Neutral Citation Number: [2019] EWCA Civ 982

Case No: C5/2016/0587

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Immigration and Asylum Chamber)
McCloskey J and UTJ Lindsley

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division))
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
JG (JAMAICA)	**Respondent**

- -
- -

Mr Marcus Pilgerstorfer (instructed by **the Treasury Solicitor**) for the **Appellant**
Mr Manjit Gill QC (instructed by **Olives Solicitors**) for the **Respondent**

Hearing date: 5th March 2019

- -

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This is an appeal by the Secretary of State for the Home Department against a decision of the Upper Tribunal (Immigration and Asylum Chamber) (McCloskey J and UTJ Lindsley) dismissing an appeal against a decision of the First-tier Tribunal (FTTJ Burnett) which allowed the Respondent's appeal against a deportation order. The decision of the FTT was promulgated on 2 June 2015 and that of the UT on 16 November 2015. The Respondent's identity was anonymised in the FTT because the judgment involved sensitive evidence about one of his children, and we are prepared to take the same course. The case has had a troubled history. An initial FTT decision in the Respondent's favour was overturned by the UT, and the case was remitted to the FTT. (The Respondent was given permission to appeal to this Court against that decision, but the appeal was ultimately unsuccessful.) The listing of this appeal was delayed because it was thought that its outcome might be affected by other pending appeals.

2. After hearing counsel's submissions on behalf of the Secretary of State we concluded that the appeal should be dismissed and that it was unnecessary to call on counsel for the Respondent. We said that our reasons would follow. These are my reasons for coming to that conclusion.

THE BACKGROUND FACTS

3. The Respondent is a Jamaican national, now aged 40. He came to the UK on 7 April 2002. On 23 September 2003 he married a British citizen, to whom I will refer as NG. NG already had three children, then aged between 10 and 6, who lived with them as his step-children. She and the Respondent had no children together, though she has since had a further child by a different father, born in 2009. The relationship did not last, and at a date which does not appear from the papers the Respondent started a new relationship, with a woman to whom I will refer as CM. At the time of the hearing in the FTT she had one son by the Respondent, to whom I will refer as JG, who was then aged five: he is a British citizen. To anticipate, the principal reason why the FTT allowed the Respondent's appeal was the impact which his deportation would have on JG. I will give more details about that, and about the circumstances of the Respondent's life with CM and with NG and his step-children, in due course.

4. The Respondent has a bad criminal record. In February 2003 he was cautioned for possessing an offensive weapon in public. On 23 January 2004 he was sentenced to twelve months' imprisonment for possession of heroin and cocaine with intent to supply. Most relevantly for our purposes, on 23 September 2011 he was sentenced to five years' imprisonment on counts of possession of heroin and cocaine with intent to supply. He was released from custody in August 2013.

5. Reflecting his criminal record, the Respondent's immigration history is also complicated. He initially had leave to remain as a student, though he overstayed. Following the 2004 conviction he was the subject of a deportation order, but he appealed successfully and was later granted discretionary leave to remain until May 2011. He subsequently applied for indefinite leave to remain, but that was refused and the refusal was upheld on appeal. He has accordingly had no leave to remain since his

release from custody in August 2013. The deportation order with which we are concerned was made on 17 June 2013.

THE LAW

6. By sections 32 and 33 of the United Kingdom Borders Act 2007 the Secretary of State is obliged to make a deportation order in the case of a foreign national who has been convicted of an offence for which he or she was sentenced to at least twelve months' imprisonment, unless their deportation would breach their rights under the European Convention on Human Rights. Typically the relevant rights are those under article 8 of the Convention – that is, the protection of private and family life. It is well established that the effect of sections 32 and 33 is that a tribunal hearing an appeal from a deportation order where deportation would engage article 8 must balance the Convention rights of the person whom it is proposed to deport against the public interest in the deportation of foreign criminals.

7. Prior to 28 July 2014 the Secretary of State's policy as to how that balance should be struck was set out in paragraphs 398-399A of the Immigration Rules. I need not quote them here, but I should note that paragraph 398 provided that in the case of foreign criminals sentenced to a term of imprisonment of at least four years "it [would] only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". The effect of that language was considered by this Court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 1192. Para. 42 of the judgment of the Court delivered by Lord Dyson MR explains that the test is not one of exceptionality as such, but rather that:

> "… in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase 'exceptional circumstances' is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals."

It continues, at para. 43:

> "The general rule in the present context is that, in the case of a [foreign criminal sentenced to at least four years' imprisonment] very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'."

Thus, in effect, the Court held that in a case of the kind in question the test of whether deportation would breach the article 8 rights of the foreign criminal would depend on whether there were "very compelling circumstances" in his or her case, which would of their nature be exceptional.

8. That approach was endorsed by the Supreme Court in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799: see paras. 37-38 of

the judgment of Lord Reed (pp. 4816-7). In para. 38 Lord Reed said that cases of the relevant kind:

> "… will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria)*. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State."

There is a similar observation at the end of para. 50 (p. 4819B).

9. By the Immigration Act 2014, with effect from 28 July 2014 a new Part 5A was introduced into the Nationality, Immigration and Asylum Act 2002. This comprises sections 117A–117D. Section 117A (2) requires a tribunal considering the question whether an interference with article 8 rights is justified to:

> "(in particular) have regard –
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C."

I need not set out section 117B. Section 117C reads as follows:

> "(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."

The phrase "qualifying child" in section 117C (5) is defined in section 117D (1) as:

> "a person who is under the age of 18 and who —
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more."

10. We are in this appeal concerned principally with section 117C (6), which applies where a foreign criminal has been sentenced to at least four years' imprisonment. It will be seen that it adopts the language of "very compelling circumstances" which this Court had in *MF (Nigeria)* held represented the test under the previous law, and that case and *Hesham Ali* are accordingly authoritative as to its meaning (subject only to the effect of the following words "over and above those described in Exceptions 1 and 2", as to which see below).

11. At the same time that Part 5A came into force the relevant Immigration Rules were recast so as to accord more closely with the statutory language. It was common ground before the FTT, and not challenged thereafter, that the version of the Rules current at the date of the hearing (i.e. 6 May 2015) should apply, and they have not in fact changed since in any way relevant for our purposes. Paragraph 398 applies "where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention". It distinguishes between, at (a), cases where the person in question has been sentenced to a period of imprisonment of at least four years and, at (b) and (c), cases where the offending is less serious. In cases falling within (b) and (c) the Secretary of State will consider whether paragraph 399 or 399A applies:

> "and, if it does not, the public interest will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A".

Paragraph 399 describes circumstances relating to the person's family life. I need only set out part (a), which applies where the person in question:

> "… has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;
>
> and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

It will be seen that that is broadly equivalent to "Exception 2" in section 117C (5), so far as concerns a parental relationship, though it splits out "the effect of [the parent's] deportation" into the two possible scenarios, i.e. where the child goes with the parent and where he or she remains behind without them. Paragraph 399A describes circumstances relating to private life and is in identical terms to Exception 1 as defined in section 117C (4).

12. The effect of section 117C has been clarified by a number of recent authorities. I need not review them in detail, but I should draw attention to some points relevant for the purposes of this appeal.

13. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207, this Court addressed the meaning of the phrase in section 117C (6) "very compelling circumstances, *over and above those described in Exceptions 1 and 2*". Paras. 29 and 30 of the judgment of the Court, given by Jackson LJ, reads (so far as material):

> "29. …. The phrase used in section 117C (6), in para. 398 of the 2014 … does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. … [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

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

Mr Pilgerstorfer, for the Secretary of State, agreed that in practice in most cases which satisfied the requirements of section 117C (6) the matters relied on would be of a character which fell within one or other of the two Exceptions.

14. In *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803, [2016] 1 WLR 4203, this Court examined the interaction between section 117A (2) and sections 117B and 117C. *Rhuppiah* was itself a case under section 117B, but it was followed in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239, which concerned section 117C. The effect of both decisions is that Part 5A formally changes the position as it was prior to its enactment in that it requires tribunals to adopt a structured approach, applying the statutory steps, rather than simply treating the Secretary of State's policy as regards the public interest as a relevant consideration. In *NE-A (Nigeria)* Sir Stephen Richards (with whom McFarlane and Flaux LJJ agreed) said, at para. 14 of his judgment:

> "Part 5A of the 2002 Act … is primary legislation directed to tribunals and governing their decision-making in relation to Article 8 claims in the context of appeals under the Immigration Acts. I see no reason to doubt what was common ground in *Rhuppiah* and was drawn from *NA (Pakistan)*, that sections 117A-117D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8. In particular, if in working through the structured approach one gets to section 117C(6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that 'the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2' is one to which the tribunal is bound by law to give effect."

He continued, at para. 15:

> "None of this is problematic for the proper application of Article 8. That a requirement of 'very compelling circumstances' in order to outweigh the public interest in the deportation of foreign criminals sentenced to at least four years' imprisonment is compatible with Article 8 was accepted in *MF (Nigeria)* and in *Hesham Ali* itself. Of course, the provision to that effect in section 117C(6) must not be applied as if it contained some abstract statutory formula. The context is that of the balancing exercise under Article 8, and the 'very compelling circumstances' required are circumstances sufficient to outweigh the strong public interest in the deportation of the foreign criminals concerned. Provided that a tribunal has that context in mind, however, a finding that 'very compelling circumstances' do not exist in a case to which section 117C(6) applies will produce a final result, compatible with Article 8, that the public interest requires deportation. There is no room for any additional element in the proportionality balancing exercise under Article 8."

15. In *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273, the Supreme Court considered the nature of the exercise required by section 117C (5). Lord Carnwath, with whom the other members of the Court agreed, said, at para. 23 of his judgment (pp. 5286-7):

> "… [T]expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of reasonableness under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor … can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more."

16. The upshot of those decisions, so far as concerns the present case, is that in so far as the Respondent sought to rely on the effect of his deportation on his son (who, being a British citizen, was a qualifying child) it would not be enough to show that that effect would be "unduly harsh", in the sense explained in *KO*. That would satisfy Exception

1, but because his case fell within section 117C (6) he needed to show something over and above that, which meant showing that the circumstances in his case were, in Jackson LJ's phrase in *NA*, "especially compelling". In short, at the risk of sounding flippant, he needed to show that the impact on his son was "*extra* unduly harsh".

THE DECISION OF THE FTT

17. The structure of the FTT's decision is as follows:

(1) At paras. 1-42 the Judge sets out the procedural background

(2) At paras. 43-45 he directs himself as to the burden and standard of proof.

(3) At pars. 46-53 he identifies the applicable statutory provisions and rules. He quotes in full section 117C of the 2002 Act and the relevant part of paragraph 398 of the Immigration Rules, noting that, since this was a four-year case, he would have to consider whether there were very compelling circumstances over and above those described in paragraphs 399 and 399A. He quotes passages from the judgment of this court in *Secretary of State for the Home Department v MA (Somalia)* [2015] EWCA Civ 48 which emphasise "the great weight to be attached to the public interest in the deportation of foreign criminals", by reference to both *MF (Nigeria)* and *SS (Nigeria)* ([2013] EWCA Civ 550, [2014] 1 WLR 998).

(4) At paras. 54-65 he reviews the Respondent's offending history. He concludes, at para. 65:

> "I would repeat the offences the appellant has committed are extremely serious. There is a public interest in the need to protect society against crime, a wider impact of the offending conduct on the community at large, its consequential effects and the need to operate a deterrent policy. I understand and acknowledge the ***great weight*** [emphases in original] to be given to this in this case as advised by the Court of Appeal in the case of *MA Somalia*. I have taken these factors into account in forming my decision."

(5) The dispositive reasoning is at paras. 66-128, under two headings – "Appellant's private and family life" (paras. 66-110) and "Article 8" (paras. 111-128). The headings do not give a very clear idea of the specific issues addressed. In fact, the first section assesses the Respondent's case by reference to paragraphs 398 and 399 of the Immigration Rules and the second performs similar exercises under both section 117C of the 2002 Act and, separately, article 8. I consider below whether that was an appropriate way to proceed.

"Private and family life"

18. At paras. 71-81 the Judge sets out the basic facts about the Respondent's relationship with his two families – his former wife, NG, and her children and his current partner, CM, and their child, JG. He was not living with CM, because of his bail conditions, but he lived with her step-father, very nearby. Importantly, JG lived with the

Respondent rather than with CM, who had a job and was also attending university, though she saw him nearly every day: she had found looking after JG while the Respondent was in prison "difficult". The Judge does not say in terms that the Respondent was JG's primary carer, but that would seem to follow. CM was pregnant with another child by the Respondent, but the Judge said that he attached little weight to this because the child was conceived at a time when they were well aware of the precariousness of his immigration status. The Respondent saw a good deal of his former family with NG, who also lived nearby: two of NG's children (his step-children) were now grown-up and had small children of their own, but two were still under eighteen. They had a very close bond with him. On the basis of those findings the Judge concludes at para. 78 that he had a genuine and subsisting relationship with his children, both JG and his step-children (and indeed the two step-grandchildren). At paras. 79-81 he addresses specifically "the nature and quality" of the relationship with JG, describing the relationship with him following his release from prison as "close".

19. At para. 82 the Judge says that he is turning to the question whether it would be "unduly harsh" for JG to remain in the UK without the Respondent, and at paras. 83-87 he discusses how that issue should be approached. Nothing turns on that discussion for our purposes, and I need not set it out, though it is worth noting that he explicitly reminds himself of section 117C (6), which he sets out in full at para. 87. However, at paras. 89-92 he digresses from the "unduly harsh" question to consider whether the case falls within paragraph 399A. He concludes that it does not: he finds that although there would be obstacles to the Respondent's re-integration in Jamaica, in view of the fact that he had lived thirteen years in the UK, they would not be "very significant".

20. At paras. 93-104 he reverts to the question of the impact of the Respondent's deportation on "the children", noting that their best interests are a primary consideration. He notes that it has not been argued that any of them, or their mothers, could reasonably be expected to move to Jamaica. He makes clear that he is considering not only JG but also the step-children (and their children), but he reserves his detailed consideration to the impact on JG. As to that, JG had for some time been displaying symptoms of emotional and psychological damage and was under the care of the North Bristol Child and Adolescent Mental Health Service ("the CAMHS"). The Judge refers to, and quotes from, a number of letters from the local NHS Trust and/or the CAMHS and to two reports, the more recent being from an independent social worker, Mr Robert Simpson. Only short passages are quoted, and we were not shown the documents from which they were extracted; I need not reproduce them in full here. I should note, however, that at para. 97 the Judge quotes a letter from the Trust which refers to JG suffering from "sleep difficulties and tempers, physicality and emotional upset", with "oppositional behaviours and threats of self-harming", and describes his bond with the Respondent as "intense". (The self-harming is also referred to at para. 74, where it is said that the Respondent regards himself as responsible for it – as I understand it, because of his having been away in prison.) The Judge summarised the effect of Mr Simpson's report as being that "there will be serious emotional harm to the child if the appellant is deported at this time". He concludes, at para. 104:

> "It is having considered all the circumstances that I find it would be unduly harsh for the child to remain in the UK without the appellant."

The reference to "the child" is plainly to JG.

21. At para. 105 the Judge finds that it would not be unduly harsh for CM to remain in the UK without the Respondent.

22. His conclusion, at paras. 106-110, reads:

> "106. I have considered the combination of all these features listed above and balanced them against the very weighty consideration in the immigration rules (this is reflected in section 117 NIAA 02).
>
> 107. I have come to the conclusion that at this time and on the evidence now before me there are very compelling reasons over and above those in paragraphs 399 and 399A.
>
> 108. In forming my written decision I have separated out the various factors but in making the decision as to whether there are very compelling circumstances I have taken a holistic view of the totality of the case.
>
> 109. In the circumstances of this case, the separation of the appellant from his children and extended family is in the public interest but the strong (very weighty) public interest in this case is outweighed by the appellant's interests and those of the children concerned and his partner.
>
> 110. I find that the appellant meets the requirements of the immigration rules namely that there are very compelling reasons over and above the matters listed in paragraph 399 and 399A which outweigh the public interest in this case."

"Article 8"

23. As I have said, this section starts by considering section 117C of the 2002 Act. The Judge concludes at paras. 113-114 that the Respondent does not satisfy sub-section (4), i.e. Exception 1, for the reasons already given by reference to paragraph 399A. At paras. 115-116, likewise referring back to his findings on the Rules, and in particular to "the professional reports" he finds that "the effect of the appellant's deportation on his child would be unduly harsh", so that the case falls within sub-section (5), i.e. Exception 2. At para. 117 he refers to section 117C (6) and says that his previous finding "that there are very compelling reasons over [*sic*] the requirements of the immigration rules … applies to exception 2". He concludes, at para. 118:

> "I am satisfied that the appellant meets the immigration rules and that he meets the exceptions in section 117. The public interest which has great weight in this case is outweighed by the combination of all the factors. This includes the appellant's private and family life and the best interest of all the children involved in this case."

24. The Judge then proceeds, at paras. 119-122, to consider the application of article 8 apart from the Rules and the statute, referring to the well-known approach in *R (Razgar) v Secretary of State for the Home Department)* [2004] UKHL 27, [2004] 2 AC 368. However, as he himself observes, his prior conclusions for all practical purposes dictate

the conclusion that the Respondent's removal would constitute a breach of the article 8 rights of himself and his family.

25. At para. 123 the Judge notes that that outcome also accords with the best interests of the children, which were "to be with both parents and in the United Kingdom": he describes that "a primary consideration but … not necessarily conclusive".

Overall Conclusion

26. The Judge's concluding paragraphs read:

> "124. In all the circumstances of this case, the separation (i.e. deportation) of the appellant from the children and his partner is in the public interest but this is outweighed by the appellant's interests and those of the children (including step children and wider extended family) and his partner.
>
> 125. The appellant has committed serious offences and received a substantial period of imprisonment. There is a public interest in the deterrence of the commission of such offences by foreign nationals. I reiterate again I have taken note of the decision of Court of Appeal in *SSHD v MA (Somalia).*
>
> 126. In all the circumstances and for the reasons already given above I consider that the decision of the respondent is disproportionate.
>
> 127. Having carefully scrutinised the evidence before the Tribunal, and balancing the competing interests, I find that the decision of the respondent is a disproportionate response and would breach the appellant's article 8 rights.
>
> 128. Therefore the appellant meets the exceptions set out in section 33 UKBA 2007."

27. Although para. 124 makes it clear that the Judge had taken into account the impact of the Respondent's deportation on himself and on CM and the children in both his extended families, it is clear from the preceding reasoning that the decisive consideration was the impact on JG in the light of the professional evidence about him.

THE DECISION OF THE UPPER TRIBUNAL

28. Since the ultimate question is whether the decision of the FTT was correct in law I need not summarise the reasoning of the UT in any detail; and the shape of the arguments before it was in any event rather different. The UT noted that counsel for the Secretary of State (not Mr Pilgerstorfer) had had to concede that the decision of the FTT was "replete with correct self-directions in law" and it reminded itself, by reference to *Edwards v Bairstow* [1956] AC 14, of the limited basis on which an error of law could be found in the factual conclusions of a tribunal which had directed itself correctly: in effect the decision had to be shown to be irrational, or perverse. It found no such error in the present case.

THE APPEAL

29. There are four grounds of appeal, but in his oral submissions Mr Pilgerstorfer took grounds 1 and 2 together.

Grounds 1 and 2

30. Mr Pilgerstorfer, like his predecessor in the FTT, was constrained to accept that the Judge had directed himself correctly as to the exercise required by section 117C of the 2002 Act and the corresponding provisions of paragraphs 398-399A of the Immigration Rules, even though he had not had the benefit of the most recent case-law. I need not labour the point, but he clearly understood that the Respondent needed to show that there were very compelling circumstances over and above those covered by paragraphs 399 and 399A of the Rules (and Exceptions 1 and 2 in section 117C): see in particular paras. 107 and 117 of his decision. He also repeatedly acknowledged that that was a very high hurdle, given the great weight of the public interest in deporting foreign criminals who had committed offence attracting a sentence of over four years imprisonment: see in particular paras. 65, 109, 118 and 125 of the decision.

31. Mr Pilgerstorfer submitted that notwithstanding those correct self-directions the Judge failed to apply them in making his assessment (ground 2), or in any event that he failed sufficiently to explain how he had done so (ground 1). The formula pleaded by him in ground 2 is that "in its application of the law to the facts [the FTT] imposed too low a standard to the phrase 'very compelling'" and "did not require the other factors to be 'very compelling'". Although that avoids the terminology of "perversity", as advocates tend to prefer to do, that is in substance what is alleged: given the correct self-direction, the only basis for saying that the Judge imposed too low a standard can be that the outcome is one that could not have been reached by a tribunal applying the right standard. In effect, therefore, this is a combined perversity/reasons challenge, though there is inevitably, as Mr Pilgerstorfer acknowledged by taking the two grounds together, a good deal of overlap between them.

32. As to perversity, it is, as I have said, clear that the Judge regarded the decisive factor in his conclusion as being the damage to JG's mental health likely to be caused by the Respondent's deportation. It is of course well-recognised in the case-law that the removal of a parent will generally have an adverse impact on the wellbeing of any child with whom he or she has a subsisting relationship but that that in itself will not constitute a sufficiently compelling reason to satisfy section 117C (6) (or the equivalent Rules). But the evidence before the Judge in this case was at least potentially capable of showing that there was in the present case a risk of harm to JG's mental health that reached the necessary threshold. It did not rely on the "mere" impact of separation but on the specific psychological damage evidenced by the materials referred to at para. 20 above (in a context, it must be recalled, where it appears that the Respondent was JG's primary carer). I have to say that the Judge's summary of the medical and professional evidence does not itself paint a very full picture of the situation, or of the precise extent of JG's problems, though the references to self-harm are striking; and it may be that if we were making our own judgment I might not have regarded it as as compelling as the Judge did. But that is not the role of this Court: we could only, so far as this ground is concerned, go behind the Judge's decision if it was one which was not reasonably open to him on the evidence. For such a challenge to succeed it would have been necessary for us to be taken through the evidence to show that it was incapable of supporting a

conclusion that the harm to JG reached the necessary threshold. But Mr Pilgerstorfer, no doubt advisedly, did not undertake that exercise: indeed the letters and reports to which the Judge referred were not in our papers. There is thus no basis on which we can say that the Judge's decision was not reasonably open to him, and I would uphold the UT's decision that perversity had not been established.

33. I turn to the reasons challenge. The pleaded ground is that it was necessary that the Judge should "identify" the circumstances on which he relied on as being over and above Exceptions 1 and 2 (or paragraphs 399 and 399A) and that he failed to do so. When he gave permission Burnett LJ said that there might be value in this Court giving guidance as to "the extent to which it is necessary to articulate at each stage the accumulative factors leading to the conclusion that article 8 trumps the public interest in deportation".

34. I agree that it is important that in any case involving the deportation of a foreign criminal the FTT should make it clear in its reasons that it has reached its decision by performing the structured analysis required by section 117C and paragraphs 398-399A of the Rules. Specifically, if it believes that the high threshold required by section 117C (6) has been crossed it must say why. It may be possible to identify some particular factor that is decisive, in which case it should do so. But that will not always be the case. It may be simply that the factors that would be sufficient to satisfy paragraphs 399 and/or 399A (i.e. Exceptions 1 and/or 2 in section 117C) are present to a specially high degree: see the final sentence of para. 29 of the judgment in *NA (Pakistan)*. In such a case all that the tribunal can do is make it clear that that is its view.

35. It may be that if he had had the benefit of the most recent case-law the Judge would have expressed himself slightly more explicitly. But in my view it is sufficiently clear from his reasons both that he took the structured approach required by section 117C and why he regarded the threshold in sub-section (6) as crossed. The very compelling circumstances on which he relied were, essentially, the severity of the harm that JG was likely to suffer if the Respondent were deported. It is not, as I have said, necessary that that should be a different "circumstance" than might satisfy Exception 1. Mr Pilgerstorfer accepted in his oral submissions that the Judge's reasoning would have been adequate if he had said explicitly that he was finding that the impact on JG of the Respondent's deportation would be unduly harsh to a special degree; but he submitted that his decision was legally flawed because he did not say do so. But I do not think that the precise language used matters, if it is clear that that was the substance of his reasoning; and in my view it is.

36. Mr Pilgerstorfer in his oral submissions referred to the Judge's description of his assessment as "holistic" and said that it was unclear whether he had relied on other matters besides the impact of the Respondent's deportation on JG – for example, the difficulties that he would face in re-integrating in Jamaica. I think that it is clear that the Judge did indeed take into account other matters: he says so in para. 118. It seems in particular that he took into account the impact that his deportation would have on the Respondent's partner and his step-children. But that is unobjectionable in principle. As Jackson LJ notes at the end of para. 30 of the judgment in *NA (Pakistan)*, the necessary test may be satisfied by a combination of circumstances. Having said that, it is clear that in this case the only element capable of crossing the high threshold required by section 117C (6) was the impact on JG, and it was on that which the Judge rightly focused.

Ground 3

37. The Secretary of State's case under this ground is that the FTT was wrong to assess the Respondent's case separately, as it did, under section 117C and under article 8, over and above its assessment by reference to the Rules. In my view that criticism is well-founded. There is no substantive difference between the effects of section 117C and of the relevant provisions of the Rules, and a separate analysis was unnecessary. More substantially, it has been clear since *MF (Nigeria)*, and is reinforced by *NE-A (Nigeria)*, that the question whether deportation of a foreign criminal would involve a breach of his, or his family's, rights under article 8 can and should be conducted in the context of the decision whether there are "very compelling circumstances" of the kind required by paragraph 398 and, now, section 117C (6): a free-standing article 8 assessment, undertaken outside the statutory structure, is inappropriate.

38. However, the fact that the exercises that the Judge performed at paras. 111-128 were unnecessary does not in itself vitiate the exercise which he performed, explicitly by reference to the Rules, at paras. 66-110. Mr Pilgerstorfer submitted that the fact that the Judge conducted a free-standing article 8 exercise at paras. 119-122 (see para. 24 above) cast doubt on whether the earlier exercise by reference to the Rules was in fact approached in the correct structured manner. But the Judge's Rules-based analysis was unimpeachable on its face, and in the absence of any sign that he fell into the error alleged I do not think it can be impeached on the basis that he subsequently performed a different exercise.

Ground 4

39. This ground is that the UT wrongly treated the Secretary of State's appeal as a straightforward "perversity appeal". Strictly, I need not address it, since we are concerned not with the UT's reasoning but only with that of the FTT. But it will appear from what I have said at para. 31 above that I would agree with the UT that this was in substance a perversity appeal. Given that the Tribunal's express self-direction could not be impugned, the substance of the Secretary of State's challenge was bound to be that it had reached a conclusion that it could not reasonably have reached on the basis of the evidence before it. More emollient advocates sometimes prefer such formulations as that the tribunal "failed to follow its own direction" or, as Mr Pilgerstorfer did here, that it "applied too low a standard"; but in the absence of any overt signs of the tribunal losing sight of its self-direction, or misunderstanding it, the only evidence of the alleged error will be the unreasonableness of the result, which brings us back to the perversity standard.

40. The UT's characterisation of the appeal was related to some trenchant observations which it made about what it perceived to be the Secretary of State's practice of appealing routinely in any case where the FTT allowed an appeal against a deportation order, without any real attempt to identify an error of law as opposed to simply disputing the tribunal's factual assessment. We are not in a position to comment either way about those observations, beyond saying that we hope that that is not the Secretary of State's practice now, if it ever was.

CONCLUSION

41. It is for those reasons that, despite Mr Pilgerstorfer's able submissions, I concluded that this appeal should be dismissed.

Lady Justice King:

42. I agree.

Lord Justice Moylan:

43. I also agree.