



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10981/2017

THE IMMIGRATION ACTS

Heard at Field House
On Friday 17 May 2019

Decision & Reasons Promulgated
On 14 June 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MISS CARROL [J]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright, Counsel instructed by Thomas Andrew & Daodu solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. By a decision promulgated on 28 February 2019 (“the Decision”), I, sitting with Mr Justice Waksman (sitting as an Upper Tribunal Judge), found an error of law in the decision of First-tier Tribunal Judge Colvin, allowing the Appellant’s appeal against the Secretary of State’s decision dated 21 September 2017 refusing

the Appellant's human rights claim. The Decision is annexed hereto for ease of reference.

2. The Secretary of State's decision was made in the context of a decision to deport the Appellant to Jamaica based on an offence she committed which led to a conviction and twelve months' sentence in 2002. It is common ground that the Appellant has not committed any criminal offence since.
3. The background facts are set out at [2] and [3] of the Decision and I do not need to repeat those. As is evident from what is there said, the salient factors in this case are the Appellant's private life in the UK, her family life with Mr [S] and the delay since the commission of the index offence.
4. In relation to the Appellant's private life, she has been in the UK since May 2000. She came here as a visitor but has remained unlawfully since the expiry of that leave. She was aged forty-two years when she arrived and is now aged sixty-one. In addition, she has some health problems. Her family members are in the UK. She has no family in Jamaica.
5. The Appellant has been in a relationship with Mr [S] since 2012 and they live together. Mr [S] is originally from Jamaica but came here in the 1960s as a young man. He is British. He has a daughter, aged thirty years. He also has a sister in the UK. I was told that his other family members are in the US. He has no family in Jamaica. Mr [S] has a number of health problems. The Appellant is both his partner and his carer.
6. The index offence is one of wounding. The Appellant's account is that it was committed in self-defence against the partner of her former partner. I have no sentencing remarks in relation to that offence given the passage of time. However, even if there was an element of self-defence, the jury clearly did not accept that this was a complete defence as the Appellant was found guilty of the offence. It is common ground that the Respondent did not make any decision to deport the Appellant until March 2015. It appears that the Appellant had previously applied to remain on human rights grounds in 2008 which application was refused, and the appeal dismissed. I do not have a copy of that decision, but I understand it to be accepted that there was no deportation decision at that stage.

LEGAL FRAMEWORK

7. As Mr Jarvis reminded me, since the offence was committed as long ago as 2002, this is not an automatic deportation decision under the UK Borders Act 2007. It is a decision to deport made under section 3 Immigration Act 1971. As Mr Jarvis submitted, and Mr Plowright accepted, Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") applies. Mr Jarvis also very fairly submitted that I should be guided in my consideration of the human rights claim by Section 117C because he said there was a slight disconnect between the terms of the Immigration Rules ("the Rules") in relation to the Appellant's offence and sentence and those of Section 117C. Section 117C is more generous to the

Appellant and Mr Jarvis said therefore that I should apply that section in preference to the Rules. Mr Plowright did not object.

8. Section 117C reads as follows:

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

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”

9. The Appellant’s sentence was one of twelve months. As such, she can succeed if she meets either of the two exceptions in Section 117C (4) and (5). Although, as Mr Plowright conceded, the Appellant cannot meet the first of those exceptions because she has been here unlawfully, save for the first six months, it is nonetheless necessary to consider whether she would meet that exception except for the lawful residence provision if I need to go on to consider the Appellant’s case on a wider assessment of proportionality. In that regard, although Section 117C(6) provides only for an application of “very compelling circumstances” outside the Rules for those sentenced to over four years, the Court of Appeal in NA (Pakistan) & Another v Secretary of State for the Home Department [2016] EWCA Civ 662 (“NA (Pakistan)”) recognised that the same test must be capable

of applying also to those with a sentence of under four years who cannot meet the exceptions in order to render the scheme compliant with Article 8 ECHR. This is dealt with at [25] to [27] of the judgment as follows:

“25. Something has obviously gone amiss with the drafting of section 117C(3). In *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, HL, at 592-593, Lord Nicholls (with whom the other members of the Appellate Committee agreed) explained the circumstances in which the courts in interpreting statutes can correct obvious drafting errors. In our view the lacuna in section 117C (3) is an obvious drafting error. Parliament must have intended medium offenders to have the same fall back protection as serious offenders. Mr Tam invited us so to rule.

26. In reaching this conclusion it is important to bear in mind that the new Part 5A of the 2002 Act is framed in such a way as to provide a structured basis for application of and compliance with Article 8, rather than to disapply it: see the title of Part 5A, the general scheme of the provisions in that Part and, in particular, section 117A(1). If section 117C barred medium offenders from asserting any Article 8 claim other than provided for in subsections (4) and (5), that would plainly be incompatible with Article 8 rights (either their own or Convention rights of individuals in their family) in some cases. Equally plainly, it was not Parliament's intention in enacting Part 5A to disapply or require violation of Article 8 in any case. We also place reliance on section 3(1) of the Human Rights Act 1998. That provision requires courts to construe legislation in a way which is compatible with Convention rights, if it is possible to do so. It is possible to do so here. In accordance with the guidance given by Lord Nicholls, the words which need to be read into section 117C (3) so as properly to reflect Parliament's true meaning are clear, namely the same words as appear in sub-section (6) and in para. 398 of the 2014 rules, which came into effect at the same time as part of an integrated and coherent code in primary legislation and the Immigration Rules for dealing with deportation cases.

27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

10. The Supreme Court has recently provided guidance in relation to the way in which the test of “unduly harsh” is to apply in order to meet the second exception in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 (“KO (Nigeria)”). The Supreme Court concluded that the question whether the effect was unduly harsh was an assessment which had to be made based solely on the impact on either the partner or child, taking no account of the public interest in deportation which was already built in to the exception. However, the Supreme Court drew attention to the high level of impact required to satisfy the test as follows:

“23. On the other hand the expression “unduly harsh” seems clearly intended to introduce a higher hurdle than that of “reasonableness” under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further the word “unduly” implies an element of comparison. It assumes that there is a “due” level of “harshness”, that is a level which may be acceptable or justifiable in the relevant context. “Unduly” implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent’s offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show “very compelling reasons”. That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more.

...

27. Authoritative guidance as to the meaning of “unduly harsh” in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the “evaluative assessment” required of the tribunal:

“By way of self-direction, we are mindful that ‘unduly harsh’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb ‘unduly’ raises an already elevated standard still higher.”

On the facts of that particular case, the Upper Tribunal held that the test was satisfied:

“Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.”

This view was based simply on the wording of the subsection, and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial.”

11. Notwithstanding the need to ignore the facts relating to the offence and relative severity of it when looking at the exception in Section 117C (5), that passage says

nothing about the way in which the test outside the exceptions is to operate. In NA (Pakistan), the Court of Appeal said this:

“29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C (6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8.”

This Tribunal has recently considered whether that passage continues to apply following the Supreme Court’s judgment in KO (Nigeria) and has confirmed that it does (see in particular RA (s.117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT 00123 (IAC)).

12. The issue therefore is whether the Appellant can meet the exceptions in Sections 117C (4) and (5) and, if not, whether there are very compelling circumstances outside those exceptions which permit her to succeed. In considering that issue, I have regard to the approach set out in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 (“Hesham Ali”). Although the judgment in Hesham Ali pre-dates the introduction of Part 5A of the 2002 Act which includes, inter alia, Section 117C, that judgment is still helpful for what it has to say about the public interest in deportation and the way in which the proportionality assessment in deportation cases should be approached, in particular at [50] and [82] to [83] where Lords Reed and Thomas advocated the following approach:

“50. 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."

...

82. I agree with the judgment of Lord Reed and in particular the matters he sets out at paras 37-38, 46 and 50. I add three paragraphs of my own simply to emphasise the importance of the structure of judgments of the First-tier Tribunal in decisions where article 8 is engaged. Judges should, after making their factual determinations, set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed at paras 37-38, 46 and 50. It should generally not be necessary to refer to any further authority in cases involving the deportation of foreign offenders.

83. One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

In other words, the issue then becomes one whether removal, or in this case deportation, has unjustifiably harsh consequences for the Appellant and others affected by the decision when the Appellant's private and family life is balanced against the public interest (see also *Agyarko and Ikuga v Secretary of State for the Home Department* [2017] UKSC 11 - "*Agyarko*").

13. I canvassed with the representatives at the outset of the hearing whether, when looking at the consequences and proportionality of the decision, I needed to take account of the slightly different context here which involves a deportation based on an offence committed many years ago. The issue for me though is whether removal in consequence of the decision breaches the Appellant's human rights and not whether the decision is unlawful. Mr Jarvis accepted that the lawfulness of the decision is something which may weigh in the balance when considering the public interest. Ultimately, though, as he pointed out, and I accept, although it might be said that deportation has more serious consequences than removal because of the bar to re-entry whilst there is an extant deportation order, the same or a very similar bar exists in removal cases also applying paragraph 320(7B) of the Rules.
14. An additional point arises, though, in light of the facts of this case as to how proportionality is to be assessed more widely given the unlawfulness of the

Appellant's residence in the UK. As Mr Jarvis submitted, and I accept, if I am not persuaded that the exceptions in Section 117C are met, when looking at proportionality more generally, I have to take into account the other factors in Sections 117A-D, in particular those in Section 117B which reads as follows:

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

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom."

15. Finally, I do not repeat what was said in the Decision about the effect of the delay in taking deportation action. That is set out at [10] to [17] of the Decision. That is the approach which I intend to take in this case in the event that it becomes relevant to consider this factor.

EVIDENCE

16. I have before me the Appellant's bundle as was before the First-tier Tribunal. The pagination does not follow sequentially throughout and therefore I refer to documents in that bundle where necessary by reference to the document itself. In addition, I have a further witness statement from the Appellant dated 21 March 2019 with enclosures. I also heard oral evidence from the Appellant and from Mr [S].

The Appellant's Evidence

17. The Appellant has provided two witness statements, a recent one as above and one dated 1 October 2018.

18. The Appellant's statements deal with her immigration history, the circumstances of her offending, her and her partner's family circumstances and medical problems.

19. I do not need to deal with the Appellant's immigration history as that is uncontroversial and already set out in the Decision. Dealing first with the offence, therefore, I have mentioned that the Appellant says that she committed it in self-defence. The circumstances are expanded upon at [6] of her first statement as follows:

"6. ... There were however extenuating circumstances. The alleged victim of the offence of wounding was a lover of my ex-partner Eddie Edwards. Prior to the commission of the offence I was previously living with Eddie Edwards whom I was in a relationship with. I had returned to collect my belongings from my previous partner home and met the victim there. She was very obstructive and locked me in the wardrobe as I was trying to remove my belongings. I forced my way out of the wardrobe but she lurched at me with a table knife she was eating with. In the process of defending myself she alleged that I wounded her when in fact, I was merely defending myself. That by no means makes me a danger to other members of the community. The incident and conviction are historic having taken place over 16 years ago. The Respondent should not now seek to rely on the historic offence and conviction to deport me. Furthermore, I have served my sentence. I was not recommended for deportation by the Crown Court Judge on conclusion of the criminal proceedings in 2002 and I have not been involved in any further offences since then."

20. In terms of her rehabilitation, the Appellant says this:

"11. The offence being relied upon by the Respondent resulted in my first and only custodial sentence. I deeply regret the incident which took place over 16 years ago. Since I served the sentence I have tried to put the incident behind me and by my efforts and hard work I have put myself in the best position and have re-established myself as a good member of society. I have never since completing my sentence engaged in a fight even when provoked.

Whilst in prison in 2002, I took the opportunity to improve myself by undertaking courses in English, Mathematics, IT and Pottery. I have not reoffended. I am completely rehabilitated. I do not pose a risk or danger to members of the community. Prior to my arrival in the United Kingdom I have never been involved in the commission of or convicted of a criminal offence. I am not a hardened criminal. I disagree that my deportation is conducive to public good and in the public interest. The offence was committed over 16 years ago and since I served my sentence, I have not exhibited and continue not to exhibit any tendency to show that I am or will be a risk or danger to the community. I have not engaged in fights or any activity that would lead to any allegations of commission of a crime against me. I made a grave mistake by engaging in what I would describe as a domestic fight and for which I had been punished by society for by serving a short custodial sentence. My presence in the United Kingdom will not be detrimental to public good. I had used my time in prison constructively and contributed positively to the community when I was released into the community. I am completely rehabilitated. I have rehabilitated myself so that I may live a law abiding life in society."

21. In terms of her own family circumstances, the Appellant has a number of relatives in the UK, including her mother and siblings (see [9] of her first statement). They are all British citizens. That they live in the UK and are now British citizens is confirmed by letters from them in the bundle. They confirm that the Appellant is close to them and their own families.

22. The main relationship on which the Appellant relies however is that with her partner, Mr [S]. She confirms that they have been together since 2012. She says this about the relationship:

"7. ... My partner [O] has always supported my application to remain in the United Kingdom as we both emotionally rely on each other and he has been a source of moral support and strength. He exerts influence over me. I will never get myself involved in a fight again. I now live as part of a stable family unit. I am very close to my partner. My partner has medical conditions including advanced prostate cancer. He also has a condition which causes extreme pain in his legs, knees, back and other parts of his body. I care for him and he also cares for me."

23. The care which the Appellant provides to Mr [S] was the main focus of the evidence before me. The Appellant gave oral evidence that she assists Mr [S] to use the toilet and shower. Due to his prostate cancer, he has to use the toilet frequently. I do not need to go into detail about the evidence of the extent of her assistance; that would be unnecessarily intrusive. Suffice it to say that the assistance she gives is of a highly personal nature. She also cooks for him and does the shopping. She said that there was no other family member who could care for Mr [S] if she were not there. His sister is herself in her seventies and housebound. The Appellant also helps her by preparing some meals and paying

her bills for her. She also takes her to appointments. However, Mr [S]'s sister does have a carer who comes in the mornings to help her wash. Mr [S] also has an adult daughter with whom he maintains contact. However, the Appellant said that she would be unable to assist as she works and travels internationally for her job. Mr [S] has no friends as they have died. As Mr Jarvis noted, there was no witness statement from either Mr [S]'s sister or his daughter and neither attended to give evidence. However, the Appellant said that this was because she had not been asked to provide statements from them. Mr [S]'s daughter was at work and could not attend. His sister, as already noted, is housebound.

24. When asked why Mr [S] could not return to Jamaica with her, the Appellant said that this would not be possible as she did not have anywhere to live there and no family there who could help them.

25. The Appellant also has health problems. In her first statement, she says that she has "type 2 diabetes, osteoporosis and chest pains". She suffers from high cholesterol and blindness in the left eye as well as back pain. Her second statement updates on the position in this regard as follows:

"3. My health has been deteriorating considerably and my medical condition has now worsened. I recently undertook surgery in relation to my heart and now strongly believe that should I be removed from the United Kingdom my life expectancy will be shortened as I now have extreme difficulty in breathing...."

26. Annexed to her statement are a short letter from Dr S Kaddoura of the Department of Cardiology, Chelsea and Westminster Hospital dated 11 December 2018. He records that the Appellant has "a background of ischaemic heart disease, myocardial infarction and primary PCI with stenting in 2009 and has cardiovascular risk factors of hypertension, hyperlipidaemia and diabetes mellitus". The other documents record appointments leading to admission in March 2019 which the Appellant indicated in oral evidence was to replace an existing stent which had worn out.

Mr [S]'s Evidence

27. Mr [S] has provided a witness statement dated 1 October 2018. He provides the following relevant evidence in that statement:

"5. We have now been together for over 6 years. Since that time our relationship has developed into a very serious one. We have plans to marry. We live together as a couple and a family unit. ... My family and friends all know here and love her and consider her part of our family. I consider her to be my other half and we are inseparable.

6. We are emotionally and financially dependent on each other. This dependence however goes beyond emotional or financial ties as we both care for each other. I financially support Carrol. She is not having recourse to public funds and will not do so in the future.

7. Should my partner the appellant be removed to Jamaica this would not be conducive to her wellbeing. A very strong relationship of love, bond, affection and dependency exists between Carrol and myself and her removal will cause unbearable consequences to both of us.
 8. The uncertainty around Carrol's immigration status has contributed significantly to the vulnerability of her wellbeing as she feels frustrated and helpless. We as a result have not been able to plan properly for the future. I am not able to leave the United Kingdom and move to Jamaica to live with her and continue our relationship there because I have medical conditions including prostate cancer which I will not be able to manage in Jamaica should I be compelled to leave the United Kingdom with her for Jamaica...
 9. Carrol is an honest, gentle, caring woman and she deserves to stay in the United Kingdom to be with her family. She should not be denied this right. She cares for me and I also care for her as she also suffers for serious medical conditions including type 2 diabetes, osteoporosis, chest pains, high Cholesterol, and blindness in the left eye.
 10. My partner's deportation will have a major devastating effect on myself. It will be an unthinkable battle to protect myself mentally, physically, and maintain a degree of social functioning."
28. Mr [S] also gave oral evidence. That evidence was largely consistent with that of the Appellant. He confirmed their relationship. He also confirmed his health problems as the Appellant has recorded them. His cancer had spread to his bones some three months previously. He had been to the hospital on the previous day and they were due to review him again in three months. He was given medication but no other treatment.
29. Mr [S] confirmed the care which the Appellant provides for him and that there is no-one else within the family who can care for him. Other than his sister and daughter, his other family members live in the US. He confirmed that his sister is too unwell herself to help him and that his daughter works and travels the world so could not help. He is unable to go to the toilet unaided and has to be helped to shower or bath. This is due to his arthritis. Although he said that he would be able to cook, he could not cook anything hot because he has arthritis in his hands which prevents him holding things. For the same reason, he cannot shop for himself. He has never had assistance from social services. Before he met the Appellant, his health complaints were not as bad as they are now and so he did not need the assistance which he now needs.
30. Mr [S] is now aged eighty-four years. He was able to work part-time until some months ago but has had to give up due to his health. He said that he did not think he could get the treatment he has here if he were to return to Jamaica. He would not be able to afford treatment there. He has been back to Jamaica since he left. The last time he was there was in 2013 when someone he knew had died.

Other Evidence

31. Although there are documents in the bundle confirming the multitude of health complaints from which the Appellant and Mr [S] suffer, there is no formal medical report in relation to either. A large number of the documents relate only to appointments or a diagnosis at a particular point in time. For example, there are documents annexed to Mr [S]'s statement which indicate that there were some concerns about his blood pressure but, by a letter dated 27 June 2018, from the Department of Cardiology at King's College Hospital, it is confirmed that whilst he has some ongoing symptoms, the only treatment recommended was a referral to a diabetologist and a review after six months.

32. I have already referred to the latest medical letter in relation to the Appellant. The one which I found the most useful in terms of a summary of Mr [S]'s condition is from his GP dated 8 July 2015 which reads as follows:

“[O] has prostate cancer which was diagnosed in 2013. Recent Bone scans (April 2015) suggest there are bony metastases and he has been commenced on 3 monthly hormone therapy injections; prostatic. This medication was started in clinic dated 26th June 2015. As far as I am aware he will remain on hormone treatment indefinitely or until instructed otherwise by the oncologist. If he does not have the treatment potentially his prostate cancer will metastasise further. He is also on tamsulosin which helps with his urinary symptoms.

[O] also has a chronic right sided otitis externa for which we have referred him to ENT. He has chronic right arm pain (radiculopathy) which is related to the degenerative disc disease in his cervical spine. You will note that he is on naproxen for symptoms relief.”

33. Although I accept that the evidence shows that the Appellant and Mr [S] are both prescribed a number of medications, there is no evidence before me that those cannot be obtained in Jamaica nor that either they would have to pay for them or that they would be unable to afford them. There are no medical reports as to the prognosis if they were to return to Jamaica. There is no medical evidence as to the support which Mr [S] receives from the Appellant nor whether that support could be obtained from other sources, particularly from social services.

DISCUSSION AND CONCLUSIONS

Section 117C

34. For reasons which I will come to in due course, this appeal succeeds or fails depending whether the Appellant can meet the exception in Section 117C (5) based on her family life or otherwise whether the impact on that family life is so severe that it outweighs the public interest. I will therefore begin with a consideration of the evidence in that regard.

35. Mr Jarvis did not contend that I should not accept the evidence about the severity of Mr [S]'s condition nor about the assistance which he requires based on any absence of supporting evidence. He accepted that the evidence of the Appellant and Mr [S] was consistent in this regard. I also observe that, although Mr [S] was able to come and go from the hearing room unaided, he did not seek to exaggerate his evidence about what he could and could not do for himself. I accept that evidence in particular as reflecting the extent of his medical conditions and the effect on his ability to look after himself.
36. What that evidence shows is that Mr [S] suffers from a number of chronic medical conditions including prostate cancer which has spread to his bones and arthritis which inhibits his ability to carry out some functions for himself. Of particular importance is the evidence that he requires help with very personal functions such as going to the toilet and washing himself. Although I accept Mr Jarvis' evidence that Mr [S] could in principle look to social services to assist in that regard (in the way that they do, for example, in relation to his sister), at his advanced age, I accept that being helped in that way by a complete stranger would impact on his personal dignity.
37. I accept as did Mr Jarvis that it would be unduly harsh for Mr [S] to return to Jamaica with the Appellant. The evidence is that neither of them have family members there who could help them adjust to life there. That was not challenged. As such, the Appellant would have to find work and find a place to live. Given his need for regular treatment for his conditions, Mr [S] could not be expected to return to Jamaica at that stage. It might in due course be possible for him to do so once the Appellant was settled but I accept Mr Jarvis' concession that to do so in the short term would be unduly harsh.
38. That leaves the prospect of Mr [S] remaining in the UK without the Appellant. I recognise that the test of what is unduly harsh is a high and exacting one. I also accept that, following KO (Nigeria), it is not open to me to take into account when considering that standard to take account of the relative severity (or otherwise) of the Appellant's offence, the reasons behind that offence nor that there was a delay of some thirteen years before the Respondent took deportation action. However, although Mr [S] has family in the UK, I accept the evidence which was unchallenged that his family members are unable to provide the sort of regular care which he needs. I have already set out the difficulties of having social services provide that care. Although, as Mr Plowright fairly conceded, in principle, social services could step in to provide the sort of care which the Appellant provides, that would, as he said, be to replace a partner with a carer. I have not set out in detail the evidence which I received about the very personal level of care which the Appellant has to provide for Mr [S]. As Mr Jarvis, accepted, however, to require Mr [S] to have a stranger provide that care would impact on his personal dignity. It is that coupled with the deterioration in Mr [S]'s medical condition which has led me to conclude that it would be unduly harsh for Mr [S] to remain in the UK without the Appellant.

39. For that reason, the Appellant meets the exception in Section 117C (5). Her appeal succeeds on that basis.
40. In case that conclusion is challenged, however, I go on to consider the other aspects of this case. In relation to the exception under Section 117C (4), Mr Plowright accepts that the Appellant cannot meet this in full as she has not been lawfully resident in the UK for most of her life. I accept that the Appellant is socially and culturally integrated in the UK. Although she has not apparently worked here (she is not entitled to do so) and came here at a relatively advanced age, and although her family members and Mr [S] were originally from Jamaica, they are all now British citizens. She regularly attends church in the UK and those who know her have provided supporting letters as to her community involvement in that regard.
41. I do not however accept that there are very significant obstacles to the Appellant's integration in Jamaica. She did not leave Jamaica until she was in her forties. I do not have any information about what she did before then, but she would be well used to the customs there and I assume probably worked there. The main obstacle to her readjustment is the lack of family there and her health conditions. However, she is an adult and the evidence does not show that she is dependent on her family members here for her care. Her evidence is that Mr [S] is dependent on her for care (see above). There is no evidence that the medication which she receives for her ailments would not be available to her in Jamaica. Some of her health problems pre-date her arrival in the UK.
42. For those reasons, even if the Appellant had been lawfully resident in the UK for most of her life, I would not have accepted that she could meet all the criteria in Section 117C (4). As it is, she cannot meet two of the three criteria.

Very Compelling Circumstances Outside Section 117C/ the Rules

Factors for the Appellant

43. If the Appellant did not meet either of the exceptions in Section 117C, the effect of deportation on Mr [S], in particular, would still be relevant to consideration of the impact on the Appellant's family life. I accept that the Appellant has a strong family life with Mr [S]. They are in a genuine and committed relationship. The evidence about that was not challenged. Even if I had found that the impact of depriving Mr [S] of the care of the Appellant was insufficient to meet the very high threshold in Section 117C (5), that would nonetheless be a very weighty factor in the Appellant's favour when assessing proportionality.
44. Although I have rejected any suggestion that the obstacles which the Appellant would face on return to Jamaica when integrating there are not "very significant" it is evident that she would face problems re-adjusting to life there. She has not been there since 2000. Even if as I think likely, she would have worked there before coming to the UK, and would have been educated there, she has been away from the country for a significant period and there would be some

adjustment needed. She has no family members or friends there and whilst no doubt her family here could provide some financial support on return (as Mr [S] does now) I accept that, particularly given her age, the Appellant would find adjustment very difficult. That is a factor to which I attribute some weight.

45. The Appellant's own medical condition also has to be taken into consideration. However, as Mr Jarvis pointed out, it is not suggested that those health problems are sufficient to meet the Article 3 ECHR threshold. There is no evidence that the Appellant could not get treatment in Jamaica. I give that factor little weight
46. Although I accept the evidence about the other aspects of private life which the Appellant enjoys in the UK, such as her relationship with family here and her church activities, and I take that into account, the evidence is limited and I was not asked to hear any evidence from those persons to provide more detail (even though a number of the Appellant's family members were present at the hearing). I also give that factor little weight.

Public Interest

47. I accept that Section 117C provides that deportation of foreign criminals is in the public interest. Although the Appellant's offence is historical, and I accept that she has not committed any criminal offence since 2002, she remains liable to deportation. Even though she no longer poses a risk, is remorseful for her offence and, given the passage of time can be assumed to be rehabilitated, there remains a public interest in deportation. It is though relevant to the public interest that the Appellant does not pose any risk of reoffending.
48. I remind myself of what we said in the Decision in relation to the delay in making a decision to deport. I accept, as set out at [17] of the Decision, that the delay in taking deportation action can, when proportionality is assessed outside the Rules, be a relevant consideration and may operate to the benefit of the Appellant by reducing the public interest in deportation. However, the Appellant was here unlawfully and should have returned to Jamaica during that period. As Mr Jarvis put it, although there is a delay by the Respondent in taking deportation action for thirteen years, there is a longer delay counting against the Appellant for failing to return home when she had no right to be here. I accept though that, although the Appellant entered into the relationship with Mr [S] at a time when she knew full well that she had no right to be here (having lost an appeal against removal), there is no indication that the Respondent took any steps to remove her after her unsuccessful appeal and she may have formed the view that she would not be removed in spite of her unlawful presence.
49. However, it remains the case that, due to the unlawfulness of the Appellant's presence in the UK, there is also a public interest in deportation based on the maintenance of effective immigration control. Further, as Mr Jarvis submitted, and I accept, the application of Section 117B means that I can give little weight to the Appellant's private and family life both of which were formed and enjoyed here whilst she was present unlawfully.

50. Mr Plowright submitted that it was relevant that the Appellant has been here for nineteen years, one year short of the residence requirements in paragraph 276ADE of the Rules. He accepted that there is no “near miss” principle. There is, though, a further reason why this cannot avail the Appellant and that is because, as Mr Jarvis submitted, and I accept, the fact of the criminal conviction would prevent the Appellant benefitting from either the family life or private life provisions of the Rules.
51. I accept that, when the combination of factors in the Appellant’s favour is balanced against the public interest, with the exception of the impact on Mr [S], none of those factors would be sufficient taken individually or cumulatively to outweigh the public interest. I accept that, applying Section 117B, I can only give little weight to the Appellant’s family life with Mr [S]. However, that does not mean that I give this no weight at all. Although the Supreme Court in Hesham Ali was not considering the effect of Sections 117B and 117C, as is made clear in its judgment, whether a decision to deport is proportionate depends ultimately on whether, weighing the factors for and against an appellant, the factors in favour of an appellant outweigh the public interest. Put another way, as the Supreme Court said in Agyarko, the ultimate question is whether the impact of removal (or in this case deportation) is unjustifiably harsh.
52. Taking into account what I say about the severity of the impact of deportation of the Appellant on Mr [S] and weighing in the balance also the length of time since the offending in this case which reduces the public interest to some (limited) extent in deportation, I am satisfied that the impact of the Appellant’s deportation is unjustifiably harsh. The Appellant would therefore also succeed if her claim needed to be considered more widely. As it is, my primary conclusion is that she succeeds on the basis that one of the exceptions in Section 117C is met.

DECISION

The Appellant’s appeal is allowed on the basis that Section 117C (5) is met.

Signed
Upper Tribunal Judge Smith



Dated: 22 May 2019

APPENDIX: ERROR OF LAW DECISION



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

Appeal Number: HU/10981/2017

THE IMMIGRATION ACTS

**Heard at Field House
On Tuesday 19 February 2019**

Determination Promulgated

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**Before
MR JUSTICE WAKSMAN SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE SMITH**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MISS CARROL [J]

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondent: Mr L Youssefian, Counsel instructed by Thomas Andrew & Daodu solicitors

ERROR OF LAW DECISION AND DIRECTIONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, we refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State for the Home Department is technically the Appellant in this particular appeal. The Respondent appeals against a decision

of First-tier Tribunal Judge Colvin promulgated on 19 November 2018 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 21 September 2017 refusing the Appellant’s human rights claim in the context of a decision to deport the Appellant to Jamaica.

2. The Appellant came to the UK as a visitor in May 2000, aged forty-two years, and was granted leave as a visitor until November 2000. She did not depart when her leave expired. She applied to remain as a student nurse in June 2004 which application was refused in June 2008. On 2 July 2008, the Appellant was served with notice of liability to removal as an overstayer. She submitted a human rights application which was refused in July 2008 and her appeal was dismissed in October 2008. On 3 September 2002, the Appellant was convicted of an offence of wounding and was sentenced to 12 months imprisonment. The Respondent served her with a deportation decision in March 2015 and her human rights claim was refused in May 2015.
3. The Appellant has been in a relationship with a British citizen, Mr [OS], since 2012 and they live together. Both the Appellant and Mr [S] have various medical conditions. Mr [S] is originally from Jamaica and may be part of the “Windrush” generation, having come to the UK in 1959/60 in his twenties. He has returned to Jamaica in 2004 for a funeral and in 2014 to stay with a friend. He has a brother in Jamaica. He has a daughter aged thirty years who lives in the UK and with whom he has frequent contact. The Appellant’s immediate family are also in the UK. She does not apparently have family members in Jamaica. In spite of Mr [S]’s age and medical conditions, he continues to work part-time in the UK.
4. The Decision allowing the appeal is based in part on the Appellant’s family and private life circumstances but in large part on the Respondent’s delay in taking any action to deport or remove her and the impact of that delay on the public interest. We will come to how the Judge reasoned her assessment below.
5. The Respondent challenges the Decision on three grounds. First, he says that the Judge should not have given any or as much weight as she did to the delay factor given the Appellant’s unlawful presence in the UK. He points to the case of Xu, R (on the application of) v Secretary of State for the Home Department (IJR) [2014] UKUT 375 (IAC), itself referring to the Supreme Court judgment in Patel v Secretary of State for the Home Department [2013] UKSC 72: the Respondent is entitled to expect those in the UK unlawfully to leave and is not obliged to remove an individual. In relation to the relative weight to be given to delay, he also points to the Tribunal’s decision of RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC) which he says post-dates the Court of Appeal judgment in MN-T (Colombia) v Secretary of State for the Home Department [2013] EWCA Civ 893 on which the Judge relies at [36] of the Decision.

6. Second, the Respondent says that the Judge was not entitled to give weight or not as much weight as she did to the Appellant's rehabilitation. He refers to the case of Secretary of State for the Home Department v Olarewaju [2018] EWCA Civ 557 which reviewed the authorities in relation to the weight to be given to rehabilitation and pointed to the fact that this is only one facet of the public interest in deportation.
7. Third, he says that, although, given Mr [S]'s age, medical conditions and family ties it could be accepted that it would be unduly harsh for him to relocate to Jamaica, the Judge failed to make clear findings whether it would be unduly harsh for him to remain without the Appellant.
8. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 12 December 2018 in the following terms so far as relevant:
 - "... [3] Paragraphs 2-3 of the grounds merely repeat argument put forward at the hearing as to the significance in terms of delay of service of an IS151A on the Appellant and the fact that she became ARE in 2008.
 - [4] The arguable ground in relation to the issue of delay is as to the judge's reliance on **MN-T (Colombia)** [2016] EWCA Civ 893, in which a 5 year delay in commencing deportation action was held to make a 'critical difference' and to constitute an exceptional circumstance weighing in favour of the Appellant. The Respondent points to a subsequent decision of the UT in **RLP (BAH revisited - expeditious justice) Jamaica** [2017] UKUT 00330 which stated that *'even egregious and unjustified delay on the part of the Secretary of State is unlikely to tip the balance in the Appellant's favour'*. While it is by no means clear that this decision of the UT is capable of directly over riding that of the Court of Appeal, it is arguable that the Judge's failure to consider RLP at all constitutes a possibly material error of law.
 - [5] It is also arguable in the light of case law cited at paragraph 6 of the grounds that the judge wrongly attributed weight to the period of rehabilitation.
 - [6] The ground contending failure to consider and to articulate what the unduly harsh consequences on the Appellant's partner would be were he to remain in the United Kingdom without her is less arguable. The judge at paragraph 38 refers to this 84 year old man's treatment for advanced prostate cancer, the fact that the Appellant is his main support and carer and his belief that her deportation would have a 'major devastating effect' on him.
 - [7] There is therefore an arguable error of law disclosed by the application."
9. The matter comes before us to determine whether the Decision contains a material error of law and if we so find, to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

Decision and Reasons

10. We begin with the Respondent's second ground as we can take this very shortly. The Appellant was convicted of an offence in 2002. She has committed no

further offences in the sixteen years since then. That was undoubtedly a factor which the Judge was entitled to take into account. It is clearly relevant to the public interest in relation to the protection of the public against the risk from criminals. The absence of offending will tend to reduce the public interest in the balance. We do not read Olarewaju as saying anything to the contrary. The reference at [26] of the judgment to a factor which cannot without more ever be regarded as amounting to very compelling circumstances is to the age at which Mr Olarewaju committed his offences which would have been taken into account in the length of sentence. True it is that the Court of Appeal refers to rehabilitation as only one facet of the public interest and we do not doubt that taken alone it could not be sufficient to amount to a very compelling circumstance but the passage of time since the offending is a relevant factor and the Judge was entitled so to conclude at [34] of the Decision.

11. However, we consider the Respondent's first ground to be stronger. The Judge refers at [32] to the Court of Appeal's judgment in MN-T (Colombia) and what that has to say about delay. We accept Mr Youssefian's point about whether what is said in the guidance in RLP can be taken into account given that this part of the headnote may not be included in the decision as a whole. In any event, the judgment in MN-T (Colombia) clearly takes precedence over the Tribunal's decision which post-dates it. The Court of Appeal's judgment was not apparently cited to the Tribunal and is not therefore considered.
12. However, there is a further reason why the Judge may have erred in taking into account the judgment in MN-T (Colombia) and that is its factual context. The appellant in that case had arrived in the UK in 1977 aged nine years. She was, by the time of the Court of Appeal's judgment aged forty-eight years. Moreover, she was granted indefinite leave to remain in September 1980 and had therefore been in the UK lawfully until a deportation decision was made against her in July 2008, nine years after the index offence. Thereafter, the Respondent took no action to deport her. The appellant applied for further leave to remain over three years after her appeal was dismissed. Reliance was placed on the lack of offending since the index offence (by then about thirteen years) and the Respondent's delay in deporting her since her unsuccessful appeal some three years earlier. It was her appeal against that refusal which formed the basis of the appeal before the Court of Appeal. We accept that the focus of the delay was a period when the appellant had no leave to remain in the UK, having been made subject to a deportation order. However, the Court of Appeal's conclusion that the delay in that case made a "critical difference" has to be read in the context of the overall facts and in particular what is said at [29] of the judgment that the appellant had lived in the UK for most of her life and had satisfied the requirements of exception 1 of Section 117C Nationality, Immigration and Asylum Act 2002 ("section 117C") many years earlier. The appellant had also come to the UK as a child, a matter which the Court of Appeal also considered relevant by its citation of Maslov v Austria [2009] INLR 47 at [31] of the judgment. Her age when she came to the UK is said at [33] of the judgment to be "significant".

13. Mr Youssefian relies on what is said at [35] of the judgment as follows:

“I agree that rehabilitation alone would not suffice to justify the Upper Tribunal’s decision in this case. If it had not been for the long delay by the Secretary of State in taking action to deport, in my view there would be no question of saying that “very compelling circumstances over and above those described in Exceptions 1 and 2” outweighed the high public interest in deportation. But that lengthy delay makes a critical difference. That lengthy delay is an exceptional circumstance. It has led to the claimant substantially strengthening her family and private life here. Also, it has led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over the last 13 years. This is one of those cases which is on the borderline. The Upper Tribunal might have decided either way. The Court of Appeal would not have reversed the Upper Tribunal’s decision if the Upper Tribunal had decided that because of the high public importance the claimant must be deported.”

[our emphasis]

14. We accept that delay may remain relevant to where the public interest balance is struck even in a case where the person to be deported has been here unlawfully throughout. However, it is unhelpful to pick out words from an assessment in one case as justifying an assessment in a different factual context without taking into account the relevant factors which are different. We recognise that the different factors between this case and that in MN-T (Colombia) in some respects favour the Appellant rather than undermining her case. For example, the offending in MN-T (Colombia) was far greater. The period between the offence and the deportation decision was also shorter and in MN-T (Colombia) what was relied upon was the period after the deportation decision rather than before it. However, the period that the appellant in MN-T (Colombia) had spent in the UK, her age when she arrived and that she had lawful residence for a long period prior to the offending are all factors which favoured the appellant in that case which do not apply here.
15. That brings us on to the effect of the Appellant’s unlawful residence and whether the Judge was entitled to rely on the Respondent’s delay also in removing her to justify the conclusion that there are very compelling circumstances. This brings in to the equation a point made by Mr Lindsay which he accepted was not one of the grounds pleaded but which he said was obvious and that is the failure to have regard to Section 117B. That is relevant not only to the weight which can be given to family and private life developed whilst a person is here unlawfully but also the separate public interest in removal of those here unlawfully. It is that latter factor in particular which we consider that the Judge has failed to take into account which is relevant to ground one concerning the weight given to the delay in particular in removal (as distinct to the separate public interest in deportation).
16. We note in this regard what is said at [35] of the Decision about the Appellant’s immigration history. We accept Mr Youssefian’s point that the Judge did not have to keep repeating the point there made about her poor immigration

history. There is recognition also in that paragraph that the Appellant should have gone back to Jamaica (although the Judge perhaps does not give sufficient weight to the fact that she should have done so when her leave expired and not simply when served with a removal notice). Contrary to the views of Judge Lambert, however, we consider that the Judge has erred in giving weight to the Respondent's failure to remove the Appellant at [36] of the Decision. We recognise that the context of the Supreme Court's judgment in Patel is different from this case (relating to whether there is an obligation to give a removal decision) and that the case of Xu also concerns a slightly different issue whether those in the "legacy" programme were entitled to leave to remain based on Home Office delays. That latter decision does however make clear that the Respondent is entitled to expect those here unlawfully to leave and that there is no obligation to remove within any particular period.

17. We accept of course that this is not to say that delay in effecting removal can never be a relevant factor. Mr Youssefian referred us for example to [52] of the judgment in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 in support of his submission that protracted delay can still be relevant if, during that period, family life is strengthened. That does no more than state one of the principles derived from EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41. However, when analysing the difference which the delay made in this case, we consider the Judge to have erred in placing reliance on MN-T (Colombia) without having regard to the other factors there which strengthened that appellant's case and failing to take into account the separate public interest in the maintenance of effective immigration control when considering whether the Appellant should have left the UK whilst here unlawfully rather than waiting to be removed.
18. There is a further reason which leads us to find that the Judge has erred in her Decision and that is the manner in which she reached her conclusion. This is based on an extension of the Respondent's third ground.
19. Whilst the third ground as pleaded is confined to whether the Judge made adequate findings in relation to the unduly harsh test, we permitted Mr Lindsay to extend his submissions to an argument that the Judge had not applied that test in the way in which the Supreme Court now says that this should be assessed in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. The hearing of this appeal pre-dates that judgment and it is therefore unsurprising that the Judge was not taken to it. Although judgment was handed down shortly before the Decision was dated, we take no point about the Judge's failure to refer to it. She may not have recognised the significance. Mr Lindsay also accepted that the Respondent could have referred to it in his grounds but did not do so. Again, though, he submitted that this was probably due to the person drafting the grounds having been unfamiliar with a test which had only recently been changed by the Supreme Court's judgment.

20. Mr Lindsay accepted that the Judge was entitled to adopt a “balance sheet” approach. That is the approach advocated by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. Hesham Ali pre-dates Section 117C and that section is therefore not there considered by the Supreme Court, but we accept as did Mr Lindsay that the approach continues to apply when looking at whether there are compelling circumstances outside the exceptions laid down in Section 117C.
21. However, as a twelve months’ sentence case, the Judge first had to consider whether the Appellant meets either of the exceptions set out in Section 117C which she sets out at [19] of the Decision. We do not criticise her for not dealing with exception 1 concerning the Appellant’s private life. It was abundantly clear on these facts that the Appellant could not succeed on this basis, not least because she had not been in the UK lawfully. It might though have been helpful for the purposes of the overall assessment if the Judge had reached findings whether the Appellant was integrated in the UK and whether there were very significant obstacles to her integration in Jamaica.
22. However, the position in relation to exception 2 is relevant as the Judge implicitly recognises in her conclusion at [40] of the Decision. That paragraph of the Decision bears setting out in full:
- “When taking account of all these factors I have reached the view that the public interest in deporting the appellant is substantially less than it might be in other cases. This is because the ‘critical difference’ has been the significant delay in taking the deportation action which has allowed the appellant to substantially strengthen her family life and demonstrate her rehabilitation from an offence committed 16 years ago. In addition there is the impact on the appellant’s partner of her deportation which I consider – particularly in light of his serious medical condition and at the age of 84 – would be unduly harsh as to fall within s.117C (5) of the 2002 Act. In summary, I am satisfied that there are sufficient factors in the appellant’s favour to amount to “very compelling circumstances” that outweigh the public interest and render her deportation disproportionate.”
23. As we point out above, the Judge referred to Section 117C at [19] of the Decision. She accepts at [25] that the issue is whether the effect of deportation on the Appellant’s partner is “unduly harsh”. However, in the section which follows dealing with the case-law, the Judge is unfortunately led into referring to cases, in particular MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450 which suggest that the harshness of the effect is to be balanced against other factors such as the immigration and criminal history. Thereafter, the Judge moves to the “balance sheet approach” to which we have already referred. In so doing, and by considering the impact of the deportation on the Appellant’s partner in the overall context of the other factors including the delay on which the Judge has placed “critical weight”, there is no reflection of the degree of interference which is required in order to reach the relevant threshold. It is not clear to us, by reference to the case-law to which the Judge had regard at [25] to [29] of the Decision, whether the Judge at [40] of the Decision intended to

conclude that exception 2 was met because deportation of the Appellant would be unduly harsh for her partner when the factors to which she had regard were balanced into the equation (which is contrary to the approach laid down in KO (Uganda)) or whether the conclusion at [40] of the Decision is intended to be that the consequences of deportation would be unjustifiably harsh following the carrying out of a balance sheet approach outside consideration of the exceptions. If the latter, that would need to take into account the Judge's conclusion (if that were her conclusion) that exception 2 could not be met. It follows, for those reasons, that we accept that the Respondent's ground three is made out for failure to make clear findings on the "unduly harsh" issue.

24. Having been alerted to the point, and particularly in light of the reference to MM (Uganda), Mr Youssefian was obliged to accept that the Judge may have erred in this regard. He said however that if there were an error, it made no difference because of the factors set out at [38] of the Decision. We accept that some of those factors may point in the direction of being able to meet a high threshold particularly in relation to consideration of Mr [S] leaving the UK with the Appellant. However, other than the final sentence at [38] of the Decision, there is no clear finding why it would be unduly harsh for him to remain here without her. It is also impossible to read [38] when looked at in the context of the rest of that section, including the "critical difference" made by the delay as anything other than the performance of a balance between the public interest and the level of interference. That may become relevant if the degree of interference is insufficient to meet the threshold in exception 2 but was not the correct approach for determining whether exception 2 was met. Ultimately, the result may be the same given the test outside the Rules whether deportation would lead to "unjustifiably harsh" consequences. However, we are unable to say with confidence that the outcome will be the same (for the reason we give above) and we therefore consider the error to be material.
25. For those reasons, we are satisfied that the Decision contains an error of law and we set it aside. There is little dispute about the facts of this case and we therefore consider it appropriate to re-make the decision in this Tribunal. We are however reluctant to do so without hearing evidence for ourselves. We have therefore given directions for the filing of further evidence (if the Appellant wishes to do so) and a further oral hearing at which we will be able to hear from the Appellant and Mr [S].

DECISION

We are satisfied that the Decision contains a material error of law. We set aside the decision of First-tier Tribunal Judge Colvin promulgated on 19 November 2018. I make the following directions for the re-making of the decision:

DIRECTIONS

1. **Within 28 days from the date when this decision is promulgated, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which she relies.**
2. **The appeal will be relisted for a hearing before Judge Smith to re-make the decision on the first available date after 28 days from when this decision is promulgated. Time estimate 1/2 day.**

Signed
Upper Tribunal Judge Smith



Dated: 27 February 2019

Signed
Mr Justice Waksman

