



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

Appeal Number: HU/16511/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 24 June 2019**

**Decision & Reasons Promulgated
On 05 July 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**OBO
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Malik, Counsel instructed by Calices Solicitors

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. His date of birth is 5 August 1971.
2. I have anonymised the Appellant in order to protect the identity of his children.
3. The Appellant claims to have come to the UK unlawfully in 1986. On 7 December 2010 he was sentenced to a period of twelve months' imprisonment having been convicted of an offence of dishonesty involving false documents which were used for the purpose of making an application for indefinite leave to remain. He pleaded guilty on the morning of the

trial. The sentencing comments which are in the Respondent's bundle indicate that the offence occurred in 2005. The Appellant approached solicitors to attempt to regularise his immigration status. The solicitors were corrupt and have since been convicted of offences involving providing false information for those seeking to remain in the UK. The sentencing judge stated as follow:-

"I have no doubt you knew precisely what you were entering into which was illegal arrangements to remain in this country it being impossible to regularise your position given how you arrived here in any other way. You therefore have accepted that you provided false documentation, namely false work certificates which led the Home Office to believe that not only have you arrived here legally but you have been here for some considerable time. That was untrue."

4. Following conviction, the Secretary of State made a deportation order on 5 September 2011. The Appellant is a foreign criminal. His deportation was deemed by the Secretary of State to be conducive to the public good (s.3(5) of the Immigration Act 1971) and a deportation order was made pursuant to s.5(1) of the 1971 Act. Pursuant to s.32(5) of the 2007 Act the Secretary of State must make a deportation order in respect of a foreign criminal unless there is an exception under s.33. The Appellant claimed that an exception applied because deportation would breach his rights under Article 8 ECHR. His appeal was dismissed by the First-tier Tribunal.
5. The Appellant remained in the UK in breach of a deportation order. He then made an application to remain here on human rights grounds which was effectively an application to revoke the deportation order. This was refused by the Secretary of State on 15 November 2017. His appeal was allowed by the First-tier Tribunal in a decision that was promulgated on 21 November 2019. The decision was set aside by a panel comprising the Honourable Mrs Justice Lang DBE and Upper Tribunal Judge McWilliam in a decision that was promulgated on 18 March 2019.

The error of law decision

6. The Upper Tribunal concluded as follows:-

"16. The structure of the Rules and the statutory framework is such that the public interest question has been decided within the sentencing thresholds. KO decided that Exception 2, like Exception 1 is self-contained. No account should be taken of the Appellant's criminality when considering whether deportation is unduly harsh. We do not accept Mr Malik's submission that the judge's assessment was autonomous and her reference to criminality went no further than to acknowledge the thresholds within the statutory regime. It is clear from a proper reading of the decision that when assessing unduly harsh in the context of the separation of the family the judge attached weight to the Appellant's criminality. Following KO, this is a material error.

17. Moreover, we are troubled by the conclusion of the FTT that the delay or failure to make arrangements for the Appellant's deportation affected the public interest in deportation. The

Secretary of State made a deportation order against the Appellant shortly after he was convicted of the trigger offence. This order was maintained on appeal. Thus, the Appellant decided to remain in the UK in breach of it. It is difficult to see how this could reduce the public interest in deportation. Whilst the Respondent relies on Patel [2013] UKSC 72 where the Supreme Court decided that there was no duty to issue removal directions at the same time as the decision to refuse leave, we accept Mr Malik's submission that the case is not on point because it concerned a removal decision and the right of appeal within the then statutory regime. However, we accept that there is no obligation on the Secretary of State to make arrangements to deport the Appellant. He decided to remain here unlawfully and in breach of a deportation order. The delay in making a deportation order is not a matter which is capable of reducing the weight to be attached to the public interest. He is, of course, entitled to rely upon the consequence of the delay, which is that his private and family life, and that of his children, has strengthened with time.

18. The judge attached weight to the Appellant's criminality when assessing unduly harsh which amounts to a material error. Furthermore, she found that there had been a delay or failure to act by the Respondent and that this decreased the public interest. This was not a finding that was open to her.
19. However, we do not accept the other criticisms of the FTT decision, made by the Secretary of State. In our view, the judge gave careful consideration to the evidence and made rational findings in respect of the family and the impact on the children, which were properly open to her on the basis of the evidence before her. What weight to attach to the evidence was a matter for her. In the Secretary of State's skeleton argument there is a specific challenge to the finding that the Appellant's son needs a male role model. It is asserted that this was not supported by the evidence. In our view it was open to the judge to make this finding when considering the deportation of the father of an eleven- year old boy. Therefore, we consider that the judge's findings on the evidence should be preserved when the appeal is re-heard.
20. On the basis of the judge's findings, which found that the Appellant's deportation would have a significant impact on the children, we do not accept the Secretary of State's submission that the impact of the Appellant's deportation on the family amounted to no more than the usual consequences of deportation and therefore it was not capable in law of meeting the "unduly harsh" test. In our view, that will be a matter for the Upper Tribunal to decide when the appeal is re-heard.
21. Therefore, we allow the appeal only on the basis of the errors of law set out above, at paragraphs 16 to 18. We set aside the decision of the FTT and adjourn the matter for a hearing in the UT in order for the decision to be remade, having had regard to the Practice Statement of the Senior President of Tribunals of 25 September 2012. The findings of the judge relating to the children are preserved. The task to be undertaken by the UT on

the next occasion is the assessment of “unduly harsh” in the context of separation of the family.

22. We make the following directions:-

- (1) Should the Appellant wish to rely on evidence that was not before the FTT an application should be made pursuant to Rule 15(2A) of the 2008 Procedure Rules no later than two weeks before the hearing.
- (2) The Appellant is to serve and file a consolidated bundle not later than two weeks before the substantive hearing.
- (3) Parties are to file and serve skeleton arguments not later than seven days before the substantive hearing.”

7. The Appellant and his wife, BO, have three children; EMO and EZO are the eldest children. Their dates of birth are respectively 20 October 2004 and 29 January 2007. They are British citizens. The youngest child is ESO. ESO’s date of birth is 21 January 2011. ESO and BO have leave to remain. All the children were born here in the UK.
8. The Upper Tribunal preserved findings that were made by the First-tier Tribunal (see [19] to [21] of the decision of the Upper Tribunal). The First-tier Tribunal Judge considered that the children had lived here all their lives and that they were in full-time education. The eldest child at that time was in year 9 and the judge found at [53] that this was a significant point in her education. The judge took into account that the children had not visited Nigeria and that they had “no meaningful relationship with any family members in Nigeria”. The judge concluded that it would be in the children’s best interests to remain here as part of a family unit in the UK. There was evidence of the wife’s employment and the judge found that the Appellant played “a significant role in caring for the children”. The judge concluded that it would be unduly harsh to expect the children to return to Nigeria. This was conceded by Mr Wilding representing the Secretary of State at the error of law hearing.

At the resumed hearing

9. At the start of the hearing Mr Malik asked for further time to consider the Secretary of State’s skeleton argument and the further evidence adduced by the Secretary of State pursuant to Rule 15(2A) of the 2008 Procedure Rules. He also wanted to make enquiries with his instructing solicitors and the Appellant about any further evidence. None had been served by the Appellant in response to the directions of the Upper Tribunal. I rose for fifteen minutes to give Mr Malik further time. The hearing was resumed. Mr Malik indicated that there was no further evidence to be relied upon by the Appellant and he was content for the matter to proceed by way of submissions only. The further evidence submitted by the Respondent related to the issue of delay. Mr Malik indicated that the Appellant did not rely on delay. The further evidence was therefore not material to my conclusions.

10. In the light of the findings of the Upper Tribunal when setting aside the decision it is necessary at this point in this decision to summarise the findings made by First-tier Tribunal Judge Swaney which I accept are the starting point for my decision. The salient findings are as follows:-

- “53. The appellant’s eldest daughter is in Year 9 at school. She may well have started her GCSEs and if she has not, she is likely to be making important decisions about which ones to take. It is reasonable to say that this, for her, is a significant point in her education. The appellant’s two eldest children are 14 and nearly 12 and have spent their whole lives in the United Kingdom. They have not visited Nigeria much less lived there in the past. I accept they have no meaningful relationship with any family members in Nigeria and to expect them to leave the United Kingdom to enter an entirely new education system, with a different curriculum, in a different country which they have never visited away from their friends, community and established support in my view would be unduly harsh.
54. I must also consider if it would be unduly harsh to expect the children to remain in the United Kingdom without their father. In doing so I have had regard to the public interest in deportation, to which I have given reduced weight for the reasons set out above. I have also had regard to the fact that the appellant is their main carer and the person to whom they turn if they have a problem (evidence of the appellant’s wife), that the absence of the appellant is likely to severely impact on his wife’s ability to sustain her employment given the increased childcare responsibilities that will fall on her. It is in the public interest for working families to remain working families.
55. The two eldest children have described clearly their attachment to their father and what his absence would mean to him and I place weight on their wishes. This is not a case where the appellant was separated from his family during a lengthy period of imprisonment. His eldest daughter was not quite six years old when he went to prison and his son was only three and a half. While they may remember their father’s absence, their father has been a constant presence for the majority of their lives and his absence was a relatively short one between August 2010 and March 2011 which included a period of immigration detention.
56. The appellant’s son is of an age where a male role model is very important and while it might be open to him to visit the appellant in Nigeria, or to maintain communication through other means, this is no substitute for the appellant’s active presence in his life. The prospect of the appellant’s children being able to visit him, certainly in the short to medium term in Nigeria is limited. This is because the appellant’s wife is on a limited income and, unless and until the appellant could find work in Nigeria, is likely to be the one who has to fund any travel. The reality therefore is that the only contact that is likely between the appellant and his children in the short to medium term is by telephone or other indirect means.”

The Legal Framework

11. This is an application to revoke a deportation order and the relevant Immigration Rules are set out at paragraph 390, 390A, and 391A¹. Sections 117A–D of the NIAA 2002 Act are material with specific reference to Section 117C(5)².
12. The considerations set out in the statute are reflected in the Immigration Rules³.

Application of the Legislation and the Immigration Rules

¹ 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

- (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
- (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

² **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 consideration 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).

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 –

13. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath (giving the judgment of the Supreme Court) analysed the exception, based on the deportee's relationship with a qualifying child, in Section 117C(5) NIAA 2002 and paragraph 399(a) IR. At [15], he explained that he started from the presumption that the provisions were intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 per Lord Hodge at [10]). He concluded that the exception was self-contained and so, in deciding whether or not it

-
- (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.

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.

117D Interpretation of this Part

- (1) In this Part -
 - "Article 8" means Article 8 of the European Convention on Human Rights;

applied, the decision maker should only consider the factors specified and disregard the degree of seriousness of the parental offending and other public interest considerations (at [20]-[23]).

14. Lord Carnwath gave guidance on the meaning of “unduly harsh” at [23]:

“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

“Qualifying child” means a person who is under the age of 18 and who –

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who –

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).

(2) In this Part, “foreign criminal” means a person –

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who –
 - (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under –

- (a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
- (b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
- (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –

- (a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
- (b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
- (c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
- (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.

³ A398 These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

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."

-
398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
 - (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
 - (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
399. This paragraph applies where paragraph 398 (b) or (c) applies if -
- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
 - (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.
- 399A. This paragraph applies where paragraph 398(b) or (c) applies if -
- (a) the person has been lawfully resident in the UK for most of his life; and
 - (b) he is socially and culturally integrated in the UK; and
 - (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

15. Lord Carnwath cited with approval the guidance given by the Upper Tribunal in MK (Sierra Leone) v SSHD [2015] UKUT 223:-

“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.”

16. In RA (S.117C: “Unduly harsh” seriousness of offence) Iraq [2019] UKUT 123 (IAC) the Upper Tribunal considered the test of unduly harsh following KO and decided that the approval by the Supreme Court of the test formulated by the Upper Tribunal in MK does not mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it. At paragraph 17 the Upper Tribunal said:

“17. As can be seen from paragraph 27 of KO (Nigeria), the test of ‘unduly harsh’ has a dual aspect. It is not enough for the outcome to be ‘severe’ or ‘bleak’. Proper effect must be given to the adverb ‘unduly’. The position is, therefore, significantly far removed from the test of ‘reasonableness’, as found in section 117B(6)(b).”

And the court decided that the way in which a court or Tribunal should approach Section 117 remains as set out in the judgment of Jackson LJ in NA (Pakistan) and Another v Secretary of State [2016] EWCA Civ 662 and the court said as follows:

“22. It is important to keep in mind that the test in section 117C(6) is extremely demanding. The fact that, at this point, a tribunal is required to engage in a wide-ranging proportionality exercise,

balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest, does not in any sense permit the tribunal to engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of section 117C. Not only must regard be had to the factors set out in section 117B, such as giving little weight to a relationship formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years."

17. In NA the Court of Appeal said as follows:-

"28. The next question which arises concerns the meaning of 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. The new para. 398 uses the same language as section 117C(6). It refers to 'very compelling circumstances, over and above those described in paragraphs 399 and 399A.' Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

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.

....

32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal,

must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

33. Although there is no ‘exceptionality’ requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

...

36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are ‘sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2’. If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in *MF (Nigeria)*), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.”

Submissions

18. Mr Malik made submissions in the context of his skeleton argument. He started by stressing that certain findings had been preserved by the Upper Tribunal.
19. The issue before the Upper Tribunal is whether it would be unduly harsh for the children to remain in the UK without the Appellant. It was conceded by the Presenting Officer on the last occasion that it would be unduly harsh for them to relocate with the Appellant to Nigeria.
20. Mr Malik drew my attention to four findings of the First-tier Tribunal as preserved by the Upper Tribunal which he submitted cumulatively amounted to undue harshness for the purposes of Section 117C(5). He relied on paragraph 54 of the First-tier Tribunal decision. Those factors are as follows:
1. The Appellant was the children’s main carer and the person to whom they turn to if they have a problem.
 2. The Appellant’s wife is a part-time student and she is employed on a part-time basis. In the absence of the Appellant her ability to sustain employment given increased childcare responsibilities would be severely impacted.
 3. The Appellant’s son is at an age where a male role model is very important.
 4. The prospect of the Appellant’s children being able to visit him “certainly in the short to medium term in Nigeria is limited”.

Mr Malik accepted that the first three factors relied upon are not sufficient, individually or cumulatively to meet the high test. However, in his view, what tips it over enabling the Appellant to meet the elevated threshold is the fourth factor. The Appellant's wife is on a limited income and the judge found that the Appellant was likely to be the one who would have to fund travel and therefore he would have to find work in Nigeria first. Thus, the judge concluded that in reality the only contact that is likely between the Appellant and his children "in the short to medium term" is by telephone or other indirect means. The final factor relied upon according to Mr Malik is a powerful finding in the Appellant's favour when assessing unduly harsh. He stated further that he accepted that the evidence does not establish unduly harsh by a significant margin but that it may cross the threshold.

21. I heard submissions from Mr Tufan. He relied on KO and RA and his skeleton argument. In his view nothing out of the ordinary has been identified which would amount to unduly harsh or very compelling circumstances over and above in accordance with s.117B(6) bringing my attention to the fact that Mr Malik had not made submissions under s.117B(6).
22. Mr Malik responded. The Appellant not being able to have meaningful contact with his children is not a "natural consequences of deportation" rather it would amount to bleak and severe consequences for the children.

Conclusions

23. The problem with the Appellant's case is that factors going beyond those that normally follow a deportation when a family is separated have not been properly identified. He has chosen to rely on the evidence that was before the First-tier Tribunal and not to submit further evidence which may have assisted his case.
24. The judge found that there would likely be a delay in the children being able to visit Nigeria. I do not accept that this factor, together with the other three factors (which unarguably, as conceded by Mr Malik, are not individually or together capable of meeting the high threshold) would enable the Appellant to meet the elevated test. There is nothing preventing the Appellant from seeking employment in Nigeria on his return. There is no evidence that the Appellant's wife would have to give up her employment and/or studies here. The children are of school age. Whilst I accept that she will be faced with difficulties attempting to juggle childcare and other responsibilities, I do not find that the Appellant's deportation would prevent her from working. The judge's findings as to what amounts to the short to medium term is not specified. The Appellant has chosen not to provide further evidence on the issue of employment opportunities for him in Nigeria. It is not reasonable to draw an inference from the judge's conclusions that there would be a significant delay in the Appellant's children being able to visit him in Nigeria which would establish that the circumstances reached the high threshold. I accept that

the Appellant's wife may not earn very much and that there may some delay in the Appellant finding employment in Nigeria, but I do not accept this this, together with the other three factors relied on by the Appellant reach the elevated threshold.

25. The judge found that the Appellant was the children's main carer. Whilst not departing from this finding, it must be viewed in context. The Appellant was not able to work at the date of the decision of the First-tier Tribunal because of his status here. He may at present spend more time looking after the children than his wife does, however, the children have two parents who are both able and willing to care for them. There is no evidence that the Appellant's wife's ability to care for the children will be materially compromised by the absence of the Appellant. It is clear that separation of the family will be tragic and have adverse effects on the children who will be devastated. They probably do not remember his incarceration. Whilst it is very much in their best interests to remain here in the UK with both parents, the Appellant has failed to identify factors of meeting the elevated hurdle.
26. Mr Malik did not rely on s.117C(6) of the 2002 Act. There is no evidence before me that the Appellant could satisfy any of the limbs s.117 (4). He has not been lawfully resident here most of his life. There is no evidence that there would be very significant obstacles to integration. He did not advance a case on the basis that he is socially and culturally integrated and the evidence would not support a finding in his favour. Very compelling circumstances have not been properly identified that would be capable of amounting to very compelling circumstances, notwithstanding that the Appellant is not a serious offender. In any event, in this case the Appellant would have to establish "exceptional circumstances" in the context of para 390A and the evidence on which he has chosen to rely falls well short of this.
27. The Appellant's appeal is dismissed under Article 8.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 03 July 2019

Upper Tribunal Judge McWilliam