Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07086/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2022	**On 27 April 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

RICHARD OLAYINKA BABALOA
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. M. Marziano of Westkin Associates
For the Respondent: Mr. E Tufan, Senior Presenting Officer

DECISION AND REASONS

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Introduction

1. The appellant is a national of Nigeria and is presently aged 34. He appeals against a decision of the respondent not to grant him leave to remain on human rights (article 8) grounds. The respondent's decision is dated 16 May 2018.

2. A deportation order made under section 32(5) of the UK Borders Act 2007 was issued by the respondent in respect of the appellant on 29 March 2017.

3. The First-tier Tribunal (Judge Page) allowed the appellant's appeal by a decision dated 18 November 2019. The respondent was granted permission to appeal by Judge O'Brien on 13 December 2019. By a decision dated 15 April 2020 the Upper Tribunal (McGowan J and UTJ Blundell) allowed the respondent's appeal to the extent that the decision of the First-tier Tribunal was set aside, and it would be remade by this Tribunal. No findings of fact were preserved.

4. At the outset I confirm my gratitude to the representatives for their helpful submissions. Further, I am grateful to Mr. Marziano for his detailed skeleton argument which was prepared with considerable skill.

Anonymity

5. No anonymity order has been issued to date, and no party requested an order before me.

6. I note the observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. I am satisfied that the appellant has previously been subject to the open justice principle in respect of his criminal convictions, which are a matter of public record and so considered to be known by the local community.

7. I conclude that the common law right permitting the public to know about Tribunal proceedings in this matter, a right further protected by article 10 ECHR, outweighs the appellant's rights protected under article 8 ECHR ('article 8'): *Cokaj (anonymity orders, jurisdiction and ambit)* [2021] UKUT 202, at [17]-[28]. I do not make an anonymity order.

Background

8. The appellant entered the United Kingdom as a visitor in August 2000, accompanied by his father. He was aged 13 at the date of his arrival. He

remained in this country, overstaying his leave, and lived with his mother. In the meantime, his father returned to Nigeria.

9. In January 2005, the appellant's mother applied for leave to remain on human rights grounds. The appellant, aged 17 at the time, was identified as being dependent on the application along with three siblings. The respondent refused the application by a decision dated 2 February 2005.

10. The appellant's mother made a second application for leave to remain on human rights grounds less than a week after the initial refusal.

11. On 29 August 2007, the respondent informed the appellant's mother through her legal representatives that the appellant could not benefit from the then existing 7-year child policy as the appellant was aged over 18.

12. In January 2008, the appellant's mother applied for leave to remain on human rights grounds, again relying upon the 7-year child policy. The application was rejected on 10 March 2008 with the respondent observing that as the appellant was aged 18 or over he could not fall for consideration under the policy.

Family

13. The appellant has a British citizen child from a previous relationship:

    - A, aged 14.

14. The appellant lived with A's mother, AH, from 2007 until 2010 when the relationship came to an end. The appellant states that he sees A every weekend. AH is silent in her evidence as to the regularity of contact between father and child.

15. The appellant has been in a relationship with a British citizen, MD, since 2012 and they have a child together:

    - JL, aged 5.

16. MD has a British citizen child from another relationship:

    - JP, aged 11.

Criminal Convictions

17. The appellant has accumulated numerous convictions since August 2006.

18. In August 2006 he was convicted at Croydon Magistrates Court of driving otherwise than in accordance with a licence (not possessing a

full licence) and driving with no insurance. He was fined £150 and disqualified from driving for three months.

19. In October 2006 he was convicted at Greenwich Magistrates Court of possessing cannabis and failing to surrender to custody. He was fined a total of £90.

20. In July 2007 he was convicted at Maidstone Crown Court on five counts of supplying heroin, six counts of supplying crack cocaine and one count of possessing heroin. The supply offences are identified on a police national computer ('PNC') print-out as having taken place on 3 May 2006, 4 May 2006, 10 May 2006, 11 May 2006, 15 May 2006, 16 May 2006, 20 May 2006, 22 May 2006, 31 May 2006, 8 June 2006 and 20 June 2006. At the relevant times the appellant was aged 18. The possession charge occurred on 11 January 2007. Having pleaded guilty to all counts he was sentenced to an 18-month community order incorporating a 6-month drug rehabilitation requirement.

21. In September 2009 he was convicted at North Kent Magistrates Court of travelling on the railway on 6 July 2009 without paying a fare and fined £40.

22. In February 2010 he was convicted at North Kent Magistrates Court of travelling on the railway on 3 December 2009 without paying a fare and fined £350. The offence took place less than three months after his earlier conviction.

23. Following coordinated early morning drugs raids at 29 premises across north Kent and south-east London resulting in the arrest of 19 people, the appellant pleaded guilty at North Kent Magistrates Court of supplying crack cocaine. He was committed to Crown Court for sentence and on 9 June 2010 he was sentenced at Maidstone Crown Court to a custodial term of 42 months.

24. In May 2013 he was convicted at East Kent Magistrates Court of travelling on the railway on 18 December 2012 without paying a fare and fined £400.

25. In August 2013 he was convicted at North East London Magistrates Court of travelling on the railway on 19 April 2013 without paying a fare and fined £400. This offence took place five months after his earlier conviction.

26. In February 2016 he was convicted at the County of Wiltshire Magistrates Court of theft from a person and sentenced to undertake a community order with an unpaid work requirement.

27. In March 2016 he was convicted at South Essex Magistrates Court of theft and, additionally, of possessing or controlling an article for use in fraud. He was sentenced to 6 months imprisonment on both counts, to be served consecutively. The sentence was suspended for 18 months.

Deportation order

28. The appellant applied for leave to remain on human rights (article 8) grounds on 7 August 2015.

29. Further to the appellant's criminal convictions the respondent issued a notice of decision to deport on 9 November 2016. The appellant provided a response to the notice on 29 November 2016.

30. The respondent signed a deportation order on 29 March 2017. It was served upon the appellant on 31 March 2017 alongside a decision to refuse leave to remain on human rights grounds. The human rights claim was certified under section 94B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), thereby only permitting the appellant an out-of-country appeal right.

Further criminal convictions

31. Though subject to a deportation order, the appellant continued to commit crimes.

32. In August 2018 he was convicted at Central London Magistrates Court of driving a vehicle whilst unfit through drink or drugs, possessing cannabis, using a vehicle whilst uninsured and driving without a licence. The offences took place on 23 May 2018. He was sentenced to a community order running for 48 weeks with a 4-week curfew requirement and tagging.

33. In November 2018 he was convicted at North London Magistrates Court of failing to comply with the requirements of a community order. The court ordered that he continue to undertake the unpaid work requirement of the existing community order.

34. In May 2019 he was again convicted at North London Magistrates Court of failing to comply with the requirements of a community order. The order was revoked.

35. On 29 May 2019, the appellant was stopped whilst driving a vehicle. There was a delay in proceedings, and he was first convicted for the offences detailed in the paragraph below. For this offence he was convicted in November 2019 at Central London Magistrates Court of driving under the influence of drugs, driving whilst disqualified and using a vehicle without insurance. A custodial sentence of 16 weeks was

wholly suspended for 12 months. He was disqualified from driving for 3 years.

36. The appellant was stopped whilst driving a vehicle on 26 September 2019. On 11 October he was convicted at East London Magistrates' Court of using a vehicle whilst uninsured and driving whilst disqualified. He was sentenced to a community order and disqualified from driving for 12 months.

37. On 11 May 2020, the appellant was stopped by the police whilst driving a vehicle. There was a delay in his sentencing, resulting in his being first dealt with for a subsequent arrest and conviction detailed in the paragraph below. In respect of this matter, he was convicted at Central Kent Magistrates' Court in April 2021 for driving whilst disqualified, exceeding 70mph on a motorway, driving a motor vehicle while unfit through drink or drugs, driving a motor vehicle with the proportion of specified controlled drug above the specified limit and resisting or obstructing a constable. The appellant was sentenced to a total sentence of 180 days imprisonment with attendant fines.

38. On 10 July 2020, some 6 weeks after his previous arrest, the appellant was stopped whilst driving a vehicle. In November 2020 the appellant was convicted at Central London Magistrates Court of driving whilst disqualified and using a vehicle without insurance. He was sentenced to 10 weeks imprisonment and disqualified from driving for 3 years. His suspended sentence of 16 weeks in respect of the November 2019 conviction was activated, to be served consecutively.

Asylum/human rights

39. In the meantime, the appellant claimed asylum on 23 May 2017. He failed to attend several substantive asylum interviews. He also failed to respond to a section 72 notice, served upon him by the respondent on two occasions, requesting that he provide written submissions as to how he could rebut the presumption that his crime was serious and that he was a danger to the community.

40. The respondent withdrew the section 94B certificate and by a decision dated 16 May 2018 reconsidered the application for international protection. A certificate was issued under section 72 of the 2002 Act and the application for asylum refused on the basis that Article 33(2) of the 1951 UN Convention on the Status of Refugees applied to the appellant. Consequently, the respondent concluded that the Convention did not prevent the appellant's removal from the United Kingdom. Additionally, the respondent concluded that in any event the appellant was not able to establish that he held a well-founded fear of persecution upon return to Nigeria.

41. In respect of article 8 the respondent accepted the appellant’s children and his partner’s child were aged under 18. It was accepted that they were all British citizens. However, it was not accepted that the appellant had a genuine subsisting relationship with his children and his partner’s child because he had not provided any reliable documentary evidence to establish such state of affairs.

42. Since the commencement of this appeal in June 2018, the appellant has spent some 27 weeks in prison, primarily for driving offences.

First-tier Tribunal

43. At the hearing held before Judge Page at Taylor House on 30 October 2019, the appellant withdrew his international protection appeal. He also withdrew his human rights appeal founded upon articles 2 and 3 ECHR. The appellant confirmed his pursuit of his article 8 appeal alone.

Law

44. The issue before this Tribunal is whether the effect of the appellant’s deportation upon his partner, his children and/or his partner’s child would be unduly harsh.

45. He is a foreign criminal for the purposes of section 32 UK Borders Act 2007.

46. For the purposes of Part 5A of the 2002 Act, the appellant is a ‘medium offender’ having been sentenced to 42 months’ imprisonment in 2010.

47. MD and the children are ‘qualifying’ persons for the purposes of the 2002 Act: section 117D(1).

48. Section 117C(3) and (5) of the 2002 Act:

> ‘(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.
>
> ...
>
> (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.’

49. The relevant part of paragraph 398 of the Immigration Rules (‘the Rules’) states:

> '398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> …
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months …'

50. Paragraph 399(a) of the Rules is consistent with section 117C(5):

> '399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;
>
> and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
>
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
>
> (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.'

<u>Evidence</u>

Documents

51. The appellant relied upon a bundle of documents running to 105 pages filed with the First-tier Tribunal. He also relied upon a supplementary bundle running to 50 pages filed with this Tribunal.

52. The appellant relies upon various documents including, but not limited to:

    - Witness statement: the appellant, dated 21 October 2019
    - Witness statement: the appellant, signed at the hearing
    - Witness statement: MD, signed at the hearing
    - Witness statement: Appellant’s mother, dated 21 October 2019
    - Letter: MD, dated 6 July 2015
    - Letter: MD, dated 27 December 2015
    - Letter: Appellant’s mother, undated
    - Letter: Probation practitioner (Ms. Burns), undated
    - Social worker’s report (Ms. Meek), dated 28 September 2019
    - Addendum social worker’s report (Ms. Meek), dated 28 October 2019
    - Addendum social worker’s report (Ms. Meek), dated 4 March 2022
    - Final amended Education, Health and Care Plan for JL, dated 5 August 2021.

53. The appellant previously relied upon a psychological report prepared by Dr. Ewa Oboho, a Registered and Chartered Forensic Psychologist, dated 13 June 2017. I observe that consequent to a decision of Conduct and Competence Committee of the Health and Care Professions Tribunal Service on 5 November 2017, Dr. Oboho was struck off from the Register of Health and Care Professionals. Mr. Marziano did not rely upon the report in his submissions.

Evidence

54. The appellant informed me as to his family history and detailed his personal circumstances when he engaged in criminal activity. He explained the importance of his children in his life and confirmed that he had amended his behaviour because he wants to be a good father.

55. MD states that she cannot relocate to Nigeria with the appellant and the children. She is a British citizen with Dominican ancestry and has no personal connection to Nigeria beyond her relationship with the

appellant. Her child, JP, sees their biological father on occasion, and she does not wish to separate them. She states that she has anxiety and depression. She has provided some evidence that she is prescribed anti-depressants.

56. In respect of JL, MD confirms that the child is too young to understand these proceedings and it has proven difficult to explain events to them consequent to their autism. Whilst JL's speech and understanding is presently underdeveloped, their emotions are heightened, and they find it hard to express feelings with words. They can react with aggression as occurred when the appellant was in prison.

57. The appellant relies upon a report, and addendum reports, prepared by Julie Meek, an independent social worker. Ms. Meek opines as to the younger children who reside with the appellant and MD that they continue to have an attachment to their father and that both children require security, particularly the younger child who has autism. She further opines that the appellant's removal would have a detrimental impact upon the children, with the change particularly impacting upon the younger child.

58. I confirm that I have read the EHC plan. There is no requirement that its contents be detailed in this decision save that it confirms JL to have been diagnosed with autism spectrum condition ('autism') when aged 2. I take judicial note that by the age of 2 a diagnosis of autism by an experienced professional can be considered reliable, though usually children do not receive a final diagnosis until much older. Additionally, I take judicial note as to the impact delayed language and communication skills development can have upon the ability to form relationships and interaction with others.

59. The appellant's probation officer confirms that he is a medium risk to the public in respect of driving offences.

Decision

60. In assessing an appellant's credibility, a decision whether the account given is in the essential respects truthful must be taken by a tribunal on the totality of the evidence, viewed holistically: *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ 367; [2005] I.N.L.R. 377.

61. The former Senior President of Tribunals (Ryder LJ) identified in *Uddin v Secretary of State for the Home Department* [2020] EWCA Civ 338, [2020] 1 WLR 1562, at [11], the utility of the self-direction long-established in criminal proceedings by *R v. Lucas (Ruth)* [1981] QB 720: if a court concludes that a witness has lied about one matter, it does not

follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because a person's motives may be different as respects different questions. I am mindful of this self-direction.

62. I remain mindful that a person may exaggerate, or embellish, a strong claim simply because of a fear of losing an appeal. I also appreciate that someone may not be truthful because of shame of earlier criminality.

63. I found MD to be an impressive witness. She is clearly under considerable strain as a result of these proceedings and due to numerous events in her life including the deaths of people close to her.

64. Whilst MD presented well, taking care to consider her answers and explaining her position with emotional depth, the appellant presented very poorly. The longer the appellant gave oral evidence the more it became apparent that he is very self-centred in his outlook and is a stranger to the truth. I reached the firm conclusion that on several occasions he simply said the first thing that came into his head, resulting in his evidence being contradicted by both his partner and his mother.

65. I acknowledge that the appellant’s mother wished to help her son, but her only seeing the good in him and ignoring his criminality ultimately undermines her ability to provide evidence that can properly be relied upon.

66. I address the relevant facts and the family’s credibility below.

Exception 2

Preliminary

67. Mr. Tufan candidly, and appropriately, accepted that it would be unduly harsh for MD and the children to relocate to Nigeria with the appellant. The respondent’s position before me was that it would not be unduly harsh for MD and the children to remain in this country whilst the appellant returned to Nigeria: *Patel (British citizen child – deportation)* [2020] UKUT 00045 (IAC).

i. <u>*Partner*</u>

68. The respondent is not satisfied that the appellant resides with MD. Mr. Tufan properly noted that the PNC record identifies the appellant as residing at his mother’s address. Before me the appellant gave a convoluted, and at times nonsensical, explanation as to why the police recorded him living at his mother’s address. He sought to explain that at

the time of his last arrest he had moved with his partner and their two children to his mother's home because cladding had to be removed from the property following the Grenfell Tower fire. For this reason, he states that he was living with his mother at the time of his last arrest on 10 July 2020 and this is why he provided her address to the police as his home address.

69. MD confirmed that save for a brief period in 2013 she has never resided at the home of the appellant's mother. She confirmed that the family was required to move out of their home for work to be undertaken on cladding, but they moved to a property 'down the street' and not to the home of the appellant's mother.

70. The appellant's mother confirmed that the appellant has not lived with her for at least seven years, nor has he and his family temporarily stayed with her.

71. I conclude that the appellant deliberately provided a false address whenever he was stopped by the police, and such address was that of his mother. I find that he was not truthful to me when asserting that at the time of his arrest in July 2020 he was residing at his mother's home.

72. As noted above, I have found MD to be an impressive witness and so, being mindful of the requisite standard of proof, I accept that she resides with the appellant and the children.

73. I am satisfied that the appellant and MD are in a genuine and subsisting relationship and have been since 2012. MD is a qualified person as defined by section 117D(1) of the 2002 Act and so the appellant can properly seek to rely upon Exception 2.

74. The appellant explained his usual day as follows: he gets up at 10am – stated to be because he suffers from depression - and then at 3.30pm collects the children from school. He cooks dinner for the family three or four times a week, and then spends time with the children, helping them with their homework. He reads to the children and watches random videos on YouTube with them.

75. MD explained that she has full-time employment that requires her to attend her office on occasion during the month and to work at home for the rest of the time. She gets up in the morning, prepares breakfast for the children, gets them ready for school and then takes them to school before starting her own work.

76. MD was clear in her evidence that the appellant does not cook for her. She described him as a poor and limited cook. She informed me that whilst he cooks basic meals for the children, simple food such as chicken and rice, she prefers to eat meals that she likes. When it was put to her

that the appellant had stated that he cooks family meals, she was clear that this was not true.

77. The appellant detailed in his evidence that MD works until 4.30pm every weekday. MD confirmed that this was not the case. She works until 5.30pm

78. I am satisfied that the appellant's evidence was indicative as to his self-centred nature. Though living with his partner for many years, he was entirely unable to correctly identify what time she finishes work even though she has regularly been working at their home since the beginning of the pandemic. It was striking that the appellant was unable to provide any evidence as to his participating in household chores beyond cooking dinner three or four times a week. Though asked to explain his usual day, he was unable to detail any evidence of productive work between 10am and 3.30pm. I am satisfied that he leaves most household chores to his partner, spending time engaged in activities that solely satisfy him, such as music. His evidence as to his interaction with his own children was vague and seemed to me to rarely go beyond activities that he himself wanted to be involved with such as watching videos on YouTube. I conclude that MD is required not only to work full-time for the benefit of the family but is also required to undertake the vast majority of the household chores and spend significant time supporting the children. I am satisfied that save for the benefit to MD in his collecting the children and keeping them occupied from 3.30pm to 5.30pm the appellant's physical absence from the home would not affect the running of family life.

79. The appellant explained that he gets up at 10am because he suffers from depression. In conversation with Ms. Meek in March 2022 the appellant refers to being stressed by his immigration status and having worries. He references his depression and having been prescribed Sertraline, an anti-depressant. I am satisfied that he struggles consequent to the restrictions placed upon him by these proceedings. No cogent medical evidence has been placed before this Tribunal evidencing a diagnosis of depression. However, I observe that in 2017 the appellant was being prescribed sleeping tablets for low mood whilst in detention. I am therefore satisfied that he does have depression, though its adverse impact on a day-to-day basis is not mentioned by other witnesses in this appeal. Indeed, the supporting letters confirm the appellant to be 'highly motivated' and a 'skilled musician artist'. The evidence strongly suggests that the appellant is capable of undertaking tasks that he personally enjoys without hindrance, whilst justifying his reluctance to undertake tasks that disinterest him upon his suffering from depression. I find that the medication currently prescribed is working well, and that the decision not to be involved in getting the

children ready for school and taking them to school is one that the appellant has made through exercise of his own free choice. His preference is to stay in bed and to require MD to take on these tasks before she starts work.

80. Another striking aspect of the oral evidence before me was the contrast between how MD and the appellant spoke about each other. I consider MD to be heartfelt in her evidence as to how important the appellant is in her life, both in looking after the children while she works and the emotional support he provides to her at difficult times. As for the appellant he barely spoke about MD save in answer to questions about her working patterns, which he got noticeably wrong. His evidence was primarily focused upon his personal upset as to his own position. He referred to having ‘never had a chance in life’, which sits ill at ease with the considerable efforts made by both his mother and partner to support him. He placed significance upon being a 34-year-old man who suffered from depression without engaging with the fact that he is able to pursue his interests in music and go out with friends, whilst his partner works and then must look after the house and children. He accepted that he had made stupid decisions that affected his children, but offered no observation as to how his decisions affected MD. It was clearly noticeable that the appellant appeared incapable of having any insight into how his criminal behaviour over the last decade has adversely affected his partner. Indeed, he appeared to offer no insight into how his selfish behaviour at home impacts upon his partner. He presented no insight into the efforts that his partner is required to undertake on behalf of the family every day in circumstances where his own efforts are minimal. At no time did he express any love or warmth for his partner. The contrast with MD’s expressions of love and care for the appellant was clear. During the course of his oral evidence, he concentrated almost entirely upon his own woes and feelings, with brief reference to his acceptance that he had to be a better father. The only conclusion I can reach having read the appellant’s witness statement and heard his oral evidence is that he is a deeply selfish man who possesses no true insight into the significant efforts made by MD on his behalf. He appears entirely unaware as to the adverse impact his selfish actions have upon her and others. I am satisfied that his continual selfishness contributes to MD’s own depression.

81. Turning to the assessment of undue harshness, in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273, Lord Carnwath held at [22]-[23]:

> ‘22. Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C's deportation be "unduly harsh"?

> Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word "unduly" is intended as a reference back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and like the test of "reasonableness" under section 117B, exception 2 appears self-contained.
>
> 23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.'

82. The criterion of undue harshness sets an elevated bar which carries a much stronger emphasis than mere undesirability.

83. The Court of Appeal confirmed in *HA (Iraq) and Another v. Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 W.L.R. 1327 that the question for tribunals under section 117C(5) of the 2002 Act is whether the harshness which the deportation would cause for the offender's partner or child is of a sufficiently elevated degree to outweigh the public interest. The statutory intention is that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the low level that applies in the case of a person liable to ordinary immigration removal where, by section 117B(6) of the 2002 Act, the test is whether it would not be reasonable to expect the partner or child to leave the United Kingdom, and the very high level that applies to an offender who has been sentenced to a period of imprisonment of four years or more where, by section 117C(6), the test is whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

84. The Court further confirmed that although section 117C(5) requires an offender to establish a degree of harshness that goes beyond an acceptable level, which might therefore be described as being an ‘ordinary level of harshness’, it is incorrect to find that the level of harshness in a particular case is ‘ordinary’ simply because it is not exceptional or because the facts fit into some pattern that is commonly encountered in deportation cases.

85. I am satisfied that the appellant’s mother, who presently financially supports her son, would be able to provide financial support to MD to help secure post-school care for her grandchildren. The appellant served two custodial terms amounting to some 27 weeks being spent in prison in late 2020 and 2021. During that time MD and the children coped without him. Whilst MD would welcome the presence of the appellant to help her with the children between 3.30pm and 5.30pm, JP is now of an age where they can provide some support. Whilst separation would understandably be undesirable to MD, and I accept she clearly wishes to remain residing with the appellant, I conclude that it would not be unduly harsh for the couple to be separated. The appellant cannot satisfy the elevated bar and the appeal on this ground is dismissed.

ii. <u>*Children*</u>

86. The appellant’s separation from A would not result in undue harshness. A resides with their mother, seeing their father on occasion. A was separated from their father when he was in prison in 2020 and 2021. The appellant provided no evidence of contact with A during his imprisonment, informing me that he had no prison visits because of the pandemic and that his phone calls were to MD. A has experienced life without their father’s presence and whilst I accept that they would miss him, his physical absence from A’s life would not be unduly harsh.

87. The same position exists for JP. Though JP lives with the appellant and considers him to be a father figure, JP has some contact with their own father. At the time the appellant went to prison in 2020 and 2021 JP was of an age to understand events and was able to cope. JP lives with their mother, who provides good care and much love. Whilst JP would miss the appellant, such separation would not in all of the circumstances be unduly harsh.

88. As accepted by the representatives, the primary consideration in this appeal was whether the separation of JL from their father would be unduly harsh.

89. JL is a 5-year-old, soon to be aged 6, who lives in a loving family unit. I accept that JL will have no recollection of their father’s imprisonment earlier this decade, and so they have no experience to draw upon in

respect of separation if their father were to be deported. I accept MD's account that JL struggled when the appellant was in prison, in part because they do not cope well with change.

90. The representatives accept that JL was diagnosed with autism in May 2019, when aged 2 and that the present assessment identifies their condition as 'high'. JL has been identified as displaying reduced social interaction, and whilst they seek comfort from known adults it takes time for them to develop confidence with new people. JL has sensory needs.

91. I observe the approach to the test established by the judgments in *KO (Nigeria)* and *HA (Iraq)*. The test is an evaluative exercise which focuses on the reality of an affected child's particular situation. A key part of the exercise is to consider the importance of the relevant parent to the child and the degree of emotional dependence the child has on that parent. Such harm is not required to be of the level of psychiatric injury.

92. I am satisfied upon considering the evidence before me that JL enjoys a close loving relationship with their father. The substance of their relationship is one to be expected when a child is aged 5 and has recently started primary school. It involves walking home from school, sharing dinner, shared engagement with social media and playing together. That activities between father and child are no wider is no surprise when considering JL's age. Ultimately, I conclude that whilst this is a finely balanced assessment, the fact that JL has no previous recollection of separation coupled with their personal difficulties with autism would result in separation from their father being unduly harsh as it would be emotionally damaging and result in significant problems, such as aggression, increased poor behaviour at school and an inability for a period of time to cope with such significant change in their life. In such circumstances, I am satisfied that the appellant meets the requirements of Exception 2 in respect of his child JL and so he has established that an exception exists in respect of the public interest in his deportation. His human rights (article 8) appeal is allowed on this ground.

93. I am mindful that the Supreme Court is soon to consider the application of the test identified by the Court of Appeal in *KO (Nigeria)* in conjunction with the appeal from the judgment in *MI (Pakistan) v. Secretary of State for the Home Department* [2021] EWCA Civ 1711. However, if I were required to adopt the approach endorsed by the Tribunal in *Imran (Section 117C(5): Children, Unduly Harsh)* [2020] UKUT 83 (IAC), [2020] Imm. A.R. 830, disapproved in *MI (Pakistan)*, which considered the approach to the unduly harsh test adopted by the Court of Appeal in *PG (Jamaica) v. Secretary of State for the Home Department* [2019] EWCA Civ 1213, I would still find in favour of the appellant

consequent to the emotional harm that will be suffered by JL upon separation from their father. Even if the test is elevated greater than that identified in *HA (Iraq)* JL's separation from their father at the present time would still be properly identified as unduly harsh.

94. It is appropriate that I observe my decision to be one of fine margins. If JL had been older when their father was imprisoned, for example aged 7 or 8, they would have had several months to adapt to the absence of their father with the support of their mother, their school and local social services. JL could then be expected to build upon those experiences if separated from their father on another occasion. The appellant should properly be aware that a further period of imprisonment is very likely to result in this tribunal adopting a different approach to the undue harshness test applied in deportation matters if the respondent were again to seek his deportation. He should not expect to be successful on such ground if he returns to prison for a fourth time.

Article 8 outside of the Immigration Rules – Very compelling circumstances

95. Having concluded that the appellant succeeds in respect of Exception 2, there is no requirement that I consider the existence of very compelling circumstances. However, I was asked to by Mr. Marziano and so consider it in the alternative, on the basis that the appellant has not succeeded in establishing Exception 2.

96. Section 117C(6) of the 2002 Act provides that the public interest requires deportation unless there are very compelling circumstances, over and above those described in section 117C(4) and (5). The test is a very stringent one: *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 20.

97. The Tribunal confirmed in *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 123 (IAC); [2019] Imm. A.R. 780 that section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of *KO (Nigeria)*, namely those who have not been sentenced to imprisonment of 4 years or more, and those who have.

98. The Immigration Rules replicates the very compelling circumstances test at paragraph 398, requiring an appellant to establish that there are very compelling circumstances over and above those set out in paragraphs 399 and 399A of the Rules.

99. In *Secretary of State for the Home Department v. Garzon* [2018] EWCA Civ 1225, at [28] Mcfarlane LJ, giving judgment on behalf of the Court, approved the Tribunal's self-direction:

> ‘28. In its final paragraph, the tribunal refers to the phrase "very compelling circumstances", observes that "very" indicates a very high threshold and observes that the word "compelling" means circumstances which have a powerful, irresistible, and convincing effect. It is hard to contemplate how the tribunal could have demonstrated any greater focus on the public policy factors in favour of deportation.’

100. There is not a closed list of what will constitute ‘very compelling circumstances’ and a flexible approach is required. Sir Ernest Ryder confirmed in *Akinyemi v Secretary of State for the Home Department (No. 2)* [2019] EWCA Civ 2098, [2020] 1 W.L.R. 1843, at [39]:

> ‘39. The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e., they will be exceptional having regard to the legislation and the Rules.’

101. When undertaking a holistic proportionality balancing exercise, I adopt the balance sheet approach as encouraged by Lord Thomas in *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 W.L.R. 4799.

102. On the negative side of the scale this Tribunal is required to have regard to the maintenance of effective immigration controls being in the public interest: section 117B(1) of the 2002 Act. Further, the deportation of foreign criminals is in the public interest: section 117C(1).

103. Unlike the consideration of the identified exceptions to the public interest, a consideration of very compelling circumstances requires an appellant’s criminality to be placed in the assessment.

104. The appellant’s attitude to his offending can appropriately be identified as one where he avoids taking any responsibility for his actions. He has proven content to blame others for his initial engagement in criminality, such as his mother for taking several jobs when he was young and the absence of his father. He also readily blames his social environment. Before me, he identified for the first time that he was sorry for his actions, however such sorrow lacked substance as he reverted at the hearing to minimising his actions.

105. It is noticeable that in his witness statements there is no true engagement with the fact that in 2007 he was convicted on 12 counts of possessing and supplying class A drugs. Having been under surveillance

for several weeks and having been identified as participating regularly in the supply of controlled drugs, the appellant was fortunate to have only received a community order. I am satisfied that the appellant benefited from a Crown Court judge giving him a second chance, as his identified level of involvement in the supply of drugs would normally be addressed by a significant term of imprisonment. As has regularly proven the case ever since, the appellant failed to grasp the opportunity provided. He appears to have been wholly unable on several occasions to identify his good fortune before the courts, returning again and again to court having committed the same crimes and not learning from his receiving ever increasing sentences.

106. By means of his October 2019 witness statement he details in respect of his conviction in 2010 that he made a mistake by agreeing to sell drugs and sold only one ‘quantity’ worth £20 to an undercover police officer. I do not accept that it was a one-off transaction. The appellant has a history of supplying drugs and was content to return to such trade. He was arrested as part of a police operation focused upon several properties in south-east London and north Kent. He was one of 19 people arrested at various premises during early morning raids. Being mindful of the sentencing regime existing in 2010, a sentence of 42 months’ imprisonment following a guilty plea, which would permit a reduction in sentence of up to one-third, would appear to be extremely harsh in respect of having only sold one wrap of drugs on one occasion as now asserted by the appellant. I conclude that the appellant is not being truthful, and I am satisfied that having been given a chance to leave his criminal lifestyle behind him in 2007 he remained fully engaged in making money from supplying drugs in 2010 and was sentenced on the basis of his active engagement in such supply.

107. Though on their face the convictions for fare evasion are at the lower end of the scale, they provide evidence as to the appellant’s willingness to continue to commit the same crimes regardless to his being caught and brought before the courts. His behaviour exhibits a personal belief that he is above the law. At the hearing, and somewhat to the surprise of Mr. Marziano, the appellant appeared to deny that the latter two convictions for fare evasion related to him. In seeking to answer questions from Mr. Tufan as to why the police had 14 aliases for him on their records and 5 alias birthdates, the appellant engaged in a convoluted story that other persons had committed the crimes and gave his name to the police before walking away and leaving him with the difficulties. The appellant was given time to discuss matters with Mr. Marziano outside of the hearing room and upon return I was informed by Mr. Marziano that the appellant accepted that he committed all the fare evasion offences and that he had given different variations of his name to the police. In respect of the several other aliases on record, the

appellant sought to explain that they related to friends who had previously used his name when stopped by the police. However, he was unable to explain why the police would then identify the names of friends as being used by him as an alias. Having listened to the appellant give evidence on this issue the only reasonable conclusion I can reach is that he was saying the first thing that came into his head. In seeking to minimise, or indeed deny, his involvement in fare evasion he sought to detail a fanciful explanation that he was the victim of dishonest acts by friends. As I observe above, the approach adopted by the appellant strongly suggests that as his evidence progressed during the hearing, he ever more became a stranger to the truth.

108. Turning to the numerous driving offences, the appellant tried to explain his actions with regard to his last two convictions. In May 2020, he informed me that he was at his mother's home when a female friend began to bleed heavily. She was having a miscarriage. The appellant explained that he went to a local Co-op shop to purchase pads, but they did not have the correct size. He returned to his mother's home where it was suggested that he travel to the local Sainsburys' to make the purchase. He explained that he was acting in the best interests of his female friend. A concern as to the probity of the appellant's evidence is that as the friend's bleeding occurred no one considered it sufficiently serious to call an ambulance. This covers the period of time in which the appellant left the house and returned empty-handed from the first shop, and his decision to travel to the second shop by car. I am satisfied that the appellant relies upon a friend suffering a miscarriage to explain his willingness to use his mother's car to travel to the shop. When considering whether the recounted events are true, I note that the appellant provided no reasoning as to why either his mother or someone else could not undertake the trip. I further observe that what would seem on its face to be powerful mitigation, namely seeking to aid a person suffering from a miscarriage, is not recognised by the sentence imposed for driving whilst disqualified, namely 120 days imprisonment. Nor has the appellant sought to explain why he was also convicted of resisting or obstructing a constable upon being stopped. Crucially, the appellant's evidence fails to engage with his having been convicted of exceeding 70mph on a motorway and having been intercepted by police. No cogent explanation has been provided as to why he was required to drive at such speed along a motorway to reach his local Sainsburys', said to be close to his mother's home. The appellant's mother is silent as to this event in her evidence. I find that the appellant has been untruthful. Ultimately, I conclude that the appellant was so nonchalant in driving whilst disqualified that he undertook this journey with no thought that he was breaking the law.

109. As to the arrest in July 2020, the appellant left his partner and their young children at home and had gone out for a meal at a restaurant with a female friend who was wearing high heels. As they left the restaurant and walked to his friend's car she twisted her ankle. His evidence becomes confusing at this stage as he was clear in his evidence before me that they were in the car and his friend was having trouble driving. Consequently, he got out of the car and placed her in the passenger seat, before placing himself behind the steering wheel intending to drive the car to a side road and park it. He provided no cogent explanation as to why there was a requirement to drive the car elsewhere and park it, when it was already parked. Again, the only reasonable conclusion that can be reached is that the appellant is not telling the truth. He explained to me that he explained events as described in mitigation to the court. However, it is apparent that the court did not accept his mitigation because he was sentenced to 10 weeks' imprisonment.

110. A real concern that arose at the hearing is that the appellant initially denied having been convicted on more than one occasion of driving whilst under the influence of drugs, namely cannabis. When the convictions were read to him, he embarked upon a detailed explanation that no drugs were upon him when he was stopped and that it had taken a long time for the results of the drug tests to come back. He initially disputed that any traces of drugs had been found in his system. When it was pointed out that he pleaded guilty to these offences, he proceeded to state that he was unsure as to whether traces of drugs had been found in his system before finally acknowledging that he had pleaded guilty to having driven under the influence of cannabis. He explained that in respect of the offences he had not smoked cannabis on the day he drove, but the previous day. I observe that on his own evidence before me, in respect of his last conviction, he was arrested in the afternoon on 11 May 2020 and so for the level of cannabis to be above the permitted level when tested - 2 micrograms per litre of blood (2ug) - either he smoked very heavily the day before, or he had smoked on the day of the offence. I take judicial notice that as a general rule, consumption of cannabis 7-12 hours prior is likely to place someone above the legal limit. The appellant's evidence before me is that his consumption was significantly over the 12-hour mark. I am not required to consider this matter to the criminal standard, but on the balance of probabilities I am satisfied that he smoked cannabis on the day of his arrest and was willing to drive the car in the knowledge that he had been smoking cannabis.

111. I am satisfied that the appellant adopts a blatant disregard for this country's driving laws. Over many years he has driven, not only without having taken and passed a driving test, but also as a disqualified driver.

He seeks to portray his reasons for driving as spur of the moment decisions, usually to aid someone else. However, even upon gentle examination, his self-justification is unsustainable.

112. His criminal record establishes that he is content to drive when not permitted to do so, to drive at speed and to drive under the influence of drugs. He appears to have no concern for other road users or pedestrians. He has no concern as to the lives he may impact if he is in an accident through speeding or impaired ability through drugs. He has no concern that others may be adversely affected by his driving without insurance. I am satisfied that the appellant is an extremely selfish man, only concerned to be able to drive when and how he wishes to. He has no true insight into how his behaviour, and his subsequent imprisonment for driving offences, has affected his family nor as to the public interest in his being deported. I do not accept that he is sorry for the offences, save that he is sorry for having been caught.

113. I consider the assessment by the probation service that the appellant is a medium risk to the public in respect of driving offences to be correct. His lack of insight, and his selfishness whereby he acts as he wishes regardless of the law, means that there continues to be a real risk that he will consume drugs, get behind the wheel of a car, drive at speed and by such actions hit a pedestrian or another vehicle. Over the years he has shown a total disregard for the risks that he poses to other people. It should properly be noted that the appellant expressed annoyance at being identified as a criminal at the hearing, despite several convictions and three separate prison sentences, one of which was for 42 months. There is a significant disconnect between his personal view of his behaviour and the view that society properly takes.

114. MD was unable to give any cogent example as to when she has been able to persuade the appellant not to drive whilst disqualified. Whilst well-meaning, and clearly invested in her relationship with the appellant, I conclude from considering her evidence that she has proven unable to divert him from his selfish anti-social behaviour and cannot be considered to be a source of protection. The appellant has consistently proven willing to take drugs and drive whenever he wishes, regardless of the risk of his appearing before the courts and being placed in custody.

115. I have read the evidence of the appellant’s mother with care. She is worried about her son, which is understandable. However, there is no identifiable insight into the appellant’s criminality. Rather, he is described as an ‘exceptionally good man’ and someone who is not ‘violent or [sic] criminal committing crimes disturbing the peace of the community and society at large.’ There is no engagement with the many years of criminality through which members of the public have been

placed at risk, either through the supply of drugs or by the continued disregard of driving laws. There appears to be no understanding that the appellant's continued use of vehicles, on occasion whilst under the influence of drugs, is a significant concern to the public. Her evidence strongly suggests that she is not willing, or capable, of influencing her son's antisocial attitudes.

116. I have read the letters of support with care. They portray the appellant as a highly motivated, 'inspirational' and friendly person. None of the authors engage with his regular acts of criminality. It is unclear as to whether they are aware of his anti-social behaviour, or whether they condone it. In the circumstances, I place very little weight upon these letters.

117. There is little that can positively be placed in favour of the appellant, save that he has a loving relationship with MD and his children. It is proper to note that the best interests of the children are a primary consideration but are not determinative. It is also appropriate to note that the appellant has lived in this country since he was aged 13, that his mother and siblings reside in this country and that he suffers from depression. However, though he left Nigeria in his teens he has an understanding as to how society works in that country. He has a wider family in that country and his family who are present in this country can provide him with initial support to secure accommodation on return. I observe that his mother and partner are presently supporting him in this country. He can enter the local employment market on return to Nigeria.

118. In the circumstances, and placing into the assessment his criminality, if the appellant had not succeeded in respect of Exception 2, he would not have succeeded in establishing the existence of very compelling circumstances.

Conclusion

119. The appellant's human rights (article 8) appeal is allowed on the sole ground that the exception to the public interest in his deportation is established as it would be unduly harsh for his youngest child, JL, to be required to relocate to Nigeria and at the same time it would be unduly harsh for JL to be separated from their father.

Notice of Decision

120. By means of a decision sent to the parties on 15 April 2020 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 18 November 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

121. The decision is remade, and I allow the appeal on human rights (article 8) grounds.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 11 April 2022

TO THE RESPONDENT
FEE AWARD

No fee was paid and so there is no fee award.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 11 April 2022