IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16545/2019**

THE IMMIGRATION ACTS

Heard at Field House
On 12th July 2021

Decision & Reasons Promulgated
On 5th August 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'OEA'
(ANONYMITY DIRECTION CONTINUED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

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

Representation:

For the appellant: *Ms N Parsons,* instructed by D J Webb & Co Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim, in the context of a deportation order having been made against him as a "foreign criminal" (as defined by section 117D of the Nationality, Immigration and Asylum act 2002). The deportation order was made as a consequence of his sentence of one year's imprisonment, following his conviction on 12th June 2017 for fraud involving credit cards in the region of £300,000, under the automatic deportation provisions of section 32 of the UK Borders Act 2007. His index offence was not his first conviction involving dishonesty. The appellant had previously been convicted on 21st June 2012 of making false representations (a cheque) for gain, for which he received a community order.

2. In terms of his wider history, the appellant, a citizen of Nigeria, entered the UK in June 2008 and entered into a relationship with a naturalised British citizen, 'SA,' who herself was born in and lived in Nigeria until aged 10, after which time she entered and subsequently settled in the UK, some 25 years ago. The appellant previously applied for an EEA residence card on 17th March 2009, as a dependent of his uncle, an EEA national said to be exercising free movement rights. That the application was refused and following the refusal, the appellant and SA were married on 19th May 2012. It was shortly before his marriage that the appellant was convicted of his first offence. On 4th March 2013, he applied for leave to remain based on his marriage to SA, which was refused. The couple have gone on to have two children, both British citizens born in the UK; a son, who I will refer to as "child A", born on 24th of October 2013; and a daughter, "child B", born on 8th July 2018.

The respondent's refusal of the appellant's application

3. In the meantime, the appellant applied for leave to remain on the basis of his role as a parent to child A on 22nd July 2014. He was granted leave until 5th May 2017. Prior to the expiry of that leave, on 2nd May 2017, the appellant applied for further leave to remain, which was refused on 7th October 2019, following his conviction for the index offence. The respondent accepted that the appellant had, and continues to have, genuine and subsisting relationships with both his British citizen wife and two children, but concluded that the effect of deportation would not be unduly harsh, either from the perspective of SA and the children relocating to Nigeria (the so-called 'go' scenario); or the appellant being deported to Nigeria with the remainder of the family remaining in the UK (the 'stay' scenario).

4. Considering the appellant's private life, the respondent noted that the appellant had not been lawfully resident in the UK for most of his life and there was no evidence that he had had any leave until the grant on 5th November 2014. The respondent did not accept that he was socially and culturally integrated in the UK, accepting on the one hand, the period of time he had been in the UK, including while employed, but on the other, his criminal offending. Moreover the respondent did not accept that there would be very significant obstacles to the appellant's integration into Nigeria,

noting his previous claimed occupation as a banker; his educational qualifications at degree level; and his employment in the construction industry in the UK.

5. The respondent also concluded that there were not very compelling circumstances over and above Exceptions 1 and 2 as set out in sections 117C(4) and (5) of the 2002 Act and refused his application.

The First-tier Tribunal's decision

6. Following a hearing at Harmondsworth on 20th January 2020, First-tier Tribunal Judge Samini, (the 'FtT'), allowed the appellant's appeal. The respondent appealed and this Tribunal set aside the FtT's decision, allowing the appeal, with the preserved concession that the appellant has genuine and subsisting relationships with SA and his children. The error-of-law decision is annexed to these reasons.

The issues in this appeal

7. I identified and agreed with the representatives that the issues in this case were:

   a) whether the appellant meets the requirements of 'Exception 2' (section 117C(5) of the 2002 Act) – namely whether the effect of the appellant's deportation on SA and the children would be unduly harsh, either in the 'stay' or 'go' scenarios. In considering undue harshness I considered the effect on SA, in the context of her claimed role as a carer for her own mother; and the two childrens' best interests. In assessing undue harshness, the appellant's offending is not relevant beyond the initial point that deportation for foreign criminals is in the public interest;

   b) whether there are very compelling circumstances over and above Exceptions 1 and 2, in the context of the appellant's family and private life, and also noting the factors set out in section 117B of the 2002 Act, as part of a 'balance sheet' assessment. In the context of the appellant's private life, while it was accepted that the appellant had not been lawfully resident in the UK for most of his life, his social and cultural integration in the UK and very significant obstacles said to exist in relation to his integration in Nigeria remain relevant.

The Hearing

8. I make initial observations about the evidence presented to me, to explain the context of my later findings. First, there was no agreed combined bundle and regrettably, the parties needed to refer not only to a supplementary bundle prepared for this hearing sent to this Tribunal on 28th June 2021, but also a version of a bundle before the First-tier Tribunal, which it transpired was incomplete and necessitated the representatives providing me with extra copies; a loose OASys Report, which I had reviewed but which Ms Parsons did not have a copy of; and, as the appellant began his oral evidence and when questioned about the lack of evidence to support his assertions on a number of points, he referred to evidence on his mobile phone having been sent to his solicitors and not available to us. I invited the appellant via his

solicitors and Ms Parsons to provide any additional evidence on which he wished to rely over the lunch break. The consequence of this is that there are at least five separate sources with different page numbers to which I will need to refer in this decision. Preparation of the bundles for this hearing was not adequate.

9. Moreover, in terms of the witness evidence, whilst the appellant and SA adopted witness statements in one of the bundles, these were brief and their brevity necessitated Ms Parsons having to adduce extensive additional oral evidence by way of examination-in-chief, of which Ms Isherwood had no prior notice. Whilst I do not draw adverse inferences from the lack of detail in the written witness statements, there was no good reason why the written witness statements could not have been more detailed in the first place, particularly noting that they were relatively recent statements dated 28th June 2021.

10. Finally, there was a lack of documentary evidence which could, in my view, have been readily available to support various assertions of both the appellant and SA. Whilst I noted Ms Parsons' submission that I should not draw adverse inferences from the lack of production of such evidence and in particular, any failings on the appellant's solicitors' part to produce this evidence, I accept Ms Isherwood's submission that I am also entitled to consider the burden of proof as being upon the appellants and that where they have failed to adduce evidence that could have been readily available, I am entitled to consider the extent of the documentary evidence; and the extent to which I am being asked to take the word of SA and the appellant, particularly where that oral evidence amounts to general assertions, lacking in detail. To pick just three examples, the appellant claimed as an obstacle to his integration into Nigeria, the fact that family members in Nigeria relied upon his remittances. There was a single remittance advice in the first bundle and only when queried, did he then seek to rely after the lunchtime break in the hearing on additional three months' remittances from September to November 2020, detailing payments of some £35 in any one month. This was despite discussions with him on the morning of the hearing as to whether he might be able to obtain bank statements electronically which might show a broader pattern of remittances (he did not suggest that he could not adduce bank statements).

11. A second example is the couple's assertions about their support network within the UK and in particular SA's six other siblings, a number of whom live not too far away from the appellant's household, which comprises the appellant; SA; their children; and SA's mother (they all live in SA's home). The issue was whether SA's siblings would, in the event of the appellant's deportation, be willing to assist SA. Whilst SA and the appellant made general assertions that SA's six siblings would be unable to assist because they were working and too busy, there was no other evidence from any family members, whether by way of witness statement or attendance. Similarly, while there were references to SA's membership of her church and the appellant spoke of his involvement in that church and guiding younger members of the church in not repeating similar mistakes that he had made in offending, there was no evidence from any church member or minister as to his engagement in that church.

12. Even something as simple as whether the appellant was self-employed or employed was not resolved adequately. He had referred to a small number of construction industry scheme payslips in his bundle, which appeared on the one hand to suggest self-employment, whilst on the other, the appellant was confused in his oral evidence and suggested that he had a contract of employment. No such contract or any correspondence from his putative employer corroborating the appellant's assertion that they would re-employ him once COVID restrictions were removed had been provided.

13. Having made these initial observations, I now turn to the witness evidence of the appellant and his wife, SA.

The appellant's evidence

14. The appellant adopted his witness statements. These recited his immigration history as having entered the UK in 2008, shortly afterwards meeting SA, with whom he entered into a relationship and proposed to her in March 2010. They were married in 2012 with a big wedding, and the following year, their son, child A, was born. The appellant did not in his witness evidence deal anywhere about the consequences of his subsequent imprisonment, for six months in 2017, but then moved on to discuss the birth of his daughter in July 2018. He added that SA's mother, with whom they lived and who had dementia, took up a lot of SA's time. He claimed to have a "zero chance" of reoffending and nothing like that would ever happen again. He added in that context that he had worked full-time as an interior decorator, beginning working via an agency in October 2017 but working with them directly in June 2018. They had promoted him to the position of supervisor and he had subsequently received training in that role.

15. He added that he would be unable to return to Nigeria as he supported his mother and siblings there financially and they would struggle without his support. He would be unable to get employment there as he did not have the resources to start his own business and did not have any connections there.

16. In oral evidence, the appellant claimed initially to have pleaded guilty to the first offence whereas in fact the OASys Report indicated that he had gone to trial and then was convicted. When challenged he accepted that he in fact had not pleaded guilty; had wished to do so, but his lawyer had advised that he could not change his plea.

17. The appellant had lived with SA and his mother-in-law for the last six years. His mother-in-law's condition had deteriorated and she now required "24 hour care" from SA. It was only when the mother was sleeping that SA could do anything else. However, when questioned around childcare arrangements for child A and the fact that child A travelled some distance away to school in the Bexley area everyday, the appellant confirmed that SA was in fact away travelling from the family home for around four hours each day, comprising trips of an hour each way to take and then pick up child A.

18. The appellant asserted that he had been promised by his employer, when the Covid lockdown ended, that he could return to work. He had been carrying out a supervisory role and reported back to his director about his team's completion of work each day. He had also worked for two years via the "Sentinel" scheme in railway construction.

19. Whilst he accepted that in child A's birth certificate he had referred to his occupation as a "banker", that only related to a banking qualification, as his degree was in banking and he had never in fact worked as a banker. In relation to child B, her birth certificate had referred to his occupation as being in construction. He said that he had not carried out any job searches in Nigeria because the situation would be "hopeless". Getting jobs in Nigeria depended upon connections and his family were not in a position to support him. His father had passed away in 2011. Whilst he had two brothers and a sister as well as an elderly 84 year old mother, all four were dependent upon him. When he was challenged about the extent of the monthly remittances between September and November 2020 as amounting in some cases to only £35 he suggested that this could last the entire family a couple of weeks. His mother was no longer in the family home and was instead renting a property. Whilst he was the eldest son, he had not inherited the family property on his father's death because his father had married twice and he had another sister who had inherited the property. One of his brothers worked for a government ministry but there were difficulties in the brother being paid and he had also a second brother who was a doctor but once again there were difficulties in that brother being paid and that brother was considering coming to the UK. When the appellant had been able to work, the family had made some savings and the family were currently relying upon those savings to survive.

20. In terms of the appellant's mother's accommodation in Nigeria, it would be large enough potentially for him to return and stay there, but it was in poor condition and it would not be large enough for the entirety of the family, including SA and children A and B to return with him.

21. In terms of the role he played in the UK, he enjoyed playing "rough and tumble" with his children, checking his son's homework and playing football with him and also dropping child B at nursery every day. He accepted that if permitted to stay, he would need to return to work financially. He accepted that if he did so, there would be a problem as no-one would be able to look after SA's mother. If he were returned to Nigeria, SA and the children could not be expected to live there as he could not get the money for a "luxury" life and they would not be able to cope. When challenged that there was no evidence of any savings, he said that he had transferred money to a personal savings account, of which there was no disclosure. He was not able to comment on whether SA or her mother were receiving benefits, as SA dealt with those matters. He was also challenged on the lack of evidence from his employer, which he had said he had provided to his solicitor. He claimed to be employed and specifically had signed a contract of employment, albeit none was provided. He initially suggested being unable to work since last March but then suggested that he had in fact worked until last October. His employer was allowing him to look for

jobs and he had created a CV and was looking online for jobs in the UK. He was not receiving furlough pay.

22. When challenged as to whether he was relying upon his mother-in-law financially, as page [12] of the OASys report said that he relied on her financially, as she received benefits, he said that the OASys report was not accurate. He added that he was not in contact with the people with whom he had been involved in the criminal fraud and his life was focussed on going to work and coming back home as well as engaging with church attendees and in particular younger people whom he sought to guide. When it was put to him that the OASys Report referred explicitly in May 2018 to him continuing to maintain contact with criminal associates (page [12] of the report) he disputed this. When it was suggested to him that he had provided no up-to-date evidence in relation to child A's school and who was looking after both child A and also SA's mother whilst the couple were attending court, he suggested that SA had made arrangements with her sisters or brother. He then he clarified SA's brother was supposed to be at the house and would drop child A at school. When challenged as to whether this meant that SA's mother would be left by herself today, he accepted that she would be, for a time. When asked whether SA would have a wealth of family support were the appellant returned to Nigeria, he disputed this, saying that they all had financial problems of their own and that any role they would play would never replace his role in caring for his children. When challenged that the medical evidence did not support the contention that SA's mother could not be left alone, he again disputed this.

23. In relation to the issue of whether he could return to Nigeria, the appellant said that he had only recently revealed to his mother about his criminal conviction and he had not discussed the matter with child A's school in the UK. He spoke regularly with both his mother and siblings in Nigeria, every few weeks. He spoke English at home. Whilst he wife's language was Urhobo and his was Yoruba, he had spoken Yoruba to his son to try and impart some knowledge of that language with him.

24. In terms of his support for relatives in Nigeria, when it was suggested to him that he had not disclosed enough evidence to suggest that they were entirely reliant upon the appellant, he clarified that they were not entirely reliant on him, but his contributions made enough of an impact on their daily living, for example, helping to pay for a carer for his mother.

25. The appellant disputed ever having worked in Nigeria apart from a brief period in 2005 when he was used for "errands" by his uncle. In terms of his university education, this was paid for by his father, who had sold shares. His mother had worked as a teacher and although she was receiving a pension, this was only intermittent.

26. When asked about the effects during his period of imprisonment on child A, he said that SA had attempted to distract child A by taking him to various places and SA had indicated that she had struggled to cope.

SA's evidence

27. SA recited the couple's immigration history and the fact that they had a large wedding in the UK (750 guests had attended) and she had a large family in the UK, with six siblings, including two brothers living in Kent; one sister who lived 10 minutes' drive away; and three brothers who lived 30 minutes' to an hour's drive away. However, SA had always been the closest to her mother, as her older siblings had left home many years ago. She no longer had any connections in Nigeria and had only visited it on a couple of occasions in the last 25 years, including taking child A to Nigeria for a couple of weeks. In oral evidence she had suggested that her sister lived at least half an hour away as opposed to 10 minutes away and said that the witness statement reference to 10 minutes was in error. She explained that her mother's dementia had become more problematic after 2017, following the appellant's release from prison, and she was her mother's primary carer. Her mother would not be able to cope without SA. Her siblings would not be able to assist in SA's absence if she accompanied the appellant to Nigeria, as they all had their own families. They could, on particular occasions assist. For example, the medical correspondence at page [25] of one of the appellant's bundles had referred to a sister accompanying the mother on that occasion to the medical appointment, but it was generally SA who fulfilled this role. SA accepted that were the appellant allowed to stay in the UK, he would resume working and she had not been able to think yet how to juggle matters if the appellant were at work and she had to look after the children and her mother (SA was not currently working). The appellant had been very helpful to her during the COVID pandemic.

28. During the appellant's absence in prison, SA had struggled to cope. Child A had kept asking about the appellant and they had initially told child A that he was at work, but after a number of occasions she had to take him to Belmarsh prison. The couple were currently financially coping, although running down their savings. Were the appellant returned to Nigeria, SA would have to rely upon state support and her "fate would be sealed". There was nothing to return to in Nigeria and it had a very different culture from the UK and she had no support there. She also had the wider support network of her UK church and she also explained about child A's excellent educational attainment in the UK. She accepted that her mother could be left for several hours each day, albeit she had been fainting and the extreme fatigue had started a few months ago. It was put to SA, and she accepted, that she would often be out of the house for four hours each day, but her mother was left alone with a timetable for breakfast, lunch and when she should take her insulin. She could be left alone when SA went out shopping. Her siblings would not be able to assist SA, were the appellant returned to Nigeria. Whilst she had discussed this with them, she accepted that she had not provided any witness statements from them. She accepted that her mother did not receive carer's allowance, but she had only recently applied for this and she was only in receipt of child benefits. She had been unaware of any entitlement to carers allowance and social services, in particular, had not provided any support to the family.

The appellant's submissions

29. In very broad summary, Ms Parsons went through the various provisions of sections 117B to D of the 2002 Act. Whilst she accepted that there was not all of the evidence that might have been adduced, there was plainly sufficient evidence to conclude that Exception 2 was met and/or that there were very compelling circumstances. Put simply, SA's mother was at an advanced stage of dementia, with all of the consequences that that condition entailed. The circumstances of SA leaving, namely the "go" scenario, was therefore entirely impractical. Similarly, if SA were to stay without the appellant, that would rupture the family entirely and SA would be left struggling to cope with both two young children and her mother. It was speculative as to what support, if any, would be provided by the state and any support would never be a replacement for SA. Child A had excelled at school and there would necessarily be a substantial impact on him. Referring to other considerations under section 117B, the couple both spoke English; the appellant had worked; in terms of the offending, the fact that the appellant had not offended in the five years since his period of imprisonment, even where, as here, he had been unable to work because of the COVID pandemic, was testament to his likely rehabilitation.

The respondent's submissions

30. Ms Isherwood's primary contention was the absence of evidence and the burden of proof. In terms of social and cultural integration, there was no evidence from the church with which the appellant claimed to be involved and no evidence from the employer for whom the appellant claimed to provide work. The same problem undermined any assertions around significant obstacles to integration in Nigeria. It was far from clear that there was complete evidence. The remittances were simply not sufficient to demonstrate a dependent family in Nigeria. Moreover, whereas on the one hand, the appellant had asserted that his mother was not living in the original family home and renting a home, SA had referred to her as still do doing so and also there being potentially two family homes in Nigeria. It was also simply not credible that SA's brother, a doctor, would be relying on the appellant for remittances and even on the appellant's case, his relatives were not entirely reliant upon him and clearly had their own sources of income which had not been disclosed.

31. In terms of Exception 2, what was striking about this case was the absence of any substantive evidence about the children. Child A appeared to be doing very well at school but there was no independent social work report about the extent of the appellant's engagement with child A or what impact, if any, his removal would have. Similarly, there had been a telling lack of consistency with SA claiming that she and her husband never spoke any language other than English at home whilst the appellant made it clear that he did. Both witnesses had made it clear that they continued to have an interest in Nigerian news and the appellant himself continued to have regular contact with his relatives in Nigeria. The appellant had practical experience in the UK including two years in the construction industry and both he and his wife were educated to degree level. Even if the "go" scenario were not realistic, the "stay" scenario was not unduly harsh. SA had a large family within the

UK, a number of whom lived in close proximity. It was simply not enough to make the bald assertion that they would be unable or unwilling to assist SA in circumstances where no evidence had been adduced. Also, whilst it was said that SA's mother had advanced dementia, clearly we did not have the full picture as it had only emerged during oral evidence that in fact SA left her own mother for at the very least four hours each day whilst she was travelling to collect child A and also on other occasions during shopping. At the very least, the appellant's assertion that she required 24 hour care was plainly not credible. There were also real concerns about the extent to which the appellant's assertions about being re-employed and getting further work were credible in circumstances where there was no contract or documentation to that effect. In the circumstances, neither the "stay" nor the "go" scenarios were unduly harsh and there were certainly not very compelling circumstances.

The Law

32. I do not recite lengthy passages from the law. Instead, I set out the relevant statutory provisions, without gloss, and the core principles.

33. Sections 117A to D of the Nationality, Immigration and Asylum Act 2002 provide:

> *"PART 5A*
>
> *Article 8 of the ECHR: public interest considerations*
>
> *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."*

34. A person must meet an increasing scale of hurdles, to succeed in a human rights appeal, ranging from a person who is not liable to deportation at all, who may succeed on the basis of Section 117B(6), to the most significant hurdle for foreign criminals who have been sentenced to a period of imprisonment of four years or more (not this appellant's case). The appellant is in the middle, in the sense that section 117C applies to him, but his offence is not so serious as to have resulted in a sentence of four years or more. Even where he cannot meet 'Exception 1', I can nevertheless consider his circumstances through the initial lens of parts of Exception 1 when considering "very compelling circumstances".

35. Bearing in mind the cases of HA (Iraq) v SSHD [2020] EWCA Civ 1176; AA (Nigeria) v SSHD [2020] EWCA Civ 1296; and KB (Jamaica) v SSHD [2020] EWCA Civ 1385, when considering "unduly harsh", I do not apply any notion of exceptionality or an baseline of the "ordinary" effects of deportation on "any" child. I accept that every assessment of "unduly harsh" must have as its focus the effects on SA; child A; and child B. The wording "unduly harsh" reflects section 117C(1), that the deportation of foreign criminals is in the public interest, so it does not start off as a neutral evaluation, but in the context of that public interest, the focus remains on the effects on the children. Unduly harsh effects may be common place and are highly fact-specific, particularly as they centre on the effects on individual children, including (but only as examples and not as a 'tick-list') their ages; educational and emotional needs; and the role played by the potential deportee parent.

36. In the assessment of "very compelling circumstances", which reflects the strong public interest in deportation, such a public interest still has a moveable quality, i.e. the public interest may not have the same weight for all serious foreign criminals; and at its heart, it is helpful to assess very compelling circumstances through the "balance-sheet" approach, weighing on the one hand, the factors in the appellant's favour, holistically, against the strong (but not immovable) public interest in deportation. Factors which can be relevant (although of varying weights and which again are examples, and not an exhaustive list) include: the nature of the offence (for example, whether it includes an element of violence), its seriousness and the appellant's role in the offence, as often reflected in the sentencing Judge's remarks; the extent of rehabilitation and likelihood of reoffending; the depth of the appellant's integration in the UK and quality of his relations with his wife children; whether the family could be expected to move to Nigeria, noting that SA; child A and child B are British citizens; whether his relationship could be sustained after his removal; the need to promote the children's' welfare; and the obstacles to the appellant's

integration in Nigeria (noting that this is a broad evaluative assessment, with the concept of being "insider" meaning the appellant having enough of an understanding of how Nigeria works to be able to participate in it, be accepted within it, operate day-to-day and build up a network of relationships there).

37. Whether or not there are very compelling circumstances, I also need to consider the wider section 117B factors.

Findings of fact and discussion

38. I considered all of the evidence presented to me, whether I refer to it specifically in these findings or not.

39. I am prepared to accept, just, that the appellant remains socially and culturally integrated into the UK. This is on the basis that the appellant has been released from prison since 2017, following which time he has worked for at least a period for an interior decorating company, even if he is not employed by them. I find that he is an independent contractor and not an employee. I reach this finding based on the construction industry scheme ('CIS') documents, which suggest that he is a contractor; the fact that he has not produced a contract of employment nor any document supporting his assertion that he is guaranteed re-employment on the end of the COVID restriction or any evidence of furlough payments. Nevertheless, despite being self-employed, the limited CIS pay documents (including "invoice number 27" of 5th November 2020, suggesting at least 26 prior invoices in question), indicates a pattern of work over a significant period, as well as, on the appellant's account, that he has previous worked in the construction industry via the railway "Sentinel" scheme, which validates the safety of railway workers (I was shown the appellant's "Sentinel" card). By virtue of his continued working and also his involvement with, and engagement in, taking his son's education, which was reflected in a brief letter from child A's school, which refers to his parents as being supportive and attending all pupil consultation meetings (the letter was dated 4th December 2019, so postdates the appellant's release from prison), I am satisfied that the appellant remains integrated in the UK, notwithstanding his offending; and notwithstanding his continuing contact with former criminal associates (I prefer the evidence of the OASys report dated May 2018, noting that is likely to be objective, whereas the appellant, with two convictions for dishonesty, as well as clear inconsistencies in other parts of his oral evidence, is less likely to be objective).

40. I find that there are not very significant obstacles to the appellant's integration into Nigeria for the purposes of his private life, on the evidence before me, which is scant. He is in regular communication with his relatives in Nigeria and accepts that he would have accommodation to move to, were he returned there. Whilst he is adamant that he would be unable to work as he had been able to do so prior to leaving Nigeria and would return without sufficient connections to do so, I am not satisfied that he would not return to Nigeria as an "insider". He is educated to degree level but more importantly has practical experience in both construction work as well as having IT qualifications, and ongoing, good relationships with family

members including his mother, who, albeit elderly, is somebody with whom he himself has close connections, and two brothers, one of whom is a doctor. He accepts that he has not carried out any job searches whatsoever in Nigeria and in fact complains more that he would not be able to afford a "luxury" standard of living in Nigeria in the context of resettling with his family there. Whilst I accept that this comment was made in the context of considering the viability of the entire family's return, it is clear in my mind that the appellant resists return in respect of his private life, not because of any real obstacles to integration but because he desires a better "luxury" standard of living than one which he would expect to have in Nigeria.

41. I am also far from satisfied that I have been provided with the full picture of the family's assets and circumstances in Nigeria. He specifically stated that his mother was no longer living in the family home he had lived in and was instead living in separate, rented accommodation, with a leaking roof. In contrast, SA confirmed that the mother remained living in the family home; she had seen pictures of it and while it was not in good condition, she referred to the existence of a second family home, although when asked further details, she disclaimed any further knowledge as she had "a lot on her mind".

42. I find that the partial picture I have been presented with, of limited remittances and conflicting evidence between the appellant and SA, suggests that the family in Nigeria have more substantial resources than they are willing to admit to. I am satisfied that the appellant would be able to integrate into Nigeria were he returned there, noting he had lived there until the age of 30; was educated to degree level; and has practical work experience in construction in the UK, including work of a responsible nature, as reflected in the safety requirements of the Sentinel scheme. I do not accept the suggestion that there is no construction work available in Nigeria.

43. I turn to the effects of deportation on SA; by extension her mother; and also their children, "A" and "B". In this context, I start by saying that I have been told virtually nothing about child B other than her age (3 years' old) and she is a British citizen and it is not suggested that there are any health or other particular difficulties that might present obstacles in the event either of the family returning to Nigeria as one unit; or which point to the effect of deportation in the event that the remainder of the appellant's family stay in the UK.

44. Turning next to child A's best interests, I know a little more, albeit there has been no independent social worker report, rather a standard end-of-year school report dated July 2019. From that report, child A appears to be excelling at school (and SA confirms continues to do so) and at the age of 7, will be at an important stage in his education; but I know little more than that from an educational perspective, other than there was not, when child A was attending nursery during the period of the appellant's imprisonment, any apparent impact on his engagement in school, for example any behavioural problems or difficulties. Indeed the current school are not aware of the appellant's prior offending or imprisonment and the school have not, probably for that reason, commented on the impact of the appellant's imprisonment. SA described his behaviour as withdrawn, while the appellant was in prison, which I

am prepared to accept, but there is no evidence of any long-term impact. In making the comment, I am conscious that child A was far younger (the appellant was released in 2017); and the period of imprisonment, reduced for parole, was for a relatively brief period of six months and that the effect of deportation is for a period of at least 10 years.

45. However, also considering the full picture of child A on the very limited evidence, I find that that the appellant and SA have not given consistent evidence and SA has attempted to downplay the extent to which any languages other than English are spoken at home. The appellant made clear that he does speak Yoruba to child A and in the context of the wider family network within the UK and regular contact between the appellant and relatives in Nigeria, I am also satisfied that child A will have been exposed to the Nigerian diaspora community, albeit I also accept that child A has only visited Nigeria to see his paternal relatives on one occasion, when very young.

46. In considering the "go" scenario, the relocation of child A to Nigeria with the appellant would in my view only be realistic if SA similarly relocated with him. As I have already indicated, I am not satisfied that I have the full picture in relation to the family's resources and connections within Nigeria. I do not accept as more than an assertion that on the event of the family's relocation as a whole to Nigeria, that they would be without adequate accommodation; without family connections and without the ability of child A and child B to access suitable education. Where I refer to suitable education I do not state that the level of education would necessarily be at the same level as the standard in London, where child A goes to school but given the absence of evidence about the family's assets and their historic ability to fund the appellant through a period of graduate level education, as well, on the appellant's account, not carrying out substantive work until the age of 30 when he came to the UK, I am not satisfied that the appellant has demonstrated that if child A were returned with his parents as part of a family unit to Nigeria even though he is a British citizen that this would be unduly harsh. The viability of doing so in turn depends on the ability of SA to similarly relocate with the appellant and in that context I have considered SA's caring role and arrangements for her mother. I accept from the medical correspondence from the mother's doctor, dated 17th June 2021, that the mother has advanced dementia and a number of other complex medical needs. However, I accept the criticism of Ms Isherwood that beyond a list of diagnosed conditions, there is little discussion about the consequences and effects of those conditions upon SA's mother. There is a reference to dizziness and fatigue, with recommendations for fluid intake; good diet; exercise and mindfulness exercises; and in another letter dated 4th November 2019 to disorientation and an episode of delirium in 2019 for which she was admitted to hospital. However, I do not find as reliable the appellant's assertions about the effects of dementia upon the mother. On the one hand, the appellant asserted that his mother-in-law relies upon 24 hour care from SA, and the only break was when the mother slept; whereas on SA's own evidence, her mother was left alone for at least four hours each day prior to lockdown, during the period when the appellant was working as recently as last

October; and that is just in relation to the school drop-offs and not also in relation to any shopping visits where SA also mentioned leaving her mother alone.

47. While I accept that SA plays a primary role in caring for her mother, I find that the extent of that caring role is exaggerated, and I do not accept the assertion, which is no more than that, that SA's extensive family, a number of whom live nearby, no more than 10 minutes away, or even on SA's account, half an hour away, would, in the event of the family's relocation as a whole to Nigeria, be unable or unwilling to assist SA's mother. The lack of any evidence whatsoever with regard to any social services assessment, including, for example respite or domiciliary care is relevant not only to the extent of her current condition, which in my view is not explained simply by SA's assertion that she carries out the care when, as is now apparent, she leaves her for extended periods of time; but also the lack of a full picture in relation to the role that other family members play. SA, on her own account, has a large family within the UK; close relationships with fellow church members within the UK; the accommodation of SA's mother in fact belongs to the mother and the mother is, according to page [12] of OASys report, in receipt of benefits and indeed has in fact financially supported the appellant himself.

48. Whilst the arrangements may currently be that SA provides a substantial amount of care to her mother, I do not accept that such roles would not be taken by members of SA's immediate family in conjunction with support from the local authority in the context of a professional domiciliary carer if necessary. I do not accept Mr Parsons' submission that a finding of such assistance is speculative – it reflects the large family of SA's mother, living near to her; and the absence of any evidence explaining why they would not assist and why social services will not also fulfil any statutory obligations to assist SA's mother.

49. In considering further whether SA's ability to return to Nigeria would be unduly harsh I am conscious that she has not returned to Nigeria for more than a couple of occasions in 25 years and that in reality the majority if not all of her relatives are now in the UK and she has no substantive friendship or networks within Nigeria. That being said, the appellant is in regular contact with his family in Nigeria and for the same reasons that I regard the full picture as not having been provided in relation to his family relations, I also conclude that the real picture is likely to be of SA returning with the appellant and their children to suitable accommodation; education; and where SA is educated to degree level, with practical experience of setting up her own business, albeit a business that ultimately did not prosper in the UK. There has been no attempt to explore the possibility of jobs in Nigeria. Considering the evidence as a whole, I am not satisfied that the "go" scenario would be unduly harsh.

50. In relation to the "stay" scenario, namely where SA and the couple's children remain in the UK but the appellant is removed to Nigeria, I conclude that the effects of this would not be unduly harsh. SA does not currently work. She currently provides the primary care for her mother. The effect of the appellant's deportation would not be to deprive the family of accommodation or their current home setting or family network. The couple have already explained that were the appellant allowed to

remain in the UK, he would in fact immediately seek work and so in reality the couple would need to make suitable arrangements whereby SA would be able to cope alone at least during working hours with her mother and also in relation to arrangements for the children. I do not minimise the impact of the support for SA which the appellant provides outside working hours and his exclusion for many years from the UK. However, from a purely practical perspective, I am satisfied that were the appellant removed, the consequence of this would not be the loss of any accommodation and I am also satisfied that in terms of finances, SA and the children, would at least, receive financial state support, including if SA does not return to work, the possibility of carer's allowance for her mother, for which SA has already applied. I am also satisfied that in the same way that SA's relatives would assist SA's mother in the event of the entire family relocating, similarly if the appellant alone were removed, SA's relatives would provide substantial practical and, if necessary, financial support for SA and her children alone in the UK.

51. In relation to other effects upon SA and her children, on the one hand I am conscious that her looking after her mother and the children would be draining and necessarily mean less time spent by SA in providing supervision and care for her children, a role which the appellant has played during the COVID pandemic to a greater extent. There is no evidence of the emotional impact on SA and her children beyond the fact of SA's absence. I do not fall into the trap of considering what the "ordinary" consequences of deportation would be. Rather, I reflect that there is simply no evidence beyond the practical consequences (which would in my view be substantially mitigated) as to what emotional impact, if any, there would be upon SA and her children. I know nothing at all about child B; and child A has performed excellently at school, even starting off in an educational setting when his father was imprisoned. In summary, the appellant has simply not adduced sufficient evidence to demonstrate that the effect of deportation in the "stay" scenario would be unduly harsh.

52. I next considered the question of whether there were very compelling circumstances over and above Exceptions 1 and 2. I take as my starting point the public interest in deportation. I accept that the appellant's sentence was at the lower end of the scale in terms of automatic deportation, namely only one year and was not one of violence, albeit it was as part of a large-scale fraud. As recorded in the sentencing remarks of the Woolwich Crown Court of 12th June 2017 , the appellant was part of a fraud involving 487 attempts to make purchases of £300,000, of which 168 transactions were successful, resulting in a loss of £167,000, albeit the appellant was only personally implicated with ten victims and 25 transactions, and was not the "hub", but had been dishonest before, which was seen as aggravating. Moreover, none of the defendants, including the appellant, had attempted to assist the authorities with any information to get to the bottom of the fraud.

53. I also take into account as a positive factor that author of the OASys report records a low risk of reoffending and this is reinforced by the fact that the appellant has not reoffended since his release in 2017, albeit in circumstances where he receives financial support from his mother-in-law and brother-in-law, as indicated in the

OASys report. I do not place additional weight on his claim to carry out a form of mentoring with younger church members, given the absence of any substantive evidence, beyond his bare assertion, but I also take into account that the appellant has been seeking to work and, in that context, re-integrate within the local community.

54. I take into account in particular that the best interests of the appellant's children are to remain with their family as a single family unit and I also find on a real world analysis that in the event of the appellant's deportation, SA is likely to stay with her mother and the two children in the UK, so that they will have limited contact with their father, albeit the opportunity for occasional visits and regular contact via social media and internet telecommunication. As a consequence, the children's best interests will not be met by the fracturing of the family. On the other hand I am satisfied that the remaining family unit within the UK, namely of SA, her mother and the two children and wider immediate family in the UK, will remain a strong and loving family unit, which would have a real mitigating impact on the adverse effects of the appellant's deportation.

55. I take into account that the appellant has been in the UK since 2008 (albeit for much of which, without leave) and in the context of his work history, is unlikely to be a burden on taxpayers. He remains integrated in UK society and has close relations with his wife and children. I also bear in mind that he would return to Nigeria, where he lived until aged 30, as an "insider", with family, access to accommodation; and necessary experience to obtain work.

56. Weighing all of these factors, there would not, in my view in the circumstances be very compelling circumstances over and above Exceptions 1 and 2 already outlined for the purposes of Section 117B(5) of the 2002 Act. The public interest in deportation, even noting the lower end of offending, is not outweighed by the factors relating to the appellant's private and family life, in the context of the very limited evidence provided.

57. In relation to the wider article 8 analysis and section 117B of the 2002 Act, I take into account that the appellant has been in the UK since 2008. He remains integrated in UK society. I accept that the family unit all speak English and the appellant has worked, so he is not a burden on the UK taxpayer. I also take into account that for part of the period when he was in the UK between 2014 and 2017 that he had leave to remain, albeit that both his private life and indeed his initial family life with SA was established when he had no leave to remain. Weighing the effects of his deportation upon SA and his two children, I conclude that the significant impact upon them is mitigated to a substantial extent both by SA's supportive family within the UK and also by the extent of the family's resources within Nigeria, noting in reality that it is likely that SA will choose to remain the UK with the couple's children and her mother.

58. In the circumstances, whilst the impact will be significant, refusal of leave to remain is proportionate, for the purposes of an article 8 assessment. As a consequence, the

appellant's appeal against the refusal of his human rights claim fails and is dismissed.

Decision

59. The appellant's appeal on human rights grounds is dismissed.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **22nd July 2021**

TO THE RESPONDENT
FEE AWARD

The appeal has failed and so there can be no fee award.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **22nd July 2021**

ANNEX: ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16545/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Skype	
On 1st December 2020	**On 18th December 2020**

Before

THE HON. MRS JUSTICE THORNTON
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

'OEA'
(ANONYMITY DIRECTION CONTINUED)

Respondent

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

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

Representation:

For the appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the respondent: *Ms S Jegarajah*, instructed by D J Webb & Co Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 1st December 2020.

2. Both representatives attended the hearing via Skype and the Tribunal panel attended the hearing in-person at Field House. The parties did not object to attending via Skype and we were satisfied that the representatives were able to participate in the hearing.

3. The Secretary of State appeals against the decision of First-tier Tribunal Judge Samini, who, following a hearing at Harmondsworth on 20th January 2020, allowed the appeal of the respondent (hereafter, 'Claimant') of the Secretary of State's refusal on 7th October 2019 of his human rights claim, in the context of deportation order having been made against him on the same date. The deportation order was made under the automatic deportation provisions of Section 32 of the UK Borders Act 2007. The Claimant's most recent offending had resulted in a sentence of one year's imprisonment, following his conviction on 12th June 2017 for conspiring/making false representations to make gain for himself or another, specifically he had been involved in a fraud of obtaining personal details of victims' credit cards, with a conspiracy to make purchases in the region of £300,000.

4. The Secretary of State accepted in the human rights refusal that the Claimant had two British national children, born in October 2013 and July 2018, with whom he had a genuine and subsisting parental relationship. The Secretary of State also accepted that the Claimant had a genuine and subsisting parental relationship with his wife, 'SA'. The Secretary of State did not accept that it would be unduly harsh for the Claimant's children to live in Nigeria with SA and him (whilst SA was a British citizen, she had been born and spent part of her childhood in Nigeria, up to the age of 10). The Claimant had lived in Nigeria until the age of 30.

5. In the alternative, the Secretary of State did not accept that it would be unduly harsh for the Claimant's children and SA to remain in the UK without him. The children could be cared for by SA, who would have family support in the UK, as she had six siblings living in the UK.

6. In respect of the Claimant's private life, the Secretary of State noted that the Claimant had not been lawfully resident in the UK for most of his life. She did not accept his social and cultural integration, in light of the limited period of time he had been in the UK, during which he had received two convictions for dishonesty, in 2012 and 2017. The Secretary of State considered, but did not accept, that there were very compelling circumstances in respect of the Claimant's case.

The FtT's decision

7. The Judge referred, albeit incorrectly, to the Claimant not being liable to automatic deportation (paragraph [7] of her decision) but nevertheless went on to consider the automatic deportation provisions of section 117C of the Nationality, Immigration and Asylum Act 2002. That error is therefore not one that we regard as material. The Judge concluded at paragraph [14] that the Claimant had integrated in the UK, both socially and culturally and there is no appeal against that finding. The Judge continued (at paragraph [14]) as follows:

> "if the appellant is deported, the appellant's wife [name redacted] would be left without a source of emotional and psychological support, as well as the appellant's proactive parental role in his children's lives. Having heard both the appellant and his wife give evidence, it is clear that he does regret his criminal behaviour and has made his best efforts to make amends by having undertaken various training courses in order to improve his employment prospect as decorator working in the construction industry. The appellant has been financially supporting his family in this capacity since his release from prison two years ago. The appellant and his wife both care for their children and the appellant is the main breadwinner in the family. In considering the issue of welfare of the appellant's child, I have regard to section 55 of the Borders Citizenship and Immigration act 2009. I find that in the circumstances of this case, the appellant's deportation would mean that his children would be left without the main source of financial support as well as the parental care that the appellant provides for his children. The appellant's wife is the main care provider for her mother who suffers with diabetes and dementia, and that is one of the main reasons that she cannot relocate to Nigeria where she has no family or connections and where she has not lived since she was 10 years old. I find the totality of the said factors do render the effect of the appellant's deportation on the appellant's wife, children and mother-in-law would be unduly harsh."

8. The Judge went on to cite the well-known authorities of MM (Uganda) [2016] EWCA Civ 167 and KO (Nigeria) UKSC [2018] 53, and at paragraph [17] stated that the Claimant's removal would mean that his children would be deprived of a meaningful relationship with their father. The Claimant's children were settled at school, the oldest being seven years old in October 2020.

The grounds of appeal and grant of permission

9. The Secretary of State raised the following grounds in her appeal:

   (a) (1) The Judge's reasoning that the effect of the Claimant's deportation would be unduly harsh was limited to the deprivation of a meaningful relationship with the Claimant and a loss of financial support. That was not sufficient, bearing in mind the authority of SSHD V PG (Jamaica) [2019] EWCA Civ 1213. The Judge's findings suggested that the effect of the Claimant's deportation would merely be inconvenient and discomforting, but nothing amounting to severe or bleak consequences.

   (b) (2) The Judge failed to consider what the unduly harsh effects would be if the entire family relocated to Nigeria. The Judge failed to consider what assistance

the Claimant's relatives in Nigeria could provide in the event of the family's relocation.

(c) (3) The Judge had failed to consider and analyse that SA's presence in the UK was not required to support her mother, because the mother could receive adequate care from the many other family members in the UK; and medical professionals and social services.

(d) (3) The Judge had erred in concluding, at paragraph [18], that the Secretary of State's decision to refuse the human rights claim was disproportionate. There had been no consideration of the seriousness of the Claimant's offence, with a strong public interest in deporting the Claimant. The lack of further offending was, at best, a neutral point that assessment. The Judge had failed to refer to any of the relevant statutory provisions or case law.

10. First-tier Tribunal Judge Chohan initially refused permission to appeal, but permission was granted by Upper Tribunal Judge Kamara on 28th May 2020. She regarded the Judge's reasons for concluding that the effect of the Claimant's deportation, if SA and his children were to remain in the UK without the Claimant, as arguably inadequate. She granted permission on all grounds.

The hearing before us

Preliminary issue on extension of time

11. A preliminary issue arose on whether we should extend time to admit the Secretary of State's appeal. Our reasons for extending time to admit the application are set out below. This issue was quite properly raised before us by Ms Jegarajah at the beginning of the hearing when, as we normally do, we went through and checked our understanding of the issues before us. Ms Jegarajah helpfully provided a timeline, which was as follows:

(a) The refusal of permission by the First-tier Tribunal (Judge Chohan) had been promulgated on 9th April 2020.

(b) Applying the time limit in the Tribunal Procedure (Upper Tribunal) Rules 2008, rule 21(3)(aa) requires that an application be made 14 days after the date on which notice of the First-tier Tribunal's refusal of permission was sent to the to the parties. Even ignoring the date of promulgation of the refusal decision, the time-limit expired, absent an extension, on 23rd April 2020.

(c) The Secretary of State renewed her application to the Upper Tribunal for permission on 5th May 2020, so 12 days out of time.

12. Ms Jegarajah also drew our attention to the fact that although it was only touched on in her skeleton argument, the time issue had been raised previously in correspondence with Upper Tribunal Lawyers in an email of 10th April 2020, prior to the Upper Tribunal's grant of permission, and the Claimant's representatives had suggested that this should be resolved by way of preliminary issue.

13. Ms Jegarajah raised was she described as an observation that there was a difference in treatment by the Upper Tribunal Lawyers, between on the one hand, the approaches of Tribunal Lawyers to breaches of time limits by an individual appellant, such as in this case, where the Tribunal Lawyer had chased, upon the Claimant's failure to file a skeleton argument in time, as opposed to the lack of similar proactivity where the Secretary of State had breached a time-limit. When we discussed with Ms Jegarajah whether this was a specific issue that she was asking us to resolve, for the purpose of considering whether to extend time, she confirmed that she did not ask to us resolve that asserted difference in treatment, but merely asked for her observation to be recorded.

14. She then went on to refer to the principles for whether to grant an extension of time in R (Onowu) v First-tier Tribunal (IAC) (extension of time for appealing: principles) IJR [2016] UKUT 185. We discussed with her those principles, which she agreed as applicable: first, account has to be taken of the seriousness of the breach of the Rules. The more serious the breach, the less likely it is that relief will be granted. Second, account has to be taken for the reasons for the breach. If there is a good reason, it is more likely that relief will be granted. Third, all of the circumstances of the case have to be considered, having particular regard to the factors highlighted by the Overriding Objective. Particular care has to be given to asylum and humanitarian rights cases, to ensure that appeals are not frustrated by representatives' failures to comply with time limits. In most cases the merits of the case will not be relevant unless it can be seen without much investigation that the grounds are either very strong or very weak.

15. Ms Jegarajah asserted that in granting permission, Judge Kamara had failed to engage with the timeliness of the application and had simply granted permission. The Claimant's representatives had written again in August 2020, raising the time issue with the Tribunal. First, the delay was 12 days, so not a brief delay. Second, there had been, to-date, no explanation provided by the Secretary of State for the delay. Third, the merits of the appeal were exemplified in the generalised nature of the Secretary of State's challenge. The time limit issue had been raised in the skeleton argument, and the Claimant, who had succeeded in resisting deportation, would be adversely affected by a grant of permission. We reviewed where in the skeleton argument (running to some 36 paragraphs) the issue was raised. It was raised, in one sentence of the first paragraph:

> *"The respondent's core submission is that the decision of the FtT is perfectly sustainable. The grounds amount to no more than a perversity challenge which appeared to have been made out of time. It is trite law that an arguably generous decision is not by itself an error of law."*

16. On behalf of the Secretary of State, Ms Cunha accepted that the application for renewed permission had been made out of time, but she had not appreciated that it was an issue before it was raised at the hearing, and therefore in seeking to explain the delay, could only make the general observation that in the context of the COVID pandemic, many of those working in immigration litigation (both the Secretary of State and representatives) had faced real challenges to disruption and business

continuity and that the delay was unlikely to have been intentional. The fact that permission had been granted, was testament to the arguable merits of the grounds.

Conclusion on extending time

17. In reaching our conclusion that it is appropriate for us to extend time, we accept first that the delay of 12 days is not insignificant. While Ms Cunha could not provide more than a possible explanation, namely in the context of the COVID-19 pandemic, as she had not anticipated that there was a time issue (for which we make no criticism of her, as the reference in the skeleton argument was brief), we take judicial notice that there has been widespread disruption and an effect on parties and their ability to file and comply with appropriate time limits. We accept Ms Jegarajah's submission that COVID-19 does not provide a 'catch-all' excuse for non-compliance, but we take judicial notice of the fact that the Secretary of State's non-compliance took place at an early point during the first UK national lockdown (April/May 2020). We are prepared to accept that this was a particularly challenging time for the conduct of litigation.

18. We did not just base our decision on the Secretary of State's possible explanation for the delay. We also considered that such an extension of time was merited for two other reasons. The first was in relation to the strength of the merits of the challenge. We put them no higher at this stage than being arguable merits, based on Judge Kamara's grant of permission. Second, as the case of Onowu counselled us, we were considering a human rights claim. While there may be serious consequences for individuals as a result of a representative's default, equally in this case, relating to deportation of a foreign criminal, the consequences of default to the public interest in deportation also needed to be considered as a relevant factor, when considering whether to extend time. Taking all of the above factors into account, we regarded it as in accordance with the Overriding Objective that we extend time to admit the permission application.

The Claimant's submissions

19. In her skeleton argument, Ms Jegarajah submitted that it was important not to treat any of the decided cases, including KO (Nigeria), as factual precedents. The approach to an evaluative assessment of what was "unduly harsh" needed to be considered in light of the case of HA (Iraq) v SSHD [2020] EWCA Civ 1176. References to consequences being "severe" or "bleak" should not be substitutes for the statutory language of Exception 2, in section 117C of the 2002 Act. There should not be an evidential threshold when assessing "undue harshness", for example an "ordinary" level of harshness which could be objectively measurable.

20. The Secretary of State's remaining grounds were, in essence, disagreements with legitimate findings. There was no requirement that the Judge must explicitly refer to all of the relevant statutes or case-law, as long as the Judge's language demonstrated that she had applied that law. At paragraphs [2] to [6], the Judge had analysed the Secretary of State's reasons for deportation and the Judge was not required to answer each and every point raised in argument by the Secretary of State. The Judge had

plainly considered at paragraph [14] whether the Claimant's family could relocate to Nigeria and an argument that the Judge's reasoning was deficient was a high threshold, which the grounds did not meet. Any perversity challenge should similarly fail.

21. This was not a case where the degree of harshness was no more than that which was ordinarily expected by deportation of a parent. The Claimant's wife was the primary caregiver for her elderly mother, who suffered from dementia and diabetes. The Claimant's wife had therefore not been the children's' sole or primary carer, with care being shared with the Claimant. The Claimant had worked full-time for two years and the family was financially dependent on him. The Judge had been entitled to find that SA was emotionally and psychologically dependent on the Claimant.

22. In oral submissions, Ms Jegarajah pointed out that the Judge had expressly referred herself, at paragraph [12], to section 117C, including that the deportation of foreign criminals is in the public interest, which was one of the sections that had been put in emboldened font. We were also counselled against preferring what we would have decided over what the Judge had decided, when the Judge had considered the evidence before her; see the authority of UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095.

23. The Judge's decision had been adequately structured, with paragraphs [1] and [2] dealing with the Claimant's immigration history and the only question was whether the effect of the Claimant's deportation was unduly harsh. The Judge's analysis at paragraph [14], referred to above, was adequate, and the Judge's reference at [15] to not requiring any balancing act and focussing solely on the effect of SA and her children was in that context.

The Secretary of State's submissions

24. Referring to the skeleton argument on behalf of the Secretary of State, almost all of the Judge's findings had been limited to a single paragraph [14], which lacked any reasoning or engagement with the elevated nature of the "unduly harsh" test. HA (Iraq) had not overruled the authority of PG (Jamaica) or KO (Nigeria).

25. Ms Cunha emphasised once again that there had been a failure to consider the unduly harsh effect of deportation within the context of the strong public interest in deportation of a foreign criminal. The Judge's self-reference to the 'MAB' approach at paragraph [15] was a misdirection in law, coupled with a lack of findings and analysis at paragraph [14]. Paragraph [14] had referred to a loss of financial support which was more akin to inconvenience. Whilst the Claimant's wife, SA, had been a carer while the Claimant was in prison, the Judge had failed to analyse or explain why SA could not get the support of her extensive family network, including SA's six siblings in the UK, to support her mother and enable SA to work, just as she had worked in the past, in professional roles. The Judge's analysis at paragraph [17] added nothing further, largely repeating what had been said at paragraph [14].

Discussion and conclusions

26. We reminded ourselves of the basic principles for an appellate jurisdiction. The right of appeal to the Upper Tribunal is on a point of law. The Upper Tribunal should not interfere with an FTT decision because it does not agree with it or because it thinks it can do a better job. We also accept that a Judge's reasoning has to be considered in the context of their having heard all of the evidence. It is not appropriate for us to focus on specific wording and seek to place a construction on words in isolation from the judgment as a whole.

27. It is in that context that we considered the limited issue in this case, which is whether the Judge had erred in her assessment of whether 'Exception 2' applied, namely whether the effect of the Claimant's deportation would be 'unduly harsh'. If the Judge was entitled to conclude that the effect was unduly harsh, the Secretary of State's challenge must fail. We also accept Ms Jegarajah's submission that we must not add a gloss to the statutory language, and that the Judge had referred at paragraph [12] to the statutory provision (section 117C(1)) that the deportation of foreign criminals is in the public interest, along with a number of other statutory provisions she had highlighted.

28. We also, however, go on to consider what we regard as the two key flaws in the Judge's decision. The first is the assessment of the legal test and the second is the sufficiency of findings and reasoning.

29. In relation to the first issue, the Judge recited sections 117C and D of the 2002 Act at paragraph [12]. She then made her findings at paragraph [14], which as we have set out, represent the entirety of the findings, and then concluded that the effect of deportation would be unduly harsh. The Judge then went on to cite two passages from case-law: the 'MAB' approach from paragraph [18] of MM (Uganda) at paragraph [15] of her decision, and at paragraph [16], an excerpt from KO (Nigeria. In particular, at paragraph [15], the 'MAB' approach is cited with approval:

> *"The phrase 'unduly harsh' in paragraph 399 of the Rules (and s. 117C 5) of the 2002 Act) does not import a balancing exercise requiring public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned."*

30. That same passage was considered by the Supreme Court in KO (Nigeria) at paragraphs [34] to [35]:

> *"34. Judge Southern went on to consider how he would have decided the case applying his understanding of the approach in MAB. He described the difference as "stark":*
>
> *"It will be recalled that the MAB approach has been summarised as follows:*
>
> *'The phrase 'unduly harsh' in paragraph 399 of the Rules (and section 117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances*

> *of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.*'
>
> *In this appeal if there is to be no balancing exercise requiring the public interest to be weighed and if the focus is solely upon an evaluation of the consequences and impact upon the claimant's children, it is clear that the application of paragraph 399(a) can deliver only one answer, that being that it would be unduly harsh for the claimant's children to remain in the United Kingdom without their father, given that there is a close parental relationship which cannot be continued should their father be deported.*"
>
> *35. Miss Giovanetti for the Secretary of State takes issue with that alternative reasoning, which she criticises as applying too low a standard. I agree. The alternative seems to me to treat "unduly harsh" as meaning no more than undesirable. Contrary to the stated intention it does not in fact give effect to the much stronger emphasis of the words "unduly harsh" as approved and applied in both MK and MAB."*

31. The Court of Appeal went on to consider these same passages at [50] to [53] of HA (Iraq). We do not cite those paragraphs in full, but note the Court of Appeal's caution against a gloss on the statutory test and the lack of an objectively measurable standard, but, at its core, we also note that the criterion of undue harshness sets a bar which is "elevated" and carries a "much stronger emphasis" than mere undesirability, as some degree of harshness is acceptable because there is a strong public interest in the deportation of foreign criminals. The underlying question is whether the harshness that the deportation will cause for SA and their children is of a sufficiently elevated degree to outweigh that public interest in the Claimant's deportation.

32. In this case, having cited section 117C of the 2002 Act at paragraph [12]; having made findings and reached an apparent conclusion at paragraph [14], the Judge went on to cite the '*MAB approach*' at [15], in isolation, without directing back to the need for any analysis needing to be in the context of the public interest in the deportation of foreign criminals. Whilst recognising that we should consider the Judge's assessment of the legal test as a whole and not draw individual paragraphs out of context, we have, nonetheless, arrived at the view that the Judge misdirected herself in relation to the law. By structuring the decision as she did, the isolated self-direction at [15] is to be read as ignoring the context of the public interest in the deportation of foreign criminals and the Judge fell into the same trap identified by Miss Giovanetti in KO (Nigeria), with "unduly harsh" becoming no more than undesirable.

33. It may sometimes be the case, because it is apparent from the reasoning and findings, that a Judge need not make a lengthy self-direction with regard to the law. However, given the brevity of the findings at paragraph [14], we do not accept that it can safely be inferred that there was such appropriate contextualisation of the public interest in deportation and that the underlying question was appropriately considered. In reality, the Judge's findings comprised a finding on the Claimant's social and cultural integration; the Claimant's previous criminal offending and regret for that behaviour;

consideration of the Claimant's role in providing financial support and being an active parent and providing emotional support for SA, and her role as main carer for her mother and SA's limited connections to Nigeria. The analysis is limited to that, before the Judge reaches her decision that the effect of deportation would be unduly harsh, at the end of paragraph [14].

34. In our view, while noting, with caution, the authority of UT (Sri Lanka), there is simply insufficient reasoning by the Judge, in circumstances where there has been a material misdirection in law, for us to be satisfied that the Judge appropriately considered the evidence and made appropriate findings through the lens of the appropriate test.

35. In conclusion, we accept that the Judge did err in law in not applying the "unduly harsh" threshold, in the context of the public interest in deportation, and failed to explain and reach sufficient findings to justify her conclusion at the end of paragraph [14]. In the circumstances, we regard the Tribunal's decision as unsafe and it must be set aside. In doing so, there has not been any withdrawal of the concessions made by the Secretary of State that the Claimant has genuine and subsisting relationships with SA and his children and to the extent that there needs to be findings on the existence of those genuine relationships, those findings are preserved for the remaking.

Decision on error of law

36. We conclude that there are material errors here and we must set the Judge's decision aside. We do so, preserving the Judge's findings that the Claimant has genuine and subsisting relationships with his wife and qualifying children.

Disposal

37. With reference to paragraph 7.2 of the Senior President's Practice Statement, given the limited scope of the issues, it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

38. The following directions shall apply to the future conduct of this appeal:

    (a) The Resumed Hearing will be listed, if possible, before Upper Tribunal Judge Keith sitting at Field House on the first available date**, face-to-face,** time **estimate 4 hours,** to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

    (b) The Claimant shall no later than 4 PM, **14 days** prior to the Resumed Hearing file with the Upper Tribunal and served upon the Secretary of State's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall

stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

(c) The Secretary of State shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the Claimant's evidence; provided the same is filed no later than 4 PM **7 days** prior to the Resumed Hearing.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law, and we set it aside, subject to the preserved findings.

The anonymity directions continue to apply.

Signed *J Keith* Date: 14th December 2020

Upper Tribunal Judge Keith