Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12784/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

THE HON. MR JUSTICE SHELDON
UPPER TRIBUNAL JUDGE GLEESON

Between

MAWANDE SICWEBU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Heard at Field House on 10 June 2024

Representation:
For the Appellant: Mr David Ball of Counsel, instructed by Mordi & Co Solicitors
For the Respondent: Mr Nicholas Wain, a Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 26 April 2017 to deport the claimant to South Africa, of which he is a citizen, as a

foreign criminal, by reference to sections 32 and 33 of the UK Borders Act 2007 ("the 2007 Act"), and his decision on 27 April 2017 to refuse to treat his human rights claim as coming within the Exceptions in the 2007 Act and section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) ("the 2002 Act"). We remind ourselves that by reason of the length of his sentence (more than 12 months and less than 4 years) the claimant is a 'medium offender' for the purposes of section 117C of the 2002 Act.

2. This being an appeal by the Secretary of State, for clarity we shall refer to the appellant below as 'the claimant' and the respondent below as 'the Secretary of State'.

The index offence

3. The claimant was convicted on 14 February 2017 in relation to abduction of and assault on a minor. This is his only criminal conviction, but a very serious one. The claimant blames his alcoholism, and says that he is now sober and very much regrets his actions.

4. The circumstances of his offending were described by Lady Justice Simler, as she then was, in Sicwebu *v Secretary of State for the Home Department* [2023] EWCA Civ 550 at [9] as follows:

> "On 20 January 2017, the [claimant] pleaded guilty at Ipswich Crown Court to offences of taking a child without lawful authority, and assault by beating. The child, an 11 year old (referred to as child A), was walking with a friend in Chelmsford. The [claimant] approached the two children, told the other child to go elsewhere. He said "come with me or I'll kill you" to child A and led child A to the back garden of a house. Once there, he grabbed her by the wrist, punched her in the chest and stomach which winded her, and slapped her round the face. The incident ended when child A's father phoned her. She managed to answer the phone, crying and he told her to run, which she did. The ordeal lasted about 40 minutes and had a traumatic effect on child A."

5. Even with reduction for an early guilty plea, HHJ Levett sentenced the claimant to 32 months on the abduction charge (maximum sentence 7 years), and 4 months concurrent (maximum 6 months) on the assault charge. The Crown offered no evidence in respect of a third charge.

6. The sentencing judge considered the claimant's action to be 'a spontaneous impulsive act and therefore unlikely that there would be any suggested retribution'. (It may be that 'retribution' is a typographical error for 'repetition').

7. The claimant's name was placed on the list of those debarred from working with children and vulnerable adults, pursuant to the Safeguarding Vulnerable Groups Act 2006. That is permanent and has had a significant effect, as previously he had worked with vulnerable

persons in what the Judge Levett described as 'the Mental Health Team area'. The claimant was excluded from contact with his own children for a time, but this has now been lifted.

8. On 9 February 2018, the claimant was released on licence. His licence expired on 12 June 2019. He has not reoffended.

The O'Callaghan decision [30 July 2018]

9. Following a hearing on 20 July 2018, the decision being sent to the parties on 30 July 2018, First-tier Judge O'Callaghan (as he then was) dismissed the claimant's appeal. We shall refer to this decision as the 'O'Callaghan decision'.

10. Judge O'Callaghan did not have the benefit of the guidance on the meaning of 'unduly harsh' given by the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, handed down on 24 October 2018.

11. At [136] Judge O'Callaghan found that the claimant had not addressed sufficiently the alcoholism on which he blamed his offence. He noted that the claimant continued to be assessed as presenting a medium risk of harm to the general public and that 'the index offence is an example of what may occur if he is unable to put into place appropriate skills and protective mechanisms'.

12. At [137], Judge O'Callaghan held that:

> "Whilst this concern is not a static one, and the [claimant's] position may change favourably if either probation can provide appropriate courses in the community addressing anger management and alcohol awareness or the [claimant] secures professional support from elsewhere, I find that at the present date and on the evidence before me, the [claimant] remains as likely to commit further serious offences as he did in October 2016, because issues arising from his alcohol misuse have not been appropriately addressed. In such circumstances, being mindful of the public interest, of which the risk of further offending is a core element, and the index offence, I find that it would not be unduly harsh for [the claimant's wife and children] to remain in this country without [him]."

13. Judge O'Callaghan did not consider that 'very compelling circumstances' above and beyond those envisaged in Exceptions 1 and 2 to section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) had been shown. He dismissed the appeal.

14. On 20 November 2018, Upper Tribunal Judge Grubb refused permission to appeal to the Upper Tribunal and the claimant became appeal rights exhausted on the O'Callaghan decision. Judge Grubb considered that the comments at [137] were 'no more than a recognition' that in the future the claimant might be able address, and

establish evidentially, that he had addressed satisfactorily his alcohol abuse. He said that:

> "…There is nothing wrong in principle in a Judge expressing such a view but it does not affect the lawfulness of the decision based upon his clear and sustainable findings on the evidence before him at the hearing, namely that he is likely to commit further offences."

The Khan decision

15. On 27 April 2018, the claimant made further submissions which were accepted as a paragraph 353 fresh claim, but were refused with an in country right of appeal on 25 July 2019. The new material concerned the claimant's attempts to address his alcoholism, and the effect on his family if he were to be removed.

16. On 22 November 2019, First-tier Judge M A Khan heard the claimant's appeal against the 25 July 2019 decision and allowed the appeal. This decision will be referred to as the 'Khan decision'. The Khan decision was sent to the parties on 13 January 2020.

17. Judge Khan held that deportation was disproportionate on the facts as they then were. Judge Khan noted that the O'Callaghan decision was the *Devaseelan* starting point for the consideration of this appeal. At [43], Judge Khan inserted paragraphs [128]-[134] of the O'Callaghan decision, noting that the appeal had been dismissed in 2018 'on the very narrow issue that the claimant had failed to seek professional help to address his alcohol misuse'.

18. Judge Khan noted evidence from Anna Hunter, a therapist, in a letter dated 14 November 2019; and a letter from Paul Moyse, who lived at the Foyer Hostel (for homeless people), reflecting the support the claimant gave there and that the claimant had helped him stay away from alcohol. There were probation letters recording that the claimant remained a medium risk of harm to children and a low risk to everybody else. Those letters dated back to 2018 when the claimant had only just begun therapy with Ms Hunter. The claimant had also attended just four sessions with Alcoholics Anonymous, over a two-year period: he said that he preferred one to one support.

19. Judge Khan found the relationship between the claimant and his British citizen wife to be genuine. There were two daughters (there are three now). He considered that on the limited facts found, taken with those found by Judge O'Callaghan, the claimant had rebutted the presumption in paragraph 396 of the Immigration Rules.

20. Given the evidence of the claimant having addressed his alcoholism, Judge Khan felt that it was appropriate to depart from the conclusions in the O'Callaghan decision. He found that the Secretary of State's decision was disproportionate and allowed the appeal.

21. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal to the Upper Tribunal

22. On 18 February 2020, First-tier Judge Shimmin granted permission on all grounds. The appeal was considered, and the decision remade by Upper Tribunal Judge Hanson, who identified the following issues in the Khan decision:

(1) Failure to consider the Immigration Rules whether the 'go' or 'stay' scenarios would be unduly harsh for the claimant's family members;

(2) Had Judge Khan directed himself to the correct test, he would have found that neither the 'go' nor 'stay' scenario would be unduly harsh;

(3) Judge Khan fell into error in relying on the O'Callaghan decision, in which at [137] Judge O'Callaghan had conflated two unrelated tests: the test of undue harshness 'is an isolated consideration with no balancing exercise': see *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53 (24 October 2018)

23. On 16 June 2020, during the first lockdown of the Covid-19 pandemic, Upper Tribunal Judge Hanson allowed the Secretary of State's appeal, considering the appeal on the papers alone. He made an anonymity order (which the Court of Appeal has discharged)

24. Judge Hanson remade the decision by dismissing the claimant's appeal.

25. The claimant appealed to the Court of Appeal.

Court of Appeal

26. The judgment on appeal was given on 19 May 2023, by Lady Justice Simler, with whom Lady Justices Whipple and Falk agreed. The Court set aside the decision of the Upper Tribunal: see *Sicwebu* (cited above).

27. The Court of Appeal considered that Judge Hanson had failed to make findings of fact on the evidence of the claimant's wife and must, therefore, be taken to have accepted that evidence as credible. The Judge was also criticised for failure to engage with the expert evidence of Dr Tamara Licht, a clinical psychologist. The Upper Tribunal decision was 'acknowledged to be light on reasoning'.

28. The Secretary of State accepted that the 'go' scenario, where the claimant's family would accompany him to South Africa, was not appropriate. The Court of Appeal was concerned principally with whether Judge Hanson's decision regarding the 'stay scenario' was sustainable, that is to say, whether it would be unduly harsh for the claimant's wife and children to remain in the UK without him.

29. Having identified a number of errors of reasoning in the Upper Tribunal decision, Simler LJ said this:

> "68. The cumulative errors I have identified in the judge's application of the unduly harsh test are material. I do not think it can be said that his ultimate conclusion would inevitably have been the same had he not made these errors. It might be the same; it might not. In those circumstances, the appeal must be allowed and the judge's decision set aside.
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> 69. My conclusion means that the case will have to be remitted for a yet further rehearing. This is regrettable given the long delay caused by the number of hearings that have already been required (through no fault of the parties), and the strain that living with the prospect of imminent deportation must inevitably have had on this family. It was common ground that the case should be remitted to the Upper Tribunal rather than the FTT, with a direction that it should be dealt with by a different judge. I think it best to leave questions of case management and preserved findings of fact to the specialist tribunal.
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> 70. For all these reasons, I would allow the appeal and remit the case to a differently constituted Upper Tribunal."

30. We are that Tribunal. The position before us is that permission to appeal to the Upper Tribunal is deemed to have been granted (see [21] above) and an error of law found in the Khan decision. We are tasked with remaking the decision afresh.

Upper Tribunal proceedings

31. The Upper Tribunal appeal came before UTJ Smith on 23 June 2023, who gave directions for the claimant to file and serve ANY additional evidence on which he intended to rely at the hearing.

32. The Secretary of State's appeal then came before us on 9 April 2024. The claimant had not complied properly with the direction for a consolidated bundle or the direction to disclose any new evidence on which he sought to rely. By that time, it was 7 years since the index offence and 5 years since the period of licence following release had ended.

33. The claimant began giving oral evidence but at the beginning of cross-examination, it became clear that there was a quantity of potentially

relevant evidence in his possession which had not yet been disclosed. The claimant said that his solicitor travels a good deal outside the UK and had not requested the documents in question from him.

34. We considered it in the interests of justice to adjourn the hearing one last time, to give the claimant a final opportunity to put his evidence in order and comply with the directions made by Upper Tribunal Judge Smith.

35. That is the basis on which this appeal comes before us today, for remaking afresh.

Issues

36. The issues to be determined in this appeal are:

(a) Whether there would be 'very significant obstacles' to the claimant's integration into South Africa if deported there, in accordance with the exception at section 117(4) of the 2002 Act;

(b) Whether the claimant meets the "unduly harsh" exception to deportation at section 117C(5) of the 2002 Act;

(c) If not, whether very compelling circumstances exist such as to render deportation disproportionate under Article 8 of the Convention (section 117C(6) of the 2002 Act).

New evidence

37. The claimant has produced new evidence, which we have admitted following a rule 15(2A) application. Having regard to the length of time which has elapsed since the index offence in 2016 and the two First-tier Tribunal decisions, it is plainly in the interests of justice to admit more recent information of matters concerning the claimant and his family members:

(2) **In 2020:** the Secretary of State's 2020 CPIN for South Africa, a letter from the Mid-Essex Hospital Services Department of Gastroenterology, reflecting the history of colitis experienced by the claimant's wife from 2003 onwards, and an updating letter from Ms Hunter dated 20 July 2020,

(3) **In 2022:** letters dated 6 June 2022 concerning adverse posts on social media which had upset the claimant's wife. PC Dean Bell did not see any direct threats in the posts forwarded to the police and so there was no further investigation of these posts.

(4) **In 2023**: on 28 March 2023, an Amnesty press release about the murder and crime rates in South Africa; on 1 April 2023, a press release from the World Bank; new witness statements from the claimant, his wife, and his mother-in-law, together with an

unsigned witness statement which we treat as at best a proof of evidence from his brother-in-law; a press report about the extortion of small businesses in South Africa dated 4 October 2023; an updating letter dated 8 November 2023 from the Essex Department of Gastroenterology, indicating that his wife's gastric troubles, having been in remission for some time, had flared up again; an undated and partially completed referral to integrated care for the wife; on 14 November 2023, a letter from the Department of Gastroenterology, noting that bowel cancer was not found and taking the claimant's wife off the cancer pathway; and two records of 111 calls on 4 and 30 December 2023 for her, the first for sinusitis and the second for back pain;

(5) **In 2024**: an incomplete letter (header and signature missing) concerning the child N and her developmental delay (this appears to be several years old as it only refers to N having one sister); a psychiatric report on the child N from Professor Tim Dalgleish MA MSc PhD FBPsS FMedSci CPsychol, noting that she had a sensory processing disorder, and experienced worry and anxiety when the claimant was absent, although not at a level which would now give rise to a diagnosis of Separation Anxiety Disorder, but that the child had 'a very close bond' with this claimant and would suffer 'significant separation anxiety' if she were to be separated permanently from him, which would affect her education and social relationships, already difficult because of the sensory processing disorder; and an orthodontic appointment for the child N for 2 May 2024 at the Royal London Hospital.

Evidence

38. At the oral hearing, we heard evidence from both the claimant and his wife. Both of them were cross-examined by Mr Wain, representing the Secretary of State. We read the witness statements of the wife's mother and brother (the latter unsigned), and of an Assistant Pastor from the claimant's church.

39. The Secretary of State accepts that the claimant's criminal offending was not sexually motivated, and that he has taken steps to understand and address his issues with alcohol.

40. We did not accept a number of assertions in the witness statements of the claimant and his wife as they were not corroborated by third party evidence that we would have expected to see. For instance, the claimant had stated that his wife had expressed suicidal intent and had been prescribed further anti-depressants on 12 September 2022. There was no mention of this matter in her medical records.

41. We found the claimant's wife to be a credible witness in her oral evidence. She did not embellish her answers and was particularly frank about her relationship with her family members. Where her evidence

departed from that of the claimant (e.g. as to the reasons why NS had moved to a new school), we preferred her evidence.

42. We found the claimant to be a credible witness on a number of matters, but on several occasions in his oral evidence we considered that he sought to exaggerate the situation and also gave answers which were designed to bolster his case.

43. We have accepted the following facts and matters. The claimant was born in South Africa on 14 November 1988. He came to the United Kingdom with his mother on 4 August 2004 at the age of 15. He has lived in the United Kingdom since then, more than half of his life. He obtained Indefinite Leave to Remain on 21 July 2006. He did not seek naturalisation. He does not have any immediate family members in South Africa, and has no circle of friends there.

44. The claimant was aware from his time living in South Africa that the economic situation was difficult. He was aware that highly skilled people had experienced difficulties in securing work. He had learned about the current state of South Africa when he carried out research as part of a business analysis course that he was doing: he was aware that unemployment was high, that there were problems with guns, and corruption was high.

45. Before his conviction, the claimant worked as a support worker for vulnerable children, and had obtained a number of qualifications relating to the catering industry. Before his imprisonment, the claimant embarked on a combined degree course in Social and Political Science with the Open University.

46. The claimant has committed no further offences, either during his licence period or subsequently. Since his release from prison, the claimant has been unable to work, but he has taken a number of online courses on business analysis, landscaping and gardening. We find that the claimant is someone who wishes to work, and would work if there were no bar to so doing.

47. The claimant is a practising Christian. He and his wife attend church regularly. This is confirmed by the Assistant Pastor's witness statement. The Assistant Pastor refers to support for the family being provided by his church when the claimant was in prison. The claimant explained that since his release from prison, the church provided him one-off financial support to enable him to pursue an online course in business analysis. There is no evidence to suggest that the church will be willing and/or able to provide any consistent or significant financial support to his wife if the claimant were to be deported.

48. The claimant married his wife in April 2012, several years before the index offence. The marriage is plainly a genuine one and seems to be based on mutual respect and affection. They have three children: NS,

who was born on 18 April 2012; SS, who was born on 22 November 2015; and FS, who was born on 18 December 2020. The Secretary of State accepts, as we do, that there is a genuine and subsisting family life between the claimant, his wife, and the children. The claimant is very involved in his children's daily lives. He plays with them. He takes SS to school every day, and helps both NS and SS with their school work. Each of the children has a close relationship with him.

49. The claimant's wife is 37 years old. She has a number of medical conditions. She has ulcerative colitis, which led to her admission to hospital in 2013 and three times in 2016. She has been on antidepressants for some time. They help her to sleep and cope with everyday life. Her daily dose of *Sertraline* was recently increased. The medical records state that the claimant's wife has a "stress-related problem". She has had a number of miscarriages, including on 24 September 2022 when the baby was 17 weeks old. On that occasion, she suffered a serious haemorrhage, resulting in her receiving a blood transfusion. This led to hospital admissions, and an iron infusion to correct her anaemia. Her anaemia requires the claimant's wife to have regular check-ups to manage her health: she cannot take regular medication to manage it, because of her colitis.

50. The claimant's wife told us that she suffers from joint pains, which she describes as arthritis (although there is no formal diagnosis of arthritis). She says that her joints are affected if she does a lot during the day. She says that she can only do a minimal amount of washing up, that doing laundry is very challenging, and that the claimant helps her with laundry and also with making tea and dinner. The housing association from whom she and the claimant rent their house have put in stair rails to assist her going up and down the stairs.

51. We accept that the claimant's wife does experience difficulties in carrying out day to day activities as a result of her various medical conditions. Her physical condition is not so severe, however, that she is currently entitled to a Personal Independence Payment (PIP): she has made several PIP applications, all of which have been refused. The claimant's wife has had a recent diagnosis of lupus, an autoimmune disease, and it is possible that this will impact negatively on her ability to carry out day to day activities consistently in the future.

52. The claimant's wife is clearly very reliant on the claimant not just for assistance with the children, and around the house, but also for emotional support. She described him in oral evidence as a 'shoulder to lean on', which we accept. In her witness statement, the claimant's wife stated that if he is deported 'we will not be able to cope mentally and physically because of my poor health. It was very hard for me when he was in prison. I sought counselling several times'.

53. We are satisfied that this is likely to be the case, based on his wife's previous experience during the claimant's imprisonment, as well as

her ongoing ill-health problems. The evidence we heard, and which we accept, is that the wife relies heavily on the claimant when she experiences periods of ill-health. With his support, she says that she can rest and focus on her treatment. Without him, the claimant's wife says that she does not think that she could care adequately for her family. We accept that this is a likely outcome. All of the evidence suggests that she is both physically and mentally fragile.

54. Earlier in her life, and before she had children, the claimant's wife worked in a number of other jobs: waitressing, and as a sales assistant in a department store. She has minimal qualifications, and received only D and E grades in her GCSE examinations.

55. Quite recently, the claimant's wife had been able to begin working at a branch of McDonalds. She told us that she did so because her youngest daughter had turned 3, and she was required to work if she wished to continue receiving her benefits. In addition to the salary that she received from her work, the claimant's wife received Universal Credit, and child benefit. She travelled to her work by bus.

56. The wife did not work in the kitchen at the restaurant, but cleaned the tables. She took breaks, and her health condition was known to her employers. She explained that she was in agony after her shifts had been worked. She worked one or two shifts weekly, less than she originally worked when she was provided with 3 shifts. Although the work was hard, the claimant's wife said that she found it enjoyable. The money also helped the family.

57. The claimant's wife told us that she would like to work from home. She said that if the claimant were to remain in the United Kingdom, and returned to work, she would also like to continue working but would do so at the weekends. We accept her evidence on these matters. She is plainly trying hard to make the best of a very difficult situation, given the claimant's inability to work, the threatened deportation, her physical and mental condition, and the everyday difficulties of raising three young children.

58. It is clear that the claimant's wife has been the target of some distressing comments on social media from members of the community where they used to live. Although in her witness statement, she stated that she had been threatened with violence there was no evidence put before this tribunal to corroborate that allegation and it was not found to be the case by the police. The police concluded that no offence of harassment was demonstrated.

59. In the circumstances, whilst we accept that the claimant's wife has been the subject of some unpleasant social media commentary, we do not find that she has been threatened with violence. We do accept, however, that she perceived there was such a threat, and that the family installed a RING doorbell to improve their sense of safety. We

also note that the family has recently moved from their previous location to a different part of Witham. In oral evidence, the claimant's wife told us that she had not experienced any difficulty in the new location or with her new neighbours.

60. With respect to support networks for his wife and children if the claimant were to be deported, we find that whilst some occasional financial support might be provided by members of his family, and physical support might be provided on occasion by his sister, his wife will not receive any significant or regular support from her own family.

61. We were told that the claimant has several family members living in the United Kingdom. His mother is a mental health nurse working in a prison in Scotland. His sister lives near to the claimant's home, with their stepfather. The stepfather is separated from their mother. The stepfather was recently made redundant from his job with the Royal Mail. He has a number of health conditions, but helped the claimant with his legal fees (using his redundancy lump sum) at an earlier stage of the proceedings. He has limited further ability to assist financially.

62. The claimant's sister is 38 years old and does not have her own family. The claimant's wife told us that she thinks that the claimant's sister would like to help more. The claimant's mother helped by accommodating the elder two children, N and S, whilst the claimant was in immigration detention following his release from prison.

63. The claimant's own mother and sister helped him financially after his release from prison. The claimant told the tribunal that his mother and sister were now unable to provide financial support as they had their own commitments: his mother supported his stepfather, and his sister did not earn enough to assist. The claimant's brother did not earn enough to provide financial support.

64. There is clearly a degree of connection and affection between the family members. We do not accept that the claimant's family will provide no financial or other assistance either to him if he were to be deported to South Africa, or to his family left behind after such deportation.

65. However, we accept that their financial support will Their previous financial support is likely, in our judgment, to be indicative of what they will do if he is deported. not be substantial and will only be occasional.

66. As for physical assistance to his wife and the children, this is unlikely to be substantial given where the claimant's mother lives now, and the health conditions affecting his stepfather. The claimant's sister, we find, will provide occasional support.

67. As for the wife's family, her mother lives in Chelmsford. Her mother did not give oral evidence, so there has been no opportunity to test the contents of her witness statement: we have given it such weight as it will bear. In her witness statement, the wife's mother says that she will be unable to provide support for her daughter and children if he is deported. She says that she lives "far away" from Witham. This is not correct. Witham is only 11 miles away, and takes about 20 minutes by taxi.

68. In an addendum statement, the wife's mother sought to explain what she meant by saying she lives 'far away': she uses public transport to travel to her daughter's home, which involves taking a bus and then a train, and a walk at either end. This can take her more than 2 hours. She states that she has angina, and that her symptoms are exacerbated by traveling and additional caregiving activities.

69. The wife's mother says that she is the primary caregiver for her son, who lives with her, and suffers from epileptic seizures requiring 'constant vigilance and care'. That conflicts with the oral evidence of the claimant's wife, who said that her brother's epilepsy is triggered by stress, and he is able to work. He has not had a fit since 2019 when their father died.

70. In the absence of cross-examination, we consider that the wife's mother may have been downplaying the assistance that she might be able or willing to provide to her daughter and the children if the claimant were to be deported, but we accept that it is unlikely that she will offer much support or frequent support. She did not help out when the claimant was in prison and does not appear to have helped out since his release.

71. The wife's brother, in his witness statement, asserted that because of his epilepsy it would be impossible for him to assist his sister with her childcare tasks. Again, in the absence of cross-examination, we give his statement such weight as we can. We have concluded that it is unlikely that he will offer much support, or frequent support, if the claimant is deported. He did not help out when the claimant was in prison and has not provided any assistance since his release.

72. The claimant's wife has another brother who lives near to their mother. He has six children, one of whom has additional needs and another has global delay. He works hard as a bus driver and is not really in a position to help her. We accept this evidence.

73. The claimant's wife discussed her friendships. She told us, and we accept, that she has a very limited group of friends now. Since the index offence, she has been guarded in her relationships. She did have one close friend, who was looking after the youngest child on the day of the hearing before us. We accept, however, that the friend cannot

provide regular assistance as she has a child with autism and ADHD who requires a lot of care.

74. With respect to the claimant's children, we considered the psychology reports regarding the eldest child, N. Dr Licht's report, dated 20 October 2019, concluded that N had symptoms of separation anxiety disorder associated with the time the claimant served in prison and moderate levels of anxiety and low mood as a consequence of the claimant facing deportation.

75. A school report from 11 November 2019, on the other hand, described N as making a positive start to life in year 3 at her junior school. She was stated to have a good attitude towards work and learning most of the time, but showed signs of worry and anxiety at times.

76. A recent report from Professor Tim Dalgleish, dated 29 January 2024, observed that although N reported anxiety about her father when he was absent, and engaged in reassurance seeking and checking behaviours, the range and extent of her current symptoms, and the level of disruption they caused to her activities of daily living, were not sufficient to merit a current diagnosis of Separation Anxiety Disorder. Professor Dalgleish found nothing in the evidence to invalidate the earlier conclusions by Dr Licht that in 2019, N was experiencing Separation Anxiety Disorder. In his professional opinion, if separated permanently from her father, N would again experience significant separation anxiety, and this would be likely to affect her daily living activities.

77. Other than these reports, we have no current medical or scholastic evidence to describe the circumstances of N. The historic evidence portrays a child who, at the age of 5, presented with delay in certain aspects of her development: concentration, attention, processing skills, practical reasoning skills and language.

78. N is now at secondary school. She has recently moved schools, and is currently enrolled in a school closer to where the family lives. We accept the wife's evidence that N moved schools primarily because of the better location, but also because she was experiencing some bullying at her previous school and the current school is better for her needs.

79. The claimant's wife told the tribunal that N is happier at her new school. We were told that N was on the Special Educational Needs register at the new school, but we have not seen any documentary evidence to corroborate this. We accept, however, that it is likely that she does have some learning difficulties: the claimant's wife describes N as needing to be told multiple times what to do; she struggles with daily activities and uses visible boards as aids. She needs help with making her breakfast, as well with her homework. She described N as getting frustrated easily.

80. With respect to the middle child, S (now 8 years old), the claimant's wife told the tribunal, and we accept, that if the claimant was deported, S would struggle a lot. Even now, when the claimant takes the dog out for a walk, S asks when he is coming back and panics when he is away. The claimant's wife told us that S was quite delayed in her schoolwork, particularly in mathematics.

81. With respect to the youngest child, F, the claimant's wife said that she was always asking for 'Daddy'. F has speech problems. She took time to settle at her nursery, and will be going to primary school next year. We accept the wife's evidence regarding both of the younger children.

82. The claimant in his Addendum Statement stated that S was called a 'monkey' at a Saturday dance class, by a child who attends her primary school. The claimant asserted that in the middle of March 2024, S was told by a child in her friendship group that she did not wish to play with her any longer because of her skin colour. He says that this was reported to the school. The claimant states that in March 2024, the eldest, N, was called a 'slave' by one of her schoolmates, and that this was reported to and investigated by the school. There is no evidence to corroborate any of these incidents: if these matters had been reported to the children's schools, we would have expected there to be some written evidence to support the allegation, such as an email from the school confirming that the matter had been reported.

83. We consider that the claimant was not entirely candid with the tribunal about why N had moved school: he said that it was because of the bullying at her school, but did not mention the fact that the new house was closer to the new school. Nevertheless, we do accept that there is a real possibility that the children will suffer racist abuse at some point before they reach adulthood as this kind of behaviour is, unfortunately, not uncommon.

The Legal Framework

84. There was no dispute between the parties as to relevant legal principles. Section 32(5) of the 2007 Act obliges the Secretary of State to make a deportation order for someone who is not British and has been sentenced to imprisonment for at least 12 months. This obligation does not apply where removal would breach a person's Convention rights: section 33.

85. Section 117C of the 2002 Act provides a statutory framework for considering the Convention rights of a foreign national criminal faced with deportation:

> "117C (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.

(1) 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.

(2) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying wife, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the wife or child would be unduly harsh.

(3) 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.

(4) 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."

86. Those who fall within section 117C (2) are 'medium offenders'. If neither Exception 1 nor Exception 2 avails them, it is settled that their circumstances must also be considered under subsection 117C(6).

87. Where insufficient weight has been given to the best interests of a foreign criminal's children, this has been found by the European Court of Human Rights to be capable of contravening Article 8 ECHR: see *Unuane v United Kingdom* [2021] 72 EHRR 24. In that case, the Strasbourg Court had found that the need for parental support was 'particularly acute'.

88. The meaning of 'unduly harsh' is now settled. The guidance given by the Upper Tribunal in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, was approved by the Supreme Court in *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53 at [27]:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

89. In *HA(Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, Underhill LJ observed at paragraph 56 that there was 'no reason in principle why cases of 'undue' harshness may not occur quite commonly'.

90. With respect to section 117(C)(6) – the 'very compelling circumstances' category, in relation to 'medium offenders' such as this claimant, we are guided by the opinion of Lord Hamblen JSC (with whom Lord Reed, Lord Leggatt, Lord Stephens and Lord Lloyd-Jones JJSC agreed) in the Supreme Court in *HA(Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 (20 July 2022), [2022] 1 WLR 3784 at [46]-[52].

91. At [51], Lord Hamblen stated that:

> "51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in Hesham Ali at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom* (2021) 72 EHRR 24 the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland* (2001) 33 EHRR 50 *and Üner v The Netherlands* (2006) 45 EHRR 14, summarised the relevant factors at paras 72-73 as comprising the following:
>
> "• the nature and seriousness of the offence committed by the applicant;
>
> • the length of the applicant's stay in the country from which he or she is to be expelled;
>
> • the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> • the nationalities of the various persons concerned;
>
> • the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> • whether the spouse knew about the offence at the time when he or she entered into a family relationship;

> • whether there are children of the marriage, and if so, their age; and
>
> • the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …
>
> • the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> • the solidity of social, cultural and family ties with the host country and with the country of destination."

92. We have had regard to that guidance in reaching our conclusions on the factual matrix in the present appeal.

Submissions

93. Mr David Ball, counsel for the claimant, contended that (i) there would be very significant obstacles to integration into South Africa for the claimant; (ii) it would be unduly harsh for his family if the claimant was deported; and (iii) there were in any event very compelling circumstances over and above Exceptions 1 and 2 in the present case, such that it would not be proportionate to deport him.

94. With respect to (i), Mr Ball submitted that the claimant had not lived in South Africa since he was a child; he has grown up, lived and worked in the United Kingdom; he has no family left in South Africa. There are significant levels of unemployment in South Africa, and it is a country that suffers from widespread corruption. There is also violence and discrimination against those perceived as foreigners. The claimant would be viewed as an outsider, and might be considered better off than some and thus at risk of kidnapping and extortion, which are prevalent in South Africa. It will take the claimant more than a reasonable period of time to establish himself in South Africa given the competition for jobs, and his lack of connections. He will also be without the love and support of his family.

95. With respect to (ii), Mr Ball submitted that there was compelling evidence that the claimant had positively rehabilitated himself, and his licence had expired many years ago. It was likely that N would suffer if the claimant was deported, as demonstrated by the suffering she endured when he went to prison. It is likely that she will suffer from significant separation anxiety if he is deported. If the claimant were to be deported, the children would be left with the claimant's wife as a single parent, and she suffers from a constellation of health problems. She is a long-term sufferer of ulcerative colitis, and has recently been diagnosed with lupus. She also suffers from menorrhagia (heavy periods). It is likely that her stress levels would increase, which could

trigger a relapse or flare ups of her health conditions, with eventual hospitalisation and the attendant risks to her young family.

96. With respect to (iii), Mr Ball submitted that this was a case where there were very compelling circumstances over and above Exceptions 1 and 2, such that deportation would be disproportionate. The need for parental support from both parents was “particularly acute”. The children are mixed race girls, who, if he is deported, are unlikely to have a meaningful relationship with their father as they grow up. If deported, he will not be able to play a proper role in their lives and help them to address racism or prejudice and other difficulties which they might encounter.

97. Since the offence, seven years have elapsed, and the claimant’s conduct has been impeccable. Furthermore, the time period has meant that the family have had longer to develop and stabilise as a unit. The claimant had addressed all the matters that caused concern to Judge O’Callaghan. There were exceptional circumstances which outweighed the public interest in deportation.

98. Mr Wain, for the Secretary of State, accepted that (i) it would be in the children’s best interests for the claimant to remain in the United Kingdom; (ii) it would be unduly harsh for his wife and his children to relocate with the claimant to South Africa; and (iii) N would find it difficult, and very upsetting, if the claimant were to be removed from the United Kingdom (the ‘stay’ scenario). A period of significant adjustment would be required both for N and for the wider family.

99. Mr Wain submitted, however, that it would not be *unduly* harsh for the claimant’s children if their father were to be deported. The period of significant adjustment that would be required for the children if he were to be deported was not such as to meet the high ‘unduly harsh’ threshold. At its highest, Professor Dalgleish’s evidence was that life for N in the period following the deportation would be uncomfortable and difficult.

100. The Secretary of State contended that the weight to be accorded to Professor Dalgleish’s evidence was limited as he did not have sight of N’s full medical records. His opinion was that there was no evidence of any current mental health problems in NS other than anxiety and concluded that N did not currently meet the diagnosis for Separation Anxiety Disorder.

101. With respect to Professor Dalgleish’s emphasis on N’s sensory processing disorder, the Secretary of State observed that this was not mentioned in the witness statements (or oral evidence) of the claimant or his wife. N’s use of ear defenders some of the time at school was not supported by any other evidence than that of Prof Dalgleish.

102. For the Secretary of State, Mr Wain argued that the claimant's wife may have exaggerated the difficulties that she experienced, in particular, when she stated that

> "My husband is the only one that has been looking after the children otherwise their lives would have been in danger, and I strongly believe that it would have led to Social Services intervention because I was more like a human vegetable".

103. Mr Wain contended that the claimant and his wife had exaggerated the threats to the wife's personal safety from people in the community. The police report stated that there were no direct threats to or targeting of the claimant's wife, and no criminal offences had taken place.

104. There were no very compelling circumstances in the case. The claimant would not face very significant obstacles to re-integration in South Africa. Whilst it was accepted that there is a significant rate of unemployment in South Africa, the claimant would be returning with skills and qualifications to help him find employment. He had not established that he would be at real risk of kidnapping or serious harm if he were to return there.

105. On an Article 8 analysis, there was a substantial public interest in the claimant's removal, and deportation was a proportionate response. There was a risk of further offending, especially if the claimant were to begin drinking alcohol again or his relationship with his wife were to break down.

106. Mr Wain reminded us of the public interest in deterrence, and in maintaining public confidence in the ability of the United Kingdom Government to expel foreign nationals who commit serious crimes in this country. He argued that the weight to be given to the public interest was not diminished by the passage of time since the index offence was committed.

Analysis

107. Addressing each of the issues identified above in turn, we consider what the evidence is and what conclusions we can draw from it.

i) Would there be very significant obstacles to the claimant's integration into South Africa if he was deported there?

108. Whilst there will undoubtedly be some obstacles to the claimant's integration into South Africa if he were to be deported, given that he has not lived there for over twenty years and has no family members living in South Africa, and does have a circle of friends living there, we do not consider that that those obstacles would be so great that they amounted to 'very significant obstacles' as required by section 117C(4) of the 2002 Act (the remaining elements of that section are

plainly satisfied: that is, the claimant has been lawfully resident in the United Kingdom for most of his life; and he is socially and culturally integrated in the United Kingdom).

109. The claimant was born in South Africa and lived there until he was 15. During that time, he was in education and will have developed some understanding of the life and culture of his fellow citizens. The claimant also has some understanding of the current situation in South Africa from his recent studies. The claimant speaks English, one of the main languages spoken in South Africa. He is intelligent, as reflected by some of the courses that he has undertaken. He is articulate, as was clear to the tribunal from his oral evidence. He is reflective and has a degree of self-knowledge, as reflected in his response to the index offence and his time in prison. He is also motivated to work.

110. Given the claimant's skill sets, we find that he would be able to settle in South Africa. Whilst we accept that there is a high level of unemployment in South Africa, we do not consider that it will be impossible for the claimant to obtain employment which will enable him to support himself. He will not have the advantage of family connections or insider status, but the positive attributes, described above, strongly indicate that he will have the skill sets and the resilience to make a life for himself in South Africa.

111. We note the evidence about the prevalence of violence and serious crime in South Africa. We do not doubt that this may present issues for the claimant, as it does for many other South African citizens. Nevertheless, we do not find that South Africa is a lawless society: there is a functioning police force and judiciary with a strong commitment to the rule of law. We do not accept that there is a risk in South Africa at a level which would require him to be granted international protection.

112. Although there is no doubt that the claimant will suffer considerably at being kept apart from his family, with whom he has very strong connections, he does not have any medical issues and there is no evidence to suggest that this will lead to any form of breakdown. If the effect on the claimant were the only issue, we would be minded to dismiss his appeal.

(ii) <u>Would it be unduly harsh for the claimant's family if he was to be deported to South Africa?</u>

113. We find that if the claimant were to be deported to South Africa, the circumstances facing and experienced by his wife and children in the United Kingdom would be extremely bleak. The claimant plays a significant role in the life of the family, and his relationships with his wife and with each of his children are strong. We are satisfied that the claimant's wife relies heavily on him, not only for day-to-day activities around the house and for shared care of their children, but for

considerable emotional support. It is he who steps in when her health deteriorates and she is in pain: his help allows her to recover and resume her maternal and domestic duties, but if he is removed, that support at times of crisis will be removed. Her physical condition is such that on her own, she would have great difficulties in performing the day-to-day activities necessary to maintain a household and would struggle greatly to care for the children as a lone parent.

114. Whilst the claimant's wife was able to manage when he was in prison, this was not easy for her. Furthermore, that was for a limited time period and required her to look after just two children. She would have three children to look after now, for many years and on her own. In addition, her physical condition appears to have worsened, and she experiences real difficulties in carrying out some basic functions such as laundry. It is likely that the claimant's wife's ability to carry out the daily activities for the family will lessen over time, given her medical conditions.

115. Accordingly, we do not consider that, in the claimant's absence, the physical support that his wife would need to manage the household and care for the children will be provided by family members, friends or members of the church. At best, we consider that family members would be able to provide limited and occasional support. Similarly, friends and members of the church. His wife would not have the financial means to buy in the necessary support, and the provision of support from social services (which we assume for these purposes will perform their duties under the law: see *BL(Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 357 at §53) is most unlikely to fill all of the gaps left by the absent claimant.

116. As for emotional support, this could be provided in part by the claimant from abroad, through regular phone calls or web-based video platforms such as *Zoom* or *Skype*. Nevertheless, this would not come close to substituting for the claimant's physical presence in the family unit. Issues will arise and incidents will happen during the course of an ordinary day where it will simply not be possible for the claimant to provide the necessary emotional support if he lives abroad. We were particularly struck by his wife's description of the support that the claimant provides to her.

117. We are gravely concerned that, if the claimant were to be deported, his wife will not be able to cope, and this will have a very negative effect on her own mental and possibly physical well-being. We consider that there is a real risk that his wife may have a breakdown: her mental health is fragile, and she is currently prescribed medication for her anxiety. This will only increase if the claimant is deported.

118. We find that the children are likely to suffer considerably from the absence of their father and the emotional and other support that he provides to them and would provide to them as they grow up. The

relationship that each of the children has with him is a close and loving one. N was described by Professor Dalgleish as having a 'very close bond' with the claimant, and we find that he also has a very close bond with the two younger children. These bonds will be shattered by his departure, and the use of *Zoom* or *Skype* and other long-distance communication methods, will not provide any substitute for the previous relationship that they now enjoy. This may become particularly acute as the children progress into adolescence and early adulthood.

119. We recognise that care must be taken with Professor Dalgleish's evidence as he did not have sight of N's full medical records. Nevertheless, he did meet with N personally and conducted an interview with her mother. We consider that his report was measured and carefully reasoned, and we give it significant weight.

120. We accept the evidence of Professor Dalgleish that N is likely to suffer significant separation anxiety if separated permanently from her father. There is a solid foundation for his opinion: N's sub-clinical levels of anxiety now, when her father is mostly present, and his acceptance of Dr Light's opinion that N did experience symptoms diagnostic of Separation Anxiety Disorder when the claimant was in prison.

121. We accept Professor Dalgleiesh's opinion that the risk that if N experiences significant separation anxiety following her father's deportation, that would affect negatively her daily living activities, including her education and social relationships, and is likely to impact on her well-being and progress. However, we reject Professor Dalgleish's opinion that N's education is particularly vulnerable due to sensory processing disorder, as there is no mention of this disorder in the more recent medical evidence or statements.

122. We find that all three children will suffer greatly from witnessing and experiencing the likely deterioration in their mother's well-being. We also consider that there is a significant risk that if the claimant's wife fails to cope, during a crisis period in her health, the children may be taken into care and the remaining family unit broken apart.

123. The circumstances of this case, therefore, are markedly different from the ordinary situation described by Sedley LJ in *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 at §27:

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does".

In the instant case, the consequence of deporting the claimant may well be the permanent break-up of the family he leaves behind. That would be devastating.

124. Overall, we are satisfied that on the particular facts of this case, the deportation of the claimant to South Africa would be unduly harsh for all members of his family. A strong family unit will be divided, with at least very serious consequences for each of the family members who remain in the United Kingdom, and the potential of devastating family break up if and when his wife becomes unwell again.

(iii) Do compelling circumstances exist such as to render deportation disproportionate under Article 8

125. Given our findings at (ii) above, it is not necessary for us to make a finding on (iii). Nevertheless, for completeness, we record our conclusion that the factual matrix in this appeal is such that deportation would be disproportionate under Article 8 ECHR.

126. Whilst we accept that there is a very strong public interest in deporting a foreign criminal, there are several specific factors in this case which lessen that interest at this point in time. First, it seems clear that the claimant is now a person of good character, and the index offence for which he has rightly been punished appears to have been out of character. This is borne out by the various probation and prison reports that we have seen.

127. Second, as the Secretary of State accepts, the claimant has taken steps to address the concerns expressed in the O'Callaghan judgment. Third, the claimant is well past his licence period and has not only refrained from committing further offences but has been successful in building a strong family life and has sought to improve himself educationally.

128. We therefore dismiss the Secretary of State's appeal against the Khan decision and uphold the decision of the First-tier Tribunal.

Notice of Decision

129. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law. We do not set aside the decision of the First-tier Tribunal but order that it shall stand.

Signed: Date: 19/07/2024

The Hon. Mr Justice Sheldon
sitting as a Judge of the Upper Tribunal