



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-006000

First-tier Tribunal No: HU/50144/2020

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 26 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**KAK (SIERRA LEONE)**

Respondent

**Representation:**

For the Appellant: Mr Clarke, Senior Presenting Officer

For the Respondent: Mr Hodson, legal representative, for Immigration Legal Services

**Heard at Field House on 17 April 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I continue the anonymity order which was made by the First-tier Tribunal. No one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family members. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The Secretary of State appeals, with the permission of Upper Tribunal Judge Pickup, against the decision of First-tier Tribunal Judge S.L.L. Boyes. By her decision of 22 August 2022, Judge Boyes (“the judge”) allowed the appeal on human rights grounds. To avoid confusion, I shall refer to the parties as they were before the FtT: KAK as the appellant, the Secretary of State as the respondent.

## **Background**

2. The appellant was born in Sierra Leone on 15 April 1990. He entered the United Kingdom with his mother when he was three years old. They arrived at Bristol Airport on 26 November 1993.
3. The appellant's mother claimed asylum on 12 January 1998. The appellant was named as a dependant on her claim. The asylum claim was refused on 30 October 1998. They applied for Indefinite Leave to Remain in 2002. That application was refused on 22 September 2004. The appellant and his mother were however granted ILR exceptionally, outside the Immigration Rules, on 29 March 2009.
4. The appellant has committed criminal offences in the United Kingdom. He received a conviction for Affray in 2009, which resulted in a non-custodial sentence. On 2 May 2014, however, the appellant was convicted of burglary and was given a sentence of sixteen months imprisonment.
5. The respondent duly contacted the appellant to indicate that she was considering his deportation. He made representations which included a claim that he would be at risk on return to Sierra Leone. Asylum interviews duly took place. The appellant's asylum and human rights claims were refused and certified under s94B of the Nationality, Immigration and Asylum Act 2002. A deportation order was signed on 4 December 2014.
6. The appellant made further submissions in 2015 but they were found not to meet the test in paragraph 353 of the Immigration Rules. On 2 August 2019, the appellant was issued with a s120 notice, in response to which he made further submissions. On 10 July 2020, the respondent wrote to the appellant to state that she had decided to withdraw the certified decision and the subsequent decision under paragraph 353 as a result of *R (Kiarie & Byndloss) v SSHD* [2017] UKSC 42; [2017] 1 WLR 2380.
7. On 10 July 2020, the respondent reconsidered the appellant's protection and human rights claims and refused them by letter. The appellant appealed against that decision to the First-tier Tribunal.

## **The Appeal to the First-tier Tribunal**

8. The appeal was heard by the judge, sitting at Taylor House on 17 March 2022. The appellant was legally represented by a Ms Cole. The respondent was represented by a Presenting Officer. Ms Cole confirmed at the outset of the appeal that the appellant did not wish to pursue the protection limb of his appeal and that the focus was consequently on Article 8 ECHR.
9. The judge heard oral evidence from the appellant and his mother, after which she heard submissions from the advocates. She reserved her decision at the end of the submissions but it subsequently became clear to the judge that the electronic bundles which had been uploaded to the Tribunal's systems were incomplete. She issued directions for those difficulties to be addressed, and it is the time taken for compliance with those directions which explains a significant part of the delay between the date of the hearing and the date of the judge's decision.

10. The judge's reserved decision spans twenty five pages of single-spaced type. It is, on any view, a very thorough and carefully considered judgment. It is structured in the following way.
11. The judge set out the appellant's immigration history and his antecedents at [3]-[20]. She then turned to his personal circumstances, including his three biological children and two stepchildren in the United Kingdom, at [21]-[29]. The judge summarised the respondent's decision at [30]-[32] and the appellate proceedings at [33]-[42]. At [43]-[45], the judge set out the documentary evidence which was before her. At [46]-[58], there was a detailed review of the law, including the relevant provisions of primary legislation and the Immigration Rules as well as a number of authorities including *SSHD v HA (Iraq)* [2022] UKSC 22; [2022] 1 WLR 3784. The judge undertook a detailed consideration of what was said by Lord Hamblen in *HA (Iraq)*, at [51]-[58] of her decision.
12. At [59], the judge commenced the structured analysis required by section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). She found that the appellant had lived in the UK for more than 28 years but that only 5.5 years had been lawful residence: [72]. He did not meet the criteria for the first statutory exception to deportation, in s117C(4), as a result.
13. In respect of Exception 2, the judge recorded that it was accepted by the appellant that he did not contend that he had a relationship with a qualifying partner: [73]. At [74]-[98], the judge undertook a detailed analysis of the evidence which was said to establish that the appellant continued to enjoy a genuine and subsisting parental relationship with two of his biological children. She found the appellant and his mother to be 'entirely credible' in their evidence on this subject: [98]. At [101], she accepted that the appellant enjoyed a genuine and subsisting parental relationship with those two children, despite a 'break in his involvement in their lives', after which 'involvement has only recently resumed'. She accepted that he 'enriches their lives' by providing 'emotional parental support', notwithstanding the fact that he did not live with them.
14. At [102]-[108], there was a similarly detailed analysis of the best interests of the children and whether it would be unduly harsh on them for the appellant to be deported. Although the judge accepted that the appellant's deportation would have a detrimental effect upon them and that it would be 'harsh', she concluded that the evidence before her did not demonstrate that the statutory threshold was met.
15. Having found that the appellant could not meet the statutory exceptions to deportation, the judge went on to consider whether there were very compelling circumstances over and above those exceptions which sufficed to outweigh the public interest in deportation. She began by directing herself in accordance with s117C(2) of the 2002 Act, that the more serious the offence committed by a foreign criminal, the greater is the public interest in his deportation. At [110]-[114], the judge therefore considered the seriousness of the two offences committed by the appellant. At [115]-[117], the judge considered the appellant's conduct after conviction. At [118], she reiterated her conclusion in respect of the appellant's children.
16. Continuing the analysis prescribed by the Strasbourg authorities, at [119]-[124], the judge undertook a detailed analysis of the appellant's ties to the UK,

including his upbringing in this country, the family members who reside here, and the mental health difficulties he had recently encountered. She rejected the respondent's argument that the appellant was not socially and culturally integrated to the UK, finding instead that he was 'entirely' so: [123]. Then, at [125], the judge explained why the appellant would find relocation to Sierra Leone 'very challenging' even if those challenges were not sufficient to amount to 'very significant obstacles'. Finally, at [126], the judge summarised the outcome of the balancing exercise in this way:

The Appellant was convicted of an offence serious enough to justify a custodial sentence of around or just over two years (albeit reduced for a guilty plea). That offence was serious, but not at the most serious end of the scale for reasons that I have provided above. There is a very strong public interest in deporting foreign criminals. Against that I must balance the factors which weigh against the proportionality of deporting the Appellant. I have taken all of the factors that I have identified above into account. However, two factors in particular weigh heavily in the Appellant's favour. The first is the family life that he enjoys with Amari and Levi and the second is that he has spent almost all of his life in the UK in contrast to his lack of any social or close family links to Sierra Leone. Whilst he does not quite meet the requirements of exception 2 (because I consider that the impact upon Amari and Levi of him being deported would be harsh rather than unduly harsh), when considered in conjunction and cumulatively with the other Article 8 factors that weigh in his favour and given the length of the Appellant's sentence and the nature of the offending, both of which I have considered above, the factors that weigh in the Appellant's favour in this case amount cumulatively to very compelling circumstances which would mean that deportation would not be proportionate.

17. So it was that the appeal was allowed on Article 8 ECHR grounds.

### **The Appeal to the Upper Tribunal**

18. The respondent's application for permission to appeal was refused by Judge Mills but granted, on renewal, by UTJ Pickup. There are two grounds of appeal, which may be summarised as follows:

- (i) The judge misdirected herself in law and left material matters out of account in considering the seriousness of the appellant's offence; and
- (ii) The judge misdirected herself in law in relation to s117B of the 2002 Act when she concluded that the appellant's private life in the UK was a 'significant and weighty factor' in his favour.

19. For the Secretary of State, Mr Clarke addressed the second ground first. He submitted that the judge had failed to consider the 'little weight' provisions of s117B of the 2002 Act. Although the appellant had ILR from 2009, *Rhuppiah v SSHD* [2018] UKSC 58; [2018] 1 WLR 5536 left open the possibility that even settled status might be 'precarious' in certain circumstances, in which connection he relied on *obiter dicta* from Lord Wilson (with whom the other Justices agreed) at [33] and [47]. The judge had failed in any event to consider that a deportation order had been made against the appellant in 2014. The judge's error was

compounded by her failure to adopt the approach set out in *Akinyemi (No 2) v SSHD*, which required her to assess the extent to which the public interest in deportation was reduced by length of residence.

20. As to the first ground, Mr Clarke submitted that the judge had minimised the seriousness of the offence by considering the absence of aggravating factors. It was clear from [112] and [126] of her decision that this approach had been material to the outcome. It was clear from *SSHD v HA (Iraq)* that the touchstone of seriousness was the sentence actually imposed. Even if the judge had set out the sentence and the sentencing remarks, she had imposed her own view of the seriousness of the offence.
21. Mr Hodson submitted that the decision was fully and cogently reasoned. The Secretary of State focused on omissions which were merely technical and which would have had no impact on the ultimate conclusion reached by the FtT.
22. As to ground two, it was to be recalled that s117B(4)-(5), when read with s117A(2)(a), provided generalised normative guidance which could be overridden in an exceptional case. So said Sales LJ (as he then was) in *Rhuppiah v SSHD* [2016] EWCA Civ 803; [2016] 1 WLR 4203, in remarks which were left untouched on appeal. It was also relevant in this connection that the public interest in deportation was not a fixity. The judge had obviously been aware of these principles. It was in any event difficult to see how the 'little weight' provisions would have affected the balance in any real way. Those provisions did not apply to the appellant when he was a child (up to April 2008) and did not apply after he was granted ILR (in March 2009).
23. In relation to the first ground, Mr Hodson submitted that the judge had set out the sentencing remarks in full and had actually treated the offence as warranting a higher sentence. Insofar as she had undertaken her own analysis of the offence, her approach was in accordance with the guidance given by Lord Hamblen at [66]-[71] of *SSHD v HA (Iraq)*. The judge was entitled to conclude that a more serious offence might have sufficed to outweigh the public interest but that this one did not.
24. Mr Clarke replied, submitting that the judge had failed to appreciate Lord Hamblen's distinction, at [66] of *SSHD v HA (Iraq)*, between considerations which related to the offender and those which related to the seriousness of the offence. The judge had failed to approach s117B correctly, particularly in light of the fact that the appellant had been the subject of a deportation order since 2014.
25. I reserved my decision at the conclusion of the submissions.

## **Analysis**

26. Since both advocates addressed the second ground first, I propose to do so too.

### *The Second Ground of Appeal – s117B*

27. As I have recorded above, the respondent's key contention in this ground is that the judge failed to apply the 'little weight' provisions in s117B of the 2002 Act when considering the appellant's Article 8 ECHR claim via the statutory mechanism of s117C(6) of the same Act. The provisions in question are as follows:

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

(1) ...

(2) ...

(3) ...

(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) ...

28. Mr Hodson accepted during oral argument that although the judge referred to Part 5A of the 2002 Act at [50] of her decision, she had not demonstrably turned her mind to the application of ss117B(4)-(5) thereafter. He submitted, however, that a proper application of those provisions to the particular facts of the appellant's case would have made no difference to the outcome of the appeal.

29. What must be established in order to make good that submission is that the judge's decision would inevitably have been the same if she had turned her mind to the statutory provisions: *IA (Somalia) v SSHD* [2007] EWCA Civ 323, at [15], applying *Detamu v SSHD* [2006] EWCA Civ 604. For the reasons which follow, I am satisfied that Mr Hodson is comfortably able to show that the judge would have reached the same conclusion if she had taken s117B into account. In order to explain why, it is necessary to consider the chronology once more, and to assess what impact the 'little weight' provisions of the 2002 Act might properly have had on the judge's analysis.

*Period 1 - Entry to the UK (1993) to Majority (2008)*

30. The appellant entered the UK in 1993, when he was three years old. He attained his majority on 15 April 2008. His was unlawfully present in the UK throughout that time. Mr Hodson submitted that the appellant's unlawful presence in the UK whilst he was a minor could not properly diminish the weight which was to be attached to the private life he had established at that time. Mr Clarke did not demur. I consider that he was correct in that approach.

31. McCloskey J noted at [22] of *Kaur (children's best interests / public interest interface)* [2017] UKUT 14 (IAC) that Parliament had made no distinction in ss117B(4)-(5) between children and adults. That is evidently so but, as Sales LJ explained in *Rhuppiah v SSHD*, s117A(2) and s117B provide 'generalised normative guidance' which 'may be overridden in an exceptional case'. Sales LJ gave the example of a private life which had a 'special and compelling character'. It was possible, Sales LJ noted, to conceive of cases falling within s117B(4) or (5)

in which private or family life ‘of an especially strong kind’ might be accorded great weight for the purpose of analysis under Article 8’.

32. When *Rhuppiah* reached the Supreme Court, Lord Wilson endorsed Sales LJ’s approach to the ‘little weight’ provisions, noting at [36] that it was necessary to find some limited flexibility in the legislation if it was intended to produce a result which was compatible with Article 8 ECHR. He stated that it was impossible to improve on the approach Sales LJ had adopted in the Court of Appeal and noted that the degree of flexibility provided by s117A(2)(a) was such that it enabled applications ‘occasionally to succeed’. Because Ms Rhuppiah had been granted leave to remain by the date of the hearing in the Supreme Court, however, it was not necessary for the court to consider Sales LJ’s conclusion that her case was not one in which such flexibility could have been brought to bear: [50]. Lord Wilson did note, however, that the conclusion was ‘at first sight slightly surprising’.
33. It would be even more surprising if ss117B(4)-(5) served to diminish the weight which was to be attached to the private life of a child, which would in almost every case be established without any appreciation that their immigration status was precarious or unlawful. In this case, it was not the appellant who was responsible for his entry to the UK as a three year old, or for the asylum claim which proved unsuccessful, or for the decision to remain in the United Kingdom without leave before and after that claim was made. As a child, the appellant was not in control of his own destiny and it would be peculiar to attach less weight to his fifteen years of residence to the age of eighteen because his mother had chosen to act in those ways.
34. Had the judge considered the application of s117B(4)-(5) to the appellant’s private life below the age of eighteen, therefore, she would have attached significant weight to it in the same way as she did without reference to those provisions. The appellant’s was clearly a case to which the observation made at [74] of *Maslov v Austria* (1638/03); [2009] INLR 47 applied:

Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 *in fine*).

35. Richards LJ observed in *JO & JT v SSHD* [2010] EWCA Civ 10; [2010] 1 WLR 1607 that Maslov concerned an immigrant who had spent all but the first six years of his life lawfully in Austria. What was said by the ECtHR did not apply in terms to a person who had been raised unlawfully in the host state ‘but the fact that the person has been there since childhood is still a weighty consideration in the Article 8 balancing exercise’: [31]. Toulson and Mummery LJ agreed.
36. Had the judge considered the point more fully, with reference to these principles, she would inevitably have concluded that the private life established in this first period was deserving of weight.

*Period 2 – Majority (2018) to ILR (2019)*

37. There was then a short period during which the appellant was not a minor and did not have settled status. That period ran from his eighteenth birthday on 15 April 2008 to the grant of ILR on 29 March 2009, a period of nearly a year. Had the judge given little weight to any private life established by the appellant in that narrow window of time, it would have made no difference to the outcome of the appeal; the appellant had put down roots in this country for the preceding fifteen years.

*Period 3 – ILR (2019) to Deportation Order (2014)*

38. Turning to the next stage of the chronology, Mr Clarke submitted that the appellant's immigration status had been precarious even after he had been granted ILR in 2009. He based that submission on what was said by Lord Wilson at [33] and [47] of *Rhuppiah v SSHD*.
39. At [44] of *Rhuppiah v SSHD*, Lord Wilson stated that a person's immigration status was 'precarious' for the purposes of s117B(5) if they had 'leave to reside here other than to do so indefinitely' At [47], he went on to decline to appraise the suggestion in *AM (Malawi)* [2015] UKUT 260 (IAC); [2015] Imm AR 5 that "even a grant of indefinite leave to remain might yield a precarious immigration status in the circumstances identified at para 39(e) above". The suggestion in question was that "a grant of indefinite leave to remain might render the person's status precarious if the grant had been obtained by deception or if he or she had embarked on a course of criminal conduct which would justify its withdrawal."
40. There is no suggestion in this case that the appellant obtained ILR by deception, as had been the case in *Butt v Norway* (47017/09); [2012] ECHR 1905, which Lord Wilson cited at [47] as providing 'partial support' for the approach in *AM (Malawi)*. The respondent's suggestion is, instead, that the appellant had embarked on a course of criminal conduct which would have justified the withdrawal of his settled status, thereby rendering it 'precarious'. I will proceed on the basis that *AM (Malawi)* and Lord Wilson's tentative *obiter dicta* represent the law in this regard.
41. Even on that basis, however, it is clear that s117B(5) could not apply to the appellant's private life in the period 2009-2014. His conviction for affray attracted a non-custodial sentence and the respondent took no action in response to it. There is no reason to think that the appellant embarked upon a course of conduct in 2009 which continued to 2014; the two offences were unrelated and of a wholly different character. Had this submission been made to the judge, she would have rejected it, and would have been entitled to attach weight to any private life the appellant had established in this period. (I repeat, however, that the really significant period for the judge was clearly the first of those which I have considered, whilst the appellant was a child in this country.)

*Period 4 – Deportation Order (2014) to the Present*

42. Mr Clarke then submits that the appellant committed a serious offence in 2014 and it was made clear to him shortly afterwards that the respondent intended to pursue deportation action against him. From that point onwards, I accept that the appellant's immigration status must be deemed to have been precarious. Indeed, it might have been said that the appellant was present in the UK unlawfully from that point, given that the deportation order which was made on 4 December 2014 had the effect of invalidating the appellant's ILR under s5(1) of the Immigration Act 1971. (The suspensive effect of an appeal is of no effect

where, as here, the deportation decision was under s32(5) of the UK Borders Act 2007: s79(3) of the 2002 Act refers.)

43. The normative considerations to which the FtT should have had regard in relation to the period from 2014 onwards are therefore that little weight should be given to: a private life or 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; or to a private life established by a person at a time when the person's immigration status is precarious
44. As will be apparent from my summary of the judge's analysis, and indeed from my reproduction of her [126], there were two aspects of the appellant's Article 8 ECHR rights which caused her to allow the appeal.
45. The first was the family life which he enjoys with two of his biological children. Neither s117B(4) nor s117B(5) bore on the weight which could properly be attached to those relationships; the only personal relationship which is identified in the subsections is that between a person who appeals to the FtT and their qualifying partner.
46. The second aspect was the appellant's private life in the UK, to which s117B(4) and (5) did apply. Had the judge turned her mind squarely to the effect of those subsections upon the weight which could properly be attached to the latter part of the appellant's private life, however, it is apparent that she would have attached significant weight to it in any event. I am able to reach that conclusion for the following reasons.
47. It is clear from the judge's analysis that the fundamental basis for her conclusion was the fact that the appellant had arrived in the United Kingdom at such a young age, that he had grown up in this country, and that he had no real ties to Sierra Leone. His private life had been *established* in this country when he was a minor and not as an adult, with the consequences I have explained above. The appellant did not establish any significant aspects of his private life after the deportation order was signed in December 2014; he did not, for example, develop a career which was instrumental in the judge's decision that his deportation would be disproportionate. To put it more shortly, the appellant had already put down his roots before the deportation order was signed and his private life had been established by that point. Neither that conclusion nor the judge's concern about the appellant's lack of ties to Sierra Leone would have been materially affected by applying Part 5A of the 2002 Act.
48. I can deal fairly briefly with a final materiality point taken by Mr Clarke under the umbrella of this ground of appeal. It was prefigured in the final paragraph of the grounds, although I confess that I struggled to understand it before I heard argument. Having heard from Mr Clarke, I think the point is that the judge failed, as a result of her error in relation to s117B, to calibrate the public interest in deportation correctly.
49. The point takes what was said by Ryder LJ at [50] and [53] of *Akinyemi (No 2) v SSHD* [2022] EWCA Civ 492; [2022] 1 WLR 3339 as its foundation. I need not reproduce both of those paragraphs in full. Their effect is accurately summarised in the respondent's ground in this way: "the relevance of long residence in the UK in these circumstances is that it is capable of lowering the public interest in deportation". Mr Clarke argued that the judge failed to approach the matter in

that way; there was no consideration of the weight which should be attached to the appellant's long residence when assessing the public interest.

50. I do not consider that the judge erred in this respect, or that her failure to approach the assessment of proportionality in the manner suggested in *Akinyemi* serves to increase concern about the omission of detailed consideration of s117B. The judge arranged various factors on the appellant's side of the scales of proportionality. One of those factors – to which she clearly attached significance – was the fact that he had spent his formative years in this country. She arranged various factors on the respondent's side of the scales and undertook an assessment of the public interest in deportation. Having done so, she weighed the factors and concluded that the appellant prevailed. That is a classic 'balance sheet' approach.
51. I cannot see why it would have made any difference for the appellant's length of residence to have been taken into account in calibrating the public interest in deportation, as opposed to being a factor in his favour on the opposite side of the balance sheet. I note that Underhill LJ (with whom Arnold and Snowden LJJ) came to the same conclusion when considering the effect of *Akinyemi (No 2)* in *Zulfiqar v SSHD* [2022] EWCA Civ 492; [2022] 1 WLR 3339. At [56], he said that "in many cases it is equally apt to treat the particular features of the case either as diminishing the weight to be given to the public interest or as increasing the weight in the opposite pan of the scales." I do not accept that the judge erred in considering the appellant's length of residence on his side of the scales.
52. I agree, therefore, with Mr Hodson's submission that the omission of express reference to s117B of the 2002 Act in the judge's analysis was not material to the outcome of this particular appeal. Whilst I am not able to say that the judge omitted reference to those provisions because they were so obviously of little or no import, it is quite clear that the decision on the appeal would inevitably have been the same if the judge had considered those provisions. The respondent's second ground of appeal therefore fails.

#### *The First Ground of Appeal – the Seriousness of the Offence*

53. The target of this ground of appeal is the judge's analysis of the appellant's offending behaviour, particularly at [109]-[114] of her decision. The first part of the complaint is that the judge wrongly treated the absence of aggravating features as being capable of minimising the public interest or mitigating the seriousness of the offence. Mr Clarke accepted that the judge had set out the sentencing judge's remarks in full but submitted that she had taken a 'wrong turn' in her decision when she focused on the lack of violence and other such matters as influencing the seriousness of the offence. He submitted that she had failed to appreciate the distinction drawn at [67] of *HA (Iraq)*, between the seriousness of the offence and factors personal to the appellant.
54. I do not accept that the judge erred in these ways, or at all, in assessing the seriousness of the offence. She was plainly aware that she was required to assess the seriousness of the offence when carrying out a proportionality assessment for the purpose of the very compelling circumstances test: *HA (Iraq)* refers, at [60]. She set out the judge's sentencing remarks in full at [8] of her decision and she was cognisant of the length of the sentence imposed upon him by HHJ Graham. The analysis undertaken at [109]-[114] of her decision was in

compliance with the guidance given by Lord Hamblen at [68] of *SSHD v HA (Iraq)*, that '[a]ny evidence that bears on seriousness is relevant to that statutorily required assessment. The judge had made specific reference to that part of *HA (Iraq)*, and others, at an earlier stage in her decision.

55. At [110], the judge took into account the fact that the appellant had been convicted on a plea and that his sentence had been discounted accordingly. To do so was in accordance with [68] of *HA (Iraq)*, where Lord Hamblen explained that the seriousness of the offence cannot necessarily be determined merely by reference to the sentence imposed. He gave the example of two joint participants in a robbery, one of whom went to trial and one of whom entered a plea. The seriousness of the offence was the same, he noted, and that similarity could not be judged by the sentences, since there would have been a substantial reduction for an early plea.
56. I note in this case that the judge tried to come to a conclusion as to the sentence which might have been imposed but for the guilty plea. She concluded that the sentence would probably have been in the region of two years without the plea. This stage in her analysis clearly indicated her awareness of what was said in *HA (Iraq)*, which she had in any event cited at earlier stages of her decision. She gave no indication that she was treating the offence as less serious on account of the guilty plea; to do so would have been contrary to [69] of *HA (Iraq)*, which was clearly at the forefront of her mind.
57. At [111], the judge went on to consider the nature of the offence. She did so after reaching the conclusion that the offence was rather *more* serious than the sentence imposed might have suggested. Again, the structure of the analysis undertaken by the judge suggests very clearly that she had *HA (Iraq)* in mind, since Lord Hamblen stated at [70] of his judgment that the nature of the offending could be a relevant consideration. That conclusion was supported by the Strasbourg jurisprudence, including *Unuane v The United Kingdom* (80343/17) (2021) 72 EHRR 24, he noted. He also noted the approval in *Sanambar v SSHD* [2021] UKSC 30; [2021] 1 WLR 3847 of an Upper Tribunal decision which had assessed the nature and seriousness of the offences by reference to the circumstances of the offending and not simply the sentence imposed.
58. The judge's analysis of the nature of the burglary at [112]-[113] is a holistic one. She noted that the appellant and his co-defendant 'went equipped'. That was a reference to the crowbar and the screwdriver which were found nearby. She noted that they had ransacked the property. She observed that HHJ Graham had noted that burglary of a dwelling was always a serious matter. She noted that the value of the stolen goods was comparatively modest (£600) and that the appellant was not charged with aggravated burglary and that there was no violence used. This latter observation is the subject of specific criticism in the Secretary of State's grounds, but it represents nothing more than a recognition by the judge of the presence of the crowbar and the screwdriver and the fact that their presence was not an indication of a more serious offence. She stated that the burglary was not 'at the top end of the scale of such crimes', which was correct. She noted that certain crimes were considered in the deportation context to be particularly serious, observing that crimes involving violence or drugs were said at [70] of *HA (Iraq)* to fall into that bracket. Again, the description of the offence and the reference to authority was correct.

59. At [113], the judge noted that the appellant was not a habitual burglar and that he had not offended again. She considered this to lessen the risk to the public. That was a legitimate part of the proportionality exercise, as is clear from [58] of *HA (Iraq)*, at which Lord Hamblen endorsed the approach of Underhill LJ in the Court of Appeal to cases in which there was a 'reduced risk of re-offending' which 'cannot be excluded from the overall proportionality exercise.
60. The judge went on to state that she had no OASys report but she accepted that the appellant had not reoffended since his release from prison. She gave limited weight to that factor, as she did to the fact that he had entered a guilty plea. In doing so, the judge again demonstrated her awareness of what was said in *HA (Iraq)* in both the Court of Appeal and the Supreme Court. At [69], Lord Hamblen endorsed Underhill LJ's suggestion that the acknowledgment of guilt should be allowed to be put into the proportionality balance, in that it may be relevant to rehabilitation but did not impact on the seriousness of the offence. Nothing in the judge's decision suggests that she failed to draw that distinction, and the structure of it suggests that she was clearly cognisant of the principles she had set out previously. Nor is there any reason to think, as is suggested in the latter half of this ground of appeal, that the judge somehow lost sight of the circumstances in which the appellant entered his guilty plea. She was clearly aware of that because she had reproduced HHJ Graham's sentencing remarks in full and she was in any event careful to state that she was only able to give limited weight to the guilty plea.
61. I therefore reject the respondent's submission that the judge minimised or improperly discounted the public interest in the appellant's deportation. She took careful account of the seriousness of the offence and the nature of the offence and she was clearly at pains to apply the guidance given in *HA (Iraq)* with care. This ground fails to establish any error of law on the part of the judge.

### **Conclusion**

62. Whilst I accept that the judge erred in failing to consider the 'little weight' provisions of s117B of the 2002 Act, her error in that regard was not material to the outcome of this appeal for the reasons that I have given. I have concluded for those reasons that ground two is not made out. The first ground of appeal fails, on proper analysis of the judge's decision, to establish any legal error in her approach. The respondent's appeal will be dismissed accordingly.

### **Notice of Decision**

The respondent's appeal is dismissed. The decision of the First-tier Tribunal, allowing the appellant's appeal on Article 8 ECHR grounds, will stand.

M.J.Blundell

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

10 May 2023