Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13918/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2020	**On 28 January 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

ABDELHAKIM [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Lam, Counsel, instructed by David Tang & Co
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Morocco. His date of birth is 1 January 1979. He was granted leave to enter on 5 December 2010. He overstayed. On 15 December 2017 he was convicted of two counts of possessing false identity documents. The offences concerned a forged Belgian passport and a false driving licence which he used to try to open a bank account. He was sentenced to fifteen months' imprisonment. The Secretary of State made a deportation order on 19 June 2018. The Appellant is a foreign criminal as defined by Section 32(1) of the UK Borders Act 2007. Under

Section 32(5) the Respondent is obliged to make a deportation order pursuant to Section 3(5) of the 1971 Act.

2. The Appellant appealed against deportation on human rights grounds. His appeal was dismissed by First-tier Tribunal Judge M A Khan following a hearing on 21 March 2019. Following a hearing at Field House on 22 October 2019, I set aside the decision of the FtT. The salient parts of my decision read as follows: -

> "*Error of law*
>
> 10. I shall engage firstly with ground 3. This ground asserts that the judge did not make a finding whether the Appellant and his partner have a genuine and subsisting relationship. The judge found that the Appellant and his partner were not credible and that their evidence was not consistent. However, I do not accept that this equates in this case to the judge having found that the relationship is not genuine and subsisting. Whilst it is clear that their evidence was problematic and the judge rationally found that they had not been living together since 2013 as they claimed in their witness statements, their evidence was that they were living together at least a number of days a week. It cannot be reasonably inferred that the judge found there was no lawful and subsisting relationship between the Appellant and his partner because he found them not to be credible about the length of time they had been living together or the extent of his role as a father. It was incumbent on the judge to resolve the issue of the relationship at the time of the hearing notwithstanding that the witnesses may have exaggerated about the intensity of the relationship between the Appellant and Ms [K] or the extent of his parental role.
>
> 11. Ground 2 asserts that the finding of the judge at paragraph 45 is perverse because it was based on minor discrepancies in the evidence. I have some sympathy with this argument. The judge failed to make a proper assessment of the Appellant's relationship with his child. Whilst the judge's criticism of the evidence is lawful (I specifically refer to paragraph 38 of the decision and the judge was entitled to conclude from the evidence that the relationship between the Appellant and his son had been exaggerated), it cannot reasonably be inferred from this that the parental relationship is not genuine and subsisting. At paragraph 39 that the judge found that the Appellant's role as a father was peripheral. However, if the family is living together part of the week, even if it is the case that he does not take his son to nursery or he has not lived in the family home as long as claimed, it is difficult to see how his role could be described as simply peripheral. There is no proper engagement with the evidence of family life and inadequate findings made on the issue.
>
> 12. That the judge considers "unduly harsh" is inexplicable if he found that the relationship between the Appellant and is son is not genuine and subsisting. In any event, he did not make a lawful assessment of unduly harsh having directed himself on what the Court of Appeal said in LC China [2014] EWCA Civ 130. Whereas we now know that when considering unduly harsh the Appellant's criminality is not a material factor, see KO. Thus ground 4 is made out.

13. For the above reasons the judge materially erred and the decision should be set aside.

14. There are no reasons properly identified in the grounds for going behind the findings at paragraph 38 or the evidence as set out by the judge. However, there will need to be a proper assessment of Article 8.

15. There is substance in grounds 2, 3 and 4 of the grounds for the reasons that I have given. As far as ground 1 concerned, I do not find that there is substance in this ground which states that the judge "has failed to state what standard of proof he was applying". However, there is no legal obligation on the judge to set out in his decision the standard and burden of proof. There is no support for the judge having applied the wrong standard and burden of proof in the decision. However, this is not material because the decision cannot stand. Although this was not raised in the grounds and it is not material, I also note that the judge, at paragraph 48, wrongly identifies the decision of the Respondent. He states that it is not an automatic deport. The decision is an automatic deportation under the 2007 Act. There is also a further problem that the judge sets out the old Immigration Rules. Moreover, although reference is made to Section 117A and B there is no reference to Section 117C which concerns deportations.

16. I set aside the decision of the First-tier Tribunal to dismiss the appeal. The matter was adjourned to be remade by the UT at a future hearing."

The law

3. The Immigration Rules set out how the Secretary of State and her officials will exercise the powers conferred by the 2007 Act. The relevant paragraphs read 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 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.'

4. On 28 July 2014 the Immigration Act 2014 came into force. It provided that a new part 5 should be inserted into the Nationality, Immigration and Asylum Act 2002. That part provides so far as material:-

'**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.'

5. In KO Nigeria v the Secretary of State for the Home Department [2018] UKSC 53 at paragraph 22 Lord Carnwath with whom the other justices agreed, said that on the face of it, exception 2 in Section 117C of the 2002 Act raises a factual issue seen from the point of view of the partner or child and at paragraph 23 he said:

> "On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

6. A Tribunal or court considering Section 117C(5) of the 2002 Act must focus not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather on whether the effects of deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. The Tribunal must consider whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and

whether it would be unduly harsh for the child and/or partner to remain in the UK without him.

7. There have been two recent Court of Appeal decisions of significance. In PG (Jamaica) v SSHD [2019] EWCA Civ 1213 the court considered the unduly harsh test and said as follows;

> 38. The decision in *KO (Nigeria)* requires this court to adopt an approach which differs from that taken by Judge Griffith and Judge Finch. In the circumstances of this appeal, I do not think it necessary to refer to decisions predating *KO (Nigeria)*, because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation.
>
> 39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or child in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to

deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature.

8. In SSHD v KF (Nigeria) [2019] EWCA Civ 2015, the Court of Appeal again considered the proper interpretation of the unduly harsh test and said as follows;

> "30. Furthermore, and with respect to the First-tier Tribunal judge, I consider that his conclusion on the evidence about the respondent's family that his deportation would be unduly harsh is unsustainable in the light of Lord Carnwath's analysis of the proper interpretation of Exception 2 in s.117C(5), namely that:
>
> > "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."
>
> Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.
>
> 31. For those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what Parliament has decided, and it is important to bear in mind the observations of Hickinbottom LJ in *PG (Jamaica)* at paragraph 46:
>
> > "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with the other parent, they will inevitably be distressed. However, in section 117C (5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of ECHR. It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will.""

9. In NA (Pakistan) v Secretary of State [2016] EWCA Civ 662, the Court of Appeal gave guidance to decision makers about the approach of appeals under the 2002 legislation and Article 8 generally. In RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123, the UT decided that the way that the Tribunal should approach section 117C remains as set out in NA. In so far as the judgement is relevant to the issue in this appeal, Jackson LJ said: -

> 27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."
>
> 28. The next question which arises concerns the meaning of "very compelling circumstances, over and above those described in Exceptions 1 and 2". The new para. 398 uses the same language as section 117C(6). It refers to "very compelling circumstances, over and above those described in paragraphs 399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.
>
> 29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
>
> …
>
> 32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon

collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

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

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic [2012] UKSC 25; [2013] 1 AC* 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 a*t [38]:

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

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

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

…

38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *& UUML;ner v Netherlands (2007) 45 EHRR 14 and Maslov v Austria*? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportation or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying

> these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8.

The evidence

10. In accordance with directions of the Tribunal the Appellant served a supplementary bundle (AB/B) dated 19 December 2019. He also relied on the bundle before he FtT (AB/A).

The evidence of the Appellant

11. The Appellant relied on his witness statements of 7 March and 19 December 2019. He gave oral evidence and adopted his statements as evidence-in -chief. His evidence can be summarised. The Appellant came here in 2010 as a visitor and overstayed. He cannot remember the date he came here. The Home Office has his passport. He met his partner in 2013. She has ILR. Their relationship is genuine and subsisting. They started to cohabit in May 2013. He worked using a false Belgian passport. The purpose of obtaining the false document was to enable him to work and it was not used for any other purpose. When the passport was about to expire, he acquired a false driving licence because the bank was threatening to close his account without proof of ID and lawful residence. He did not use the documents to commit a criminal offence. He used them to secure employment and to open a bank account so that he could pay bills. He successfully attended courses in prison which would enable him to find work here. At times he had to work outside of London and would stay with friends. He returned to the family home 2-4 days a week. When his son was born and the Appellant was working, he would give his partner money.

12. EA attends nursery here. He speaks only a few words of Arabic. He is a British citizen. The Appellant was released from detention on 10 October 2018 and has since devoted his time to caring for his son. The Appellant is very close to his son. It would be very harsh for them to stay here without him. The Appellant wants his son to have one culture. He wants him to be educated and go to university in the UK. In Morocco the Appellant has an elderly mother. His father is deceased. He has no contact with his siblings. The Appellant has lost contact with family in Morocco. He would have no support on return. Before coming to the UK, he studied in Morocco and obtained a qualification in hospitality in 2001. It was a two-year course. His partner has been here for 18 years. She came as a refugee. Neither she (nor their son) has ever been to Morocco. His partner is studying in the UK. She intends to study for a degree in tourism and leisure. She cannot speak French and would not be able to find work in Morocco. Language would be a barrier. She has worked in the UK, but she is now dependent on state benefits.

The evidence of Ms [K]

13. Ms [K], the Appellant's partner, relied on her witness statements of 7 March and 19 December 2019. In addition, she gave oral evidence and she adopted her statements as evidence-in-chief. Her evidence is that the Appellant has shown remorse for his crimes. He committed the offences so that he could work here. He is hard-working. He is not a risk to society. He's an excellent father. He and their son are very close. EA is very attached to his father. When he visited him in prison he would cry when leaving. He would call other men "Dad" on the bus on the way home. He needs his father. Children suffer in broken homes. She wants to provide her son with a stable environment. The Appellant attends to their son's needs. EA is closer to his father. He takes him to and collects him from nursery. EA had a speech delay and the Appellant has helped him overcome this. When the Appellant was in prison for eleven months it was very difficult for her to cope. She struggled. Her friends would help her with childcare if she needed it, but it was difficult for them because they work. She has never been to Morocco. It would not be possible for them to move there and continue family life. Ms [K] has been here for the last 18 years. She was aged 16 when she came to the UK. She grew up here. She is Eritrean; however, she only lived there for a year. She lived in Saudi Arabia before coming here. She speaks Arabic; however, she can barely understand the French/ Arabic language which is spoken in Morocco. She has worked as a travel operator. She is settled here. Her parents are here. She has local authority accommodation. Her rent is paid for her. She has friends here. She does not know what she would face in Morocco. The uncertainty is very stressful. She would not be able to adapt to a move to another country. She was younger when she came to the UK. She did not know when she met the Appellant that he was an overstayer. Once she realised this about seven of eight months into living together, she intended to help him to regularise his status, but she was not able to do this until she was granted ILR in 2018. She did not realise that it would take so long.

Submissions

14. Mr Whitwell conceded that there was a genuine and subsisting relationship between the Appellant and his wife and between the Appellant and his son. Both representatives agreed that the issue in this appeal was whether deportation would be unduly harsh on the children and/or the Appellant's partner and if not whether there are very compelling circumstances within the meaning of s.117C (6). Mr Whitwell reminded me that the UT on the last occasion did not find any reason to go behind the findings of the judge at [38]; namely, that the Appellant has exaggerated his role as a father and that his partner was the main carer for EA. However, he accepted that I must consider the evidence at the date of the hearing. Mr Whitwell submitted that it was not entirely clear when the Appellant came to the UK. In his evidence he said that he came in May 2010; however, he did not at that time have a visa. In his view the Appellant may have come here unlawfully. The focus of the evidence in the witness statements was the situation for the family should it have to return to Morocco rather than separation. The Appellant's partner has social housing and friends here. EA will be attending nursery soon. None of this will change should

the Appellant be deported. Whilst the situation may be difficult, it does not reach the elevated standard necessary. In respect of the fears that the family has about EA growing up in a single parent household, Mr Whitwell draw my attention to the case of PG at [38] and [39] and KF at [30]. Mr Whitwell said that there is no doubt that relocation would be difficult, but again the impact on either EA or his mother does not meet the elevated standard required. The Appellant does not meet any limb of para 399A or Exception 1. He has stayed unlawfully. He is not socially and culturally integrated and there are no very significant obstacles to integration. In so far as section 117C (6) is concerned Mr Whitwell submitted that the parties were aware that the Appellant did not have leave when they formed a relationship and decided to have a family. There are no properly identified very compelling circumstances.

15. Mr Lam started by addressing me on the public interest and the circumstances of the Appellant's criminality. He sought to distinguish the cases of PG and KF. I asked him to focus initially on unduly harsh reminding him that the Appellant's criminality plays no part in the assessment. However, he then submitted that the offences were committed in order that the Appellant could work, and he referred me to ZH (Bangladesh) [2009] EWCA Civ 8 2009 and what was said about the Appellant's criminality in the OASys report. He reminded me that the assessment of unduly harsh is fact sensitive. The emotional trauma to the family would be harsh. The Appellant plays an important role in the life of his son who needs a father. He said that he was not sure that the Appellant's wife would cope. The harm is difficult to quantify. There are language barriers. There would be no family support. It is harsh to expect the Appellant's wife and child to live in a country that they have never visited. There are no job prospects there. They would have nowhere to live. The Appellant's wife has a dream to study and work here. She is a refugee and has established a stable life here. She wants to better herself. This would be impossible in Morocco because of the language barrier. Her ambitions would be dashed. In the alternative, all matters considered cumulatively amount to very compelling circumstances. The Appellant is not presently able to work, but he has done so previously. He is hard working. He has worked here and paid taxes. It is not in the public interest to make EA fatherless and for the family to remain here on benefit without the Appellant. It is irrational to say that the Appellant is no culturally or socially integrated here. He speaks English and has friends here.

Conclusions

16. The Appellant is a medium offender. I accept that he is at low risk of re-offending. I have considered the OASys assessment. I accept that the offences were committed in order that he could work here and to open a bank account. I accept that he did not commit further criminal offences with the false documents. His criminality is not material to the assessment of unduly harsh. It is relevant when assessing Article 8 generally.

17. EA is aged four. He attends nursery here. I have no reason to doubt that the family is close and loving and that the Appellant is a good father. It is without doubt very

much in EA's best interests to grow up with his father in his life, preferably here in the UK rather than in Morocco.

18. The Appellant says that he has lost contact with the people he knew in Morocco including his family. The Appellant came here 8 ½ years ago. I find that there is no reason why he cannot re-establish links with his family, friends and acquaintances in Morocco. The Appellant has worked here in the UK. He completed a course in Morocco before he came here. There is no cogent evidence before me that the Appellant would not be able to make a life for himself and his family in Morocco. EA is young and in good health. I do not find that he would suffer as a result of a language barrier. I understand from his mother's oral evidence that there was a speech delay. There is no evidence that this was of significance or that he needed specialist treatment. EA would have the option to come and study here when he is older. The Appellant's partner would be able to overcome any language barrier. She already has a head start in that she speaks Arabic. There is no evidence before me that she would have to abandon her ambitions although she may have to modify her plans. I have considered her position as a refugee here. However, I do not find that having to relocate would necessarily be better or worse for her than it would be for a spouse who has lived here all her life. I appreciate that she feels anxious about the uncertainty of what would happen to the family in Morocco. This is entirely reasonable in the circumstances. She is happy and settled here. She would have to give up things such as her flat and friends and proximity to family members. I acknowledge that it will be disruptive to relocate. The family would prefer to stay here together. Of course, EA and his mother could remain here, but this would lead to separation of the family. There was little evidence of practical difficulties that this would present to the family save the normal problems that single parents face; however, I accept that separation would be very upsetting for all members of the family and not in the best interests of EA.

19. Whilst the assessment is fact sensitive, the cases of PG and KF are binding on me. In respect of the wishes and hopes of the Appellant's spouse, together with the distress caused to the family on relocation or separation and the prospect of EA growing up in a single parent household, these are all factors that are capable alone or cumulatively of reaching the elevated threshold required. They are all the consequences that naturally flow from deportation of a parent/father. Mr Lam was not able to identify any features of the case that could support a finding on a proper application of the law that deportation would be unduly harsh. There is no properly identified feature of this case which would enable me to conclude that there was a degree of harshness going beyond what would necessarily be involved for any child/ partner faced with the deportation of a parent/partner. Whilst para 339A of the rules is set out in the Appellant's skeleton argument, there are no written submissions relating it. I asked the parties to clarify their position. It was agreed that the Appellant cannot satisfy the first limb. There was no evidence that there would be very significant obstacles. Mr Lam did not address me on this. I was not referred to any case law to support Mr Lam's submission about social and cultural integration and any adverse decision being irrational, but it is totally at odds with what the Court of Appeal said in Binbuga [2019] EWCA Civ 551. I find that the

Appellant does not satisfy any limb of para 339A. However, if he did satisfy 339A (c), this would make no difference to the outcome of his appeal. Exception 1 does not apply in the Appellant's case.

20. Mr Lam was not able to identify any features of the case which could be very compelling within the meaning of s117C (6). I remind myself that the test is extremely demanding and that I must have regard to s. 117B factors. I have taken on board what Mr Lam said about the public interest. The Appellant is a medium offender. I have considered the judge's sentencing remarks. The Appellant sought to use false documents because he had no status and had overstayed. He had a sophisticated forged Belgium passport which potentially gave him a right of residence here and a false driving licence which he used to try to open a bank account. Whilst I accept what Mr Lam said about the reasons for offending, and the level of risk presented by the Appellant, it is my view that he is seeking to downplay the seriousness of the offences. Whilst the offences do not involve violence or drugs, I take into account the judge's sentencing remarks that the offences are extremely serious for which the court imposes deterrent sentences. I find that there is an element of remorse. Whilst he is at low risk of reoffending, rehabilitation will not ordinarily bear material weight in favour of a foreign criminal. The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question of the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending (see DS (India) v SSHD [2009] EWCA Civ 544**)**. Risk of offending is one facet only of the public interest. The public interest in deporting foreign criminals is high. I accept that the Appellant entered the UK lawfully; however, he overstayed and formed a relationship with a qualifying partner when he was here unlawfully. It is in the best interests of the child to remain with his family intact in the UK and deportation will be very distressing for the family. However, considering all material matters there are no very compelling circumstances. The decision does not breach the Appellant's rights under Article 8.

21. The Appellant is not able to come within Exceptions 1 or 2. He has not identified "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2. Having conducted a fact sensitive assessment, on the evidence before me applying the legislation and relevant case law, the balance falls in favour of the Secretary of State in this case.

22. The appeal is dismissed under Article 8

No anonymity direction is made.

Signed *Joanna McWilliam* Date 11 January 2020

Upper Tribunal Judge McWilliam