



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/03037/2018

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
on 07 March 2022**

**Decision & Reasons
Promulgated
on 15 June 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**IO
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. It is appropriate to make an order because the case considers current child welfare issues and sensitive issues relating to past childhood abuse. I make clear that the order is not made to protect the appellant's reputation following his conviction for a criminal offence. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Representation:

For the appellant:

Ms S. Akinbolu, instructed by Sunrise Solicitors

For the respondent:
Officer

Mr T. Lindsay, Senior Home Office Presenting

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 19 February 2019 to refuse a protection and human rights claim in the context of deportation proceedings.
2. First-tier Tribunal Judge Lucas dismissed the appeal in a decision promulgated on 21 August 2019. The decision was set aside by the Upper Tribunal and remitted for a fresh hearing. First-Tier Tribunal Judge Page allowed the appeal in a decision promulgated on 17 April 2020.
3. The Secretary of State was granted permission to appeal to the Upper Tribunal. In a decision promulgated on 14 December 2020, the Upper Tribunal found that the decision involved the making of an error of law (annexed). The First-tier Tribunal's finding that it would be 'unduly harsh' for the appellant's children to remain in the UK without their father should he be deported was preserved (the 'stay scenario'). The First-tier Tribunal only erred in failing to make any findings as to whether it would be 'unduly harsh' for the family to relocate to Nigeria should the appellant be deported (the 'go scenario').
4. The decision was to be remade at a resumed hearing in the Upper Tribunal. The issues for determination in the appeal were narrowed to the following points:
 - (i) Whether it would be 'unduly harsh' for the family to relocate to Nigeria (the 'go scenario')(paragraphs 399(a)(ii)(a), 399(b)(ii) and section 117C(5) Nationality, Immigration and Asylum Act 2002 (NIAA 2002)); or in the alternative
 - (ii) Whether there are 'very compelling circumstances' that outweigh the public interest in deportation (section 117C(6) NIAA 2002).
5. The rehearing of the appeal was delayed. The appellant was without representation and said that his mental health had deteriorated to the extent that he was too unwell to attend a hearing. Following adjournments and a subsequent case management hearing, the case was finally listed for a resumed hearing on 07 March 2022. The appellant was legally represented. He confirmed that he felt well enough to give evidence. The appellant was treated as a vulnerable witness although no special measures were thought to be necessary except vigilance when questioning and to take breaks if needed.
6. The appellant and his wife gave evidence. Their evidence and the oral submissions made by the legal representatives is a matter of record. I will refer to relevant parts of the evidence as necessary in the course of my findings.

Decision and reasons

7. The underlying factual circumstances relating to the appellant's immigration history and family life in the UK are not disputed. Nor was the fact that the appellant has been suffering from mental health issues, albeit there was a question as to whether there was sufficient evidence to show the extent of those issues at the date of the hearing.
8. The appellant entered the UK in July 2005 as a student. He was 19 years old at the time. The respondent's summary of his immigration history suggests that he was granted successive periods of leave to remain in the UK as a student. He was granted leave to remain as a spouse in 2012 and was granted Indefinite Leave to Remain (ILR) on the same basis on 16 February 2013. The appellant remained in the UK on a lawful basis until a deportation order was signed on 17 February 2016, which by operation of law revoked his ILR. At the date of the hearing the appellant had lived in the UK for nearly 17 years.
9. The appellant raised protection and human rights issues in response to the notice of intention to deport. On the advice of his legal representatives he no longer pursues the appeal on protection grounds. However, the appellant's past history in Nigeria might still be relevant to the overall assessment of the human rights claim.
10. The basis of the appellant's claim was that his parents were members of a confraternity called The Rosicrucian Order. The appellant said that some members of the organisation conduct ritual sexual abuse. When he was 13 years old he was raped by a group of his father's friends. He was treated in hospital. His older sister took him to the police station to report the incident. In support of the protection claim the appellant produced a copy of a medical report from Teju Specialist Hospital in Ibadan from 1999. He also produced a letter from his sister confirming the incident, which was accompanied by her contact details and identity documents. The injuries described in the medical report were consistent with the appellant's account. The appellant also produced a copy of a police report dated 29 July 1999 and a 'Police Case Request' for a medical report from the doctor, which were also broadly consistent with his account.
11. The respondent's decision letter dated 19 February 2018 did not appear to dispute this past history, but refused the claim on the ground that the appellant would not have a well-founded fear of persecution on return to Nigeria because there was in general a sufficiency of protection and/or he could relocate to another area of Nigeria. The appellant did not attend the hearing before First-tier Tribunal Judge Lucas. His findings relating to the protection claim were set aside by the Upper Tribunal. By the time the appeal was reheard by First-tier Tribunal Judge Page the appellant no longer pursued the protection claim. As a result, the First-tier Tribunal has not made any clear findings about the appellant's account of past childhood abuse.

12. Medical correspondence from the hospital to the appellant's GP during 2016 indicated that the appellant had disclosed a history of childhood sexual abuse although it was reported that he was reluctant to talk about it. At that time a consultant psychiatrist at the Bow & Poplar CMHT diagnosed schizophrenia and severe depression with psychosis. The appellant reported to the psychiatrist that he had tried to end his life while he was in prison and was hearing voices. He was 'struggling with thoughts of past abuse'. In 2018 there is evidence to show that the Psychological Therapies Service at Mile End Hospital recorded that the appellant reported having suicidal thoughts when he feels stressed. His children were reported to be a protective factor and a safety plan was developed. The letter indicates that he was being referred to a trauma treatment group. The medical notes indicate that by 2018/2019 the appellant had also be diagnosed with Post-traumatic Stress Disorder (PTSD). Although there is no detailed psychiatric or psychological evaluation of the causes of the diagnosis of PTSD, the medical evidence is also broadly consistent with the appellant's account of childhood trauma.
13. The evidence before the First-tier Tribunal also included the expert country report of Professor Mario I. Aguilar. Although Professor Aguilar considered that not all members of such an order would commit unlawful acts of the kind described by the appellant, it was at least plausible that some members of such a group might act in that way. He had heard of similar excesses by groups within various confraternities.
14. I am satisfied that when the evidence relating to the appellant's past childhood abuse is considered as a whole it supports his account of past trauma. I accept that it is more likely than not that the appellant suffered the past ill-treatment he claims. The evidence also indicates, perhaps uncontroversially given the serious nature of such childhood trauma, that the appellant still struggles with the repercussions of that event, and that it is likely to underpin at least some of his current mental health problems.
15. At the case management hearing on 08 December 2021 the appellant informed the Upper Tribunal that he was working with his doctor and psychiatrist and was expecting an appointment. At that time he considered that it would be possible to obtain up to date medical evidence, but by the date of the hearing on 04 March 2022 the evidence was still somewhat lacking. The appellant explained that it had been difficult to see mental health professionals during the pandemic but confirmed that he was still taking medication. I accept that access to medical services might have been constricted to a certain extent during the pandemic.
16. I summarised the medical and psychiatric evidence before the First-tier Tribunal in the error of law decision [11]-[13]. The psychosocial report of Susan Pagella from 2019 described the appellant as suffering from 'considerable and significant mental health problems'. She observed that the appellant was 'significantly affected' by his childhood experience of

multiple rape. In her opinion removal to the place of the original trauma was likely to lead to a deterioration in his mental health. She noted that those suffering from schizophrenia might be removed from reality and may be unaware of the seriousness of their illness or be reluctant to undergo treatment.

17. More recent evidence from the appellant's GP, which underpinned an application for an adjournment in March 2021, stated that in the weeks running up to the hearing that was listed on 30 March 2021 the appellant had 'a worsening of his mental health despite taking all his medication.' In view of that deterioration his GP supported a delay. This evidence was consistent with that of Susan Pagella in suggesting that the appellant's subjective fear of return to Nigeria was brought to the fore when his deportation appeal became imminent. The insecurity raised by the prospect of return to Nigeria led to a deterioration of his mental health condition.
18. The appellant did not produce any up to date evidence from a doctor or psychiatrist relating to his mental state for the hearing. The only additional evidence was said to be a recent but undated letter from a mental health senior nurse practitioner at the Tower Hamlets Primary Care Mental Health Service. Mr Okubule said that the appellant was currently diagnosed with a depressive episode with psychotic symptoms. He said that the appellant's immigration status was causing him to have low mood, suicidal thoughts, anxiety and panic attacks. Mr Okubule confirmed that the appellant was currently prescribed 'anti-depressant medication namely mirtazapine 45mg, olanzapine 17.5mg and taken once daily.'
19. During the hearing Mr Lindsey sought to undermine the reliability of this letter on the grounds that (i) it appeared to suggest, wrongly, that olanzapine was an anti-depressant when it is an anti-psychotic medication; and (ii) that the dosage of olanzapine stated in the letter did not appear to accord with publicly available information from the NHS website.
20. When the letter is considered with the range of other evidence that shows that the appellant has been receiving treatment for his mental health conditions for a number of years, I did not find these arguments at all persuasive. The letter from Mr Okubule should not be read in a forensic way. Nothing in the letter is markedly inconsistent with previous medical evidence. The way in which the sentence highlighted by Mr Lindsey is drafted might cause some to consider that olanzapine was an anti-depressant medication, but the sentence is punctuated with a comma. Little significance can be placed on the fact that Mr Okubule did not go on to specifically describe olanzapine as an anti-psychotic medication. It is known that the appellant has been diagnosed with a mental illness that has psychotic features. At the hearing, time was taken up questioning the appellant about the dosage of his medication when he could not remember the exact dose. The reference to a 17.5mg dose might simply be a typographical error given that the NHS information states that

olanzapine can come in 7.5mg tablets. In evidence the appellant said that he is allowed to take up to two tablets a day, which is broadly consistent with the NHS information relating to an average dose of 15mg of olanzapine per day i.e. two 7.5mg tablets.

21. I conclude that the evidence continues to show that the appellant is being treated for the same mental health issues. The underlying condition remains the same although there is little information at the current time as to the severity of his condition. I accept that some mental health services might not have been as readily available during the pandemic. The appellant says that he is able to contact the emergency mental health service if need be. At the moment, the evidence indicates that his condition is being managed primarily through medication. There is little evidence to suggest that his condition has deteriorated in recent months to such an extent that he has required a high level of intervention or treatment by local mental health services.
22. I have accepted that the appellant suffered serious childhood trauma when he was in Nigeria. The medical evidence suggests that this serious event has had a lasting and detrimental impact on his mental health. There is no recent evidence to suggest that there has been a marked deterioration in his health or that there has been any recent crisis which required immediate treatment. The appellant's condition is being managed primarily through medication.
23. I readily accept that the prospect of returning to Nigeria, the place of his childhood trauma, is likely to lead to give rise to a subjective fear of return even there is no current risk on return. The medical evidence indicates that the appellant also has a subjective fear that his young son might be at risk of similar ill-treatment if they returned to Nigeria because of his own experience as a child. The evidence from the appellant's GP demonstrates that his mental health deteriorated in early 2021 as a hearing loomed to determine whether he should be deported to Nigeria. This in turn supports Susan Pagella's opinion that the appellant's mental health is likely to deteriorate if he were to be removed to Nigeria.
24. The appellant says that he has returned to Nigeria on short visits since he came to the UK, but has not returned since he met his wife i.e. for at least 12 years. I accept that returning for a visit is not quite the same as returning to live in Nigeria on a permanent basis. The fact that the appellant returned for a visit many years ago does not necessarily negate the subjective fear he still has of living in Nigeria on a permanent basis.
25. First-tier Tribunal Judge Page considered the family circumstances in some detail in his decision [32]-[36]. The appellant's wife and two children are British citizens. His wife was born in Nigeria but came to the UK when she was six years old. I found her to be an open and honest witness. She told me that all of her immediate family, including her parents and siblings, live in the UK. She has not returned to Nigeria since she arrived in the UK as a

child. She described her parents as 'very British'. They do not return to visit Nigeria except on rare occasions. The last time her father went to Nigeria was a long time ago when one of his parents died. In short, the picture she presented was of a family with Nigerian roots who are long settled in the UK and do not have any significant or continuing ties with the country. Despite her heritage, the appellant's wife does not have any experience of independent life as an adult in Nigeria and is unlikely to have any significant relationships with people there who might be able to assist her to establish a life there.

26. Similarly, it seems that the appellant became estranged from his parents. The intimation was that this was partially as a result of the trauma he suffered from members of the confraternity of which they were members. Independently, the appellant's wife also confirmed that they have 'no contact with his side' of the family. The appellant came to the UK as a young adult aged 19 years old. Although he spent his childhood in Nigeria, and is likely to be more familiar with the country than his wife, he has little or no experience of how to forge an independent life as an adult there.
27. I accept that both the appellant and his wife are educated and able to work. I also accept that there might be fewer job opportunities in Nigeria of the kind available to them here in the UK. The appellant's wife works as a Project Manager and explained that she is 'building her career' here. She is currently the main breadwinner because the appellant is not permitted to work. She expressed concerns about high levels of unemployment in Nigeria. Neither she nor the children spoke any Nigerian languages. Her concern was that, as an outsider who did not have any connections there, it would be far more difficult for her to find work in a country that already had high rates of unemployment. She was worried that they would struggle to earn a living and might face destitution. The appellant's wife was also extremely concerned about security issues in Nigeria. She knew of a woman who lived near her who had gone to Nigeria on holiday and was killed during a mugging. She also cited a story that she had heard about a boy who had been bullied in a boarding school. The teachers did not pick up that he was being bullied. He went home with bruises and later died. In addition to her fears about physical and financial insecurity, the appellant's wife pointed out that she would be separated from all her close family members who live in the UK.
28. The appellant's children are British citizens. His son is eight years old. His daughter is nearly four years old. Both children were born in the UK, have never visited Nigeria, and do not speak any Nigerian languages. The children are growing up with all the benefits associated with life in an economically developed country. The evidence shows that there are no significant problems with their health and development.
29. Beyond the normal activities of children of that age, the appellant's son has been marked out as a talented footballer. He has been given a training contract with Arsenal football club. His mother was highly articulate in

explaining why this was of such importance to his development. In fact, the high profile nature of the club featured less in her explanation as to why this was important for her child. She explained that, not only were the sporting facilities good, but the club also assisted the small number of children chosen (only 15-18) with their education. Her son would also be given support with his health and would have chances to travel. She considered that it was an opportunity for her son to develop his social skills and to develop a bigger friendship group. It would teach him discipline. Although she acknowledged that her son could play football in Nigeria, I accept that an opportunity to be trained with a Premier League club with an international reputation is something that only a small number of children are offered and that this is a unique opportunity that would be lost to him if the family had to relocate to Nigeria.

30. The appellant's representatives produced no background evidence about the situation in Nigeria in order for the Upper Tribunal to assess the conditions that the family might face. This was a glaring omission in their preparation of the case. It is not possible for a judge to make a proper assessment without some context. To this end neither party had any objection to me considering the most up to date US State Department Report on Nigeria (2020) (USSD).
31. In the section relating to the treatment of women (and girls) in Nigeria the report states that the practice of demanding sexual favours in exchange for employment or university grades remained common. In some regions women suffered harassment for social and religious reasons. There was inadequate funding for primary healthcare facilities and the cost of healthcare limited access. The report indicates that one in 10 women aged 15-49 experienced sexual violence. A UNICEF survey from 2014 found that one in four girls and one in 10 boys experienced sexual violence before they were 18. The constitution provides the same legal status for women. However, women experienced 'considerable economic discrimination'. The law did not mandate equal remuneration for work of equal value nor mandate non discrimination based on gender in hiring. Women generally remained marginalised.
32. In the section relating to the treatment of children the USSD states that the law requires provision of free basic education for every child of primary and junior secondary school age. Despite these provisions, there was extensive discrimination and impediments to female participation in education, particularly in the north. Public schools remained substandard and limited facilities precluded access to education for many children. Primary school attendance was low and learning outcomes nationally were poor on average, especially in northern states.
33. The USSD reported that child abuse remained common throughout the country, but the government took no significant measures to combat it. Findings from the Nigeria violence Against Children Survey released in 2015 revealed approximately six of every 10 children experienced some

form of physical, emotional, or sexual violence during childhood. One in two children experienced physical violence, one in four girls and one in 10 boys experienced sexual violence, and one in six girls and one in five boys experienced emotional violence.

Best interests of the children

34. In assessing the best interests of the children I have considered the broad principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration although they are not the only consideration.
35. The respondent must have regard to the need to safeguard the welfare of children who are “in the United Kingdom”. I take into account the statutory guidance “UKBA Every Child Matters: Change for Children” (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: “The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.” The UNCRC sets out rights including a child’s right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.
36. The appellant has two primary school aged children who are British citizens. One is a boy and the other a girl. They have grown up in the UK and have known no other life. They are well settled in their lives here and are able to access the opportunities afforded to them as citizens of a country with a developed economy. These benefits include access to free education and healthcare. The oldest child is more likely to have developed ties outside the immediate family. In particular, he has been offered a rare chance to train with a Premier League club, which could potentially open up opportunities well beyond those that might be available to him if the family relocated to Nigeria.
37. If the family relocated to Nigeria their position would be quite different. The children’s parents were both born in Nigeria but have little experience of independent adult life there. Higher levels of unemployment and lack of existing connections are likely to make it harder for them to find work to support the family. The evidence shows that, as a woman, their mother is likely to face the additional obstacle of discrimination when searching for work. The evidence shows that the appellant’s mental health is likely to deteriorate if he is removed to Nigeria, the source of his original childhood trauma. Although it is possible that he might be able to access some

medical treatment there, the family is likely to face economic uncertainty. It is far from clear whether they would be able to afford treatment if the appellant's condition deteriorated to the extent that he developed psychotic symptoms. The position of the appellant's wife would be extremely difficult if he became unwell. She would have to bear the burden of trying to provide an income for the family as well as caring for the appellant and two children on her own. It is at least possible that the family could be at risk of living in far more constrained and difficult circumstances, which might impact on the parents' ability to safeguard and care for the children in the same way as they do in the UK.

38. Whilst not discounting the fact that many children suffer abuse and mistreatment in this country, the evidence relating to Nigeria shows that it is common for children to have more limited access to education, that children are more likely to have a poorer quality of education, and are likely to be at higher risk of physical and sexual abuse. The appellant's daughter is likely to face far higher levels of discrimination and disempowerment if she grew up in Nigeria than she would in the UK. The appellant's son would also be likely to face greater disadvantage and would miss the range of opportunities now offered to him through the training contract he has been offered. Both children would be uprooted from the only life that they have known to a country with a far different level of economic development to a precarious situation in which their parents would face real uncertainty about how they would earn a living to support the family. While not discounting the fact that their parents have skills and education that might assist them to find work, the children would not be relocating to a country with equivalent levels of opportunity and economic development.
39. Having considered the circumstances as a whole in the context of the evidence relating to the treatment of women and children in Nigeria I conclude that the best interests of the children point strongly towards them remaining in the UK with both parents.

Article 8(1) - private and family life

40. The appellant has lived in the UK for a period of over 17 years. Prior to his conviction he was settled in the UK and had strong family and private life ties here. Even if his wife and children relocated to Nigeria their family life together is likely to be of an altogether different character given the challenges that they are likely to face in establishing themselves there. I am satisfied that the evidence shows that the appellant's removal pursuant to the deportation order would interfere with his right to private and family life in a sufficiently grave way to engage the operation of Article 8(1) of the European Convention.

Article 8(2) - proportionality

41. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are “in accordance with the law” for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.
42. Part 5A of the Nationality, Immigration and Asylum Act 2002 (‘NIAA 2002’) applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person’s right to respect for private and family life under Article 8 of the European Convention. In cases concerning the deportation of foreign criminals the additional public interest considerations contained in section 117C apply. 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).
43. The courts have repeatedly emphasised that significant weight should be given to the public interest in deportation. However, that is not to say that the weight to be given to the public interest is uniform or monolithic: see *Akinyemi v SSHD* [2019] EWCA Civ 2098. The more serious the offending behaviour; the greater the weight is placed on the public interest in deportation. The less serious the offending behaviour; the more readily an individual’s compelling or compassionate circumstances might outweigh the public interest in deportation.
44. The exceptions to deportation outlined in section 117C NIAA 2002 reflect the respondent’s position as to where a fair balance is struck between the weight that must be given to the public interest in deporting foreign criminals and the person’s right to private or family life. If the appellant meets the requirements of one of the exceptions the respondent accepts that his removal would be disproportionate.
45. Section 117C(5) states that an exception to deportation applies where a person has a genuine and subsisting relationship with a qualifying partner or children and the effect of deportation would be ‘unduly harsh’. In *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 the Court of Appeal made clear that earlier cases stating that this required a level of harshness beyond the ‘ordinary’ harsh effects of deportation should not be read to require exceptional circumstances. The assessment must still focus on the effect of deportation on the particular child and whether the degree of harshness is sufficiently severe to outweigh the public interest in deportation. How a child will be affected by a parent’s deportation will depend on range of different factors.
46. It is not disputed that the appellant has a genuine and subsisting relationship with a qualifying partner and children. The First-tier Tribunal

has already found that it would be unduly harsh for the children to remain in the UK without their father if he were to be deported to Nigeria.

47. For the reasons given above, I have found that the best interests of the children point strongly to them continuing remaining in the UK in the care of both parents. I bear in mind that the best interests of the children are not determinative, but they do inform the assessment of whether it would be unduly harsh to expect the children to relocate to Nigeria with their parents when assessing the theoretical 'go scenario'. I have also taken into account the decision in *Patel (British citizen child - deportation)* [2020] UKUT 45 (IAC). The British citizenship of the children is a relevant factor, but is not always a weighty factor. The weight to be given to the children's citizenship will depend on the facts of each case.
48. The evidence shows a stark contrast between the quality of life of British children in the UK and that of the average child in Nigeria. Children in the UK are likely to be physically safer and have access to free education and healthcare. They are more likely to have access to other opportunities that are less likely to be available to children in Nigeria. The appellant's children would be uprooted from their life in the UK in circumstances that I have found would not be in their best interests. Their parents are less likely than some to be able to assist them to integrate in Nigeria given that they themselves have limited experience of independent adult life there. The children would lose the opportunities that might arise from their life in the UK. In particular, the appellant's son would be denied a rare opportunity to develop his talents as a footballer with a Premier League club. The evidence shows that the appellant's daughter is likely to face far higher levels of discrimination and fewer opportunities if she were to grow up in Nigeria.
49. In many cases of a similar kind the respondent accepts that it would be unduly harsh for British children to be expected to relocate to Nigeria with a parent who is subject to deportation. It is open to the respondent to assert that it would not be in a particular case, but in this case the decision letter merely asserted that the appellant's son could adapt to life in Nigeria because his parents had 'good knowledge of the culture, traditions and societal norms' there. I have found that, in fact, his parents have limited experience of independent adult life in Nigeria although they have some cultural connections. No consideration was given to the 'real world' circumstances of children in Nigeria. At that time, the appellant's daughter had not been born. The greater risk of physical and economic insecurity, the higher levels of violence against children, and the few opportunities available to children in Nigeria were not considered.
50. I bear in mind that the threshold to show that deportation in the 'go scenario' would be unduly harsh is a stringent one. In *KO (Nigeria) v SSHD* [2018] UKSC 53 the Supreme Court made clear that the test in deportation cases was intended to be a higher hurdle than the test of 'reasonableness' used in non-deportation cases. There must be a level of harshness that

goes beyond the usual level of harshness that might be expected from the deportation of a parent [23].

51. The assessment of 'undue harshness' in the context of the 'stay scenario' and the 'go scenario' are not equivalent. In the first scenario the children would benefit from the stability of remaining in the UK and would continue to benefit from the standard of life and opportunities afforded by their citizenship. The First-tier Tribunal has already found that it would be unduly harsh for them to be separated from their father on a long term basis if he were to be removed to Nigeria.
52. In the second hypothetical scenario the children would remain with their parents but would face a more wholesale upheaval of their lives with the loss of opportunity that life in the UK presents, the possibility of parents struggling with deteriorating mental health and/or to earn a living. In my assessment the second scenario is a more direct, deleterious, and long term upheaval for these young children. After having considered the evidence as a whole I am satisfied that it would be unduly harsh to expect the appellant's wife and children to relocate to Nigeria in order to maintain their family life with the appellant. In coming to this conclusion I have taken into account the rather weak level of ties that the parents have to Nigeria, the evidence relating to the appellant's mental health, how a deterioration in his condition might impact on the family as a whole, and the evidence relating to the treatment of women and children in Nigeria.
53. For the reasons given above, I conclude that the appellant meets the requirements of the exception to deportation under section 117C(5) NIAA 2002.
54. Section 117C(6) NIAA 2002 states that the public interest requires deportation unless there are 'very compelling circumstances' over and above Exceptions 1 and 2. The test has repeatedly been described as a demanding one involving a high threshold: see *NA (Pakistan)* and *KO (Nigeria) v SSHD* [2018] UKSC 53.
55. The assessment under section 117C(6) of the NIAA 2002 and paragraph 398 of the immigration rules reflects the overall balancing exercise undertaken by the Strasbourg court when assessing whether the interference with a person's private or family life is justified and proportionate under Article 8(2) of the European Convention. After all, that is the stated intention of the statutory scheme. The need to consider the relevant principles outlined in the Strasbourg jurisprudence was emphasised by the Supreme Court in *Hesham Ali v SSHD* [2016] 1 WLR 4799 [25-33]. After section 117C NIAA 2002 was introduced the Court of Appeal in *NA (Pakistan)* expressly recognised the need to consider Strasbourg principles when applying the statutory scheme [38].
56. Even if I had not found that the appellant met the exception to deportation under section 117C(5) I would conclude that the appellant's overall

personal circumstances and that of his family are sufficiently compelling to outweigh the public interest in deportation.

57. Significant weight must be placed on the public interest in deportation of foreign criminals. The appellant's offence was serious and this was reflected in the sentence of two years imprisonment. The appellant's two convictions in 2015 formed part of the same set of offences. The sentence fell within the medium range of sentences for the purpose of assessing the public interest in deportation for the purpose of Article 8 of the European Convention. Even then, the appellant falls towards the lower end of the 12 months to four years range. The offence did not involve violence, drugs or a sexual offence. Such offences are usually considered particularly serious.
58. I note that the First-tier Tribunal did not determine the issue of whether the appellant had rebutted the presumption under section 72 NIAA 2002 that he had committed a serious offence and was a danger to the community. This is because the certificate under section 72 only affected the way in which the First-tier Tribunal should dispose of an appeal brought on protection grounds. The appellant no longer relied on protection grounds at the First-tier Tribunal hearing. The fact that the decision letter certified the protection claim with reference to section 72 does not compel me to come to any particular conclusion about the weight to be given to the public interest when assessing a human rights claim with reference to Article 8 of the European Convention. Section 72 relates to a particular set of principles relating to the exception to the principle of non-refoulement under the Refugee Convention.
59. I am still obliged to weigh up evidence that is relevant to the assessment of what weight should be placed on the public interest in deportation for the purpose of Article 8. The evidence does not show a long history of criminality. There is no evidence to show that the appellant has been convicted of any further offences in the six years since his release from prison. The evidence showed that he complied with the conditions of his release and co-operated with his offender manager. There is no evidence to show that the appellant is likely to pose a current risk of reoffending.
60. On the other side of the balance there are a number of factors relating to the personal circumstances of the appellant and his family that cumulatively create a very compelling picture:
- (i) The appellant's young age on arrival and his long residence in the UK;
 - (ii) The fact that the appellant had a good immigration history and was someone with settled status;
 - (iii) The appellant's mental health, although lacking in evidence to show a breach of human rights as a stand alone factor, is still a relevant and compelling factor given his history of childhood abuse in Nigeria.

The appellant's subjective fear of return is likely to give rise to mental suffering if he is removed to Nigeria;

(iv) The fact that deportation in either the 'stay' or 'go' scenarios would be unduly harsh on the appellant's wife and children.

61. When these cumulative factors are weighed against the somewhat reduced weight of the public interest in deportation of the appellant as a foreign criminal due to the relatively limited nature of his criminal convictions and the low likelihood of reoffending I conclude that the appellant's personal circumstances are sufficiently compelling to outweigh the public interest in deportation. For these reasons I also conclude that section 117C(6) applies.

62. For the reasons given above, I conclude that the appellant meets the exceptions to deportation contained in sections 117C(5) and 117C(6) NIAA 2002. The appellant's removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is ALLOWED on human rights grounds

Signed M. Canavan Date 31 May 2022
Upper Tribunal Judge Canavan

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

ANNEX



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/03037/2018

Appeal Number:

THE IMMIGRATION ACTS

**Decided at Field House by remote
video conference on 30 November 2020
(V)**

Decision Promulgated

.....

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IO

Respondent

(ANONYMITY DIRECTION MADE)

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves consideration of child welfare issues. I find that it is appropriate to continue the order. I make clear that the order is not put in place to protect the original appellant's (IO) reputation following his conviction for a criminal offence, but to protect his children. Unless and until a tribunal or court directs otherwise, the original appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the appellant: Mr E. Tufan, Senior Home Office Presenting Officer

For the respondent: Ms D. Revill, instructed by Sunrise Solicitors

DECISION AND REASONS

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The original appellant (IO) appealed the respondent's (SSHD) decision dated 19 February 2018 to refuse a protection and human rights claim in the context of deportation proceedings.
3. First-tier Tribunal Judge Lucas dismissed the appeal in a decision promulgated on 21 August 2019. The decision was set aside by the Upper Tribunal and remitted to the First-tier Tribunal for a fresh hearing. First-tier Tribunal Judge Page ("the judge") subsequently allowed the appeal in a decision promulgated on 17 April 2020.
4. The Secretary of State's grounds of appeal are not particularised clearly, but the following points can be derived from the submissions.
 - (i) The judge failed to apply the 'unduly harsh' test properly. The facts of this case were similar to those in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213. It was submitted that the facts of this case did not, as a matter of fact, meet the relevant threshold.
 - (ii) The judge failed to make findings as to whether it would be unduly harsh for the children to live in the country to which their father would be deported.
 - (iii) The judge erred in finding that the Secretary of State gave undue weight to the offence in the decision letter.
 - (iv) The judge erred in placing weight on the fact that the appellant had not committed any further offences: *RA (section 117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 00123 referred.
5. Mr Tufan acknowledged that the last ground was overtaken by the Court of Appeal decision in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176. I noted that, even before that, the decision in *RA (Iraq)* was inconsistent with principles applied by the Strasbourg court, which the Supreme Court and Court of Appeal had repeatedly emphasised should be taken into account: see *Hesham Ali v SSHD* [2016] 1 WLR 4799 [25] and *NA (Pakistan) v SSHD* [2017] 1 WLR 207 [38].
6. A face to face hearing was not held because it was not practicable due to public health measures put in place to control the spread of Covid-19. The appeal was heard by way of a remote hearing by Skype for Business

with the parties' consent. All issues could be determined in a remote hearing.

Decision and reasons

7. The judge summarised the appellant's immigration history and noted his conviction for possessing criminal property (money laundering) for which he was sentenced to two years imprisonment [1-5]. He set out the relevant statutory framework relating to the assessment of Article 8 in deportation cases involving periods of imprisonment of less than four years but at least 12 months [10-15]. The judge then directed himself to relevant case law before turning to consider the key issue of whether deportation would be 'unduly harsh' on the appellant's children for the purpose of section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") [16-18]. At [19] the judge set out a key passage from the Supreme Court decision in *KO (Nigeria) v SSHD* [2018] UKSC 53 [19].
8. At [20] he made clear that he understood that a court must not take into account the seriousness of the offence in considering the question of undue harshness. He also reminded himself that paragraph 399 of the immigration rules required a court or tribunal to consider whether it was unduly harsh for the child or partner to live in the country to which the person is deported "and/or" whether it would be unduly harsh for them to remain in the UK without him. At [21] the judge acknowledged the principles outlined by the Court of Appeal in *NA (Pakistan)* (as then interpreted) by recognising that deportation inevitably involves disruption of family life and something beyond the usual negative effects of deportation must be shown.
9. The judge referred to section 55 of the Borders, Citizenship and Immigration Act 2009 ("the BIAA 2009") and reminded himself that the best interests of the children are a primary consideration. However, despite going on to say that he took the best interests of the child as a starting point no evaluative assessment appeared to take place [29-30]. The judge made no clear findings as to what was in the best interests of the children.
10. Nevertheless, the judge went on to consider the evidence relating to the family's circumstances in some detail. At [32] he summarised the family structure and again noted that the issues were whether it would be unduly harsh for the appellant's wife and children to live in Nigeria or to remain in the UK without him. He explained in detail why the evidence showed a strong relationship between the appellant and his two children and the primary role that he takes in looking after the children while his wife is at work [34-36]. The judge went on to consider what was said in the independent social worker report of Ali Eric Dooley, who concluded that separation would have a detrimental impact on the oldest child who had a strong bond with his father [37]. Given that the report was

prepared in March 2017 it would have been reasonable to infer that the bond between the appellant and his children had only strengthened and deepened over time.

11. The judge also considered the psychosocial report of Susan Pagella, a psychotherapist. She concluded that that the threat of removal had an adverse effect on the appellant's mental health. He is anxious for himself and his son. In her opinion it was in the best interests of the children to remain with their father [40].
12. Although it is not mentioned in the First-tier Tribunal decision, a significant body of evidence relating to the appellant's mental health was contained in the bundle. The respondent's decision letter did not dispute the appellant's account of serious sexual abuse by a group of men from a cult when he was 13 years old. His account was supported by contemporaneous medical and police reports from Nigeria. The appellant's account of past trauma was also consistent with mental health problems that have continued to trouble him in the UK. Medical records and correspondence indicate that the appellant suffered from low mood, suicidal ideation and self-harmed while in prison. Shortly after his release he was seen by the local psychiatric team who, in 2016, diagnosed Schizophrenia but the evidence indicates that by 2018 he was considered to be suffering from Post-traumatic Stress Disorder and by 2019 and early 2020 (shortly before the hearing) he was recorded as suffering from a "Major Depressive Episode, severe, with psychosis". As recently as March 2020 the appellant was reporting increased PTSD symptoms as a result of the upcoming hearing. He reported that voices were telling him to harm himself and to "end it". He was referred to the relevant psychiatric team for assessment.
13. In fact, the overall picture was more compelling than the judge's summary of the psychosocial report suggested. Ms Pagella described him as suffering from "considerable and significant mental health problems". She observed that the threat of forced removal appeared to have brought the memory of past trauma to the surface. She said that the appellant was extremely anxious for his safety but also that of his son in relation to the cult he feared. She found that the negative impact of removal on the appellant's mental health would inevitably impact on the other members of the family.
14. Having directed himself to the correct legal framework, reminded himself of the relatively stringent threshold for the test of 'unduly harsh', and considered the evidence relating to the family's circumstances the judge concluded:
 - "41. After considering all the above evidence and the appellant's evidence of his involvement with his son [A] and daughter and the fact that he is effectively the main carer of his children, I [have] concluded that the inevitable consequences of deportation that the children would face were unduly harsh though accepting that distress is an inevitable feature of

deportation. This is what deportation does to families, it causes family disruption and distress. However, the thrust of the respondent's deport decision is geared more to what should follow if the appellant's sentence was more than four years where a more stringent test must be applied.

42. The respondent's decision did in my view give undue weight to the appellant's offence. There is very little else there to consider. This takes me to the judgement of Lord Carnwath at paragraph 22 in **KO (Nigeria)** where at paragraph 23 he said...[quoted]

... I found that the respondent's approach in the decision to deport the appellant placing so much emphasis on the appellant's offence, notwithstanding that the appellant committed the index offence many years ago, has effectively applied the additional test applied by Section 117C(6) as though the appellant's sentence was four years or more. The unduly harsh test was satisfied, I concluded, in the case of the appellant's children and his partner because she has no support and will be left as a single mother and would have to give up her career. I found on balance that the best interests of the children and the unduly harsh consequences upon them should tip this appeal under Article 8 in the appellant's favour. However, he has committed a serious crime, albeit that he is now fully rehabilitated, but should he reoffend he would not be able to raise the rehabilitation issue again in his favour as he has been able to in this appeal. The appellant's offences were committed in 2012 and are now some eight years ago. He has mental health problems that are being addressed and those mental health problems are said to be geared in part to his continued uncertainty facing deportation long after he completed his sentence. I am not satisfied that the mental health issues that have been raised are of sufficient weight to prevent the appellant from returning to Nigeria because they are geared in large part to the protection appeal that has been abandoned. I have decided that the consequences to the appellant's two children and his British citizen wife would be unduly harsh in all the circumstances of this case and on the narrow issue as to whether the appellant is entitled to the exception under Section 117C(5) I find that Exception 2 does apply as the effect of the appellant's deportation would be unduly harsh."

15. Mr Tufan made submissions on the first two grounds but did not pursue the last two orally. In relation to the first point, he did not seek to suggest that the judge's summary of the legal framework was incorrect. He submitted that nothing in *HA (Iraq)* suggested that the decision in *PG (Jamaica)* was wrongly decided. In so far as the grounds refer to *PG (Jamaica)* they only do so with reference to the general facts of that case whereby the Court of Appeal accepted that three children would be distressed by the deportation of their father but concluded that those were the unfortunate consequences of deportation. The Court of Appeal went on to observe that the difficulties PG's partner would face without him did not "elevate the case above the commonplace". Nothing in *PG (Jamaica)* sets out any binding guidance when each case must be considered on the facts. Mr Tufan submitted that the Supreme Court in *KO (Nigeria)* made clear that 'unduly harsh' was an elevated test. This case did not disclose anything other than the ordinary state of affairs.
16. Ms Revill pointed out that the Court of Appeal in *HA (Iraq)* made clear that it would be wrong to treat cases like *KO (Nigeria)* as factual

precedent and that each case must be considered on its own facts. At [56] Lord Justice Underhill gave the following guidance:

“The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond “that which is ordinarily expected by the deportation of a parent”. Lord Carnwath does not in fact use that phrase, but a reference to “nothing out of the ordinary” appears in UTJ Southern’s decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold “acceptable” level. It is not necessarily wrong to describe that as an “ordinary” level of harshness, and I note that Lord Carnwath did not jibe at UTJ Southern’s use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, “ordinary” is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of “undue” harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being “is this level of harshness out of the ordinary?” they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent’s deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of “ordinariness”. Simply by way of example, the degree of harshness of the impact may be affected by the child’s age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child’s emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.”

17. I note that Lord Justice Jackson also emphasised the need for a child centred approach and outlined the impact that emotional harm can have on a child. At [157] he said:

“...For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent where face to face contact cannot continue may be akin to a bereavement. A decision that gives primary consideration to the best interests of the child will instead focus on the reality of that child’s actual situation and the decision-maker will be more assisted by addressing relevant factors of the kind identified by Underhill LJ at the end of [56] than by making generalised comparisons. Likewise, as explained in the footnote to [48], the aphorism “That is what deportation does” is an important truth, but it is not a substitute for a proper consideration of the individual case....”

18. The approach taken in *HA (Iraq)* has since been approved by the Court of Appeal in *AA (Nigeria) v SSHD* [2020] 4 WLR 145. The effect of these decisions has indeed been to depart to some extent from the approach taken in *PG (Jamaica)* whereby the ‘ordinariness’ of family separation as a result of deportation was considered key.
19. I have considered the First-tier Tribunal decision in light of the evidence and the relevant law. Since then the law has been modified to place a

child focused emphasis on the assessment of whether the effect of deportation is unduly harsh on the facts of each case. I conclude that the submissions made by the respondent amount to disagreements with the decision rather than identifying a material error of law. The judge was aware of the elevated threshold required to meet the test of 'unduly harsh'. It was open to him to take into account the strength of the relationship and the level of involvement that the appellant had in the upbringing of his children. It was also open to the judge to place weight on the views of an independent social worker and a psychotherapist. The decision in *HA (Iraq)* makes clear that the circumstances do not need to be exceptional when considering whether the case engages something more than the 'ordinary' negative effects of deportation. The emphasis must be on the effect that it would have on the facts of this case. It is understandable that the respondent might disagree with the judge's conclusion, but his findings were not outside a range of reasonable responses to the evidence.

20. In relation to the second ground, Ms Revill accepted that the judge was required to consider whether it would also be unduly harsh for the children to live in the country to which their father would be deported. She submitted that it was clear that he was aware of the circumstances. However, even though the judge identified the issue at [20], [30] and [32] it seems clear that he made no findings on an essential element of the legal framework. There was no assessment of whether it would be in the interests of the children to live in Nigeria, what the conditions would be for them there, what weight should be given to the fact that they are British citizens or the effect on the appellant's partner. Although I have found that it was open to the judge to conclude that it would be unduly harsh to separate the appellant from his children, and those findings are preserved, the decision must be set aside for findings to be made on the second element of the 'unduly harsh' test. What Lord Justice Jackson described as the "go scenario".
21. Although Mr Tufan observed that the judge commented on the weight given to the conviction in the decision letter, the third ground was not developed in any meaningful way in oral submissions. I agree that the judge's references to the offence at [42] are not explained all that clearly, but when one considers the reasons for refusal it is possible to discern what the judge may have been referring to. At the bottom of paragraph 111 of the decision letter, when considering whether deportation would be unduly harsh on the child, the respondent accepted that deportation would separate him from his child but asserted that they could keep in contact by modern methods of communication. The letter went on to state: "While this is not the same as direct personal contact, it is considered that your deportation from the UK is in the public interest due to your criminal conviction." In so far as this statement appeared to import a public interest consideration into the assessment of whether deportation would be unduly harsh it was open to the judge to observe that this would be contrary to the current legal position. He was correct

to observe that the interests of the child would only be balanced against the public interest relating to the conviction as part of a broader balancing exercise under section 117C(6) (very compelling circumstances).

22. The fourth point was not pursued and was not arguable for the reasons given above at [5].
23. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The findings relating to the “stay scenario” (paragraphs 399(a)(ii)(b) and 399(b)(iii)) are preserved. The decision will need to be remade to make findings in relation to the “go scenario” (paragraphs 399(a)(ii)(a) and 399(b)(ii)) and if necessary section 117C(6) (paragraph 398(c)).
24. It is appropriate for the Upper Tribunal to remake the decision given that some of the findings have been preserved. Both parties agreed to this course of action.

Mode of hearing

25. A discussion took place about the mode of hearing. Ms Revill said that her client would prefer to give evidence at a face to face hearing but no further reasons were given to explain why this was necessary in light of the current public health situation. Although I bear in mind that a remote hearing is not the usual way of hearing a case, and I accept that the appellant may feel that giving evidence face to face might have more impact, I also have to consider the exceptional circumstances arising from the Covid-19 pandemic and the continued need to take precautions to avoid the spread of the disease.
26. Where possible, and if it is in accordance with the overriding objective, the Upper Tribunal is hearing cases by video conference in order to reduce the need for people to travel to and spend time in the court building. Where necessary, some face to face hearings are taking place, but usually they are confined to cases where there is a need for a witness to give evidence with the assistance of an interpreter, which is difficult to do effectively by video conference, or in some particularly complex cases that might not be suitable for long submissions to be made by video conference i.e. to avoid lengthy screen time.
27. In this case the issues have been narrowed to remaking on the question of whether it would be unduly harsh for the appellant’s family to live with him in Nigeria. The issue is important, but that is the case in all appeals involving human rights claims. Remaking is not likely to involve particularly lengthy oral evidence or complex submissions. The appellant and his wife both speak English and will not need an interpreter. In general, the family circumstances are not disputed. I bear in mind that their evidence is likely to focus on what the impact would be on their

family if they relocated to Nigeria. Much of that evidence will be contained in written statements. Questions will only be required to clarify or emphasise certain elements of their evidence. The exercise is unlikely to be the same as assessing the credibility of a lengthy account of events given, for example, in an asylum claim. The assessment is likely to focus far more on background evidence relating to the circumstances that they might face in Nigeria, an evaluation of any evidence that might be produced about the effect of leaving the UK, and any up to date medical evidence about the effect that forced removal is likely to have on the appellant's mental health. On the information currently before me I am satisfied that the appellant and his wife are likely to be able to answer questions by video conference without any significant impairment of their evidence, they would still be able to participate in the hearing, and the representatives would still be able to make effective submissions as they were able to do at the error of law hearing.

28. For these reasons I conclude that remaking can be done fairly by way of a remote hearing although provision is made in the directions for more detailed submissions to be made on mode of hearing if there are any compelling matters that need to be drawn to the Upper Tribunal's attention above and beyond the statement that the appellant would prefer a face to face hearing.

DIRECTIONS

29. **The parties** shall have regard to the Amended Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic (19 November 2020) when complying with these directions.
30. **Subject to any written submissions objecting to the mode of hearing**, which must be received no later than 7 days from the date this decision is sent, the case will be listed for a remote hearing before the Upper Tribunal on a date to be fixed.
31. **The appellant** shall file on the Upper Tribunal and serve on the respondent the details of any witnesses that will be called at the hearing no later than 14 days from the date this decision is sent.
32. **The appellant** shall be responsible for preparing a consolidated bundle of up to date documents that both parties can rely on at the hearing in accordance with [23-26] of the Presidential Guidance Note. The bundle must be filed and served at least 14 days before the hearing.
33. **The parties** shall file and serve any skeleton argument, if they wish to rely on one, at least 7 days before the hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law
The decision will be remade at a resumed hearing in the Upper Tribunal

Signed M.Canavan
Upper Tribunal Judge Canavan

Date 07 December 2020