



IAC-BH-PMP-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/17031/2019

THE IMMIGRATION ACTS

**Heard by Skype for business
On the 7 April 2021**

**Decision & Reasons Promulgated
On the 4 June 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

**YANNICK NTANTU
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Whitwell, Senior Presenting Officer

For the Respondent: Ms Logan, Counsel instructed on behalf of the respondent, Mr Ntantu.

DECISION AND REASONS

Introduction:

1. On 17 October 2019 the respondent made an order that the appellant is to be deported from the United Kingdom ('UK'), following his criminal convictions as it was considered that his presence in the UK was not conducive to the public good. The respondent refused the appellant's human rights claim in a decision letter dated 2 October 2019.

2. The appellant, a citizen of South Africa, appealed this decision to the First-tier Tribunal (Judge Cox) (hereinafter referred to as the "FtTJ"). In a decision sent on 5 November 2020, the FtTJ allowed his appeal on human rights grounds, and the Secretary of State has now appealed, with permission, to the Upper Tribunal.
3. Whilst this is the appeal brought on behalf of the Secretary of State, for sake of convenience I intend to refer to the parties as they were before the FtT.
4. The FtT did not make an anonymity order and no grounds have been raised by the appellant in support of such an order during these proceedings.
5. The hearing took place on 7 April 2021, by means of *Skype for Business* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing with the parties' advocates. No technical problems encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
6. I am grateful to Mr Whitwell and Ms Logan for their detailed and clear oral submissions.

Background:

7. The appellant's immigration history is summarised in the decision of the FtTJ at paragraphs 1-10.
8. The appellant arrived in the UK on 12 April 2001 with his mother and two other siblings. There is no dispute that he was aged 4 at the date of his arrival. His mother applied for asylum with the appellant and his siblings recorded as her dependents. The application was refused, and her appeal was dismissed in November 2001. Her appeal rights became exhausted on 3 January 2002.
9. It is recorded that she then applied for leave to remain on human rights grounds again with the appellant and his siblings listed as her dependents. That application was refused with an in country right of appeal and in a decision dated 9 March 2006, her appeal was dismissed. She became appeal rights exhausted for a second time on 2 May 2008.
10. On 10 November 2010, the appellant was granted indefinite leave to remain in the UK along with his mother and siblings.
11. On 21 June 2017, the appellant was convicted of supplying class A drugs and on 12 October 2017 he was sentenced to 26 months detention in a young offender's institution for each offence, to be served concurrently.
12. In light of his conviction, a decision to deport him was issued on 17 October 2017. This was responded to by the appellant in July and August 2018 where he

made a protection claim and a human rights claim. A decision was made on 2 October 2019 to refuse a protection and human rights claim.

The decision of the Secretary of State dated 2 October 2019:

13. The decision letter is a lengthy document extending to 20 pages.
14. Having set out the appellant's immigration history, the respondent set out the reasons for deportation namely that on 21 June 2017 he was convicted two offences of supplying a controlled drug of class A and was sentenced on 12 October 2017 to 26 months detention in a young offender's institution for each offence to be served concurrently. It is right to observe that the respondent considered the conviction in the light of the claim made for asylum and section 72 of the NIAA 2002.
15. The sentencing remarks of the judge are set out at paragraph [24] and at [70] of the FtTJ's decision. The respondent considered that objectively any crime which resulted in a sentence of 26 months is considered a serious crime as reflected in the sentencing remarks. Having reached that conclusion, it was considered that the appellant had failed to rebut the statutory presumptions.
16. The respondent addressed the submissions made in respect of the protection claim. It is right to note that the appellant did not pursue his protection claim before the FtTJ.
17. In respect of his article 8 claim the respondent set out the nature of his claim which related to his relationship with his partner. The respondent considered paragraph 399 (b). It was not accepted that his partner was a British citizen or settled in the UK because the appellant had not provided evidence of her citizenship or settlement. There was no evidence either of her UK residency. It was further not accepted that it was a genuine or subsisting relationship in light of the lack of evidence which had been provided.
18. In the alternative, assuming that the relationship was genuine and subsisting, it was formed when he was in the UK lawfully and his immigration status had not been precarious this was because he had been granted indefinite leave to remain in the UK in 2010 and that he had met his partner in 2015. However, it was not accepted that it would be unduly harsh for her to live in South Africa if she chose to do so. Little was known about her including her age, nationality, or other personal circumstances that there is no reason to believe that she could not live with the appellant in South Africa. Furthermore, it would not be unduly harsh for her to remain in the UK even though he was to be deported. This is because no reason to be provided as to why it would be unduly harsh for her to remain in the UK whilst he was deported to South Africa.
19. Consideration was given to paragraph 399A in the context of the appellant's private life.

20. It was not accepted that he had been lawfully resident in the UK for most of his life; this was because he had arrived in the UK on 12 April 2001 at the age of four and since then had lived in the UK continuously for 17 years in total. However out of the 17 years, only seven years and eight months had been spent under “lawful residence”.
21. It was not accepted that he was socially and culturally integrated in the UK. Whilst he lived in the UK since the age of four, he had not made any positive contributions to society and had shown a blatant disregard of the law of the UK having committed a serious offence of supplying drugs. Reference was made to the sentencing remarks.
22. It is accepted that there would be some significant obstacles to his integration into the country to which it was proposed to deport him; this is because he had lived in the UK since he was four. Having left South Africa at such a young age, it was considered that he may no longer have a recollection of his time in South Africa. It was not known if he had any residual ties back in that country through his mother or father’s ties. He is now a young man who would require a degree of guidance on return to South Africa. However, it was not considered that the significant obstacles were insurmountable and that with the help of his mother and other relatives in the UK and possibly abroad, he could successfully reintegrate into life in South Africa. Family members could visit him in South Africa and help him settle down there. Any friendships in the UK that had been established could be maintained through modern means of communication.
23. Whilst it was accepted that deportation would have some interference in his private life, his removal engaged the public interest due to his offending and the interest of preventing further offending. It was not accepted that he met the requirements of the private life Exceptions against deportation.
24. Under the heading “very compelling circumstances”, the respondent noted that his deportation was conducive to the public good and there was a “significant public interest” because he had been convicted of an offence for which he had been sentenced to a period of 26 months for drug offences and thus in order to outweigh the very significant public interest in deporting him, he would need to provide evidence of a very strong article 8 claim over and above the circumstances described in the Exceptions to deportation.
25. In conclusion, the respondent considered that his deportation would not breach the UK’s obligations under Article 8 of the ECHR and the public interest in deporting him outweighed his right to a private and family life.

The Decision of the First-tier Tribunal:

26. The appeal came before the FtTJ on 30 September 2020. The FtTJ heard oral evidence from the appellant, his partner, mother, and brother. The FtTJ also had a bundle of documentation including witness statements from the family members, his partner, probation service and emails as to job applications.

27. The FtTJ findings of fact and analysis of the issues are set out at paragraphs [45]-[89]. I shall set out a summary of the factual findings made, and the decision reached by him.
28. As regards the appellant's circumstances, his parents were born in the DRC and later moved to live in South Africa. In April 2001, when the appellant was four years of age, his mother and two brothers came to the UK. His stepsister remained in South Africa and after coming to the UK for a brief period, she went to America where she continues to live.
29. In the UK, the appellant's mother applied for asylum which was subsequently refused as were applications made for leave to remain. On 10 November 2010 the appellant was granted indefinite leave to remain in the UK along with his mother and siblings.
30. The FtTJ accepted the account of the appellant circumstances set out at paragraphs [14 – 33] and found that the appellant lived in the UK since he was four years of age. The FtTJ accepted that the appellant had no recollection South Africa; he had no family there and had no connections with the country (at [33]). He had attended school and completed his education in the UK and had developed social and cultural ties to the UK. He was satisfied that the appellant was socially and culturally integrated into the UK (at [58]).
31. The FtTJ found that the appellant had less than 10 years of residence in the UK and thus could not demonstrate that he had been lawfully resident in the UK for most of his life (at [64]-[66]).
32. As to his family life in the UK the appellant lived with his mother and siblings in the family home; his elder brother having moved to his own property. As the eldest male in the household, the appellant took on a level of responsibility and provided significant support for his mother. In her evidence, she stated that the family's life was shattered when the appellant was arrested in May 2017. Since his release he had supported her in caring for the two youngest siblings. The appellant's elder brother had a close relationship with the appellant had supported the appellant in his rehabilitation since release.
33. The FtTJ found that the appellant and his mother and brother had a close relationship, and that the appellant was currently living with his mother and two younger siblings. The FtTJ acknowledged there had been difficulties in the relationship in the past, but the judge accepted they had a closer relationship now and the judge accepted that the appellant provided some support for his mother (at [55]).
34. It was conceded on behalf of the appellant the evidence did not demonstrate that there were emotional ties or dependency that went beyond the normal ties between an adult child and parent and thus the judge did not find that the relationships fell within family life (at [56]). However, at [57] the judge found that the relationships formed an integral part of the appellant's private life in the UK.

35. The FtTJ found that the appellant had a relationship with his partner, who was a British citizen and resident in the UK (at [48]). He found her to be an “impressive witness” and had no reason to doubt her evidence relating to the relationship between herself and the appellant (at [50]). The FtTJ found that the appellant and his partner were together, but it was not a relationship akin to marriage and they did not live together. Thus, it did not come within the meaning of family life (at [51]).
36. The appellant had been convicted in 2017 of offences of supplying drugs to which he had been sentenced to 26 months imprisonment. The circumstances of the offence and the sentencing remarks are set out at paragraphs [70]-[74].
37. The FtTJ found that this was his first offence which the judge found was a “serious offence” but that it was an “isolated incident” which occurred when the appellant was “lost” (see [58] and at [71 – 74]). The judge found that the appellant had not committed any further offences, he was satisfied that the appellant was “very unlikely to commit any further offences in the UK”, the judge accepted that he truly regretted getting involved and causing his family pain and anguish. The judge found that the appellant “now appreciates the support of his loving family” and that the judge believed “he would not want to do anything that would want to cause his family any further distress” (at [75]). The FtTJ found that the appellant was “genuinely remorseful” at [86], he was at a “very low risk of further offending, he had a strong support network within the UK and that they would continue to provide that support (at [86]-[87]).
38. The FtTJ found that the appellant could not meet either Exception 1 or Exception 2 but found that the appellant’s case could be distinguished from “many of the cases that come before the tribunal” and for the reasons set out at paragraphs [78 – 87], the FtTJ found that the relevant factors identified relevant to the strong private life that he had established in the United Kingdom, taken alongside his rehabilitation, and lack of reoffending and being at a low risk of further offending, his strong support network and the relationships with his family members were “exceptional” and outweighed the significant public interest arising in his case.
39. The FtTJ therefore allowed the appeal.

The Appeal before the Upper Tribunal:

40. The Secretary of State sought permission to appeal that decision and permission was granted by FtTJ Swaney on 3 December 2020.
41. The Secretary of State was represented by Mr Whitwell, Senior Presenting Officer. The appellant was represented by Counsel Ms Logan.

The grounds:

42. Mr Whitwell relied upon the written grounds. No further written submissions have been received on behalf of the respondent.

43. However, Mr Whitwell made oral submissions to which I have given careful consideration.
44. The written grounds submit the following:
 - (1) The judge found that the appellant could not bring himself within either of the Exceptions of section 117C (4) or (5) as the appellant had not resided lawfully in the UK for half of his life and there were no qualifying relationships on which to base an “unduly harsh” finding.
 - (2) At this point the judge should have turned to section 117C (6) to determine if there were any “very compelling circumstances” taking the case over and above the Exception requirements, but he did not. It is submitted that this amounts to a material misdirection in law relying upon NA (Pakistan) v SSHD [2016] EWCA Civ 25 – 27.
 - (3) The grounds submit that had the correct test been applied, it is clear that there were no very compelling circumstances that could be shown. As confirmed by Rafferty LJ in SSHD v CT (Vietnam) [2016] EWCA Civ 488; the starting point in considering Exceptional circumstances is not neutral: SS Nigeria and MF Nigeria. Rather, the scales are heavily weighted in favour of deportation and something very compelling is required to swing the outcome in favour of a foreign criminal whom Parliament said should be deported.
 - (4) The judge found at [89] that the respondent’s decision amounted to an unnecessary and disproportionate interference with the appellant’s rights to enjoy respect for his private life in the UK. The appellant’s rights outweighed the respondent’s legitimate aims of protecting the economic well-being of the country and for the prevention of disorder or crime. The basis for this appears to be that the appellant’s non-qualifying family members would not move to South Africa, which it is respectfully submitted for is far short of meeting the very high threshold necessary for this claim to succeed (at [85]).
 - (5) In the same paragraph at [85] the judge erred by making allowances for the length of the appellant sentence, which has been established and should only be used to determine where the case for the consideration within section 117 (see HA (Iraq) [2020] EWCA Civ 1176 at paragraph 43.
 - (6) Finally, it is submitted that the judge gave inadequate reasons for allowing the appeal; he applied non-applicable case law such as Agyarko and Razgar and has failed to consider the appeal in the context of criminal deportation.
45. In his oral submissions Mr Whitwell made the following submissions.
46. He submitted that this was a case concerning “very compelling circumstances over and above “Exceptions 1 and 2” as it was common ground that the appellant did not meet the rules or Exceptions 1 or as set out in section 117C.

47. However, in terms of very compelling circumstances the skeleton argument on behalf of the appellant asserts that the judge considered it “in substance” thus he submitted that was telling because there was no reference in the decision to the test of “very compelling circumstances” save for that at [40] where the judge recited s 117.
48. He submitted that the failure to do so would not be fatal to his decision if the judge had considered the issue “in substance”. However when applying the decision in NA (Pakistan) by reference to paragraph 29, 30, 32 and 33 of that judgement and paragraph 32 which emphasises the fact that if all an appellant could advance in support of his article 8 claim was a “near miss” case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were “very compelling circumstances, over and above those described Exceptions one and two” he would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fallback protection.”
49. And at paragraph [33] of the same decision that “cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.”
50. Mr Whitwell submitted that there was an absence of factors identified.
51. As to the assessment, the respondent did not dispute that the judge found that the appellant was socially and culturally integrated in the UK, but that Exception 1 contained three limbs and as to the second limb, the FtTJ found at paragraph [66] that the appellant was not lawfully resident in the UK for most of his life. As to the third limb, the judge did not make any assessment as to whether there were any very significant obstacles to his reintegration.
52. In summary, Mr Whitwell submitted that the judge was required to consider how far he met the rules to see whether they circumstances were “very compelling over and above those Exceptions. Thus, as he could not meet two of the three limbs, it could not possibly be called a “near miss”.
53. As to family life, the judge found that Article 8 (1) was not engaged and there was no “family life”. In respect of his partner, they were not married thus Article 8 was not engaged there. When looking to see whether the appellant met the family life part of the rule, the judge did not consider undue harshness.
54. At [63] the FtTJ refers to paragraph 399A which is private life. Anyone reading the decision would say that the appellant does not come close to establishing family life.
55. When looking at other reasons given by the judge, he identified rehabilitation and seriousness of the offence. In this context, Mr Whitwell referred to the

decision of HA (Iraq) and that such findings would be unlikely to carry much weight. The judge also placed weight on the low risk of reoffending.

56. Drawing together those matters, he submitted that the judge had stated at paragraph [84] that this was a difficult case to determine, that is the judge found it to be finely balanced and that being the case it did not require much to tilt the balance to demonstrate that there was a material error of law shown by a lack of reasoning.
57. Whilst the judge referred to private life it was not elevated to demonstrate “compelling circumstances over and above Exceptions 1 and 2” and if it was, the judge had not explained it in the decision.
58. He therefore invited the tribunal to set aside the decision.
59. Ms Logan relied upon her skeleton argument. The written submissions make three points:
 - (1) The decision of the FTJ to allow the appeal on human rights grounds was correct.
 - (2) The FTJ found that the appellant's circumstances, taken cumulatively, were Exceptional and outweighed the significant public interest arising in this case, and this finding was correct (at paragraph 85)
 - (3) It is submitted that “Exceptional” is in substance the same as “very compelling” per Jackson LJ in the case of NA (Pakistan) paragraph 43.

“The word Exceptional is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation”. She submits that the FtTJ gave “compelling reasons” which were the “Exceptional circumstances”.
60. In her oral submissions she submitted that the FtTJ had used the word “Exceptional” and that this had the same meaning as the term “very compelling circumstances” which is the term used in section 117 C (6) and thus the judge did apply the correct test. She submitted that the judge did go through the whole of section 117C and why would he do that if he was not taking it into account?
61. In her oral submissions she addressed the assertion made by the respondent that the judge was required to give adequate reasons. She submitted that the judge did give adequate reasons.
62. The written submissions address the factual circumstances of the appellant. He was sentenced to a term of 26 months YOI and so as a medium-term offender was not on the face of the statute entitled to the above statutory protection but the court in the case of NA (Pakistan) v SSHD 2016 (paragraph 25) held that medium term offenders are entitled to the same protection as serious offenders.

63. The FTJ recited in his judgement the relevant statutory provisions including the above test as set out in section 117 C (6) and had regard to it in his Judgement (at paragraph 68).
64. In her oral submissions she addressed the assertion made by the respondent that the judge was required to give adequate reasons. She submitted that the judge did give adequate reasons.
65. She submitted that the FtTJ gave adequate reasons for his decision which were set out in the factual findings made by judge under the heading "circumstances of the appellant ". They can be summarised as follows:
- The appellant came to the UK with his mother and his two brothers in 2001 when he was four years old.
 - He has lived in the UK ever since being now 24 years of age, aged 19 when he committed the offence, aged 23 at the date of the hearing and he has never been back to South Africa.
 - His parents were originally from the Democratic Republic of Congo, they married and went to South Africa. His father left the family in 2000 and returned to DRC, they have not seen him since, and he has recently passed away. (see FTJ appellant's circumstances).
 - He has never been back to South Africa and has no connections whatsoever with that country.
 - "The appellant has no recollections of South Africa. He has no family there and has no connections with the country" (see FTJ paragraph 33)
 - South Africa is "for all intents and purposes a foreign country". (see FTJ paragraph 83).
 - In his asylum interview the appellant stated that he could not be expected to live in South Africa because "I wouldn't have anywhere to live, I wouldn't know what to do for money, how to get a job. If I went back, I would end up on the streets and have to go back to crime" (see FTJ paragraph 42)
 - "At its highest the claim could be said to give rise to a potential breach of Article 3 on destitution grounds" (see FTJ paragraph 43).
66. In her oral submissions he also referred to the factual findings made about the strength of the relationship between the appellant and his family members including his brother and his mother.
67. It is submitted in the written submissions that to deport the appellant in these circumstances as found by the FTJ, would involve uprooting him from his settled UK community where he has had very strong societal and family ties for many years, forcibly removing him from his close and loving family, and transporting him to a far country where he has no friends or family and with which he has no connection whatsoever. Such circumstances amount to very

compelling reasons against deportation.

68. Ms Logan in her oral submissions then turned to Exception 1. She submitted that the judge correctly found that the appellant had not been lawfully resident in the UK for half of his life but that the appellant was a “near miss” referring to paragraph [32] of NA (Pakistan).
69. It is submitted that the FTJ correctly found that the appellant could not bring himself within the Exceptions under section 117C, since as regards Exception 1 the appellant could not prove that he has been lawfully resident in the UK for most of his life. However – the appellant is still entitled to invite the court to treat him as a “near miss” on the facts as found by the FTJ and stated in his Judgement.
70. The FTJ found that the appellant is socially and culturally integrated into the UK (at paragraph 58), and on the appellant's circumstances as found by the FTJ he would plainly face very significant obstacles to his integration into the country to which he is proposed to be deported (FTJ paragraphs 42, 43)
71. The appellant was brought to this country by his mother when he was 4 years old. He had no choice but to accompany his mother and then remain in the UK as a dependent child. His mother did her very best to regularise her status and that of her children, claiming asylum on the very date of her arrival in the UK – and she was eventually successful in obtaining leave to remain for herself and her children. Whilst it is therefore correct that the appellant was in the UK unlawfully until 2010 it would be unduly harsh to hold him responsible for what he could not help. In her oral submissions she stated that the circumstances of the child at the age of four and having no choice as to where he was taken was a proper factor for the judge to take account of in his proportionality assessment. When asked to identify where this was in the proportionality assessment, Ms Logan indicated that this was set out at paragraphs 58. As to whether there were very significant obstacles to his reintegration, Ms Logan identified that this was considered by the FtTJ at paragraphs 42 and 43 when the judge found that in South Africa, he would face destitution. The she submitted that was a very significant obstacle to his integration. Thus, she submitted that whilst the judge did not use the term “near miss” and this had been the term that Counsel had used in her skeleton argument, in essence the judge did identify that as key facts.
72. The third point relied upon in the written and oral submissions relates to the nature of his private life in the UK.
73. It is submitted that the appellant has very strong family relationships in the UK as was found by the FTJ, although it was conceded on behalf of the appellant that there are no special elements of dependency beyond the normal emotional ties (applying Kugathas v SSHD 2003 EWCA Civ 31).
74. By reference to the material in the bundle, the appellant's brother, mother, and girlfriend who is a British Citizen all filed and served witness statements and

attended court to give evidence.

75. It is submitted that there was “abundant evidence” as was found by the FTJ that the appellant has the benefit of very close and loving relationships with his family and girlfriend. Even though he has reached his majority he is still living in the family home with his mother and younger brothers and has not yet qualified to earn a living. The appellant is now the oldest male in the household. He provides support to his mother and his younger brothers. (FTJ paragraph 29) Some courts have held that family life may continue in such circumstances (see SSHD v HK Turkey 2010 EWCA Civ 583).
76. The FTJ found that the appellant went to school and then sixth form college in the UK. (FTJ paragraph 21) and that he has been gainfully employed although he has not found it easy to obtain work after coming out of custody due to his immigration status. (FTJ paragraph 28) He hopes to become a joiner .and is seeking to complete a Level 3 NVQ diploma. (FTJ paragraph 30). It is submitted that the appellant is not yet equipped to earn a living and lead an independent life. He is still dependent on his family with whom he still lives.
77. The appellant's brother David also gave evidence and confirmed that as the eldest male in the household the appellant had taken on a level of responsibility and provides a significant support for their mother who would be devastated if the appellant were deported. (FTJ paragraph 53) David gave evidence that he has a close relationship with the appellant and that he has fully supported the appellant with his rehabilitation since his release. He said that the appellant is a changed person and that he thought very hard before leaving his mother and moving to away. David said he would not have moved if he had had any doubts about the appellant. (FTJ paragraph 54)
78. The appellant's mother stated that their life was shattered when the appellant was arrested in May 2017. she also stated that whilst the appellant was in prison, he proved to her that he had learnt from his mistake and that since his release he has supported her in caring for her youngest sons. (FTJ paragraph 52)
79. The FTJ stated that he was in no doubt that the Appellant and his mother and brother have a close relationship. (FTJ paragraph 55).
80. The appellant has a close relationship with his girlfriend who is a British citizen, and they have been together since 2016 and she visited him regularly whilst he was completing his sentence. (FTJ paragraph 81) They have talked about their future together. As stated, above Ms Johnson gave evidence to the FTJ.
81. Ms Logan submits that the judge stated that the appellant's case could be distinguished from many of the cases that come before the Tribunal. The appellant has three discrete relationships that do not engage family life but are nonetheless important relationships that cannot be replicated in South Africa. The FTJ stated “I appreciate that the appellant can use modern methods of communication to remain in contact with his mother his brother and [his girlfriend] but I am satisfied that if so, these relationships will be fundamentally

different". (paragraph 78).

82. The FTJ further stated that they could not be expected to uproot themselves to maintain their relationships with the appellant. The appellant's mother is the primary carer of two British citizen school age children who see their father every weekend. It would be unduly harsh to expect them to leave the UK now and it would be likely to have a profound effect on their relationship with their father. (FTJ paragraph 82).
83. As regards his brother, the FTJ stated that he is in a long-term relationship, living with his partner, has a business that he has worked hard to establish and is a British citizen. He cannot reasonably be expected to start again in "what is for all intents and purposes a foreign country". (FTJ paragraph 83).
84. In her oral submissions and in answer to those of Mr Whitwell, she submitted that this did amount to a strong private life and that the respondent was wrong to submit that it did not constitute a strong private life but was overwhelming evidence.
85. It is further submitted the judge was correct to consider the nature and seriousness of the offence and the future risk of offending. In fact, it is submitted that he had no alternative having regard to section 117 C (2) "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal" and section 117 C (6) and case law such as Hesham Ali v SSHD 2016 UKSC to which he referred in his Judgement (paragraph 62).
86. In her oral submissions, Ms Logan submitted that the FtTJ's assessment of the nature and seriousness of the offence properly took account of the decision in HA (Iraq) at paragraph 141 and that it established that a deportee if he had shown positive evidence of rehabilitation and reduced risk of reoffending it could not be excluded from the assessment. Whilst she accepted that the facts of the case had to be put in the balance and that weight will vary and it would rarely be of great weight, she submitted it was still necessary to carry out an assessment of criminality.
87. By reference to the facts of the appeal the FTJ found that the appellant was aged 19 at the time of the offence and had no previous convictions. The FTJ also accepted that the appellant had not committed any further offences and was very unlikely to commit any further offences "The appellant told me that he truly regrets getting involved and knows that he caused his family pain and anguish. In my view he now appreciates the support of his loving family. I do not believe he would want to do anything that would cause his family further distress. (FTJ paragraphs 70 - 75).
88. The FTJ said further "probation service has stated that the appellant is a very low risk of further offending and I agree. He has a strong support network within the UK, that rallied round him after his arrest, and I have no doubt that they will continue to provide him with that support. As such I have attached

some weight (not a lot) to my finding that the appellant is very unlikely to commit any further offences in the UK” (FTJ paragraphs 85, 87).

89. Reliance is placed on the decision of HA (Iraq) v SSHD 2020 EWCA Civ 1176

“... but if there were other compelling circumstances in his case, the fact that his case was comparatively less serious could form an element in his overall case that the strong public interest in deportation was outweighed.

“generally, for the purpose of the proportionality balance that falls to be struck in a deportation case the seriousness of the relevant offending is established by the level of sentence “(paragraphs 93,94).

90. The last point relied upon related to an assessment of other relevant factors. Ms Logan further submits that courts will have regard to the Strasbourg jurisprudence when applying the tests set out in the domestic legislation” (see Jackson LJ, NA (Pakistan) v SSHD 2016 EWCA Civ 662 (paragraph 38).

91. The FTJ refers in his Judgement to the decision of the Supreme Court in the case of Hesham Ali v SSHD 2016 UKSC 60 and at paragraph 26 (of his Judgement in Hesham Ali) Lord Reed summarises the effect of the Strasbourg case law about foreign criminals and at paragraph 33 like this court in NA Pakistan he makes it clear that the factors referred to in those cases need to be taken into account in the assessment of the proportionality of the deportation of foreign offenders whether or not they are settled migrants” per Underhill LJ- (see HA (Iraq) v SSHD 2020 EWCA Civ 1176 and Hesham Ali paragraph 26)

“In a well-known series of judgments, the court has set out the guiding principles which it applies when assessing the likelihood that the deportation of a settled migrant would interfere with family life and if so its proportionality to the legitimate aim pursued. In Boultif v Switzerland 2001 33 EHRR 50 para 48, the court said that it would consider the nature and seriousness of the offence committed by the applicant : the length of the applicant's stay in the country from which he or she is to be expelled: the time elapsed since the offence was committed by the applicant: and the applicant's conduct during that period: the nationalities of the various persons concerned : the applicant's family situation ... Two further factors were mentioned in Uner v Netherlands 2006 45 EHRR 14 para 58: ... and the solidity of the social and cultural and family ties with the host country and with the country of destination.

In Maslov v Austria 2009 INLR 47, paras 72 – 75, the court added that the age of the person concerned can play a role when considering some of these criteria. For instance, when assessing the nature and seriousness of the offences, it has to take into account whether the person committed them as a juvenile or as an adult. Equally when assessing the length of the person's stay in the country from which he or she is to be expelled and the solidity of the social cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she came only as an adult. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to

which the deportation of the person concerned will promote the legitimate aim pursued. They are not exhaustive”.

Thus, she submitted that all of those factors were relevant and that the judge properly took into account those in his factual findings.

92. In conclusion Ms Logan submitted that the FTJ applied the correct test to this case in that he did in substance find that the very compelling circumstances of the appellant over and above the statutory Exceptions, outweighed the strong public interest in deportation, and further, that the decision of the FTJ to allow the appellant's appeal on human rights grounds was the correct decision given the very compelling circumstances of this case.
93. Mr Whitwell by way of reply submitted that the difficulty with the submissions made on behalf of the appellant is that they asked the tribunal to look at the decision as a whole rather than by looking at the findings of fact. An example would be the appellant's circumstances in South Africa and that this was the oral evidence and evidence in the appeal rather than factual findings.
94. As to the issue of very significant obstacles and the reliance upon paragraph 42 – 44, the judge did not find that the appellant would be subject to destitution and thus would be a breach of Article 3. Had the judge so found, the judge would have allowed the appeal on Article 3 grounds.
95. At the conclusion of the hearing, I reserved my decision and indicated to Ms Logan that in the absence of the appellant, that she should ensure that her instructing solicitors would inform the appellant that I would be reserving my decision which would be given in a written judgement. She confirmed that she would do so.

Preliminary issue:

96. Before dealing with the substantive grounds, it is necessary to address a preliminary issue raised by Ms Logan on behalf of the appellant. It had not been raised in the written submissions previously served on the Tribunal and the respondent.
97. It relates to the grant of permission. Ms Logan submitted that the FtTJ when granting permission at paragraph [4] considered that the arguable errors related to the issue of inadequacy of reasons only. She submitted that the first part of paragraph [4] of the grant of permission stated that “while I am satisfied that the FtTJ had in mind S117C (6) when making his decision, it is arguable that the judge did not give adequate reasons.”
98. Ms Logan submitted that this should be read as a limited grant of permission. Mr Whitwell submits that this could not properly be read as a limited grant relying on the decision in Safi.

99. I have considered the submission in the light of the grant of permission. The relevant decision is that of *Safi and others (permission to appeal decisions)* [2018] UKUT 388 (IAC).
100. The headnote to that decision stated as follows:
- (1) *It is essential for a judge who is granting permission to appeal only on limited grounds to say so, in terms, in the section of the standard form document that contains the decision, as opposed to the reasons for the decision.*
- (2) *It is likely to be only in very Exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document.*
101. The grant of permission makes no reference to this being a limited grant of permission. Furthermore, if the FtTJ granting permission intended this to be a limited grant of permission, the FtTJ has not done so in a way which complies with *Safi and others (permission to appeal decisions)* [2018] UKUT 388 (IAC) as set out above. The FtTJ failed to incorporate his intention (if there was such an intention) to grant permission on limited grounds within the decision section of the standard document, where it is simply stated, 'is granted'. If a judge intends to grant permission only on limited grounds, he or she must make that fact absolutely clear. That is not the position here and there is no reference to the appeal grounds being limited in the way set out by the Upper Tribunal in *Safi* (see paragraph 43).
102. Furthermore, paragraph [4] is not entirely clear. Whilst the FtTJ when granting permission stated that the judge had in mind S117C(6) when making his decision, towards the latter part of paragraph [4] the permission judge returned to the arguable failure to refer to the “threshold for establishing very compelling circumstances as set out by the Court of Appeal in NA (Pakistan) or how he applied it to the facts” and therefore identifying that the FtTJ arguably had not had S117C(6) properly in mind.
103. I am not satisfied that there are any exceptional circumstances that exist to limit the grant of appeal nor have any been identified by Ms Logan and I am further satisfied that there is no unfairness to the appellant who has submitted written submissions dealing with all of the grounds and thus being able to engage with the issues raised.

Discussion:

104. I have carefully considered the submissions made by each of the advocates and I am grateful for the careful and clear submissions made by each of them as reflected above. I have set out in full the submissions made by each of the advocates.

105. The relevant legal framework that the FtIJ was required to apply and relevant to this appellant's appeal can be summarised as follows:

The Legal Framework

106. Section 32 of the UK Borders Act 2007 ('the 2007 Act') defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as a 'foreign criminal'. Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of Exceptions contained in section 33, of which the only relevant Exception is that 'removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's [ECHR] rights...' (see section 33(2)(a)).
107. For the purposes of this appeal, the relevant legal framework concerns Art 8 of the ECHR and Part 5A of the NIA Act 2002 and, principally, as it applies in deportation cases. In particular, the appeal is concerned with Exception 1 in s.117C(4) and the additional provision in s.117C(6) concerned with "very compelling circumstances over and above those described in Exceptions 1 and 2". It is common ground that the judge was required to apply s.117C in determining the issue of whether the appellant's deportation would be disproportionate and a breach of Art 8 of the ECHR.
108. Sections 117C (1) and (2) set out the position regarding the "public interest" as follows:
- "(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."
109. By virtue of s.117C(3), if a 'foreign criminal' has been sentenced to at least twelve months' imprisonment but not to four years or more imprisonment, then if Exception 1 or Exception 2 applies, deportation is not in the public interest (see, HA (Iraq) v SSHD [2020] EWCA Civ 1176 at [29]).
110. Section 117C (4) sets out Exception 1 as follows:
- "(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."
111. Exception 2 is found in s.117C(5) as follows:
- "(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."

112. Section 117C (6) of the NIA Act 2002 provides as follows:

“(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 circumstance, over and above those described in Exceptions 1 and 2.”

113. Although s.117C(6) is phrased as only to apply to a foreign criminal who has been sentenced to at least four years, imprisonment, the Court of Appeal has held that this provision must also apply to a person who has been sentenced to a period of imprisonment of at least twelve months but less than four years (so-called ‘medium offenders’) and who cannot bring themselves within either Exception 1 or Exception 2 (see NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [25]-[27]).

114. As regards “very compelling circumstances” requirement in s.117C(6), the case law recognises the high threshold required to meet this test which requires the individual circumstances as a whole, including circumstances which did not in themselves result in Exception 1 or Exception 2 being met, being considered cumulatively with all other relevant circumstances and balanced against the public interest reflected in the seriousness of the individual’s criminal offending (see NA (Pakistan) at [32] and HA (Iraq) at [60]).

115. Subsequently, the Court of Appeal in AA (Iraq) v SSHD [2020] EWCA Civ 1296 identified the four leading authorities in relation to ss.117C (5) and (6) beyond which it would usually be unnecessary for a Tribunal to make reference: KO(Nigeria); HA (Iraq), NA (Pakistan) and R (Byndloss) v SSHD [2017] UKSC 42.

116. In respect of the Supreme Court’s decision in Byndloss, the Court of Appeal made specific mention to Lord Wilson’s judgment at [33] and [55] where he said this about the approach to proportionality in deportation cases:

"33. The deportation of a foreign criminal is conducive to the public good. So said Parliament in enacting section 32(4) of the 2007 Act: see para 11 above. Parliament's unusual statement of fact was expressed to be for the purpose of section 3(5)(a) of the 1971 Act, so its consequence was that every foreign criminal became automatically liable to deportation. Parliament's statement exemplifies the "strong public interest in the deportation of foreign nationals who have committed serious offences": *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799, para 14, per Lord Reed JSC. In the *Ali* case the court was required to identify the criterion by reference to which the tribunal should determine an appeal of a foreign criminal on human rights grounds against a deportation order. The decision was that the public interest in his deportation was of such weight that only very compelling reasons would outweigh it: see paras 37 and 38, per Lord Reed JSC.

...

55. The third [feature of the background] is that, particularly in the light of this court's decision in the *Ali* case, every foreign criminal who appeals

against a deportation order by reference to his human rights must negotiate a formidable hurdle before his appeal will succeed: see para 33 above. He needs to be in a position to assemble and present powerful evidence. I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters: (a) the depth of the claimant's integration in United Kingdom society in terms of family, employment and otherwise; (b) the quality of his relationship with any child, partner or other family member in the United Kingdom; (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise; (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the United Kingdom; (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case; (f) any significant risk of his reoffending in the United Kingdom, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform."

117. What is said there is particularly relevant to s.117C(6) and the issue of "very compelling circumstances".
118. It is against that background that I engage with the submissions advanced on behalf of the Secretary of State.
119. There is no dispute that the appellant satisfies the definition of foreign criminal as he is not a British citizen and has been convicted of an offence which led to a period of imprisonment of at least 12 months: (see section 117D (2) of the 2002 Act).
120. The appellant's conviction and sentence fall into section 117C (3) of the 2002 Act; he has not been sentenced to a period of imprisonment of four years or more, with the effect that, if Exception 1 or 2 applies, his deportation will not be in the public interest. Thus, his deportation can only be resisted if he meets one (or both) of the Exceptions or shows that there are "very compelling circumstances, over and above those Exceptions": see Section 117C (6).
121. As to the private life Exception (Exception 1) the appellant could not succeed under that Exception as he could not meet all three limbs. The FtTJ found that he was socially and culturally integrated in the UK (at [58]). Ms Logan submits that the FtTJ also found that there were very significant obstacles to his integration. That is an issue that I will return to in due course.
122. On behalf of the respondent, the submissions and grounds identify that having found that the appellant could not bring himself within Exceptions 1 or 2, the FtTJ failed to address the relevant legal framework by turning to S 117C (6) and applying the relevant test of whether there were "very compelling circumstances over and above the Exceptions in 1 and 2".

123. The thrust of the grounds on behalf of the Secretary of State is that such a conclusion is absent from the decision and that the judge failed to apply the correct test taking into account the high threshold necessary.
124. With respect to the FtTJ, the decision does lack structure and clarity and on a first reading one might consider that the judge was determining an appeal as an article 8 appeal “outside the rules” as exemplified by his reference at paragraph [88] where he stated that the appellant had demonstrated that his circumstances were “sufficiently compassionate so to justify being granted leave to remain outside of the immigration rules.” The respondent’s written grounds identify paragraphs where the judge refers to case law which was irrelevant (for example at [61]).
125. However, I agree with the submissions made by Ms Logan that on an overall reading of the decision, the judge was plainly aware of the statutory regime applicable and did adopt this as part of his reasoning and analysis. At paragraphs [38]-[40] the FtTJ set out the applicable statutory framework by reference to section 32 of the UK Borders Act and Part 5A of the NIAA of 2020 and set out the section 117C considerations applicable to appeals involving foreign criminals. At [63] the FtTJ referred to paragraph 399 and 399A of the Immigration Rules and identified that the only relevant paragraph in this appellant’s case was that under paragraph 399A (which is Exception 1; S117C (4)).
126. Whilst the appellant did advance a case under “family life” on the basis of his relationship with his close family members and his partner, it was not based on Exception 2 and Ms Logan does not seek to advance that. In any event, on the FtTJ’s assessment of the evidence, he did not find family life was engaged. He did however treat the family relationships including that of his partner as a significant and fundamental part of the appellant’s private life.
127. As to the private life Exception (Exception 1), earlier in his decision the judge addressed whether he was socially and culturally integrated in the UK and found in his favour on this issue (at [58]). The FtTJ also found that he could not demonstrate that he had lawfully resided in the UK for most of his life (at [64]-[66]). The appellant could not succeed under that Exception as he could not meet all three limbs. Ms Logan submits that the FtTJ also found that there were very significant obstacles to his integration. That is an issue that I will return to in due course.
128. At [67] the FtTJ concluded that the appellant could not meet the rules, albeit at that paragraph there is the misstatement of the law in the context of this appeal. At [68]-[69], the FtTJ returned to the correct legal framework by directing himself to sections 117B and C and that he took as his starting point “the more serious the offence committed, the greater is the public interest in deportation of the foreign criminal” and expressly stated Lord Reed in the decision of Hesham Ali that “great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence

of more than 12 months” (paragraph 46).” At [69] the FtTJ again noted that the appellant did not fall within Exception one or two and did not meet the requirement of the rules. He stated, “in my view these matters also weigh heavily against the appellant.”

129. As I have said, the structure and layout does lack some clarity, but when viewing the decision as a whole, I am satisfied that the judge did have in his mind the correct legal framework when undertaking his analysis and reaching his overall decision. As set out above, the judge plainly had regard to S117C and the Exceptions to deportation, recognising that in this appellant’s case the only relevant Exception was that under Exception 1; S117C (4) and paragraph 399A) and in his analysis found that he could not meet the requirements as all three limbs were necessary.
130. It must therefore follow that the only question that remained was that under section 117(6) and whether there were “very compelling circumstances over and above” those Exceptions in this appellant’s case.
131. On behalf of the respondent, it is submitted that there was no reference to that terminology or that it was a high threshold to surmount. In his alternative submission, Mr Whitwell submitted that if the FtTJ had considered the issue in substance, there would be no error in law but that in any event the FtTJ failed to set out that there were any “very compelling circumstances” and thus there was an absence of factors identifiable in this appellant’s case.
132. I have given careful consideration to that submission and have done so in the light of the decision of the FtTJ and the evidence before him. Having done so, I prefer the submissions made by Ms Logan. As she identified, whilst the FtTJ did not refer to “very compelling circumstances over and above” the Exceptions, in his final analysis the assessment made by the judge when considering the circumstances cumulatively, he found them to be “exceptional” and that they were such as to “outweigh the significant public interest arising in his case” (at [85]). In that paragraph, the FtTJ referred to factors in favour of the appellant relevant to his private life (to which I will later return) and that whilst individually they would not be of sufficient weight to outweigh the public interest, when taken cumulatively the judge found that he was “satisfied that they are exceptional and outweigh the significant public interest arising in this case.” It is also right to observe that the judge identified further factors in the balancing exercise and relevant to whether there were very compelling circumstances over and above the Exceptions, relating to the appellant’s rehabilitation and lack of reoffending (see paragraphs [85] – [87]).
133. Whilst the FtTJ used the terminology as set out in the previous test of “exceptional circumstances” rather than by reference to the terminology in the statute of whether there are “very compelling circumstances over and above” the Exceptions, I am satisfied that his reference to the exceptionality of the circumstances in substance amounted to the same test.

134. Mr Whitwell submitted that if the FtIJ had considered this in substance there would be no error of law, but that in the alternative, even if the judge had considered the issue in substance, the judge had failed to show on the factual circumstances of this appellant that there were in fact “very compelling circumstances”.
135. When dealing with that issue, the real question in my view is whether it was rationally open to the judge, on the basis of the factual findings made and on the evidence before him, to find that the appellant could point to ‘very compelling circumstances’ over and above the Exceptions.
136. Whilst the appellant could not meet all three limbs of Exception 1 (S117C (4)), that does not mean a foreign criminal facing deportation it is disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions one and two when seeking to contend that there are “very compelling circumstances over and above those described in Exceptions one and two”. However, if relying upon such features, the judge would need to identify features of the appellant’s case of a kind mentioned in Exceptions one and two or features outside the circumstances described in those Exceptions which made his claim on article 8 especially strong or in other words sufficiently compelling. There can be no dispute that S117C (6) is a high and demanding test.
137. When considering the appellant’s circumstances, the FtIJ considered his relationships with his family members and also his partner. The decision letter proceeded on the basis that the appellant had not shown that he and his partner were in a genuine and subsisting relationship or that she was a British citizen resident in the UK and thus was not a “qualifying partner”. However, the judge who had heard the evidence of the appellant’s partner and found her to be an “impressive witness” (at [50]) accepted her account of their relationship and that they had met in 2015 – 2016, that she was a British citizen and had always lived in the United Kingdom and whilst they were in relationship they were not married. Consequently, he did not consider that relationship fell within Exception 2.
138. As to the family members (his mother and brother) it appears to have been conceded by counsel that the relationship did not go beyond normal ties (at [56]) however the judge at [57] considered that the relationships with his family members formed an integral part of his private life in the UK. It appears by reference to the preceding part of that paragraph that this was based on their circumstances, how they had entered the United Kingdom and had continued to live together alongside the length of residence with those family members which was not in dispute.
139. When reading the decision, it is plain that the judge found that the appellant had a very strong private life with his family and partner. Whilst the appellant was now over 18, it was common ground that he remained living in the family home with his mother and siblings, he was the oldest male in the household

and provided support for both her and his younger siblings (see paragraphs [29] and [35]). The judge concluded at [78] that whilst there was a strong public interest in his deportation, the appellant's case could be distinguished from many of the cases that came before the tribunal and made reference to the appellant having "three discrete relationships that do not engage family life but are nonetheless important relationships that cannot be replicated in South Africa." The judge took into account the respondent's assertion that the appellant could use modern forms of communication to remain in contact with his mother, brother and his partner but was satisfied that if that took place, the relationships would be "fundamentally different". At paragraphs [79] – [83] the judge set out his reasons for reaching that conclusion. The judge found that in the event of the appellant's deportation, he would not be able to maintain and continue to develop his relationship with his partner. She was a British citizen who lived all her life in the UK, she was in the process of establishing a career and that she could not go to South Africa. The judge stated "I am satisfied that she could not reasonably be expected to uproot herself and try to begin again to establish an adult life in South Africa" (at paragraphs [79] – [80]). At [81] he placed weight and found to be a significant point, that the appellant's partner had visited him regularly and that it would have been "very easy for her to walk away from the appellant that time, but she stuck with him and supported the appellant. In my view, this speaks volumes about her feelings about the relationship."

140. When considering the relationship between the appellant and his family members (his mother and brother), he reached the conclusion that they also could not be expected to uproot themselves to maintain their relationships with the appellant. The appellant's mother being the primary carer of two British citizen children aged 8 and 13, attending school in the UK and seeing the father every weekend (at [82]). At [83] the judge considered the circumstances of his adult brother; he was a British citizen. Again, the judge concluded that on the factual circumstances his brother had not returned to South Africa and had been in the UK for nearly 20 years and that he could not reasonably be expected to start again in what was for all intents and purposes a "foreign country".
141. The FtTJ returned to the appellant's private life at [85] in his final analysis. Whilst he refers to "three key elements of "the appellant's private life, it is not entirely clear to me whether he meant the three different relationships or whether he meant the relationships with his family and partner, the social and cultural links with the United Kingdom and the very significant obstacles to his reintegration to South Africa.
142. I can find no reference in the decision to the term "very significant obstacles". However, on the factual findings and on the evidence, which was not disputed, such an assessment would be satisfied in his case. There is no dispute that the appellant had entered the UK along with his mother and two brothers in 2001 when he was four years of age. He lived in the UK since that date and had never returned to South Africa. A relevant and substantial factor in his favour

was that neither of his parents were nationals of South Africa and were originally from the DRC. His father had left the family in 2000 and returned to the DRC and they had not seen him since. It was common ground that the appellant had never been back to South Africa and had no connections to the country. The judge found that to be the case and also found that he did not have any recollections of that country (at paragraph [33]. At [83] whilst setting it the context of the appellant's brother, but must logically also apply to the appellant, the FtT found that a return to South Africa would be "in all intents and purposes a foreign country."

143. At [42] the judge considered that the appellant would arguably be destitute if required to return to South Africa. Whilst that was in the context of an asylum/Article 3 claim and was not analysed any further, it was in some respects supportive of the evidence before the judge which he accepted as to the strength of his ties, both family, social and cultural in the UK and the absence of those ties in South Africa and thus to the issue of whether there were very significant obstacles to his integration. The respondent accepted that there were significant obstacles but that they were not insurmountable on the basis that there may be family relatives in South Africa. However, the evidence before the judge was clear that there were no such family connections to South Africa which would not be surprising bearing in mind the length of time that the appellant had been absent, the age he left that country but also that neither of his parents were nationals of South Africa but were nationals of the DRC.
144. That element of the private life Exception is not essentially concerned with the general difficulties of life in the receiving country, as explained by Moore-Bick LJ in *SSHD v Kamara* [2016] EWCA Civ at [14]:

"in my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C (4) and paragraph 399A is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language is subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgement to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other countries carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

145. However, on the factual background of the appellant and his family members, and making a "broad evaluative judgement", in my judgement it could properly be said that the appellant would not be considered enough of an insider to understand life in South African society or to participate in it. The FtTJ's acceptance of the factual background and his omnibus conclusion that to "all intents and purposes South Africa is a foreign country" to the appellant's

family members, there was sufficient evidence to demonstrate that there were very significant obstacles to his integration to South Africa in the event of his deportation, even if the FtTJ did not expressly say so.

146. The FtTJ also found that the appellant was socially and culturally integrated in the UK given the length of residence in the age of four, having attended school and completed his education in the UK and having developed social and cultural ties to the UK. Again, whilst not articulated with any clarity, those factors when taken together must have formed part of the strong private life that the appellant had established in the UK during his residence which formed part of the assessment of the FtTJ.
147. In my judgement those factors were relevant factors in the FtTJ's analysis as identified in the Strasbourg jurisprudence. The wide-ranging evaluative exercise required under s. 117C (6) clearly includes an application of the principles in the Strasbourg authorities to ensure compatibility with the UK's obligations under Article 8 and must be accommodated within the statutory scheme - see NA (Pakistan) at [29] and [38]; HA (Iraq) at [28] and Unuane at [72-75] and [81-83]. The Strasbourg authorities set out the relevant criteria to use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. The respective weight to be attached to these criteria will inevitably vary according to the specific circumstances of each case - see Unuane at [78]. In the Supreme Court's decision of Byndloss, at paragraph [55] a number of criteria were listed relevant to the issue of "very compelling circumstances". They included:
- "(a) the depth of the claimant's integration in the United Kingdom in terms of family, employment and otherwise.
 - (b) the quality of his relationship with any child partner or other family member in United Kingdom:
 - (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise.
 - (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the United Kingdom.
 - (e) the likely strength of the obstacles to integration in the society of the country of his nationality is: and surely in every case
 - (f) any significant risk of his reoffending in United Kingdom judge no doubt with difficulty in the light of his criminal record set against the credibility of his probable assertions of remorse and reform."
148. These were some of the factors that the judge considered and identified in his analysis. A different judge may have taken a different approach for example in relation to weight attached to certain evidential factors identified by the FtTJ but I do not consider that the FtTJ was in error in taking those factors into account in his conclusion that on the facts of this particular appellant's case there were "very compelling circumstances" or using the terminology of the

FtIJ “ exceptional circumstances “ which taken cumulatively outweighed the strong public interest in his deportation.

149. One of the other factors relied upon by the judge concerning ‘very compelling circumstances’ related to the appellant’s rehabilitation. The appellant relies on Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 where, at [38], Lord Reed held that the assessment of the proportionality of a person’s deportation:

‘...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...

150. Lord Kerr, in his dissenting judgment in Hesham Ali, concurred with the majority on the rehabilitation point. At [164], he said:

‘The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation.’

151. Ms Logan submits that this passage was endorsed by the Court of Appeal in [49] of Akinyemi (No. 2) v Secretary of State for the Home Department [2019] EWCA Civ 2098, where it was described as a conclusion ‘not doubted by anyone.’

152. The Court of Appeal addressed rehabilitation in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176. After having surveyed the authorities (noting that he had ‘some difficulty’ with a suggestion by Hamblen LJ at [84] of Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551 that rehabilitation would ‘generally be of little or no material weight’), Underhill LJ held, at [141]:

‘...the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight...’

153. In her submissions, Ms Logan made reference to the Strasbourg jurisprudence. Those authorities also demonstrate that rehabilitation is not a factor that is irrelevant to the question of proportionality. For example, in Boultif at [48], the court held that:

‘In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period...’

154. Looking at the FtTJ's assessment of the issue of rehabilitation, the offences committed by this appellant were in 2017 and it appears that he was released in 2018. The hearing before the First-tier Tribunal was in September 2020. That was a reasonable passage of time capable of informing a finding as to rehabilitation. The judge reached unchallenged findings of fact at [75] that the appellant had not committed any further offences and that he was satisfied that the appellant "is very unlikely to commit any further offences in the UK". This was supported by the FtTJ's assessment of the probation officer's report which stated that the appellant posed a very low risk of re-offending (at [87]). In addition, the FtTJ formed a favourable view of the appellant and accepted the appellant's evidence that his offending was a "one off" and an "isolated incident" (at [74] and [86]). The FtTJ also accepted that the appellant was "genuinely remorseful" (at [86]) and "truly regrets getting involved" and that he had a "strong support network within the UK" and that his family would support him and that the judge did not believe that the appellant would do anything that would cause his family further distress (at [75]).
155. Drawing this analysis together, on the basis of the jurisprudence set out above, rehabilitation is capable of attracting some weight. Mr Whitwell on behalf of the respondent accepted that the FtTJ was entitled to place weight on this. In fact, the judge ascribed "some weight" to the appellant's rehabilitation (see [87]). I do not consider that the weight ascribed by this judge, bearing in mind the moveable quality of the public interest in the deportation of foreign criminals (as to which, see section 117C (2) of the 2002 Act, and Akinyemi (No. 2) at [39]), sets out) was wrongly applied. Nor do I find his assessment of this issue coupled with his consideration of the appellant's offending to be in error or irrational. The written grounds at paragraph 6 submit that the FtTJ erred in law by making allowances for the length of the appellant's sentence which, it is submitted, should only be used to determine where the case falls for consideration within S117 as set out at in HA (Iraq) at [43]. The paragraph given within that citation is not support for that submission. At paragraph 43 the court was addressing the issue of undue harshness. However, whilst I would agree that the length of the sentence imposed is relevant to establishing the category in which the appellant falls, it is also relevant to Sections 117C (1) and (2) which set out the position regarding the "public interest" as follows:
- "(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."
156. Thus, the FtTJ's analysis of the offence at [85] and by reference to the length of sentence by reference to where it fell in the sentencing guidelines was not an

impermissible assessment nor was it one that could not carry any weight and was relevant to S 117C (2). Barring irrationality, weight is a matter for the judge.

157. The judge was fully cognisant of the public interest in the deportation of foreign criminals, and correctly directed himself on the issue throughout the decision (at [68], [76] and [84]. At [68] he referred to S117C and reminded himself of the importance of S117C (2) and the “great weight” given to the public interest in the deportation of foreign criminals (citing Hesham Ali) and at [85] referred to the “significant public interest arising in this case”.
158. His analysis of the evidence and his factual findings concerning the strong private life and the nature of the ‘very significant obstacles’ the appellant would be likely to face in South Africa (even if not articulated using that terminology) was rationally open to him, they were unchallenged findings alongside those which demonstrated that the appellant was socially and culturally integrated. Those factors alongside the finding concerning the appellant’s rehabilitation, the strong private life relationships he had in the United Kingdom which could not be replicated outside of the UK and this cumulatively amounted to ‘very compelling circumstances’ was a judgment rationally open to the judge.
159. Therefore, the FtTJ having considered all factors weighing in the appellant's side of the balance cumulatively was entitled to conclude that the weight of the public interest in this particular case did not require his deportation because it could be said that there were “*very compelling circumstances*” over and above those described in Exceptions 1 and 2.
160. I remind myself that an appeal to the tribunal may only lie where there is an error of law. It is trite law that many judges will approach the same set of facts very differently. The mere fact that one judge adopts a relatively favourable interpretation of the evidence they have heard does not necessarily render that finding irrational, simply on the basis that other judges, even many other judges, may have approached the same question in a different manner.
161. I also remind myself of the observations of Floyd LJ in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 at paragraph 19:

“19. I start with two preliminary observations about the nature of, and approach to, and appeal to the UT. First, the right of appeal to the UT is “on any point of law arising from a decision made by the [FTT] other than an excluded decision”: Tribunal, Courts and Enforcement Act 2007 (“the 2007 Act”), section 11 (1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12 (1) and (2) of the 2007 Act. If there is no error of law in the FTT’s decision, the decision will stand. Secondly, although “error of law” is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v SSHD at [30]:

“Appellate courts should not rush to find such misdirection simply, because they might have reached a different conclusion on the facts or express themselves differently.”

162. Even if the decision could be characterised as a generous one, it has not been demonstrated by the respondent that on the particular factual circumstances of this appellant’s case and on the evidence before the FtTJ that the decision was either inadequately reasoned or that he failed to apply the correct legal principles in substance. For those reasons, I am satisfied that the decision of the FtTJ did not involve the making of a material error on a point of law so that the Upper Tribunal should set aside the decision. I therefore dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

Signed

Dated 17 May 2021

Upper Tribunal Judge Reeds

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email