Neutral Citation Number: [2019] EWCA Civ 2027

Case No: C5/2018/2409

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Storey
DA/01549/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE LEGGATT

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Between:

CI (Nigeria)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

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Laura Dubinsky and **Rowena Moffatt** (instructed by **Duncan Lewis**) for the **Appellant**
William Irwin (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 9 October 2019

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Approved Judgment

Lord Justice Leggatt:

Introduction

1. The appellant ("CI") is a Nigerian national who came to the United Kingdom with his mother when he was one year old and has lived here ever since. He is now aged 27. He has no family or other ties with Nigeria. CI was severely abused by his mother as a child and was finally taken into care at the age of 15. He subsequently committed a series of criminal offences and in 2013 (aged 20) was sentenced to various periods of detention in a Young Offenders' Institution – two of which exceeded 12 months. This led to a decision by the Secretary of State in July 2014 to make a deportation order against him. CI has challenged that decision on the ground that deporting him from the UK would breach his right to respect for his private life protected by article 8 of the European Convention on Human Rights. By a long and somewhat circuitous route that challenge has now reached this court on an appeal from a decision of the Upper Tribunal (Immigration and Asylum Chamber) promulgated on 1 August 2018, which dismissed CI's appeal from the Secretary of State's decision.

2. Before coming to the issues raised on this appeal, I will outline more of CI's immigration and personal history and identify the applicable legal framework.

Immigration history

3. CI was born in Nigeria on 2 October 1992. He entered the UK on 29 January 1994, aged 15 months, with his mother and two sisters on a visitor's visa valid for six months. CI's mother remained in the UK with her children after the visa expired. On 2 August 1994 she claimed asylum. That claim was refused on 2 December 1994. On 30 March 1995 the family was served with notice of a deportation order requiring them to leave the UK but no steps were ever taken to enforce the order.

4. The asylum claim made by CI's mother was reconsidered on 4 April 1996 and was again refused. An appeal against that decision was dismissed on 7 July 1997 and any further rights of appeal were exhausted on 24 July 1997.

5. On 11 June 2002 CI's mother applied for indefinite leave to remain in the UK relying on Deportation Policy 5/96 ("DP5/96"), which stated criteria to be applied when considering whether enforcement action should proceed or be initiated against parents of children with long residence in the UK. A "policy modification statement" issued in 1999, while emphasising that each case must be considered on its individual merits, said that the "general presumption" was that enforcement action would not normally be taken in cases where a child born here or who had come to the UK at an early age had been living continuously in the UK for seven or more years. The statement identified certain factors as relevant in deciding whether enforcement action should nevertheless proceed in such a case.

6. In *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, paras 22-39, the Court of Appeal analysed the relevant policy documents and concluded that tribunals considering the effect of DP5/96, as modified in 1999, should start from the position that it was only in exceptional cases that indefinite leave to remain would not be given to a child who had been continuously resident in the UK for seven years;

but the tribunal should go on to consider whether any of the factors identified in the policy modification statement made the case an exceptional one. It has not been suggested that any of those factors would have made CI's case an exceptional one.

7. The application made by CI's mother relying on this policy had still not been dealt with, however, when on 3 November 2004 she made another, separate application for indefinite leave to remain, which was then given priority over the first application. The second application was made under the "Family ILR Exercise". This was a concession announced on 24 October 2003 to allow families with one or more children who had made unsuccessful applications for asylum before 2 October 2000 to stay in the UK. The policy statement said that all dependants of the applicant who met the basic criteria for the concession should be granted indefinite leave to remain. Certain categories of family were excluded from the scope of the concession, but it has not been suggested that CI's family fell within any of the exclusions. CI's mother, however, failed to respond to a questionnaire, which led to her being declared ineligible for the concession on 29 March 2006. Subsequently, on 25 June 2007, solicitors acting for CI's mother returned the questionnaire. Further delay then occurred before the Home Office dealt with the application. Eventually, on 12 October 2010 all the members of the family including CI were granted indefinite leave to remain in the UK.

CI's personal history and convictions

8. There is substantial evidence, including detailed social services records, that CI was subjected as a child to sustained physical, verbal and emotional abuse by his mother. As well as suffering physical chastisement, CI and his siblings were frequently denied food and were left locked in the house for long periods. The home conditions were very dirty and CI was often denied access to the bathroom. He and his siblings had very few possessions. CI's mother was a drug user and she would send CI to buy drugs for her or to beg for money from neighbours. Although the local authority was aware of many of the problems from an early stage, it was only in October 2007 that CI was eventually taken into care under a police protection order after his mother had refused him entry to the family home. He was placed in foster care and later moved into semi-independent accommodation with four or five boys of his age. Despite frequent absenteeism from school, CI gained six GCSEs and two AS levels.

9. In 2009 and 2010, while he was living in the semi-independent accommodation, CI accrued a number of criminal convictions for miscellaneous offences. There seems then to have been a break in his offending. In 2012 he began studying for a Foundation Degree in IT JavaScript and Programming at Birkbeck, University of London. He also had a sales job in Brighton. However, on 24 April 2013 CI was convicted at Inner London Crown Court after pleading guilty to four offences, being two thefts from motor vehicles, an attempted robbery and theft from a person. For these offences he was sentenced to a total of 28 months' detention (comprising consecutive sentences of six, eight and 14 months, with a concurrent sentence of eight months) in a Young Offenders' Institution. On 9 August 2013 CI was convicted at South Western Magistrates' Court of a further offence of robbery, for which he was sentenced to 15 months' detention to run consecutively to his earlier sentence.

10. In November 2015 CI was convicted of an assault committed in prison and was sentenced to a further seven months' imprisonment. There is evidence to suggest that when he committed that assault CI may have been in a psychotic state, and immediately

afterwards he was admitted to Norbury Psychiatric Intensive Care and Admissions Ward at River House Medium Secure Unit from HMP Wandsworth under the Mental Health Act on the basis that he was experiencing "complex persecutory delusions".

11. The custodial period of CI's sentence ended in February 2016 when he was placed on licence, but he was then kept in detention under immigration powers. In February 2017 he was released on immigration bail. When assessed by a clinical psychologist in October 2017, CI was diagnosed as suffering from a major depressive disorder with some significant post-traumatic traits. When he gave evidence in the Upper Tribunal in May 2018, CI was not employed but was attempting to train as an online stock trader. In his evidence he described his life as being "on hold" pending the outcome of these proceedings.

12. CI has a son who was born in December 2017 and who is a British citizen. However, CI and the child's mother separated before their son was born and CI said in evidence that he has refrained from developing a relationship with his son for fear of the pain of separation if he is deported from the UK.

Deportation proceedings

13. On 10 July 2014 the Secretary of State decided to make a deportation order against CI under section 32(5) of the UK Borders Act 2007 on the basis that CI had been convicted of a criminal offence for which he had been sentenced to a period of imprisonment of at least 12 months. CI appealed against the decision to the First-tier Tribunal (Immigration and Asylum Chamber), which allowed his appeal. However, its decision was reversed by the Upper Tribunal (Immigration and Asylum Chamber) on 8 October 2015. CI was granted permission to appeal to the Court of Appeal, which on 28 June 2017 set aside the Upper Tribunal's decision and remitted the case to the Upper Tribunal for a re-hearing. That re-hearing took place on 31 May 2018 before Upper Tribunal Judge Storey, who in a decision promulgated on 1 August 2018 dismissed CI's appeal against the decision to make a deportation order. It is from that decision of the Upper Tribunal that CI has again obtained permission to appeal to this court.

The legal framework

14. When a person who is not a British citizen is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months, section 32(5) of the UK Borders Act 2007 requires the Secretary of State to make a deportation order in respect of that person (referred to in the legislation as a "foreign criminal"), subject to section 33. Section 33 of the Act establishes certain exceptions, one of which is that "removal of the foreign criminal in pursuance of the deportation order would breach… a person's Convention rights": see section 33(2)(a). CI relies on this exception, arguing that his deportation would breach his right to respect for his private life guaranteed by article 8 of the Human Rights Convention.

15. The right protected by article 8 is a qualified right with which interference may be justified on the basis of various legitimate aims which include the prevention of disorder or crime. The way in which the question of justification should be approached where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 is governed by Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by amendment in 2014).

16. Section 117B lists certain public interest considerations to which the court or tribunal must have regard in all such cases. These include the considerations that:

> "(1) The maintenance of effective immigrations controls is in the public interest.
>
> …
>
> (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.
>
> …"

17. Section 117C lists additional considerations to which the court or tribunal must have regard in cases involving "foreign criminals" (defined in a similar way to the 2007 Act). These considerations are (with the most relevant provisions highlighted):

> "(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."

18. "Foreign criminals" who fall within section 117C(3) because they have been sentenced to a period of imprisonment of at least 12 months but less than four years have been referred to in the case law as "medium offenders" – in contrast to those with a sentence of four years or more, who are described as "serious offenders". In calculating periods of imprisonment for the purposes of the relevant provisions, consecutive sentences are not to be added together: see section 117D(4)(b) of the 2002 Act and section 38(1)(b) of the 2007 Act. However, the four consecutive sentences of imprisonment imposed on CI in 2013 included sentences of 14 months and 15 months, each of which crossed the 12 months threshold and brought him within the category of medium offenders.

19. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207, paras 25-27, the Court of Appeal concluded that there is an obvious drafting error in section 117C(3) of the 2002 Act which must have been intended to afford the same fall-back protection to medium offenders as is available under subsection (6) to serious offenders of relying on "very compelling circumstances, over and above those described in Exceptions 1 and 2". The Court of Appeal held that section 117C(3) is to be construed as containing such a fall-back provision.

20. Paragraphs 398-399A of the Immigration Rules state the practice to be followed by Home Office officials in assessing a claim that the deportation of a foreign criminal would be contrary to article 8. Paragraphs 398-399A are in very similar terms to section 117C(3)-(6) of the 2002 Act. However, as the Court of Appeal pointed out in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239, para 14, although the Immigration Rules are relevant because they reflect the responsible minister's assessment, endorsed by Parliament, of the general public interest, they are not legislation; by contrast, Part 5A of the 2002 Act is primary legislation which directly governs decision-making by courts and tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on article 8 grounds. The provisions of Part 5A, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result compatible with article 8: see *NE-A (Nigeria)*, para 14; *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536, para 36. Further, if in applying section 117C(3) or (6) the conclusion is reached that the public interest "requires" deportation, that conclusion is one to which the tribunal is bound by law to give effect: see *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803; [2016] 1 WLR 4204, para 50; *NE-A (Nigeria)*, para 14. In such a case there is no room for any further assessment of proportionality under article 8(2) because these statutory provisions determine the way in which the assessment is to be carried out in accordance with UK law.

21. In these circumstances it seems to me that it is generally unnecessary for a tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis.

The Upper Tribunal decision

22. The Upper Tribunal judge decided the case by reference to paragraphs 398-399A of the Immigration Rules, but it would have made no substantive difference if he had applied section 117C(3) and (4) of the 2002 Act (as strictly I think he should). The first question for decision was whether Exception 1 set out in section 117C(4) – mirrored in paragraph 399A of the Immigration Rules – applied. If not, the second question was whether there were "very compelling circumstances" which outweighed the public interest in deportation.

23. The Upper Tribunal judge concluded that none of the three requirements of Exception 1 / paragraph 399A was met in this case. He accepted that CI had been lawfully resident in the UK for the following periods: (i) the six months following his arrival in the UK for which his mother's entry visa was valid; (ii) from when his mother claimed asylum on 2 August 1994 until her appeal rights were exhausted on 24 July 1997; and (iii) since being granted indefinite leave to remain on 12 October 2010. On this basis, CI had been lawfully resident in the UK for 11 years and one month; but as he was 25 years old at the time of the Upper Tribunal decision, this did not amount to "most of his life".

24. The Upper Tribunal judge found that CI was not "socially and culturally integrated in the UK" on the grounds that the social and cultural integration he had acquired during his childhood had been "broken" by his pattern of offending between 2009 and 2013 and his periods in detention and had not subsequently been reacquired. In addition, the judge considered that the difficulties which CI would face on deportation to Nigeria as a result of his lack of ties with Nigeria and mental health condition, although significant, did not amount to "very significant obstacles" to his integration into that country. For all these reasons, Exception 1 and paragraph 399A did not apply.

25. The Upper Tribunal judge then considered whether there were "very compelling circumstances" over and above those described in Exception 1 / paragraph 399A. After weighing the factors pointing in favour of protecting CI's right to respect for private life against the public interest in his deportation, the judge concluded that there were not. Accordingly, he dismissed CI's appeal against the Secretary of State's decision.

The issues on this appeal

26. On this further appeal, it is argued on behalf of CI that the Upper Tribunal judge erred in law in deciding each of the four issues as he did: that is to say, the issues whether each of the three requirements of Exception 1 was met and the issue whether, if any of them was not met, there were nevertheless "very compelling circumstances, over and above those described in Exception 1" which outweighed the public interest in deportation. I will take each of these four issues in turn.

(1) Period of lawful residence in the UK

27. The first issue is whether the Upper Tribunal judge was correct in law to conclude that CI had not been lawfully resident in the UK for most of his life. It is common ground that the phrase "most of his life" in section 117C(4)(a) of the 2002 Act is to be understood in a quantitative rather than a qualitative sense as meaning "more than half": see *SC (Jamaica) v Secretary of State for the Home Department* [2017] EWCA Civ 2112; [2018] 1 WLR 4004, para 53.

28. There is no definition of "lawful residence" for the purposes of section 117C (or paragraph 399A of the Immigration Rules). But two decisions of this court bear on its interpretation.

Akinyemi

29. In *Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236; [2017] 1 WLR 3118 the appellant (A) was born in the UK to Nigerian nationals lawfully present here. A was himself a Nigerian national by virtue of his parents' nationality and never acquired British citizenship, although there was a period during which he would have had an absolute right to do so if he had applied for it. A never required leave to enter or remain in the UK and was therefore never liable to administrative removal from the UK because the power of removal only exists in relation to someone who requires leave to enter or remain the UK but does not have it.

30. As in the present case, A appealed against a decision to deport him to Nigeria as a "foreign criminal" on the ground that this would violate his right to respect for private life protected by article 8. In assessing whether the public interest required A's deportation, the Upper Tribunal judge held that pursuant to section 117B(4) of the 2002 Act (quoted at paragraph 16 above) little weight should be given to A's private life, as his residence in the UK for his entire life had been unlawful. In the Court of Appeal A challenged that finding, arguing that, although he had never acquired a vested right of residence, his presence in the UK had never been unlawful within the meaning of section 117B(4), as he was not in breach of any UK law by being here.

31. The Court of Appeal accepted A's interpretation, for essentially two reasons. The first, as stated by Underhill LJ at para 41, was that:

> "as a matter of the ordinary use of language it seems to me unnatural to describe a person's presence in the UK as 'unlawful' (which is not necessarily the same as not being 'lawful') when there is no specific legal obligation of which they are in breach by being here and no legal right to remove them …"

The second reason was that "a construction which focuses on removability rather than a positive right to remain is more in keeping with the statutory context" (para 42). With reference to section 117B(4), Underhill LJ said:

> "The reason why it is reasonable to place little weight on private life established while a person's presence in the country has been 'unlawful' is surely that he or she has no legitimate expectation of their continuing presence in the country and may be removed

> at any time. It is similar, but *a fortiori*, to that underlying section 117B(5), relating to private life developed while a person's immigration status is 'precarious'. It is hard to see how that policy can apply to the situation of a person born in the United Kingdom to parents who were lawfully present and who in due course became settled, who is legally irremovable and who is entitled to acquire British nationality: such a person's expectation that they will continue to live indefinitely in the UK is entirely legitimate."

SC (Jamaica)

32. The second relevant decision of this court is *SC (Jamaica) v Secretary of State for the Home Department* [2017] EWCA Civ 2112; [2018] 1 WLR 4004. The appellant in that case (SC) was a Jamaican national who had arrived in the UK with his mother at the age of 10. They were refused leave to enter but granted temporary admission for a month. Around a year after their arrival, SC's mother applied for asylum with SC as her dependant. The asylum claim was ultimately successful and SC was granted indefinite leave to remain as a refugee. One of the issues on A's appeal against a decision to deport him as a "foreign criminal" was whether the period from the date when the claim for asylum was made until asylum was granted counted as a period of lawful residence for the purposes of section 117C(4)(a). The Court of Appeal decided that it did.

33. In reaching that conclusion, both Ryder and Davis LJJ (with each of whose judgments Henderson LJ agreed) attached some significance to the fact that, in a part of the Immigration Rules dealing with when leave to remain will be granted on the basis of long residence in the UK, "lawful residence" is defined in paragraph 276A(b) for this purpose as:

> "residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain; or
>
> (ii) temporary admission within section 11 of the Immigration Act 1971 (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
>
> (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

It was accepted on SC's appeal that temporary admission was deemed to be granted from the date of the asylum application made by his mother, so that the period from that date until SC was subsequently granted leave to remain fell within this definition. Davis LJ also thought it made sense for lawful residence at least to relate back to the date of the asylum application in circumstances where the application had succeeded and the grant of leave to remain was on the footing of acknowledging a pre-existing status (see para 73).

CI's argument

34. On the present appeal, counsel for CI accepted that the Upper Tribunal judge was wrong to count the period while CI's asylum claim was pending as a period of lawful residence in the UK because – unlike in *SC (Jamaica)* – the asylum claim failed and did not result in leave to remain being granted. But they submitted that *SC (Jamaica)* is authority for the proposition that the definition of "lawful residence" in paragraph 276A(b) of the Immigration Rules should be applied by analogy in interpreting the phrase "lawfully resident" in paragraph 399A and in section 117C(4)(a) of the 2002 Act. Accordingly, any period of temporary admission pending the outcome of an application for leave to enter or remain which is subsequently granted is a period when the applicant is lawfully resident for this purpose.

35. Ms Dubinsky on behalf of CI accepted that the power under section 11 and Schedule 2 of the Immigration Act 1971 to grant temporary admission did not apply at the relevant time to persons, such as CI and his mother, who were granted leave to enter the UK for a limited period and then overstayed. But she argued that they were subject to a parallel regime of temporary release pending deportation under section 5 and Schedule 3 of the 1971 Act. As overstayers, CI and his mother were liable to deportation pursuant to section 3(5)(a) of the 1971 Act and (as mentioned earlier) were given notice in 1995 of a deportation order against them. Ms Dubinsky submitted that the only inference that can reasonably be drawn from the fact that CI's family were allowed to remain in the country after their asylum claim failed, and were not detained pending deportation or deported, was that they had been granted temporary release under Schedule 3 of the 1971 Act.

36. Ms Dubinsky further submitted that, although paragraph 276A(b)(ii) refers only (as regards the law previously in force) to "temporary admission" and does not expressly mention temporary release, temporary admission and temporary release must be treated as equivalent for the purpose of the definition of lawful residence, as there is no logical basis for treating them differently.

37. It followed, Ms Dubinsky argued, that the period after the family applied for indefinite leave to remain in June 2002, or at any rate after the second application under the "Family ILR Exercise" was made in November 2004, until indefinite leave to remain was subsequently granted in October 2010, qualifies as a period in which CI was lawfully resident in the UK for the purposes of paragraph 399A of the Immigration Rules and section 117C(4)(a) of the 2002 Act. On this basis, at the time when the decision of the Upper Tribunal was made, CI had been lawfully resident in the UK for more than half of his life.

No evidence of temporary release

38. Enterprising as this argument is, I think it flawed for several reasons. The short answer to it is that there is no evidence to suggest that CI was ever granted temporary release. The provisions relied on for this purpose are para 2(3) and (5) of Schedule 3 to the 1971 Act, dealing with control pending deportation. As originally enacted, these stated:

> "(2) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom …

> …
>
> (5) A person liable to be detained under sub-paragraph (2) or (3) above shall, while not so detained, be subject to such restrictions as to residence and as to reporting to the police as may from time to time be notified to him in writing by the Secretary of State."

Although some minor amendments were later made to these provisions, their substance remained the same at all relevant times, including the requirement for any restrictions as to residence and reporting to be notified in writing by the Secretary of State. Assuming in favour of CI that a person on whom restrictions were imposed under para 2(5) of Schedule 3 was in an analogous situation to someone granted temporary admission or release from detention and subject to restrictions under para 21 of Schedule 2 to the 1971 Act, the first problem for CI's argument is that there is no evidence that CI's family ever were notified in writing that they were subject to any restrictions pending deportation. The greater likelihood, as it seems to me, is simply that, after they were given notice of a deportation order against them in 1995, no steps were ever taken to enforce it and they were never granted any status equivalent to temporary admission (or what is now immigration bail).

39. A second problem is that there is nothing on any view to link the inferred temporary release of CI's family with either of the applications made for leave to remain. There is thus no basis for the suggestion that some form of authorisation was given to CI remaining in the UK while those applications were considered.

The meaning of "lawfully resident"

40. There are, however, more fundamental objections to CI's argument. It makes no sense to treat someone who is present in the UK in breach of immigration laws and liable to removal – for example, because (as in the present case) they have remained in the UK after a limited leave to enter or remain has expired – as "lawfully resident" in the UK within the meaning of section 117C(4)(a) of the 2002 Act, whether or not the person has been granted temporary admission or release pending deportation or is on immigration bail. To describe such a person as "lawfully resident" in the UK is not consistent with the ordinary use of language. It is also inconsistent with the policy underlying the statutory provision. The reason for focusing on the period for which the person concerned has not merely been resident but lawfully resident in the UK must be that, as provided in section 117B(4), little weight should generally be given to a private life established at a time when a person is in the UK unlawfully. As Underhill LJ observed in *Akinyemi* at para 42, that in turn is because, as a general principle, a person cannot legitimately expect to be allowed to stay in a country on the basis of relationships formed and ties created when he or she has no right to be living there in the first place. In *Jeunesse v The Netherlands* (2014) 60 EHRR 17, para 103, the European Court made it clear that this principle is not displaced where a state "tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit ..."

41. Furthermore, the fact that sections 117B(4) and 117C(4)(a) of the 2002 Act have a common rationale means that to treat someone who is in breach of a legal obligation by being in the UK and is legally liable to be removed as "lawfully resident" for the

purpose of section 117C(4)(a) would be inconsistent with the *Akinyemi* case, which treated such a person as in the UK "unlawfully" for the purpose of section 117B(4). Although, as Underhill LJ pointed out, the opposite is not necessarily true, it would be illogical to regard someone who is in the UK "unlawfully" as nevertheless "lawfully resident" here, for the purpose of the same exercise of deciding whether the interference with private life caused by deporting the person on account of criminal offending is justified in the public interest.

42. I recognise that it is not CI's case that anyone granted temporary admission or immigration bail is "lawfully resident" in the UK for the purpose of section 117C(4)(a). The question is, however, whether there is a good reason to treat the fact that such a person has made an application for leave to remain which is subsequently granted as bringing them within the scope of the provision.

43. In general, it seems to me that there is not. The grant of leave to enter or remain to someone who does not currently have it is not ordinarily a matter of entitlement. By the same token, the Secretary of State is not ordinarily under a legal obligation to grant an application for leave to enter or remain. It is a matter of administrative discretion. A foreign national whose presence in the UK is in breach of immigration law but is tolerated while such an application is pending and who develops a private or family life during this period cannot claim to do so with a legitimate expectation of being allowed to stay, even if the application is subsequently granted.

Successful asylum-seekers

44. I do not accept that *SC (Jamaica)* is authority for the proposition that "lawful residence" means the same in section 117C(4)(a) of the 2002 Act as it does in paragraph 276A of the Immigration Rules. The definition in paragraph 276A showed only, as Davis LJ observed in *SC (Jamaica)* at para 73, that "Parliament was accepting that temporary admission is not entirely and always to be excluded from notions of 'lawful residence': although of course in many contexts it may be so excluded…" What was actually decided by the Court of Appeal in *SC (Jamaica)* was that an asylum seeker was lawfully resident pending the outcome of their successful application for asylum. As Davis LJ observed, and as Mr Irwin for the Secretary of State on this appeal submitted, this is explicable on the basis that upholding an asylum claim involves acknowledging a pre-existing status rather than exercising a discretion to grant permission to stay in the country. As stated in the guidelines issued by the United Nations High Commissioner for Refugees:

> "A person is a refugee within the meaning of the [Refugee] Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee."

See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992) at para 28. The special position of asylum-seekers is also reflected in section 77(1) of the 2002 Act, which provides that, while a person's claim for asylum is

pending, he may not be removed from or required to leave the UK in accordance with a provision of the Immigration Acts.

45. Ms Dubinsky pointed out that in *R (ST) v Secretary of State for the Home Department* [2012] UKSC 12; [2012] 2 AC 135, the Supreme Court held that a refugee is not "lawfully in [the] territory" of a contracting state within the meaning of article 32 of the Refugee Convention unless their presence is lawful under the domestic law of the contracting state; and that under UK domestic law a refugee who has been temporarily admitted to the UK while their application for asylum is determined but who has not yet been granted leave to remain in the UK is not lawfully present for this purpose.

46. In the *ST* case, however, although the claimant had been recognised to be a refugee from Eritrea, the Secretary of State was contending that she could safely be removed to Ethiopia, and this issue had not yet been resolved. Under article 33(1) of the Refugee Convention, contracting states have an obligation not to expel or return a refugee to territories where their life or freedom may be threatened on account of a reason which qualifies the person for refugee status. However, that does not prevent a contracting state from expelling a refugee who is not lawfully present in its territory and who can be removed to a safe country. This is reflected in paragraph 334 of the Immigration Rules, under which an application for asylum will only be granted if its refusal would result in the applicant being required to go, in breach of the Refugee Convention, to a country in which their life or freedom would be threatened.

47. In these circumstances it can be said that being a refugee within the meaning of the Refugee Convention does not, by itself, give rise to a legitimate expectation of being permitted to stay in the UK (and establish a private and family life here): it is only where the individual concerned satisfies the conditions for being granted leave to remain as a refugee – including the condition that there is no safe country to which they can be removed – that such a legitimate expectation arises. The subsequent grant of leave to remain shows that this condition was met and that it would, in consequence, have been a breach of the UK's obligations in international law to expel such an individual from the UK. This provides a justification for treating an applicant for asylum who has been temporarily admitted to the UK while their application is determined and who is subsequently granted leave to remain as a refugee as "lawfully resident" in the UK during this period for the purposes of section 117C(4)(a) of the 2002 Act.

48. It is not necessary or pertinent to pursue this question further, however, as the decision in *SC (Jamaica)* is a binding precedent. What matters for present purposes is that there is no warrant for extending the *ratio* of that case to overstayers whose claim for asylum has been rejected but who later apply on the basis of their continued presence in the UK for a legal right to remain.

Delay in granting indefinite leave to remain

49. Ms Dubinsky also suggested that, by the time CI's family had applied for indefinite leave to remain under DP5/96 (as modified), which they fell within, CI was in practice not liable to removal and could legitimately expect to be allowed to remain in the UK indefinitely. That expectation was further reinforced after the second application was made in 2004 under the Family ILR Exercise. In these circumstances, CI should be regarded as having been "lawfully resident" in the UK for the purposes of section

117C(4)(a) from June 2002, or at the latest from November 2004, and in either case therefore for "most of his life".

50. Although analytically distinct from the doctrine of legitimate expectations, there is a related principle of public law that a public authority must act consistently with a policy that it has lawfully adopted, unless there is good reason not to do so: see e.g. *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546, paras 29-31. If the Secretary of State had rejected CI's application for leave to remain, a claim for judicial review based on an argument that this was inconsistent with DP5/96 or with the policy underpinning the Family ILR Exercise might well have succeeded. I do not consider, however, that this is a sufficient basis on which to treat a person as "lawfully resident" in the UK for the purpose of section 117C(4)(a). It is apparent that Part 5A of the 2002 Act is intended to provide a clear and straightforward set of rules for decision-makers to apply: see *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273, paras 14-15. It would defeat that purpose if, in order to determine whether a person satisfied the test of lawful residence at a particular time, it was necessary to investigate potentially complex and conjectural questions as to whether, if an application for leave to remain had been made or determined sooner and had been refused, or perhaps even if such an application was in fact refused, the decision could have been successfully challenged by way of judicial review.

51. In my view, the interpretation which is most consistent with the aims of the legislation, including the aim of legal certainty, looks simply at the person's legal status at the relevant time (subject to the special case of successful asylum-seekers). If a "foreign criminal" has no legal right to be in the UK and is in breach of UK immigration law by being here, then that person is not "lawfully resident" in the UK. The fact that the Secretary of State has adopted a concessionary policy which means that no enforcement action would in practice be taken does not alter this position. Nor does the fact that an application has been made for leave to remain. It is only if and when the application is granted that the individual's legal status can be said to have changed.

52. This does not mean that it is always irrelevant to ask whether, if CI's application for leave to remain had been made or determined sooner than it was, the application would or should have succeeded. As Lord Reed explained in *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, paras 51-52:

> "51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. …
>
> 52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK

> unlawfully is liable to diminish – or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase – if there is a protracted delay in the enforcement of immigration control. …"

53. The stage at which such considerations are relevant, however, in a case involving deportation of a "foreign criminal" is in assessing whether there are "very compelling circumstances" over and above those described in the Exceptions which outweigh the public interest in deportation. That is indeed implicit in Lord Reed's discussion, which starts from the premise that the applicant is residing in the UK unlawfully.

Conclusion regarding lawful residence

54. The upshot is that the only error made by the Upper Tribunal judge in calculating the length of time for which CI had been lawfully resident in the UK was an error made in CI's favour of including in the calculation the period during which his mother's unsuccessful asylum claim was pending. On a correct legal analysis, CI had been lawfully resident in the UK only during the six months immediately following his arrival and then after he was granted indefinite leave to remain on 12 October 2010. This did not amount to "most" of his life. The Upper Tribunal judge was therefore right to conclude that the first requirement of Exception 1 (and paragraph 399A) was not met.

55. Although this means that the judge was right to find that Exception 1 (and paragraph 399A) did not apply, it remains relevant to consider whether he was also entitled to conclude that the other two requirements of Exception 1 were not established because this may affect whether the decision that there were no "very compelling circumstances" is open to challenge.

(2) Social and cultural integration in the UK

56. The second requirement of Exception 1 is that the person facing deportation is "socially and culturally integrated in the UK". The issue here is whether the Upper Tribunal judge erred in law in finding that, although CI was socially and culturally integrated in the UK as a child, this integration was "broken" by his criminal offending and periods in detention, and was not subsequently re-established. This raises a question of principle as to how the offences committed by a "foreign criminal" and sentences of imprisonment imposed for those offences are relevant to the test of social and cultural integration.

The nature and formation of private life

57. In assessing whether a "foreign criminal" is "socially and culturally integrated in the UK", it is important to keep in mind that the rationale behind the test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under article 8. The test should therefore be interpreted and applied having regard to the interests protected by the concept of "private life". The nature and scope of the concept was explained by the Grand Chamber of the European Court of Human Rights in *Üner v The Netherlands* (2006) 45 EHRR 14, para 59, when it observed that:

> "… not all [settled] migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of article 8. However, as article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of article 8." (citations omitted)

58. Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European Court. Thus, in the *Üner* case at para 58, the court considered it "self-evident" that, in assessing the strength of a foreign national's ties with the "host" country in which they are living, regard is to be had to "the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."

59. The European Court returned to this theme in *Maslov*, stating (at para 73) that:

> "… when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult."

Relevance of offending and imprisonment

60. What then in principle is the relevance to the assessment of the offences committed by a "foreign criminal" and the period(s) of imprisonment to which he or she has been sentenced? In the first place, it is clear that the person facing deportation cannot place positive reliance on associations with criminals or pro-criminal groups to demonstrate social and cultural integration. Thus, in *Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551, paras 49-60, the Court of Appeal held that it was an error of law to regard the appellant's involvement in gang culture as a good example of his integration into life in the UK, for the reason that social and cultural integration in the UK connotes integration as a law-abiding citizen.

61. Criminal offending and time spent in prison are also in principle relevant in so far as they indicate that the person concerned lacks (legitimate) social and cultural ties in the UK. Thus, a person who leads a criminal lifestyle, has no lawful employment and

consorts with criminals or pro-criminal groups can be expected, by reason of those circumstances, to have fewer social relationships and areas of activity that are capable of attracting the protection of "private life". Periods of imprisonment represent time spent excluded from society during which the prisoner has little opportunity to develop social and cultural ties and which may weaken or sever previously established ties and make it harder to re-establish them or develop new ties (for example, by finding employment) upon release. In such ways criminal offending and consequent imprisonment may affect whether a person is socially and culturally integrated in the UK.

62. Clearly, however, the impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature and frequency of the offending, the length of time over which it takes place and the length of time spent in prison, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. In that regard, a person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots in this country than someone who has moved here at a later age. It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK. No doubt it is for this reason that the current guidance ("Criminality: Article 8 ECHR cases") that Home Office staff are required to use in deciding whether the deportation of a foreign criminal would breach article 8 advises that:

> "If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated."

The judge's reasoning

63. Given that CI has lived his whole life in the UK since the age of one, was educated here and has no ties with Nigeria (other than knowing that it is his family's country of origin), it is not surprising that, as the Upper Tribunal judge found, he identifies himself as "black British". It is clear that his entire social and cultural identity has been formed in the UK. The judge's finding that, at least as a child, he was socially and culturally integrated in the UK therefore seems inevitable.

64. The Upper Tribunal judge nonetheless found that CI's criminal offending and subsequent detention had "broken" his previously established social and cultural integration.

65. The judge reached this conclusion by first considering whether social and cultural links that a person has forged in the UK <u>can</u> be broken by anti-social behaviour in the form of criminal offending and by imprisonment consequent on conviction for such anti-social behaviour. He expressed the view that they can, at least as regards social ("if not also cultural") links, but said that the question is "highly fact-sensitive" and that "much will depend on the particular circumstances of the case" (see para 37 of the decision).

66. The judge accepted (at para 38 of the decision) that a different view was taken by another panel of the Upper Tribunal in *Tirabi (Deportation: "lawfully resident": s.5(1))*

[2018] UKUT 00199 (IAC), para 15, which reasoned that, as criminal offending and imprisonment are already part of the definition of a "foreign criminal", it could not "have been intended that, in any general sense, the commission of an offence would demonstrate a lack of integration." The judge said that "this seems to convert a question of fact into a legal rule." He asked rhetorically whether "the commission of a string of serious offences over a period of 20 years, say, [is] to be equally irrelevant as the commission of a very minor offence on one isolated occasion?" He further observed:

> "If the opposite of 'social[ly]' is 'anti-social' and if criminal behaviour is anti-social, then on the panel's approach one could have the anomaly of a decision-maker finding that there was integration even though the person concerned had exhibited consistently anti-social behaviour."

The judge also noted that Home Office policy, as set out in "Criminality: Article 8 ECHR", Version 6, 22 February 2017, clearly considers the commission of offences as relevant to the issue of integration in this context.

67. The Upper Tribunal judge then stated (at para 39 of the decision):

> "In my judgment, the effect of the claimant's pattern of offending over a period of some 3 years and 7 months and his periods in detention was to break the social and cultural integration he had acquired during his childhood. The question therefore is whether since February 2017 he has reacquired the status of someone who is socially and culturally integrated."

68. The judge went on to address this latter question and answered it the negative.

CI's arguments

69. Counsel for CI criticised the judge's finding that CI's criminal offending and detention had "broken" his social and cultural integration in the UK on the ground that, as the judge acknowledged later in the decision, CI is not socially and culturally integrated in Nigeria. They submitted that, given that humans are social beings and that CI has lived in the UK since the age of one, a finding that he is not socially and culturally integrated anywhere in the world has an air of unreality, which is a matter that the judge failed to address.

70. Counsel for CI also placed reliance on the following passage from the judgment of Sales LJ (with whom Moore-Bick LJ agreed) in *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152, para 14:

> "The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

They argued that CI is on any view an 'insider' in the UK, as his life here is the only life he knows.

71. The question which Sales LJ was addressing in the *Kamara* case, however, was the third limb of section 117C(4)(c) – that is, whether there would be very significant obstacles to the claimant's integration into the country to which he is proposed to be deported. The passage quoted was directed to the individual's ability to <u>become</u> integrated into the society in another country. Sales LJ was not suggesting that being an insider in terms of understanding how life in a society is carried on and a capacity to participate in it is by itself enough to demonstrate that the individual is <u>already</u> socially and culturally integrated in the country concerned.

72. I also do not accept that there is any inherent unreality or incongruity in a finding that a person is not socially and culturally integrated anywhere in the world. I can envisage, for example, that a foreign national who leaves his country of origin and comes to the UK might after a period of years in the UK have ceased to be socially and culturally integrated in his country of origin without having yet developed sufficient ties to have become socially and culturally integrated in the UK. It is equally possible for someone who has become socially and culturally integrated in the UK to cease to be so without yet being integrated into another country.

73. The latter possibility is illustrated by *AM (Somalia) v Secretary of State for the Home Department* [2019] EWCA Civ 774, paras 70-75 and 87-94, where the Court of Appeal rejected an argument that it was not open to the tribunal in law to find that the appellant (AM), who had lived in the UK for over 30 years, was not socially and culturally integrated in the UK. AM had come to the UK from Somalia when he was nearly 12 years old, had attended secondary school, had several jobs, married and had three daughters. But at around the age of 25 his marriage broke down and he moved into a hostel, lost contact with his family and became addicted to alcohol. Over the next 13 or 14 years he engaged in a long history of drink-related offending, with 27 criminal convictions for 45 offences. He was both homeless and jobless. He knew very few people, had no contact with any members of his family and there was no evidence that he had any friends or other indications of a private life. In explaining why, on the facts of that case, the First-tier Tribunal was entitled to find that AM was not socially and culturally integrated in the UK, Males LJ said (at para 93):

> "That was so not merely because of his conviction for a serious offence and the time which he had spent in prison as a result, but also because of the long period of anti-social criminal behaviour leading up to that conviction, the complete absence of any family life in this country for what was at the time of the hearing before the First-tier Tribunal the last 14 years, and the absence of any evidence of social or other connections here other than the mere fact of his lawful presence in this country. This was no doubt an unhappy life, particularly as there are some indications that AM wanted to reform, but it cannot be described as a life of social or cultural integration in this country."

74. I think it important to note that the finding that AM was not socially and culturally integrated in the UK, and the decision of the Court of Appeal that this finding was one that it was open to the tribunal to make, were not based on AM's criminal offending

and time spent in prison alone. A critical part of the reasoning was that, following a period of many years in which he had effectively dropped out of society and persistently offended, the appellant had no social or other ties at all in the UK.

Errors of approach

75. I am sure that the Upper Tribunal judge was right to say that social and cultural integration in the UK can be broken by criminal offending and imprisonment and that this is a fact-sensitive question. However, he gave no reasons for his conclusion that this was the effect of CI's offending and imprisonment in the present case. I appreciate that where a judgment is made on the basis of an overall evaluation of the circumstances of a case, the conclusion arrived at is not capable of logical demonstration and there is a limit to the reasoning that can be given to justify it. But in order to discharge the duty to give adequate reasons for its decision, a tribunal should at least identify the main facts and circumstances which have led to the conclusion and give some indication, where it is not self-evident, of what the significance of these facts is considered to be.

76. Here the only circumstances identified by the Upper Tribunal judge in the passage quoted at paragraph 67 were the length of the period over which CI's offending occurred and, by implication, the frequency of offending during this period and length of the periods which CI spent in detention. How these matters were considered to have "broken" the social and cultural integration acquired during CI's childhood, however, was not spelt out. To determine whether this was the effect of CI's offending and imprisonment it would be necessary to assess whether or to what extent his criminal behaviour and time spent in detention did in fact disrupt or destroy his social and cultural ties in the UK. That in turn would require some consideration of CI's current situation to see whether, for example, he has maintained relationships with members of his family, has other social relationships, has accommodation, has found or looked for work, has avoided re-offending and has engaged in any activities of a positive nature following his release from custody. The Upper Tribunal judge did consider these matters; but he did so, not for the purpose of deciding whether CI's offending and time spent in detention had broken his social and cultural integration in the UK, but on the footing that it had done so, with the onus then placed on CI to demonstrate that he had re-acquired "the status of someone who is socially and culturally integrated".

77. This, in my view, was an erroneous approach. The judge should simply have asked whether – having regard to his upbringing, education, employment history, history of criminal offending and imprisonment, relationships with family and friends, lifestyle and any other relevant factors – CI was at the time of the hearing socially and culturally integrated in the UK. The judge should not, as he appears to have done, have treated CI's offending and imprisonment as having severed his social and cultural ties with the UK through its very nature, irrespective of its actual effects on CI's relationships and affiliations – and then required him to demonstrate that integrative links had since been "re-formed".

78. A clue to why the Upper Tribunal judge approached the question in the way that he did seems to me to lie in his repeated use of the phrase "anti-social behaviour" and the suggestion in the passage quoted at paragraph 66 above that a person who exhibits anti-social behaviour over a significant period of time cannot be socially integrated in the UK because "anti-social" is the opposite of "social". Given the range of meanings that the word "social" can bear, this linguistic argument seems to me fallacious. The phrase

"socially and culturally integrated in the UK" is a composite one, used to denote the totality of human relationships and aspects of social identity which are protected by the right to respect for private life. While criminal offending may be a result or cause of a lack or breakdown of ties to family, friends and the wider community, whether it has led or contributed to a state of affairs where the offender is not socially and culturally integrated in the UK is a question of fact, which is not answered by reflecting on the description of criminal conduct as "anti-social".

79. Focusing in the way the Upper Tribunal judge did on the duration and seriousness of the appellant's criminal offending and the length of his prison sentences also seems to me potentially to involve double counting. Those matters clearly affect the strength of the public interest in deportation. The greater the extent of the person's criminality and the harm done to other members of society by their offending behaviour, the stronger the case for requiring a "foreign criminal" to leave the UK. This public interest is also reflected in the classification of foreign criminals according to the length of the period of imprisonment to which they have been sentenced, with different rules applicable to "medium" and "serious" offenders. The reason for considering whether the person is socially and culturally integrated in the UK, however, is not to assess the strength of the public interest in deportation: it is to assess whether deportation would involve an interference with the person's private life of such gravity that this outweighs the public interest in deporting them on account of the seriousness of their offending. It is therefore wrong to treat the individual's criminal offending as relevant to the test of integration, not because of what it shows about the solidity of his social and cultural ties to the UK, but because it strengthens the case on the other side of the scales in favour of deportation.

80. The judge's many references to integration being "broken" by anti-social behaviour give the impression that he saw the relevant question as being whether, through the nature and seriousness of his offending, a "foreign criminal" has broken the social contract which entitles him to the protection of the state. That, however, is not the relevant test, which should be concerned solely with the person's social and cultural affiliations and identity.

Conclusion on social and cultural integration

81. On the facts found by the Upper Tribunal, CI was not able to point to any close family or other personal ties. The judge described him as "presently someone who chooses to live a mobile lifestyle without wishing to develop long-term attachments." That said, the finding that he was not "socially and culturally integrated in the UK" does seem to me to have an air of unreality about it. While the facts of every case are different, the extent of CI's alienation from British society was not at all comparable to that of the appellant in the case of *AM (Somalia)*, for example. Not only has CI's social and cultural identity been formed entirely in the UK but, despite his abusive mother, he achieved a significant level of academic success at school and started to attend university. His offending, while significant, was almost all committed over a period of around four years between the ages of 16 and 20 – partly therefore as a juvenile – after he had been moved from a foster home into semi-independent accommodation. He has mental health problems but is not (unlike AM) suffering from addiction or socially isolated. He had a relationship with a girlfriend which survived his time in prison and with whom he had a child after his release; although they then broke up and he has refrained from developing a relationship with his son while the prospect of deportation

is hanging over him, at the time of the Upper Tribunal hearing he was living with another girlfriend. Although estranged from his mother (unsurprisingly given the history of abuse), he was in regular contact with his siblings. He was unemployed but gave evidence that he had taken active steps to learn how to become a financial advisor. The Upper Tribunal judge assessed him as "clearly someone of intelligence and ability to make a good life for himself without illegal activities" (see para 44 of the decision).

82. It is difficult to see in these circumstances how, had the question been approached in the correct way, it could be said that the integrative links established by CI through living his entire conscious life in this country had been severed by his offending and imprisonment to such an extent that he was no longer "socially and culturally integrated in the UK".

(3) Very significant obstacles

83. In considering the third requirement of Exception 1, the Upper Tribunal judge accepted that there would be significant obstacles to CI's integration into Nigeria. Given the undisputed facts that CI has never set foot in Nigeria since he left when he was 15 months old, knows no one in Nigeria and would have no financial support from any family members or friends if sent there, so much at least seems self-evident. The judge also accepted that the difficulties that CI would face in obtaining accommodation, employment and access to health services in Nigeria would be aggravated by his mental health problems. In that regard, the judge referred to the expert evidence of a clinical psychologist, Dr Natalie Brotherton, that "deportation would have a devastating effect on [CI's] mental health and rehabilitation."

84. Despite this, the Upper Tribunal judge did not accept that the obstacles to integration into Nigeria which CI would face would be "very significant". This was for two reasons. The first was that, although CI has no family ties to Nigeria and identifies as black British, "it has not been suggested that his mother brought him up ignorant of Nigerian customs and traditions" (see para 43 of the decision). The second reason was that, although the judge was prepared to accept that CI's mental health problems would make it more difficult for him to integrate than a normal adult in his mid-twenties, in his view the background evidence did not demonstrate that CI "would be unable to access mental health facilities or community assistance if he needed them" and his evident abilities and past work experience in the UK made it likely that he would be able to find work in Nigeria (see para 44 of the decision). The judge also considered it likely that CI would be able to obtain accommodation, even if initially it was by accessing health/welfare services.

85. In my view, both the reasons given by the Upper Tribunal judge are flawed.

Assumed knowledge of Nigerian culture

86. An inference that an immigrant who has no memory of his country of origin (having left it as an infant) must nevertheless have acquired some knowledge of its culture and traditions through his upbringing might in some cases be a reasonable one to draw. But on the evidence before the Upper Tribunal there was no reasonable basis for drawing such an inference in this case. The judge referred to the fact that CI's mother was abusive towards him but considered that that fact "does not demonstrate that he lacked familiarity with his mother's cultural way of life." This appears wrongly to have put

the onus on CI to prove that he was not familiar with Nigerian culture rather than requiring some factual basis for finding that he was. More importantly, it paid no regard to the evidence about the nature and extent of the delinquency of CI's mother as a parent. It is not only the evidence of her abusive treatment of her children but also the evidence of her severe neglect of them that is relevant in this context. As Dr Rachel Thomas, another psychologist who gave expert evidence, observed in her report, the information about CI's mother indicates that she was "not the sort of responsible parent who will have spent the time to teach her children about their cultural origins." There was, moreover, positive evidence to which the Upper Tribunal judge did not refer that CI and his siblings had indeed been brought up by their mother ignorant of Nigeria and its culture. CI's older sister explained the matter graphically when she wrote:

> "Nigeria is as foreign to us as China. We don't know it and we don't know anyone there."

The judge gave no reasons for rejecting this and other evidence to similar effect and I can see no reason to do so.

Effect on mental health

87. In relation to CI's mental health problems, the judge (as already mentioned) accepted Dr Brotherton's assessment that deportation would have a "devastating effect" on his mental health and on his prospects for rehabilitation. In addition, Dr Thomas expressed the opinion that, even if suitable mental health facilities are available in Nigeria, if CI is deported he "is likely to be far too psychiatrically unwell by this time and highly unlikely to access them." Dr Thomas noted that, even in the UK where CI has lived all his life and where the level of support services available is extensive, he is reluctant enough to access them. She concluded:

> "It is my view that, if returned, he will therefore not access any treatment programme and will revert to a life of violence and crime being how he knows how to survive."

88. In finding that the evidence did not demonstrate that CI "would be unable to access mental health facilities or community assistance if he needed them", the judge made no mention of Dr Thomas's expert evidence to the contrary. He was not of course obliged to accept her evidence. But if he disagreed with Dr Thomas's assessment that CI was likely to be far too psychiatrically unwell if returned to Nigeria to be able to access mental health support (assuming it to be available), it was incumbent on the judge to give some reason for rejecting it, and he gave none.

89. In these circumstances, the uncontradicted evidence that CI's deportation would have a devastating effect on his mental health and rehabilitation seems to me also to vitiate the judge's inference that, because CI is "clearly someone of intelligence and ability" and has some work experience in the UK, it is likely that he would be able to find work in Nigeria. Quite apart from the difficulties presented by CI's lack of knowledge of Nigerian society, the judge's extrapolation from CI's situation in the UK to how he is likely to fare in Nigeria failed to take into account this evidence.

90. The same applies to the judge's finding that CI would be likely to be able to obtain accommodation, "even if initially it was by accessing health/welfare services". So far

as I am aware, there was no evidence about the availability of accommodation through health or welfare services in Nigeria on which to base such a prediction. But even if the optimistic assumption made in this regard was justified, this finding again takes no account of the difficulties that CI would have in accessing such services in a country of which he has no knowledge given his likely psychiatric condition if sent there.

Conclusion on obstacles to integration

91. For these reasons, the judge's determination that the obstacles to CI's integration into Nigeria would not be "very significant" in my view cannot stand.

"Very compelling circumstances"

92. It follows from the conclusions that I have reached so far that the Upper Tribunal judge was right to find that CI did not fall within Exception 1 set out in section 117C(4) of the 2002 Act. That is because, although the judge in my view erred in law in his approach to the second and third limbs of the test, he was right to conclude that CI had not been lawfully resident in the UK for most of his life. This appeal can therefore succeed only if the Upper Tribunal judge made a material error of law in holding that CI could not establish "very compelling circumstances", over and above those described in the Exceptions.

Relevance of the factors described in Exception 1

93. It is clear that the words "circumstances, over and above those described in Exceptions 1 and 2", which are used in section 117C(6) and which the Court of Appeal in *NA (Pakistan)* held are to be read into section 117C(3), do not prevent a person facing deportation from relying on matters falling within the scope of the Exceptions to establish "very compelling circumstances" at the second stage of the analysis: see *JZ (Zambia) v Secretary of State for the Home Department* [2016] EWCA Civ 116, paras 28-30; *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207, paras 19-21 and 29-32. As Jackson LJ explained in *NA (Pakistan)* at para 32, discussing 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."

94. Since the factors described in Exception 1 also form part of the assessment of whether there are "very compelling circumstances", the errors that I have identified in the approach of the Upper Tribunal judge to the second and third limbs of Exception 1 also inevitably affected the second stage of his analysis. Thus, the Upper Tribunal judge relied at this stage on his earlier findings – which, for the reasons given, I consider involved legal errors – that CI's "integrative links with the UK … were broken by his pattern of criminal offending between 2009-2013 and his subsequent periods in detention" (see para 49 of the decision); and that "he would not face very significant obstacles to integrating into Nigerian society" (see para 51).

Other alleged errors

95. CI's grounds of appeal contend that the Upper Tribunal judge made two further errors of law in determining whether there were "very compelling circumstances". One alleged error was to hold that CI could not rely on the principles set out in *Maslov v Austria* [2009] INLR 47. The other was to fail to take into account in assessing the public interest in CI's deportation the effect of the delay and the responsibility of the Home Office in causing the delay that occurred before he was granted indefinite leave to remain. I will consider the second of these alleged errors first.

Delay in granting indefinite leave to remain

96. On behalf of CI, Ms Dubinsky advanced an argument that the long delay which occurred before CI was granted indefinite leave to remain after he had become eligible for it gave rise to an "historic injustice" which reduced the public interest in his deportation and amounted to a very compelling circumstance over and above those described in Exception 1. In support of this argument Ms Dubinsky relied on the authorities of *Patel v Entry Clearance Officer (Mumbai)* [2010] EWCA Civ 17 and *R (Gurung) v Secretary of State for the Home Department* [2013] EWCA Civ 8; [2013] 1 WLR 2546.

97. *Patel* concerned British Overseas Citizens who, as a result of discriminatory legislation, were prevented for many years from being recognised as British citizens and settling in the UK. After the legislation was changed, they and their spouses were given entry clearance but their children – who by then were in their twenties – were refused entry clearance. The Court of Appeal held that, where the children still had ties which amounted to family life with their parents, so that article 8 was engaged, account should be taken in assessing the proportionality of excluding them from the UK of the fact (if it was a fact) that, but for the historical wrong of the discriminatory legislation, the family would or might have settled here long ago (see para 15).

98. In *Gurung* the less favourable treatment of Gurkha veterans discharged before 1997 in comparison with other foreign members of the British armed services who sought to settle in the UK was similarly treated as a historic injustice which should be taken into account in the article 8 balancing exercise. Thus, the Court of Appeal held (at para 42) that:

> "If a Gurkha can show that, but for the historic injustice, he would have settled in the United Kingdom at a time when his dependent (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now."

99. These cases were concerned with the systemic effects of past policies which had subsequently been acknowledged to have been racially discriminatory. It would be a major extension of the principle recognised in these cases to treat it as engaged by an administrative delay in dealing with an application for leave to remain in an individual case. I am not persuaded that the concept of "historic injustice" is applicable to a case of this kind. Additional difficulties face the attempt made by Ms Dubinsky in oral argument to characterise as an historic injustice the fact that local authority social workers did not take steps to assist CI to apply for indefinite leave to remain after he became eligible to do so in January 2001. The Secretary of State is not responsible for the acts or omissions of local authority social workers. Moreover, any potential relevance of this factor is limited in circumstances where CI's mother applied for indefinite leave to remain with CI as her dependant in June 2002, some 16 months after the earliest possible date, which in the overall timeline of this case was not a significant delay.

100. Nevertheless, I think it clear that the delay of almost ten years which occurred from when CI became eligible to apply for indefinite leave to remain in the UK in January 2001 until he was eventually granted indefinite leave to remain in October 2010 is indeed relevant to the proportionality assessment in this case. Its relevance does not depend upon characterising the delay as a historic injustice. An important consideration is that CI was a child throughout almost all of this period, as he did not reach the age of 18 until February 2010. As a child, he could not be expected to apply himself or follow up an application made on his behalf for leave to remain. Whether or to what extent the delays in the grant of leave to remain were attributable to the Home Office or to local authority social workers or to CI's mother does not in these circumstances matter. What is clear is that the responsibility does not lie with him. The general principles relating to the "best interests" of children of which account needs to be taken in applying article 8 include 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; [2013] 1 WLR 3690, para 10; and *KO (Nigeria)*, para 15. A corollary of this principle, as it seems to me, is that it would be wrong in applying article 8 to treat the public interest in CI's deportation as increased or the weight to be given to his private life as reduced by reason of delay in his being granted indefinite leave to remain for which he was not in any way responsible.

101. As mentioned earlier, it has not been suggested that, if an application had been made on CI's behalf and dealt with timeously either under DP5/96 (as modified in 1999) or the Family ILR Exercise, there was any reason for refusing to grant indefinite leave to remain. It follows that the private life which CI established between 2001 and 2010 should not be treated as carrying less weight in determining whether there are sufficiently compelling circumstances to outweigh the public interest in his deportation on account of the fact that he did not have lawful residence or settled status in the UK

during that period. This is also consistent with the point made by Lord Reed in the *Agyarko* case (quoted at paragraph 52 above) that in some situations – for example, where a person present unlawfully or lacking settled status in the UK was certain to be granted such status if an application were made – then the person's actual immigration status should not significantly affect the weight to be given to their article 8 rights.

102. In this case, in assessing whether there were very compelling circumstances, the Upper Tribunal judge took into account the fact that, had CI's mother from 2001 onwards taken active steps to apply for leave to remain on the basis of seven years' residence, he would likely have been granted indefinite leave to remain earlier and would thus, in 2018, have been able to show he had spent most of his life in the UK lawfully. The judge also considered – in my view rightly – that he should not apply the "little weight" provisions in section 117B of the 2002 Act in this case. In these circumstances I am not persuaded that this line of argument ultimately provides a reason to interfere with the judge's assessment.

Applicability of the Maslov case

103. As noted earlier, the object of Part 5A of the 2002 Act is through a structured approach to produce a final result that is compatible with article 8. To ensure that this is achieved, it is necessary when considering whether circumstances are sufficiently compelling to outweigh the public interest in the deportation of a "foreign criminal" to take into account the jurisprudence of the European Court of Human Rights, including the important decisions of *Üner v The Netherlands* (2006) 45 EHRR 14 and *Maslov v Austria* [2009] INLR 47: see *NA (Pakistan)*, para 38.

104. In *Maslov* the European Court reaffirmed the criteria, already established in its judgment in *Üner*, which are to be applied when assessing whether the expulsion of a foreign national on account of criminal offences is consistent with article 8. These include the need to have regard to "the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there" (see para 74 of the *Maslov* judgment). In *Maslov* the court further stated (at para 75):

> "In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion."

105. In the present case the Upper Tribunal judge concluded (at para 49 of the decision) that CI "is not able to invoke the principles set out in *Maslov v Austria* because he was not for most of his childhood a settled migrant." Counsel for CI contend that this was an error of law.

106. It is apparent that in the *Maslov* case (as in *Üner v The Netherlands*) the European Court was focusing on the situation of settled migrants with a right of residence in the host country; and the court has subsequently stated that different considerations apply where the person facing expulsion has never been granted such a right of residence. The importance of the distinction was explained in *Jeunesse v The Netherlands* (2014) 60 EHRR 17, paras 103-105. The court there said that, in the case of a settled migrant who has been granted a right of residence in a host country, a subsequent withdrawal of that

right, for instance because the person concerned has been convicted of a criminal offence, will constitute an interference with his or her right to respect for private and/or family life which requires justification under article 8(2). The court distinguished such a case from cases where the individual has not been granted a right of residence and emphasised that in the latter situation article 8 does not generally impose a positive obligation on the state to grant a right of residence to enable the individual to exercise private or family life on its territory. As it was put in para 105 of the judgment:

> "As the factual and legal situation of a settled migrant and that of an alien seeking admission to a host country – albeit in the applicant's case after numerous applications for a residence permit and many years of actual residence – are not the same, the criteria developed in the court's case-law for assessing whether a withdrawal of a residence permit of a settled migrant is compatible with article 8 cannot be transposed automatically to the situation of the applicant. Rather, the question to be examined in the present case is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to article 8 to grant her a residence permit …"

107. The importance of this distinction has been recognised in domestic case law. The leading authority is *DM (Zimbabwe) v Secretary of State for the Home Department* [2015] EWCA Civ 1288; [2016] 1 WLR 2108, in which the Court of Appeal considered the situation of a "foreign criminal" who had lived for the majority of his life in the UK after entering on a visitor's visa at the age of nine and overstaying but had never been granted leave to remain. Jackson LJ (with whose judgment King LJ and Russell J agreed) accepted that there was a tension between the reasoning in two previous decisions of the Court of Appeal concerned with persons in a similar situation. In *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10; [2010] 1 WLR 1607, at para 52, Richards LJ said, in relation to one of the appellants (JT), that:

> "… in distinguishing *Maslov* on the simple basis that JT's presence in this country had not been shown to be lawful, the tribunal seems to have regarded *Maslov* as being entirely irrelevant to JT's case. Whilst the point of distinction was correct as far as it went, it was not a proper basis for disregarding what was said in *Maslov* about the position of those who have been in the host country since early childhood or about the significance of the age at which criminal offences were committed ..."

On the other hand, in *ED (Ghana) v Secretary of State for the Home Department* [2012] EWCA Civ 39; [2012] Imm AR 487, at para 32, McFarlane LJ said:

> "For my part, having looked carefully at the extract from *JO and JT* to which reference has been made, I cannot see any room for manoeuvre that would allow the very specific facts of the case to alter what is a strict and plainly expressed legal structure. Either an individual's presence is 'lawful' or 'unlawful' in immigration terms. The determination of that status then in turn indicates whether or not the need for 'very special reasons' applies to his

> case. ED cannot claim 'lawful' status. Therefore, as a matter of law, *Maslov* does not apply to his case and the judge was entirely correct in the approach that she took."

108. In *DM (Zimbabwe)* Jackson LJ addressed the question of which of these authorities the court should follow and concluded that the reasoning in *ED (Ghana)* should prevail. His reasons were that: (i) it is clear from the judgment in the *Maslov* case that the court was specifically focusing on settled migrants with a right of residence in the host country; (ii) the European Court has subsequently distinguished the situation of migrants without a right of residence in the host country and indicated in *Jeunesse* that the reasoning in the *Maslov* case was applicable only to settled migrants; and (iii) it "is self-evident that in any assessment of a person's right to remain in a country under article 8, it must be an important consideration whether he has any right to be there at all" (see para 34). Drawing the threads together, Jackson LJ said (at para 35):

> "I accept that paragraphs 71 to 74 of *Maslov* set out factors which are relevant considerations in deportation cases, but the weight attached to those factors is diminished if the deportee is unlawfully present in the host country. I do not accept that paragraph 75 sets out principles of law which apply to criminal offenders who are unlawfully present in a country."

109. I have no doubt that this decision, which is in any event binding on us, correctly states the law. Although the points made in the *Maslov* case about the need to take account of the applicant's age when he or she (a) moved to the host country and (b) committed criminal offences are of general relevance in deportation cases, the observations made about the "special situation" of persons who have spent most of their childhood and youth in the host country and the need for "very special reasons" to justify their expulsion are not applicable to criminal offenders who are unlawfully present in the UK.

110. Unlike the appellants in *JO (Uganda)*, *ED (Ghana)* and *DM (Zimbabwe)*, however, CI is not unlawfully present in the UK. He has indefinite leave to remain and is thus a "settled migrant", as that expression has been used in the case law of the European Court. On the other hand, he has not spent all or the major part of his childhood and youth lawfully in the UK, and therefore does not fall within the description in para 75 of the *Maslov* judgment. This raises the question whether, as the Upper Tribunal judge in this case thought, the principles stated in *Maslov* (and, in particular, para 75 of the judgment) are inapplicable because they are confined to settled migrants who have had that status – or who at any rate have been lawfully present in the host country – for most of their childhood.

111. In my view, the relevance of the *Maslov* case (and other cases in the same line of authority) is not limited in this way. In the first place, it would be wrong to read the court's judgment in that case as if it were a legislative text. As discussed by Sir Stanley Burnton (with whom McFarlane and Maurice Kay LJJ agreed) in *R (Akpinar) v Upper Tribunal* [2014] EWCA Civ 937; [2015] 1 WLR 466, paras 30-54, the statement in para 75 of the *Maslov* judgment about the need for "very serious reasons" is not to be read as laying down a new rule of law but rather as indicating the way in which the balancing exercise should be approached in the circumstances of that case. As Sir Stanley Burnton pointed out, this is confirmed by the way in which the court expressed its

ultimate conclusion in para 100 of the judgment that there had been a violation of article 8 in that case:

> "Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. …"

This was a conventional balancing exercise, with no bright line rule applied in relation to the length of the applicant's lawful residence in Austria.

112. Secondly, as I have indicated, the distinction of principle drawn in the case law of the European Court is between the expulsion of a person who has no right of residence in the host country on the one hand and, on the other hand, expulsion which involves the withdrawal of a right of residence previously granted. There is no such distinction of principle between a person who has spent most of their childhood lawfully in the UK and someone who has spent part but less than half of their childhood living in the country lawfully. The difference is one of weight and degree. Such a difference is compatible with adopting the condition specified in section 117C(4)(a) that a foreign criminal has been lawfully resident in the UK for most of his life as a *prima facie* requirement. But it would not be consistent with the test of proportionality under article 8, which involves a balancing exercise, to treat the principles stated in the *Maslov* case as inapplicable to a settled migrant with a right of residence just because the individual concerned, although present in the country since early childhood, has not had a right of residence for a particular length or proportion of their time in the host country.

113. Third, as discussed above, although little weight should generally be given to a private life established when a person was present in the UK unlawfully or without a right of permanent residence, it would not (as the Upper Tribunal judge recognised) be fair to adopt this approach on the particular facts of this case, where the grant of indefinite leave to remain was delayed for many years when CI was a child for no good reason and through no fault of his. In determining whether it is compatible with article 8 to deport him from the UK, CI should not in these circumstances have less weight accorded to the fact that he has spent his childhood and youth in the UK than would be the case if he had had a vested right of residence for most of that period.

114. I therefore consider that the Upper Tribunal judge erred in regarding the principles established in *Maslov* as inapplicable in the present case because CI was not a settled migrant for most of his childhood.

Were the errors material?

115. It remains to consider whether the legal errors made by the Upper Tribunal judge in assessing whether there were very compelling circumstances were material to the conclusion reached.

116. Standing back and looking at the circumstances of this case as a whole, I have mentioned that it is not one in which the appellant can point to close personal relationships or other strong social ties to this country. There are three matters in particular, however, to which it seems to me that, as a result of errors in his approach, the judge failed to give proper weight.

117. The first is the severity of the difficulties and suffering that CI would potentially face if sent to Nigeria. There is a material difference between returning an immigrant to a country with which he retains some social and cultural ties and deporting him to a country with which he has none and which, in the words of CI's sister in this case, "is as foreign to us as China". The harshness of such deportation is magnified in the present case to the extent that it could be considered cruel by the evidence of the devastating impact that it would have upon CI's mental health.

118. Secondly, I consider that the judge's erroneous approach to the question of social and cultural integration and erroneous conclusion that the principles set out in *Maslov v Austria* are not applicable to CI led him significantly to underestimate the importance of the fact that he is a settled migrant who has spent almost his whole life in this country, has received his entire education here and has grown up with an entirely British social and cultural identity.

119. The third matter is the impact of CI's criminal offending on his private life in the UK. As discussed, his offending fell in the medium category and comprised a number of offences, some of which involved violence. However, all the offences were committed at a young age ending (with the exception of the assault in prison in 2015) when he was 20 years old, since when – so far as the evidence showed – CI had not re-offended. Importantly, the offending needs to be seen in the context of the abuse and neglect which CI suffered throughout his childhood and, apart from a period of a year or so during which he was in foster care, his grossly deficient parenting. Save for one reference in passing to CI's "troubled childhood history", it does not seem to me that, in assessing whether there were very compelling circumstances, the judge took this into account.

120. When considering whether CI would be able to integrate into Nigerian society, the Upper Tribunal judge noted that CI had been assessed by his probation officer in July 2013 as having good social skills and the intelligence and ability to make a good life for himself without illegal activities (see para 51 of the decision). It does not appear, however, that the judge recognised the potential relevance of that assessment to CI's future in the UK and to the potential for rehabilitation if his mental health problems are addressed.

Conclusion

121. I conclude that, if the second stage of the article 8 evaluation had been carried out on a correct legal basis, the Upper Tribunal could reasonably have decided that there were very compelling circumstances sufficient to outweigh the public interest in CI's deportation. It follows that the decision of the Upper Tribunal should be set aside and the case remitted for a further re-hearing.

Lord Justice Hickinbottom:

122. I agree.

The Senior President of Tribunals:

123. I also agree.