Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07486/2018 (V)**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Working Remotely by Skype for Business
On 25 March 2021

Decision & Reasons Promulgated
On 14 April 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

C A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms H Short instructed by Turpin & Miller LLP

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of

any matter likely to lead to members of the public identifying the respondent (CA). A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Angola who was born on 24 March 1981. He claims to have entered the UK in 1992 when he was around 10 years old. His mother entered the UK separately. She claimed asylum in 1995 but her claim was refused in 1996. In December 2003, the appellant's mother applied for indefinite leave to remain in the UK. She was granted ILR in May 2004. The appellant applied for ILR on 4 March 2004 and he was granted ILR on 10 January 2005.

4. Between 26 January 2004 and 26 January 2018, the appellant was convicted on nine occasions of fifteen offences. Important for the purposes of this appeal, on 5 August 2016 the appellant was convicted of attempted robbery and sentenced, inter alia, to eighteen months' imprisonment suspended for 24 months.

5. On 30 November 2017, the appellant was convicted at the Kingston-upon-Thames Crown Court of possession/control of identity documents with intent and sentenced to a period of six months' imprisonment. As he was in breach of the previous suspended sentence order, that sentence was activated in part to a custodial sentence of fifteen months making, in total with the consecutive six months' imprisonment, 21 months' imprisonment. The appellant did not appeal against the sentence or conviction.

6. The appellant has, subsequently, on 26 January 2018 been convicted of travelling on a railway without paying the fare for which he was fined £220.

7. Following the appellant's conviction on 30 November 2017, the Secretary of State wrote to the appellant on 19 December 2017 notifying him of her intention to deport him from the UK as a 'foreign national criminal' under s.32 of the UK Borders Act 2007.

8. On 4 January 2018, the appellant made representations to the Secretary of State contending that his deportation to Angola would breach his human rights, in particular Art 8 of the ECHR. The appellant relied on the fact that he had left Angola as a 10 year old and had lived thereafter in the UK. He also relied on the fact that he had two children in the UK with his partner, who were British.

9. On 14 February 2018, the Secretary of State refused the appellant's human rights claim under Art 8 of the ECHR. The Secretary of State was not satisfied that the appellant met either of the Exceptions in ss.117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) (the "NIA Act 2002") or that there were "very compelling circumstances" over and above those in Exceptions 1 and 2

(s.117C(6)). As a result, the appellant's deportation was proportionate and not a breach of Art 8.

The Appeal to the First-tier Tribunal

10. The appellant appealed to the First-tier Tribunal. The appeal was heard on 21 February 2020 by Judge M R Hoffman. Both the appellant and Secretary of State were represented. The appellant gave oral evidence before the judge. The judge concluded that the appellant could not establish a breach of Art 3 of the ECHR based upon his mental health, in particular PTSD he claimed to suffer as a result of being a forced child soldier in Angola from around the age of 7 years old. That finding is not challenged and I need say no more about it in this decision.

11. As regards Art 8, the judge found that neither Exception 1 nor Exception 2 in ss.117C(4) and (5) applied to the appellant. With regard to Exception 1, the judge was not satisfied that the appellant had spent "most of his life" lawfully in the UK. As regards Exception 2, the judge accepted that the appellant had a genuine and subsisting parental relationship with his two children (but not as was conceded with his partner, their mother) but went on to find that it would not be unduly harsh for the appellant's children to remain in the UK if the appellant were deported. Finally, the judge found that there were "very compelling circumstances" over and above Exceptions 1 and 2 which outweighed the public interest reflected in the appellant's offending and so his deportation was disproportionate and a breach of Art 8. On that basis, the judge allowed the appellant's appeal.

The Appeal to the Upper Tribunal

12. The Secretary of State sought permission to appeal to the Upper Tribunal on three grounds.

13. First, as explained by Mr McVeety in his submissions before me, Ground 1 that the judge had erred in law by inconsistently finding that Exception 1 did not apply but, in determining that there were "very compelling circumstances", had found that there were "very significant obstacles" to the appellant re-establishing himself in Angola.

14. Secondly, Ground 2 contend that the judge failed to give adequate reasons for his conclusion in relation to s.117C(6) that there were "very compelling circumstances" over and above Exceptions 1 and 2 which outweighed the public interest.

15. Thirdly, Ground 3 contend that the proceedings before the judge were procedurally irregular and unfair due to the appellant's disruptive behaviour at the hearing. This included repeatedly interrupting the Presenting Officer, and his own representative and resulted in the Presenting Officer being unable fairly to question, or cross-examine the appellant as she would have liked.

16. On 1 April 2020, the First-tier Tribunal (UTJ Martin) granted the Secretary of State permission to appeal on all grounds.

17. Following directions from the Upper Tribunal, further representations were made both by the appellant (dated 13 August 2020) and the Secretary of State (dated 9 July 2020). Because of the issues raised under Ground 3, I directed on 22 September 2020 that a Case Management Hearing should be held. That hearing was held before UTJ Perkins on 16 December 2020. As a result, and this was accepted by both representatives before me, it was agreed that Ms Short's record of what had transpired at the First-tier hearing was agreed. It was accepted that the Presenting Officer had neither requested an adjournment nor made a request to file further submissions after the hearing.

18. The appeal was listed before me on 25 March 2021 at the Cardiff Civil Justice Centre working remotely in order to determine the error of law issue. Ms Short, who represented the appellant, and Mr McVeety, who represented the Secretary of State, joined the hearing by Skype for Business.

19. In addition, the appellant joined the hearing, apparently via his smart phone, by Skype. At the outset of the hearing, I noted that the appellant appeared to be walking outside rather than being based in a private room. As a consequence, I enquired from the appellant where he was. He told me that he was in a garden. I asked him if he would use his phone to show me his surroundings. I wished to confirm that the appellant was, even if outside, in a private area where the Tribunal's proceedings could not be overheard. In response to my request the appellant became aggressive and engaged in a sustained tirade of expletives and invectives directed against the Tribunal in seeking, in the appellant's view, to control him. His outburst was sustained over several minutes. Indeed, it only came to an end when, with Ms Short's agreement, the appellant was informed that he would be removed from the remote hearing in order for it to carry on. Ms Short was entirely in agreement with this as the proceedings concerned only legal issues. There was no doubt, in my mind, that the appellant's disruptive behaviour, which showed no signs of abating, would have made the continuation of the hearing impossible. The hearing then continued, as I have said with Ms Short's agreement and indicating that she would inform the appellant of what had transpired following the hearing, with oral submissions from both representatives. In addition, I had the parties' earlier submissions and Ms Short's skeleton argument.

The Legal Framework

20. For the purposes of this appeal, the relevant legal framework concerns Art 8 of the ECHR and Part 5A of the NIA Act 2002 and, principally, as it applies in deportation cases. In particular, the appeal is concerned with Exception 1 in s.117C(4) and Exception 2 in s.117C(5) and the additional provision in s.117C(6) concerned with "very compelling circumstances over and above those described in Exceptions 1 and 2". It is common ground that the judge was required to apply s.117C in determining the issue of whether the appellant's deportation would be disproportionate and a breach of Art 8 of the ECHR.

21. Sections 117C(1) and (2) set out the position regarding the "public interest" as follows:

> "(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."

22. By virtue of s.117C(3), if a 'foreign criminal' has been sentenced to at least twelve months' imprisonment but not to four years or more imprisonment, then if Exception 1 or Exception 2 applies, deportation is not in the public interest (see, HA (Iraq) v SSHD [2020] EWCA Civ 1176 at [29]).

23. Section 117C(4) sets out Exception 1 as follows:

> "(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."

24. Exception 2 is found in s.117C(5) as follows:

> "(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."

25. The proper approach to the "unduly harsh" requirement is set out in the decisions of the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53 and the Court of Appeal in HA (Iraq), especially at [39]-[58]. It is unnecessary to set out the approach, as the judge's finding that the appellant did not satisfy Exception 2 because it was not established that it would be "unduly harsh" for his two qualifying children with whom he had a genuine and subsisting parental relationship to remain in the UK if he were deported, is not challenged.

26. Section 117C(6) of the NIA Act 2002 provides as follows:

> "(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 circumstance, over and above those described in Exceptions 1 and 2."

27. Although s.117C(6) is phrased as only to apply to a foreign criminal who has been sentenced to at least four years, imprisonment, the Court of Appeal has held that this provision must also apply to a person who has been sentenced to a period of imprisonment of at least twelve months but less than four years (so-called 'medium offenders') and who cannot bring themselves within either Exception 1 or Exception 2 (see NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [25]-[27]).

28. As regards "very compelling circumstances" requirement in s.117C(6), the case law recognises the high threshold required to meet this test which requires the individual circumstances as a whole, including circumstances which did not in themselves result in Exception 1 or Exception 2 being met, being considered cumulatively with all other relevant circumstances and balanced against the public interest reflected in the seriousness of the individual's criminal offending (see NA (Pakistan) at [32] and HA (Iraq) at [60]).

29. In HA (Iraq), the Court of Appeal provided guidance on the application of s.117C(6). Underhill LJ (with whom Peter Jackson and Popplewell LJJ agreed) said this (at [31]-[38]):

> 31. The effect of the phrase "very compelling circumstances over and above those described in Exceptions 1 and 2", and the nature of the exercise required by section 117C (6) as it applies both to medium offenders and to serious offenders, are carefully discussed at paras. 28-34 of *NA (Pakistan)*. It is unnecessary that I quote that discussion in full here, but I should note four points applicable to the case of a medium offender.
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> 32. First, the discussion is underpinned by the fundamental point of principle which the Court identifies at para. 22 of its judgment, as follows:
>
> > "Section 117C (1) of the 2002 Act, as inserted by the 2014 Act, re-states that the deportation of foreign criminals is in the public interest. The observations of Laws LJ in *SS (Nigeria)* [[2013] EWCA Civ 550, [2014] 1 WLR 998], concerning the significance of the 2007 Act, as a particularly strong statement of public policy, are equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. Both the courts and the tribunals are obliged to respect the high level of importance which the legislature attaches to the deportation of foreign criminals."
>
> It is because of the high level of importance attached by Parliament to the deportation of foreign criminals that, where neither Exception 1 nor Exception 2 applies, the public interest in deportation can only be outweighed by very compelling circumstances.
>
> 33. Secondly, the Court's explanation of the effect of the phrase "over and above those described in Exceptions 1 and 2", at para. 29, reads as follows:
>
> > "The phrase used in section 117C (6), in para. 398 of [the Immigration 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'. … [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 Rules]), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong."
>
> That passage is expressed to cover the case of both serious and medium offenders. At para. 32 the Court specifically addresses the case of medium offenders, as follows:

> "… [I]n the case of a medium offender, if all [the potential deportee] 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."

Those two passages make clear that, in carrying out the full proportionality assessment which is necessary where the Exceptions do not apply, facts and matters that were relevant to the assessment of whether either Exception applied are not "exhausted" if the conclusion is that they do not. They remain relevant to the overall assessment, and could be sufficient to outweigh the public interest in deportation either, if specially strong, by themselves[3] or in combination with other factors.

34. Thirdly, at para. 33 the Court says:

> "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."

This passage makes a point which appears often in the case-law. But it is important to bear in mind that it is directed at the exercise under section 117C (6). The Court was not saying that it would be rare for cases to fall within section 117C (5).

35. Fourthly, at para. 34 the Court addresses the relevance of the best interests of any children affected by the deportation of a foreign criminal. It says:

> "The best interests of children certainly carry great weight, as identified by Lord Kerr in *H (H) 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. …"

Again, this is a point frequently made in the case-law; but, again, it should be borne in mind that, as the reference to a "sufficiently compelling circumstance" shows, the final sentence relates only to the exercise under section 117C (6).

36. I have not so far referred to authorities about the regime which preceded the coming into force of Part 5A in 2014 and the associated changes to the Rules. However, as this

Court made clear in *Akinyemi v Secretary of State for the Home Department* [2019] EWCA Civ 2098, [2020] 1 WLR 1843, ("*Akinyemi (no. 2)*") the underlying principles relevant to the assessment of the weight to be given to the public interest and article 8 have not been changed by the introduction of the new regime (see per the Senior President of Tribunals at para. 46). The purpose of the new provisions was to give statutory force, accompanied by some re-wording, to principles which had already been established in the case-law relating to the Immigration Rules. That means that cases decided under the old regime may still be authoritative. We have already seen that this Court in *NA (Pakistan)* referred to the important observations of Laws LJ in *SS (Nigeria)* about the weight to be given to the public interest in the deportation of foreign criminals. It also referred on several occasions to the decision of this Court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 544.

37. The most authoritative exposition of the principles underlying the old regime can be found, two years after it had been superseded and even some months later than *NA (Pakistan)*, in the decision of the Supreme Court in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799. It is authoritative on the points of principle underlying both regimes and was so treated in *Akinyemi no. 2* (see paras. 46-50). That being so, I should say that I can see nothing in the judgments of the majority inconsistent with the approach taken by this Court in *NA (Pakistan)* as discussed above. At para. 26 of his judgment Lord Reed summarises the effect of the Strasbourg case-law about foreign criminals, and at para. 33, like this Court in *NA (Pakistan)*, he makes it clear that the factors referred to in those cases need to be taken into account in the assessment of the proportionality of the deportation of foreign offenders (whether or not they are "settled migrants").

38. Reference to the previous case-law is important for the purpose of a particular point made by the Appellants in these appeals. It will be seen that in para. 32 of its judgment in *NA (Pakistan)* this Court expresses the test under section 117C (6) as being whether the circumstances relied on by the potential deportee "are sufficiently compelling to outweigh the high public interest in deportation"; and it uses the same formulation in paras. 33 and 34 (see paras. 36-37 above). The Appellants contend that that is the only correct formulation, and that it is dangerous to refer simply to "very compelling circumstances". It would, to say the least, be surprising if it were wrong to use the very language of the statute; but in any event the position becomes clear when the development of the case-law is understood. This Court in *NA (Pakistan)* took the language of "sufficiently compelling" from the decision in *MF (Nigeria)*. Paragraph 398 of the pre-2014 Rules had used the phrase "exceptional circumstances". At para. 42 of its judgment in *MF* the Court said that that did not mean that a test of exceptionality was to be applied (a point repeated in *NA (Pakistan)* – see para. 36 above) and continued:

> "Rather …, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something *very compelling* (which will be 'exceptional') is required to outweigh the public interest in removal [emphasis supplied]."

At para. 46 it expressed the same point slightly differently, referring to "circumstances which are *sufficiently compelling* (and therefore exceptional) to outweigh the public interest in deportation [again, emphasis supplied]". The effect is clear: circumstances will have to be very compelling in order to be sufficiently compelling to outweigh the strong public interest in deportation. That remains the case under section 117C (6)."

30. Subsequently, the Court of Appeal in AA (Iraq) v SSHD [2020] EWCA Civ 1296 identified the four leading authorities in relation to ss.117C(5) and (6) beyond which it would usually be unnecessary for a Tribunal to make reference: KO(Nigeria); HA (Iraq), NA (Pakistan) and R (Byndloss) v SSHD [2017] UKSC 42.

31. In respect of the Supreme Court's decision in Byndloss, the Court of Appeal made specific mention to Lord Wilson's judgment at [33] and [55] where he said this about the approach to proportionality in deportation cases:

> "33. The deportation of a foreign criminal is conducive to the public good. So said Parliament in enacting section 32(4) of the 2007 Act: see para 11 above. Parliament's unusual statement of fact was expressed to be for the purpose of section 3(5)(a) of the 1971 Act so its consequence was that every foreign criminal became automatically liable to deportation. Parliament's statement exemplifies the "strong public interest in the deportation of foreign nationals who have committed serious offences": *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799, para 14, per Lord Reed JSC. In the *Ali* case the court was required to identify the criterion by reference to which the tribunal should determine an appeal of a foreign criminal on human rights grounds against a deportation order. The decision was that the public interest in his deportation was of such weight that only very compelling reasons would outweigh it: see paras 37 and 38, per Lord Reed JSC.
>
> ……..
>
> 55. The third [feature of the background] is that, particularly in the light of this court's decision in the *Ali* case, every foreign criminal who appeals against a deportation order by reference to his human rights must negotiate a formidable hurdle before his appeal will succeed: see para 33 above. He needs to be in a position to assemble and present powerful evidence. I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters: (a) the depth of the claimant's integration in United Kingdom society in terms of family, employment and otherwise; (b) the quality of his relationship with any child, partner or other family member in the United Kingdom; (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise; (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the United Kingdom; (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case; (f) any significant risk of his reoffending in the United Kingdom, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform."

32. What is said there is particularly relevant to s.117C(6) and the issue of "very compelling circumstances".

Discussion

Ground 3

33. It is helpful to begin with Ground 3 and the respondent's contention that the proceedings were procedurally irregular and unfair to the respondent because of the

appellant's disruptive and aggressive behaviour during the First-tier Tribunal hearing.

34. What happened at the hearing before the judge is not, as I have indicated, in dispute. The judge made reference to the appellant's behaviour during his evidence (at para 31 of his determination) and during the submissions (at para 48 of his determination). At para 31, the judge said this:

> "Ms Burrell [the Presenting Officer] asked the appellant to confirm that he had worked as a fitness instructor, warehouse operative and a security guard in the UK. The appellant confirmed that he had done all those jobs. Ms Burrell next asked the appellant why he could not use those skills to find work in Angola. At this point, the appellant became agitated. He repeatedly asked Ms Burrell why she *"was here [in the UK]"* and said that this was a *"funny question"*. He said that he had children in the UK and that if he wanted to go to Angola, he would go to Angola. He repeatedly asked Ms Burrell why she did not go to Angola. At this point, I explained to the appellant that he should not be asking Ms Burrell questions but should answer hers. I put Ms Burrell's question to the appellant myself, but the appellant continued to display signs of agitation and, at this point, I decided to adjourn the hearing for five minutes to enable the appellant to calm down."

35. It then transpires that the hearing resumed and the appellant continued to give his evidence which is set out at paras 32 and 33 of the judge's determination.

36. Consequently, it would appear, from the judge's determination, that as a result of the appellant's attitude and approach to the questions being put by Ms Burrell, the judge briefly adjourned the hearing in order for the appellant to resume a level of calmness which would allow the cross-examination to continue, which it did.

37. As regards the submissions, at para 48 the judge relates the appellant's behaviour as follows:

> "At this point of the determination I should explain the appellant's behaviour during oral submissions. This began with the appellant repeatedly interrupting Ms Burrell's submissions, asking her whether *"she knew Angola?"*. Despite my repeated requests for him to refrain from interrupting her, he continued to do so. I suggested to Ms Short [the appellant's counsel] that she should have a word with her client at which point he said, *"I don't want to be here"*. Ms Short confirmed that she was content for the appellant to leave the courtroom and that she was confident she would address his needs if he was outside. I therefore gave permission for the appellant to wait outside with [an individual who attended with the appellant]. He did, however, re-enter the hearing a few minutes later. Later, when Ms Short made her submissions, the appellant began to interrupt her as well, at one point repeatedly claiming that if he was returned to Angola he *"will become the biggest terrorist in the world"*. When the appellant ignored my request that he refrain from interrupting his own advocate I decided to adjourn the hearing for five minutes to allow him to compose himself. Ms Short agreed but asked me to take into account that the appellant became agitated when Angola is spoken about, which she said was evidence of his PTSD. Ms Short left the courtroom for a few minutes and returned without the appellant whom she said had decided to (*sic*) wait outside. Ms Short said that she was happy to proceed in his absence. The hearing therefore resumed, although the appellant returned to the courtroom a few minutes later. While he continued to interject, and I had to continually remind him not to interrupt Ms Short's submissions, the appellant appeared to be less agitated than earlier."

38. Attached to the grounds of appeal is the note of the hearing made by Ms Burrell. In that note she states:

> "Appellant was aggressive towards me throughout the evidence and submissions. He took a break at the beginning of cross-exam due to his aggression. During this break I asked security to keep an eye on my court. When we reconvened he became aggressive again and was asked to leave the court by his rep and litigation friend. We continued in his absence to submissions. The appellant returned during submissions and proceedings to make comments and talked throughout my subs which was intimidating and rather distracting. During cross and subs I made it clear to the Judge that I would usually go into more detail or push him more during questioning, but felt unable to, considering the circumstances. The appellant left the room again and then came back during his rep's submissions. He interrupted his rep's submissions and at one stage shouted 'I will be the biggest terrorist you will ever meet if you send me back, and it will all be directed at your country'. The appellant was given plenty of breaks, tissues and water during the hearing. It was reported by the Judge during one of the breaks that the appellant was swearing at the security guards."

39. In his submissions, Mr McVeety accepted that Ms Short's recollection of events was accurate. The Presenting Officer had made no formal request for an adjournment and had not made any request to make further written submissions after the hearing. Nevertheless, Mr McVeety submitted that the evidence showed that the appellant was hostile in court and this was potentially unfair if the Presenting Officer was not able to put further questions. He candidly, however, accepted that there was no detailed evidence from the Presenting Officer as to precisely what she had not been able to ask or explore in cross-examination or submissions. He acknowledged that perhaps the place to have raised this was at the hearing before the judge.

40. In response, Ms Short relied upon a number of decisions, referred to in her skeleton argument, concerning allegations of impropriety by a judge at a hearing: PA (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 0337 (IAC); HA (conduct of hearing: evidence required) Somalia [2009] UKAIT 00018 and KD (inattentive judges) Afghanistan [2010] UKUT 261 (IAC). She submitted that the representative had a duty to raise inappropriate behaviour, including by an appellant, with the judge at the hearing. Likewise it was relevant whether any complaint was not raised at the hearing or at least shortly after. Evidence to support the allegations was crucial, she submitted. In this case, Ms Short submitted that the Presenting Officer had not raised contemporaneously the fairness of the hearing and that her position was compromised. She did not seek an adjournment and she did not seek to request permission to file subsequent written submissions. Ms Short pointed out that the Presenting Officer's cross-examinations ended at the end of her questions rather than as a result of the disruption by the appellant which had led to him leaving the hearing room before subsequently returning to give further evidence. Likewise, that was the position as regards her submissions to the judge. Ms Short pointed out that the appellant had been absent from the room on a number of occasions and the Presenting Officer had had an opportunity to raise her concerns in his absence but had not done so. There was no statement of truth or formal evidence concerning the impact upon the Presenting Officer of the appellant's disruptive conduct.

41. The requirement that proceedings must be procedurally fair applies in favour both of the appellant and the respondent. No less than the appellant's representative, the Secretary of State's representative was, as a matter of fairness, entitled to the opportunity to fully present the Secretary of State's case. That included, within the bounds of reasonable questioning, cross-examination and the making of relevant submissions to the judge. If the appellant's disruptive conduct, which Ms Short accepted was challenging, prevented the Presenting Officer fairly exploring the appellant's evidence in cross-examination or making relevant submissions to the judge, there would be a prima facie case of unfairness. Indeed, in an extreme case, the conduct of an individual at a hearing, whether appellant or witness or representative, might be such as to render the proceedings unfair if that behaviour created a situation and an atmosphere antithetical to the proper conduct of the proceedings. I did not understand Mr McVeety to contend that latter situation appertained in this appeal. Rather, his submissions focused upon the impact upon the Presenting Officer's ability to ask questions and make submissions.

42. There is no doubt that the appellant's behaviour was disruptive. The circumstances were undoubtedly challenging for both advocates and the judge. It is worth noting, of course, that the appellant also interrupted on numerous occasions his own Counsel's submissions. The appellant's conduct was wholly inappropriate and inconsistent with the required decorum and respect owed to each and every participant in the judicial process. The judge, however, dealing with this difficult situation responded reasonably and appropriately by granting temporary adjournments in order for the appellant to calm down. That endeavour was, of course, not wholly successful. I do not doubt that the Presenting Officer, in particular, found the appellant's behaviour difficult and problematic. However, I accept Ms Short's submissions that, on the evidence available to me, it has not been shown that the Presenting Officer was unfairly prevented from presenting the Secretary of State's case through cross-examination or submissions. There is not a sufficient evidential basis to demonstrate precisely what the Presenting Officer was prevented from asking the appellant or submitting to the judge. As Ms Short submitted, the Presenting Officer did not seek an adjournment on the basis that she could not fairly continue nor did she seek to make a request to file written submissions after the hearing on the basis that she had been unable to make her submissions. There was an opportunity to do this, not least during the time that the appellant was absent from the hearing.

43. Looking at the judge's determination and the progression at the hearing, I am satisfied that the Presenting Officer was, albeit with some difficulty, able to explore what she wished to do so in cross-examination or with the assistance of the judge asking some questions himself. Likewise, the judge records in detail the submissions made by the Presenting Officer and, indeed, Ms Short at paras 35-39 and 40-47 respectively. Those submissions are, with respect, very full and thus the relevant matters which the judge had to reach findings upon. Despite the unacceptability of the appellant's conduct, I am not persuaded that the proceedings were, as a result, unfair, in particular to the respondent's representative. For these reasons, therefore, I reject Ground 3.

44. I now turn to the remaining two grounds which challenge the judge's conclusion that, applying s.117C(6), there were "very compelling circumstances" over and above those described in Exceptions 1 and 2 to outweigh the public interest such that the appellant's deportation would be disproportionate and a breach of Art 8.

Ground 1

45. Mr McVeety dealt briefly with Ground 1. He acknowledged that the ground as drafted appeared to omit the point which was intended to be made. He explained that the Secretary of State's contention was that it was inconsistent for the judge to find that Exception 1 in s.117C(4) did not apply but, at the same time, find that there were "very significant obstacles" to the appellant's reintegration into Angola when applying s.117C(6).

46. In the course of his submissions, I pointed out to Mr McVeety that the judge had found that Exception 1 did not apply to the appellant solely on the basis that he did not satisfy the requirement in s.117C(4)(a), namely that he had been "lawfully resident in the United Kingdom for most of [his] life". That was the judge's finding at paras 74 and 82 of his determination. Although the appellant claimed to have been in the UK since 1991 or 1992, he had only been resident in the UK lawfully from 10 January 2005 when he was granted ILR until 14 February 2018 when he was notified that a deportation order had been signed. That was a total of thirteen years and the appellant is 30 years old. The requirement to have spent "most" of his life in the UK lawfully resident meant the majority of it, i.e. more than half (see SSHD v SC (Jamaica) [2017] EWCA Civ 2112 at [53] per Sir Ernest Ryder (SPT)). At para 74, having, therefore, considered that the appellant could not meet the requirement in para 399A(a) of the Rules (equivalent of s.117C(4)(a)) the judge went on to say that it was:

> "Therefore unnecessary for me to consider whether the requirements of sub-paras (b) and (c) have been met."

47. The requirements in sub-paras (a) to (c) of para 399A of the Rules reflect those in s.117C(4)(a)-(c). The judge made the same point, namely that he was only deciding the issue under s.117C(4)(a), explicitly in para 82 of his determination where he also noted the Presenting Officer's acceptance that the appellant met the requirement in s.117C(4)(b) namely that he was "socially and culturally integrated in the United Kingdom".

48. Consequently, the judge found that Exception 1 did not apply but without making any finding as to whether or not there were "very significant obstacles" to the appellant's integration on return to Angola. In the circumstances, it was not inconsistent for the judge to find, in para 98 of his determination when concluding there were "very compelling circumstances", that there were "very significant obstacles" to the appellant re-establishing himself in Angola. Ground 1 is, therefore, not established.

Ground 2

49. I turn now to Ground 2.

50. The judge's reasons for allowing the appellant's appeal under Art 8 on the basis that there were "very compelling circumstances" are found at paras 76-98 of his determination.

51. The judge accepted that the appellant enjoyed family life with his two children and that he had developed a private life in the UK since arriving in the early 1990s (see para 76).

52. In paragraphs 78-79, referring to s.117C(2), the judge accepted that the appellant had committed a serious offence, namely attempted robbery, and that he had a propensity to re-offend.

53. At para 81, the judge found, on a balance of probabilities, that "the appellant will likely continue to re-offend if he is permitted to remain in the UK".

54. At para 83, the judge noted the appellant's relationship with his two sons with whom he had regained contact since release from prison in November 2019. Prior to that he had only had limited contact with his one son and had never met the other. The judge noted that the appellant now had three months of supervised contact amounting to two hours per week and had had unsupervised contact for the past two weeks (see para 83).

55. At para 84, the judge concluded that it was in the children's best interests to remain in contact with their father. Consistent with his conclusion under Exception 2, whilst recognising that the appellant had a genuine and subsisting parental relationship with his children, at para 86 the judge accepted that it would not be "unduly harsh" upon the children if he were deported.

56. Having done so, at para 87 the judge directed himself that there must be "very compelling circumstances" to outweigh the strong public interest in deportation.

57. At para 88, the judge found: "I do not accept that there are very compelling circumstances arising out of the appellant's relationship with his sons".

58. Then at paras 89-92 the judge considered the appellant's private life in the UK. At para 92 the judge reached the following conclusion:

> "I therefore find that the appellant's private life in the UK is slight for a man who claims to have lived in the country since the early 1990s. With the exception of the lady who attended the hearing with him (but did not give evidence) he appears to have few, if any, friends. There is no evidence that he has obtained any qualifications. I also take into account that even setting aside his period of imprisonment, he has not worked for a number of years. Before that, he appears to have worked sporadically, and held no jobs long-term. Nevertheless, Ms Short submitted that the factors against removal are as follows: the appellant has lived in the UK for 26 years (although I note it may be slightly longer than that); he speaks English (therefore s.117C(2) does not apply); he only lived in

> Angola for the first ten years of his life; he had never returned to that country and has no ties there; he held ILR for fourteen years and, prior to that, he was in the UK as a child. She refers to the fact that he was abandoned by his mother with his stepsisters in Portugal, and when he came to the UK, he was mistreated by his stepbrother. He has experienced grief throughout his whole life, including the death of his parents. Further he now has contact with the children and, she says, he has rehabilitated himself in prison. (On this final point, for the reasons set out above, I am not satisfied that the appellant has been rehabilitated.)"

59. At para 93, the judge noted Ms Short's submission that there were "very significant obstacles" to the appellant re-establishing his private life in Angola due to his vulnerability and that he would be left destitute. He relied on an expert report from Dr Amundsen which stated that state support was "non-existent" and that having been absent from Angola for more than 25 years and having no family to return to posed a significant risk to the appellant's livelihood. The judge, however, went on to say:

> "I accept that if the appellant does still have family in Angola, it is unlikely that he is still in contact with them given (a) how long he has been absent from that country for and (b) that he is not even close to his family in the UK. But while I also accept it might be difficult to find work or accommodation without a family or social network, it seems to me unlikely that it is impossible to do so without them."

60. At para 94, the judge noted in Ms Short's submission that the appellant's criminal record would lead to social discrimination in Angola again relying upon Dr Amundsen's report. However he noted the expert's view that there was "no reason to believe" that the Angolan authorities would be informed about the appellant's criminal record. He concluded that it was "plain", therefore, that if people in Angola became aware of the appellant's criminal record it would be because he told them and the respondent could not be blamed for that.

61. At para 95, the judge noted Ms Short's submission, relying upon Dr Amundsen's conclusion, that the appellant faced a high risk of destitution on return to Angola.

62. At paras 96-98, the judge carried out the balancing exercise required under s.117C(6) in respect of the issue of proportionality as follows:

> "96. I remind myself that where the respondent has made an assessment that the public interest is in favour of a foreign criminal's deportation, that person's Article 8 claim must be sufficiently strong to outweigh the public interest and "*only a claim that is very strong indeed – very compelling, as it was put in MF Nigeria – will succeed*": see Hesham Ali, para 50. This is a very finely balanced case, and I have not found it easy to reach a decision. However, after careful consideration of all the evidence, I am – somewhat reluctantly – led to the conclusion that the appellant's circumstances are sufficiently compelling so as to outweigh the strong public interest in his deportation.
>
> 97. I accept that the appellant's conduct in the UK (at least as an adult) has been incredibly poor, although his offences have not been at the most serious end of the spectrum. He is, however, a persistent offender who has shown a proclivity to threaten and harass and, at times, result to violence, including against his former partner, Ms A. I do have very real concerns that the appellant has not been fully

> rehabilitated and is likely to continue to offend. Furthermore, his claim during oral evidence that he would like to work in close protection and have access to a firearm suggests that the appellant has a distinct lack of awareness when it comes to the implications of his criminal record and violent behaviour. There is, in my view, a clear public interest in his deportation. Nevertheless, for the following reasons, I find that the proportionality balance just about weighs in the appellant's favour.
>
> 98. I take into account that while the appellant has not been lawfully resident in the UK for most of his life (as required under Exception 1 set out in s.117C(4)), he has lived here for most of his life, and for more than 25 years. I also take into account that until 24 March 1999, he was present in the UK as a minor, in circumstances that were essentially outside of his control. Therefore, he has spent just under six years in the UK as an adult with no leave to remain, but fourteen years as an adult with ILR. As Ms Burrell accepted in her submissions, the appellant has socially and culturally integrated in the UK during that time. Furthermore, while he speaks Portuguese and likely has some knowledge of Angola from his childhood and through his mother, I accept that there are very significant obstacles to him re-establishing his private life in Angola. He has not lived there since his childhood and, importantly, it was a childhood marred by the abuse he suffered as a child soldier forced to fight for UNITA. As the psychiatric report shows, the abuse the appellant suffered has almost certainly had repercussions in the Complex PTSD he suffered from in the past; and, according to Dr Chisholm, it will likely re-surface if he is returned to Angola. I have set out above why I have decided the appellant cannot succeed on Article 3 ECHR medical grounds. But in the context of Article 8, I find that the cumulative effect of the appellant's PTSD being re-triggered in Angola, the difficulty in obtaining treatment without funds (see Dr Amundsen's report, page 4) coupled with the lack of a family or support network there, which will make it difficult for the appellant to find accommodation or work in a country that already has high unemployment (Dr Amundsen's report, pages 7 to 8) would, on balance, likely leave the appellant destitute (Dr Amundsen, pages 9 to 10). When coming to that conclusion, I have also taken into account that the appellant's lack of qualification while significant work experience in the UK would not give him any advantage in the jobs market in Angola. And while the appellant's relationship with his children would not on its own have led me to find that his deportation would be disproportionate, taking it in the round with the other factors on the appellant's side of the scale, I find this adds additional weight to his claim."

63. The judge then went on in para 99 to give the following warning:

> "I would, therefore, make it clear to the appellant that should he continue to re-offend, and should his crimes become more serious, that might well tip the proportionality back in favour of his deportation from the UK."

64. On behalf of the respondent, it is said that the judge failed to give adequate reasons for his conclusion given the appellant's criminal record and that his private life was entitled to little weight. Further, it is contended that the judge failed properly to take into account his own finding that the appellant had failed to rehabilitate and Dr Chisholm's evidence that he was not presently suffering from any mental health problems. It was wrong to take into account Dr Amundsen's speculative views as to the appellant's situation in Angola. Paragraph 11 of the grounds adds that the judge erred by failing to give adequate regard to the public interest in the appellant's deportation.

65. In a 'reasons' challenge, there are two potential bases upon which a case can be made.

66. First, where the reasons are inadequate to understand the judge's ultimate conclusion and do not show that he has properly engaged with the relevant issues, including the evidence (see, e.g. Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)). As the Court of Appeal stated in English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 at [16}:

> "justice will not be done if it is not apparent to the parties why one has won and the other has lost."

67. Secondly, the reasons, whilst adequate to explain the decision, do not rationally support the conclusion or findings reached.

68. In this appeal, the first of those challenges is not explicitly made and, as is plain from reading the detailed reasons given by the judge, it cannot be said that it is unclear why the judge found in the appellant's favour. The challenge is, therefore, essentially a challenge to the rationality of the reasons given by the judge and whether or not he has properly took into account all relevant factors. It is not suggested that the judge misdirected himself on the applicable law.

69. The test of irrationality is an onerous one to meet. It requires the Tribunal to be satisfied that *no* reasonable Tribunal properly directing itself could have reached the finding or conclusion challenged. The fact that a Tribunal has reached what might be characterised as a generous view, for example in striking the balance between the public interest and an individual's circumstances under Art 8.2, does not in itself necessarily establish an error of law.

70. The point was made in Mukarakar v SSHD [2006] EWCA Civ 1045 and approved by the Supreme Court in R (MM) (Lebanon) and Others v SSHD [2017] UKSC 10 at [107] where Lady Hale and Lord Carnwath (in their joint judgment) said this:

> "107. It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):
>
> > "… It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case … The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law … Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.""

71. In Lowe v SSHD [2021] EWCA Civ 62, McCombe LJ (with whom Asplin LJ agreed) re-iterated the importance of appellate courts and tribunals exercising caution before interfering with "evaluative judgments" by first instance judges (see [29] citing Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at [114]-[115] per Lewison LJ). In

Lowe, the challenge was to the First-tier Tribunal's assessment of whether there were "very significant obstacles" to an individual's re-integration on return to his own country.

72. In this appeal, the judge was entitled to have regard to all relevant factors, including the impact upon the appellant's children even though Exception 2 was not met. As the judge noted, in itself the impact upon his children would not make the appellant's deportation disproportionate but that impact was to be taken into account as part of the cumulative set of factors relevant in determining the appellant's circumstances and whether there were "very compelling circumstances". The judge set out a number of factors based upon the appellant's long time residence in the UK over 25 years including a period of fourteen years as an adult with ILR and a significant period as a minor (his having come to the UK aged 10) even though at that time technically he had no leave to be here but that that was "essentially outside of his own control".

73. The appellant also had the background of having been a forced child solider in Angola. The judge was entitled to take into account the expert evidence from Dr Amundsen which, as Ms Short submitted, as a country expert was necessarily projecting forward to what would be the appellant's circumstances on return. I do not accept Mr McVeety's criticisms of the judge's approach to the evidence, including the expert evidence. The judge was entitled to find, for the reasons he gave, that the appellant would face "very significant obstacles" to establishing himself in Angola given the period of time he had been in the UK (where in addition it was accepted he had become culturally and socially integrated), his family and other circumstances in Angola which he left when he was 10 years old and that the medical evidence showed that, even though his Complex PTSD was not currently requiring treatment, because of his previous circumstances in Angola it would likely be reactivated on return.

74. It may well be, as the judge found, that none of these factors taken individually outweighed the public interest on the basis of being "very compelling circumstances". The case law makes plain, however, that the judge was required to consider all the features – positive and negative – including features of the case which did not, in themselves, engage either of the Exceptions in ss.117C(4) and (5).

75. It cannot be said that the judge failed properly to have regard to the public interest demonstrated by the appellant's criminal offending (see paras 79-81). The judge was plainly well aware of it, including his risk of re-offending and his incomplete rehabilitation (see e.g. para 97). He balanced against that "strong public interest" (para 96) the particular circumstances of the appellant given his long time residence in the UK since the age of 10 (over 25 years) and the impact upon him on return to Angola given his history as an enforced child soldier there and the difficulties he would face of establishing himself with family that he is, as the judge found, unlikely still to be in contact with. Even if it was unlikely to be impossible for him to find work or accommodation without such a family or social network, the judge found that there were real difficulties in doing so. The grounds do not directly challenge

the judge's finding that there would be "very significant obstacles" to him re-establishing himself in Angola.

76. Bearing in mind the need to establish that the judge's decision was irrational or one which no reasonable Tribunal properly directing itself could reach, I am unpersuaded that is established. It may well be that the decision is somewhat generous and not necessarily a decision which every judge assessing these circumstances would reach. Indeed, it might not have been a decision that I would have reached. But, as the Supreme Court reminds us, that is not the yardstick of irrationality or Wednesbury unreasonableness. The judge himself remarked that it was a "very finely balanced case" and that, taking into account the "strong public interest" the proportionality balance "just about weighs in the appellant's favour".

77. In these circumstances, and despite my own hesitancy as to the conclusion I might have made on the facts had I been the judge at first instance, I am not persuaded that the judge's finding, though generous, was irrational or Wednesbury unreasonable and not, therefore, one he was properly entitled to reach on all the evidence.

78. For these reasons, I reject Ground 2.

Decision

79. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of an error of law. That decision, therefore, stands as does the judge's decision to dismiss the appellant's appeal under Art 3 of the ECHR which has not been challenged.

80. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
1 April 2021

TO THE RESPONDENT
FEE AWARD

The judge, despite allowing the appeal, made no fee award as his decision had been made on the basis of evidence that was not before the respondent. That decision has not been challenged and I see no reason to depart from it.

Signed

Andrew Grubb

Judge of the Upper Tribunal
1 April 2021