Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08572/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2019	**On 12 March 2019**

Before

THE HON. MRS JUSTICE LANG
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

P B E
(ANONYMITY DIRECTION MADE)

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we 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 or his family members. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the Appellant's children from serious harm, having regard to the interests of justice and the principle of proportionality.

Representation:
For the Appellant: Mr T. Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms G. Mellon, Counsel, instructed by David Benson Solicitors

DECISION AND REASONS

1. The Appellant ("the SSHD") appeals against the decision of the First-tier Tribunal ("FTT"), promulgated on 24 September 2018, in which Designated FTT Judge Shaerf allowed the appeal by the Respondent (Mr E) under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") against the SSHD's decision to refuse his human rights claim.

2. UT Judge Kekic granted the SSHD permission to appeal on 2 January 2019.

3. Mr E is a national of Nigeria, with indefinite leave to remain in the UK. He was convicted of acquiring criminal property under section 329(1) of the Proceeds of Crime Act 2002, and sentenced to a total of 6 years imprisonment. By virtue of section 32(5) of the UK Borders Act 2007 ("UKBA 2007"), the SSHD was obliged to make a deportation order against him. Following this, the Respondent raised a human rights claim by way of submissions dated 8 February 2017. This claim led to the appealable decision. The FTT allowed his subsequent appeal on human rights grounds, concluding that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2", why the public interest did not require his deportation, within the meaning of section 117C(6) of the NIAA 2002.

4. The SSHD appealed on the grounds that his family circumstances did not reach the high threshold of "very compelling circumstances" in section 117C(6) of the NIAA 2002, and the FTT had not correctly applied the statutory test to the facts of the case. It was also argued that the FFT had placed too much weight on the rehabilitation of Mr E.

Facts

5. Mr E was born in Nigeria on 26 June 1958 and is now aged 60. He has been resident in the UK for 28 years.

6. Mr E entered the UK on a business visa on 12 September 1990. Following his marriage to a British citizen, Y E, in early 1991, he was granted an extension of stay until 4 June 1992. On 27 October 1992, he was granted indefinite leave to remain.

7. His first marriage did not last, and he subsequently entered into a long-term relationship with A A. They had a child, P, in 1994. That relationship ended in about 1998, and Mr E has little contact with his son P, who is now an adult.

8. In 2001 Mr E met T O-E, and they married in 2003. Mrs E (as she was known after the marriage) was born in Nigeria on 27 September 1968. She became a British citizen in 2010.

9. Mrs E has a daughter from a previous relationship called C B, who was born in May 1996. She is a British citizen.

10. Mr and Mrs E have three children. Their older daughter, E, was born in October 2002, and is now aged 16. Their son, U, was born in November 2003, and is now aged 15. Their younger daughter, O, was born in July 2006, and is now aged 12. All three children are British citizens, and are at school in the UK.

11. On 20 November 1996, Mr E was convicted of two offences of driving whilst disqualified and three offences of driving without insurance. He was sentenced to 28 days imprisonment, fined, and disqualified from driving for 9 months. His licence was endorsed.

12. On 20 June 2003, Mr E was convicted of driving whilst disqualified and driving without insurance. He was sentenced to 14 days imprisonment, fined, and his licence was endorsed with penalty points.

13. On 18 June 2004, Mr E was convicted of going equipped to cheat, contrary to section 25 of the Theft Act 1968. He was found in possession of two metal boxes with fake 100 US dollar bills. He was sentenced to 15 months imprisonment. On the same occasion, he was convicted of possession of cocaine, and sentenced to 1 day's imprisonment.

14. On 8 January 2013, Mr E was convicted after a trial at Southwark Crown Court on 19 counts of acquiring criminal property, contrary to section 329(1) of the Proceeds of Crime Act 2002. He was sentenced to 6 years imprisonment on each count, to run concurrently. The offences involved money-laundering about £778,000 which were the proceeds of an advance fee fraud, committed by others.

15. On 4 October 2016, Mr E completed the custodial element of his sentence and he was detained under immigration powers. Bail was granted on 28 October 2016. Following a judicial review challenge, he was granted an in-country right of appeal.

The decision to deport

16. On 20 February 2013, the SSHD notified Mr E of his liability to deportation under section 32 UKBA 2007. Mr E made representations that deportation would be in breach of article 8 ECHR because of the interference with his family and private life, and that of his wife and children.

17. On 10 March 2015, the SSHD made a decision to deport, concluding that the public interest in deporting him outweighed his family and private life rights.

Legal framework

(1) Automatic deportation under the UKBA 2007

18. Under section 32(5) UKBA 2007, the SSHD must automatically deport, as a "foreign criminal", a person who is not a British citizen, following conviction for a criminal offence for which he has been sentenced to 12 months imprisonment or more, unless he falls within the exceptions in section 33.

19. By section 33(2)(a), automatic deportation does not apply where removal under a deportation order would breach a person's Convention rights.

20. Section 32(4) UKBA 2007 provides that, for the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good. By section 33(7), section 32(4) continues to apply, despite the application of section 33 exceptions.

(2) Article 8 ECHR

21. By virtue of section 6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

22. Mr E claimed that his removal would be in breach of the "right to respect for private and family life" under article 8(1) ECHR. Article 8(2) provides:

> "There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(3) Best interests of children

23. By virtue of section 55 of the Borders, Citizenship and Immigration Act 2009, in making decisions on deportation, the SSHD must have regard to the need to safeguard and promote the welfare of children who are in the UK.

24. The House of Lords, in ZH (Tanzania) v Home Secretary [2011] 2 AC 166, held that, in the application of article 8(2), the children's best interests should be treated as "a primary consideration", to give effect to article 3.1 of the UN Convention on the Rights of the Child. Nationality and the rights of citizenship are of particular importance in assessing the best interests of any child. Thus, the decision-maker must ask whether it is reasonable to expect the child to live in another country, and to be deprived of the opportunity to exercise the rights of a British citizen. However, even if it is found to be in the best interests of the child to remain in the UK, that factor can be outweighed by the strength of "countervailing considerations" in favour of removal (per Lady Hale at [29] – [33]).

25. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, Lord Hodge, delivering the judgment of the Court, summarised the principles to be applied, at [10]:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

(4) Sections 117A – D NIAA 2002

26. Sections 117A-D NIAA 2002 have set out public interest considerations which a court or tribunal must take into account in an appeal based upon article 8:

"**117A Application of this Part**

(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).

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

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving 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.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation

unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"*Article 8*" means Article 8 of the European Convention on Human Rights;

"*qualifying child*" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"*qualifying partner*" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(2) In this Part, "*foreign criminal*" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) …

(4) …

(5) …"

(5) Immigration Rules

27. The considerations set out in section 117C NIAA 2002 are reflected in the Immigration Rules ("IR") which provide, so far as is material:

"**Deportation and Article 8**

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) …

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 deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

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.

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling

circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. 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."

(6) Application of the legislation and the Immigration Rules

28. The approach which tribunals should adopt was helpfully described by Hickinbottom LJ giving the judgment of the Court of Appeal in Secretary of State for the Home Department v KE (Nigeria) [2017] EWCA Civ 1382, at [30] to [36]:

"30. The statutory provisions in sections 117A-117D are law (cf the Immigration Rules: see Ali at [17]). However, both section 117C and the relevant Immigration Rules set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8(2) where there is a public interest in deporting a foreign criminal but countervailing article 8 factors. The force of the assessment in section 117C is, of course, the greater because it directly reflects the will of Parliament. The statutory provisions thus provide a "particularly strong statement of public policy" (NA (Pakistan) at [22]), such that "great weight" should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, "are likely to be a very small minority (particular in non-settled cases)" (Ali at [38]), i.e. will be rare (NA (Pakistan) at [33]).

31. But the required, heavily structured analysis does not eradicate all judgment on the part of the decision-maker and, in its turn, the court or tribunal on any challenge to that decision-maker's decision. It is well-established, and indeed self-evident, that relative human rights (such as the right to respect for family and private life under article 8) can only ultimately be considered on the facts of the particular case. The structured approach towards the article 8(2) proportionality balancing exercise required by the 2002 Act and the Immigration Rules does not determine the outcome of the assessment in an individual case.

32. Whether an exception in paragraph 399 or 399A applies is dependent upon questions that require case-specific evaluation, such as whether in all of the circumstances it would not be reasonable for a child to leave the United Kingdom or whether in all of the circumstances there are insurmountable obstacles to family life outside the United Kingdom.

33. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, the decision-maker, court or tribunal entrusted with the task must still consider and assess whether there are "very

compelling circumstances" that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not — indeed, cannot — be taken into account in any general assessment. As Lord Reed, giving the majority judgment, said in Ali:

> "49. … It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context, and, where a court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate. In that way, relevant differences between, for example, cases where lawfully settled migrants are facing deportation or expulsion, and cases where an alien is seeking admission to a host country, can be taken into account.
>
> 50. 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…, 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 on 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 [MF (Nigeria)] — will succeed."

See also [53] to similar effect.

34. Therefore, as Lord Reed emphasises, whatever the seriousness of the offences or length of sentence, the ultimate question is the same — would deportation be in breach of article 8 — but the sentence imposed affects the approach to the exercise of assessing proportionality for article 8(2) purposes. If it is at least four years' imprisonment, any decision-maker must attach very considerable weight to the general assessment of the public interest in deporting foreign criminals, now directly adopted by Parliament in statute, under which such a sentence represents a level of offending in respect of which the public interest almost always outweighs countervailing considerations of private or family life, only being outweighed by countervailing factors which are very compelling (see Ali at [46]). Where there is a challenge to a decision involving the article 8(2) balancing exercise by a decision-maker on behalf of the Secretary of State in an individual case, as I have already described, the court or tribunal must give that general assessment substantial weight, because it is endorsed by Parliament; and it must also take into account — but no more than take into account — the application of that general assessment to the facts of the specific case by the original decision-maker (OH (Serbia) at [15(d)]). As independent judicial bodies, on hearing a challenge to an executive decision in an individual case, it is the duty of the court or tribunal to make its own findings of the relevant facts and then make its own assessment of the proportionality of the proposed

deportation (Ali at [46]).

35. Since Ali, the 2014 Act has intervened, encapsulating the relevant Government policy in statute rather than merely Immigration Rules. However, in my view, the principles and approach expounded by Lord Reed still apply; although, in considering the appropriate weight to be given the assessment of the strength of the general public interest in the deportation of foreign offenders, any decision-maker, court or tribunal conducting the article 8(2) exercise has to bear in mind that that is now incorporated into statute, and so, even more starkly, reflects the will of Parliament."

29. In NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, the Court of Appeal gave guidance on the application of section 117A(6), "where the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2". Jackson LJ, giving the judgment of the Court said:

"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. …

…

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."
>
> …"

30. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath (giving the judgment of the Supreme Court) analysed the exception, based on the deportee's relationship with a qualifying child, in section 117C(5) NIAA 2022 and Paragraph 399(a) IR. At [15], he explained that he started from the presumption that the provisions were intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 per Lord Hodge at [10]). He concluded that the exception was self-contained and so, in deciding whether or not it applied, the decision-maker should only consider the factors specified, and disregard the degree of seriousness of the parental offending and other public interest considerations (at [20]– [23]).

31. Lord Carnwath gave guidance on the meaning of "unduly harsh". The word "unduly" assumed that there was a "due" level of harshness, that was a level which may be acceptable or justifiable in the context. "Undue" implied something going beyond that level; "a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent" (at [23]).

32. Lord Carnwath cited with approval the guidance given by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC):

> "….'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable, or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

Conclusions

33. In our judgment, the FTT Judge correctly directed himself on the relevant legal tests at paragraphs 41 and 42 of his Decision:

> "41. There was no challenge for the Respondent to the claim that the Appellant meets the criteria of s.117C Exception 2 and I am satisfied on the evidence that he does meet the Exception 2 requirements of a genuine and subsisting relationship with a qualifying partner, his wife and their three qualifying children.
>
> 42. I have to consider the best interests of the Appellant's minor children and I do so in the knowledge that they and their mother are British citizens and there is no intention to remove any of them. I have to consider their interests in relation to the impact on them of the deportation of the Appellant, noting that the best interests of the children are a priority but not paramount. I have kept in mind that the Appellant was sentence to a term of six years' imprisonment so that he falls outside the scope of paragraphs 399 and 399A of the Immigration Rules and that to succeed he must show that there are very compelling circumstances and that the consideration whether there are "very compelling circumstances" matters relevant to an assessment whether the Appellant's case falls within Exception 2 may also be relevant: see para.58 of *NA (Pakistan) v SSHD [2016] EWCA Civ. 662*. Further I remind myself that because the Appellant 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: s.117C(6)."

34. Mr Wilding rightly conceded that paragraph 41 and 42 did not disclose any error of law, but contended that the Judge failed to apply these principles when reaching his conclusions. He relied in particular on the Judge's failure to include the words "over and above those described in Exceptions 1 and 2" in his final paragraph which reads:

> "53. I remind myself that the deportation of foreign national offenders is in the public interest and the high threshold of very compelling circumstances required to resist it. I find the circumstances of the Appellant's family, the strength of the family unit including with his wife's eldest child and especially the relationship of the Appellant with his middle child who is commonly considered by the experts the school and the parents to be at risk amount to very compelling circumstances for the purposes of s.117C."

35. In our judgment, the FTT Judge was not required to repeat the words of section 117A(6) in full at paragraph 53, having already set them out at paragraph 42. We consider that his reference to "very compelling circumstances <u>for the purposes of s.117C</u>" (emphasis added) demonstrated that he had well in mind the terms of section 117C, when applying the test of "very compelling circumstances", including the requirement that the compelling circumstances should be "over and above those described in Exceptions 1 and 2".

36. Mr Wilding criticised the FTT Judge for failing to state whether Exception 2 was met in this case. He acknowledged that the Judge stated at paragraph 41 that Mr E met the Exception 2 requirements of a genuine and subsisting relationship with a qualifying partner, his wife and their three qualifying children. However, he did not expressly state that the effect of the deportation would be "unduly harsh" on them, nor the reasons why.

37. There were two aspects to Mr Wilding's submission. First, the FTT Judge was required to set out his reasons for finding that deportation would be "unduly harsh", by reference to the criteria and the evidence, in addition to setting out his reasons for finding that there were "very compelling circumstances". Second, in the absence of any findings on whether the deportation would be "unduly harsh", it could be inferred that the FTT Judge failed to apply his mind to this part of the test, before he went on to consider whether there were "very compelling circumstances".

38. We have carefully considered the guidance given in Secretary of State for the Home Department v Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC). At [33], UT Judge Coker said:

> "It follows that the correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:
>
> a. is the appellant a foreign criminal as defined …
>
> b. if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
>
> c. if not are there very compelling circumstances over and above those falling within 399 and 399A relied upon …"

39. In our view, UT Judge Coker was giving guidance on the order in which the relevant provisions should be considered by the FTT Judge. She was not deciding that an FTT Judge had to set out full written reasons for his conclusions at each stage. Moreover, her guidance was based on the assumption that "the purpose of 398 is to recognise circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within 399 and 399" (at [25]). So, applying the stages at [33], the factors under (b) would not also be considered under (c).

40. That aspect of the reasoning in Chege was not followed by the Court of Appeal in NA where Jackson LJ held that factors which fell within Exceptions 1 and 2 of section 117C(6) (which are reflected in paragraphs 399 and 399A IR) could, in principle, also amount to "very compelling circumstances over and above those described in Exceptions 1 and 2" (at [30], cited above at paragraph 29 of our judgment).

41. Jackson LJ went on to say, at [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)."

42. On our reading of this passage in NA, Jackson LJ was giving guidance on the approach which would often be "sensible" and "helpful" for FTT Judges to adopt

when deciding appeals under these provisions. He was not deciding that an FTT Judge had to set out full written reasons for his conclusions on Exceptions 1 and 2, in addition to giving reasons for his conclusion that there were "very compelling circumstances".

43. In this appeal, in light of the findings which the FTT Judge made, we have no doubt that he considered the deportation to be "unduly harsh", because of the impact on Mr E's family, which he set out fully. On our reading of the decision, the FTT Judge considered that the evidence relied upon by Mr E was very strong. Indeed, the evidence of the impact on Mr E's family persuaded the Judge that the higher threshold of "very compelling circumstances" in section 117A(6), displacing the public interest in deportation, was also met in this case. We do not consider it at all likely that this experienced Judge, who correctly set out the legal test earlier in his decision, later forgot to apply it and failed to consider whether the "very compelling circumstances" were "over and above those described in Exceptions 1 and 2".

44. Although we accept that it would have been best practice for the Judge to record expressly that the impact on the family would be "unduly harsh", to demonstrate that the requirements of section 117(6) NIIA 2002 had been met, we do not consider that a departure from good practice in the drafting of a decision amounts to an error of law which would justify the quashing of an otherwise lawful decision.

45. The SSHD submitted, in its grounds of appeal, that the circumstances of this case did not meet the threshold of "unduly harsh" or "very compelling circumstances", so as to outweigh the strong public interest in deportation. The SSHD relied upon the judgment of Jackson LJ in NA at [33] and [34], set out in our judgment above.

46. At the FTT hearing and at the hearing before us, the SSHD did not submit that Mrs E and the children could or should re-locate to Nigeria. Although Mrs E was born in Nigeria, she is a British citizen. The children have lived in the UK all their lives, and have never even visited Nigeria.

47. The FTT Judge accepted the evidence of the experts, which he summarised at paragraphs 29, 31, 32 and 34 of his Decision:

> "29. Mr Halim referred to the expert psychiatric report from Dr Dhumad. The Appellant's wife had told him she had been trafficked into the United Kingdom in 1995 and had been granted asylum in 1999: see para.7.2 of his original report. He had concluded at para.14.1 she suffered from severe depression which if the Appellant was deported would likely deteriorate with "a devastating impact on the whole family". Dr Dhumad also interviewed the Appellant's three minor children. He considered they were all suffering from emotional and behavioural difficulties due to separation from their father and was particularly concerned about one of them who appeared very depressed and feeling suicidal and had effectively been grieving the loss of his father since the Appellant had been detained and was unable to face any further separation. He considered the risk of suicide by this child as "extremely high, very likely to be critical in the case of (the Appellant's) removal": see para.14.1. In the addendum report Dr Dhumad confirms his diagnosis, risk assessment and opinion in the original report to be

applicable whether the Appellant was temporarily or permanently removed: see para.2 of the addendum.

…

31. I turn to the social worker's report of Ms Smart. She has dealt with the Appellant's middle child considered by Dr Dhumad to be a suicide risk at para.2.1 confirming the articulation of suicidal ideation and that uncertainty whether the Appellant will be deported has affected the child's performance, self-esteem and confidence and the child's concern for his sibling who suffers from asthma in the event that the child might have a fatal panic attack. The eldest child was found to be genuinely worried about the Appellant and the risk of his deportation and had struggled to cope with the Appellant's absence during his imprisonment. The youngest child experienced similar concerns and fears. Ms Smart describes the shock of the Appellant's imprisonment on his wife and that she had been left to raise their three children as a single parent. The wife considered she had been unable to meet the needs of the children and to give them adequate stability with the consequence that she recognised that each of them had developed behavioural problems.

32. She was particularly concerned about the middle child who had expressed suicidal thoughts as well as the difficulties the Appellant would meet on return to Nigeria. Ms Smart at para.3.3 noted that each of the three children demonstrated "their admiration for their father and hold him in high regard … (and) … they are aware of the current pressures placed on their mother being the sole provider". She went on at para.3.4 to note the Appellant "represents a significant relationship in their lives and any permanent separation will cause not only a great loss but highly likely to significantly impact upon their development". She also noticed that when all the family had been together in her presence the Appellant had shown his authority "and encouraged them to be open and honest during interview.... there was a strong sense of respect demonstrated between the family members". At para.3.5 she noted "the family interactive style was balanced in that it was sensitive and facilitative. The children were respectful of 'the Appellant' … and it was evident that (he) has influence over the way his children behave". Ms Smart concluded at para.3.6 "the parents share the power in the family and support each other in their decision-making and share in the appropriate discipline of the children". She also concluded they were "an extremely strong family unit".

…

34. The witnesses had spoken with one voice about the impact of the separation which had been and would continue to be caused in the removal of the Appellant. the evidence was that the three minor children were all anxious for each other. Ms Smart had concluded in para.9.1 that the impact of permanent separation was likely to be severe and that his wife would be unlikely to be emotionally available to her vulnerable children which would further impact on their emotional well-being and development as well as on his wife. At para.11.2 she had re-iterated her finding of the strong bond the children share with their father."

48. Letters from the school confirmed that Mr E's son, U, aged 15, was in a downward trajectory of aggressive and disruptive behaviour, which had resulted in a series of

temporary exclusions and he was now facing permanent exclusion after repeated assaults on staff.

49. A letter from the son's GP, dated 6 July 2018, described his symptoms of mental illness and suicidal ideation which led to a referral to specialist mental health care:

> "I have been seeing this child since November last year. When he came to see us on 21st November 2017 the child complained of insomnia, difficulty with sleeping and also worries about his father being deported to Nigeria…Due to the stress the child complained that he has been having migraine headaches and this has been getting worse with stress and worry. I saw the child against on the 30th May 2018 and then the child complained of his emotional difficulties. He complained that he feels "heavy hearted" and he feels that if his father is deported it will affect his studies. He also further complained that he is unable to concentrate and his performance in school has dropped. He also says he has a poor appetite and his hands have been shaking. He said he only manages 3 hours of sleep now and very often thinks of self-harm and has suicidal thoughts. He says it is not worth living if his father is deported to Nigeria.
>
> Due to the seriousness of his symptoms and presentation I referred him to the Child & Adolescent Mental Health Service (CAMHS) …"

50. The FTT Judge heard evidence from Mr and Mrs E on the impact of separation on the family and found them to be credible and reliable witnesses.

51. We consider that the FTT Judge was entitled to conclude that the unusually severe impact of deportation on Mr E's son – further deterioration in his poor mental condition with a real risk of self-harm and suicide - did amount to very compelling circumstances within the meaning of section 117C(6) NIAA 2002, which outweighed the public interest in deportation. This was a factor of such gravity that it went far beyond the usual consequences of a deportation and the consequent separation of parent and child. This conclusion necessarily involved an exercise of judgment on the part of this experienced Judge, who had the benefit of hearing the witnesses and assessing the evidence in detail. In reality, the SSHD's grounds of appeal expressed a disagreement with the FTT Judge's exercise of judgment. We bear in mind the judgment of the Court of Appeal in Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225, per McFarlane LJ at [28] and [30]:

> "28. … an appellate court must afford due deference and respect to the evaluation of an expert tribunal charged with administering a complex area of law in challenging circumstances (per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 at paragraph 30) …"
>
> "30. Whilst another specialist tribunal might have reached a contrary conclusion, it is, in my view, not possible to hold that the FTT in the present case arrived at a conclusion which was insupportable on the evidence or otherwise perverse …"

We do not consider that the Judge's conclusion on the very compelling circumstances in this case was either unsupportable on the evidence or otherwise perverse.

52. Finally, Mr Wilding submitted that the FTT Judge erred in giving undue weight to Mr E's rehabilitation when carrying out the balance sheet approach recommended in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 16. He referred to passages in the judgment of Secretary of State for the Home Department v Olarewaju [2018] EWCA Civ 557, indicating that rehabilitation would rarely establish a compelling reason to outweigh the public interest in deportation and that the risk of re-offending was a facet of the public interest, but not the most important aspect (per Newey LJ at [17], [18]).

53. In our judgment, the FTT Judge was entitled to take into account the rehabilitation of Mr E, as it was relevant to the risk of re-offending, and thus the public interest. It was a notable feature of this case. We do not accept that, in consequence, he failed to give sufficient weight to other facets of the public interest, in particular, the public interest in the deportation of foreign criminals who have committed serious offences. The FTT Judge referred to that principle in paragraphs 25, 27 and 42. He applied that principle to the facts of this case at paragraphs 47, 48, 53 and 54. He was well aware of the weighty public interest in deportation, and he took it into account.

54. We consider that the FTT Judge fairly and thoroughly assessed the evidence, and considered the public interest factors in favour of deportation, as well as those factors relied upon by Mr E, in support of his human rights claim in respect of his family life, and the family lives of his wife and children.

55. In conclusion, this decision does not disclose any error of law.

Notice of Decision

1. **The decision of the First-tier Tribunal does not contain errors of law and it shall therefore stand.**
2. **The Appellant's appeal to the Upper Tribunal is dismissed.**
3. **We make an anonymity direction under rule 14 of the Upper Tribunal's Procedure Rules 2008.**

MRS JUSTICE LANG

Date: 8 March 2019