



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/07104/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11<sup>th</sup> July 2019

Decision & Reasons Promulgated  
On 14<sup>th</sup> August 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR C S  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Emezie instructed by Dylan Conrad Kreolle Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The appellant appealed with permission against the decision of First-tier Tribunal Judge Malik who dismissed the appeal against a refusal of a protection and human rights claim dated 17<sup>th</sup> May 2018. The respondent had refused to revoke a deportation order by virtue of Section 5(2) of the Immigration Act 1971.

2. The appellant a male national of Nigeria born on 25<sup>th</sup> June 1980 claims to have entered the UK in 2001 and came to the attention of the authorities in October 2004 when he was arrested on suspicion of driving offences. He claimed asylum but thereafter was listed as an absconder and his asylum claim was refused on 26<sup>th</sup> July 2005. No appeal was filed against that decision and he next came to light on 1<sup>st</sup> December 2009 during an enforcement visit.
3. The appellant was convicted on 9<sup>th</sup> December 2009 at Manchester Crown Court for using false instruments/producing/furnishing any false documents/information and possesses/control a false/improperly obtained ID card which was released to another or apparatus etc. for making ID cards. The appellant was sentenced to fourteen months' imprisonment on 21<sup>st</sup> December 2009. The sentencing judge recommended he be deported. The appellant was served with a signed deportation order on 17<sup>th</sup> June 2010 and he appealed. On 13<sup>th</sup> September 2010 he applied for a certificate of approval to marry an EEA national. On 12<sup>th</sup> October 2010 his deportation appeal was dismissed; he became appeal rights exhausted on 16<sup>th</sup> May 2011.
4. On 12<sup>th</sup> August 2011 he was again listed as an absconder and next came to the attention of the authorities where encountered by the police on 10<sup>th</sup> January 2014. Further submissions to revoke his deportation order were refused on 11<sup>th</sup> March 2014 and his appeal against that decision was dismissed following an application for permission to appeal to the Court of Appeal whereupon the appellant became appeal rights exhausted on 12<sup>th</sup> July 2016. He was again detained on 20<sup>th</sup> March 2017 with a view to removal and the appellant filed further submissions supported by an independent social worker's report but those submissions were rejected as a fresh claim and permission to seek judicial review refused on 2<sup>nd</sup> June 2017. Further submissions were again rejected on 8<sup>th</sup> August 2017 and the appellant was detained on 15<sup>th</sup> August 2017 pending removal. Further judicial review proceedings were compromised with a consent order signed on 29<sup>th</sup> March 2018. On 17<sup>th</sup> May 2018 the appellant's protection and human rights claim was refused.
5. In the appeal before First-tier Tribunal Judge Malik the appellant claimed that he had fled Nigeria following an attack on him by the Buccaneers University Cult.
6. The appellant asserted he was in a relationship with a Belgian national from 2002 to 2011 and an application for a certificate to marry was granted in March 2011 but his then partner ended the relationship in April 2011. He and his current partner started to live together in May 2011 and they became engaged in December 2013. The appellant is not allowed to work. His partner a British citizen suffers from mental health issues and his two children both of whom are British citizens were born on 15<sup>th</sup> August 2012 and 31<sup>st</sup> August 2014 and are now 6 and 4 respectively. The appellant maintained that he had lived in the UK for seventeen years, formed strong ties with his immediate and extended family and friends. He had lost connection with any ties in Nigeria. He

asserted his partner would not be able to cope with her mental health situation and it would be difficult for her to work and care for the children and the children would suffer if he were deported. The judge recorded that the partner worked as an auxiliary nurse and was in the second year of her four-year nursing course at university.

7. The oral evidence before Judge Malik was that the appellant's partner would not be able to cope because of her anxiety and depression and she relied on the appellant to look after her children. During periods of illness she was not able to look after them and was scared they would be removed from her. Some days she could not get out of bed. She has a cousin in Bristol who could not assist. The appellant was said to be close to the children. She could not rely on the NHS or government support and thought her mental health would deteriorate. Not least she had suicidal thoughts. She asserted in oral evidence she could not continue with her education if the appellant were deported as she would not get support whilst at university to look after the children. When the appellant was in detention she had to phone in sick and had been invited to a disciplinary hearing. Her absence was due to depression.
8. The First-tier Tribunal Judge rejected the appellant's claim for asylum not least because there was no reason why the appellant could not avail himself of the assistance of the police in Nigeria should it be required and bearing in mind he did not claim asylum on his arrival in the UK despite claiming to have been in fear at that point his account was rejected as being untrue. His fear of FGM on the children was also rejected not least because the appellant and his partner were clearly opposed to it. Further there was nothing before judge to suggest that the appellant would be specifically at risk of kidnap or of any interest to the Boko Haram and in any event, he would be able to relocate to another part of the country.
9. The judge applying *Devaseelan v SSHD* [2002] UKIAT 00702 considered in the First-tier Tribunal decision of 15<sup>th</sup> April 2015 which had been upheld by the Upper Tribunal noting paragraphs 31 and 32 of the UT decision:

*"42. The decision 15 April 2015, (which was upheld by the UT) found, at paragraphs 31 and 32, "The factors which weigh in favour of the deportation order remaining in force include those which we now identify. The appellant has a poor immigration history, putting aside his criminal conviction. He came here illegally 2001 and made no attempt to regularise his status until 2004 when he made an unsuccessful claim for asylum. Following the unsuccessful appeal against the deportation order the appellant failed to attend a bail renewal hearing on 24<sup>th</sup> May 2011 which resulted in forfeiture of £2,500 worth of reconnaissance money and the appellant made no attempt to make contact with the Home Office after that until he was eventually encountered by the police in January 2014. He has therefore shown a propensity to behave illegally. It should also be noted that, just before the expiry of his appeal rights, the appellant*

*made an application to marry someone who is not his present partner. The conclusion we draw from this immigration history is that the appellant has had little or no regard for the immigration rules of this country and was even prepared to attempt to enter into marriage as a means of securing his position in the event that his deportation appeal failed. This must also be seen against the background of the initial failure of his asylum claim. Further, we regard the appellant's criminal offending as serious because we see this also, as an attempt to circumvent the laws of this country by obtaining identity documents that might have enabled him to work even though he had no entitlement to do so. He was justifiably sentenced to fourteen months' imprisonment with the sentencing judge saying that he would have recommended deportation if it had been relevant to do so. As the sentencing judge stated in relation to the offending. "It seems to me that this case signifies a determined attempt to evade the immigration requirements and involves your being concerned with others who are professionally involved in people trafficking""."*

10. Judge Malik identified that the deportation of foreign criminals was in the public interest and that the appellant's conviction related to a serious criminal offence and that he had a very poor immigration history. Having set out Section 117C of the Nationality, Immigration and Asylum Act the judge noted that unless Exception 1 or 2 applied the public interest required his deportation. His serious offence indicated that he was not socially and culturally integrated and there being no significant obstacles to his integration in Nigeria found where he had lived for many years such that he would be aware of the language, customs and culture the judge specifically found that Exception 1 did not apply. That was not challenged.
11. The judge found at paragraph 42 that it would be unduly harsh for the appellant's partner and children to remove to Nigeria with him given they were British nationals and had never been to Nigeria. As British citizens unless the appellant's partner and children voluntarily chose to relocate, they could not be forced to do so.
12. The judge with respect to the partner specifically found at paragraph 44 that she entered into the relationship with him knowing he had immigration "issues" and "neither she nor he could have had any expectation whatsoever that they could continue their relationship in the UK. With reference to the private life the appellant had acquired in the UK this was at a time when he had been here illegally, he had a very poor immigration history; had sought to circumvent the Immigration Rules; there were periods when he had evaded the authorities and failed to report.
13. At paragraph 45 Judge Malik specifically found that the best interests of the children and the mental health issues of the partner were addressed in 15<sup>th</sup> April 2015 determination which concluded

“46. ... In relation to the family, the nature of that relationship is as set out in detail at paragraph 14 and at paragraph 35. The panel recognised that the appellant’s youngest child at 7 months may not have formed a meaningful relationship with the appellant but that his daughter was very considerably disturbed by his absence during detention. It is also recognised that the appellant’s partner found it difficult to maintain her employment without the appellant present to care for the children. However, it was noted that she was able to care for herself during the appellant’s absence in detention. It cannot be argued therefore that the Tribunal were ignorant of the difficulties which his absence could bring to the family unit. It was also noted that the partner and the children should not be isolated in the United Kingdom, given that most of the appellant’s family and other family members are also resident in the United Kingdom. Indeed, his partner also has a cousin and that again the wider family relationships were considered at paragraphs 17. The effect upon the partner of the absence of the appellant during his detention and the effect upon the eldest child was also set out in paragraph 19, recording the evidence of Ms... set out at paragraphs 19, 20 and 21 and 22. The Tribunal were therefore fully appraised of the difficulties which face the family when the appellant was absent in detention and no doubt the difficulties that would be faced where he to be deported. The Tribunal recognised at paragraph 37 that there would be a harsh effect upon the partner and children upon removal” and “Overall therefore I do not find there to be any error of law, let alone a material error. In those circumstances the appeal is dismissed. The decision of the First-tier Tribunal shall stand namely that the deportation order be not revoked. The appeal on human rights is also dismissed.””

14. The judge identified that a previous determination was not binding on the second Tribunal the first decision was the starting point and facts since that date could be considered and there had been further evidence of reports and addendum reports from an independent social worker of 4<sup>th</sup> April 2017, 16<sup>th</sup> May 2017 and the second addendum report of 21<sup>st</sup> August 2017 and the third addendum report of 10<sup>th</sup> February 2018. The judge made the following findings from paragraphs 48 to 59

“48. Notwithstanding *Devaseelan*, since the decision of 15 April 2015, there has been further evidence of reports and addendum reports from an independent social worker of 4 April 2017, 16 May 2017, the second addendum report of 21 August 2017 and third addendum report of 10 February 2018. Given the dates of these reports they were not available to the FtT in April 2015. The third addendum report states at paragraph 2.5 “Charles advised that his family is here in Britain, his mother is here, his siblings are here, and his children spend time with their relatives. They all try to get together in school holidays and at family parties. When all of the cousins are together, they like to go to the park, they go shopping and they all like to play

*on the trampoline and play station together. Charles argued that it would be difficult for ..... to continue this closeness with his family should he not be here, they all lived in London and..... life is in Wigan with her work, the children's schools and their social activities. Furthermore, the children are settled here, their friends are here, their schools are here. For Charles it is so hard for them as a family, shouldn't their family be entitled to a family life where he can support and financially provide for his family. Charles further argued that for him his children and partner have been impacted by this for too long". [sic].*

49. *The report also states that when the appellant was in detention his partner had to take time off work as annual leave and phone in sick so she could care for the children as there was no-one else. The appellant's partner is recorded as stating at paragraph 3.3 that her "...anxiety is all over the place" and even though the appellant is with them, there is always the worry he will be taken at any time. The social worker had also spoken to the head teacher for the appellant's elder child's school, who said the child was generally fine in school and had settled down. The only concern was that the child was late on Thursdays and Fridays which impacted on their learning, emotional well-being and socially.*
50. *The independent social worker concluded "The analysis from the original report and the two addendum reports still remain relevant and should be read in conjunction with this third Addendum report. It is my belief as an Independent Social Worker with a background in Children and Families Social Work that Charles has a strong relationship and emotional bond with his children as evidenced within the original report, the first and second addendum report and this third Addendum report. The signs of distress that ..... was showing when her father was detained stopped both at home and at a school when Charles was at home with them ..... no longer appears to be seeking out physical contact in her father's absence .....has seen the specialist in relation to her behaviours when her father is away and they are looking in ADHD, attachment and emotional well being. These assessment are on going. As stated in the original report, first and second Addendum report this third Addendum report, ..... mental health is still suffering as a result of what is happening with Charles and his current immigration status ..... is still receiving support through the Mental-Health Assessment Team and is still awaiting a referral for coping mechanisms. Although Charles is back home there is a sense of 'limbo'. .....is still anxious about what will happen to Charles and the impact on him, her and the children should he be deported..... This exacerbates her anxiety and has led to her having panic attacks, on one occasion her panic attacks have prevented her from attending with the Mental Health team, this is a time when she would most benefit from attending these appointments. Added to this is the impact on*

*....attendance at work which has now resulted in a meeting at work in relation to her attendance. This will also worsen ..... anxieties especially should Charles be detained again as ..... will be left again with no one to care for the children which will again impact on her attendance record at work and her anxiety levels" and "Should Charles be deported to Nigeria it is the professional opinion of the author of this report that this will have a significant detrimental emotional and physical impact on his children.....and.....and therefore it is in the best interests of his children that Charles S remains in this country with his children were they can enjoy their right to private family life with their father" [sic]*

51. *It is unclear to me as to whether the patient assessment for the appellant's partner of 16 July 2014 was considered previously by the Tribunal, but I note it speaks of her having thoughts of self harm/thinking of taking an overdose due to stresses in her personal life. At that time she was pregnant with her second child and the appellant was in a deportation centre. She spoke of having a good circle of friends, not all of whom were aware of her personal circumstances. She had been dealing with her problems by herself and had become distressed. She had been supported by one of her friends in Devon. She denied any plans or intent at self harm at the time. It was the impression of the author that she was suffering from generalised anxiety disorder secondary to her personal circumstances. I have also considered the Care Plan for the appellant's partner, the risk screening document, again from 2014, which again speaks of her condition related to the appellant being in detention at the time, suicidal ideation and severe depressive symptoms and that she would be referred to children's services on an urgent basis for assessment and intensive support with her child and throughout her pregnancy. It is recorded she denied any intention of ending her life and was happy with the support offered by the mental-health assessment team.*
52. *I also note that the letter of 26 August 2016 from the home treatment team states the appellant's partner had been discharged due to the care being completed, with the opportunity, should further input be required, to access the assessment team. I also note that a letter of 7 November 2016 records "My impression is that this lady has suffered from generalised anxiety disorder due to her personal issues and problems, however there have been no problems with regards to herself and no evidence of serious mental health issues ..... symptoms would recover while all the immigration problems are settled and she continues to live with her partner in the home. This has been discussed with ..... and she does not require any support from the home treatment team. She is happy to be discharged". [sic]*
53. *The letter of 1 April 2017 states the appellant's partner ".....describes feeling very hopeless regarding the situation and on Thursday, felt there was no way out of the situation and took a small overdose of 4*

*x Sertraline 100 mgs whilst her Mum was caring for the children. States, in the heat of the moment, perceived taking 4 tablets would end her life and that she would not have to "deal" with the loss of her partner. After talking the overdose, .... describes feeling immediately remorseful and nauseous and reported feeling "foolish" that she could have potentially put her life at risk when she needs to be there for her children.....advises she arranged an appointment with GP the following day who referred to MHAT.....Denies any current suicidal ideation or self harm thoughts and identified her children as a protective factor however also recognises there are unpredictable risks to self due to.....difficult personal circumstances and situation beyond her control. Has previously been referred to home treatment due to associated risk however does not feel this level of support necessary at present and would like to address long term coping mechanisms" and ".....does not present with significant risks to self at the time of assessment and she denies any suicidal ideation, plans or intent and identifies her children as strong protective factor. ....recognises to have poor coping mechanisms and does express feelings of being hopeless with suicidal ideation at times of increased psychological stressors regarding her partner's immigration status ..... is aware this situation is out of her control and is expressing a keenness to engage with psychological therapies to aid her to develop positive coping mechanisms. There are no identified risk to others. No current concerns of neglect or vulnerability".*

54. *The letter of 20 April 2017 notes the appellant's partner describing "...worsening symptoms of depression with increased anxiety and feeling of panic. She is not sleeping due to ruminative and racing thoughts and experienced increased physical symptoms of anxiety in the form of palpitations, nausea, breathlessness and nausea. Describe thoughts of feeling she cannot "cope" however asserts she has no suicidal ideation or self harm thoughts and continues to identify her children as strong protective factor. Responds to "no" to questions on Colombian suicide severity rating scale".*
55. *A letter of 9 May 2017 speaks of the appellant's partner struggling in balancing her working life and being a single mother of two young children; she had to pay a childminder to look after the children in the evening where she would have previously substituted her income with bank shifts which she was no longer able to do. The letter states "Discussed arranging counselling but reports this has not been beneficial in the past. Discussed psychological therapy and information provided".*
56. *The GP letter of 20 September 2017 confirms the appellant's partner has a history of bipolar disorder and has been on medication for a considerable period. She attended surgery on 7 September with anxiety and depression and was taking major tranquillizers, mood stabilizers and antidepressants and was given further tranquillizers.*



*She was reviewed on 15 September 2017 and remained in a very elevated anxiety state and low mood secondary to her personal situation. The doctor states "You asked me to take a view about how she would cope if Mr S was removed from the country and my response would be that she would not cope but would deteriorate in mental health with a higher risk of requiring institutional care and the children therefore being looked after by social services".*

57. *A letter of 26 September 2017 records the appellant's partner was referred to the primary care psychological service. A letter of 6 December 2017 states "..... presented with symptoms of depression and anxiety at the assessment. The trigger to these symptoms appear to be an ongoing situation involving her partner in which he faces possible deportation from the UK. Therefore a lot of how ..... is feeling is a normal reaction given the severity of the situation. ....attended her assessment and we discussed behavioural activation as an intervention to help with her symptoms of low mood. She was keen to engage, but did not attend her next follow-up due to illness. This appointment was rearranged and she then attended one follow up a week later. She was visibly upset at this appointment and had not managed to do any of the small goals she has set herself. She failed to attend her next follow up appointment and did not give any prior warning of non-attendance. A reminder text was sent to ask her to get in touch but when she failed to do so within 24 hours, she was discharged from the service as per policy. Risk - ..... reports frequent thoughts of wanting to end her life, but no current plan or intent to do so. She has the information for crisis services should she require it and she states that her children are a protective factor for her. Her case will now be closed to our service but she can self refer at any time in the future should it be required."*
58. *A letter of 17 January 2018 speaks of the appellant's partner again being referred to primary care psychological service, to be seen on 'Step 2 Wellbeing Course'.*
59. *I have also considered the correspondence from the appellant's elder child's school regarding progress and attendance together with a letter from the appellant's partner's employer regarding a formal attendance review. I also note there is a letter from the hospital regarding the appellant's child of 17 January 2018 which states "at this point in time there is no evidence that ..... is presenting with ADHD difficulties within the home or school setting .....will be followed up as planned."*
- ...
61. *The issue before me now is whether exception 2 applies and whether the effect of the appellant's deportation would be unduly harsh and disproportionate in the context of Article 8 on the appellant, his partner and their children. Whilst the appellant's partner's GP's letter of 20 September 2017 speaks of her condition deteriorating with*

*a high risk of requiring institutional care, should he be deported, the letter of 26 September 2017 does not present such a bleak outlook and the GP letter falls short of psychiatric report. Whilst it was submitted the appellant's children may go into care if his partner was unable to cope, and accepting during his absence, whilst in detention, her condition appears to have deteriorated, nonetheless she has accessed mental-health services, medication and support from her GP/counselling; the children have not been taken into care during the periods of the appellant's absence and it appears his partner continued to work as a auxiliary nurse, study and care for their children, albeit her mental health also suffered due to the uncertainty around the appellant's immigration status and her ability to cope without him. Yet there is no reasons to assume she would be unable to continue to access the services she requires going forward and also seek help in caring for the children if need be.*

62. *I accept the appellant's removal will impact greatly on his partner and children, given the findings in the independent social worker's reports, which indicate they all have a close bond and loving relationship – and given the appellant is the main care giver for the children when his partner is at work/university. I also accept during periods of the appellant's detention, his children and partner were emotionally affected, as set out in the various documentary evidence before me. His removal now would therefore have a similar impact on them and I do not underestimate the emotional and practical upheaval the appellant's partner will encounter in balancing her work and studies and having to care for her two children, together with managing her own wellbeing. Yet as the children are both in education, there is no reason to assume she could not access childcare, after school provision, assistance from social services, friends and family, the church or reduce/adjust her work and study commitments accordingly.*
63. *I accept the appellant's absence from the daily lives of his partner and children, if deported, will again impact on them all and cause distress, to a greater extent; but there is no reason to assume, in due course, his partner and children could not visit him in Nigeria. There is also no reasons as to why support from the school, social services and/or the NHS could not be accessed for the children if required. Consequently whilst I accept the effect of the respondent's decision is harsh on all the parties, including the appellant, I do not find it amounts to 'unduly harsh', nor compelling or exceptional circumstances, when balancing the pursuit of the legitimate aim, the protection of rights and freedoms of others in the decision to deport and the public interest in deportation. In having regard to the best interests of the children, I bear in mind their best interests are "a primary consideration", not a "the paramount consideration" and whilst I accept the appellant's removal will negatively impact on*

*them, it is an unfortunate by-product of the appellant's offending that he and his children will be separated."*

### **Application for Permission to Appeal**

15. It was submitted in the grounds that the conclusions reached by the judge was unsustainable in the light of the findings made at paragraphs 62 and 63 and undue hardship was a question of fact which the judge failed to attach significant weight to the report of the independent social worker.
16. It was arguable that the judge misdirected herself in law in that she conflated the concept of undue hardship with the public interest element of Section 117C. The judge found at paragraph 63

*'Consequently whilst I accept the effect of the respondent's decision is harsh on all parties including the appellant, I do not find it amounts to "unduly", or exceptional circumstances when balancing the pursuit of the legitimate aim, the protection of rights and freedom of others in the decision to deport and the public interest in deportation'.*

It was averred that the judge was wrong in that the public interest element was not a factor to be taken into account in the assessment of the question of whether it would be unduly harsh.

17. Permission to appeal was granted by Upper Tribunal Judge Bruce, solely on the ground that it was arguable that the approach to unduly harsh, was contrary to that endorsed by the Supreme Court in **KO (Nigeria) [2018] UKSC 53**.

### **The hearing**

18. At the hearing before me Mr Clarke conceded that there was indeed an error of law in the decision but noted that it was not the findings of the judge which had been challenged but the assessment of those findings.
19. Mr Clarke submitted that in fact the concept of unduly harsh as indicated in **KO** at paragraph 14 was a threshold test and this was spelled out at paragraphs 23 and 27 of **KO**. The judge did attach significant weight to the report of the independent social worker and indeed set much of it out. The effect of the deportation on the children was not underestimated. That the partner had accessed mental health facilities and that the judge found at paragraph 61, she would be able to continue to access those service and also seek help in caring for the children was not challenged. The partner had coped before when the appellant was detained. The test was not met. Mr Clarke took me through the decision pointing out that the judge had taken into account the new evidence which was relevant and which identified the closeness of the children to their extended family in the UK [48], the children attended and continued to attend school [49] and that the partner received assistance with her mental health [50]. The partner in August 2016 required no treatment [52].

20. Mr Emezie confirmed that there was no further evidence and the overall picture was given in the report. The appellant's partner was bipolar, and the family were likely to be destitute if they went to Nigeria.
21. In the light of the evidence and findings of the judge, Mr Emezie submitted that the judge should have found it to be unduly harsh for the appellant to be deported. The Secretary of State accepted that it would be unduly harsh for the children and family to go to Nigeria. The conviction was a long time ago and his removal was not proportionate.

### Analysis

22. Mr Clarke submitted that the findings at 48 to 56 were not challenged and I agree.
23. The judge, however, made a material error of law by directly applying *MM (Uganda)* [2016] Civ 617 (the reference given is to 450 but that cannot be located and I presume she meant 617) and, she erred in law by directing herself that the more pressing the public interest in removal the harder it would be to show that the effect on his child or partner would be unduly harsh. The focus at this stage should however be on the child alone; *KO (Nigeria)* [2018] UKSC 53 confirmed at paragraph 32

*'Once one accepts, as the Department did at that stage (rightly in my view), that the issue of "reasonableness" under section 117B(6) is focussed on the position of the child, it would be odd to find a different approach in section 117C(5) at least without a much clearer indication of what is intended than one finds in section 117C(2).'*

24. I thus set aside the *conclusion* of the First-tier Tribunal and remake the decision. Much of the evidence is set out in the determination and I do not set aside the findings which are untainted by the misdirection. I preserve the general findings *prior to* paragraphs 62 and 63.
25. Section 117C of the Nationality, Immigration and Asylum Act 2002 sets out '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.'*

26. Paragraphs 398 and 399 of the Immigration Rules sets out the provisions with regard deportation and the exceptions under paragraph 398 as follows:

*'398. Where a person claims that their deportation would be contrary to the United Kingdom's obligations under article 8 of the [ECHR], and*

*(a) the deportation of the person from the United Kingdom 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 United Kingdom is conducive to the public good and 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 United Kingdom 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 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.'*

27. If an appellant convicted of an offence which has attracted a prison sentence of over 12 months but under 4 years, cannot not meet an exception under the rules, he would have to show 'very compelling' circumstances to avert deportation. I accept that the Immigration Rules and the statutory test under Section 117C should be read consistently.
28. There is no doubt that the appellant is a foreign criminal because for the purposes of Section 117D(2) because he has been convicted in the United Kingdom of an offence and has been sentenced to a period of imprisonment of at least twelve months.
29. The single issue in this appeal was the one of split of the family. The partner was always aware of the appellant's immigration status and indeed he had never had immigration status.
30. In accordance with Section 117B(4)(b) little weight should be given to 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. There is no doubt that the appellant was and has always been in the UK unlawfully. The appellant did not have lawful status when he formed a relationship and having met the appellant in 2007 and their relationship developing in May 2011, the partner must have known of the status of the appellant indeed he was only recently convicted. Exception 399(b) cannot apply. At the very least his immigration status was precarious when the relationship was formed.
31. I have nonetheless set out the conclusions in relation to the position of the partner. These have a bearing on the position of the children.
32. It is accepted that deportation may have a detrimental effect on family life but nonetheless may remain proportionate even though the family may well be

broken up because of the appellant's bad behaviour but that is the consequence of deportation.

33. That approach has been recently reiterated in *PJ (Jamaica)* [2019] EWCA Civ 1213 which identified that the issue was whether there was evidence on which it was properly open to the judge to find that deportation of the appellant would result for the partner and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation. As explained at paragraph 39 by Holroyde LJ

*'I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported'.*

34. The Court of Appeal also accepted the submission on behalf of the Secretary of State that the passage of time since the relevant offences 'could not be a material consideration: the effect of *KO (Nigeria)* is that the seriousness of the offending is not a relevant consideration at this stage, and it must follow that the fact that the relevant offending was some years ago cannot assist the person facing deportation'.
35. The real question is whether the deportation will have an unduly harsh effect on the children. It is accepted by the Secretary of State that the children would not be expected to relocate to Nigeria.
36. The best interests of the children are a primary consideration and must be that they remain in the United Kingdom and with both parents. There has been a detailed analysis of the independent social worker's report and I have carefully read all three reports, the last being given on 10<sup>th</sup> February 2018. As Mr Clarke pointed out the extended family is in Britain and the grandmother and aunts and uncles are here, and the children spend time with them. The social worker recorded that the cousins like to go to the park together. They go shopping and they all play on the trampoline and PlayStation together. The children remain at school and are occupied with their social activities. It was noted in the Secretary of State's refusal letter that in fact the children started to be late for school after the appellant was released from detention. It was noted that the children are settled, had friends here and school here. Although assessments were recorded as being undertaken on the older child no such final reports were filed. The children will be upset by the removal of their father but as cited

above that is the nature, sadly, of deportation. Otherwise their lives will continue as before.

37. I accept that the children's mother suffers from a generalised anxiety disorder which was secondary to her personal circumstances which would affect the children but nonetheless the report of November 2016 from the home treatment team referred to the appellant's partner having been discharged and that although the partner suffered from generalised anxiety disorder due to her personal issues and problems

*"However, there had been no problems with regards to herself and no evidence of serious mental health issues ... symptoms would recover while all the immigration problems are settled and she continues to live with her partner in the home. This has been discussed with ... and she does not require any support from the home treatment team. She is happy to be discharged".*

The second letter of 1<sup>st</sup> April 2017 confirmed that the appellant's partner denied any current suicidal ideation or self-harm thoughts and identified her children as a protective factor.

38. A further letter of 20<sup>th</sup> April noted she had worsening symptoms with depression.
39. The appellant's partner has struggled with balancing her working life and being a single mother of two young children but she does, on the evidence (as I state no updated evidence was put before me), have access to a child minder to look after the children and a challenged income does not constitute unduly harsh circumstances.
40. There is no doubt that the letters of 26<sup>th</sup> September 2017 confirmed that the appellant's partner presented with symptoms of depression and anxiety and again on 17<sup>th</sup> January 2018 she was referred to the Primary Care Psychological Service to be seen on the Step 2 Wellbeing Course.
41. Against the background of the medical evidence which has been set out in full above the partner has continued to work part-time throughout as an auxiliary nurse at a hospital and at the same time has embarked on a four year part-time degree course at university which she attended twice a week. She passed the modules of her foundation degree and was due to start again in September 2018. There has been no evidence to the effect that the partner's mental health has worsened or that she has ceased working or she has ceased her part-time degree course. I realise that the 2015 First-tier Tribunal decision was taken prior to the promulgation of **KO** but even if the effect of the appellant's offending should not impact on the assessment of whether the departure of the appellant would be unduly harsh on the partner I do not on the evidence find that it would be so. The evidence was that there was an extended family to help at the very least with the emotional support of the partner. She works part-time and the children are either at school or nursery school. She has the



support of the NHS and can access psychological treatment. Not least the partner did cope during the appellant's detention in 2017 albeit there may have been disciplinary proceedings.

42. It would appear that the partner's mental health difficulties thus persist whether the appellant is present or not and as I state I have no further evidence before me of the current psychological state of the appellant's partner.
43. What is clear is that, to her credit, she has managed to continue to look after the children, ensure that they get to school and that she has retained her job despite there being a letter from the appellant's partner's employer regarding a formal attendance review.
44. There was a letter from the hospital regarding the appellant's child of 17<sup>th</sup> January 2018 which confirmed that there was no evidence that the child was presenting with ADHD difficulties in the home or school setting. There were no special educational needs, assessments or reports before me.
45. It is not in doubt that the partner and the children given the findings in the independent social worker's reports indicate that they have a close family relationship and that the appellant attends to the children when his partner is at work or at university or that there was an emotional impact when the appellant was detained. The fact that the appellant's partner might have to seek assistance from Social Services, family or friends or reduce or adjust her work and study commitments is not something which could necessarily be described as unduly harsh. The children have never been taken into care during the appellant's absence and there are services that she may wish to access should she wish to do so both for herself and for the children that is from Social Services or the NHS and indeed the appellant's partner has made good use of the services of her GP and the mental health services. It is an overall and evaluative assessment that needs to be undertaken and it may be that the deportation of the appellant is uncomfortable, inconvenient or undesirable or difficult but it does not in my view reach the elevated threshold of harsh, let alone unduly harsh which raises an already elevated standard still higher.
46. Having found that the appellant does not fulfil the exception in Section 117C, or Paragraph 399, I have looked at the circumstances in relation to the Exceptions 1 and 2 of paragraph 399 of the Immigration Rules in conjunction with other factors relevant to the application of Article 8. Despite the contents of the independent social worker's report and the letters from St Mary and St John's Catholic Primary School dated 2<sup>nd</sup> February 2018, the letter from the partner's employer dated 5<sup>th</sup> February 2018 and the medical evidence nothing in those documents demonstrates that there are very compelling circumstances surrounding his family life in the UK to outweigh the public interest in his deportation.

47. The appellant does have a poor immigration history. He entered the UK illegally in 2001, did not come to the attention of the authorities where he was arrested in 2004, claimed asylum but promptly absconded and was only encountered again when he was arrested in December 2009 whereupon he was convicted and imprisoned. This appellant has known that there has been a signed deportation order since 2010. He was released on 3<sup>rd</sup> July 2010, was married on 14<sup>th</sup> March 2011 and following the dismissal of his deportation appeal in April 2011 again absconded and then his partner disclosed the relationship had dissolved. He was only encountered again by the police in January 2014. Since that time the appellant has been engaged in challenging his deportation order. It cannot be said that the Secretary of State has delayed in attempts to deport him. The appellant spent his formative life in Nigeria at the age of 39 would be able to find work in Nigeria and there was no evidence of significant medical conditions but reported glaucoma and irritable bowel syndrome but no medical evidence to establish that he had been so diagnosed. Even if he has it is clear that there are medical facilities in Nigeria and a number of health insurance schemes operating in the country. It is acknowledged that the Nigerian health care system may not meet the standards of the NHS or other developed countries. I do not accept he could not acquire basic medical treatment.
48. In essence there are no very compelling circumstances set out such that the appellant's appeal should be anything other than dismissed.

### Order

The appeal of CS is dismissed on all grounds.

### 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 *Helen Rimington*

Date 6<sup>th</sup> August 2019

Upper Tribunal Judge Rimington

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed *Helen Rimington*

Date 6<sup>th</sup> August 2019

Upper Tribunal Judge Rimington