four years unless ten years have elapsed. Where the person was sentenced to a period of imprisonment of at least four years the continuation of the deportation order will be indefinite unless it can be shown that the continuation will be contrary to the ECHR or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors. At the very least the appellant will face a ten year exclusion from the UK which will limit his ability to see his family and three of his children are still very young and it is more likely that his exclusion will be indefinite. While the family may be able to visit him in Algeria they would not be able to do this with any regularity given the cost of travelling there for a family comprising of an adult and five children. It is therefore likely that the appellant and his family would be able to see each other in person very rarely. This would mean that the appellant's three youngest children, who all have a strong bond with him, will be deprived of the physical presence and the love and affection of their father while growing up. Contact by modern methods of communication is no substitute for a parent's physical presence in the family home. The essence of their father in their formative years would affect the children, in particular, [D] who is the only male child and would have no key male role model in the home.

76. I also take into account the length of time that the appellant has spent in the UK. The respondent accepts that he has spent approximately 23 years in the UK which is a very lengthy period.
77. I find that these factors taken with the other factors considered above amount to compelling circumstances over and above those described in Exceptions 1 and 2. I find that the best interests of the appellant's children outweigh the very strong public interest in deportation of foreign criminals."

### **Decision and Discussion**

22. The Secretary of State's grounds are lengthy, but reveal only two strands of challenge. First, it is asserted that the FtT erred in failing to provide a lawful adequacy of reasoning for its conclusion that there are very compelling circumstances in existence in this case over and above those identified in Exceptions 1 and 2 of section 117C of the 2002 Act and, second, that on the facts presented such conclusion is irrational.
23. In support of both submissions the Secretary of State relies upon the decision of the Court of Appeal in Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ 1012 and, in particular, the following passage in the judgment of Elias LJ (with whom Vos LJ agreed), at [17]:

'These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.'

24. It is not for me to simply substitute my judgment for the conclusions of the FtT, there must be an identifiable legal error within the FtT's consideration or conclusion so as to require it to be set aside. I concur with the Secretary of State that such an error can

be detected therein, that being the FtT's failure to provide adequate reasons for its conclusion.

25. First, I am not satisfied that the FtT's reasoning discloses that it gave appropriate weight to the public interest in deportation, in either its assessment of whether it would be unduly harsh for the children to remain in the United Kingdom if the claimant were deported, or in its assessment of whether there are very compelling circumstances over and above those identified in Exceptions 1 and 2 in section 117C. Stating that "*the more serious the offence committed, the greater the public interest in deportation*", is insufficient and there is nothing in the reasoning which follows which alerts the reader of the decision to the very significant weight that ought to have been attached to the claimant's offending.
26. Second, duly analysed the very compelling reasons relied upon by the FtT at [75] of its decision can be reduced to the fact that the children would be deprived of "*the physical presence and love and affection of their father*" whilst growing up, and that child D would have "*no key role model in the home*". These matters though, far from being very compelling reasons, are the natural consequences of the claimant's separation from the family. Of themselves such reasons are far from compelling.
27. Ms Saeed submits that [75] has to be read in the context of the specific consequences for the children identified earlier in the FtT's decision. I agree that the FtT's decision must be read as a whole. However, in this case this does not assist the claimant.
28. Close examination of the FtT's reasoning, which I have summarised above, leads ineluctably to the conclusion that the relevant paragraphs are devoid of all but the barest analysis of the consequences of the claimant's withdrawal from the family home. There are no specific findings made in this regard in relation to child B, child C or child D and, in particular, there is no analysis of the consequences for child D of having no make role model in the house. As to child A, now an adult, it is found that the claimant's absence will affect her emotional wellbeing, but there is no particularisation of such conclusion. The inference to be drawn from the findings in relation to child E are that there would be an increased risk of her eating non-edible substances if the claimant were not physically present in the family home. The level of such risk, or change in the level of risk, is not analysed by the FtT, nor is the potential relevance of child A (now an adult) living in the family home.
29. I could add at this stage that given that it is only recently that the claimant has returned to the family home, and that for some time prior to his return he had only minimal physical contact with his children, one would anticipate there being ample source material to draw upon to demonstrate the circumstances that would prevail in the family home in the claimant's absence.
30. There is a further feature of the decision that is also of some concern, and to which I have already alluded to above. In its consideration of 'Exception 2' the FtT took account of child A's circumstances, indeed, significant weight was attributed to such cir-

cumstances. However, child A is not a qualifying child for the purposes of such consideration. This, though, was not a matter relied upon by the Secretary of State and, consequently, is not a matter I draw support from in my conclusion that the FtT's decision must be set aside.

31. Bringing all of this together, in my conclusion when the FtT's decision is looked at as a whole it is plain that there is insufficient reasoning to bridge the gap between the facts of the case, as they have been found to be, and the conclusion that those facts constitute very compelling circumstances of the type required by section 117C(6) of the 2002 Act. For these reasons, I set the First-tier Tribunal's decision aside.

### **Notice of Decision**

The decision of the First-tier Tribunal is set aside.

The decision on appeal is to be re-made by the Upper Tribunal.

### **Directions**

- A. The Secretary of State must file and serve any further evidence she intends to rely upon by no later than 13 January 2017;
- B. The appellant must file and serve a consolidated bundle of all evidence to be relied upon (including evidence that has already been served), and a skeleton argument (identifying all relevant pages within the aforementioned composite bundle) by no later than 27 January 2017.

Signed:



Upper Tribunal Judge O'Connor

Dated 20 July 2018