Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00245/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2018	**On 13 December 2018**

Before

THE HONOURABLE LORD MATTHEWS
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AQ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Blundell, Counsel, instructed by the Government Legal Department
For the Respondent: Ms J Bond, Counsel, instructed by Freemans Solicitors

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/291)
We make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant in this decision. This direction applies to, amongst others, all

parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. The Appellant is a citizen of Nigeria. Her date of birth is 16 December 1962. We have anonymised the Appellant to protect the identity of her grandchild, a minor, and because of the sensitive nature of the evidence relating to one of the witnesses.

2. On 23 November 2003 the Appellant was convicted with three others of two counts on a five-count indictment. She was convicted of conspiracy to supply and possession with intent to supply crack cocaine. One of the co-defendants is the father of her youngest son. She was sentenced to 15 years imprisonment. She was released on licence on 2 December 2010. She remained in immigration detention until February 2011. Her licence expired on 2 August 2018.

3. On 17 January 2013 the Respondent made a deportation order pursuant to Section 32(5) of the UK Borders Act 1971. The Appellant appealed. There has been much litigation culminating in a decision of the Court of Appeal: Secretary of State for the Home Department v AQ (Nigeria) & Ors [2015] EWCA Civ 250, [2015] Imm AR 990. Following this, the Appellant's appeal was allowed by First-tier Tribunal (FTT) Judge Newberry in a decision that was promulgated on 16 February 2016. This decision was set aside by Upper Tribunal Judge Martin, who found that Judge Newberry had materially erred. The matter came before us to re-hear the matter afresh.

4. We had before us an Appellant's bundle comprising 100 pages. It includes witness statements from the Appellant, her son (O), her daughter (T), a pastor (KA) and Ms Williams (the Appellant's offender manager). But for T, they attended the hearing and gave oral evidence and signed and dated their witness statements where necessary. T's statement remained unsigned and undated. The Secretary of State relied on a bundle of authorities, the original Respondent's bundle and a supplementary bundle. We had before us skeleton arguments from both representatives.

5. The Appellant was granted entry clearance as a visitor on 28 January 1988 for three months. She arrived here on 4 February that year. On 13 April 1988 she was granted an extension to 4 August 1988. Her eldest daughter, D, was born on 19 April 1988. On 23 November 1988 she made an application through her solicitors for further leave to remain on the basis of her marriage to a British citizen. This application was refused on 28 December 1989. She did not have a right of appeal against this decision. On 11 October 1991 the Appellant's second daughter, T, was born.

6. The Appellant next came to light when an application was made on her behalf on 14 February 1994 on the basis of her marriage to a British citizen. However, the Secretary of State's view was that there was no evidence that she had separated from her former spouse or that her current husband had separated from his spouse. On 21 May 1999 she applied for indefinite leave to remain with her two daughters. On 20 December 1999 D was naturalised as a British citizen. On 12 June 2000 the Appellant and T were granted indefinite leave to remain in the UK. On 10 October 2000 O was

born. On 29 April 2003 she applied for naturalisation as a British citizen. This was refused on 27 April 2004 because of her criminality.

7. The salient parts of the judge's sentencing remarks can be found in the original Respondent's bundle and read as follows:

> "You have all been convicted of a most serious offence. Those who sit in these courts, as I do, day after day, see the havoc and destruction caused by drugs on young people who come before these courts. It is a major source of crime and it is a major cause of crime and I have no doubt that the four of you were prepared to peddle drugs to convert cocaine salts into crack cocaine, which is the most addictive form of drug, entirely for gain and to your own advantage, without a moment's thought of the destruction you are causing to other people and other people's families.
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> I have read with care the letters I have received and no-one could be other than moved by the letters that have been received from [AQ]'s children. They are suffering the very deepest distress, as I suspect are all the dependants and families of the four of you; but not a moment's thought was given to that before embarking on this criminal activity.
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> I am dealing with a total of something of the order of twelve kilos of cocaine of high purity and high value. It is quite clear to me that this was a well-organised arrangement which would have continued had it not been stopped by the timely search by the police at the time when they did. You must appreciate, all of you, as must anyone else who deals in this sort of crime and these sort of drugs, that society takes the most serious view and you must face a term of imprisonment of considerable length.
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> As between the four of you, I am prepared to make an exception to a certain extent so far as Mr Ogunyemi is concerned. I am prepared to accept that he was not in the middle of this conspiracy, but was collecting further supplies which would have gone into the kitchen at Seabut Road to make yet more crack cocaine and more suffering.
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> Apart from that, I am not able to distinguish between you. Let me say at once that I have not been helped by the various versions that have been given of the facts. It is difficult to detect precisely where each one of you stood and I have come to the conclusion that, so far as the other three of you are concerned, you are all equally guilty and equally involved.
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> I am asked to be as merciful as possible and I will attempt to do that, consistent with my public duty; but it seems to me that the very least sentence which I can pass in respect of this conspiracy in respect of [AQ], Mr Ogunsola Oteniola and Mr Adebayo is a sentence of fifteen years' imprisonment. In respect of you, Mr Ogunyemi, the sentence will be one of twelve years' imprisonment.
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> I have considered the issue of a recommendation for deportation and I am quite satisfied that the potential detriment to this country by your presence is considerable. I have considered the question of hardship in relation to your dependants and families and apart from you, [AQ], I can find no justification for allowing you to remain. So, at the end of your sentence, in respect of Mr Ogunsola, Mr Adebayo and Mr Ogunyemi, in each of your cases I will make a recommendation for deportation. I do not make that recommendation in the case

> of [AQ], largely because you clearly have children who in due course will depend upon you."

The Appellant's evidence

8. The Appellant's evidence is contained in her witness statement which she adopted as her evidence-in-chief. It can be summarised. She obtained a BA (Hons) in Sociology and Education Needs after her release from prison. She has three children and one grandchild, all of whom are British citizens and here in the UK. Her daughter, T has a son who was born on 21 November 2008.

9. The Appellant admits her actions have been wrong. She is remorseful that they have negatively impacted on her family. She has since strived to make the life of her family easier and more joyful. She has worked hard to rebuild and strengthen relationships with her children and she is grateful to them for their generosity, patience and forgiveness. She is involved in the process of managing difficulties that occur in their lives and she is well-informed about their personal lives and leisure activities. She has worked with the church since her release as a charity worker and a part-time administration assistant. She has made the most of the time that she has with her family and friends.

10. T has suffered the most from the Appellant's absence. She was aged 11 when the Appellant was imprisoned and she was released shortly before her 20th birthday. She was taken into care and she is yet to fully recover from the effect of this. She had her own child when she was aged 16 and struggled to cope with the pressure of motherhood and the intensity of her emotional pain. Her son is in care. He is aged 9. The Appellant and T have repaired their relationship. T has made great personal progress and is currently working.

11. The Appellant's greatest fear is that she will be separated again from her children. Her son, O, is now aged 18. He is doing extremely well, but in the absence of his mother may end up in the same place as T. O has been a "rock of support" since the Appellant was released from prison. Her relationship with him is the strongest. It is not viable for him to join her in Nigeria. He is in year 13 at school and looking forward to going to London Guildhall Drama School or Essex University. His sisters have their lives here. She could not ask them to sacrifice and look after O. They have already suffered enough. They have a different father to O.

12. The Appellant completed educational courses in prison. She has found a legitimate job and is law-abiding. She was well behaved in prison. She has not once missed an appointment with the Probation Service or the Home Office. The Appellant is looking forward to gaining custody of her grandson who is very fond of her and asks when he can come and live with her.

13. In cross-examination the Appellant said that she supports O. She said that she has lived with him since release from prison in 2011. He attends the church as a volunteer. He attends church on Sunday and Wednesday. When she went into prison he spent six months here in the UK with her sister and then he moved to live with relatives in the United States where he remained for seven years. She was asked to describe her daily routine. She told us that she makes breakfast for O every day. He does not know how to cook. She takes him to school when it is cold in the winter

or even if the weather is good when he is tired, otherwise he catches the bus. He is in sixth form studying for A levels. He is a member of the National Youth Theatre. He attended a four -week course in the summer. She said in response to a question from Mr Blundell that the course was non-residential and she took him there in the morning and collected him at the end of the day. She said that O wanted to go to the Guildhall Drama School or Essex University. If he went to Essex University, he would not live on campus. He would remain living with her.

14. The Appellant was asked about O's friends. She said he has friends from church and school. She did not know the names of his school friends. She then mentioned the name "Michael" when pressed. She told us that she did not want his friends to come home because of the things that are happening in society. She cannot keep an eye on other people's children. O always comes home straight from school. He likes to go to church and he hangs out with his friends from church. She named four friends from church. She described his activities at home, stating that he watches TV and reads. She talks to him about his studies. She checks his school work and reminds him to do course work.

15. Her eldest daughter, D, was currently in Portugal. She went two weeks ago. She did not provide a statement in these proceedings because the Appellant did not think it was necessary. However, she sees her every weekend. She comes to the house to be fed. She lives in Chigwell, which is about half an hour's drive away. She has a partner. However, they talk every day. They have a good relationship.

16. T lives in Barking. She visits the Appellant two or three times a week. Recently T has been drinking heavily and has lost her job. She helps to support T. She gives her money and food. The Appellant has contact with T's son who is in care. He comes to the Appellant's home every weekend. She then said that she has contact with him every two to three months. She then said that she sees him every eight weeks when she visits him in care and every four weeks the child's carer brings him to the Appellant's home and he spends the weekend with her. In 2011 she tried to take formal steps to have more contact with him. She was told that this was not possible because she had not been out of prison for two clear years, she did not have accommodation of her own and her immigration status. Only the threat of deportation now presents an obstacle. O does not often see his sisters. If there is something wrong they will look after him. However, T is not stable. D has her own life.

O's evidence

17. We heard evidence from O. He relied on his witness statement which he adopted as his evidence-in-chief. His evidence can be summarised. He has a close relationship with his mother. She encourages him. He plans to go to London Guildhall Drama School or Essex University to study psychology. In oral evidence he said that he has applied to study at London Guildhall Drama School, The Royal Central School of Speech and Drama and Bristol Old Vic and confirmed to us that he would live in Bristol if successful.

18. His mother keeps him grounded and understands him. She tries her best to make sure that he is not exposed to peer pressure. He feels safe and confident with her. She is his favourite person and source of inspiration. He would be distraught and his world would be turned upside down should she leave. He does not know Nigeria. He has always lived in the UK, save when he lived in the United States, during the time his mother was in prison. His education would be disrupted if he is forced to return to Nigeria. His nephew and sisters are also extremely close to his mother and would find it difficult to cope without her.

19. In oral evidence he told us that he spends weekends and evenings working on applications, auditions and monologues. About his daily routine he told us that he occasionally has breakfast. He gets himself cereal. He goes to school on his own using public transport. If he is late his mother will take him. The course that he attended in the summer was a residential course at Goldsmith University. He does not have many friends at school. He named M, L, O and E. He goes to church every Sunday. He does not really go in the week. He considers everybody at church members of his family and did not feel able to single out specific friends. His friends visit him at home albeit not often. Recently his friend E visited him at home. His mother was there. She considers his friends as her sons and makes them comfortable when they visit. She knows E very well.

20. He could not say how often he sees T, but it was less frequent than every week. He cannot say when he last saw D. He could not turn to T for support. She has her own son. He sees him once a month. Sometimes the child comes to the house or they go and get something to eat together. He does not stay overnight with them. They may collect him from his carer's home, but they do not go into the house.

Ms William's evidence

21. Ms Williams evidence is contained in a letter she prepared in support of the Appellant's appeal of 9 November 2018. The Appellant reported to Ms Williams until the expiry of her licence. The Appellant made excellent progress and regained the sole care of her three children. They have grown up and made excellent achievement in their chosen fields. They are doing well and are contributing positively to society. The Appellant has an excellent record of compliance and engagement which has continued throughout her licence period. She would be described as a "model service user". She gained employment immediately on release and has worked in his role since. She works in a permanent role as an administrator for the church. She enjoys her job. She helps counsel people who are facing hardship and has been awarded for her commitment to help others. She is seen as a pillar of strength and hope by the people she has helped within the church community.

22. The Appellant was allocated permanent housing from Newham Council. She graduated in November 2016. She completed a victim awareness course whilst in custody. Although she was not directly involved in drug dealing, she shows understanding of the impact drugs have on the community and society. She has learnt a lot from the offence. It is highly unlikely that she would be naïve if she

entered into a future relationship. There had been no concerns with negative association or partners since her release. She is assessed as presenting a low risk of harm. She has no previous convictions. Her first encounter with the criminal justice system took place over fifteen years ago. She has been in the community for almost nine years and there have been no issues or police intelligence suggesting any offending behaviour.

23. Ms Williams voiced her concerns about the Secretary of State having "taken the case to court" over seven times to request that she is deported. She has no family in Nigeria other than her elderly mother. The Appellant is a single parent of three children and a grandmother. The Appellant would like to apply to have custody of her grandson. In oral evidence she confirmed that what she knows about the Appellant's contact with her grandson is based on what she has been told by the Appellant.

KA's evidence

24. KA gave evidence. He is a pastor. He adopted his witness statement. His evidence is that he has known the Appellant for over 25 years as a parishioner and as a committed member of staff of the church in the past five years. He is aware of her criminal history. He is her surety and why she was released from immigration detention on 18 February 2011. The Appellant and her son are inseparable. They attend the church midweek and Sunday services together although in oral evidence he stated that he does not often see the Appellant's son during the week but that he attends every Sunday.

25. The Appellant makes sure that she is involved in all aspects of her son's life. He has never experienced the love and affection or validation of a father and his whole life revolves around his mother. He meets up with his mother at work every day of the week so that they can travel home together. He once witnessed O come home from school whilst his mother was still at work meeting scheduled deadlines and when he realised his mother had yet to return he cried uncontrollably. The bond of love between the Appellant and her son cannot be exaggerated.

26. The years of separation had a significant impact on T. She was forced to live with different family members because she could not cope with life's pressures. She ended up living under the care of Social Services and gave birth to a child at the age of 16. Such an event would not have occurred under the guidance of her mother. She suffered from her mother's absence. The change in T since her mother's release has been remarkable. She now has a new sense of wellbeing and is in full-time education with career prospects. If she is deported history might repeat itself and O might suffer in the same way as T did.

27. Her impact as a part-time administration assistant for the charity cannot be overstated. She regularly goes above and beyond the call of duty and has helped many people. She is well-known to the church's congregation. He is worried about the distressing effects of her returning to Nigeria and leaving her family behind.

28. In oral evidence KA told us that he has met D. He believes she is in Portugal. He knows T very well. He described the Appellant devoting many hours a day to her job at the church. She arrives at 10am and may not leave until 9pm. He sees her son on Sunday and occasionally on Wednesday at church.

T's evidence

29. T's evidence is contained in her undated witness statement. T's evidence is that she has attempted to commit suicide on a number of occasions and has resorted to self-harming. Her life is in chaos. The Appellant was a loving and caring mother towards all her children prior to her arrest and imprisonment. She and her siblings are now confident that their mother has learnt from her mistakes and genuinely wishes to lead a normal life. T's son loves the Appellant, his grandmother. T is worried about the distressing effect of her mother's return, particularly on O, who still needs to be nurtured.

Other evidence

30. There are documents in the Appellant's bundle which we have taken into account, including two offender manager's reports

Submissions

31. We heard submissions from both Mr Blundell and Ms Bond, which we will summarise. Mr Blundell submitted that the appeal now turns on Article 8. There can be no appeal on EU grounds. O is now an adult. The key issue here is the presence of very compelling circumstances in the context of Exceptions 1 and 2 of the 2002 Act. Mr Blundell referred us to the decision of the Court of Appeal in AQ and specifically paragraphs 73, 74, 77 and 78[1].

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[1] "73. Nowhere in its determination did the FTT assess the weight of circumstances sufficient to outweigh the public interest in deportation against the standards set by the rules. AQ was sentenced to 15 years imprisonment for an offence of conspiracy to supply class A drugs. In such a case paragraph 399 provides that the Secretary of State would expect to find 'very compelling circumstances over and above those described in paragraphs 399 and 399A' before deciding that the public interest was outweighed by other factors. There was no attempt by the FTT to engage with this statement of the strength of the public interest in deportation.

74. Further, of relevance to the present case was the fact that AQ's son had lived in the United States between the ages of four and ten years. He had resumed living in the UK with his mother in 2011 and since had continuous residence with AQ for only two years before the deportation decision was made. Even if AQ had qualified for consideration under paragraph 399(a) she would not have met the requirement that her son, being a British citizen, had lived continuously in the UK for at least seven years before the deportation decision was made. In my view, despite the tribunal's lengthy and careful assessment of relevant factors, there was no attempt to see the public interest through the lens of the rules and, for this reason, the tribunal made a significant error of law.

77. I agree with Mr Drabble QC that the question to be examined by the tribunal was a practical and not a hypothetical one. In my judgment, this is the effect of the decisions of the Court of Justice in *Dereci* and the decision of this court in *Harrison (Jamaica).* I cannot accept the Secretary of State's position that the tribunal was only required to consider the ability of others to care for the child in the UK and was bound to ignore questions such as whether a family member would be willing to provide care or was under any familial or other responsibility to do so. As the Court of Justice said in *Dereci*it is for the domestic court to verify whether state action would deny the child enjoyment of the substance of his rights as a EU citizen. I do not consider this a question for the European Court and I would decline to

32. Mr Blundell referred us to the sentencing remarks of the judge and highlighted the following; the offence was committed entirely for the Appellant's own gain with no thought of the consequences, she was well aware of the impact on her children, it was a well-organised arrangement which would not have stopped if the police had not searched the properties and the judge was merciful but the very least sentence that he could impose on the Appellant was one of fifteen years.

33. Mr Blundell referred us to the evidence. He accepted that O was an entirely credible witness who gave straightforward, honest and convincing evidence. He was an impressive individual and has made considerable progress despite difficult circumstances. The Appellant was not a witness of truth. Her evidence was vague and inconsistent with O's. The evidence about breakfast was inconsistent. She said she made his breakfast every day. This was not his evidence. Whilst this in itself may not seem significant, the Appellant has built a fictitious account of family life between her and her son. She said that she took him to school when the weather was bad, but this was not his evidence. He stated that he got the bus to school and that if he is late, his mother will take him. The evidence was inconsistent in relation to the Appellant's son's friends. He said he has friends at school and that his mother treats them all like her own sons. It is not credible that she would not be able to name his school friends.

34. The Appellant said that her son goes to church with her on Sunday and Wednesday. Although it was accepted that they have a close link to the church he does not go, according to his evidence and that of AK, every Wednesday. The Appellant's evidence was that O attended a non-residential course whereas O's evidence was that the course he attended was residential. O's evidence was that he has made an application to study at Bristol Old Vic and if successful he would live in Bristol. This was a significant omission in the Appellant's evidence.

35. The Appellant said that T comes to her house two or three times a week whereas her son did not corroborate this. It is not clear what has happened to D. There was no witness statement from D despite her being a key witness. Mr Blundell said that there may be more behind it. He accepted that he could not "prove" this, but said that the absence of evidence from her is significant and supports his submission that the Appellant's evidence was vague. Much was made about the links the Appellant has with her grandson. Her evidence is that she visited him in care every eight

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make a reference. In my view, the domestic tribunal is entitled to examine all the circumstances provided that its focus is upon the practical consequences of deportation. In the present case, for example, it seems that none of the witnesses were asked whether she *would* care for AQ's son if the only alternative was that he would be required to leave the UK with his mother.

78. I am grateful to King LJ for drawing attention to the fact that in considering the question whether a Union child would be compelled to leave the Union in the absence of the primary carer it is relevant to consider the measures available to local authorities who have duties to children in need under section 17 of the Children Act 1989. Local authorities are under an obligation to promote the upbringing of children within their families and for this purpose they are provided with powers and subjected to duties under Schedule 2 Part 1 to the Act. The use of measures that are available to local authorities for the assistance of a child in need and to support their families may well impact upon the judgment whether a member of the family will in fact act in substitution for the absent primary carer."

weeks and that he stayed with her at weekend and that stays were overnight. However, this is at odds with O's evidence.

36. The Secretary of State accepts that the Appellant has been convicted of one offence only and that she presents a low risk of harm and reoffending. It is accepted that she has a relationship with O and T. Any relationship with D is unclear.

37. Mr Blundell turned our attention to the extreme seriousness of the offence and that the Appellant had been here lawfully for only three years prior to the offence. He submitted that since conviction, she has remained here under the shadow of deportation. She knew that there was a real possibility that she would be deported.

38. Mr Blundell accepted on behalf of the Secretary of State that deportation will have an impact on O. He submitted that O has survived in very difficult circumstances. He was not in the UK between the age of 4 to 11. He is now 18 and an adult. He is strong and independent. He is not dependent on his mother. There is no Article 8 family life. Mr Blundell relied on the cases of Kugathasv Secretary of State for the Home Department [2003] INLR 170and Singhv Secretary of State for the Home Department [2016].

39. Mr Blundell submitted that if there is Article 8 family life so as to engage the Convention, this would not give rise to very compelling circumstances. There are other family members here. Although it is accepted that the Appellant's son does not have particularly strong relationships with his sisters, he has a strong idea about where he is going in the future. There are no very compelling circumstances to outweigh the very strong public interest in deportation and no reason to allow this appeal outside of the Rules.

40. Ms Bond made submissions. She drew our attention to the judge's sentencing remarks and that he did not recommend deportation as far as the Appellant was concerned. There was no reason why the Appellant would have considered herself at risk of deportation. She could be forgiven for thinking that there would be no intention to deport her. She was released in 2011 and the Secretary of State is relying on a 2013 decision to deport her. She has for a long time lived in the shadow of deportation as a result of protracted litigation. She accepted that Zambrano applies to a child and that she did not pursue a claim under EU law. However, she emphasised the strength of the relationship between the Appellant and her son. She asked us to bear in mind that witnesses can exaggerate and that the Appellant in this case is desperate not to be separated from her son.

41. Ms Bond submitted that there was family life between the Appellant and O so as to engage Article 8. She provides food for him, pays bills and works to support the family. He is still at school, single and in the middle of an A level course. She relied on the cases of Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160and AA v United Kingdom (Application no. 8000/08). Ms Bond relied on the following paragraphs of Ghising:-

"53. In *Kugathas*, at [14], Sedley LJ cited with approval the Commission's observation in *S v United Kingdom* (1984) 40 DR 196:

> 'Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.'

54. Sedley LJ accepted the submission that 'dependency' was not limited to economic dependency, at [17].He added:

> 'But if dependency is read down as meaning 'support' in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support', then it represents in my view the irreducible minimum of what family life implies.'

55. Arden LJ said, at [24] – [25]:

> '24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.
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> 25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties... Such tie might exist if the appellant were dependent on his family or vice versa.'

56. We accepted the Appellant's submission that the judgments in *Kugathas* had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts.

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61. Recently, the ECtHR has reviewed the case law, in *AA v United Kingdom* (Application no 8000/08), finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. The Court said, at [46] – [49]:

> '46. The Court recalls that in *Bouchelkia v France*, 29 January1997, § 41 *Reports of Judgments and Decisions* 1997, when considering whether there was an interference with Article 8 rights in a deportation case, it found that 'family life' existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In *Boujlifa v France*, 21 October 1997, §

> 36, Reports 1997-VI, the Court considered that there was 'family life' where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France, In *Maslov*, cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted 'family life'.
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> 47. However, in two recent cases against the United Kingdom the Court has declined to find 'family life' between an adult child and his parents. Thus in *Onur v United Kingdom*, no. 27319/07,§ 43-45, 17 February 2009,the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional amount of dependence normally required to establish 'family life' between adult parents and adult children. In *A.W. Khan v United Kingdom*, no. 47486/06, § 32, 12 January 2010. the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34 year old applicant in that case did not have 'family life' with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.
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> 48. Most recently, in *Bousarra*, cited above, § 38-39, the Court found 'family life' to be established in a case concerning a 24 year old applicant, noting that the applicant was single and had no children and recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute 'family life'.
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> 49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own can be regarded as having 'family life'.'

42. Ms Bond submitted that the Appellant has made a real effort to rehabilitate herself. She relied on Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225 and what she described as the scope of flexibility in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58.

43. Mr Blundell responded insofar as the judge's sentencing remarks were referred to by Ms Bond and he stated that that was the picture in 2003. However, the situation is now that the Appellant's children are all adults.

The Law

44. The statutory framework applicable in this case is s. 117B, C and D of the 2002 Act[2] and paragraphs 398 and 399 of the Immigration Rules[3]. Because the Appellant is a

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[2] **117B Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting 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) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(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,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

…"

[3]Deportation and Article 8

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, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

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

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

foreign criminal, it is in the public interest that she should be deported. Because of the length of the Appellant's sentence of imprisonment, in order to succeed it is common ground that she has to establish that there are very compelling circumstances over and above those described in paragraphs 399 and 399A of the Rules or those set out at s.117C (4) and (5) of the 2002 Act ("Exception 1" and "Exception 2") and our reference to "very compelling circumstances" in this decision should be understood in this context. We take into account that the public interest in deportation includes the deterrent effect upon all foreign citizens (irrespective of whether they have a right to reside in the UK) of understanding that a serious offence will normally precipitate their deportation (See DS(India) v Secretary of State for the Home Department [2009], para 37, Rix LJ). The Appellant has to establish very compelling circumstances.

45. In Hesham Ali the Supreme Court said as follows:-

> "38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria)*. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule.
>
> …..
>
> 50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the

strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* -will succeed."

46. In NA (Pakistan) [2016] EWCA Civ662 the Court of Appeal stated:-

"29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C (6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C (3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in pares 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

…

33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

Conclusions

47. We were not impressed by the Appellant. We found her not credible. We understood from Ms Bond's submissions that she accepted that the Appellant's evidence was inconsistent with O's. Ms Bond asked us to consider the Appellant is desperate to remain here with her son. Whilst this may give her a motive to exaggerate and in parts fabricate aspects of her relationship with her son and his life, it does provide a reasonable explanation for doing so. She has significantly embellished and exaggerated her evidence in many respects as properly identified by Mr Blundell. The Appellant has attempted to create an impression of a level of dependency on her by O which is unsupported. We accept O's evidence and we found him to be honest and credible. We consider whether there is family life in the *Kugathas* sense and conclude in the Appellant's favour, having accepted O's evidence. We accept that O is a young adult, having recently reached adulthood, still living with his mother and in full-time education. He does not live independently.

48. Notwithstanding the level of dependency between the Appellant and O, he is an able and determined young man with a significant support network comprising church, friends and family. This was obvious from his evidence. If the Appellant left the UK, he can continue studying here. There is a possibility according to his own evidence that he would leave home to start university in 2019 in any event. We do not find that he is vulnerable or as dependent on the Appellant as she would have us believe. He has a good future ahead of him. He would not have to or chose to return with his mother to Nigeria. He would of course be able to visit her there. We do not believe that he is at risk of falling by the wayside. His circumstances cannot be compared to those of T. Fear of him ending up like T was expressed by the Appellant and AK. T was aged 11 when her mother was incarcerated. O was much younger and did not suffer as she did. He did not reside with his mother from 2003 - 2011. He is now aged 18 and better equipped to deal with his mother's absence than an 11- year old child. He presented as a resilient and capable young man. We do not underestimate the disappointment and upset he will suffer from his mother's deportation, but we do not find that the impact of it would be as serious and significant as advanced by the Appellant. There is a support network. Separation as we see it in this case is a consequence of the Appellant's criminality.

49. The Appellant's case was not advanced on the grounds that she could meet Exceptions 1 and/or 2. However, we make it clear that the evidence does not establish very significant obstacles to integration. She has not been here lawfully most of her life. It is difficult to establish that she is socially and culturally integrated in the light of such serious offending and the relatively recent expiry of her licence.

50. We found that the Appellant exaggerated the frequency of contact she has with her daughters. We are concerned by the lack of evidence from D. It is surprising that she is not in the country at the time of her mother's appeal and has not chosen to make a witness statement in support. The Appellant's evidence about D was vague. We accept O's evidence that there is a relationship between the Appellant and D, but the evidence does not establish that they are close otherwise she would have supported

her mother's appeal. T has a relationship with her mother but does not see her as frequently and is not as dependent on her as suggested by the Appellant. The Appellant told us in oral evidence that T was heavily drinking and had lost her job. This was at odds with the evidence of Ms Williams and T's own evidence. Whilst it is clear that T has had historic serious problems culminating in losing custody of her son, we find that the Appellant has exaggerated T's circumstances in her evidence at the hearing to support her case that T would not be able to offer O any support and to seek to establish that T has a greater level of dependency on her than is the case.

51. We attach weight to the evidence of Ms Williams. We accept the risk of reoffending is low and what she said about the Appellant's attitude and behaviour. We accept that the Appellant is rehabilitated and that she has turned her life around. We have no reason to believe that the witness intended to mislead us in any way. However, we are mindful that her conclusions in relation to the Appellant's family life with her grandson are dependent on what she has been told by the Appellant. Whilst nothing turns on this, we make the following observations about Ms William's evidence; the sentencing judge's comments do not refer to the Appellant being naïve or having negative associations in so far as she was in some way led astray. The sentencing comments and sentence imposed indicate that the Appellant was found to be a main player and very much involved in drug dealing. We attach weight to KA's evidence. We accept that the Appellant is not only rehabilitated but she is hard working and engaging in genuinely good work for the church. His oral evidence was not entirely consistent with the evidence in his statement. This is likely to be because he is talking about historic events in his statement rather than the position at the date of the hearing. It is clear from the evidence that it is no longer the case that O meets his mother at work every day.

52 We have considered the Appellant's relationship with her grandson. There is no independent supporting evidence of this although we have no reason to disbelieve O's evidence and we accept that she has contact with the child. However, she has exaggerated the extent of this and future intentions. The Appellant's evidence suggests an intention that the child will eventually reside with her. There is simply no support for this. There is no evidence that the Social Services may increase contact at some stage in the future. If this is on the cards we would have expected to see some evidence from the Social Services. It is likely that the Social Services are facilitating contact with the Appellant. However, it is likely that the Social Services are working on the possibility of the child being reunited with his mother. The Social Services will no doubt have concerns about the Appellant' criminality.

53. Ms Bond referred us to the sentencing comments of the judge in response to Mr Blundell's submission that the Appellant was aware of the risk of deportation from the time of her conviction in 2003. We take on board what the judge said in 2003. This suggests that the Appellant may not have thought at that time that deportation was something on the horizon because of her children. However, she was not given any reason to believe that she could stay here indefinitely notwithstanding her criminality. It must have become clear to her as time went by and her children were approaching adulthood that she was at risk of deportation. She was released from

immigration detention in 2011. Efforts were made in 2012 to deport her. We did not understand Ms Bond to be specifically relying on the issue of delay. This was not a matter on which the Appellant has previously relied. However, there was no delay by the Secretary of State. It was reasonable to wait until the conclusion of the Appellant's sentence being taking action to deport the Appellant. The delay between release from detention and deportation is not significant. There has been a significant delay following protracted litigation. Neither party is at fault. However, the Appellant has benefited from this. It has allowed her to remain in the UK to look after O until he reached adulthood. We accept that the delay has enabled the Appellant to strengthen an Article 8 claim and factor this into the assessment.

54. We briefly engage with specific points raised by Ms Bond in her skeleton argument and/or oral submissions which we did not find to be of any assistance to the Appellant. The cases of Secretary of State v Robinson [2018] EWCA Civ 85 and Bouchereau [1978] ECR 732 have no material relevance in this case. In Garzon the Appellant came here aged 11 and it was found that he would be a stranger in his home country. The Appellant was an adult when she came here and has ties to Nigeria. The trigger offence in Garzon was far less serious than those committed by this Appellant. McFarlane LJ said at [26]:-

> "The purpose of an Article 8 evaluation which is conducted after a foreign criminal has failed to bring his case within s.117C or the express provisions in the rules, is to look at the same factors again, together with other relevant factors not specifically covered within the terms of the statute or the rules, within the context of Article 8 albeit with due regard to the public policy in favour of deportation of foreign criminals and expressly taking account of the 'very compelling circumstances' threshold."

55. At [27] McFarlane LJ considered a similar challenge in the case of Mwesezi v Secretary of State for the Home Department [2018] EWCA Civ 1104 where the Secretary of State had succeeded before the Upper Tribunal in overturning a FTT decision in favour of an Appellant in circumstances which involved a foreign criminal who had come to this country at a young age and had committed offences as an adult and in respect of whom there were no very significant obstacles to integrating back into his country of origin. In this latter case the offending was said to be considerably more serious and placed him in the category of serious offender for the purposes of s.117C, and reference was made to NA (Pakistan).

56. Rhuppiah [2018] UKSC does not assist the Appellant. Any limited degree of flexibility under S117a (2) (a) cannot conceivably advance her case.

57. Notwithstanding the very distressing consequences for the Appellant's family here, particularly O, she has failed to identify matters in her favour which are capable of amounting to very compelling circumstances and which shift the balance to any meaningful extent in her favour. Looking at all matters collectively there are no circumstances drawn to our attention capable of giving rise to a particularly strong Article 8 case to outweigh the high public interest in deportation. However serious and tragic the consequences of deportation, we remind ourselves of what Sedley LJ

said in Lee [2011] EWCA Civ348 at para 27 about the tragic consequences of deportation following an Appellant's bad behaviour. In the absence of compelling circumstances, we dismiss the appeal under Article 8. We conclude that the decision to deport the Appellant is proportionate to the legitimate aim and there are no properly identified circumstances to allow her appeal outside of the Rules.

Notice of Decision

The Appellant's appeal is dismissed under Article 8.

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

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

Signed *Joanna McWilliam* Date 10 December 2018

Upper Tribunal Judge McWilliam