



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10125/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 August 2017

Decision & Reasons Promulgated
On 22 August 2017

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)**

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KOFI ANNAN NORMAN
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms R Dulay, Counsel

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is the Secretary of State, who appeals with the permission of the First-tier Tribunal, against a decision of Judge of the First-tier Tribunal Callender Smith who, in a decision promulgated on 20 December 2016, allowed the appeal of Mr Norman against the Secretary of State's decision, dated 4 April 2016, to refuse his human rights claim, founded on article 8 of the Human Rights Convention. Mr

Norman had made representations to the Secretary of State in response to being notified that the Secretary of State had decided to make a deportation order against him because his presence in the UK was deemed not to be conducive to the public good.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. From now on we shall refer to Mr Norman as “the appellant” and the Secretary of State as “the respondent”.
3. We were not asked to make an anonymity direction and we saw no reason to make one.
4. The salient background facts are as follows. The appellant is a citizen of Ghana, born on 18 January 1980 or 18 January 1981¹. He came to the UK on 10 September 1996 in order to join his mother for settlement. He was granted indefinite leave to enter on arrival. On 22 June 2004 his passport was endorsed on application with a residence permit stating he held indefinite leave to remain. On 22 August 2009 his first daughter was born to a former partner. On 23 July 2011 he married a British citizen. On 8 October 2012 his second daughter was born to his spouse.
5. The circumstances behind the current decision are highly unusual. On 15 September 2000 the appellant was convicted of conspiracy/robbery and sentenced to five years’ imprisonment in a young offenders institution. On 28 November 2005 he was convicted of failing to notify a change of circumstances to the local authority which was paying him housing benefit and sentenced to a community punishment order. For reasons which are unknown, the appellant’s offending did not cause the respondent to initiate deportation proceedings until much later. On 7 November 2014 the Home Office received an application for a no time limit stamp to be placed in the passport of a person with similar details to the appellant. In response to this application background checks were conducted which brought to light the appellant’s convictions. A decision to make a deportation order was issued and sent to the appellant’s last known address. Solicitors acting on behalf of the other Mr Norman wrote to the Home Office denying that their client had any convictions. While this matter was under investigation, the appellant travelled to Ghana. On his return to Heathrow on 14 September 2015 the appellant was detained. He clarified that he had not had any contact with the Home Office since making his no time limit application in 2004 but he confirmed he had been convicted of robbery in 2009. It was established that the appellant had not made the no time limit application in 2014 and he was released on 22 September 2015 but only after being served with a decision to make a deportation order.
6. In the notice of decision, the respondent applied paragraph 398(a) of the

¹ We note the appellant’s passport was endorsed with a correction so that his date of birth should read 18 January 1981 and this date was recorded on the residence permit, issued by the Home Office on 22 June 2004. His solicitors also gave his date of birth as 18 January 1981 in correspondence but the Home Office has continued to record his date of birth as 18 January 1980, which was transposed into the FTT’s decision.

Immigration Rules, HC395, in order to assess whether there were very compelling circumstances (over and above those set out in paragraphs 399 and 399A of the rules) which could outweigh the public interest in deportation. The respondent acknowledged the appellant had remained lawfully in the UK and more than ten years had elapsed since his last conviction. It was accepted that both the appellant's daughters were British but he had not provided evidence showing he was involved in their upbringing, he resided at the same address as them or that he was able to support them financially. Even if the relationships were accepted, this factor would not outweigh the public interest in deportation because the children could remain in the UK with the appellant's spouse. Alternatively, it would not be unduly harsh for the children to relocate to Ghana with the appellant.

7. The respondent accepted that the appellant was living with his spouse. However, this factor did not outweigh the public interest in deportation either. It was not accepted the appellant had no relatives in or ties with Ghana. In relation to the delay in making the deportation decision, the notice of decision stated²:

“Records do not provide sufficient detail to be sure as to why your case was not referred by the Prison Service to the Immigration Service ... it is accepted that this error by the responsible agencies will have caused you to believe your status in the UK was unaffected by your criminality. Nonetheless, consideration has been made in a reasonable timescale since your offending history came to light as a result of an NTL application submitted in your name in 2014 and your subsequent detention in 2015 following your re-entry into the UK. The delay is without doubt a significant factor but must be balanced against a criminal record that itself is of considerable weight. As such the Secretary of State has concluded that the balance between your rights and the public interest still lies in you being deported from the UK.”

8. The appellant appealed to the First-tier Tribunal and his appeal was heard at Taylor House on 12 December 2016. The appellant was represented by counsel and gave oral evidence, as did his spouse and his mother. The judge found the evidence of the appellant and his spouse “cogent and credible”. He made the following findings of fact:

- The appellant had entered the UK at the age of 15 and had resided in the UK for at least 15 years;
- The appellant had not committed any offences since 2005;
- Neither of the appellant's convictions were reported to the Home Office by the Prison Service;
- The appellant's offending only came to light because an “identity fraudster” had submitted an NTL application in 2014;
- The first time the appellant became aware of “anything untoward” was in September 2015 when he was detained;

² See paragraph 45.

- Between the time he last offended and the commencement of deportation proceedings, the appellant had married and become the father of three British children;
 - The appellant had not been aware that his presence in the UK had been “precarious” as a result of his convictions and neither he nor his spouse had been able to weigh up the consequences of this when planning to start a family;
 - The appellant had undertaken courses aimed at preventing reoffending during his 2½ years in the YOI, although records were no longer available;
 - In relation to the 2005 offence, the appellant had received £1800 compensation following a road traffic accident and he did not know he had to inform the local authority about this;
 - The appellant’s eldest child, who was more than seven years of age, had been living with him and the appellant's spouse since she was two years old and the appellant is her only parent in the UK;
 - It was not in the child’s best interests to live with the appellant in Ghana or alone in the UK with her stepmother;
 - The appellant’s youngest child was only two months old and was receiving treatment for significant healthcare concerns; and
 - The appellant's spouse has no family or relatives in Ghana who might support the family there and they have no home there.
9. The judge did not refer to the rules relied on by the respondent but he directed himself to apply section 117C of the Nationality, Immigration and Asylum Act 2002. He also noted the respondent’s internal guidance document, Criminality Guidance in Article 8 ECHR Cases, v5, 28 July 2014, which stated that,

“6.7 A foreign criminal may claim that where there has been a delay in decision-making (e.g. between the end of the custodial sentence and the decision to deport, or the date of any representations and date of the decision), the public interest in his deportation is reduced or his private and/or family life is strengthened in the intervening period such that the deportation would be disproportionate. Delay should always be considered and explained in the assessment of very compelling circumstances even if the foreign criminal has not relied on it at this stage. ... The consequence of Home Office delay when the foreign criminal was in the UK lawfully is likely to depend on the reasons for, and the consequences of, the delay on the foreign criminal’s family and private life (*EB (Kosovo)*).”

10. The judge’s reasoning for his conclusion that the appeal should be allowed is condensed into five short paragraphs as follows:

“89. I have noted earlier that there is a seven year-old child involved in the factual matrix ... and, whilst her best interests should be respected they are not the only interests that are in play and there is no hard and fast rule that puts her – or any of the

other children in relation to this appeal – in possession of any “trump card” that may be played to prevent the Appellant’s deportation.

90. However, in all the circumstances of this case, I have no hesitation in stating that the decision to deport him is unduly harsh both in terms of his own position – as someone who never realised that he was at risk of this kind of action over a 15-year period – and in terms of [the] impact and potentially catastrophic effect on his wife and three children.

91. None of them realised this was ever a possibility and, in reality, if he had realized it was a possibility, then fatherhood and marriage itself might not have been something he embarked upon.

92. I find the 17-year delay between conviction and the decision to deport and 15-year delay between the Appellant being released from [the] YOI and the decision to deport constitutes a compelling circumstance in the context of this appeal and the eventual result.

93. This Appellant has been allowed to develop private and family life including that with his wife and three children which on its own – and taken cumulatively vis-à-vis each of them individually – constitutes compelling circumstances for why the Respondent's decision to deport the Appellant is disproportionate and an infringement of Article 8 as well as being not in the best interests of his three children.”

11. Permission to appeal was granted by Judge of the First-tier Tribunal Parkes on all grounds because,

“it seems the Judge had been moved by the apparent harshness of the decision being made so long after the offences had been committed. That however is not a reason not to deport someone and the current rules had to be applied.”

12. The appellant did not file a rule 24 response opposing the appeal.

13. We heard submissions from the representatives on whether the judge made a material error of law.

14. Mr Melvin focused on the first two of the three written grounds filed by the respondent. The first of these argued the judge had misdirected himself in law, taken account of irrelevant considerations and failed to give adequate reasons for his conclusion that there were very compelling circumstances for the purposes of section 117C(6). It was insufficient to find the effects of the appellant’s deportation on this wife and children would be unduly harsh. Whether the decision was unduly harsh on the appellant was not a relevant consideration. Compelling circumstances, as opposed to *very* compelling circumstances, were not enough. The judge had not made a finding that there were very compelling circumstances over and above the other relevant factors. The judge failed to make any finding as to why it was not

reasonable for the family to relocate to Ghana. The second ground argued the judge had failed to consider all aspects of the public interest, as had been summarised in *SSHD v LW (Jamaica)* [2016] EWCA Civ 369, at paragraph 14.

15. Mr Melvin relied on two cases. Firstly, in *NE-A (Nigeria) v SSHD* [2017] EWCA Civ 239, the Court of Appeal had reiterated that tribunals were bound by law to give effect to Parliament's assessment that the public interest requires deportation unless there were very compelling circumstances over and above the exceptions provided for. Secondly, while not shying away from the length of the delay in this case, he took us to the recent case of *RLP (Bah revisited - expeditious justice) Jamaica* [2017] UKUT 00330 (IAC), in which the President provided guidance that,

"In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR."

16. For the sake of completeness, we acknowledge the third ground which, as said, Mr Melvin chose not to place particular reliance on. It argued that the judge had erred by failing to explain why he took the view that the delay was caused by the Home Office in this case. We regard Mr Melvin as wise not to pursue this line of argument and we incline to agree with Judge Parkes when he commented that,

"[i]f the delay in making the deportation order was not that of the Home Office it would be interesting to know where the fault lay."

17. Ms Dulay made a robust defence of the First-tier Tribunal's decision allowing the appeal, which she described as "sound". She characterized the respondent's submissions as mere disagreement with the decision, rather than demonstrating any material error of law on the part of the judge. In particular, she argued that, even though the judge referred to compelling circumstances, as opposed to very compelling circumstances, he must have had the correct test in mind because he had set out the whole of section 117C in paragraph 88 of his decision. She also took us to numerous paragraphs in the decision which, Ms Dulay argued, showed that the decision reflected a full understanding of the public interest in deportation. She placed particular emphasis on paragraph 77 in which the judge said,

"With a background of time spent in a YOI for conspiracy/robbery, such a prosecution and such a sentence was inevitable. In context, however, that does not show in my view either similar or ingrained offending and is clearly now so far in the past - with no other convictions - that I do not find it adds significantly to the weight of the criminality issues that I have to consider in relation to the public interest in relation to deporting him."

18. To make sense of that paragraph it is necessary to note that the previous paragraph discussed the impact on the decision of the 2005 conviction for benefit fraud.
19. Ms Dulay sought to distinguish the facts underlying the decision in *RLP* from those in the present case. The important part of that decision reads as follows:

“22. ... The submission of Ms Rutherford is that this test is satisfied by reason of the extreme delay on the part of the Secretary of State during the period 2002 - 2012, the hallmarks whereof were incompetence and maladministration.

23. We reject this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant’s case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise. We conclude that the Appellant’s case fails to surpass the threshold by some distance.”

20. In contrast, the appellant in the present case has always resided in the UK lawfully, having arrived here as a child. His family life was well-established long before the commencement of deportation proceedings. Ms Dulay also rightly reminded us that the respondent had granted his application for an NTL endorsement in his passport in 2004, which was after the conviction for conspiracy/robbery.
21. We note at this point that we have not had sight of the judge’s sentencing remarks in respect of the appellant’s convictions and there is no indication that these were before the First-tier Tribunal. Neither Mr Melvin nor Ms Dulay had copies. It seems likely that these documents are no longer available in view of the passage of time.
22. We reserved our decision as to whether the decision of the First-tier Tribunal should be set aside for material error of law in accordance with section 12(2) of the Tribunals, Courts and Enforcement Act 2007.

23. We remind ourselves of the provisions of Part VA of the 2002 Act, which state in relevant part as follows:

“117A. Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person’s right to respect for private and family life under Article 8, and
- (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

- (a) in all cases, to the considerations listed in section 117B, and
- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

...

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

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) ...

(4) ...

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”

24. These provisions and the provisions of Part 13 of the Immigration Rules have been the subject of extensive analysis from the higher courts. A succinct summary of the correct approach to article 8 in cases governed by the rules was provided by Lord

Reed in *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60, at paragraph 50, as follows:

“In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament’s and the Secretary of State’s assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed.”

25. In *NE-A (Nigeria)*, the Court of Appeal held that the assessment was different in a case governed by section 117C. Sir Stephen Richards, with whom McFarlane and Flaux LJ agreed, stated as follows:

“13. Mr Buley’s submission is that the approach set out in *Hesham Ali* is equally applicable to Part 5A of the 2002 Act, so that section 117C(6) is a relevant and important consideration in the Article 8 analysis but it does not displace the proportionality assessment to be made by the tribunal on the facts of the case as a whole. He accepts that *Hesham Ali* was dealing specifically with the Rules, not with the statutory provisions. He also accepts that Part 5A of the 2002 Act differs from the Rules in being directed specifically to tribunals. But he submits that the requirement in section 117A(2) for the tribunal to “have regard to” the considerations in sections 117B and 117C is precisely consistent with the analysis in *Hesham Ali* and that this approach preserves the well-established and well understood role of the appellate decision-maker. It leaves the tribunal to perform its established task of determining whether there is a breach of Article 8, instead of substituting a statutory test for that question. Mr Buley emphasises the distinction between, on the one hand, a requirement to have regard to a statement of policy which reflects the view of Parliament and, on the other hand, a requirement to conduct the analysis within a statutory formula.

14. I would reject that line of argument. In my judgment, the analysis of section 117C(6) in *Rhuppiah* is correct and should be followed. There is no inconsistency between that analysis and what was said in *Hesham Ali*. The focus in *Hesham Ali*, as is conceded, was on the Rules: indeed, Lord Reed noted in terms at paragraph 2 of his judgment that it was unnecessary to consider the amendments to the legislation effected by the Immigration Act 2014, i.e. the provisions of Part 5A of the 2002 Act. Moreover, integral to Lord Reed’s reasoning was that the Rules “are not law ... but a statement of the Secretary of State’s administrative practice” and they “do not therefore possess the same degree of democratic legitimacy as legislation made by Parliament” (paragraph 17; see also paragraph 53); and that they do not govern appellate decision-making, although they are relevant to the determination of appeals (paragraph 41). Part 5A of the 2002 Act,

by contrast, is primary legislation directed to tribunals and governing their decision-making in relation to Article 8 claims in the context of appeals under the Immigration Acts. I see no reason to doubt what was common ground in *Rhuppiah* and was drawn from *NA (Pakistan)*, that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8. In particular, if in working through the structured approach one gets to section 117C(6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is one to which the tribunal is bound by law to give effect.

15. None of this is problematic for the proper application of Article 8. That a requirement of "very compelling circumstances" in order to outweigh the public interest in the deportation of foreign criminals sentenced to at least four years' imprisonment is compatible with Article 8 was accepted in *MF (Nigeria)* and in *Hesham Ali* itself. Of course, the provision to that effect in section 117C(6) must not be applied as if it contained some abstract statutory formula. The context is that of the balancing exercise under Article 8, and the "very compelling circumstances" required are circumstances sufficient to outweigh the strong public interest in the deportation of the foreign criminals concerned. Provided that a tribunal has that context in mind, however, a finding that "very compelling circumstances" do not exist in a case to which section 117C(6) applies will produce a final result, compatible with Article 8, that the public interest requires deportation. There is no room for any additional element in the proportionality balancing exercise under Article 8."

26. The analysis of Sales LJ in *Rhuppiah v SSHD* [2016] EWCA Civ 803, with which the court agreed, is encapsulated in the following passage³:

"50. ... The 'very compelling circumstances' test in section 117C(3) and (6) provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of Article 8 to remove them. If, after working through the decision-making framework in section 117C, a court or tribunal concludes that it is a case in which section 117C(3) or (6) says that the public interest 'requires' deportation, it is not open to the court or tribunal to deny this and to hold that the public interest does *not* require deportation."

27. Finally, we would mention that the Supreme Court in *R (Kiarie and Byndloss) v SSHD* [2017] UKSC 42 provided a non-exhaustive list of the kinds of matters which a tribunal might consider to be "very compelling reasons" for finding that a foreign criminal had succeeded in negotiating the "formidable hurdle" imposed. These are⁴:

³ See paragraph 7 of *NE-A*.

⁴ See Lord Wilson at paragraph 55.

- “(a) the depth of the appellant’s integration in UK society in terms of family, employment and otherwise;
- (b) the quality of his relationship with any child, partner or other family member in the UK;
- (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise;
- (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the UK;
- (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case,
- (f) any significant risk of his re-offending in the UK, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.”

Error of law?

28. Part VA came into force on 28 July 2014 and it was therefore incumbent on the judge in this case to have regard to its provisions. We note in passing that, whilst the judge referred to section 117C, he made no reference to section 117B, as he was required to do. We do not, however, suggest this error was material to the outcome of the appeal because the judge was plainly aware of the fact this appellant had always had leave. The issues for us are (1) whether the judge’s assessment of the public interest and his application of section 117C(6) were legally sound and, if not, (2) whether his error was material in the sense another tribunal could have come to a different conclusion on the found facts.
29. Having carefully scrutinised his decision and considered the submissions of the representatives, we have come to the conclusion that the judge’s decision contains significant errors.
30. Whilst not simply applying an “abstract statutory formula”, it is plain that the judge, in order to make a properly structured decision, was required to give reasons and to identify “very compelling circumstances”, over and above those described in the Exceptions (only Exception 2, described in section 117C(5), appears to have been argued in this appeal).
31. Whether or not, as a matter of construction, when applying section 117C(6) it is first necessary to show that the appellant falls within the Exception before moving on to identify the very compelling circumstances was discussed in *Akinyemi v SSHD* [2017] EWCA Civ 236, at paragraph 14. The court in that case preferred a more flexible approach. However, whatever the correct approach, our reading of the

decision in this case shows the judge muddled the concepts and so failed to follow a sufficiently structured approach.

32. As said, the reasoning contained in the decision in the five paragraphs set out above is brief. Paragraph 90 might be said to contain a finding that Exception 2 was met in respect of the impact of deportation on both the appellant's wife and the three children. The impact would, by any measure, be deemed harsh. However, section 117C(5) shows the appellant must show that the impact would be *unduly* harsh. The brief statement by the judge that he has no hesitation in stating the decision is unduly harsh does not assist the reader to know why he came to that conclusion.

33. The Upper Tribunal in *MAB (para 399: "unduly harsh") USA* [2015] UKUT 00435 (IAC) provided some textual analysis of the rules:

"2. Whether the consequences of deportation will be "unduly harsh" for an individual involves more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold.

3. The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are 'inordinately' or 'excessively' harsh taking into account of all the circumstances of the individual."

34. In this case, the judge has simply failed to provide adequate reasons why such an elevated threshold has been met. Furthermore, by referring in paragraph 90 to the appellant's own position, the judge has taken into account an irrelevant consideration. Section 117C(5) is clear that the effect of the deportation on the partner and child are the relevant considerations in play.

35. The paragraphs which follow also show a degree of laxity in the way the judge has grappled with the statutory test. By twice referring to compelling circumstances⁵, as opposed to *very* compelling circumstances, we are driven to conclude the judge may not have had correct test in mind notwithstanding his citation of the law at paragraph 88. In other circumstances, the omission of the qualifying word might not have led us to hold serious concerns. However, the context of this appeal is crucial because, as seen from the passages set out above, the higher courts have repeatedly emphasised the extremely high threshold which Parliament has decided to impose before the public interest can be outweighed.

36. The absence of detailed reasoning in these paragraphs also leads us to agree with the respondent that the judge has not provided adequate reasons for his conclusion that section 117C(6) has been met. Whether or not the judge was required to conduct a full balancing exercise, having regard to the statutory provisions, or merely to work through the section so as to deliver an article 8-compliant result, the

⁵ See paragraphs 92 and 93.

judge has not in this case provided adequate reasons for his overall conclusion.

37. We therefore turn to the second question, which is whether the errors identified are material. We have pondered whether a differently-constituted tribunal, starting from the findings of fact made by Judge Callender Smith, which we would preserve, would also have to find the decision breached article 8. This is not a line of argument adopted by Ms Dulay so we heard no submissions on it.
38. The most striking feature of this case, as the judge clearly had in mind, is the delay. We are in little doubt that this could and should be regarded as a feature of the assessment of very compelling circumstances, the search for which is wide-ranging, as shown by the list provided in *Kiarie and Byndloss*. It is acknowledged in the respondent's own guidance that, in the case of an individual who has lived in the UK with leave, this factor may be significant. The reference there to the case of *EB (Kosovo) v SSHD* [2008] UKHL 41 must be to the guidance of Lord Bingham as follows:

"13. In *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that *Shala* was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.

14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's

precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 50, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of *JL (Sierra Leone)*, heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. *JL* escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v Secretary of State for the Home Department* [2005] EWCA Civ 947, [2005] INLR 575, para 25:

"Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"

39. Whilst their Lordships were not considering delay in making a deportation decision following a conviction, we see no reason why these principles should not be adapted for application in a deportation appeal, provided the facts are somewhat distant from those considered in *RLP*. In the latter case, the President was considering delay in the context of an individual who was already an overstayer by the time he married and went on to commit offences.
40. Does the length of the delay in this case, which we calculate to be precisely 15

years⁶, coupled with the appellant's formation of solid family and private life ties in the UK whilst ignorant of his vulnerability to deportation, mean that his case is bound to succeed before another tribunal? We do not think so. It is undoubtedly a very important factor and we accept Ms Dulay's submission that this case can be distinguished from *RLP* on its facts. However, it is possible that another tribunal, properly directing itself, would nonetheless consider that the appellant had not reached the extremely high threshold of very compelling circumstances over and above the Exceptions. There are insufficient findings of fact for us to conclude otherwise. Moreover, the factual circumstances will have moved on since December 2016, particularly with regard to the third child's health.

41. The decision is set aside. The parties were not prepared to proceed to a continuation hearing. We consider the appeal must be remitted to the First-tier Tribunal in line with paragraph 7.2 of the Practice Direction so that further facts can be found.
42. The appeal must be heard by a different Judge of the First-tier Tribunal. To assist with that task we make the following directions:

DIRECTIONS

- (1) The appeal will be heard by any Judge of the First-tier Tribunal except Judge Callender Smith on a date and at a place to be notified;
- (2) The findings made by Judge Callender Smith in paragraphs 65 to 80 of his decision and summarised in paragraph 8 of ours (above) are preserved;
- (3) Consolidated bundles containing all additional evidence and the evidence previously filed must be filed at the Tribunal and served on the other party no later than 14 days before the hearing.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal will be heard again in the First-tier Tribunal.

An anonymity direction has not been made.

Signed

Date 17 August 2017

Deputy Judge of the Upper Tribunal Froom

⁶ The period between the appellant's conviction for the index offence and the service of the decision to deport him ran from September 2000 to September 2015.