Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13302/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons promulgated**
On 15 December 2015	**On 29 January 2016**

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Plimmer

Between

P A
ANONYMITY ORDER MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:	Ms M Rasoul, instructed by Myles Hutchinson and Lithgow Solicitors
Respondent:	Mr J Parkinson, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Introduction

1. The origins of this appeal are traceable to a decision made on behalf of the Secretary of State for the Home Department (the "Secretary of State"), dated 30 May 2012, to deport the Appellant, a national of the Democratic Republic of the Congo (the "DRC"), aged 42 years, from the United Kingdom (the "UK").

2. We have anonymised the appellant because he is a vulnerable adult and extensive reference is made to medical evidence relating to him. We have also anonymised his partner ("L"), so as to ensure that her identification does not lead inadvertently to his identification, and also because this decision refers to sensitive medical evidence relating to her.

3. Both members of the panel have contributed to this decision.

Appeal Proceedings

4. On 13 December 2012, the Appellant's appeal against the Secretary of State's decision was dismissed by the First-tier Tribunal (the "FTT"). On 21 June 2013, the decision of the FTT was set aside by the Upper Tribunal (the "UT") and remitted for fresh hearing. By its decision promulgated on 02 October 2013, a different panel of the FTT dismissed the appeal once again.

5. On 3 March 2014 permission to appeal to the UT was granted. On 4 December 2014, at a case management review hearing, directions requiring the service and lodging of the Appellant's medical evidence by 01 March 2015 were given and the listing of the appeal was adjourned pending the expected country guidance decision of the UT. On 30 May 2015 the decision in BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 was promulgated. This was followed by further case management directions, which included an extension of time to 19 August 2015 for the provision of the Appellant's further medical evidence. The Appellant's representatives duly submitted a supplementary bundle in compliance with directions. Next, on 23 November 2015, the conventional Notice of Hearing notifying the relisting of the appeal on 15 December 2015 was transmitted.

Background facts

6. The Appellant arrived in the UK on 25 September 2004 and claimed asylum. His appeal against the refusal of his asylum claim was heard in absentia and dismissed on 23 May 2005. He is recorded as having absconded. Whatever his circumstances he lodged another claim for asylum soon after this in December 2005 under a different name and different date of birth. A finger print check revealed his identity. On 3 March 2006 he pleaded guilty to the offence of attempting to obtain leave by deception and was sentenced to 12 months imprisonment and recommended for deportation. On 12 January 2007 the Appellant was released from prison into hospital. In a letter dated 22 January 2007 Dr

Snow, a Consultant Physician described the Appellant as "*currently very seriously ill requiring intensive nursing care and very careful monitoring*" after neurosurgery. In a follow up letter dated 4 April 2007 Dr Snow said that should the Appellant be removed from access to medication supplies and proper medical follow up, "*immune function will rapidly fail, there would be a flare up of his cerebral toxoplasmosis and risk of other opportunistic infections leading to severe illness or death*". The Appellant was released into the care of Newcastle Social Services and placed in 24-hour residential care on 24 April 2008. A social services assessment dated 4 July 2008 states that the Appellant "*needs regular support in order to complete daily tasks, if he is unaccompanied outside he will often forget where he is or where he lives"*. The decision letter refers to a report from South Tees Hospitals NHS Trust dated 27 May 2009. This states that the Appellant was diagnosed as HIV positive in January 2007 with toxoplasmosis encephalitis, and that he had significant memory loss such that he was in a care home with support workers to assist him on a daily basis. A more up to date letter from the same source dated 24 September 2014 describes the toxoplasmosis as a consequence of being severely immunocompromised at the time with a very low CDR count.

7. The Appellant was notified of his liability to be deported on 14 May 2010. This was based on his 2006 conviction and the recommendation for deportation by the sentencing judge. In response to this the Appellant stated he wished to return to the DRC on 18 November 2010 before amending this to Cameroon on 6 December 2010. On 7 December 2010 the Secretary of State wrote to the Appellant. It was explained that the UKBA had liaised with the Appellant's best interests assessor who had made it clear that she believed he had the capacity to make this decision. The best interests assessor further explained that the Appellant shared an in-depth plan on how he would be supported to return to Cameroon, where some of his family members were residing, and she supported his request. The Secretary of State concluded the letter by outlining the options to the Appellant and asking him to discuss these with his family, representatives and best interests assessor in order to make an informed decision about the best way to proceed. This letter seems to have crossed with a letter from Middleborough Council of the same date. Whilst we have been provided with the first page of this letter only this is likely to be in support of the Appellant's application to return to Cameroon.

8. In a form dated 12 January 2011 signed by the Appellant with an address given as "Roseleigh Care Home" he made a formal application under the 'voluntary assisted return and reintegration programme' to be returned to Cameroon. The Secretary of State's bundle contains screen shot of CID notes dated 17 January 2011. These include, "*Applicant has applied to return to Congo on AVR programme…Applicant does not meet criteria for AVR programme – REJECTED (More than 12 months sentence…"*. The CID note is inaccurate in two important respects: the application was for a return to Cameroon (not the Congo) and the Appellant was not sentenced to more than 12 months as he was sentenced to 12 months imprisonment. What is clear is that the Appellant's application to make a voluntary return

was rejected by the Secretary of State. The decision letter states that on 11 March 2011 the Appellant stated he no longer wished to return to the Cameroon and wished for his asylum application to be considered. However, there is no documentary evidence to support that assertion. The documents in the Secretary of State's bundle then paint the following picture at this point in the chronology: the Appellant clarified that he wished to return to the Cameroon and he withdrew his asylum application in May 2011. Another form to enable the Appellant to return to the Cameroon was completed by him on 15 September 2011 but the Secretary of State again rejected the application on 20 September 2011, commenting "*'Applicant has received custodial sentence in excess of 12 months, therefore he does not fit our criteria' (He has been rejected by AVR before for the same reason)"*. It is difficult to trace with any precision what happened next. The decision letter asserts that the Appellant made a further application to depart in October 2011 but failed to sign the required form.

9. On 14 November 2011 the Secretary of State issued a new notice of intention to deport, relying on the same grounds as before. On 15 December 2011 the Secretary of State asked the Appellant (who continued to reside at Roseleigh Care Home) for an up to date medical report, before issuing him with a Liability for Deportation Notice on 3 February 2012. There then followed a further request for additional information regarding the Appellant's health. This was followed by the decision currently under appeal, described in [1] above.

10. The Appellant met L in 2011 when he was still living in the care home. He left the care home at the beginning of 2012 and began cohabiting with L. They have lived together and L has cared for the Appellant on a full-time basis ever since.

Error of law

11. On behalf of the Appellant, Ms Rasoul relied upon the grounds of appeal she had drafted on behalf of the Appellant. She focused her submissions upon the FTT's failure to engage with the medical evidence before it when making important findings of fact and the lack of clarity in the FTT's findings regarding the availability of family members in the DRC and Cameroon to care for the Appellant. Ms Rasoul made it clear that the findings in the country guidance decision in BM (*supra*) are such that the Appellant no longer relies upon any risk to him as a failed asylum seeker and his claim is entirely predicated upon Article 8 of the ECHR for a combination of family and health reasons, which when viewed together meet the requirement of exceptionality.

12. Mr Parkinson while describing the availability of support for the Appellant in the DRC as "a crucial issue" invited us to conclude that the FTT was entitled to find that the Appellant would have adequate support in the DRC.

13. After hearing submissions from both parties we announced our decision with reasons, which we now set out in more detail in writing. We are satisfied that the FTT made two material errors of law that require the decision to be set aside.

Medical evidence

14. First, we consider that the FTT failed to sufficiently engage with detailed medical evidence. This included a medico-legal report dated 5 December 2012 prepared on behalf of the Medical Foundation by Mr Alan Bryce. This comprehensive report was based upon 11 sessions with the Appellant. Mr Bryce carefully summarised the appellant's past and current health concerns. In February 2007 the Appellant was admitted to hospital very ill. His survival remained in doubt at the time and, after further investigations and treatment, he was found to have HIV infection with very advanced immunodeficiency. His neurological problems were said to have been caused by toxoplasma infection of the brain and possibly meningitis due to tuberculosis. He was discharged on 6 March 2007. He is said to have suffered from persisting memory deficit and was placed in a residential care home. Mr Bryce then summarised further expert evidence before opining that the Appellant has been left with permanently damaged memory function and is completely dependent on the care of others. Mr Bryce opined "*he is extremely vulnerable in any society without a carer literally alongside him*" and is at "*great risk*" is left alone. Without the support of L Mr Bryce concluded that the Appellant would require 24-hour residential care.

15. The FTT also had a report dated 30 August 2013 from Dr Kamlana, a consultant psychiatrist. He diagnosed the Appellant as suffering from a mixed anxiety and depressive disorder as well as having a mild cognitive disorder associated with brain damage. Dr Kamlana's report also contained similar observations to those that we have already set out from Mr Bryce.

16. We acknowledge that the FTT referred to this evidence [30 and 31] and accepted that the Appellant suffers from the disorders described and is in need of support [32]. However, we conclude that the FTT failed to take this evidence into account when considering the issue of Appellant having sought to voluntarily leave the UK. The FTT recorded that between 2010 and 2011 the Appellant made requests to leave the UK to return to the DRC or join his family in Cameroon before resiling from these requests. The FTT then made the following finding at:

> "Furthermore we concluded that his persistent conduct in requesting a facilitated return to one country and then the other, before withdrawing his requests, was nothing more than an attempt to manipulate the immigration process to suit his own ends."

17. This finding cannot be reconciled with the medical and other evidence available to the FTT that we have summarised above. Although it appears that the Appellant initially stated he wished to return to the DRC this was relatively quickly and formally amended to an aspiration to return to

Cameroon before the Secretary of State considered the application. When the Secretary of State considered the application it was rejected on the erroneous basis of return to the DRC, when by that stage it was clear that the application was based upon return to Cameroon. Further the FTT failed to take into account the fact that the Secretary of State had refused the Appellant's application to make a voluntary departure on two occasions in 2011. It follows that the FTT was entirely mistaken in describing the Appellant as having engaged in persistent conduct that included changing the country of return and then withdrawing applications. We are satisfied that the accurate picture is starkly different.

18. We conclude that the FtT's failure to engage with and/or understand the medical and other evidence including that relevant to the voluntary departure process, resulted in an error of law of the kind identified in Edwards v Bairstow [1956] AC 14. The materiality of this error of law seems to us incontestable.

19. Even if we are wrong about this, we consider the finding that the Appellant deliberately sought to manipulate the system between 2010 and 2011 to be unsustainable. The undisputed medical evidence that we have summarised above is such that it was not rationally open to the FTT to find that this Appellant was capable of deliberate manipulation of this kind. The Appellant was living in a residential care home and in the care of social services for the entirety of this period. He suffered from significant memory loss. His capacity to make decisions was markedly limited. The FTT's finding that this Appellant exercised manipulation is one that reaches the high threshold of perversity in all the circumstances of this case.

Availability of care in DRC / Cameroon

20. The second error of law which we have identified relates to the FTT's assessment of the availability of care available to the Appellant in the DRC and Cameroon. The preponderance of the evidence establishes that the Appellant's family fled DRC in order to reside in Cameroon a very long time ago. Given this, together with the nature and extent of the Appellant's health concerns and care needs, we consider that it was incumbent upon the FTT to make clear and sustainable findings on the critical issue of whether the Appellant has relatives based in the DRC or Cameroon who are able and willing to provide the requisite intensive care for the foreseeable future. For the reasons elaborated below, we conclude that the FTT failed to do so.

21. The FTT appears to have assumed that "*regular contact with his family who clearly care for him*" [32] means that there is a family member able, willing, available and resourced to provide the intensive level of care necessary for him. We bear in mind that the Appellant asserted this to be the case in 2010 but there was no evidence to support the finding that such care would be available in 2013. In contrast to the position in 2010, three years later the Appellant did not have the benefit of assistance and advice from social services or a best interests assessor. The FTT drew

strong adverse inferences from the evidence of the Appellant and L that they did not canvass the issue of support with his family members. In the same vein, the FTT concluded that "*the Appellant either knows that there would be support for him so he did not need to make the enquiry, or that he made the enquiry and that suitable arrangements are in place...*". We consider that the adverse inferences and this conclusion involved unjustified speculation, devoid of evidentiary foundation. These findings are unsustainable accordingly. We are satisfied that the materiality of this error of law is beyond plausible dispute.

The FtT's decision remade

Hearing

22. Both representatives concurred with our suggestion that the decision of the FtT should be remade in this forum and that an adjournment was not necessary for this purpose. We proceeded accordingly. At the beginning of the rehearing we clarified the further evidence that was now available to us in a supplementary bundle. This included further medical evidence, supporting evidence from Church members and telephone bills.

23. Whilst removal directions have been made to the DRC it was agreed that when remaking the decision we should consider the position in both the DRC and Cameroon, should the Secretary of State at some future date seek to amend the removal directions.

24. We then heard oral evidence from the Appellant and L. They were each briefly cross-examined by Mr Parkinson. During the course of his submissions Mr Parkinson accepted the Appellant's medical condition as described in the medical reports. He also accepted that the Appellant has a family life with L.

25. We pause here to note that Ms Rasoul quite properly drew to our attention a mistake in L's witness statement before the FTT. This was confirmed by L. She explained that the witness statement inaccurately referred to her relationship with the Appellant as a sexual one when it was not, albeit they had an intention to marry and had lived together for a long time. Mr Parkinson did not cross-examine L about this issue and did not invite us to draw adverse inferences as a result of this during his submissions. We consider he was correct to do so. Both the Appellant and L gave evidence in a straightforward albeit unsophisticated manner. We have no doubt about their genuine attempts to be honest with the Tribunal, and Mr Parkinson did not submit otherwise. We accept that this was a genuine error.

26. Mr Parkinson re-emphasised that he considered the crucial issue in this rather unusual case to be whether or not the Appellant would obtain the necessary level of care if returned to the DRC. He asked us to find the evidence regarding this to be unclear and unpersuasive. Mr Parkinson conceded that if we found against the Secretary of State on this point then

the relevant threshold of exceptionality for the appeal against the deportation order to be allowed on Article 8 grounds was met.

27. We then heard from Ms Rasoul who highlighted the exceptionality of the case when all the relevant factors are considered cumulatively. She predicated her submissions firmly and solely upon Article 8. Upon the completion of submissions we reserved our decision, which we now give with reasons.

Applicable Immigration Rules

28. The decision to make a deportation order is of some vintage, having been made in May 2012, and before the implementation of the new Immigration Rules relating to deportation (which came into effect from 9 July 2012). These new provisions were further amended with effect from 28 July 2014 and apply to all appeals heard on or after this date even if the Secretary of State's decision was made before that date – see YM (Uganda) v SSHD [2014] EWCA Civ 1292.

29. The current version of the Immigration Rules contain the following under a section headed 'Deportation and Article 8':

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> > (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> >
> > (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 but at least 12 months; or
> >
> > (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
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> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be outweighed by other factors where there are very compelling circumstances over and above those described in 399 and 399A.
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> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> > (a) the person has a genuine and subsisting parental relationship with a child…; or
> >
> > (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

(a) the person has been lawfully resident in the UK for most of his life…"

Findings of fact

30. We have already indicated that we are satisfied that the Appellant and L gave honest evidence and have been entirely credible in seeking to explain the current circumstances as best as they can. Much of the evidence is accepted and we can therefore set out our findings briefly.

31. We accept the medical evidence that has been submitted on behalf of the Appellant, much of which we have already summarised. We would highlight that the letter from South Tees dated 24 September 2014 states that the Appellant was severely immonocompromised in the past and if his treatment was stopped he would quite quickly return to his nadir low CD4 level giving him a life expectancy of 1 to 2 years. L has provided compelling evidence, supported by the medical evidence, that she has to remind the Appellant to take his medication every day given the extent of his memory loss. Even if the appropriate medication is accessible to the Appellant in DRC and Cameroon we accept that he requires a person to prompt him and monitor his medication on a daily basis. Without this his treatment will stop and he will be faced with the fate summarised in the South Tees' recent letter.

32. We find that the Appellant and L are in a close relationship that amounts to family life. This was not disputed on behalf of the Secretary of State and indeed accepted at the FTT hearing in 2013 [22 and 28]. They have been living together for nearly four years. L is 60 and a widow. She has grown up children and grandchildren living in the UK. She is HIV positive. They are committed to and love each other. They wish to marry. This is a case in which the Appellant is in a family relationship with a person who has become his sole carer. This must be viewed in its full context. The medical evidence supports the Appellant needing 24-hour care. This care is provided exclusively by L. We are therefore satisfied that their relationship goes beyond that of a mere carer looking after another person. Indeed L has made it clear that she is devotes so much time and energy to caring for the Appellant because she loves him. The care that she provides is therefore an intrinsic part of the family life that they share.

Their daily lives are entirely consumed by one another and this has been the status quo for nearly four years. The Appellant is entirely dependent upon L for all of his basic needs throughout the day. We accept that L is responsible for and wholly committed to caring for him constantly throughout the day given his health concerns and that without her, he would require 24-hour residential care indefinitely.

33. The Appellant has a well-established private life in the UK We find that he has formed strong bonds with his Church community. He is a regular attender of bible study and Church on a Sunday. It is clear from the supporting letters in the supplementary bundle that the Appellant is warmly regarded by friends he has met within the All Nations Church community. They have provided helpful examples of the extent to which the Appellant is unable to look after himself such as wearing flip-flops to walk in the snow, which generates mixed elements of both private and family life.

34. We now turn to the only real factual dispute between the parties: the availability of family members in either the DRC or Cameroon to care for the Appellant. We find that the Appellant has lost contact with all of his family members and currently has no one to turn to for care and / or support in the DRC or Cameroon. We further find that he, together with his family (which at this stage included his mother, brother and two sisters) left the DRC for Cameroon during the war and after three siblings were killed in 1998. The Appellant has been broadly consistent about this and it ties in with the background evidence on the DRC, as well as L's evidence regarding the Appellant's family. It is also consistent with the flashbacks documented by Tom Wright, a psychological therapist, in a Medical Foundation report dated 20 January 2015.

35. We accept the Appellant's evidence that he kept in touch with his family in Cameroon by telephone but lost contact with extended family members in the DRC when he left the DRC. We are satisfied that the Appellant has no contacts in the DRC, having left the country together with his family a long time ago and at a very unstable time.

36. We find that the last time the Appellant had any contact with family in the Cameroon was probably in 2014 and he has had no means of contacting them since this time and does not know where they are. We note Mr Parkinson's concern that the Appellant and L were unable to be clear about the exact time that contact ceased. That is factually accurate – they both admitted to such. The explanation for the Appellant is an obvious one given his accepted significant memory issues. L is clearly not adept at recalling detail but we have no doubt at all that she has been entirely honest with the Tribunal. She accepted that there used to be contact but it stopped. She provided her telephone bills to her solicitors without checking them. These demonstrate that for the period for September 2013 to August 2014 there were two very short calls to a mobile phone in Cameroon. We accept the Appellant's evidence that he has lost contact with his family in Cameroon and does not know where they are or whether they are alive. He knows that a sister died because

his brother told him about this in 2013. He had a mobile phone number for his brother but it has not worked. Whilst the Appellant was unable to place a date on this, we are satisfied, having considered all the evidence in the round that it is likely that all contact ceased in around May 2014. We do not speculate as to the reason for this but we accept the Appellant's evidence that he was eager for it to continue and his efforts were to no avail.

Application of the law to the facts

37. It was accepted on behalf of the Appellant that he is unable to meet the relevant Immigration Rules. He has been sentenced to an offence of 12 months but paragraph 399 does not apply to him. He is in a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, and it has been accepted that it would be unduly harsh for L to live in the DRC or Cameroon. As we set out above, we entirely accept the former as did the FTT and the Secretary of State's representative. Further, Mr Parkinson did not seek to dispute the contention that it would be unduly harsh for L to live in the DRC or Cameroon with the Appellant. L is HIV positive and has substantial and long-standing connections to her community, family members and the UK. As a British citizen she should not be required to depend upon healthcare in the DRC or Cameroon that in all likelihood will not be able to meet her needs, given her age and HIV status. We are satisfied that there are very significant difficulties which would be faced by L in continuing family life in the DRC or Cameroon, which could not be overcome or which would entail very serious hardship for her. For reasons we set out below it would in our view be unduly harsh for L to remain in the UK without the Appellant in light of the particular closeness of their relationship and her clear emotional dependence on him. We are satisfied that for the last few years L's life has willingly been entirely consumed by looking after the Appellant and that she has undertaken this out of love. However, the relationship was formed at a time when the Appellant did not have leave to remain. His immigration status has at all material times been at best precarious. We are therefore satisfied that whilst the requirements of (ii) and (iii) of paragraph 399(b) are met, (i) is not. Paragraph 399A does not apply as the Appellant has not been lawfully present in the UK for most of his life.

38. Paragraph 398 makes clear that where, as here, paragraphs 399 and 399A do not apply it will only be in very compelling circumstances over and above those described in paragraphs 399 and 399A that the public interest in deportation will be outweighed by other factors. The authoritative exposition of the correct approach to the test contained in the old version of the final words of paragraph 398 (which referred to exceptional circumstances as opposed to very compelling circumstances over and above those described in 399 and 399A) has been set out in MF (Nigeria) v SSHD [2014] 1 WLR 244. One of the issues before the Court was how the approach taken in paragraphs 398-399B was compatible with the assessment of proportionality required by the jurisprudence relating to Article 8 of the ECHR. Paragraphs 43-44 of the judgment of the Court,

given by Lord Dyson MR, read, so far as material, state as follows (p. 561 D-E):

> "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. These compelling reasons are the 'exceptional circumstances'.
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> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence ... ."

39. In SSHD v AJ (Angola) and AJ (Gambia) [2014] EWCA Civ 1636, Sales LJ referred to MF Nigeria and said, in a judgment with which the other members of the Court agreed:

> “39. The fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in Huang and R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin).
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> 40. The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new Rules and through their lens is important, as the Court of Appeal in MF (Nigeria) has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new Rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area.
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> 41. In LC (China) v Secretary of State for the Home Department [2014] EWCA Civ 1310, this Court again emphasised the points made in both SS (Nigeria) and MF (Nigeria). It dismissed an appeal from the Upper Tribunal, which had allowed an appeal from the FTT. This Court held that the FTT in that case "clearly erred" in its understanding and application of the new Rules, by considering the case of a foreign criminal based on Convention rights outside the new Rules (see para. [14]), just as the Upper Tribunal has done in both the cases before us. As in the cases before us, the error had

occurred because the decision of the FTT had been made before the judgment of this Court in *MF (Nigeria)* was handed down. At para. [17], Moore-Bick LJ (giving the leading judgment) said this:

> "Two points of importance emerge from the decisions in SS (Nigeria) and MF (Nigeria). First, both emphasise the great weight to be attached to the public interest in the deportation of foreign criminals and the importance of the policy in that regard to which effect has been given by Parliament in the UK Borders Act 2007, a weight and importance neither of which seem to have been fully appreciated by the First-tier Tribunal in this case. The second is that it is wrong to consider the question of infringement of article 8 rights outside the terms of the Immigration Rules, as the First-tier Tribunal did.""

40. More recently, in MA (Somalia) v SSHD [2015] EWCA Civ 48, Richards LJ said:

> "17. It follows from MF (Nigeria) that MA's case should have been considered only within the Immigration Rules and on the basis that the scales are heavily weighted in favour of deportation and that something very compelling is required to outweigh the public interest in deportation."

41. The decision under Article 8 must be made through the lens of the Immigration Rules but we must nevertheless apply the five-stage Razgar [2004] UKHL 27 test, whilst recalling that the essential question when considering proportionality is whether the Appellant has shown very compelling circumstances over and above those described in paragraphs 399 and 399A, capable of outweighing the significant public interest in deporting him.

42. We are satisfied that the strong and deeply ingrained family life between the Appellant and L, as accepted by the FTT, will be subjected to a major interference in consequences of the decision to deport. Family life will not just be ruptured: the Appellant's deportation will almost inevitably result in its abrupt and permanent destruction. We have already set out above that it has been accepted that it would be unduly harsh to expect L to reside in the DRC or Cameroon and there are insurmountable obstacles to family life continuing in either of those countries. They will be unable to sustain any meaningful telephone or other contact given the Appellant's memory issues and the absence of support for him in the DRC and Cameroon.

43. There will also be a significant interference with the Appellant's private life. The Appellant has been in the UK for over 10 years and has built up substantial links with his Church community in particular. His medical condition is such that he is likely to find it very difficult to rebuild such contact in the community or be in a position to manifest his religious beliefs (which are very important to him as set out within the supporting letters we have referred to, as well as Mr Wright's report) without support mechanisms in place. In all likelihood, in the unusual circumstances of this case all meaningful community and Church links will end on his deportation.

44. There is no doubt that the Secretary of State's decision is in accordance with the law and pursues a legitimate aim, namely the prevention of crime and the protection of the rights and freedoms of others, as well as the economic well being of the country.

45. We now turn to the pivotal issue in this appeal: whether there are very compelling circumstances capable of outweighing the significant public interest in deporting the Appellant given his criminal offence. We note that the Appellant used his own tribal name to claim asylum again and this can properly be regarded at the less serious end of the spectrum of criminality of this genre. Nevertheless we do not overlook the seriousness of his conviction and sentence. As HHJ Joseph observed when passing sentence on 3 March 2006 it is "*always a serious offence when somebody who has been refused leave to remain in this country tries to get round that refusal by using deception by telling lies, that is what you have done".* We are satisfied there is no risk of reoffending. However issues of public revulsion, public confidence and deterrence remain, as does the significant public interest in deporting the Appellant.

46. In considering the relevant public interest question for the purposes of Article 8 of the ECHR, section 117A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") states that we must have regard to the considerations listed in section 117B and, as this is a deportation case, the considerations listed in section 117C.

47. Section 117B(2)-(3) can be dealt with simply by us acknowledging that the Appellant speaks English but is most unlikely to ever be financially independent. In this particular case the Appellant is likely to have more cause than most to rely upon the health and social care resources available in the UK. This is a relevant factor going against the Appellant when considering the public interest, which we bear in mind.

48. The applicability of sections 117B(4) is less straightforward. Little weight should be given to a relationship formed with a qualifying partner (in this case L) that is established by a person at a time when he is in the UK unlawfully – see Deelah and others (section 117B - ambit) [2015] UKUT 515 (IAC). Was the Appellant in the UK unlawfully when he began and developed his relationship with L? At the time the Appellant's relationship began in 2011 he had been notified of his liability to deportation and he was in the process of seeking to facilitate a voluntary departure from the UK. At around the time he started living with L in 2012 he had been issued with a decision to make a deportation order, which carried with it a right of appeal. The Appellant duly exercised his right of appeal, on 15 June 2012. Once an appeal to the Tribunal against an immigration decision under section 82(1) of the 2002 Act is pending then the appellant cannot be removed from or required to leave the UK. An appeal remains pending until it is finally determined.

49. In AM (S117B) Malawi [2015] UKUT 260 (IAC) the Upper Tribunal described the relevant legislation as drawing a sharp distinction between unlawful and precarious immigration status in these terms [23]:

> "Our starting point must therefore be that Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK "*unlawfully*", and any period of time during which that person's immigration status in the UK was merely "*precarious*". We are satisfied that those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. They must have enjoyed some immigration status within the UK at the given date, because if that were not the case, then their presence in the UK would have been unlawful at that date. Thus we are satisfied that Parliament envisaged that the immigration history of a particular individual might disclose periods when they had enjoyed lawful immigration status in the UK, and periods when they were in the UK unlawfully because they had enjoyed none. Some might enter unlawfully and never acquire a grant of leave. Others might subsequently acquire a grant of leave. Some might enter lawfully but then fail to obtain a variation of their leave. Others might always have held a grant of leave. We regard the immigration history of the individual whose Article 8 rights are under consideration as an integral part of the context in which any Article 8 decision is made, whether by the Respondent or the FtT."

50. In AM the Upper Tribunal's focus was firmly upon those with some form of leave to remain. No consideration was given to a person who was liable to deportation with a pending in-country suspensive statutory appeal or those with temporary admission. Although this Appellant could not be required to leave the UK at the material time, he did not have any form of leave. It is difficult to see how he could be said to be in the UK unlawfully, when he could not be required to leave and was legitimately pursuing his right to appeal. Accordingly, we find that he was at the material time a person whose presence and status in the UK were precarious. We acknowledge the legal effect of this as set out in section 117B of the 2002 Act to include a requirement that we must attach little weight to the Appellant's private life.

51. In any event, on 14 May 2010 the Appellant was notified of his liability to deportation. There then followed a period of correspondence between the Appellant and the Secretary of State regarding his voluntary departure. The Appellant was again notified of his liability to removal under served with a Liability to Deportation Notice on 3 February 2012. Although this is not clear from the Secretary of State's decision letter, we are satisfied that the Secretary of State must have granted the Appellant temporary admission (or at least he was entitled to be granted temporary admission) after his sentence of imprisonment expired, whilst a decision was made on whether to make a decision to deport him – see paragraph 2 of Schedule 3 to the Immigration Act 1971. For those liable to deportation, the main alternative to detention is the grant of temporary admission. A person granted temporary admission is 'lawfully present' in the UK for the purposes of social security entitlement – see Szoma v Secretary of State for Work and Pensions [2005] 1 AC 564. Although such a person does not have leave and his status is of precarious nature, those with temporary admission (including many asylum seekers) cannot be said to be in the UK unlawfully.

52. We note paragraph 2.3.8 of the Secretary of State's Immigration Directorate Instruction ("IDI") 'Criminality guidance in Article 8 cases' which states:

> "Section 117B(4) of the 2002 Act sets out that little weight should be given to a private life or a relationship with a qualifying partner established when the person is in the UK unlawfully. Section 117B(5) sets out that little weight should be given to a private life established at a time when the person's immigration status is precarious. A person is in the UK unlawfully if he requires leave to enter or remain in the UK but does not have it. For the purposes of this guidance, a person's immigration status is precarious if he is in the UK with limited leave to enter or remain but without settled or permanent status, or if he has leave obtained fraudulently, or if he has been notified that he is liable to deportation or administrative removal."

This suggests that a person who has been notified that he is liable to deportation has precarious as opposed to unlawful immigration status. In any event we are satisfied for the reasons that we have already provided above that this Appellant's immigration status was precarious and not unlawful when he established family life with L.

53. We now turn to section 117C of the 2002 Act. Sub-sections (1) and (2) are self-explanatory. By virtue of sub-section (3) we must consider whether Exception 2 applies. This is defined at (4) as follows:

> "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."

A "qualifying partner" is defined at section 117D(1)(a) as a British citizen. We have already decided above that the effect of the Appellant's deportation on L would be unduly harsh. Section 117C(3) provides that "*the public interest requires C's deportation unless Exception 1 and 2 applies*". Section 117C is unclear as to what should happen where an exception is met. One interpretation is that where an exception is met the public interest does not require deportation. Such an interpretation would be inconsistent with paragraph 339(b) of the Immigration Rules. As discussed above this imposes three conditions, two of which we have found the Appellant to have met. These conditions are more onerous that the single condition imposed by section 117C(3) regarding a relationship with a qualifying partner. We consider that where a section 117C(3) exception applies, this is a relevant factor to be taken into account when conducting the proportionality exercise under Article 8.

54. At this stage we draw the various threads together. We are satisfied that the interference with family life in this case is at the severe end of the spectrum. The effect of deportation will end family life. Family life in this case consists of a loving relationship between a couple who have cohabited for nearly four years, and is dominated by a very compelling and exceptional feature which pervades it on a daily basis. The

Appellant's medical condition is so serious that without L he would be in a care home, where he resided for some four years previously. This is because he requires 24-hour support and care, which he gets from L. She in turn is fully committed to providing this demanding level of care not because she feels a sense of responsibility or because she is paid but because she loves the Appellant and wants to help him. His care needs are such that virtually all of her daily existence is devoted to looking after him. It is our assessment of the evidence that L gets just as much out of the relationship as the Appellant does. While he is physically and emotionally dependent upon her she is emotionally dependent upon him. It follows that rupturing the relationship will have a devastating impact upon both the Appellant and L.

55. Many appeals in which reliance is placed upon Article 8 are characterised as a 'health/medical case' or a 'carer case' or 'strong relationship' case. This case does not permit easy categorisation. In this context we remind ourselves that, as a matter of law, Article 8 of the ECHR is not susceptible to comprehensive categorisation or definition. It is an often textured and elastic right, and has been described as "*the least defined and most unruly*" of the Convention rights (see [30] of R (on the application of Wright and others) v Secretary of State for Health and another [2009] 2 WLR 267). We conclude that when all the relevant circumstances are considered cumulatively very compelling circumstances emerge. To summarise:

    (i) We attach weight to the strong quality of the family life enjoyed between the Appellant and L. The interference with family life is such that it will cease altogether upon the Appellant's deportation.

    (ii) The impact of the cessation of family life and the care that this brings with it is likely to be catastrophic for the Appellant. He will not have any support, much less the care he requires, in the DRC or Cameroon.

    (iii) We attach limited weight to the Appellant's private life in the UK.

    (iv) We consider that the Appellant is unlikely to be able to practice his religion or access the community without the support that he requires in the DRC or Cameroon. This will have a detrimental impact on his established way of life.

56. The recent country guidance decision of BM (*supra*) notes at [7] that "*DRC is one of the poorest countries in the world. Food insecurity affects one third of the population and life expectancy is amongst the lowest in the world. Corruption is endemic*". Indeed Mr Parkinson conceded that in the absence of family support for the Appellant in the DRC and Cameroon, the requisite test to allow the appeal was met. The Appellant will not be able to obtain and / or take the daily medication he needs. The medical evidence makes clear that if treatment stops he would return to his nadir low CD4 count giving him a life expectancy of one to two years. Without access to care, support and accommodation it is likely that the Appellant's living conditions will be dire such that his life expectancy will be considerably shorter than one to two years in consequence and the

balance of his existence is likely to be accompanied by serious pain, suffering and indignity.

57. The impact of the cessation of family life on L will be catastrophic in an emotional sense as her entire life has centred around the Appellant. She will also have to suffer with the knowledge and anxiety of the Appellant's likely mental and physical suffering and probable death within a relatively short period of time after his deportation, together with the agony of not knowing what is happening to him. In these circumstances the effect of the Appellant's deportation would be unduly harsh on L.

58. Finally, for this combination of reasons we conclude that the crucial question that we have posed above must be answered affirmatively when all the relevant considerations are viewed cumulatively. The Appellant's circumstances in the DRC or Cameroon, in the absence of L's care or alternative care are likely to be dire for the reasons we give above. Further, it would not just be unduly harsh for L to live in the DRC or Congo and for her to remain in the UK without him. This is a case in which the Appellant's deportation would lead to the cessation of family life and cause L intense emotional suffering, particularly in light of her knowledge of his likely dire conditions and short life expectancy in DRC or Cameroon. Our conclusion is that the Appellant has shown very compelling circumstances over and above those described in paragraphs 399 and 399A, capable of outweighing the significant public interest in deporting him.

Decision

59. The decision of the FTT is infected by material errors of law and we accordingly set it aside.

60. We remake the decision of the FTT by allowing the appeal.

Signed: **Melanie Plimmer**

Ms Melanie Plimmer
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 20 January 2016