Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00882/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 October 2017	**On 13 December 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MP
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr W Hanson, Counsel
For the Respondent: Ms S Naik, Counsel and Mr A Bandegani, Counsel

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the minor family members.

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The Appeal

2. This appeal was brought against a decision made on 29 April 2014 which refused to revoke a deportation order made in 2011 against MP. MP now seeks to argue that his deportation would amount to a disproportionate breach of his rights under Article 8 ECHR.

3. For the purposes of this decision I refer to MP as the appellant and the Secretary of State for the Home Department as the respondent reflecting their positions before the First-tier Tribunal.

Background

4. This appeal has a somewhat complicated history. I set out only those parts of the history that are relevant to this re-making of the Article 8 ECHR challenge to the refusal to revoke the deportation order.

5. MP was born in the Democratic Republic of Congo (DRC) in 1987. At around 2 years old his birth mother relinquished responsibility for him. Thereafter his father and his father's wife had responsibility for the appellant. There was no dispute before me that the appellant's step-mother has acted as his mother since he was aged 2 years old and I refer to her in this decision as his mother.

6. The appellant's father came to the UK in approximately 1993. His wife and their other two children joined him in approximately 1998 but the appellant remained behind with paternal relatives because of insufficient finances to enable him to travel as well. MP's parents and two siblings were granted indefinite leave to remain (ILR) on an exceptional basis on 1 May 2000.

7. MP came to the UK illegally with a friend of his father's in September 2001. He was just under 14 years old at that time. He was granted ILR in line with the rest of his family on 18 September 2003.

8. Between 2003 and 2004, whilst still a minor, the appellant received convictions for street robbery, possession of an offensive weapon and assault on a police officer. By way of sentence, he received a referral order for 12 months, a supervision order and a community rehabilitation punishment order of 100 hours as well as compensation in the sum of £50.

9. On 15 November 2005 the appellant was arrested for robbery. On 12 April 2006 at Blackfriars Crown Court he was convicted of robbery and on 8 June 2006 he was sentenced to five years' detention in a young offender's institute to serve a minimum of 2 years and 6 months' imprisonment.

10. The sentence issued on 8 June 2006 was made together with an order that the appellant be placed on an indeterminate sentence for public protection (IPP sentence) with a minimum tariff of 2 years and 6 months. An IPP sentence such as that imposed on this appellant had to be imposed for specific offences if the sentencing

judge considered the offender to be dangerous and there was a significant risk of serious harm to the public.

11. On 14 March 2011 the respondent made a deportation order against the appellant. On 7 July 2011 the appellant made a refugee claim. That was refused on 17 October 2011. The appellant appealed against that refusal and against deportation. His appeal to the First-tier Tribunal was dismissed on all grounds on 2 December 2011 and his rights of appeal were exhausted on 6 January 2012.

12. The appellant made further submissions and, after litigation concerning certification of a decision refusing to find those submissions had merit, on 29 April 2014 the respondent made the decision under challenge here to refuse to revoke the deportation order.

13. On 28 August 2014 the appeal against the refusal to revoke the deportation order came before the First-tier Tribunal. The appeal was allowed on asylum and human rights grounds on the basis of country evidence showing risk for failed asylum seekers and criminal deportees in the DRC. The decision of the First-tier Tribunal was issued on 26 September 2014.

14. On 5 February 2015 the Upper Tribunal found that the decision of the First-tier Tribunal disclosed an error of law such that it had to be set aside to be remade. The error of law finding concerned an incorrect approach to the issue of risk to failed asylum seekers and criminal deportees in the DRC.

15. There were various developments over the next 2 ½ years concerning aspects of the appeal which are no longer relevant. Once those issues resolved, it was agreed that the appeal would proceed on the basis of Article 8 ECHR only.

Preliminary Issue

16. At the hearing, the appellant applied to admit, amongst other documents, an expert report dated 20 October 2017 on country conditions in DRC. The respondent objected to the report being admitted late.

17. As part of the assessment of whether to admit the country report, I considered to the litigation history leading up to the hearing on 26 October 2017. After it was agreed that the re-making of the appeal would address only an Article 8 ECHR challenge to the refusal to revoke the deportation order, a hearing was listed for 16 December 2016, this hearing being altered to a case management hearing listed for 22 December 2016. That hearing did not take place but the appellant provided a lengthy skeleton argument dated 22 December 2016 setting out his Article 8 ECHR case.

18. After various attempts, finally, a substantive hearing was listed for a full day on 5 September 2017. For the 5 September 2017 hearing the appellant served a bundle of evidence on 25 August 2017 comprising eleven sections and running to well over five hundred pages. The appellant also filed a supplementary bundle dated 31 August

2017 containing a further witness statement of the appellant's sister dated 31 August 2017 and an expert report dated 30 August 2017 addressing IPP sentences.

19. The hearing on 5 September 2017 did not proceed as the respondent had not had sufficient time to address the extensive new materials. The appeal was set down for hearing on 26 October 2017. A direction was made on 13 September 2017 for the respondent to file a skeleton argument by 26 September 2017 and indicating that the case would proceed on the grounds set out in the appellant's skeleton argument dated 22 December 2016.

20. There was no need for further directions for the appellant as his case had been prepared already, for the hearing adjourned on 5 September 2017. However, on 20 October 2017, six days before the hearing, the appellant's legal representatives served a second supplementary bundle. This comprised three sections and over 100 pages of further evidence and including a supplementary skeleton argument dated 16 October 2017 and the report dated 20 October 2017 on country conditions in DRC. Nothing suggests that there had been any reference to an intention to submit these documents either at the hearing on 5 September 2017 or thereafter. They could not have been anticipated by the Tribunal or the respondent, therefore. An application under Rule 15(2)(a) of the Upper Tribunal Procedure Rules for the Tribunal's permission for the new materials to be admitted was made only on 24 October 2017.

21. In the meantime, the Secretary of State served her skeleton argument a month late on 23 October 2017. In a letter dated 23 October 2017 the respondent objected to the expert report on conditions in DRC dated 20 October 2017 being admitted.

22. The assessment of whether to admit the country report therefore had to be made in the following context. The appeal has been outstanding in the Upper Tribunal for over 2 ½ years. A substantive hearing on 5 September 2017 was adjourned because of late service of documents for the appellant. The appellant's case was stated to have been ready as of 5 September 2017. The country report refers to instructions having been sent by the appellant's legal representative only on 16 October 2017, that is 10 days before the re-listed hearing. It was provided only 6 days before the new substantive hearing. The application required by the Tribunal Procedure Rules for the country report to be admitted was not made until 2 days before the hearing.

23. There is no possible conclusion other than that the country report was submitted significantly late. Ms Naik's submissions as to why this was so and how it could be in the interests of justice to extend time were necessarily limited to the instructions provided to her by the appellant's legal representatives. Those instructions did not appear include any good reason for lateness. The only explanation provided was that there had been a review of the case following the hearing on 5 September 2017 and a decision made then to obtain a country report. It had taken from 5 September 2017 to 16 October 2017 to locate an appropriate expert. There was no explanation as to why the Tribunal and the respondent were not put on notice of the report having been sought or for the failure to make a proper application for it to be admitted until 2 days before the hearing.

24. Against that background, the respondent's objection that the report was provided extremely late, without any proper reason for that lateness, where it was wholly unexpected and where that was in the context of an appeal that urgently required final determination had significant merit. My conclusion was that the appeal could be conducted fairly and justly without the country report. I refused to admit the report.

25. The respondent also raised concerns about the proposal to call additional witnesses to those identified in correspondence prior to the hearing and to a further additional witness statement from the appellant's sister being provided. In the event, Mr Hanson took a pragmatic approach and indicated that he would be able to deal with those new materials and no further decision on admission of evidence was required.

The Hearing

26. I heard evidence from the appellant, his father, his mother, his sister, his two younger brothers, his brother-in-law and a close friend. Following the oral evidence, I heard oral submissions from Mr Hanson and Ms Naik. I reserved my decision.

The Law

27. The appellant maintains that the respondent's decision to refuse to revoke his deportation order breaches his Article 8 ECHR rights. The structured approach set out in Section 117C of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and part 13 of the Immigration Rules, in particular paragraphs 390 to 399A, must be applied when assessing whether a breach of Article 8 ECHR arises in a deportation case.

28. The parties were in agreement that because the appellant received a sentence of 5 years' imprisonment, the test he must meet in order to make out an Article 8 ECHR case is that set out in Section 117C(6) of the 2002 Act:

> The public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

29. Exception 1, relevant to this appellant, is set out in s.117C(4) and states that it 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 cease integration into the country to which C is proposed to be deported.

30. The correct approach to the "very compelling circumstances" test is well set out by the Court of Appeal in [28] – [39] of NA (Pakistan) v SSHD [2016] EWCA Civ 662, thus:

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

29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

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.

31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."

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

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

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

> "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

35. The Court of Appeal said in *MF (Nigeria)* that paras. 398 to 399A of the 2012 rules constituted a complete code. The same is true of the sections 117A-117D of the 2002 Act, read in conjunction with paras. 398 to 399A of the 2014 rules. The scheme of the Act and the rules together provide the following structure for deciding whether a foreign criminal can resist deportation on Article 8 grounds.

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

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *Uner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria*? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8.

39. Even then it must be borne in mind that assessments under Article 8 may not lead to identical results in every ECHR contracting state. To the degree allowed under the margin of appreciation and bearing in mind that the ECHR is intended to reflect a fair balance between individual rights and the interests of the general community, an individual state is entitled to assess the public interest which may be in issue when it comes to deportation of foreign criminals and to decide what weight to attach to it in the particular circumstances of its society. Different states may make different assessments of what weight should be attached to the public interest in deportation of foreign offenders. In England and Wales, the weight to be attached to the public interest in deportation of foreign offenders has been underlined by successive specific legislative interventions: first by enactment of the 2007 Act, then by promulgation of the code in the 2012 rules and now by the introduction of further primary legislation in the form of Part 5A of the 2002 Act and the new code in the 2014 rules. Statute requires that in carrying out Article 8 assessments in relation to foreign criminals the decision-maker must recognise that the deportation of foreign criminals is "conducive to the public good" (per section 32(4) of the 2007 Act) and "in the public interest" (per section 117C(1) of the 2014 Act)."

31. Following this learning, the approach I must take is to assess whether the appellant meets the requirements of Exception 1 set out in Section 117C(4) and then include that assessment as a factor when considering whether there are "very compelling circumstances over and above" those covered by the Exception. As indicated by the Court of Appeal in [37] of NA (Pakistan):

> "It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in Section 117C(6)."

32. As indicated by the Court of Appeal at [38] of NA (Pakistan) there remains a place for ECtHR jurisprudence within the "very compelling circumstances" assessment. The parties were in agreement that this was also in line with the approach approved by the Supreme Court in the later case of Hesham Ali v SSHD [2016] UKSC 60 albeit that case was decided without reference to the provisions and structure provided by Section 117C. The Supreme Court in Hesham Ali considered the appropriate role for Strasbourg jurisprudence at [115]:

> "115. A consistent thread running through the cases which I have discussed (and others which preceded them such as *Benhebba v France* (Application No 53441/99, [2003] ECHR 342) (unreported) 10 July, 2003 and *Mehemi v France* (2000) 30 EHRR 739) is the need to review and assess a number of specifically identified factors in order to conduct a proper article 8 inquiry. Another theme is that this examination must be open-textured so that sufficient emphasis is given to each of the factors as they arise in particular cases. Of their nature factors or criteria such as these cannot be given a pre-ordained weight. Any attempt to do that would run counter to the essential purpose of the exercise. This can be readily exemplified: a significant prison sentence may be offset by the strength of family ties or progress on the part of the offender post-conviction, for instance. Or expulsion might be justified where the offending is relatively minor but the length of time spent in the host country is short and there are no strong family ties there. The *application* of the various factors as opposed to the *recognition of their relevance* involves a holistic, open-minded approach. For this reason, giving pre-emptive, indicative weight to particular factors on a generic basis is impermissible if it distorts the proper assessment of these in their peculiar and individual setting."

33. Mr Hanson set out helpfully in [45] of his skeleton argument the potentially relevant factors from Strasbourg jurisdiction to be taken into account in the "very compelling circumstances" test, as including:

- the nature and seriousness of the offence committed by the appellant;
- the length of the appellant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the appellant's conduct during that period;

- the appellant's family situation;
- the nationalities of the various persons concerned;
- the solidity of the social, cultural and family ties with the host country and with the country of destination;
- whether offences were committed as a juvenile or as an adult;
- whether the person came to the host country during childhood.

34. It remains important to keep in mind, however, that in a deportation case, a "very compelling circumstances" assessment, even where it is "holistic" and must properly take account of Strasbourg jurisprudence, is not a free-standing Article 8 evaluation. Albeit that the "very compelling circumstances" question is not answered only by looking at the public interest in deportation, the statutory regime now in force provides that this must be at the forefront of any assessment, increasingly so in line with the seriousness of the offending behaviour. As indicated by s.117C(1) and (2):

> (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.

Discussion

Criminal Offences

35. In order to reflect properly the structured approach of s.117C and proper weight to be given to the public interest, my starting point in the "very compelling circumstances" assessment is the index offence, the seriousness of that offence and the appellant's other offending behaviour.

36. The sentencing remarks of the judge in 2006 indicate that the appellant was one of two main perpetrators of the robbery which was carried out on two victims, one male and one female. Reports before the criminal court described the appellant punching the female victim twice before stealing her mobile phone. The sentencing judge went on to give further details:

> "Insofar as aggravating features are concerned then I list these; first of all there was a completely innocent victim here who had obviously been anxious to protect [D] when you approached and when you offered aggression to this person Mr [O]. Secondly this was a prolonged attack involving not only you being two of the defendants but there were also others. However, I am satisfied having heard the evidence which lasted a number of days that you were the main players in this offence. Thirdly, even when Mr [O] was trying to get away and summon help on his mobile phone you saw fit to pursue him and restart the attack. He was on the floor and seen by a bus driver who slowed down to let him on board. Even then he was not safe because you, [the appellant's brother] saw fit to follow him onto the bus and to continue the attack as was evidenced by a passenger saying, "What do you want to do; kill him?"

> I have noted of course that insofar as the attack was concerned that involved not only punching but also kicking and kicking while somebody was on the ground. In relation to you both this offence was committed at a point in time when you were both subject to a community sentence and therefore you are both in breach of that.
>
> ...
>
> Insofar as you were concerned, MP, you have three previous convictions for robbery. You have the one committed on 9 July 2003 – committed 12 July 2003. I understand those were both in the nature of street robberies. I am told and am prepared to accept that those involved the threat of violence but not the actual use of violence. I am also told that in relation to the offence of 21 May 2004 of which you were convicted on 2 December that you robbed a male victim of a mobile phone in the street.
>
> Additionally of course you have a specified offence albeit not a serious specified offence of affray on 19 August 2004 and you also have a specified offence of assault on a police officer on 13 October 2005. That would appear to have been committed only a matter of a very few weeks before the instant offence. Insofar as the offence of possessing an offensive weapon in public is concerned I accept that that is not a specified offence but nonetheless I understand that you did in fact arm yourself with a nunchakus."

The judge went on to conclude that:

> "Anybody in my view who offers that sort of violence can only be said to pose a risk of significant harm of causing serious harm to members of the public.
>
> Those factors coupled with your previous convictions for specified offences make it impossible to contend that it would be unreasonable to conclude that the assumptions of Section 229(3) do not apply. I must for the same reasons come to the conclusion that there is a significant risk of serious harm from the commission by you of further specified offences. Accordingly, I am obliged to impose a sentence of detention for public protection."

37. The imposition of an IPP sentence led to the appellant being in criminal detention for 10 years even though the tariff for his offence was 5 years' imprisonment. The IPP sentence regime was abolished in 2012 following numerous legal challenges. Hansard records that when legislation was introduced to end IPP sentences, the then Justice Secretary stated that IPP sentences were "unclear, inconsistent and … unjust to the people in question".

38. Materials and submissions have been put forward for the appellant at various times during this litigation arguing that he has been unfairly treated or prejudiced by the imposition of the IPP sentence and that this should weigh on his side of the balance. I did not accept that there was any real basis for that to be so or that or that any weight detracted from the high public interest in his deportation or attracted to his side of the balance because of the IPP sentence. The sentence was lawfully made. When the appellant appealed it to the Court of Appeal, it was upheld. The legislation revoking the IPP scheme could have done so retrospectively but did not.

39. The public interest in the appellant's deportation remains very high, therefore, reflecting his sentence of 5 years' imprisonment. Further, albeit committed whilst the appellant was a minor and not capable of activating the automatic deportation regime, the appellant's earlier offending must also form part of the case against him.

Section 117C(4) - Exception 1

40. Having set out the details of the index offence and concomitant strong public interest in deportation which must remain at the forefront of the "very compelling circumstances" consideration here, I turn to the provisions of Section 117C. As set out above, I must first consider whether the appellant can meet Exception 1 of s.117C(4). For ease of reference I set out Exception 1 again here:

(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 cease integration into the country to which C is proposed to be deported.

Lawful Residence

41. The appellant concedes that he does not come within Exception 1 as he has not been lawfully resident in the United Kingdom for most of his life. He was lawfully resident with ILR from 2003 to 2011 when the deportation order ended his leave. Even had it not done so, as of the date of hearing before me he could still not have shown that he had been in the UK lawfully for most of his life.

Social and Cultural Integration

42. The degree of the appellant's social and cultural integration into the UK was disputed by the parties. Having come to the UK in 2001 aged 13 years and 11 months there must have been some integration until his imprisonment in 2005. It is difficult to see that the appellant was strongly integrating and conforming to the social and cultural norms of the UK, however, given that his behaviour was such that he was expelled from school in 2004 and committed the offences set out above in 2003 and 2004.

43. The respondent also submitted that social and cultural integration could not have taken place during the appellant's period of detention, from the autumn of 2005 to the spring of 2016, a period of over 11 years out of his 16-year presence in the UK. The respondent relied on [24] and [25] of Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC) which considered "social and cultural integration", (albeit in the context of the Immigration Rules):

> "24. In our judgement, the gravamen of the new paragraph 399A(b) is integration in the UK. Integration must be shown to exist in two respects: social and cultural. Neither one nor the other is sufficient. The term integration imports a qualitative test: in order to assess whether a person "is" socially and culturally integrated in

the UK, one is not simply looking at how long a person has spent in the UK or even at whether that period comprises lawful residence: but the fact that an appellant has spent some or all of his time in the UK unlawfully may be of relevance in deciding whether he has integrated in these two ways. Another difference between the old and the new Rules is that whereas the previous rule required any period of imprisonment to be discounted, the new rule is silent on the matter. As a result we consider that it must remain open to the decision-maker to consider time spent in prison negatively, because it does not bespeak integrative behaviour; but the rule no longer mandates that.

25. Mr Mak submitted that it is implicit in the paragraph 399A context – a rule dealing with foreign criminals - that merely being a foreign criminal cannot preclude a person from showing the necessary integration. With that we can easily agree. Mr Mak further submitted that the rule cannot have been intended to assist only a few such persons. With that we wholly disagree. The new Rules make even clearer than the pre-28 July 2014 rules that deportation of foreign criminals is always in the public interest and can only be outweighed in very limited circumstances. In general terms imposition of a custodial sentence is an indication that the person concerned has not respected the values of the host society (cf in the context of EU law on deportation of foreign criminals, Case C-400/12 Secretary of State v MG ECJI:EU:C2014:9 at [31]). Further, whilst in prison a person cannot be a useful member of society at large; during that time such a person cannot as a general rule show integration into society. Thus, although the new rule does not as such preclude time in prison from being considered as to whether social and cultural integration is shown, its terms leave very little scope for such argument."

44. The respondent submitted that, albeit the statutory regime did not exclude the possibility of time in prison being capable of amounting to cultural and social integration, there was "very little scope for such argument" and that this appellant could not make out that he came within this limited category.

45. It was argued for the appellant that during his period in prison because of the nature of the IPP regime he had to undergo intensive courses in order to progress towards release. He had also volunteered to take additional courses. This had allowed him to show a degree of social and cultural integration as allowed for in Bossade.

46. All of the reports before me from the Prison Service, Parole Board and Probation Service from 2009 onwards indicate that the appellant was a model prisoner. That was so even though, in 2012, after being transferred to open conditions on the recommendation of the Parole Board, he was returned to Category C detention because of concerns raised by the respondent on the basis of his immigration status. The Parole Board reports from this time comment on his resilience in dealing with this set back and his determination to continue his progress towards release nevertheless.

47. The views of the professionals on the appellant's rehabilitation whilst in detention are well summarised by the Probation Service letter dated 26 May 2016:

> "MP does not present a high and imminent risk of harm to the public and his case is manageable in the community. I do not assess that MP presents as a high risk of abscond or reoffending on licence. ... his current compliance on licence demonstrates his ability to reintegrate in society. MP was brought back to the Closed Conditions on Immigration matters rather than any breach of regimes, which together with his current good progress indicates evidence of reformation of his character.
>
> Whilst at HMP Wayland and under my supervision MP presented as a model prisoner. ... he resided on the super enhanced open wing at HMP Wayland where he was subject to less restrictive regimes, was unlocked 24 hours a day, had a key to his room, lived as part of a community and had the ability to associate more freely and cook for himself. MP was seen as a positive and calming influence on the wing and his social time was spent in the gym or engaging with activities in the Chapel, for example, choir practice.
>
> MP has a positive record of engaging with his sentence plan and prior to his release he completed the Resolve Programme as a means of further addressing any risk associated with violence in his case. MP engaged well with this offending behaviour programme and received positive feedback in his post programme report and review. ...
>
> MP has consistently demonstrated the ability to engage with professionals and his working relationship with myself was a positive one. In my opinion MP has effected change and is motivated to desist from reoffending in the future. He has made use of his time within a custodial setting to develop vocational skills to enable his positive resettlement in the community, for example, achieving a level 2 Diploma in Carpentry. MP has gained practical experience of employment in a custodial setting with his last role being that of Offender Representative covering a number of wings. I believe that MP's mature and diligent attitude contributed towards him securing this trusted position and as part of his role he was given the freedom to move around the prison with less restriction.
>
> I wish MP all the best in the future and am hopeful that he can continue to live a pro-social life within society."

48. This letter, together with the very positive descriptions of the appellant in all reports from 2009 onwards, it was submitted, showed that, exceptionally, he had established a degree of social and cultural integration whilst in detention.

49. I saw some force in that argument. Ironically, the length of time that the appellant was in detention because of the IPP system and the requirements of that system to demonstrate progress provided him with the opportunity to begin to demonstrate that he was someone able to respect the social and cultural norms of the UK. The evidence from the professionals concerned with monitoring his progress and rehabilitation is consistent as to his having used that opportunity to the full.

50. Further, even accepting that social and cultural integration can only be shown to a limited degree whilst the appellant was in detention and not living in society, it appeared to me that it put the appellant in a position to become integrated rapidly and substantially on release. Since his release in April 2016, he has conducted himself in a manner that is entirely consistent with UK social and cultural norms. He has

demonstrated this in a number of way, including his influence on his younger brothers. He has encouraged one of his younger brothers to take up part-time work and pursue his studies seriously in order to take up a career in finance and accounting. He has had an additionally positive influence on his other younger brother, SP, whose behaviour had become problematic at school, culminating in the summer of 2016 on an alleged assault on a teacher. The appellant intervened with SP and liaised with him with the Youth Offending Service and spoke to his brother's friends, also accompanying SP to counselling sessions with a psychologist. SP indicated in his evidence that the appellant spent more time with him than their father and was a very significant role model for him.

51. The evidence was also consistent as to the appellant playing a significant and positive role in the lives of all members of the family, including his sister, and her husband, acting as a childminder for them for up to two days a week.

52. The appellant has also pursued as far as he can, given the limits on his access to courses and finances because of his immigration status and his criminal licence, qualifications to work as a plumber and a personal fitness trainer. The consistent evidence of all of the family members and his friend MJ was that he has become a stable and thoughtful individual, able to tolerate the various restrictions on him and remain a positive force within and outside his family.

53. The evidence from the appellant and his family on his conduct whilst living in the community since April 2016 is consistent that provided by the Prison Service, Parole Board and Probation Service materials. Further, a psychology report dated 18 August 2017 prepared by Ms Pagell reached a similar conclusion as to the unusual degree of rehabilitation and reduction in risk of reoffending and genuine change in the appellant's thinking. The views of the professionals involved with the appellant were also consistent with his own comments on his previous behaviour, his time in prison, his remorse and understanding of the harm caused to his victims and the damage to his family. His evidence on these matters, supported by the professional evidence, was, in my judgment, genuine.

54. Pulling these parts of the evidence, together, it was my conclusion that the appellant, at the time of the hearing before me, notwithstanding his criminal conduct and lengthy period of detention, was someone who had shown that he was socially and culturally integrated in the UK to a substantial and significant degree.

Significant Obstacles to Reintegration in DRC

55. The appellant left DRC at the age of 13 and 11 months. I accept the he received some education there. He will retain some knowledge of the country. However, the appellant and his family witnesses gave detailed and consistent evidence that the appellant was living in DRC at a time of great disruption because of the civil war, and that he witnessed some of the abuses that took place. His sister gave corroborative evidence, describing her own difficult experiences whilst in DRC and her subjective fear of returning because of what she witnessed there as a child. His

engagement with society and culture in DRC would have been disrupted as a result and those years do not form the stable basis for reintegration that would pertain had they been formed in peaceful civil society.

56. Further, the appellant has not been in DRC since 2001, some 16 years. The appellant's evidence that he now understands some French and Lingala but does not speak either language well, his main language now being English, was not disputed. That being so is unsurprising given the age at which he came to the UK, his limited education in DRC and the number of years that he has spent in the UK including in the prison system where he had very limited exposure to either French or Lingala.

57. All witnesses confirmed that the appellant would not have any family members to look to for support on his return. It was suggested for the respondent that the evidence on this point was somewhat equivocal but I did not find that to be so. The written and oral evidence provided on the family situation in DRC in the past and now was highly consistent. After his parents left, the appellant lived in DRC with paternal relatives, an uncle and his grandmother, but both had since died. The paternal family home had been sold.

58. It was not only that evidence was given to this effect in the current witness statements and at the hearing. In a Probation Service report dated 28 November 2010 at page D126 of the appellant's bundle served on 25 August 2017, he is recorded as having referred to his paternal uncle passing away in May 2010. The appellant's mother made a statement on 22 November 2016 which is at B121 of the appellant's bundle and at [13] she indicates that the paternal family home was sold and that his grandmother, the last person who was caring for him in DRC, had died in 2011 and that she and her husband had not returned to DRC since then.

59. I accept that the appellant has no paternal relatives in DRC who might assist him to integrate and that the paternal family home has been sold.

60. The evidence was also consistent as to the appellant's mother's family refusing to have a relationship with him after his biological mother relinquished care of him to his father. This was why he was left with paternal relatives when his parents came to the UK. The evidence of all of the witnesses on this point was very consistent and given fluently and, in my judgment, entirely credibly in oral evidence. I accept that the appellant has had no contact with his maternal family since he was approximately 2 years' old and that they would not offer him any kind of support were he to return.

61. There was no suggestion that the appellant or his family have any other meaningful contacts in DRC who could offer him assistance on return.

62. The appellant's family, his mother in particular, expressed significant concerns about the country conditions in DRC and how someone with the appellant's profile would manage alone in what would be, by now, an alien environment. There was not a great deal of country evidence available against which to assess the difficulties that would be faced by someone returning with a limited knowledge of DRC and the

languages spoken there and with no network of support. The World Bank Report on DRC for 2016 indicates that "DRC is still recovering from a series of conflicts that broke out in the 1990s creating a protracted economic and social slump" and states that DRC "is among the poorest countries in the world and was ranked 176 out of 187 countries on the latest United Nations Human Development Index (2015)" and that "the poverty rate remains high". The US State Department Human Rights Report covering 2016, commenting on working conditions indicates that the average monthly wage, were the appellant able to find work, did not provide a living wage.

63. I was also referred to Kamara v SSHD [2016] EWCA Civ 813 which states at [14]:

> "14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. 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"

64. My conclusion, albeit the test is a high one, is that there would be very significant obstacles to this appellant's integration in DRC. The evidence indicates that there is no real basis for him to be able to establish a private life and integrate there. He has no links to anyone in the country who might offer him even basic support or guidance on his return. He has a limited knowledge of the local languages that are primarily used for day-to-day life. His knowledge of the country is limited given the age at which he left, the disruption in civil society at the time that he was living there and the length of time since he left. The country is in a parlous economic state. He is a young, healthy person but in all the circumstances here I do not find that he could be said to have the capacity to participate in life in DRC or have a reasonable opportunity of being accepted there.

Very Compelling Circumstances

65. Following the guidance in NA (Pakistan), the assessment of the criteria in Exception 1 of s.117C(4) carries forward into the "very compelling circumstances" assessment. As explained at [30], [32] and [37] of NA (Pakistan), it is necessary to look to see whether the Exception 1 factors are of such force, whether by themselves or taken in conjunction with any other relevant factors such as to satisfy the "very compelling circumstances" test.

66. It appears to me however, that the "very compelling circumstances assessment" must still commence by weighing the nature and seriousness of the offences and the concomitant public interest in deportation. Those are the first criteria set out the

structured approach of s.117C. The index offence here which attracted a 5-year sentence cannot be regarded as anything other than very serious. It is not the only offence albeit the others were much less serious and committed whilst the appellant was a minor. The public interest in the deportation of this appellant is high.

67. Against the weight in favour of deportation, the appellant, now 30 years old, has been in the UK for 16 years, 8 of those years with ILR.

68. Also, the index offence was committed 12 years ago. The materials considered above, in my judgment, show that his conduct during that time, albeit a great deal of it in detention, has been unusually positive. Remorse, rehabilitation and a low risk of reoffending are not factors in themselves that can necessarily defeat the public interest in deportation of a foreign criminal. The weight attracting to the public interest remains high for of someone who has committed this index offence and is difficult to displace. Those factors are relevant, however. Hesham Ali identifies at [96] that "customarily, the risk of reoffending will be of predominant importance" in the context of an Article 8 proportionality of deportation case.

69. The discussion of social and cultural integration above concludes that the appellant is part of a close family group in which he plays an important practical role, for example assisting his younger brothers to progress and his sister in bringing up her family. His family are British. It was not disputed by the respondent that the appellant was eligible for British citizenship prior to his index offence but that his parents were misadvised and so did not apply for him when the applications for his siblings were made. Where that was so and the appellant and his family were entitled to view him as settled and eligible for citizenship in due course, this is not a situation where the appellant's private life can be properly characterised as merely "precarious" and of little weight. The comments of Lord Reed in Hesham Ali at [34] on the question of whether someone is settled or not being "a more complex question than it might appear at first sight" are applicable to this appellant, certainly up until notification of the intention to deport in 2009, if not the end of his ILR in 2011.

70. These aspects of the appellant's profile also fall to be weighed with the earlier conclusions that he has demonstrated substantial and significant social and cultural integration in the UK and very significant obstacles to his integration in the DRC. Paraphrasing the guidance at [37] of NA (Pakistan) at [37], I must, finally, look to see whether the factors I have identified as significant from Exception 1 are of such force, whether by themselves or taken in conjunction with any other relevant factors such as to satisfy the "very compelling circumstances" test in Section 117C(6). That holistic assessment must afford proper weight to the public interest in deportation where an offence of this seriousness is committed.

71. Put simply, it is my conclusion that the unusual degree of substantive rehabilitation here, shown whilst in detention over an extended period of time and thereafter, the low risk of reoffending, the significant degree of social and cultural integration and very significant obstacles to any meaningful integration in DRC are sufficient, together with the factors identified in [67]-[69] to meet the "very compelling

circumstances" test. Only a "rare" case can meet the high threshold where the offence is so serious but my assessment of the factors here, after following the structured approach required in deportation cases, is that this is one of those cases.

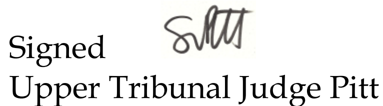
72. For these reasons, I allow the appeal under Article 8 ECHR.

73. The appellant is already aware of the serious implications for him if he reoffends because of the terms of his criminal licence. He should also be fully aware that the question of his deportation to DRC is likely to be looked at very differently in the event of any further offending.

Decision

74. The decision of the First-tier Tribunal was set aside to be re-made.

75. The appeal is re-made as allowed under Article 8 ECHR.

Signed  Date 27 November 2017
Upper Tribunal Judge Pitt