Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08187/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 March 2018	**On 13 April 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR A J J
(ANONYMITY DIRECTION CONTINUED)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms S Akinbolu instructed by Duncan Lewis & Co, Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Gambia and his date of birth is 8 September 1990. He made an application for asylum and this was refused by the Secretary of State on 20 July 2016. The Secretary of State refused to revoke a deportation order in respect of the Appellant made on 14 December 2010.

3. The Appellant was born in Norway and lived in Gambia from the age of 3 to 9. He came to the UK with his mother and brother on 30 July 2002. He was granted leave to remain here until March 2002. In December 2008 he was granted indefinite leave on the basis of long residency. In May 2010 he was convicted of GBH and an offence

of perverting the course of justice which related to the concealment of a weapon. He was sentenced to fifteen months imprisonment in respect of the GBH and one month to run consecutively in relation to the offence of perverting the course of justice. Following conviction, the Secretary of State made an order to deport the Appellant on 14 December 2010 (under Section 32 of the 2007 Act). He appealed against this and the First-tier Tribunal dismissed his appeal, finding that the Appellant had connections in Gambia through a maternal uncle and two aunts, and that his mother would be able to financially support him there until he found employment.

4. The Appellant made an application to revoke the deportation order. This was refused by the Secretary of State in December 2012. The Appellant appealed against this decision and his appeal was allowed by the First-tier Tribunal in October 2013. However, the Court of Appeal found an error and remitted the matter back to the Upper Tribunal. In August 2015, the Upper Tribunal dismissed the Appellant's appeal against the decision to refuse to revoke the deportation order. This was refused and the Appellant's appeal was allowed on 31 March 2013. This resulted in various further hearings, including before the Court of Appeal that ordered a rehearing before the Upper Tribunal. In a decision of 24 August 2015 the Upper Tribunal dismissed the Appellant's appeal against the refusal to revoke the deportation order. The Appellant made further representations under paragraph 353 of the Rules which were refused. He was removed to Gambia in December 2015. He was refused entry by the Gambian authorities.

5. The Appellant appealed against the decision of 20 July 2016 to refuse to grant him asylum and his appeal was allowed by Judge of the First-tier Tribunal Colvin under Article 8 of the 1950 Convention on Human Rights. Judge Colvin dismissed the Appellant's appeal on asylum grounds. The Appellant's asylum claim was based on his sexuality. This was not accepted by the judge. However, the appeal against the decision to refuse to revoke the deportation order was allowed. The Secretary of State was granted permission to appeal by First-tier Tribunal Judge JM Holmes on 11 January 2018.

The Decision of the First-tier Tribunal

6. Judge Colvin recorded that the First-tier Tribunal in 2011, when dismissing his appeal against deportation, found that the Appellant had connections to Gambia through a maternal uncle and two aunts, and that his mother would be in a position to financially support him until he found employment. Judge Colvin found recorded that at that time there was no evidence that the Appellant's mother had medical problems or was in any sense dependent upon the Appellant. The judge applied *Devaseelan* guidelines *(Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702) indicating that his starting point was the findings as made by the Upper Tribunal, recording and commenting on them at [36]. These can be summarised as follows:-

    1. The application's offending was serious and the offence was not a single isolated offence.

2. In terms of the mother's mental health the Upper Tribunal found:

> "We do not consider that, taken overall, the mother's condition and the role and involvement he [the Appellant] has in supporting that condition is at the level of a powerful or very compelling reasons".

3. There was more evidence before the Upper Tribunal than before the First-tier at the earlier hearing that the uncle is in poor health and a pensioner and that one of the aunts is undergoing treatment for her mental health, the other aunt is elderly and in poor health.

4. The Appellant would be able to take up immediate residence in Gambia in an existing family household and be supported there for whatever period of time it takes, and that they could not reach a conclusion that there is no active tie to the country of citizenship.

5. The submissions overstated the position in respect with the degree to which the Appellant is integrated in the UK and the obstacles that he would face in Gambia. The link to Gambia was found not to be "tenuous" or "without meaning.

7. Judge Colvin found that the "most prominent matter that has changed since this decision" related to the Appellant's mother's health. He concluded from the various medical reports before him that she underwent a major operation on her brain on 19 October 2015 for a brain tumour.

8. The judge at [38] attached weight to several references in the reports to the Appellant's mother being cared for by her son. In particular there was a letter from the University College London Hospital which was not dated reporting on her discharge after the operation which stated that her son is her main carer. This was also referred to in the discharge summary. The judge attached weight to a reference to whether the Appellant's mother required a care home. She had apparently stated that she did not want to go into care if her cognitive state deteriorated and that her son was deported and she could not return home.

9. The judge noted at [39] the Appellant's evidence that his mother had a carer who came to the house twice a day for 30 to 45 minutes to wash and dress her. However, he provided care the rest of the time including ensuring that she took medication three times a day and undertaking household chores such as shopping, cooking and cleaning. His evidence was that he tried to ensure that his mother went outside for a walk and her enjoyment of life was seriously limited by her continuing depression. The judge concluded at [40] that he was in no doubt that the Appellant was playing a significant role caring for his mother and that this represented a "major change since the Upper Tribunal Decision in August 2015". The judge concluded that the level of support which included important emotional support was not something that is likely to have been or would be provided in the future to the Appellant's mother in his absence. The judge concluded at [39]:

"There is therefore in my view a dependency which goes well beyond the normal physical and emotional ties of a mother and her grown-up son. And, from the Appellant's own statements, I believe this dependency to be mutual in some respects as he says that he does not know how he himself would cope emotionally without her particularly as he has always lived with her even though he is now nearly aged 27."

10. The judge found at [41] that there had been other changes since the Upper Tribunal's decision. The judge found that this included the death of the uncle in Gambia and the removal of one of the aunts to Senegal in order to receive medical treatment. The judge found that there was one elderly aunt living in Gambia which, according to the judge, lessened the active tie in Gambia as found by the Upper Tribunal. The judge found that there was no obvious means of financial support for the Appellant on his immediate return which was a factor mentioned in a previous decision when his mother was running a small business from home. The judge stated that two years had passed and the Appellant had not committed any further offences. The judge considered that the Appellant was aged 19 in 2009 when the offence occurred, and that he had spent eight years since then and he had not committed further offences.

11. The judge considered the appeal under the Immigration Rules and made findings as follows:

"42. I have set out above those matters that need to be considered under paragraph 390 in relation to an application to revoke a deportation order. There is no doubt in this case that the deportation order was made following a serious offence of GBH being committed by the appellant. As the Sentencing Judge remarked, this was '*a wholly unprovoked attack on an innocent member of the public*' that caused '*grave injuries*'. There is therefore also no doubt a strong public interest in the deportation of a foreign national who has committed such an offence. On the other hand, I consider that there are compassionate circumstances in this case as referred to above particularly in relation to the appellant's mother and this is a matter that I return to below.

43. As the appellant received a prison sentence for less than 4 years but at least 12 months he fails within paragraph 398(b) of the Immigration Rules. This means that I must consider the matters set out in paragraph 399A. It is the respondent's case in the refusal letter that the appellant cannot fulfil the requirements of subpar (a) as he has not been *lawfully* resident in the UK for most of his life. It points to the period of 5 years between 2002 and 2007 when he had no leave to remain. He would have been aged 12 to 17 during this time and still dependent on his mother to regularise his immigration status in line with hers. In this context it is submitted that as the appellant was brought to the UK as a young child and thus had no choice over where he was obliged to live that he ought to be treated as a settled immigrant. And the fact is that he has been here since childhood is still a weighty matter even though a part of the period was not lawful: *JO (Uganda) v SSHD [2010] EWCA Civ 10*.

44. Although there is clearly substance in such a submission, it is nevertheless the fact that on a strict interpretation of the 'lawful residence' requirement it means that the appellant has had 13 years lawful residence in the UK out of the 18 years that he has been here and this, in turn, means that he has only spent half his life lawfully resident in the UK. I am therefore forced reluctantly to reach the conclusion that the appellant does not fulfil this requirement of subparagraph (a).

45. However, I consider that it may be helpful to address also the other requirements of paragraph 399A. It is worth noting that the Upper Tribunal in its Decision questions the degree to which the appellant is truly integrated in the UK but gives no specific reasons for this position. I am of the firm opinion that the appellant is socially and culturally integrated in the UK after having been here for the past 18 years during the most formative years, receiving his secondary and college education and working here and making his friendships in this country. I also find on the evidence that there would be very significant obstacles to his integration into Gambia. This is due to the significant lessening of any 'active ties' he has there in the form of family members as stated above, his absence from the country for 18 years and the lack of any financial support on his initial return. He will also be returning after separating from his mother for the first time and despite the dependency that they continue to have with each other which I have referred to in some detail above. I consider that the cumulative effect of all these factors is likely to mean that the appellant's return to Gambia will entail very serious hardship in establishing a new private life which, according to the Home Office's own Guidance is sufficient to show 'very significant obstacles'."

12. The judge considered Article 8 outside of the Immigration Rules and made findings as follows:

"46. As the appellant does not fulfil all the requirements of paragraph 399A of the Immigration Rules I must go on to consider the issue of revocation of the deportation order under Article 8 outside of the Rules. In paragraph 398 it is stated that in the evet (sic) that paragraph 399A does not apply, the public interest in deportation will only be outweighed by other factors where [there] are very compelling circumstances over and above those described in this paragraph.

47. In this context I consider it is important to refer also to paragraph 46 of the judgement of Sales LJ in the present case when it was before the Court of Appeal [AJ (Gambia) [2014] EWCA Civ 1636]:
'*In my view, the UT should have approached the assessment of the claim under Article 8 by application of the new rules, and in particular (since the appellant could not bring himself within paragraphs 399 and 399A of the new rules) by asking itself whether there were very compelling reasons, within the 'exceptional circumstances' rubric in para 398, to outweigh the strong public interest in deportation in the appellant's case. In addressing that question, the UT should have given due respect to the guidance from the Grand Chamber in Maslov at*

para 75 of the judgment (reading it in the context of the general guidance given by the Grand Chamber at paras 68-76 of the judgment), but as a matter to be brought into the overall assessment and balanced against the strong public interest in deportation to which the UK Borders Act 2007 and the new rules give expression. On a proper approach under the new rules, in relation to a person assessed to have active ties to his country of citizenship, without a relevant family life in the United Kingdom and whose serious offending had occurred when he was an adult, I think the more natural conclusion would be that deportation would be found to be justified in a case like this.'

48. Taking this approach I find that on the evidence as it now stands that the appellant no longer has the active ties with Gambia for the reasons already given. His only connection with Gambia was his uncle and two aunts on the findings of the Upper Tribunal Decision in 2015. His uncle has since died, one aunt is in Senegal for medical treatment and the other aunt is elderly and in poor health as adduced by a medical report that has been submitted again in the appellant's supplementary bundle. The other major factor is that I find that the appellant does have a 'relevant family life in the UK'. His mother is now dependant (sic) on him. She is mentally ill and recently had a major brain operation. The appellant is a young adult who has always lived with his mother and clearly has a level of emotional dependency on her as well as being her primary carer. He has not formed an independent family unit and as it was held in the case of *Singh v SSHD [2015] EWCA Civ 639* at paragraph 24 '*a young adult living with his parents or siblings will normally have a family life to be respected under Article 8*'. However, as I have indicated above, the elements of dependency in fact go much further in this case and are, in my view, a clear factor pointing to there being compelling reasons not to deport the appellant.

49. There is also the fact that the appellant has spent 18 years living continuously in the UK during his formative years from the age of 9 and therefore the guidance in *Maslov* must be heeded as relevant. At paragraph 71 the Grand Chamber indicated that where the person to be expelled is a young adult who has not yet founded a family the relevant criteria are: the nature and seriousness of the offence; the length of the applicant's stay in the country from which he is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period and the solidity of social, cultural and family ties with the host country and with the country of destination.

50. In making my assessment under Article 8 I must also take account of the public interest matters set out in s.117C of the NIAA 2002. Clearly, for the same reasons as given above, I find that the appellant cannot fall within the Exception 1 set out in subparagraph (4) solely on the grounds relating to lawful residence.

51. To summarise, the appellant has been in the UK for 18 years since the age of 9. He committed the offence, which is fully acknowledged as being serious, when he was still young at the age of 19. He has committed no further offences since then over a period of some 8 years. At the same time, I have found on the evidence before me that the appellant is socially and culturally integrated in the UK, that there would be very significant obstacles to his integration in Gambia not least because of having significantly weakened active ties there and that he has a family life with his mother in the UK that engages Article 8. And, most importantly, I find that there are serious compassionate circumstances in this case relating to the appellant's mother and her dependency on her son for her physical and emotional care.

52. I have reached the firm conclusion in this case that there are sufficiently compelling reasons to outweigh the need for deportation on Article 8 grounds. Accordingly I allow the appeal. An anonymity order has been made previously and this is to continue."

The Law

13. The statutory scheme for automatic deportation of foreign criminals from the United Kingdom is contained in Section 32 of the 2007 Act. Section 32(1) in conjunction with Section 32(2) defines "foreign criminal": a description which it is accepted applies to the Appellant in this case. The Secretary of State is obliged to make a deportation order in respect of a foreign criminal. The exceptions to the automatic deportation regime are contained in Section 33 of the 2007 Act. Section 33(2) provides that a foreign criminal is not to be deported where that would breach that person's Convention rights or the United Kingdom's obligations under the Refugee Convention. Where a court or Tribunal is required to determine whether a decision made under the Immigration Act breaches a person's rights under Article 8 ECHR, Part 5A of the Nationality, Immigration and Asylum Act 2002 ["the 2002 Act"] applies. Section 117A of the 2002 Act states:

"(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under Section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (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.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

14. Section 117C of the 2002 Act, so far as is relevant, sets out the following considerations to which the court or Tribunal must have regard in cases concerning the deportation of foreign criminals:

"(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

...

(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."

15. The appeal is against the refusal of a revocation of a deportation order and Rule 390 applies which reads as follows:

"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

16. The relevant Immigration Rules concerning deportation and Article 8 ECHR are paragraphs A398 to 399A. Rule 398 reads as follows:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) ..., the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, [the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A]."

17. Paragraph 399A reads as follows:

"This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

18. There are two frameworks in which Article 8 is to be considered in foreign criminal deportation cases. First, there are Sections 117A to D of the 2002 Act. Second, there

are paragraphs 398, 399 and 399A of the Immigration Rules (including paragraph 390 in this case which concerns revocation).

19. In relation to Sections 117A and 117D of the 2002 Act, Sales LJ in *Rhuppiah v The Secretary of State for the Home Department* [2006] EWCA Civ 803, [2016] 1 WLR 4204 held at [45] that:

> "It is common ground that the starting point for consideration of the proper construction of Part 5A of the 2002 Act is 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, and not in violation of, Article 8."

20. In *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239 at [15] Sir Stephen Richards stated:

> "... 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".

21. Furthermore, although Section 117C (6) of the 2002 Act applies on its face to people who have been sentenced to more than four years' imprisonment, the Court of Appeal has held that the words "or unless there are very compelling circumstances, over and above Exceptions 1 and 2 "are to be read into the end of Section 117C(3) in order for that Section to be complied with Article 8: *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662. In *MF (Nigeria) v The Home Office* Lord Dyson MR held at [44]:

> "... the new rules are a complete code and ... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence".

22. In *Ali v Home Secretary* [2016] UKSC 60, [2016] 1 WLR 4799, Lord Reed JSC, with whom the other members of the Court agreed, explained (at paragraph 38):

> "The implication of the new rules is that paragraphs 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of paragraphs 399 and 399A) 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 the *SS (Nigeria)* case [2014] 1 WLR 998. 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. The Strasbourg jurisprudence indicates relevant factors to consider, and paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with the *Huang* case [2007] 2 AC 167, para 20), but they can be said to involve 'exceptional circumstances' in the sense that they involve a departure from the general rule."

23. Going on, Lord Reed said this (in paragraph 46):

> "The special feature in that context [viz. appeals against deportation decisions] is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within paragraphs 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37–38 above."

24. In paragraph 50, Lord Reed said this about the approach to be adopted by a Tribunal:

> "In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the

> public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37–38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed — very compelling, as it was put in the *MF (Nigeria)* case—will succeed."

25. Lord Reed said the following at paragraph 26:

> "……In *Maslov v Austria* [2009] INLR 47, paras 72–75, the court added that the age of the person concerned can play a role when applying some of these criteria. For instance, when assessing the nature and seriousness of the offences, it has to be taken into account whether the person committed them as a juvenile or as an adult. Equally, when assessing the length of the person's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive."

26. Lord Wilson JSC, in *Ali* said (at paragraph 70) that he now regretted his reference to society's "revulsion" (that being, he considered, "too emotive a concept to figure in this analysis"), but he adhered to the view that he was "entitled to refer to the importance of public confidence in our determination of these issues".

27. The 2002 Act and the Immigration Rules are consistent and clearly state that it is in the public interest to deport foreign criminals. The Act and the Rules provide a framework for the determination of Article 8 in that context. There is some limited guidance on what constitutes "very compelling circumstances" but the exercise is always fact-specific and involves the balancing of the public interest in deportation with the other factors. It is clear that it is a high hurdle to clear. Jackson LJ, giving the judgment in the Court of Appeal in *NA* (Pakistan) held at [33] that:

> "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".

28. In *NA* the Court concluded that a foreign criminal is not 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". The position is that:

> "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 paragraphs 399 or 399A of the 2014 rules), or feature falling outside the circumstances described on these exceptions and those paragraphs, which made his claim based on article 8 especially strong".

In the case of a medium offender, therefore (as explained in paragraph 32):

> "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."

The Judge's sentencing remarks

29. In relation to the offence committed by the Appellant which was an offence of grievous bodily harm pursuant to Section 20 of the Offences Against the Person Act, the Secretary of State relied on the judge's sentencing comments, specifically as follows:

> "I turn now finally to you, [AJJ]. I deal firstly with the offence on 18 April. This was a wholly unprovoked attack on an innocent member of the public. On the evidence that I have read he was not involved in any way in any dispute with you which would have provoked you into an attack upon him.
>
> There was a football match and, as often happens, tempers flared, but you were not on the field of play at the time. You entered the field of play and you struck him once on the jaw which caused him grave injury. You fractured his jaw. It was a displaced fracture of his jaw. It resulted in the displacement of his teeth.
>
> Fortunately, the surgery that was necessary has resolved in large measure that problem. The complainant was left, as far as I am aware, with a sensation of numbness in his lip.

It was a wholly unprovoked attack that caused grave injuries. Had you pleaded not guilty and been convicted by the jury before me I would have imposed a sentence of twenty one months and I have had in mind the relevant sentencing guidelines.

You pleaded guilty and I therefore reduce that sentence by one third, so in respect of that offence there will be a sentence of fourteen months.

In respect of the offence of attempting to conceal the weapon, all that I have said in respect of [DA] applies to you in the sense that I suspect that you were present on 6 August, but that is not supported by then jury's verdict. I will therefore sentence you on the basis that you came onto the scene at some point after the violent disorder took place.

There is no fair basis on which I could conclude that the weapon that you sought to conceal with your colleagues was the weapon that was used to stab [IG]. Were I able to reach the conclusion that it was the sentence would be longer.
It was in my judgment, however, one of the weapons carried on Western Road. There would be no other logical reason for you and your colleagues and the others who were present seeking to conceal it. So in respect of that offence, given the sentence that I have imposed today as far as the 18 April offence is concerned, there is no sentence other than an immediate custodial sentence that would be appropriate.

Were it the only offence that you stood to be sentenced for and had you spent time in custody and on tag in the same way that your co-defendant on this charge has, then I would have imposed some form of community disposal, but in view of the fact of your conviction on the 18 April offence, it seems to me that the only sentence I can impose is one of immediate custody and the sentence that I impose is the shortest that I feel meets the gravity of the offence and that is one month and because that is for an entirely separate matter it will be consecutive to the fourteen months on the first matter.

So the total sentence is fifteen months of which you must serve precisely half, which is seven and a half months, from which will be deducted the 155 days that I am told you have already spent on remand."

The Grounds of Appeal

30. Ground 1 is defined as a misapplication of the unduly harsh test. The grounds assert that the judge erred in defining "unduly harsh". However, I do not see an attempt by the judge to define unduly harsh and the test was not applicable in this case. There is reference to very serious hardship in the grounds and this is likely to be a reference to the findings of the judge at [45] in the context of very significant obstacles. The grounds are wrong to suggest that the appeal was allowed on the basis that the judge found that there would be "very serious hardship" on return. What is clear is that there is no properly articulated challenge to the finding of the judge that there will be

very significant obstacles to integration. On the basis that the grounds are an attack on the judge's finding that there are very significant obstacles to integration, the challenge is poorly articulated and without substance. It is not capable on the face of it of establishing an error of law. The point was not expanded upon in oral submissions by Mr Avery.

31. Paragraph 3 of ground 1 is a challenge to the conclusion that there are very compelling circumstances. It is argued that they do not arise from a commonplace incident such as aging parents in poor health. The challenge ignores that the judge found family life between the Appellant and his mother in the *Kugathas* sense to which there is no properly articulated challenge.

32. Paragraphs 4 and 5 assert that there is no good reason why the Appellant's mother could not be cared for by those who cared for her when the Appellant was in prison. This does not take into account the unchallenged findings of the judge in respect of the significant deterioration in her health and that dependency was not simply that of a physical of practical nature. Paragraph 6 is a bare assertion that s117C is a complete code.

33. Ground 2 is headed "Risk of Re-Offending" and asserts that the judge was wrong to attach significant weight to the low risk of re-offending. Following *Ali,* the judge should have carried out the assessment bearing in mind that great weight is generally given to the public interest in deportation if a foreign criminal is sentenced to 12 months or more. The First-tier Tribunal should give appropriate weight to Parliament 's and the Secretary of State's assessment of the strength of the public interest in deporting a foreign criminal.

The Error of Law

34. I accept that paragraph 6 of ground 1 and ground 2 generally amount to a challenge to the application of s117C of the 2002 Act (and paragraph 399A of the Rules) and the assessment of proportionality (and the conclusion by the judge that there are very compelling circumstances that outweigh the public interest in deportation). Properly read I accept the poorly articulated grounds are a challenge to the proportionality assessment. I conclude that the assessment of proportionality conducted by the judge is flawed. The judge considered proportionality and very compelling circumstances without applying the principles in *Ali* and the current statutory regime particularly with respect to the public interest. The judge referred to the public interest at [42] stating that there is no doubt that there is a strong public interest in deportation. This underplays the significance of the public interest in deportation: the starting point should be that the deportation of foreign criminals is in the public interest and it is here where the error lies. This was, broadly speaking, the reason given by FtTJ Holmes when granting permission.

Conclusions

35. The Appellant is a foreign criminal and his deportation is in the public interest. The issue here is whether there are compelling circumstances over and above those

described in Exceptions 1 and 2 and found in s117C (3) of the 2001 Act which would outweigh this.

36. The Appellant has remained out of trouble since 2009 when these offences were committed and he is at low risk of re-offending. Even considering the period served in custody, this is a significant period of time. I attach weight to this bearing in mind that the risk of re-offending is only one facet of the public interest which was not properly acknowledged by the First-tier Tribunal. I accept that the FtT did not properly appreciate this.

37. Whilst the Respondent attempted to deport the Appellant, this was not successful. It is stated that the Appellant claimed to be Norwegian and this frustrated removal. There is no suggestion that the Appellant was not born in Norway as he claims. I was not referred to any evidence on the issue. It was not raised by Mr Avery. I conclude that the aborted attempt to remove him is a neutral point which neither adds to or detracts from the public interest.

38. This offence of GBH is one of violence. Mr Avery could not confirm, but from the sentencing remarks and sentence handed down, I proceed on the basis that the offence was one under s20 of the OAPA 1861. I have noted the judge's sentencing remarks. I have taken into account that the two offences committed are not connected, but both are historic. The Appellant was not a juvenile when the offences were committed. He was a young man, aged 19. However, he had arrived here when he was very young and this is reflected in Judge Colvin's findings (to which there is no properly articulated challenge) that there would be very significant obstacle to integration and that he is socially and culturally integrated here (having been here lawfully half his life). As stated above, if indeed there is a challenge to the very significant obstacles decision in the grounds, it is inadequately expressed and does not establish an error of law let alone arguable error. The judge's conclusion in respect of very significant obstacles was open to him on the evidence in the light of the change in circumstances as found since the decision of the Upper Tribunal. (see [41] and [45]).

39. The Appellant has spent a period of 5 years here unlawfully when he was a child. An argument founded on a "near miss" alone could not amount to very compelling circumstances, but the findings made by the judge are matters that weigh in favour of the Appellant are properly placed into the mix. He has a relationship with his mother which was, as found by the judge to of a *Kugathas* kind, where there is mutual dependency. The judge made findings about the Appellant's mother's health and dependency to which there is challenge of substance.

40. The findings at [38] - [41] are lawful and sustainable. The findings as made by the judge do not suggest that the Appellant is simply looking after an aged parent in poor health, which would not on its own amount to very compelling circumstances. Due to the passage of time and the significant deterioration in the mother's health, it was of no assistance to First-tier Tribunal to consider the care arrangements that were in place when the Appellant was in custody. The judge did not make a finding about alternative care, but he accepted the Appellant was his mother's main carer

and that dependency was not only of a practical and physical nature, but there was emotional dependency. Because of the extent and the nature of dependency as found by the judge it was not necessary for him to make further enquiry about alternative care arrangements.

41. The judge attached significant weight to the correspondence from University College London hospital (at [38]) and reference to the Appellant's mother not being able to return home when the Appellant was deported. I can envisage cases where such a relationship would not amount to very compelling circumstances, in this case taking the significant level of dependency into account and the other matters which undermine the public interest (the Appellant's social and cultural integration, very significant obstacles to integration and the low risk of re-offending) and the principles in *Ali*, I conclude that there are very compelling circumstances that outweigh the public interest in deportation.

42. When properly considering very compelling circumstances and the public interest in deportation, applying the statutory regime now in place, the relevant case law (acknowledging the high hurdle and that such cases as these are rare), and applying this to the lawful findings of the judge, I conclude that the circumstances are sufficiently compelling and exceptional to outweigh the interest in deportation. The judge erred, but if I were to remake the decision I would arrive at the same conclusion. The error is not material to the outcome. The decision of the judge to allow the appeal under Article 8 is maintained.

Notice of Decision

43. The Secretary of State's application is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 11 April 2018

Upper Tribunal Judge McWilliam