Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/02501/2013**

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court	**Determination Promulgated**
On 6 and 20 August 2014	**On 29 August 2014**

Before

Upper Tribunal Judge Southern
Upper Tribunal Judge Coker

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NASEER AHMED

Respondent

Representation:

For the Appellant: Mr N. Smart, Senior Home Office Presenting Officer instructed
For the Respondent: Mr H. Bashir (at resumed hearing on 20 August 2014 only)

Determination and Reasons

1. This determination is in two parts. Part 1, apart from a correction in respect of the appellant's date of release from custody, is in the form already served upon the parties in respect of the Tribunal's decision following the hearing on 6 August 2014 that the determination of the First-tier Tribunal disclosed an error of law such as to require that it be set aside and the decision remade. For that purpose, the hearing was reconvened on 19 August 2014. Part 2 is the redetermination of the appeal.

Part 1: Decision on error of law.

2. The Secretary of State, who was the respondent before the First-tier Tribunal, has been granted permission to appeal against the decision of First-tier Tribunal Judge Law, sitting with a non-legal member of that tribunal. The panel, by a determination promulgated on 27 February 2014, allowed Mr Ahmed's appeal against a deportation order made by the Secretary of State pursuant to s32 of the UK Borders Act 2007 as a consequence of his conviction before the Birmingham Crown Court on 26 April 2010 of offences including causing death by dangerous driving, possession a controlled drug of class B, and driving while unfit through drink or drugs.. For those offences he was sentenced to a total of seven years and four months imprisonment. He has now served that sentence and was released on bail from immigration detention on 18 July 2014.

3. That means, of course, that Mr Ahmed is the respondent before the Upper Tribunal and it is the Secretary of State that is the appellant. But for ease of reference, as we shall be reproducing extracts from the determination of the First-tier Tribunal, we shall refer the parties as they were below so that references to the appellant are to Mr Ahmed and references to the respondent are to The Secretary of State.

4. Although the appellant was represented before the First-tier Tribunal, he appeared before us unrepresented, explaining that he had gone to see his solicitor the day before to tell him not to come. He had dis-instructed his solicitor because he was expensive and the applicant had discovered on the internet that it was now possible to instruct counsel directly, without paying for a solicitor as well. He said also that his father had recommended an alternative representative. On that basis he applied for an adjournment so that he could arrange for fresh representation.

5. The appellant has known since April 2014, when permission to appeal was granted, that a hearing would follow before the Upper Tribunal. He was released on bail on 18 July and has had adequate notice of this hearing yet it was just the day before the hearing he told his solicitors not to represent him at this hearing, but he has taken no steps at all to instruct a fresh representative. We refused the application for an adjournment, explained to the appellant what the purpose and format of the hearing would be and ensured that he understood the issues that we would have to address, making clear that we were first concerned with the question of whether, for the reasons set out in the respondent's grounds and developed by Mr Smart in his submissions, the determination disclosed an error of law such as to require the decision to be set aside.

6. There is no doubt that the offences committed by the appellant were very serious indeed. The sentencing remarks of the judge who sentenced the appellant to a total of 88 months imprisonment are set

out in the determination of the First-tier Tribunal. The Crown Court Judge said:

> "Some years ago you were convicted of driving with excess alcohol [3 December 1998]. Therefore on the day that I am concerned with, this was not the first time you had done that. It made what happened even more serious. You were not a qualified driver who had passed a test. You took a drunken and irrational decision to drive a large vehicle. You were very drunk indeed. That is evidenced not only by the reading two hours later but by that which was observed by the police and indeed admitted to by you to the probation officer.
>
> It may be that you were also affected by cannabis. It does not matter. The net effect was that you were in absolutely no state to drive a vehicle. You then proceeded to drive with excess speed and in an erratic and dangerous fashion. The road was busy. There were people about. You went round an island the wrong way confronting wholly innocent people in a Volkswagen who, despite the lady driver's attempt to avoid you, resulted in a collision. Mercifully and it is only a matter of chance, they were not severely injured or worse.
>
> You went on to drive on the wrong side of the road along a dual carriageway. You were driving at excessive speed, ignoring red traffic lights. You hit a Skoda vehicle, again driven by a wholly innocent person, who, as a result of which, together with the occupants in his car, were injured. You then ploughed on into a Renault which was driven by a lovely man, a family man, a good father, a sportsman, a good husband and a good son and your terrible driving resulted in his death when your car crashed the driver's side of his car. He is being completely responsible, taking all the precautions that were available to him, having a seatbelt; it would not help him against the stupid, dangerous and wicked driving by you. You then tried to run away. Fortunately there were members of the public who behaved responsibly and the police, helped by them, were able to detain you."

7. The judge then summarised the reasons given by the respondent for rejecting the submissions advanced on the appellant's behalf to the effect that he fell within one of the exceptions to liability for automatic deportation. In particular, the respondent accepted that deportation would bring about an interference with rights protected by Article 8 of the ECHR; that the appellant had five children, four of whom were British Citizens and that the appellant maintained relationships with other family members in the United Kingdom and that he himself had lived in the United Kingdom since he arrived aged just a few months old. The respondent recognised that the best interests of the children may lie in the appellant remaining in the United Kingdom so that they could continue their relationships with him but the respondent considered that, in the light of the seriousness of the offence, it would be a proportionate interference with that family life to proceed with the appellant's deportation.

8. The judge then summarised the broad range of evidence, both written and oral, offered on the appellant's behalf. Again, that is set out in some detail in the determination but for present purposes the following summary will suffice.

9. The appellant himself gave oral evidence, adopting and confirming everything set out in his witness statement. He explained that he married his wife in Pakistan in 1994, although she had not moved to the United Kingdom until 2000. He said that his wife could not accept the possibility that he might have to leave and return to Pakistan. He said he was genuinely sorry for the mistakes he had made in the past and was not the person he used to be.

10. The appellant's wife, who although living in this country for 14 years needed the assistance of an Urdu interpreter to give oral evidence, said that while the appellant had been in prison she received help from family members. She had maintained a good relationship with the appellant, visiting him regularly in prison. It had been hard to manage without him, especially as one of her children was ill and she had health problems as well.

11. The appellant's parents also both gave evidence with the assistance of an interpreter. While his father did all he could to assist his daughter in law while his son was in prison, he was in receipt of kidney dialysis following a transplant in 2010. The appellant's mother said that the appellant's wife had to look after the children all by herself, although the appellant's nephew gave evidence before the judge to the effect that while the appellant was in prison he had helped by doing the shopping and looking after the children when needed, although as he had a family of his own there was only so much he could do.

12. Next, having summarised the submissions advanced by both parties, the judge directed himself as to the legal framework. Since a correct understanding of this is at the heart of the challenge to the determination now pursued by the respondent, we reproduce that here:

13. Sections 32 and 33 of the UK Borders Act 2007 provide, so far as material:

> "32. *Automatic deportation*
>
> (1) In this section "foreign criminal" means a person—
>
> (a) who is not a British citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> ...
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ...'

33. *Exceptions*

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

…

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention."

14. The relevant Immigration Rules are, so far as relevant, as follows:

362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

…

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only

be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

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 not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

15. Article 8 of the ECHR provides:

"**Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. The judge then set out the approach he took to his assessment of the evidence. At para 42 of his determination he said this, the emphasis being added by the judge:

> "This brings us back to the statement at the end of paragraph 398, namely that "the Secretary of State in assessing that claim will consider whether paragraphs 399 or 399A applies and, **if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."** [our emphasis]. We regard the question of whether exceptional circumstances exist as being encompassed in the issues which we would have to consider under Article 8 itself. However, to preserve the two stage approach, we have first of all asked ourselves whether there are exceptional circumstances in this case that outweigh the public interest in deporting the appellant."

17. Before embarking upon his search for the presence of exceptional circumstances such as to outweigh the public interest in the appellant's deportation the judge made a series of findings of fact:

    a. The appellant's marriage is genuine and continues to subsist, notwithstanding the appellant's imprisonment;
    b. The appellant has five children, four of whom are British citizens. The eldest, who was born in Pakistan, has now been living in the United Kingdom for 13 years;
    c. It is in the best interest of the children that the appellant should remain in the United Kingdom so that their relationship with him can be maintained;
    d. The appellant has made good progress in prison and had shown real remorse. In particular there was a "very good report from the carpentry teacher";
    e. The appellant does not have an alcohol problem;
    f. If the appellant were deported, his wife and children would remain in the United Kingdom.

    Further, the judge recorded a finding that:

> "Although the respondent suggests in the refusal letter that the appellant's wife could manage without the appellant because of the wider family support available, the evidence at the hearing did not support that view."

    That is not altogether easy to follow, given evidence of assistance provided, in particular, by the nephew who gave evidence about having

helped the appellant's wife by doing the shopping and looking after the children when needed.

18. The key findings are set out between paras 58 to 60 of the determination. At para 58 the judge said:

> "In the ordinary run of cases, if there is such a thing, a foreign criminal sentenced to 7 years and four months imprisonment would be unlikely to be able to resist deportation. In most cases, that would be the proper reflection of society's revulsion and a stark deterrent to others. We have asked ourselves why that should not be the outcome in this case., an outcome which can only be avoided if there are exceptional circumstances outweighing the respondent's legitimate aims."

19. In our judgment it is at this point that the judge fell into legal error. At para 59 the judge identified the maters he considered to constitute exceptional circumstances such as to outweigh the public interest in deportation in this case. Those can be summarised as follows:

    a. Enormous disruption would be cause to the appellant's children if he were deported, whether they give up their lives in the United Kingdom to accompany him to Pakistan or whether they remain here without him;
    b. The best interests of the children "point to the appellant being allowed to remain";
    c. The appellant has himself lived in the United Kingdom since he was six months old so that "he would find it difficult now to readjust to life in Pakistan";
    d. Deportation of the appellant would have an adverse effect on other family members, "chiefly his wife and parents" and because of financial constraints, visits to Pakistan would be infrequent;
    e. There is a low risk of the appellant reoffending.

    Which led the judge to conclude:

> "Accordingly, for all these reasons, we have decided that these exceptional circumstances do outweigh the public interest in deporting the appellant. We find that the applicant is entitled to succeed under paragraph 398 of the immigration rules."

20. The difficulty with that reasoning is that the judge had lost sight of the legal framework that he had identified earlier in his determination. The "exceptional circumstances" he identified were not exceptional at all and it was not, rationally, open to him to find that they were exceptional. Subject to what we say below, they were all matters encompassed by paras 399 or 399A, but, because the appellant had committed an offence for which he was sentenced to more than four years imprisonment he did not stand to benefit from having established that he fell within those provisions. That is because, given the seriousness of the crimes committed, the public interest in his deportation was much more cogent and compelling so that something

more than falling within para 399 or 399A was required in order to outweigh the public interest. It is because of that the circumstances for such a foreign criminal need to be not just such as to fall within paras 399 or 399A but they need to be exceptional. Nothing less than that will do.

21. Put another way, the judge erred in law in setting aside the applicable legal framework and so leaving out of account the respondent's view of where the public interest lie in respect of those foreign criminals who have committed particularly serious crimes. That is not just the respondent's view. It reflects established Strasberg jurisprudence. By leaving that out of account, the judge has started the exercise of striking a balance between the competing interests in play from the wrong point. The starting point is a compelling presumption in favour of deportation, significantly more pressing than is the case for those sentenced to less than four years imprisonment. That is why something more than the factors identified in paras 399 and 399A will be required for such foreign criminals to avoid deportation.

22. The qualification expressed above is that the finding that the appellant has no alcohol problem and that he represents only a low risk of reoffending are not matters falling within para 399 or 399A but they are not capable of amounting to exceptional circumstances. There is nothing exceptional about a man serving a lengthy prison sentence having avoided alcohol and asserting an intention to maintain that position after release. More difficulty still arises from reliance of a low risk of reoffending because that discloses a fundamental misunderstanding of the statutory scheme applicable to foreign criminals.

23. The appellant is someone whose deportation is conducive to the public good because he is a foreign criminal in respect of whom the respondent must make a deportation order unless an exception applies, which the respondent found it did not. The fact that he is said to represent a low risk of further offending does not in any way at all reduce the importance or cogency of the public interest in his deportation. He faced deportation because of the offences that he committed on this occasion and not because those offences were part of a series of offences possibly to be committed in the future. He does not cease to be a foreign criminal because there is no reason to believe that he will reoffend in future.

24. For these reasons we are satisfied that the judge made an error of law and his decision cannot stand. The decision to allow the appeal under the immigration rules will be set aside and be remade afresh. There is no need, though, to disturb his findings of fact, which to a large extent go unchallenged by the respondent in any event.

25. The judge also erred in law in going on to carry out a separate freestanding assessment of the family life claim under Article 8 of the

ECHR. That is because, as is established by MF and the line of cases that followed it, the provisions of the rules in respect of assessment of the article 8 claim of a foreign criminal is a complete code, assuming, of course, it is correctly applied: *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192.

26. In any event, as the judge made clear at para 70 of the determination, the reasons for allowing the appeal, quite separately, on human rights grounds were the same, legally flawed, reasons set out in respect of the decision to allow the appeal under the rules. Therefore, that decision will be set aside also.

27. Having informed the parties that the decision to allow the appeal would be set aside and the reasons for that being necessary we indicated to the appellant that, in accordance with the directions that had been sent out with the notice of the grant of permission to appeal, the expectation was that we would proceed immediately to re-make the decision. The appellant renewed his application for an adjournment of about two weeks in order to instruct fresh representatives.

28. Having regard to the fact that the effect of s.19 of the Immigration Act 2014 is to insert a new s117 into the Nationality, Immigration and Asylum Act 2002, with effect from 28 July 2014, the remaking of the decision in this appeal will now be informed by those provisions. It was plain that the appellant had no understanding of this and was not equipped to deal with that issue and so we granted his application for a short adjournment so that he could seek legal advice, whether or not that led to arrangements for him to be represented at the resumed hearing.

29. We advised the parties also that the resumed hearing would proceed at the same venue, the Birmingham Magistrates Court, at 10.00 a.m. on 20 August 2014. The appellant is aware that the hearing will proceed on that date whether or not he has arranged to be represented.

Part 2: Redetermination of the appeal

30. The appellant, who was unrepresented at the earlier hearing, was now represented by Mr Bashir. Without objection from Mr Smart, who appeared for the respondent at both of the hearings before the Upper Tribunal, Mr Bashir submitted witness statements from both the appellant and his wife. However, he acknowledged that they added nothing of any real significance to the facts already established and that it was not necessary for the Upper Tribunal to receive any further oral evidence.

31. Mr Bashir opened his submissions with an acknowledgement that the decision now at large before the Upper Tribunal is to be informed by reference to the matters set out in section 117A-D of the Nationality, Immigration and Asylum Act 2002, inserted by s19 of the Immigration

Act 2014. He recognised also that there has been an amendment to the immigration rules applicable to deportation issues.

32. Relying upon the findings of fact made by the First-tier Tribunal Judge together with the undisputed facts as recorded in the respondent's letter setting out the reasons for refusing to revoke the deportation order, Mr Bashir submitted that the following factors, when considered together, constituted the very compelling circumstances demanded by s117C(6) of the Nationality, Immigration and Asylum Act 2002 for a foreign criminal who has been sentenced to a period of imprisonment of at least four years to establish that the public interest in his deportation has been outweighed:

    a. The appellant arrived in the United Kingdom aged just 3 months old and has remained here since then, making only occasional visits to Pakistan, the last being in 2000, the year in which his wife, to whom he was married in Pakistan in 1994, came to join him in the United Kingdom;
    b. He has, therefore, been resident in the United Kingdom for 39 years and his wife for 14 years;
    c. They have 5 children, 1 of whom has special needs and 4 of whom are British citizens. The respondent has accepted that it is in the best interests of the children for the appellant, their father, to remain here so that the family unit remains intact and that it is not reasonable to expect the appellants children or his wife to accompany him to Pakistan, so that deportation will break up the family;
    d. It would be unduly harsh for the children to be deprived of their father's presence within the family unit in the United Kingdom;
    e. The appellant has elderly parents in the United Kingdom;
    f. The appellant is fully integrated into the United Kingdom and should be treated, effectively, as if he were a British citizen;
    g. The appellant would have no family support in Pakistan and would find it difficult to find accommodation and a job so that this would represent very significant obstacles to his integration there;

33. Mr Smart, for the respondent, submitted that these factors, properly considered, could not be considered to amount to the very compelling circumstances required for the appellant to avoid deportation. The appellant speaks the local language, has visited Pakistan on a number of occasions and has renewed his Pakistani passport despite living here for a long period of time. He holds a current passport and his continuing links with his country of nationality are indicated by his choosing to marry a Pakistani national who still speaks little English, despite having lived here for 14 years. Nothing had been said about whether his wife had relatives in Pakistan who might be able to assist the appellant upon return, other than that her parents were deceased. The matters advanced, in Mr Smart's submission, did not amount to

very significant obstacles to the appellant's integration on return to Pakistan.

34. The respondent accepts that one of the appellant's children is receiving special needs tuition but there is no evidence that the presence of the appellant has any positive impact upon that or, indeed, that his absence during the four years he spent in prison had any negative impact. The evidence did not, he submitted, demonstrate that the effect upon the children would be unduly harsh.

35. Mr Smart submitted that, in any event, that was not the test applicable so that even if the tribunal were to accept what was asserted by the appellant, as he is a foreign criminal who has been sentenced to more than 4 years imprisonment, something more had to be shown than significant obstacles to integration in Pakistan or that the effect of separation on his children or wife would be unduly harsh because that was the effect of s.117C of the 2002 Act.

36. Before considering those submissions it is necessary to set out the new legal framework now applicable to the remaking of the decision.

37. So far as is relevant s117 of the 2002 Act provides as follows:

> 117A Application of this Part
>
> . (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> . (a) breaches a person's right to respect for private and family life under Article 8, and
>
> . (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> . (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> . (a) …
>
> . (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> . (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B …
>
> 117C Article 8: additional considerations in cases involving foreign criminals
>
> . (1) The deportation of foreign criminals is in the public interest.
>
> . (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.
>
> 117D Interpretation of this Part
>
> (1) …
>
> (2) In this Part, "foreign criminal" means a person—
>
> (a) who is not a British citizen,
>
> (b) who has been convicted in the United Kingdom of an offence, and
>
> (c) who—
>
> (i) has been sentenced to a period of imprisonment of at least 12 months,

38. It is clear from this that a structured approach is needed in respect of a foreign criminal who has been sentenced to more than 4 years imprisonment.

39. The starting point is to recognise that a foreign criminal who has been sentenced to more than 4 years imprisonment cannot avoid deportation by demonstrating that his circumstances fall within Exception 1 or 2. Next, as s.117C(6) provides that for such a person the public interest requires deportation unless there are very compelling circumstances

over and above those described in Exceptions 1 and 2, it is plain that there must be something more than is required to demonstrate that the appellant would have fallen within one of those Exceptions if that had been open to him. Therefore, it is helpful to look first at upon what factors the appellant relies to establish that he would have fallen within Exceptions 1 or 2 had those been open to him and then ask whether he had anything to say, in addition, that amount to very compelling circumstances.

40. But, in seeking to establish those very compelling circumstances the appellant cannot rely upon factors he points to in order to establish that he falls within Exceptions 1 or 2 because he would not then have identified very compelling circumstances *over and above* those described in those Exceptions.

41. Applying this approach to the factors identified by Mr Bashir in his submissions, the respondent accepts that the appellant meets the first 2 requirements of Exception 1 because he has been lawfully resident here for most of his life and is plainly fully integrated. Thus, to fall within Exception 1 the appellant must demonstrate that there would be "very significant obstacles" to his integration into Pakistan. Mr Bashir submits that is established because the appellant has not visited Pakistan since 2000 and he has no family network of support there. He would find it difficult to find employment and accommodation, especially as he does not have significant financial resources to assist in doing so.

42. We do not doubt that the appellant would find it challenging to establish himself in Pakistan but we are unable to accept that to amount to very significant obstacles to his integration. The requirement of primary legislation that there be not just significant obstacles but very significant obstacles is not to be overlooked. The only factor that arguably stands out from what might be thought to be the ordinary is the fact that this appellant has lived here for 39 years, having arrived as a baby. But it is unambiguously clear that he has chosen to retain cultural and other ties with his country of nationality, including choosing a wife who remained in Pakistan for 6 years after their marriage and who continues to speak Urdu as her main language which suggests that the language must have remained predominant in the appellant's home life.

43. To fall within Exception 2 the appellant needs to demonstrate, as indeed he has, that he has a genuine and subsisting relationship with his wife and children. But he must also show that the effect upon them of his deportation would be unduly harsh. In our judgement, that has not been established.

44. The requirement that the effect be *unduly* harsh imports reference to the seriousness of the offence. That much is plain from the fact that, unlike a foreign criminal sentenced to more than 12 months imprisonment but less than 4 years, a foreign criminal sentenced to more than 4 years imprisonment does not have access to protection

from deportation either by looking to para 399 of the immigration rules or to Exception 1 of s117C unless able to show very compelling circumstances over and above the fact that deportation would have an unduly harsh effect upon the appellant's wife and children. There is no evidence before us that the children suffered any particular harm from being separated from him while he served his prison sentence, although we do not doubt that the children and his wife missed him during his absence. They maintained contact by visits and, no doubt, other means of communication and that can continue should the appellant return to Pakistan.

45. Mr Bashir submitted that the combination of his length of residence, that four of the children are British and one has spent most of his life in the UK and that his wife has been here for fourteen years are sufficient factors to render the effect of his deportation on the children/wife as unduly harsh.

46. The evidence before us, considered in the light of Mr Bashir' submissions, does not in our judgement establish, given the absence of anything to support the assertion to that effect and the public interest in the appellant's deportation, that the effect upon his wife and children would be unduly harsh.

47. In any event, it is plain that this appeal falls to be dismissed. That is because, even if the appellant was able to establish that he would face very significant obstacles to integration in Pakistan and/or that the effect upon his children would be unduly harsh he would then need to go on to show something more than that. The effect of s117C(6) is that he needs to show that there are very compelling circumstances over and above what he has relied upon to establish that he would have fallen within Exceptions 1 or 2 had they been open to him .

48. It seems to us that means that there must be factors not accommodated within those Exceptions, or in addition to what is required to bring him within them, that speak cogently against deportation. In this case the appellant can point to the fact that he has elderly parents living in the United Kingdom. But if separation from his wife and minor children, whose bests interest are served by him remaining here, is not sufficient to outweigh the public interest in deportation then plainly disruption of his relationship with his parents will not either. We invited Mr Bashir to identify what factors in particular he relied upon to establish very compelling circumstances over and above that relied upon to qualify for Exception 1 or 2. He said that as the appellant has been here for 39 years since he was 3 months old he should be treated, effectively, as a British citizen. We are unable to accept that submission. The length of his residence has already been taken regard of within the statutory framework we have discussed. The appellant is not a British citizen. That may well be because he began to commit criminal offences in 1998, a Community Serve Order being imposed for offences of driving a motor vehicle with excess alcohol and

while disqualified and having no insurance. Nor do we accept these matters taken together with the mental upset that he may suffer on being separated from his family, including his elderly parents, combined with the difficulties of establishing himself in Pakistan are of sufficient import to amount to very compelling circumstances.

49. For all these reasons we are satisfied that the making of the deportation order was lawful and that there will be no infringement of any rights protected by article 8 of the ECHR as a consequence. For the avoidance of any possible doubt, we have looked at everything advanced on the appellant's behalf and it is plain that the same outcome would be delivered by an assessment of the appellant's article 8 claim even outside the added focus now provided by s117 because the appellant's deportation is plainly a proportionate response to the serious crimes he has committed. There are no factors not fully accommodated by the statutory framework against which that claim now falls to be assessed that provide a basis for concluding otherwise.

50. For the avoidance of doubt we have also considered the relevance of the changes to the immigration rules that accompanied the coming into force of s19 Immigration Act 2014. To a large extent these reflect the legislative change introduced by s.19 of the Immigration Act 2014. Where there is any tension between those amended rules and the provisions of s117 of the 2002 Act, for example as might be detected in a comparison of paragraph 399(a)(ii)(a) and s.117C(5), then the primary legislation would prevail as that cannot be displaced by an immigration rule. However, nothing of relevance to this appeal arises from an examination of the amended immigration rules which no doubt explains why neither representative addressed them in submissions.

Summary of decision

51. The First-tier Tribunal made an error of law and their decision to allow the appeal is set aside.

52. We substitute a fresh decision to dismiss the appeal.

Signed

Date: 21 August 2014

Upper Tribunal Judge Southern