



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00877/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 1 November 2018

Decision & Reasons Promulgated  
On 19 November 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

DOE  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Mupara, Counsel instructed by Reiss Edwards  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

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 him or any member of their 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.

1. I have anonymised the Appellant because he has a daughter who is a child. The Appellant is a citizen of Nigeria. His date of birth is 18 January 1967.

2. There is a lengthy immigration history. On 23 October 2008 the Appellant was convicted on a four-count indictment. The first count was an offence relating to possession of a false or improperly obtained identity card contrary to the Identity Card Act 2006. On this count the Appellant received a term of imprisonment of twelve months. The second count was making a false representation for gain, an offence under the Fraud Act 2006 for which he received a custodial sentence of nine months. The third and fourth counts were making a false statement to obtain benefit which are offences under the Social Security Administration Act 1992. The Appellant received a custodial sentence of eighteen months on count three and six months on count four. The sentences on counts three, four and five were concurrent making a total of eighteen months and the sentence on count one was to run consecutively making a total sentence of two and a half years.
3. The Secretary of State made a deportation order against the Appellant on 3<sup>rd</sup> September 2009. The order was made under Section 32(5) of the UK Borders Act 2007.
4. The Appellant made an application to revoke the deportation order and this was refused by the Secretary of State on 25 April 2013. The Appellant appealed against this decision and his appeal was dismissed by the First-tier Tribunal (the "FTT") on 6 March 2014. Permission was granted to the Appellant to appeal against this decision. The decision of the FTT was set aside by Upper Tribunal Judge Renton. He went on to allow the appeal in a decision promulgated on 24 October 2014, following a hearing at Field House on 15 August 2014. The Secretary of State was granted permission by the Court of Appeal. Permission was granted on the papers by the Sales LJ on 20 July 2015. The Appellant (in these proceedings) accepted that the decision of the Upper Tribunal contained errors and that the case should be remitted. Following the grant of permission, Underhill LJ set aside the decision of the Upper Tribunal and remitted the matter to the Upper Tribunal for reconsideration. The matter came before Upper Tribunal Judge Perkins for a substantive hearing on 16 December 2016. On that occasion the matter was adjourned to enable the unrepresented Appellant to obtain further evidence in support of his appeal. On 12 April 2017 the Appellant failed to attend the hearing. The matter proceeded in his absence and the appeal was dismissed. That decision was set aside and remitted to the Upper Tribunal further to the order of Sir Stephen Silber on 24 May 2018, granting the Appellant permission for several reasons including that the UT did not ensure that attempts were made to contact the Appellant on the morning of the hearing. It was agreed by the parties that the decision to allow the appeal should be set aside and remitted to the Upper Tribunal. Thus, the matter came before me for a substantive hearing, Judge Renton having found an error of law and having set aside the decision of the First-tier Tribunal.

5. The statutory framework applicable in this case is Section 117B, C and D of the 2002 Act<sup>1</sup>, and paragraphs 390, 398 and 399 of the Immigration Rules<sup>2</sup>. Because the

<sup>1</sup> 117B Article 8: public interest considerations applicable in all cases:

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
  - (a) are less of a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
  - (a) are not a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (4) Little weight should be given to –
  - (a) a private life, or
  - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
  - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom.

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

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

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) For the purposes of subsection (2)(b), a person subject to an order under –
- (a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
  - (b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
  - (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.
- (4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –
- (a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
  - (b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
  - (c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
  - (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
- (5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.”
- <sup>2</sup> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
- (i) the grounds on which the order was made;
  - (ii) any representations made in support of revocation;
  - (iii) the interests of the community, including the maintenance of an effective immigration control;
  - (iv) the interests of the applicant, including any compassionate circumstances.
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 and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
  - (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
  - (c) the deportation of the person from the UK is conducive to the public good and in the public interest 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

Appellant is a foreign criminal, it is in the public interest that he should be deported. Because of the length of the sentence received by the Appellant, paragraph 398(b) applies. His appeal was advanced on the basis that he has a genuine and subsisting parental relationship with a child under the age of 18 who is in the UK and is a British citizen and that it would be unduly harsh for the child to live in Nigeria and for her to remain in the UK without the Appellant (paragraph 399(a) mirrored in Section 117C(5) – “Exception 2”).

6. It is not challenged that the Appellant has been in the UK since August 1987 when he arrived here with his siblings. It is not challenged that the Appellant has two children here in the UK. His son, JW, is no longer a child. His date of birth is 10 September 1999. He is currently a student at Nottingham University. He attended the hearing and gave evidence in support of his father’s appeal. The Appellant has a daughter, RW. She was born on 12 April 2002 and is a child. There is a court order made in relation to the children facilitating contact with their father. There was no copy of this order before me; however, Mr Whitwell indicated that it was not contested that such an order existed. However, he did not accept that there was on the evidence before the Tribunal a genuine and subsisting relationship between the Appellant and his daughter RW. She did not attend the hearing to give evidence and nor did her mother, CW.
7. The Appellant’s bundle contained 32 pages and included the Appellant’s witness statement and JW’s witness statement. There was a witness statement from RW. In addition, the Appellant’s nephew, RY and niece VY provided statements in support. VY attended the hearing and gave oral evidence. RY attended the hearing but did not give oral evidence. In addition, there are witness statements from the Appellant’s two brothers AOE and AO.
8. The Appellant’s evidence can be summarised. He adopted as his evidence-in-chief his undated witness statement which he signed at the hearing before me and a letter which he wrote to the Home Office on 22 February 2017. He was asked further questions by Mr Mupara in evidence-in-chief and he was cross-examined by Mr Whitwell. His evidence can be summarised. He has lived in the UK for 31 years. He feels disgusted about his offending and views it as a mistake. He has remained out of trouble since the commission of these offences. He has been living in limbo since the deportation order because he has not been able to seek employment. It has been very difficult for him to meet the needs of his children and nephews. He regards his niece and nephews as his

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- (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.

own children. He has been supporting his children with the help of his brothers in America.

9. JW is now at university in Nottingham. He visits him there every other weekend. His daughter RW resides with her mother in Milton Keynes. She is now in sixth form. The Appellant sees her every other weekend and during school holidays. She did not attend the hearing. The Appellant explained her absence because of an argument that he had with her mother which arose from the Appellant's inability to work here and therefore to fund RW's season ticket. The Appellant in cross-examination confirmed that he spoke to RW on the telephone once a week. He explained that it would be hard for him to speak with her if he was in Nigeria.
10. If the Appellant is forced to leave his children they will be devastated. He would not be able to see them. They would not be able to travel to Nigeria. RW is a child and her mother would not allow it. She is not on good terms with the Appellant. She is now in a civil partnership with a woman.
11. The Appellant gave evidence about the relationship that he has with his niece and nephews. Their father is not on the scene and their mother, the Appellant's sister passed away in 2015. He described himself as "their sole surviving parent". Their mother passed away in 2015. The Appellant described himself as someone who is employable with computer skills.
12. In the Appellant's letter of 22 February 2017, it is asserted that the children's mother is very sick and suffers from a condition called "sjogrens". She has a tumour growing near her brain and under her chin which is suspected to be cancerous; however, she had refused treatment. There was no further evidence on this issue before me. This letter refers to the Appellant's relationship with a female. There was no further evidence on this issue either.
13. JW gave evidence. He adopted as his evidence-in-chief a letter of 16 October 2018. In addition he answered questions in examination-in-chief and he was cross-examined. His evidence can be summarised. His father has always been a part of his life. He makes a consistent effort to keep in contact with JW and to be part of his life. He has over the past few years been able to spend every other weekend with the Appellant. The Appellant has been of great encouragement throughout his life. Should he be deported he would be removed from his life. He would not be able to spend time with him in Nigeria because of the conflict there. He would also be concerned about the safety of his father. Removing him would impact on him severely. He explained in oral evidence that he needed his father here in the UK and without him his life would be turned upside down. RW and the Appellant are close. They have a normal father and daughter relationship. She does not want him to be deported. RW needs a father.
14. They would be able to remain in contact via social media; however, he is not sure whether their mother would allow RW to do so. JW knew very little about where his father was from in Nigeria and about the country in general.

15. The Appellant's niece, VY gave evidence. She adopted as her evidence-in-chief her undated witness statement. In addition, she was cross-examined. She is the daughter of the Appellant's older sister. He has played a "pivotal role" in her life and those of her younger brothers. Their father has never been present, and the Appellant has filled that role. He has always been there for them when needed. Their mother passed away in 2015 and he took over and arranged the funeral. He stayed and mediated and made all the necessary arrangements. The Appellant is all they have. Without him they do not have anyone. Her youngest brother is 18. He lost his mother at 16. Had it not been for the Appellant he would not be in school and he would not have remained out of trouble.
16. There is evidence from RW of 17<sup>th</sup> October 2018. This is a short four- paragraph letter in which she confirms that she does not want her father to be deported because he has been there for her and her brother. He takes care of their needs and he also cares for their cousins who have no parents. She loves her father and would not be able to see him if he was in Nigeria where it is dangerous. She needs him here in her life. They spend good times together. He takes care of their needs when he has money. He has helped her with her studies and homework. He plays with her and her brother. He cooks lovely food when they spend weekends and holidays in London. She appeals to the Tribunal to allow her father to remain here.
17. The Appellant relied on the witness statement of RY, his nephew who is aged 20. His evidence is in similar terms to that of his sister. The Appellant also relied on the witness statements of his brothers who reside in America. They talk about the support that the Appellant gave to the family on the death of their sister and the support that he has given specifically to her children. There is also evidence of financial support to the Appellant.
18. I heard submissions from both Mr Whitwell and Mr Mupara. I was referred to a concession made by the Presenting Officer before Judge Renton that it would be unduly harsh to expect RW to relocate to Nigeria. However, my understanding is that Mr Whitwell intended to depart from this concession because there was no evidence according to him before the Upper Tribunal supporting a genuine and subsisting parental relationship between the Appellant and RW. He referred me to the unsigned letter from RW, the lack of evidence from the child's mother and the lack of independent supporting evidence about the relationship between the Appellant and his daughter. He asked that I exercise a degree of caution in the light of the lack of corroborative evidence explaining why his daughter was not in attendance at the hearing. In his view, there was also a discrepancy about the last time the Appellant saw his daughter arising from the inconsistency in what the Appellant said and what JW said in evidence. In any event, Mr Whitwell reminded me of *Lee* [2011] EWCA Civ 348. He also reminded me of the high hurdles an Appellant has to meet in order to establish unduly harsh with reference to the judgment in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. In his view the evidence did not come close to reaching that hurdle.

19. Mr Mupara made submissions. He submitted that the consequences of deportation would be greater than that which would normally follow because the Appellant's daughter would not be able to visit him in Nigeria. She would be prevented from doing so by her mother. He referred to the contact order (this was not adduced in evidence) which stated according to him that there would be a jurisdictional constraint and that the permission of both parents would be needed for the child to travel outside of the UK. In these circumstances it was submitted that it would be unlikely that RW would be able to see her father. There is no question that she needs a father in her life. The Appellant has a positive influence on his daughter and she would be deprived of this. He referred me to the findings of Judge Renton about the relationship the Appellant has with his children and the impact that deportation would have. In addition, the Appellant stepped in as a *de facto* parent for his niece and nephews. He submitted that there would be compelling circumstances with reference to paragraph 398(c) of the Immigration Rules on the basis that the Appellant arrived here in the UK when he was aged 20 and has been here for 31 years. He has no ties in Nigeria. He has two brothers in the US and his sister has now passed away. His parents in Nigeria are deceased.

### Findings and Reasons

20. At the hearing Mr Whitwell led in cross-examination a piece of evidence that had not been previously disclosed to the Appellant or to the Tribunal. This was a copy of a PNC report relating to the Appellant and which indicated that he had been arrested in Nottingham in October 2018. When this was put to the Appellant before Mr Mupara had the opportunity to intervene and object, the Appellant stated that he had been arrested but released and that there was to be no further action against him. Mr Whitwell put it to him that there was a pending investigation. This evidence should have been served and filed on the Appellant and the Tribunal in accordance with the standard directions and I was not impressed by the way it was disclosed to the Appellant. Fairness demanded that it was properly disclosed by the Secretary of State. In reaching my decision I have not taken it into account.
21. In deciding whether deportation of the Appellant would be unduly harsh, I have had regard to the judgement of the Supreme Court in KO. It favoured a consideration of unduly harsh simply by reference to the effect on the child. Lord Carnwath approved the formulation in MK (Sierra Leone) v SSHD [2015] UKUT 223, namely:-

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

22. Lord Carnwath noted that the alternative view would involve imbuing the child with some responsibility for the conduct of the parent which would be contrary to the



principles in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74. There is a high hurdle identified in MK.

23. Having applied the correct test, I conclude that it would be unduly harsh for RW to live in Nigeria, but separation of the family, namely RW remaining in the UK without her father would not be unduly harsh for the reasons given below.
24. I had the benefit of hearing oral evidence from the Appellant, his son and niece. I found them to be broadly credible. There was some exaggeration about the difficulties relating to contact with his children should the Appellant be removed and the Appellant's evidence about the frequency of contact with his daughter was not supported. I accept the Appellant's evidence about why his daughter did not sign her witness statement/letter. It is wholly believable that she was not able to do so in the absence of a working printer. I also accept that the failure by his daughter to attend the hearing does not reflect the quality of her relationship with her father. It is a fact that the Appellant's relating with the mother of his children is acrimonious. It is credible that acrimony has deepened from the Appellant's inability to properly support his children. I have taken on board the history relating to the family and the difficulties that the Appellant has encountered gaining contact with his children which ultimately led to a court order in his favour.
25. I am in no doubt that the Appellant has a close relationship with his children. JW is now an adult; however, RW is aged 16½. I accept that he has contact with them both and a genuine and subsisting parental relationship with both. I also accept that he has a parental relationship with his niece and nephews all of whom are now adults. It is beyond doubt that it is in RW's best interests in the context of Section 55 of the Borders, Citizenship and Immigration Act 2009 for the Appellant to remain in the UK and continue to have face-to-face contact with her. This is consistent with the court order in 2013. I have taken on board the evidence of JW relating to his perception of Nigeria. It is clear that he knows very little about the country and I accept that he has never been. He is now an adult and there is in my view nothing to prevent him from visiting Nigeria other than his perception of the country. However, Nigeria is not so dangerous that it would be unreasonable to expect him to visit his father there. The level of risk is not so great as he perceives it to be. In relation to RW the position is different. I accept that without her mother's permission it is unlikely that she would be able to travel to Nigeria before her 18<sup>th</sup> birthday. Bearing in mind that her mother did not attend the hearing and she does not support the Appellant's appeal, it is unlikely that she would agree to her visiting the Appellant there. However, she will turn 18 on 12<sup>th</sup> April 2020. I do not accept that there would be anything to prevent the Appellant having contact with both his children via social media or telephone contact in the meantime. It would not be possible for RW's mother to control this kind of contact, should she wish to. I do not find it credible that she would be prevented from having contact with her father by her mother in any event. I accept that the Appellant sees RW at weekends and during the school holidays; however, the evidence does not establish that such contact is as regular as asserted by the Appellant. This is not borne out by RW's statement. She is not dependent on him financially. I accept that he has made provision for her previously (including the provision of a taxi to and from school) from

money that he receives from his brothers in the US. There is no evidence that would suggest that this source of funding would not be available to the Appellant should he return to Nigeria.

26. Whilst the Appellant's evidence in 2017 was that RW's mother was unwell, this was not addressed at the hearing before me. There was no corroborative evidence. I have taken into account the findings of Judge Renton in this respect; however, the evidence before him dated back to 2014. There is no up-to-date evidence and Mr Mupara did not refer to her health in submissions. I reasonably infer that while she may have had undiagnosed health problems in 2017, these problems were not as serious as initially thought.
27. Without wishing to trivialise the serious and distressing impact of deportation on the Appellant's daughter, there was no independent evidence, for example from a social worker, that would establish that the effect of deportation on RW would be any worse than that on any other child of her age facing the deportation of a father. Whilst it is in her best interests for the Appellant to remain here and this is a primary consideration when assessing proportionality, the evidence does not establish that it would be any worse for her than any other child of her age whose father faces deportation.
28. The Appellant must establish to succeed in his appeal that there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
29. The Appellant has committed a very serious offence which led to the loss of £35,000 from the public pocket. I have taken into account the judge's sentencing remarks. The judge described the Appellant as an intelligent man who defrauded various agencies of funds which could have been put to far better use in helping people who really needed it. The judge considered that the only sentence that was appropriate was one of immediate custody. He took into account that the Appellant had pleaded guilty and gave him due credit for this. He also took into account a letter and he was impressed by the way the Appellant expressed his remorse. The judge considered a pre-sentence report (this was not before me) and the mitigation that was advanced by his Counsel; however, he concluded that in light of the offences only a custodial sentence would be appropriate to punish the Appellant and to deter others.
30. The Appellant's case was advanced before me on the basis that there is a low risk of him re-offending. The original pre-sentence report that was before the sentencing judge was not before me. There was no independent evidence or assessment relating to the risk of re-offending. However, I take into account the significant passage of time and the sentencing judge's view of the remorse as expressed by the Appellant. Taking all the evidence together I accept that there is a low risk of re-offending. The Appellant was convicted of these offences 12 years ago. I remind myself that re-offending is only one facet of the public interest. The public interest in deportation includes the deterrent effect upon all foreign criminals (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], paragraph 37, Rix LJ).

31. The Appellant has not advanced a case on private life grounds under Article 8 as informed by the Rules. Although I was not addressed specifically on the limbs of paragraph 399A by the representatives it is clear that he has not been lawfully resident in the UK most of his life. However, I accept that he is socially and culturally integrated into the UK. Whilst I accept that the Appellant does not have immediate family in Nigeria and his links there may be limited (I take into account that his son did not know where in Nigeria his father came from or where his grandparents resided), he lived there up until the age of 20 and I find that it is very likely that he has some extended family and contacts there. I also take into account that the Appellant is employable. I understand that he has a qualification in business (see the sentencing judge's remarks and the Appellant's own evidence is that he has employment skills). I also take into account that his brothers offer him financial assistance whilst he is here in the UK and there was no evidence before me to suggest that this would not continue should he return to Nigeria. All in all, there was no evidence that there would be very significant obstacles to his integration. His case was not advanced before me on the basis that there would be. I have considered the *Maslov* guidance (*Maslov v Austria* [2009] INLR 47. Whilst the Appellant has been here since he was a child, he has not been here lawfully at any time. Significantly he committed offences when he was an adult and it is not the case that he is immature and would be unable to start a new life for himself in Nigeria. He is a mature adult of working age with employable skills.
32. I find that the Appellant has a very close relationship with his niece and nephews. However, they are now adults. I appreciate that the youngest nephew is only 18 however he has the support of his older siblings.
33. I have taken into account what the Court of Appeal said in *NA (Pakistan)* [2017] EWCA Civ 662 in relation to very compelling circumstances and remind myself of the following paragraphs:-
  - "32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in

order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

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.
34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

“Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.”

34. I remind myself of the proper approach to any consideration of proportionality of deportation of foreign criminals considered by the Supreme Court in *Hesham Ali* [2016] 1 WKL 4799 at paragraph 38:-

“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.”

35. There has been a considerable delay in this case, not arising from any fault on behalf of either party. However, the Appellant has had the benefit of remaining here throughout his son’s childhood and most of his daughter’s. It is understandable that he is frustrated that he cannot work here. However, there is now nothing stopping him from making a new start for himself in Nigeria, with the intention of helping to support his children.
36. Notwithstanding the very distressing consequences for the Appellant’s family, the length of time he has been here, the 12 year period since conviction and the low risk he poses, he has failed to identify matters in his favour which are capable of amounting to very compelling circumstances and which shift the balance to any meaningful extent in his favour. Whilst I have attached weight to the period of time that the Appellant has lived in the UK and to his relationship with his own children and his niece and nephews, these factors do not have such force to satisfy the test in Section 117C (6) of the 2002 Act. Looking at all matters collectively there are no circumstances drawn to my attention which are capable of giving rise to a particularly strong Article 8 case so as to outweigh the very high public interest in deportation. However serious and tragic the consequences of deportation, the evidence before me establishes that this is in reality a run of the mill type case. I remind myself of what Sedley LJ said in *Lee* [2011] EWCA Civ 348 at paragraph 27 about the tragic consequences of deportation following an Appellant’s bad behaviour. In the absence of compelling circumstances, where the Appellant has failed to establish that the impact of deportation would be unduly harsh on his daughter, I dismiss the appeal under Article 8.
37. The appeal is dismissed under Article 8.

Signed *Joanna McWilliam*

Date 13 November 2018

Upper Tribunal Judge McWilliam