Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04084/2015

THE IMMIGRATION ACTS

Field House	**Decision and Reasons Promulgated**
On 21st May 2019	**On 10 June 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE MCWILLIAM

Between

J O
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Harrison QC and Mr P Lewis of Counsel, instructed by Birnberg Peirce & Partners Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria, born in January 1988. He came to the UK when he was 8 years old, in 1996. He was granted indefinite leave to remain in March 2004 when he was 16 years old. He left

school with a number of good GCSE passes, and obtained a BTEC diploma in business studies at college. At the beginning of 2006 he was applying to universities to study for a degree. He was also involved with youth groups who were campaigning against knife crime having suffered the loss of a friend to a knife-crime killing.

2. On 18th February 2006 the appellant murdered a young man by hitting him (described by the sentencing judge as a "karate type blow") on the neck with intent to cause grievous bodily harm which caused him to fall to the ground, bang his head and thereby sustain a brain injury from which he died 10 days later. The assault took place in the context of an altercation between two groups of youths but there was no indication that there was any gang involvement by the appellant. The appellant pleaded guilty to manslaughter but was found guilty of murder. On 6th October 2006 the Central Criminal Court imposed a life sentence on the appellant. It was found that the appellant had not been acting in self-defence but took into account in his favour a lack of aggravating features to the crime; the fact the appellant was 18 years old; his lack of premeditation; his lack of intention to kill; and his remorse. A minimum prison term of 11 years and 169 days was initially imposed, but this was reduced to 8 years and 169 days by the Court of Appeal Criminal Division. The appellant was moved to open prison conditions following a decision of the Parole Board in December 2012 as he was at low risk of re-conviction, although he had later to be transferred back to closed conditions due to his being subject to deportation proceedings. The appellant's prison sentence came to an end on 4th September 2015 when the Parole Board decided that he posed a low risk of reoffending, albeit that if he did reoffend his risk of serious harm to the public was medium. He was then detained under Immigration Act powers but granted bail to his mother's address on 21st September 2015. The supervisory element of his life licence from the Probation Service came to an end after he had spent four years in the community.

3. On 30th July 2015 the appellant was served with notice of liability to automatic deportation under s.32 of the UK Borders Act 2007. In response he made a human rights claim. The respondent's refusal of the human rights and protection claim is dated 7th December 2015. His appeal against this decision was dismissed by First-tier Tribunal Judge Cassell in a determination promulgated on the 19th April 2017.

4. Permission to appeal was granted by the Vice President of the Upper Tribunal on 7th December 2017 in light of the grant of permission for judicial review of the refusal by the Upper Tribunal to grant permission to appeal. The matter came before The Honourable Mr Justice Sweeney and Upper Tribunal Judge O'Connor who decided in a decision promulgated on 16th May 2018 that the First-tier Tribunal had erred in law due to a failure to give cogent and adequate reasons for the decision, and as a result the decision of the First-tier Tribunal dismissing the appeal was set aside.

5. The matter came before us to remake the appeal. We heard oral evidence from the appellant, his partner J, and from an independent social worker, Ms C Brown, and a forensic psychologist Ms J Lackenby. We also had a substantial amount of documentary evidence in a core and supplementary bundles provided by the appellant, and took note of the reasoning set out in the reasons for refusal letter from the respondent.

Evidence - Remaking

6. In brief summary the key facts presented in this appeal, from the evidence of the witnesses and the supporting documentation, are as follows.

7. The appellant was born in Nigeria but left when he was 8 years old in 1996, and has not returned since that time. He has no real recollection of life in Nigeria and feels himself to be British, he would not know where to start in Nigeria if he was deported there and believes he would struggle to obtain work as he lacks connections and the information he has on Nigeria is that it is through connections that you obtain work. He does not believe he would be able to support his children, and believes that they would suffer without their father. He was brought up by his mother in the UK with little contact with his father. His mother travels to Nigeria with a church group every couple of years. His father has recently spent 18 months in that country dealing with the ill-health and passing away of the appellant's paternal grandmother. Whilst in Nigeria his father has relied upon funds from one of his older brothers. His father has a brother in Nigeria with whom the appellant last had contact with in 1996. The appellant has one full brother and a number of half-brothers from his parents. All of these brothers are British citizens, although his full brother currently lives in Switzerland for work.

8. The appellant accepts full responsibility for having hit the man he is convicted of murdering, and is aware that whatever he has suffered as a result of the crime it is nothing compared to the family, friends and others who had to deal with the death of his victim. He says he was previously a peacemaker and had no previous involvement with any gangs or violence, in fact on the contrary he had been working with community groups to turn local youths away from knife crime as one of his best friends had died of knife wounds when he was 16 years old. Ms Lackenby, the forensic psychologist, describes the behaviour which led to the offence as being influenced by the appellant's hyper-vigilance due to the death of his friend. She concludes following a full assessment that the risk of harm posed by the appellant is low.

9. The appellant has worked hard and completed number of rehabilitative courses in prison, as well as obtained an Open University psychology degree, doing levels 1 and 2 of a personal trainer course, completing

courses in computing, painting and decorating and bricklaying, and assisting other prisoners with basic literacy and mentoring and whilst in open conditions doing work with refugees and in a children's referral unit for excluded children. He made good use of his time in custody, and had no significant adjudications there.

10. When the appellant left custody in September 2015 on direction of the Parole Board he was exceptionally allowed to return to live normally with his family and did not have to spend time in a probation hostel. On release from prison he did level 3 of the personal trainer qualification and now teaches fitness in an after-school club and has private clients; he does volunteer community football coaching with a club set up by an ex-offender with a specific mission to divert urban youth from crime and with a programme going into prisons and trying to motivate convicted men into changing the path of their lives. He always discloses his conviction to those with whom he works, and has been police cleared to go back into prisons for his voluntary work and to work with children. He is committed to his work via sport to address offending behaviour as he enjoys it and it is part of his giving back to the community. He feels that it is worthwhile if just one person is diverted from a life of crime or sees that they can have a positive life after prison. Ms Lackenby, the forensic psychiatrist, provided evidence that the type of voluntary work that the appellant undertakes is a very valuable intervention in preventing crime due to his credibility with the young people and prisoners with whom he works, and in her view essential in the context of the vital work against knife and gang violence into which urban young men are being increasingly drawn.

11. The appellant is in a serious and committed relationship with J, who is a Nigerian citizen with indefinite leave to remain in the UK. J was born in 1993. She came to the UK in October 2004 with her sister to join her mother. J's sister remains in the UK and has her own child, and there is some contact between them, but she is not in a position to provide any significant support to J. Her mother was deported to Nigeria in 2007, and J became a Social Services looked after child, spending time in 13 different foster care homes and in children's homes. She believes that this has negatively affected her feelings of identity and her connections with friends. The evidence of Ms Brown was that J told her that she has recently received an apology and some compensation from Social Services in the UK for the failings in her care. J has a psychiatric diagnosis of having an emotionally unstable personality disorder with depression and anxiety. She was given this diagnosis when she was sectioned under the Mental Health Acts for two days in 2013 at Goodmayes Hospital. She describes becoming manic, being unable to focus her thoughts, losing her sense of reality, and feeling depressive and crying a lot. Since that time she has been prescribed mood stabilisers, currently quetiapine and previously lofepramine, and has the weekly support of IMPART (a mental health team dedicated to the management for those with

personality disorders) who assist her with skills to improve her mood. J receives two disability benefits, a Personal Independence Payment and Employment Support Allowance, as a result of her mental health diagnosis. As she is pregnant she also currently receives support from the Perinatal Team which works with those with mental health problems when they are pregnant and ensures that medications are appropriate, with the focus being on ensuring that she bonds with her twin babies when they are born.

12. J believes that the deportation of the appellant would cause her mental health to deteriorate because of the stress of being the mother of a small child pregnant with two more and the removal of his stabilising and positive presence in her life in the context of her not having had any stability whilst she was growing up. Her 2013 breakdown had happened because she had been subjected to a number of changes of location, and it was being said she would have to move again. She found the two short periods when the appellant was detained under the Immigration Acts (two weeks in August 2017 and three days in November 2017) very stressful and she became depressed, scared and cried all the time during this period. She says that the appellant is her source of stability. The appellant explains that due to J's depression and anxiety she sometimes needs to call him and have him confirm that he will be back with her within a period of time, and that this then enables her to calm herself and cope until that time. He believes that she would have a breakdown if he was deported as she could not cope with the loss of their relationship in the context of her being the mother of a one year old child and being heavily pregnant with twin boys.

13. J was initially granted discretionary leave to remain in the UK. In 2012, prior to her grant of indefinite leave to remain, she was taken by Social Services to Nigeria to establish whether she could be reunited with her mother. She spent 5 or 6 days in that country in a hotel in Lagos, and met with her mother in the hotel but as her mother did not have a place to live she returned with Social Services to the UK. J's mother continues to live in Nigeria, as does her older married brother, but neither has a fixed address. She has some WhatsApp contact with both of them, and some telephone contact with her mother. J does not believe that they could assist her or the appellant if they were to be in Nigeria as she has to send her mother money from the UK.

14. Her relationship with the appellant has developed from a friendship over the past three years; she was aware of his murder conviction and the deportation proceedings after some months of friendship, and they have also had to work through the fact that he had a child, NRO, with another woman, M, in March 2018. However, J says that the love they have for each other is very strong and that the appellant is committed to looking after her and their children and she says she wants to spend her life with him. She is now 26 weeks pregnant with

his twin boys, as well as having JJO their son born in December 2017. The pregnancy is deemed high risk as it is a twin pregnancy and she will have a planned caesarean birth at 37 weeks in August 2019. Until September 2018 the appellant was bound to sleep at his mother's house due to the conditions of his bail but following judicial review proceedings these conditions were found to be unlawful and since that time he has stayed over with J on a regular basis. At present he stays over about 5 nights a week, and they plan for the appellant to move in fully prior to the birth of the twins. He is now spending time with J and JJO almost every day.

15. The appellant is a very committed father to JJO, who is a British citizen. He is involved in all aspects of his care: cooking for him and feeding him; changing nappies; giving him bottles of milk; washing him; playing with him and reading to him; putting him to bed; taking him to play centres, parks and swimming. JJO goes to the appellant naturally and is distressed by his leaving. The appellant contributes financially doing shopping for all of the things he needs. JJO is currently a happily developing little boy and has no health or other concerns.

16. The appellant also has a daughter NRO, a British citizen born in March 2018, from a relationship he had with M, who is also a British Citizen. He is friends with M and has agreed work together with her to bring up NRO. M was sentenced to three and a half years imprisonment for conspiracy to supply drugs, and has been in prison although she may be released shortly to a house in Southend. The appellant has visited NRO regularly in prison every two weeks, where she resides with her mother, M, and has had her to stay for the weekend whilst M was on weekend release. He has also taken nappies, food and clothes for NRO to M, and on one occasion was called by the prison service to take NRO to hospital as she had some breathing difficulties. J feels it is important that the appellant is a father to his daughter, NRO, and sees her as her son's sister.

Submissions

17. At the end of the evidence the following was agreed as common ground by the parties:

    - That the appellant had a low risk of reoffending, is rehabilitated and is involved with commendable projects aimed at preventing crime and rehabilitating others.
    - That the appellant has a genuine and subsisting relationship with J and a genuine and subsisting parental relationship with JJO.
    - That both of the appellant's children, JJO and NRO, are British citizens and qualifying children.

- The respondent accepts that J and JJO cannot be expected to relocate to Nigeria, and to require them to do so would be unduly harsh.
- The respondent accepts that the appellant had lived in the UK lawfully for more than half of his life on Ms Harrison's undertaking that the High Court had found in the context of judicial review proceedings that his indefinite leave to remain continued by virtue of s.3C of the 1971 Immigration Act, and thus that he had held ILR from 2004 to the present day.

18. What remained in dispute was therefore:
    - Whether the appellant was socially and culturally integrated in the UK.
    - Whether the appellant would have very significant obstacles to integration in Nigeria.
    - Whether the appellant has a genuine and subsisting relationship with his qualifying child NRO.
    - Whether J is a qualifying partner.
    - Whether it would be unduly harsh for J, JJO and NRO to remain in the UK whilst the appellant is deported.
    - The extent of the public interest in deporting the appellant.
    - Whether, when an Article 8 ECHR proportionality exercise is conducted, there are very compelling circumstances over and above the exceptions to deportation set out at s.117C of the Nationality which make the appellant's deportation unlawful.

19. We do not set out the submissions made orally and in written skeleton argument/submissions but we deal with the arguments made in our conclusions set out below. We find that all of the witnesses were credible and gave truthful evidence. The expert witnesses were appropriately qualified to give the evidence that they provided, and understood their duty to the Court. The oral evidence was consistent with each other, with the written statements and reports and with the other documentation in the bundles.

20. We received some further submissions and evidence from the appellant's solicitors by email on 24th May 2019 but we have not had regard to this material as there was no application to be able to submit this material and no directions enabling further submission after the end of the hearing.

The Law

21. The test, which is embodied in s.117C(6) of the Nationality, Immigration and Asylum Act 2002 and paragraph 398 of the Immigration Rules, and which we must apply when determining this

appeal is whether there are very compelling circumstances which exceptionally mean that it is not proportionate to deport the appellant. As set out in Hesham Ali (Iraq) v SSHD [2016] UKSC 60 this test is best approached with a balance sheet approach. It is not necessary for the circumstances to be unusual, but the threshold is very high given the public interest in the deportation of foreign criminals. In the recent case of MS (s.117C (6): "very compelling circumstances") Philippines [2019] UKUT 0122, the UT considered Section 117C (6) following KO (Nigeria) v Secretary of State for the Home Department [2008] UKSC 53. In MS the Upper Tribunal decided that when concluding whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 in sub-Sections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or Tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than four years. The UT decided that it would be incorrect to say that KO compels the finding that s.117C (2) is merely declaratory of the distinction between foreign criminals who have not been sentenced to imprisonment of 4 years or more, and those who have (see [10]). The UT said that the evaluation of very compelling circumstances "calls for a wide-ranging evaluative exercise" and said: "17. Viewed in this light, it can readily be seen that the ascertainment of what constitutes "very compelling circumstances", such as to defeat the public interest, requires a case-specific analysis of the nature of the public interest. The strength of the public interest, in any particular case, determines the weight that must then be found to lie on the foreign criminal's side of the balance in order for the circumstances to be properly categorised as very compelling. It would, frankly, be remarkable if a person sentenced to four years' imprisonment for fraud had to demonstrate the same circumstances as a person sentenced to life imprisonment for multiple murders. 18. To say this is not to seek to introduce a "balancing exercise" into Exceptions 1 and 2 and the test of "unduly harsh". The words "over and above", as interpreted by Jackson LJ in NA (Pakistan), underscore the difference in the tasks demanded by, on the one hand, section 117C(4) and (5) and, on the other, section 117C(6)".

22. In NA (Pakistan) v Secretary of State for the Home Department and Ors [2016] EWCA Civ 662 in relation to Section 117C(6), Jackson LJ said the following: "29.In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there

are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong. 30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8. 31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in Maslov v Austria [2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2." 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."

23. The Upper Tribunal in MS engaged with the comments of Lord Reed in Hesham Ali about deterrence and concluded that that there is nothing

in Hesham Ali that requires a court to eschew the principle of general deterrence, as an element of the public interest, in determining a deportation appeal by reference to section 117C (6). In assessing proportionality, the Upper Tribunal considered rehabilitation concluding that following a serious offence, it will not ordinarily count as a significant factor weighing in favour of an Appellant facing deportation as a foreign criminal. This approach to rehabilitation was confirmed by the UT in RA (S.117c: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123. In that case the Upper Tribunal said that the way to approach section 117C remains as set out by Jackson LJ in NA.

Conclusions - Remaking

24. On the one side is the public interest in the deportation of an appellant who has committed an extremely serious, perhaps the most serious, criminal offence of murder. We recognise the different facets of this public interest including the protection of the public, the deterrents of others and the maintenance of the public confidence in the immigration system by deporting foreign criminals. Whilst the lack of a risk of recidivism is a matter listed below in favour of the appellant his deportation remains strongly in the public interest by virtue of this deterring others and maintaining public confidence in the immigration system.

25. We accept that there is a positive benefit to the community in the UK of the appellant's voluntary work, with urban youth who might otherwise be led into a life of crime and in the rehabilitation of offenders, particularly in the context of the current public concern at the rising numbers of young victims of knife crime in our cities. However, we do not find that the appellant can reach the test laid out by The Hon. Mr Justice Lane, President of the Upper Tribunal, Immigration and Asylum Chamber, in Thakrar (Cart JR; Article 8: value to community) [2018] UKUT 00336 where it was said that the contribution must be "very significant" and "One touchstone for determining this is to ask whether the removal of the person concerned would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it." We absolutely commend what the appellant has done to pay back to the community in the UK but he is not the instigator or prime organiser of the projects addressing crime he takes part in and we find that they would continue even if he were to be deported. In these circumstances, whilst very much to the appellant's credit, we find that his voluntary work does not diminish the very significant weight to be given to the maintenance of immigration control, and thus his deportation in the public interest in deterring others and maintaining confidence in the immigration system. Our starting point is that deportation of this appellant is strongly in the public interest.

26. We find that whilst the appellant has lived in the UK lawfully for most of his life and is socially and culturally integrated in the UK, for the reasons set out below, he cannot show very significant obstacles to integration in Nigeria and so cannot show that he meets the requirements of the first exception to deportation at s.117C(4) of the 2002 Act. We accept return there would be essentially to a foreign country of which the appellant has no prior knowledge with no close family support. However, he is a healthy, well-educated and qualified enterprising young man who we find will, with some considerable effort, be able to integrate himself in his country of nationality if deported. He would have the option to reach out for help in orientating himself and finding connections to his paternal uncle and other relatives on his father's side, and to friends of his mother whom she has visited in recent times.

27. The appellant does not have a qualifying partner as he is not married to J and they have not cohabited for two years, so whilst he is in a genuine and subsisting relationship with her he cannot meet the second exception to deportation at s.117C(4) of the 2002 Act by virtue of his relationship with J.

28. We do not find that it has been shown that it would be unduly harsh for NRO, the appellant's daughter by his former girlfriend M, to remain in the UK with her mother whilst the appellant is deported. We accept that it must be in her best interests to have contact with the appellant, her father, who is clearly kind, loving and providing towards her, and whom we have found to have a genuine and subsisting parental relationship with her, for the reasons we set out below. However, we have insufficient evidence to reach the conclusion it would be unduly harsh if he were deported as it is very unclear what the other structures and important individuals are in her life. In her case we have no evidence of harshness, meaning something severe or bleak, going beyond what would necessarily be involved for any child faced with the deportation of a parent. As a result the appellant cannot show that he meets the second deportation at s.117C(4) of the 2002 Act by virtue of his relationship with his daughter NRO.

29. On the other side of the balance sheet, and thus in the appellant's favour, is the fact that the public interest aspect of protecting the public from crime does not require his deportation: as rightly conceded by the respondent in the light of the evidence of Ms Lackenby, the Parole Board, the Probation Service and others the appellant has a low risk of reoffending and is rehabilitated.

30. Whilst ultimately the appellant cannot meet the first exception under s.117C(4) of the 2002 Nationality, Immigration and Asylum Act, as he would have not very significant obstacles to integration for the reasons set out above, we find it is relevant to confirm that we find he has been lawfully resident with indefinite leave to remain for most of

his life, as is conceded by the respondent. We also find that he is socially and culturally integrated in the UK which was not conceded by Mr Melvin. Prior to his offence and conviction he was of good character and had clearly worked hard to obtain good qualifications at school, had a normal home life with his mother and brother and a circle of friends, and had started his community work against knife crime. The respondent concedes that since his release from prison in 2015 he has shown that he is rehabilitated and is involved with commendable community projects aimed at preventing crime and rehabilitating others. He is a fluent English speaker who is supporting himself financially through self-employed work as a personal trainer, and is accepted as being in a genuine and subsisting committed relationship with J, a person with indefinite leave to remain in the UK, and having a genuine and subsisting parental relationship with their son JJO, a British citizen, and we find that he is providing significant financial support to them. We find that all of these factors strongly support his being currently socially and culturally integrated.

31. In looking at the exception 2 to deportation under s.117C(4) of the 2002 Nationality, Immigration and Asylum Act it is rightly conceded by the respondent that the appellant has a genuine and subsisting family life relationship with his partner J, however, as set out above, given that they have not cohabited for two years, she is not a qualifying partner. The appellant cannot meet the requirements of exception 2 via his relationship with his partner therefore. We find it relevant to note however that it is conceded by the respondent that it would be unduly harsh to expect J, his genuine and subsisting partner, to return to live with the appellant in Nigeria.

32. We now turn to consider whether the appellant can succeed in meeting the requirements of exception 2 through his relationship with his two qualifying children. It is accepted by the respondent that he is the father of two qualifying children, JJO and NRO, who are British citizens. With respect to JJO it is rightly accepted that he has a genuine and subsisting parental relationship with his child.

33. It not been conceded that the appellant has a genuine and subsisting parental relationship with NRO. We find, however, that this is the case. We find that the evidence of the appellant and the written statements of M, NRO's mother show that he has played an extensive and committed role in the context of M's imprisonment and the fact NRO has lived most of her life in HMP Peterborough's mother and baby. He was present at her birth. He has visited every two weeks with supplies for NRO; he has looked after her when her mother had home leave; and has even taken her to hospital when called by the prison because she needed a check up and medication. He and his partner, J, intend that NRO will be part of their family as JJO's sister, and that he will be present in her life as her father, albeit a father who is separated from her mother. For the reasons set out above the

appellant cannot show that he meets the second exception by showing that his deportation would be unduly harsh for NRO.

34. We take a different view however with respect to JJO. It is rightly conceded that it would be unduly harsh for him and his mother J to go with the appellant to Nigeria. It is not conceded by the respondent that it would be unduly harsh for him to remain in the UK with J whilst the appellant is deported.

35. We remind ourselves of the guidance on this test provided by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53, that unduly harsh is a circumstances which is particularly severe or bleak, and not just undesirable or difficult, and that this is a test which focuses purely on the impact on the child. We are in no doubt that the disappearance of the appellant from JJO's life would be extremely distressing for him but this alone would not serve to meet the requirements of this difficult test, as it would be hard to say that the direct impact on this normal healthy child would be more than the normal affects of deportation. We find however that J is JJO's primary carer and that the impact on her of the appellant's deportation would be such that impact on JJO would be extremely serious and bleak. We find that J, who is pregnant with twin boys, would not be able to cope with the deportation of the appellant, given her depression and anxiety in the context of her emotionally unstable personality disorder.

36. Mr Melvin submitted that there was insufficient evidence supporting J having mental health problems. In respect of Ms Brown's evidence, he stated that he took issue with it so far as it related to J's mental health. He submitted that the evidence bears little resemblance to the GP's notes which have been disclosed. During cross-examination of Ms Brown by Mr Melvin challenged her expertise. We accept that there was little documentary evidence to support J receiving therapy and that Ms Brown reached conclusions without having sight of medical evidence; however, this does not undermine J's credibility or the reliability of Ms Brown's evidence. J gave clear, coherent and consistent evidence which is supported to a significant degree by the GP's notes. In this respect we take into account that other agencies have been involved with J's mental health and not only her GP. We were impressed by Ms Brown's evidence. She has been a qualified social worker since 1986. She has vast experience which is set out at 2.2 of her report. It is not a tenable argument that her expertise is undermined by her move into academia. Her report and oral evidence indicated that she had spent time with J and there was no reason for her to doubt what she was told by her. There is nothing that would suggest that Ms Brown's evidence was inaccurate or that she reached conclusions that were not within her remit as an expert social worker. Furthermore, despite Ms Brown's report having been served on the respondent some time ago, it was not until the hearing before us that it became known that the respondent did not accept her evidence

relating to J's mental health. We attach significant weight to Ms Brown's evidence.

37. We find, on the basis of J's credible evidence and her GP notes, that she was previously sectioned because she had a mental health crisis due to her inability to deal with significant changes in her life. Deportation of the appellant would be a very profound and negative change, the removal of her source of stability in her view and that of the independent social worker Ms Brown, at a point in her life when she is under very significant physical and emotional stress as the mother of one small child and pregnant with two more babies. J's evidence is that she became very significantly distressed and unable to cope when the appellant was taken away from her for short periods of immigration detention prior to the birth of JJO notwithstanding that she would have been receiving mental health support at that time. J's evidence is that she would have a breakdown in the event of the appellant's deportation. We accept that this is likely. It is corroborated by Ms Brown's evidence. We have had particular regard to and attach significant weight to what Ms Brown says in her report at para 5.6-5. 8 about the consequences of the appellant's deportation in the light of J's mental health and the dire consequences for JJO. J is a former looked after child, who was let down and latterly received an apology and compensation from Social Services, and who would, in the opinion of Ms Brown, which we adopt, find it difficult to reach out to them for help with her own children. We find that notwithstanding the mental health support that J receives that the deportation of the appellant would be such a profound stressor on her because of her vulnerability and the stress of her current circumstances that it would lead to a major deterioration in her mental health. The inevitable result of this would be that J's ability to parent JJO would be seriously compromised to such an extent that she would, in all probability, not be able to care for him. We have no hesitation in this case in finding that the unduly harsh test is met, as the loss of two loving parents in quick succession would be catastrophic for this young child.

38. We were not addressed in submissions by either party in respect of s.117B. However, we have put into the balance that this is a precarious family life case which is a factor weighing against the appellant. However, we conclude that the appellant has a very strong Article 8 case which amounts to very compelling circumstances in the context of the statutory regime; notwithstanding that he has committed a very serious offence. Whilst there is a very strong public interest in his deportation due to his conviction for murder and his life sentence for which he served over 8 years in prison, and whilst we acknowledge that he has not shown he himself would have very significant obstacles to integration in Nigeria we are satisfied that the catastrophic impact of deportation on his British citizen child, JJO, due to the significant impact on his highly vulnerable and unwell partner, J, combined with the best interests of his other child, NRO, in his remaining in the UK; the fact that he has spent most of his childhood

in the UK; the length of his lawful residence and his degree of integration and extent of his positive private life ties in the UK, which include his commendable work against knife crime, make a very compelling and truly exceptional case that means that his deportation would be a disproportionate interference with his Article 8 ECHR right to respect to family and private life.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. The decision of the First-tier Tribunal was set aside

3. We re-make the decision in the appeal by allowing the appeal on Article 8 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) 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. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant's partner and children.

Signed: Fiona Lindsley Date: 3rd June 2019

Upper Tribunal Judge Lindsley