Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13907/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 August 2017 and 25 January 2018	**On 21 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer (16 August 2017).
Mr E Tufan, Home Office Officer (25 January 2018).
For the Respondent: Mr J Markus, Counsel, instructed by Paragon Law.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge P J M Hollingworth) allowing an appeal by the appellant against the decision dated 7 May 2016 refusing his application for leave to remain on human rights grounds. Following a hearing on 16 August 2017 the Tribunal (The Honourable Lord Burns, sitting as a Judge of the Upper Tribunal and Deputy Upper Tribunal Judge

Latter) found that the First-tier Tribunal erred in law such that the decision should be set aside as follows. In this decision, we will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The background to this appeal can briefly be summarised as follows. The appellant is a citizen of The Gambia born on 1 November 1979. He first entered the UK on 27 July 2002 with entry clearance as a husband following his marriage on 3 May 2002 to a British national. On 28 July 2003, he was granted indefinite leave to remain on the same basis. Subsequently, they separated and the appellant entered into a relationship with his present partner. There are three children of the family, born on 11 November 2005, 20 August 2015 and 8 September 2016, respectively. The appellant and his partner were married on 11 January 2013.

3. The appellant has been convicted of a number of criminal offences all involving drugs. On 11 October 2005, he was convicted at Derby and South Derbyshire Magistrates' Court of possessing a class C controlled drug and fined £80. In June 2006, he appeared at Derby Crown Court on two counts of possession with intent to supply a class C controlled drug and sentenced to 28 days' imprisonment suspended for twelve months. On 5 December 2008, he was convicted at Derby Crown Court of two counts of possessing controlled Class A drugs with intent to supply and possessing class C controlled drugs and on 6 February 2009 he was sentenced to a total of four years' imprisonment.

4. Subsequently, he was advised of his liability to deportation and a deportation order was signed on 10 May 2010. The appellant appealed against this decision. His appeal was dismissed on 18 August 2010 and permission to appeal was refused. On 27 September 2010, his appeal rights were exhausted and at that point the deportation order came into force which automatically revoked his indefinite leave to remain.

5. Further representations were made on the appellant's behalf leading to a decision on 1 February 2012 refusing to revoke the deportation order. He appealed against this decision and his appeal was allowed by the First-tier Tribunal in a decision issued on 17 April 2012. The panel said that it was satisfied "just on balance" that the decision to refuse to revoke the deportation order did not represent a necessary, proportionate and fair balance between the right to respect for the family life of the appellant and his child and the particular public interest in question. Following the appeal being allowed, the appellant was granted two periods of six months' discretionary leave.

6. On 22 April 2015, the appellant appeared at South Derbyshire Magistrates' Court and was convicted of possessing a controlled class B drug, cannabis/cannabis resin and was fined £99. On 26 May 2015, again at South Derbyshire Magistrates' Court, he

was convicted of possessing a controlled class B drug, cannabis/cannabis resin, and failing to surrender to custody and on 3 June 2015 he received a community order, a victim surcharge, a rehabilitation activity requirement, a court charge and a fine. An order was also made for the forfeiture and destruction of the drugs.

7. Following these convictions, on 7 December 2015 the respondent made a fresh decision to deport the appellant who then made further representations for leave to remain on human rights grounds.

The Hearing before the First-tier Tribunal

8. At the hearing before the First-tier Tribunal, the judge heard evidence from both the appellant and his wife. He was provided with an independent social worker's report dated 30 November 2016. He considered the best interests of the children and so far as the eldest son was concerned, he found that it was unquestionably in his best interests that he remained in the UK with both parents. The judge referred to HC 395 as amended ("the Rules") saying at [60]:

> "In assessing the claim the respondent considers whether paragraph 399 or 399A applies. 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."

9. The judge then went on to consider the position both of the appellant's wife and his children. He found that relocation to The Gambia was not feasible [67], in particular because of his wife's medical condition with multiple sclerosis. He considered whether Exception 1 or 2 applied as set out in s.117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and whether the effect of the appellant's deportation on his partner or children would be unduly harsh. He directed himself as follows:

> "70. In considering whether the effect would be unduly harsh, it is clearly necessary to consider the extent to which the public interest requires the appellant's removal. The appellant's immigration and criminal history must be considered. The respondent has set out the immigration history. The view of the panel in 2012 was that, just on balance, the decision to refuse to revoke the deportation order, did not represent a necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question."

10. The judge then referred to the changes in the appellant's life since 2012 and said that in the light of those developments, he had reached the conclusion that the fine balance identified by the panel in 2012 remained as finely poised as it was found to be then and just on balance enabled the conclusion to be reached that it would be disproportionate for the appellant to be removed [72]. Accordingly, the appeal was allowed.

The Grounds and Submissions

11. In the respondent's grounds of appeal it is argued that the First-tier Tribunal erred in law by applying the unduly harsh test outlined in para 399(a) and (b) of the Rules and s.117C(3) – (5) of the 2002 Act as the appellant had been sentenced to a period of four years' imprisonment and therefore fell outside those provisions. It is further argued that the judge failed to identify the "very compelling circumstances" over and above those contained in s.117C(3) – (5) that are required to outweigh the public interest under s.117C(6) of the 2002 Act.

12. In his submissions Mr Jarvis accepted that there was a degree of lack of clarity in the respondent's grounds but they did make clear the substance of the argument that the judge had erred in law by deciding the appeal by applying a test of undue harshness but had failed then to consider whether there were very compelling circumstances over and above those described in paras 399 and 399A to outweigh the public interest in deportation.

13. Mr Markus submitted that the judge had been aware of the proper test to be applied under the Rules: he had referred to it in [60]. He had been entitled to consider the issue of undue harshness which was clearly relevant to the assessment of proportionality. There was no requirement to recite any particular form of words or mantra of the moment: Secretary of State v DB (Jamaica) [2017] EWCA Civ 440 at [22]. He submitted that the judge clearly understood the weight of the public interest and that, when the decision was read as a whole, there was clear support for his conclusions. He conceded that the judge could have set out the matter more clearly but, nonetheless, he had been aware that the appellant's claim fell within para 398(a) of the Rules. He had considered all the relevant matters and had reached a decision open to him.

Consideration of whether the Judge erred in Law

14. It is common ground between the parties that when considering the appellant's appeal under the Rules, he falls within the provisions of para 398(a), which reads as follows:

> "(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 four years."

The provisions of para 399 do not apply to the appellant as they only apply to those falling within paras 398(b) or (c). Paragraph 398 then provides that "the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paras 399 and 399A".

15. This wording replaced with effect from 28 July 2014 the previous wording in force from 9 July 2012 that, where the provisions of para 399 or 399A did not apply, "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." In any event, it was accepted at the hearing before us

that the July 2012 Rules did not apply to the appellant's previous appeal in 2012 in the light of the date of decision. That Tribunal was therefore considering the position generally under article 8 without reference to the amendments to the Rules in force from 9 July 2012. The judge in the present appeal therefore had to consider whether there were compelling circumstances over and above those set out in paras 399 and 399A to outweigh the public interest in deportation.

16. The judge found that the children could not be expected to leave the UK given that it was in the interests of the oldest child to remain and, taking that approach, his mother must remain with him [62]. The relationship between the appellant and his older son had deepened since the previous decision. He found that the relocation of the entire family to The Gambia was not feasible, taking into account the fact that the appellant's wife's multiple sclerosis symptoms were unpredictable. Her future was uncertain and relapses could occur at any time [66]. He found that the consequence of her condition was that the appellant had become the primary carer for the children. He repeated that relocation to The Gambia was not feasible for her or an option because of her medical conditions [67].

17. He went on to consider s.117, finding that the appellant had a genuine and subsisting relationship with his eldest child [69]. He said that when considering whether the effect of removal would be unduly harsh, it was necessary to consider the extent to which the public interest required the appellant's removal. He took into account that since the previous decision the appellant had committed two further offences, the second attracting a community sentence and that the respondent had correctly identified the need for deterrence. There was clearly a concern as to whether the appellant had or had not achieved rehabilitation and the nature of drugs offending had to be considered with its effect upon society. The progressive nature of the appellant's wife's condition must be taken into account and the effect upon the eldest child of his father's removal must be assessed in that light. The judge concluded in [72] that the fine balance identified by the panel in 2012 remained as finely poised as it was then and just on balance enabled the conclusion to be reached that it would be disproportionate for the appellant to be removed.

18. We accept that the judge referred to the correct test in [60] but we can find nothing in his reasons or in his reasoning to indicate that he gave proper weight to the requirement both in the Rules at para 398 and in s.117C(6) of the 2002 Act that in the case of a person sentenced to a period of imprisonment of four years or more there had to be very compelling circumstances over and above those described in para 398 or in Exceptions 1 and 2 of the 2002 Act, respectively. The judge referred to very compelling circumstances in [60] but there is nothing further to indicate that he applied that test. We do not accept the submission that the paragraphs following on from [60] are his assessment of whether there were circumstances going over and above those set out in the relevant provisions in the Rules and the statute.

19. These paragraphs do not set out any proper basis on which it can reasonably be inferred that the judge was satisfied that there were very compelling circumstances

or that he was applying the test as set out in para 398 or s.117C(6). The language used by the judge in [72] that the decision remained as finely poised as it was found to be in 2012 indicates to us that the judge was not making an assessment based on whether there were such very compelling circumstances. The language he used is inconsistent with such an approach.

20. It was submitted that there was no requirement for the decision to recite any particular "form of words or mantra of the moment". We entirely agree that it is not necessary to use any particular form of words, still less the mantra of the moment, but in Secretary of State v DB (Jamaica), the comments of Irwin LJ were preceded by a finding that the particular decision under appeal had been conducted "within the confines of a careful self-direction and with a proper recognition of the great weight placed in the public interest on the deportation of foreign criminals". We are not satisfied that in the present case there has been such a careful self-direction or that there has been proper consideration of the requirement in the current Rules that there must be very compelling circumstances over and above those set out in the provisions to which we have already referred. The reference to the fact that the position remained as finely poised as it was found to be in 2012 fails to take account of the fact that there have been two changes in the Rules and the introduction of new statutory provisions in s.117A – D which required the First-tier Tribunal to apply very different provisions from those in force at the date of the previous decision.

21. The Supreme Court in Hesham Ali (Iraq) v Secretary of State [2016] UKSC 60 has made it clear that, even if the appellant did not fall within the provisions of the Rules, there has to be an assessment of article 8 but in that context, where the respondent had adopted a policy based on a general assessment of proportionality, a Tribunal should attach considerable weight to that assessment and in particular that a custodial sentence of four years or more represented such a serious level of offending that the public interest in the offender's deportation almost always outweighed countervailing considerations of private or family life and that where the circumstances did not fall within Rules 399 or 399A, the public interest in the deportation of such offenders could generally be outweighed only by countervailing factors which were very compelling: per Lord Reed at [46].

22. In summary, we are not satisfied that the First-tier Tribunal gave any or any proper consideration to the requirement both within the Rules and generally under article 8 that there must be countervailing considerations of a very compelling nature to outweigh the public interest in the deportation of those sentenced to periods of imprisonment of four years or more. For these reasons, the judge erred in law and the decision must be set aside.

23. Both representatives submitted that if the decision was set aside, the better course would be for the appeal to be retained in the Upper Tribunal for the decision to be re-made. We are satisfied that this is the right course to take.

24. The hearing was resumed before me on 25 January 2018. The appellant filed two further witness statements dated 11 and 24 January 2018 and one by his wife dated 10 January 2018. He relied on the bundle of documents (A) before the First-tier Tribunal indexed and paginated 1-351. It was agreed that there was no need for further oral evidence and that the resumed hearing could proceed by way of oral submissions only.

Further Submissions

25. Mr Markus submitted that the First-tier Tribunal had accepted that the requirements of para 399 (a) and (b) of the Rules were met and that the issue was whether the public interest in deportation was outweighed by other factors where there are very compelling circumstances over and above those set out in para 399 and 399A. He accepted that when assessing article 8 the provisions of part 5A of the 2002 Act had to be considered but the balancing exercise remained a matter for the Tribunal.

26 He submitted that the proper starting point for the assessment of the appeal was the Tribunal decision of 17 April 2012 and that any changes of circumstances should then be considered. The appellant had committed further offences since his release from prison but he could not be described, so he argued, as a recidivist in the true sense of the word. His subsequent convictions were minor offences. The First-tier Tribunal had accepted the appellant's explanation for his possession of drugs and the most recent offence, driving with excess alcohol, could properly be considered as on unfortunate mistake on the appellant's part. They did not show him as a hardened criminal. He had tried to reform but he accepted that he had made some mistakes. Overall, he posed no real risk to the public.

27. He submitted that there had been further developments in the appellant's family life which had the effect of strengthening his article 8 claim. He had married his partner and was formally registered as her carer. He received the carer's allowance and the family was in receipt of various benefits. His wife's illness has progressed since 2012 and he was the primary carer of the children. If he had to leave the UK, the family would fall apart. The public interest in the appellant's deportation had been diminished by the passage of time. It was 10 years since the index offence had been committed. The best interests of the children were clear, that they remain with their parents in the UK. In the light of his wife's disability his deportation would be disastrous for her. It was difficult to see, so he submitted, how things could be worse in the light of her degenerative disease.

28. Mr Tufan submitted that the substantive issue was whether the appellant could meet the test in section 117C(6) of showing that there were very compelling circumstances over and above those described in exceptions 1 and 2 (reflecting the provisions of para 399(a) and (b)). The issue was whether the factual matrix in the present case brought the appellant within one of those rare cases where there were such very compelling circumstances. He submitted that this was not the case. His wife's condition was not life threatening at this stage. There was evidence that her mother

and sister could provide support and further support would be available from social services. The appellant had committed very serious offences and had received a sentence of four years. It was significant that two later offences related to drugs and the offence of drink-driving could not be dismissed as a minor matter. There was a pattern of re-offending. Even if he was not a recidivist, he could properly be described as a repeat offender.

29. In reply, Mr Markus submitted that the more recent offences had been caused by the pressure the appellant had been under and were not likely to be repeated. Whilst his wife's condition may not be life-threatening, it was life-limiting and degenerative. She would not be able to look after herself and the family without him and her mother and sister would only be able to help in a limited way. It was difficult to see, so he argued, how social services could step in to provide the sort of care the appellant was providing. If the appeal was allowed, he invited me to make observations, even though I had no power to give directions, as to the period of leave to be granted as at present it was virtually impossible for the appellant to obtain employment because he was only granted short periods of leave.

Assessment of the Issues

30. It is not in issue between the parties that when considering the appeal under the Rules, the relevant provisions are para 398 and 399. The First-tier Tribunal was satisfied that the provisions of para 399(a) and (b) were met but it did not go on to consider whether there were very compelling circumstances over and above those provisions to outweigh the public interest in deportation. In relation to article 8, similar provisions to those in paras 399 and 399A are set out in sections 117A-C of the 2002 Act as statutory considerations when assessing the public interest question.

31 These provisions have been considered in a number of recent Court of Appeal decisions. In NA (Pakistan) v Secretary of State [2016] EWCA 62, Jackson LJ said at [29]:

> '…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 paras. 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.'

and in [37]:

> 'In relation to a serious offender it will often be sensible to see whether his case involves circumstances described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon

> respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made as to whether there are "very compelling circumstances over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors within Exceptions 1 and 2 are of such force whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test set out in section 117 C (6).'

32. In his judgment, Jackson LJ confirmed that whilst there was no exceptionality requirement, it inexorably followed from the statutory scheme that cases in which the circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare and that the commonplace incidents of family life such as ageing parents in poor health and the natural love between parents and children will not be sufficient [33]. It was also important to bear in mind that the best interests of children will carry great weight but it was a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to their best interests [34].

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33. In NE-A (Nigeria) v Secretary of State [2017] EWCA Civ239 Sir Steven Richards after considering the judgment of the Supreme Court in Hesham Ali [2016] UKSC 60 which was dealing with the Rules and not the provisions of Part 5A of the 2002 Act said at [14]:

> '… Part 5A of the 2002 by contrast is primary legislation directed to the tribunals and governing their decision-making in relation to article 8 claims in the context of appeals under the Immigration Acts. I see no reason to doubt what was common ground in Rhuppiah and was drawn from NA (Pakistan) is that sections 117 A-D, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result which is compatible with article 8. In particular, if in working through the structure one gets to section 117C(6), the proper application of that provision produces a final result compatible with article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation save where there are very compelling circumstances over and above those described in Exceptions 1 and 2" is one to which the tribunal is bound by law to give effect.'

34. As already set out, this appeal is proceeding on the basis that the First-tier Tribunal was satisfied that deportation would be unduly harsh both in respect of the appellant's wife and his children and that the issue to be assessed is whether there are very compelling circumstances over and above those provisions to outweigh the public interest in deportation.

35 The judge set out his conclusion in [72] of his decision as follows:

> "In the light of the developments since 2012, helpfully identified by learned counsel both in his skeleton argument and in his oral submissions and the effect of those developments, set against the nature of the appellant's offending, I have reached the conclusion that the fine balance identified by the panel in 2012, as

> identified in judge Shanahan's decision, remains as finely poised as it was found to be in 2012 and just on balance, enables the conclusion to be reached that it would be disproportionate for the appellant to be removed."

This wording strongly suggests to me that, had the judge followed the approach set out in the judgments referred to above, he would have found that the provisions of para 398 were not met. Bearing in mind that the Tribunal in 2012 was applying the law before the amendments to the Rules and the introduction of Part 5A into the 2002 Act, if the matter was as finely poised as in 2012, it is not easy to see how the appellant could have met the test of very compelling circumstances.

36. However, I must assess this issue for myself. In his skeleton argument prepared for the hearing before the First-tier Tribunal and relied on at this hearing Mr Markus identified the relevant changes in the appellant's circumstances since the 2012 Tribunal decision. The first relates to the appellant's convictions in 2015. These involved two offences of possessing Class B drugs leading to the appellant's convictions in April and May 2015. It is argued that they were offences of possession only and that, in the absence of the earlier convictions in 2008, they would not warrant deportation action.

37. The First-tier Tribunal judge took into account that the offences related only to possession only and that the quantities were very small. He accepted the appellant's explanation for committing these offences: that he was going through a stressful period in his life. He said at [50] that the appellant appreciated that he had jeopardised his family life by his offending and noted that he had completed his community order with no breaches. He took account of the short interval between the two offences as a significant factor in indicating that the reason for the offences was as given by the appellant and the fact that he had not reoffended in the interval between his release from prison until December 2014 and that he had not reoffended since the conviction in 2015.

38. However, a third offence has now been committed as in December 2017 the appellant drove with excess alcohol when he was taking his cousin home after a visit to the appellant's home. In his witness statement dated 24 January 2018, the appellant sets out his version of the circumstances of the offence. It was snowing and he was driving at 35 mph in a 40 mph speed limit. As he travelled around a bend, the car started to swerve and he hit the pavement. The car was damaged and would not start, causing an obstruction in the road. The police were contacted because of the obstruction, they attended the scene and the appellant was breath tested.

39. He was found to have exceeded the legal limit. He attended court on 16 January 2018 and pleaded guilty to the offence. He was fined £210 and disqualified for 11 months. He has no previous convictions for road traffic offences. He says that he did not realise that he had had too much alcohol in his blood as he does not regularly drink alcohol and he did not appreciate that he would exceed the relevant limit after drinking one bottle of stout brought by his cousin.

40. Mr Markus submitted that the appellant could not properly be regarded as a recidivist in the true sense of the word, which may well be right but, nonetheless, there is a pattern of offending. The index offences related to supplying and possessing controlled drugs and the appellant who had previous convictions relating to drugs offences has after his release from prison committed two further offences, albeit less serious, also relating to possession of controlled drugs. Further, during the course of these proceedings he has committed an offence of driving with excess alcohol, which, although there is no reason not to accept his account of how it occurred, cannot be glossed over as a minor offence. In the OASys report (A99-137) prepared for the index offence the appellant was said to present a low risk of reoffending. Nonetheless, he has reoffended three times since that report. The offences, committed after the Tribunal decision in 2012 describing the proportionality issue as finely balanced, cast real doubt on whether appellant is willing or able to stay out of trouble. By themselves the further offences may not warrant deportation but they must be considered in the light of the his immigration and criminal history as a whole and they raise real concerns about the appellant's attitude to the law.

41. The second change of circumstances relied on by the appellant relates to the developments in his family life since the Tribunal decision in 2012. It is submitted that they have strengthened his article 8 claim in that he and his partner have married, he is formally registered as his wife's carer and receives carer's allowance, the family have the use of a motability car funded through a disability living allowance (mobility) award, he has remained in the family home, their oldest child is progressing well school and there are now two younger children of the family born in 2015 and 2016 respectively. Further, his wife's father who assisted in providing care has sadly died and his wife's condition has progressed since 2012.

42. In her statements the appellant's wife has set out the family care carried out by the appellant. In her letter of 10 February 2014 (A239) in support of representations made to the respondent she confirmed that the appellant was a much loved and integral part of their family life and that owing to her suffering from multiple sclerosis and arthritis in her spine, he was her main carer. She said that as a loving and supportive father and husband on a daily basis they relied on him for school runs, homework and liaising with teachers and that he attended all relevant meetings, appointments and after-school activities. She also describes him and his son as inseparable.

43. In her recent witness statement of 11 January 2018, the appellant's wife refers to the fact that they have a very close family unit and the appellant plays a primary care role for her children as well as for herself. She describes him as having a very close relationship with the older child and they are always doing activities and spending time. She then says that the appellant has had to step up in terms of his childcare in relation together to the two younger children as the youngest born in September 2016 requires a lot of attention and demands to be picked up a lot of the time and has much greater attention needs than the two older children. This has caused problems as she cannot pick the youngest child up because of her back pain. She describes the

appellant as continuing to play a key role in caring for the children and he is the one who is primarily responsible for dropping the second child at nursery.

44. The First-tier Tribunal accepted the evidence of both the appellant and his wife and the documentary evidence confirms that the appellant has been awarded the carer's allowance (A251) and that the couple have the use of a motability car (A221). When assessing the impact of the appellant's wife's condition, I must take into account the medical evidence. There is a report dated 10 December 2010 (A11) from Dr Evangelou, consultant neurologist, which confirmed that the appellant's wife was under the care of the multiple sclerosis team in Nottingham and had been since 2004 when she was diagnosed with relapsing/remitting multiple sclerosis. He explained that:

> "Some patients can have a relatively mild disease but others can be severely disabled. Judging from the course of the disease in the first few years you can get an idea of the severity of the disease in the long term. [The appellant's wife] was diagnosed in 2004 and when she was last seen in 2010 she had accumulated very little disability… Judging from the progression of her illness over the first six years it is anticipated that the next 10 years her symptoms will become more prominent. She will still be able to walk independently. It is less likely that her mobility will be more seriously affected. Other symptoms that patients with multiple sclerosis experience could be urinary, coordination and numbness".

Dr Evangelou said that she did not experience significant problems requiring intensive care but that patients with multiple sclerosis have good days and bad days.

45 In a letter dated 6 February 2014 (A203) from the appellant's wife's medical centre in response to a request to confirm that she had been diagnosed as suffering from multiple sclerosis, it is confirmed that the diagnosis dates back to about 2004, that she is under the care of neurology specialists at the Queens Medical Centre in Nottingham and periodically requires treatment with betaferon. More recently, there is a letter from the Nottingham NHS trust dated 22 November 2016 (A18) to confirm that she will shortly be started on tecfidera, an oral medication licensed for the treatment of relapsing/remitting multiple sclerosis and a letter dated 28 November 2016 (A14) from a multiple sclerosis nurse to the appellant's GP confirming that the appellant attended a day case unit on 28 November 2016 to initiate tests for tecfidera, a disease modifying treatment for relapsing/remitting multiple sclerosis which could reduce relapse rates by 49%.

46. In the light of the medical evidence and given the relapsing/remitting nature of her condition there must inevitably be uncertainty about her future condition and that relapses could recur at any time. However, the latest medical evidence is to the effect that she has been receiving treatment which has the potential to reduce relapses by up to 49%. No further medical evidence has been produced about the impact of that treatment to date. In the respondent's decision letter of 7 May 2016 at para 72 it is said that in the 2012 Tribunal decision at [15] the appellant's wife stated that though her condition she needed a lot of support from the appellant and that while she has a

good network, she felt bad about having to ask for help regularly as she did when the appellant was in prison. The letter argues, and this argument was adopted by Mr Tufan, that as a British citizen the appellant's wife did not have to rely on family and friends for help that she may require and could seek any help from local authorities and medical professionals to provide any support she required.

47. The availability of such help is a relevant factor to be taken into account although it will probably need to be supplemented by help from family and friends. In the past her family have provided support but it is submitted that they are now only able to do so to a limited degree. However, the fact remains that help is available and the appellant's wife had to look for such support when the appellant was in prison. I do not accept that the appellant's wife will be without help from family and friends and she is also likely to receive help from the multiple sclerosis team and from social services.

48 I must also take into account the best interests of the children as a primary consideration. I accept that the appellant has a good and close relationship with his eldest child as set out in the witness statements and in the social work assessment dated 30 November 2016 prepared by an independent social worker, Mr C. Musendo. It is his view, which I accept and agree with, that the deportation of the appellant will not be in the best interests of the children, particularly the older child, and that removing him from the family unit is likely to have a negative impact on his wife's ability to meet their children's needs. I note that when Mr Musendo dealt with the capability of each parent to meet the children's needs [43-45 of his report], he says that it is evident from the medical records that his wife has periods of disability and periods of remission [44] and that it is therefore inevitable that if the appellant is removed from his family unit, it could have an impact on the quality of care given by his wife to their children and at [52] that if the appellant is removed from the family unit, this is likely to compromise the quality of care given to the children. However, as I have already indicated, the extent of the impact on the quality of care given by the appellant's wife can be mitigated by the help available to her.

49. I must now weigh up these various factors to consider whether the appellant can show that there are very compelling circumstances over and above those described in para 399 (a) and (b) and Exceptions 1 and 2 of the 2002 Act. I remind myself that the appellant is entitled to rely on these factors establishing undue harshness as seeking to show that there are such very compelling circumstances. I must consider whether those factors whether taken by themselves or in conjunction with other relevant factors satisfy the requirements of para 398 or s.117C(6) of the 2002 Act.

50. The best interests of the children area primary consideration but they can be outweighed by other factors. I must take into account the fact that the appellant has committed three further offences since the index offence. Whilst the Tribunal decision in 2012 has been treated as the starting point for the assessment of the current situation, the fact remains that that Tribunal reached a decision on the basis

of the law before the Rules were amended and the provisions of part 5A were introduced into the 2002 Act.

51. Although there is no issue that the appellant's wife suffers from multiple sclerosis, and whilst the evidence supports the finding of undue harshness, it does not support a finding that there are very compelling circumstances over and above the factors leading to that finding. The appellant's wife is receiving treatment capable of reducing relapse rates and does have help available to her not only from family and friends also from medical and social services.

52. Taking all these factors into account and sympathetic as I am to the situation in which the appellant's wife and children find themselves, I am not satisfied that there are other factors amounting to very compelling circumstances over and above those leading to the finding of undue harshness to outweigh the public interest in deportation and, accordingly, the appellant fails to show that he can meet the high test set out in para 398 and s 117C(6). The appeal must fail on both immigration and human rights grounds.

Decision

53. The First-tier Tribunal erred in law and the decision has been set aside. I re-make the decision by dismissing the appeal against the deportation order.

54. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter Date: 13 February 2018

Deputy Upper Tribunal Judge Latter