Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16703/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 10 October 2017

Decision & Reasons Promulgated

On 24 January 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ANSLEM ANIRAH
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Warren instructed by Turpin & Miller LLP Solicitors.
For the Respondent: Mr C Bate Senior Home Office Presenting Officer.

DECISION AND REASONS

1. In a decision handed down on 18 July 2017, a copy of which appears as Annex A to this decision, the Upper Tribunal found that a judge of the First-tier Tribunal had erred in law in allowing the appellant's appeal against the refusal of his application for leave to remain on the basis of his human rights, made following the service of an order for his deportation from the United Kingdom as a result of earlier drug related offences.

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Background

2. A summary, taken from the Error of Law finding, shows that Mr Anirah, a citizen of Nigeria born on 26 May 1960, entered the United Kingdom on 2 September 1988 and was granted leave to enter as a visitor. Further periods of leave were granted as a student and on the basis of marriage and, on 25 May 1994, a grant of indefinite leave to remain.

3. Mr Anirah has fathered four children with his wife, being Amber who at the date of the First-tier hearing was 24, Royston who at the date of hearing was 21, Valerie who at the date of the hearing was 20 and William who at the date of the hearing was 18.

4. On 19 May 2000, Mr Anirah was arrested and charged with conspiracy to import a Class A drug (cocaine) for which, on 2 March 2001 at the Canterbury Crown Court, he was sentenced to 10 years' imprisonment.

5. Mr Anirah was served with a notice of intention to make a deportation order on 20 May 2005. The appeal against the decision was dismissed on 11 July 2005, reconsideration of that decision granted, but the appeal again dismissed. On 25 March 2007, a deportation order was made and served with removal set for 5 June 2007.

6. In November 2009 Mr Anirah filed further submissions seeking a revocation of the deportation order on the basis of a breach of his private and family life if removed. The refusal of the application was appealed and on 23 March 2011 the appeal allowed. On 23 September 2011, the Secretary of State revoked the deportation order and on 26 September 2011 granted Mr Anirah six months leave to remain in the UK.

7. On 12 March 2012, Mr Anirah applied for further leave to remain relying on article 8. The application was refused and a removal direction issued which, the Judge noted, was not a decision to deport. The appeal against this decision was allowed on 22 March 2013 which resulted in a further grant of six months discretionary leave to remain until 25 January 2014.

8. On 25 January 2014, Mr Anirah applied for further leave to remain on article 8 grounds. On 9 February 2015, a new decision to deport was made based on the conviction in 2001. Mr Anirah was invited to submit any further representations he wished to make under Article 8 which he did resulting in the refusal of a human rights claim which gave rise to the appeal before the First-tier Tribunal.

Evidence and submissions

9. There are a number of preserved findings in relation to this appeal which form the starting point for the consideration of this tribunal. They are identified in the Error of Law finding as being: The finding of the Judge that Mr Anirah is unable to satisfy the requirements of 399, 399A and had failed to make out the existence of very compelling circumstances over and above those described in paragraph 399 and 399A which is a preserved finding under the Rules. The finding Mr Anirah failed to

establish the existence of family life recognised by article 8 between him and his adult children shall also be a preserved finding as shall the finding that the relationship with the children together with the other aspects identified by the Judge form part of Mr Anirah's private (incorrectly written as family in the error of law finding) life in the United Kingdom. The finding Mr Anirah has no family in Nigeria, no accommodation and no employment shall be a preserved finding although it will be necessary to consider the impact of his return and possibility of re-establishing himself if returned. It shall also be a preserved finding that Mr Anirah has not been convicted of any further offending since the index offence."

10. An issue arose in relation to the evidence filed for the purposes of this appeal by the appellant's representatives which fell outside the time limit provided by the Upper Tribunal in the error of law finding. The direction at paragraph 41(c) clearly states that evidence not filed in compliance with the time limit shall not be admitted without specific leave the Upper Tribunal, a barring provision. The direction also set out the method by which such permission was to be sought. A full copy of the directions made in paragraph 41 can be seen in Annex A. No such application was made and the evidence was filed late.

11. Mr Bates confirmed he was not prejudiced by the evidence being admitted and so the Upper Tribunal was able to proceed without having to consider this matter further; although all representatives must be aware that failing to comply with a specific direction of a tribunal without good cause could result in a referral to a supervisory professional body in addition to any sanction that may be imposed by the Tribunal itself.

12. As the effect of the direction is that the evidence is not admissible until the appellant seeks and is granted relief from that sanction, it is confirmed that such relief is granted and the evidence provided in the bundle filed under cover of a letter of 4 October 2017 admitted.

13. That bundle contained a number of witness statements by the appellant and his children Amber, Royston, Valerie, William and the children's mother, the appellant's previous wife, Ann.

14. A material difference in the situation that existed previously, which exists in this appeal, is that the children have now attained the age of 18. The appellant speaks at length in his latest witness statement of his pride in the children and the ongoing nature of the contact with them. The appellant summarises his position and desire at [18] of statement of 22 September 2017 in the following terms:

> "18. I would like to take this opportunity to appeal to the Tribunal and the Home Office that I should be given the chance to live a normal life in the United Kingdom. I came to this country in 1988 (29 years ago) and had never been back to Nigeria. I am 57 years old now. Should I be deported, I would have no one to turn to; nowhere to live and being homeless in a strange land would be a death sentence to me. My father died in 1962 I was brought up partly by well-wishers

> and the Catholic Church as my mother could not be traced. I do not have any title link whatsoever to Nigeria any more. My children are all British and have never been to Nigeria. I do have a very strong bond with my children here in the United Kingdom and would like to be part of their lives for the rest of my life. I want to be at their graduation and marriage ceremonies. I would also like to see their children (my grandchildren). Please give me one last chance to be a father to my children and see them grow up. It is true that they are all over 18 years old now but that should not be seen as detrimental to the relationship and bond between us. They remain my children and in fact the older they get, the stronger our bond and relationships become. Thank you very much for giving me this opportunity which I will forever be grateful."

15. In accordance with directions, that statement stands as the appellants evidence in chief. In reply to questions put in cross examination, the appellant confirmed that he owns a property in the United Kingdom which he has owned since 2012. The appellant was asked why, as the children live in Liverpool, he chose to buy a property in Manchester which he claimed was a short distance from where he works. There is no mortgage on the property in relation to which the appellant claims to have paid £26,000 in cash. The appellant was asked its value and referred to a house near him selling for £28,000 although stated his is a very old terraced house. When asked whether if deported he could not sell the house to raise funds the appellant claimed the other house that he referred to took three to four years to sell and that his house is run down and would take a long time to sell. He stated he did not think he would get much and was not sure of its value. It was clear that this issue had not been addressed by the appellant and there is no evidence from an estate agent confirming its value or any issues relating to the sale of the same.

16. The appellant was asked if he remained in the United Kingdom what job he would seek to which he claimed he was prepared to do anything. He has qualifications and is trained in psychology but could not work in this field without appropriate qualifications in the UK. The appellant confirmed he has health issues in relation to his chest for which he claimed he received herbal medication and that he had been referred to counselling and placed on antidepressant, but that there was a considerable waiting list and the place allocated to him was lost as he was late for an appointment. The appellant attends church in the United Kingdom. It is a Pentecostal church and he confirmed he had attended a Catholic Church in Nigeria.

17. When asked about family in Nigeria, the appellant claimed he had no family that he knew of.

18. The appellant has received compensation as a result of a finding of unlawful detention previously and when asked how much he received he thought it was about £50,000, but was not sure. When asked about a source of income, the appellant stated he could not work and cannot claim benefits as they had been stopped. The appellant

claimed he was supported by his church who are providing him with welfare payments. The appellant claimed he has spent all his capital.

19. The appellant confirmed a number of members of the Pentecostal church were of a Nigerian background and that he changed to this church as they visited him when he was in prison. The appellant thought there was a branch of the same church in Nigeria.

20. The appellant was asked why he was willing to work in the United Kingdom but he would not do so if returned to Nigeria, to which he claimed he did not want to leave the children, he has no place to stay and no contacts. The appellant also claimed he could not stay in the church since 1 May 2017, referring to the issue of the church becoming a charity, but he did not know anything about a place in Nigeria and claimed it will be difficult if not impossible for him.

21. The appellant confirmed his children all work on a full-time basis in the UK but when asked whether they will be able to provide assistance he claimed they have needs of their own and he did not think they would have sufficient funds to assist him. The appellant's daughter lives in France with the other three children living together in the UK.

22. In reply to questions put in re-examination, the appellant confirmed some of the compensation had been used to purchases his house with the balance being spent to set up the property. The appellant confirmed he only received welfare payments from the church and that although he claimed to have asked if the church will be able to help him in Nigeria, he had been told it is complicated due to the charity issues in the UK and that in Nigeria they would not be compelled to provide assistance.

23. The appellant last worked in the United Kingdom in 2000 prior to his arrest, printing invitations. The appellant claimed to have no means to support himself in Nigeria and referred to his house being worth considerably less than the £28,000 received for the other property he referred to.

24. When it was put to the appellant in re-examination that if his house sold for around £20,000 this would enable him to establish himself in Nigeria, the appellant's reply was to state that he had not been there for a long time and that he did not want to leave his children. When it was put to him again that if he had such financing would have enough to support himself in Nigeria the appellant then claimed that he might be attacked and the money taken from him as he could not carry it with him and he would be attacked. The appellant also did not think he had the attitude that would be expected in Nigeria that he had before he came here and that culturally he would not know how to go about things to find things out. The appellant claimed not have any family in Nigeria.

25. In his submissions Mr Bates referred to the fact that the appellant had succeeded previously on appeal as he had minor children but now the children were adults moving towards total independence from their mother or father and in employment. It was submitted the children also live in Liverpool with their mother yet the

appellant chose to buy a property in Manchester rather than in Liverpool near the children.

26. The appellant had received a substantial prison sentence of 10 years and the question is whether very compelling circumstances had been established to outweigh the strong public interest in his removal from the United Kingdom. It was also argued there is a very strong deterrent element in this case in relation to those involved in drug-related offences.

27. Mr Bates accepted the appellant had been assessed as posing a low risk of reoffending but that the only reason why it was found the public interest had been outweigh previously was because there were minor children and not that there were other countervailing factors that warranted the earlier appeals being allowed.

28. Mr Bates submitted the appellant has a house and has put money into the same, and that although the appellant claimed this would not provide sufficient funds to enable him to establish himself he did not demonstrate an ability to satisfy the required test and the appellant provided no evidence that the property could not be sold. The appellant has a capital asset that he can realise which could be used to support him on his return.

29. Mr Bates submitted the appellant was willing to work and that although health issues have been identified, there was no treatment being received and it was not shown that the appellant could not obtain work in Nigeria, especially as he had obtained qualifications in the United Kingdom. If employment was not available the appellant could use capital to set himself up in self-employment.

30. It was submitted the appellant's status in the United Kingdom became precarious as the moment he offended he was aware that his status was in doubt and that even though previous appeals have been allowed the appellant had only been granted limited periods of 6 months discretionary leave as it has always been the intention of the Secretary of State to remove him from the United Kingdom.

31. The appellant's private life has been disrupted as a result of his conduct since release from prison but his situation has always been precarious which has to be considered with other matters in the round including the fact there is no longer anything compelling to outweigh the public interest. Mr Bates argued that the public interest had not been wiped out by the passage of time even if it had been reduced and that the Secretary of State tried to enforce the deportation order on many previous occasions.

32. It was submitted it had not been made out the appellant established family life in the United Kingdom or that he would have no money in Nigeria. The appellant could establish a private life with the church in Nigeria as there are Pentecostal churches in Nigeria which is the church he chose to frequent in the United Kingdom with others of a Nigerian background. It is not made out the appellant has lost ties to Nigerian culture as a result.

33. It was submitted the evidence indicates periodic contact between the appellant and his children when he goes to see them in Liverpool or they see him in Manchester but that contact can be maintained, albeit non-physical contact, as the appellant will be able to speak and make other forms of indirect contact with his children as he does at the moment with his daughter in France. It was argued that any interference with any private life established will be proportionate.

34. Miss Warren submitted on the appellant's behalf that the family life enjoy by the appellant with his minor children was found to be compelling despite the length of sentence, which was a factor that had to be re-argued again. It is also relevant to consider the private life impact on the appellant and other family members in the United Kingdom which will be affected by the decision.

35. It was argued on the appellant's behalf that public interest in his deportation diminishes over time as this was not some abstract concept and it was necessary to say when that would amount to a deterrent factor. The appellant had been released from prison in 2012 and remained in the UK and it was argued it was fanciful to claim that there was a strong deterrent factor.

36. Miss Warren argued on the appellant's behalf that he had been involved in criminality since his release and that the impact of deportation upon both him and the children was not proportionate.

37. Miss Warren questioned what deporting the appellant would achieve. Whilst it was accepted it would achieve the fact that the appellant paid the price for what he had done, he had not reoffended and there was no expectation the appellant would reoffend in the future. It was argued the public interest was not a fixed concept and had to be examined in light of all the existing circumstances.

38. Miss Warren argued the appellant has no ties to Nigeria and that to return him after he had been in the United Kingdom for such a long period of time would make it culturally difficult for him to return and it had not been shown the appellant has finances sufficient to support himself in Nigeria.

39. In the United Kingdom, the appellant relies upon support from the church and has mentioned his children cannot assist in rehabilitating himself and the pressures on their finances. Whilst it is accepted the appellant has property it is of low value and it was argued the appellant would have problems selling the same and that due to his age the money from the house would not be enough him to live on.

40. Miss Warren argued the children in the United Kingdom could not support the appellant in Nigeria as they do not earn much money and nor does the appellant's wife earn much money and so is not realistic to make a finding of any financial support.

41. Compensation paid as a result of a finding of unlawful detention purchased the house but also supported the appellant and although Miss Warren criticised repeated grants of 6 months leave she accepted the lawfulness of such had not been

challenged by way of judicial review. I find there is no finding that such grants of discretionary leave had been shown to be arguably unlawful.

Discussion

42. The fact the appellant has been granted a period of 6 months limited leave to remain in the United Kingdom has not been shown to be arguably irrational or unlawful on the facts. The power exists for the Secretary of State to make such grants especially in cases where it is her intention to remove the person from the United Kingdom but that country for other circumstances prohibit such action being taken at the relevant time.

43. The appellant was sentenced to a period of 10 years imprisonment on account of his involvement in a conspiracy to import Class A drugs (cocaine) into the UK indicating the serious nature of his offending and substantial prison sentence imposed by the Crown Court. The Secretary of State served notice of her decision to make a deportation order upon the appellant on 20 May 2005 against which the appellant appealed although such appeal was dismissed on 11 July 2005. An application for the decision to be reconsidered was successful although the reconsideration decision rejected the appellant's arguments and on 25 March 2007 a deportation order was made and served upon the appellant and removal direction set.

44. The reason the appellant could not be removed is not as a result of a change in the approach of the Secretary of State but as a result of an applications for judicial review and an application for the deportation order to be revoked before the appellant had been removed from the United Kingdom, a refusal to revoke the order and an issue of whether the appellant had an in country right of appeal against that decision which it is said was contested all the way to the Supreme Court which ruled in the appellant's favour. As a result, the appellant remained in detention until released on bail on 6 April 2009 having been in detention for almost four years which, on 1 October 2009, the High Court declared had been an unlawful detention since 1 March 2007; in relation to which the compensation referred to above was paid. Further representations seeking revocation of the deportation order relying on the appellants private and family life were made to the respondent in November 2009 and again in November 2010 but refused. The appellant appealed and in an earlier determination promulgated on 23 March 2011 his appeal was allowed. On 23 September 2011, the deportation order was revoked and on 26 September 2011 the appellant granted leave to remain for 6 months. Further applications for leave to remain on 12 March 2012 relying on article 8 was refused and the removal direction made pursuant to section 47 the Immigration, Asylum Nationality Act 2006 against which the appellant successfully appealed resulting in a further grant of 6 months discretionary leave. A further application for leave made in January 2014 resulted in the deportation order.

45. The respondent is entitled to issue a further deportation order arising from the index offence provided the appellant is given ample opportunity to make representations in relation to the same. This has occurred during the course of these proceedings.

46. There is no successful challenge to the lawfulness of the current decision. In relation to the purpose of the deportation order, in *Taylor [2015] EWCA Civ 845* it was held that although the tribunal recognised the need to attach significant weight to the public interest, it erred in failing to identify clearly the different purposes served by a deportation: namely, to reflect public revulsion of serious crime, to protect the public from further offending and to deter others from acting in a similar way. There was no discussion of the public interest of a kind that indicated that the tribunal was aware of the importance of the reasons underlying it.

47. The finding of the earlier appeals has been that notwithstanding the appellants deportation from the United Kingdom being in the public interest removing the appellant from the United Kingdom would breach a protected right, namely the family life he enjoyed with his children. The appeal heard on 7 March 2013 was not an appeal against a decision to deport but an appeal against a refusal to vary leave to remain and remove the appellant which the Judge on that occasion found was disproportionate, on the basis the appellants presence as a father was important to his children's lives. The children at that time were still dependent minors.

48. What has changed in relation to this matter is the need to consider the current situation. Adopting a structured approach, it is not disputed that the appellant is a foreign criminal who was sentenced to a considerable period of imprisonment as a result of his earlier criminal conduct which means he is now the subject to an order for his deportation from the United Kingdom by virtue of section 5(1) Immigration Act 1971 which was maintained when an application opposing it on human rights grounds was made, and served upon the appellant.

49. The offence committed by the appellant and his conviction predates the introduction of automatic deportation provisions contained in UK Borders Act 2007.

50. Paragragh A362 of the Rules provides that

> "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served".

51. Paragraph 363 proved that

> "The circumstances in which a person is liable to deportation include:
>
> (i) where the Secretary of State deems the person's deportation to be conducive to the public good;
>
> (ii) where the person is the spouse or civil partner or child under 18 of a person ordered to be deported; and
>
> (iii) where a court recommends deportation in the case of a person over the age of 17 who has been convicted of an offence punishable with imprisonment.

52. The decision is therefore a lawful decision pursuant to paragraph 363 (i).

53. Other relevant provisions of the Immigration Rules include:

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(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.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave.

399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.

54. The appellant was sentenced to a period of 10 years imprisonment making his deportation conducive to the public good. Paragraph 399 and 399A are of no application per se as a result of the length of the period of imprisonment. Accordingly, 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.

55. The appellant bases his claim on the personal impact he will face if deported from the United Kingdom.

56. It is accepted the appellant has been in the United Kingdom and is integrated based on length of time here and having brought his family up here. In relation to the question whether there will be very significant obstacles in relation to the appellant's

reintegration into Nigeria, this is not arguably made out. Although passage of time away from an individual's home state is an important factor it is not the determinative factor. It is accepted that the appellant will face obstacles to reintegration but that is not the required test as illustrated by the language "very significant obstacles".

57. The appellant has no employment or support in the United Kingdom other than through his church. This church is attended by members of the Nigerian community and it is not made out that he has lost contact with all aspects of Nigerian culture.

58. The appellant owns property in the United Kingdom which is free from mortgage. The appellant claims not to be aware of the true value of this property or whether it will sell and makes reference to another property although no evidence was provided to support any of the contentions he has made. It is in particular not made out that the appellant will not be able to sell the property within a reasonable period of time from which the appellant is likely to obtain a considerable capital sum. The Tribunal has judicial notice that properties in the appellant's street, both two and three-bedroom terraces, are currently on the market for between £55-£85,000. Whilst some properties may be in better condition than the appellants this clearly shows there is a demand and casts doubt upon the appellant's assertions in relation to his own house.

59. The appellant has failed to establish that he will either be unable to sell his property or realise enough to enable him to re-establish himself in Nigeria. Whilst it is accepted that the money realised from the sale of the property will be unlikely to be enough to meet all of the appellants needs it is not made out that he will be unable to secure rented accommodation which can form a base and provide for his basic need of shelter.

60. The appellant fails to provide evidence of the cost of living in Nigeria or any evidence that he would be unable to satisfy his basic needs/requirements.

61. The assertion by the appellant was not that he could not take his funds and re-establish himself in Nigeria but a fear that if he was carrying all that money with him he would be robbed. This claim has no arguable merit as it is not suggested he will have to carry vast amounts of cash. Nigeria is a country with an active banking system in relation to which many in the United Kingdom send remittances to relatives in Nigeria electronically through that banking system. The appellant, like any other Nigerian national, will be able to lodge monies in a bank account and withdraw the same according to his needs.

62. The appellant has received support from the Pentecostal church in the United Kingdom and it is clear that similar churches exist in Nigeria. It is not made out the appellant will not be able to join a congregation in such a church and re-establish his private life in relation to that aspect, in addition to having the benefit of those attending church services or members of the church itself who he will be able to turn to for advice in relation to how to deal with the day-to-day reality of life in Nigeria if

he encounters problems he is unable to deal with. When the appellant was asked about financial support from the church he tried to explain this away by claiming that as the church in the United Kingdom is a registered charity they had to provide him with support whereas the church in Nigeria was not a charity and therefore would have no such obligation. Even if the church in the United Kingdom is a registered charity with stated charitable aims this does not mean they are mandated to help the appellant or anybody who comes to them for assistance. Discretion is always retained by trustees of a charity and those administering charitable funds in relation to how they are distributed in the absence of the terms of the charity mandating donations have to be made to anybody who asks for the same. This was not established by the appellant's evidence.

63. Whilst it is accepted that many churches are dependent upon contributions from the congregation it is also the fact that the churches, as part of their Christian duties, help those in need. The appellant fails to establish what is needed or that assistance could not be obtained from the church in Nigeria, if required. It is not made out by that the Pentecostal church attended by the appellant in Manchester would not be able to liaise with a similar church in Nigeria to advise them of the appellants return and ensure he has a point of contact in his home state.

64. In relation to employment, the comments regarding assistance from the church or the church congregation also apply. The appellant will be able to liaise with those in his home state who have lived in Nigeria and continue to do so in relation to advice on securing appropriate employment. The appellant has qualifications and has declared a desire to work in the United Kingdom which must be equally applicable to a desire to work if returned to Nigeria. Whilst it is accepted the appellant is 57 years of age it was not made out, on the basis of country or other evidence, that this will prevent him obtaining work. Mr Bates raised the issue of self-employment using part of the capital available to the appellant and it has not been made out that the appellant would not be able to secure a future in the employment market one way or the other. Although the appellant's statement that he has lost his understanding of the reality of life in Nigeria may have merit, this does not mean that he will be unable to re-establish the same with local assistance from the church, if required.

65. The children no longer provide the family life line of argument relied upon by the appellant previously as they are now adults in employment themselves and the appellant's daughter is in France. It was not made out that no member of the family would unable to provide some support or assistance to the appellant, as apart from generalised statements to this effect no hard evidence was shown to establish this was so. It was not suggested that individual family members, or cumulatively, should provide substantial sums but it must be remembered that the argument throughout the appeal processes that occurred before was based upon the very strong bond between the appellant and his children, an issue to which the appellant refers in relation to this appeal. If such a bond exists it appears highly unlikely that the children will be unwilling to support their father if he was returned to Nigeria and sought such support, even if only to the very limited extent that they were able,

the value of any financial input in Nigeria possibly having considerably more in terms of purchasing power then it would in the United Kingdom.

66. It has not been made out the appellant would be unable to maintain contact with his children who remain in the United Kingdom. The appellant is used to such indirect contact with his daughter in France and it has not been made out that he will not be to unable to secure either telephone or Skype services to enable contact to continue with all his children. It has not been made out that even if the children would be unable to afford the cost of a holiday to visit their father in Nigeria at this time, this will always be the position. The children are in employment and it is reasonable to assume that their income in such employment will increase or they will have the ability to save over time.

67. Whilst it is accepted that re-establishing himself in Nigeria will be difficult it is not made out that any problems the appellant will face cannot be overcome.

68. Whilst it is accepted the appellant has made out that it could be argued there are compelling circumstances it is not made out that very compelling circumstances over and above those described in paragraphs 399 and 399A exist in relation to this appeal.

69. I find the appellant has failed to establish an entitlement to remain in the United Kingdom under the Immigration Rules. This is, however, not the end of the matter. This is a post Immigration Act 2014 decision. In *NE-A (Nigeria) v SSHD [2017] EWCA Civ 239* it was held that there was no inconsistency between the analysis in Rhuppiah and what was said in Hesham Ali. The focus in Hesham Ali was on the rules and it had not been necessary to consider the provisions of s117. Part 5A of the 2002 Act was primary legislation directed to tribunals and governing their decision making. Sections 117A to D were intended to provide for a structured approach to the application of Article 8 which produced in all cases a final result compatible with Article 8. Section 117B(6) was more than a statement of policy to which regard was to be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" was one to which the tribunal was bound by law to give effect. There was no room for any additional element in the proportionality balance under Article 8. Observations in Akinyemi were not to the contrary.

70. It is necessary to consider the merits of the appeal by reference to article 8 ECHR as that is the nature of the jurisdiction of the Tribunal and the Rules have not been found to be a complete code by the Supreme Court.

71. The protective right relied upon by the appellant is the private life formed in the United Kingdom which includes that with his adult children. The appellant does not live with those children and it has not been established that the ties between them are any more than those that exist between a parent and their adult children. In particular it has not been established that the required degree of dependency exists

sufficient to support a finding that family life recognised by article 8 has been made out.

72. It is accepted, based on the evidence, that the bond between the appellant and the children forms a very strong aspect of their respective private lives. It is accepted the decision to deport the appellant from the United Kingdom would interfere with that private life, and other aspects of his private life the appellant has formed in the United Kingdom, sufficient to engage article 8.

73. It is not disputed that the respondent's decision is lawful meaning the issue in the appeal is that of the proportionality of the decision.

74. The arguments presented on the appellant's behalf regarding the purpose of deporting the appellant at this point in time, recorded above, are noted but not determinative. In this appeal, there is a very strong deterrent element which is not arguably reduced by the passage of time since the commission of the index offence and the appellant sentence, such that it carries no considerable weight.

75. It is accepted the appellant has not offended since he was imprisoned but his deportation from the United Kingdom is, according to relevant legal provisions, conducive to the public good.

76. Against the appellants side it is necessary to consider the respondents position. This is partially reflected in the submissions that have been set out above but it is necessary to set out in detail the comments of the sentencing judge which explains why, notwithstanding there being no evidence of previous convictions, the appellant received a period of 10 years imprisonment. The sentencing remarks of His Honour Judge Webb sitting at the Canterbury Crown Court on 2 March 2001 the following terms:

> "… All 3 of you have now been convicted of conspiracy to evade the prohibition of the importation of cocaine.
>
> The evidence has shown that you were all involved importation of cocaine coming into this country from Jamaica. There was a sophisticated method employed in order to obtain the objective: the cocaine was concealed in tins of Stamina Juice and Supplegen, Caribbean drinks which are popular over here, also in shampoo; the tins and containers were air freighted to Amsterdam, or to Zurich, where you, Gilbert Anderson, arranged for their collection by hired van and their transport into this country. The evidence discloses the very many importations: there were at least… at least… 35 journeys of a similar nature; although I accept the point, made by Mr Clegg, that a very limited number of those may have been dry runs. This conspiracy ran over a period of time, set out in the indictment and amounting to 2 years.
>
> The van which carried the drugs on the last importation was intercepted on 19th May, and it was found there were 117 tins of Supplegen in that consignment, which were found to contain viscous liquids, or scurry, which contained cocaine. The liquid and powder contained the equivalent of 21.4 kg of cocaine at 100% purity. The street level value of that consignment was said to be about £2,000,000.

The evidence has shown that you, Gilbert Anderson, to have acquired many properties in London, you purchased expensive motorcars, a month before your arrest you purchased a Mercedes for £83,500 and you are paying £800 per month in hire charges for rented cars.

This cocaine would have been distributed on the streets of London. It would have caused the sort of problems the courts are well familiar with; people would have become addicted, they would resort to dishonesty in order to feed their habits, and courts are aware of the fact that offences of violence are committed under the influence of drugs.

The scale of the activity in which you, Gilbert Anderson, have been involved is enormous; the drugs offence which I'm dealing with here comes within the category of abnormal crime. There is no mitigation what so ever that can be put forward on your behalf; you were an organiser, you had people working for you, you enjoyed handsome profits during the time this conspiracy was carried on. You now have to pay the penalty for your criminal activity I can give no discount in respect of any plea, this matter was fully contested throughout. The sentence I pass on you is one of 25 years imprisonment.

Derek Wright, you played a less significant role in this conspiracy. You were working for Gilbert Anderson, you were intimately involved, however, in the organisation. The evidence has shown that you took a part in making sure these consignments got to where they were meant to be going. You had a close relationship with Gilbert Anderson.

I accept what is said on your behalf, that you were not a member of this conspiracy at the outset that you did join it when you came here from Jamaica. You remained here beyond a period of time you are allowed by your Visa to remain and you engaged in this conspiracy.

The sentence I pass on you is one of 15 years imprisonment. I will consider, in a moment, whether I should in addition, make a recommendation for your deportation.

Anselm Anirah, you have been convicted by the jury of participation in this conspiracy as well. You also took part in a subordinate role. The jury have found that you knew what you were doing on all those occasions when you went to Schipol, when you involve yourself with the flat hired for the purposes of aiding the importation from Amsterdam, you drove the van over from Amsterdam and over from Switzerland with these consignments.

I accept that having got yourselves involved with Gilbert Anderson, you are subject to some pressure to remain a participant in the enterprise that you have got yourself involved in. I am told that there is no assistance that I can gather from the authorities the Court of Appeal has looked at previously, as to the way in which I should deal with someone who has taken the course that you have, of cooperating with Customs from the outset when you were stopped, of giving a great deal of information to the Customs officials, and giving a great deal of information, not only in the cooperation conversations, but also in the very extensive interviews. Not only that, but you volunteered your services, in the sense that you were wired up and went on to continue the journey that had been interrupted at Dover, and thereby enabled Customs to arrest the other 2 who appear in the dock beside you.

> It seems to me that although you have contested this matter, I'm entitled to take into account what you did in the assistance you undoubtedly provided thereby. Your role was subordinate, as I have said. You have not profited, other than to a limited extent, from the role you played, and I make a significant distinction between you and Anderson. The least sentence I feel it able to impose on you is one of 10 years imprisonment.

77. Notwithstanding giving the appellant the maximum benefit he could, for the reasons stated in sentencing remarks, the appellant still received a period of 10 years imprisonment.

78. The position of Secretary of State has always been that drug related offences pose a threat to the United Kingdom. It has not been shown to be an irrational conclusion that drugs cause considerable harm. Even if it is the case that the appellant has not offended since the index offence the Secretary of State has always made clear her intention to remove the appellant from the United Kingdom when able to do so.

79. Having considered all aspects of this case very carefully and having taken into account all relevant legal provisions and submissions made, and taking into account the very strong deterrent element present in this case, I find that the Secretary of State has discharged the burden of proof upon her to the required standard that to establish that the appellants deportation from the United Kingdom, as a result of the commission of the index offence, is proportionate to the legitimate aim.

80. Ms Warren posed the question during her submissions of what was the purpose of deportation at this stage and what would it achieve. The answer is that it achieves the removal from the United Kingdom of a person whose deportation is in the public interest in addition to sending a very strong and clear message to anybody believing that there will be no consequence of being involved in drug related offending.

Decision

81. **The First-tier Tribunal had been found to have materially erred in law and the decision of that tribunal set aside. I remake the decision as follows. This appeal is dismissed.**

    Anonymity.

82. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Judge of the Upper Tribunal Hanson

Dated the 29 November 2017

Annex A

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16703/2016

THE IMMIGRATION ACTS

Heard at Manchester
on 5 July 2017

Decision promulgated

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANSLEM ANIRAH
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Bates Senior Home Office Presenting Officer
For the Respondent: Mr Markus instructed by Turpin and Miller Solicitors

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Brunnen ('the Judge') who allowed Mr Anirah's appeal against the refusal of his application for leave to remain on the basis of his human rights, made following the service of an order seeking Mr Anirah's deportation from the United Kingdom as a result of earlier drug-related offences

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Background

2. Mr Anirah, a citizen of Nigeria born on 26 May 1960, entered the United Kingdom on 2 September 1988 and was granted leave to enter as a visitor. Further periods of leave were granted as a student and on the basis of marriage and, on 25 May 1994, a grant of indefinite leave to remain.

3. Mr Anirah has fathered four children with his wife, Amber who at the date of the First-tier hearing was 24, Royston who at the date of hearing was 21, Valerie who at the date of the hearing was 20 and William who at the date of the hearing was 18.

4. On 19 May 2000, Mr Anirah was arrested and charged with conspiracy to import a Class A drug (cocaine) for which, on 2 March 2001 at the Canterbury Crown Court, he was sentenced to 10 years' imprisonment.

5. Mr Anirah was served with a notice of intention to make a deportation order on 20 May 2005. The appeal against the decision was dismissed on 11 July 2005, reconsideration of that decision granted, but the appeal again dismissed. On 25 March 2007, a deportation order was made and served with removal set for 5 June 2007.

6. In November 2009 Mr Anirah filed further submissions seeking a revocation of the deportation order on the basis of a breach of his private and family life if removed. The refusal of the application was appealed and on 23 March 2011 the appeal allowed. On 23 September 2011, the Secretary of State revoked the deportation order and on 26 September 2011 granted Mr Anirah six months leave to remain in the UK.

7. On 12 March 2012, Mr Anirah applied for further leave to remain relying on article 8. The application was refused and a removal direction issued which, the Judge noted, was not a decision to deport. The appeal against this decision was allowed on 22 March 2013 which resulted in a further grant of six months discretionary leave to remain until 25 January 2014.

8. On 25 January 2014, Mr Anirah applied for further leave to remain on article 8 grounds. On 9 February 2015, a new decision to deport was made based on the conviction in 2001. Mr Anirah was invited to submit any further representations he wished to make under Article 8 which he did resulting in the refusal of a human rights claim which gave rise to the appeal before the Judge.

9. The Judge considered the basis of the appeal and evidence provided before setting out findings of fact from [49] to [64] which can be summarised in the following terms:

    i. Pursuant to paragraph 398 of the Immigration Rules, and given the length of the prison sentence, 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 [49].

ii. In *NA(Pakistan) [2016] EWCA Civ 662* the Court of Appeal explained how this test should be approached and applied. The appellant is what is called a "serious offender" [50].

iii. Paragraph 399(a) is concerned with the parental relationship with a child under the age of 18 but all the appellant's children are over 18. Notwithstanding, the appellant places reliance on his relationship with his children and them with him. Guidance is given by the Court of Appeal in *Singh [2015] EWCA Civ 630* as to the correct approach to such relationships [51].

iv. Amber is living as an independent adult in Paris and no longer has a family life with either of her parents. Royston, Valerie and William still live at home with their mother and have a continuing family life with her and each other. However, none of them has lived with the appellant since he was arrested in 2000 and they do not have a family life with him. Notwithstanding the lack of family life, it is found the relationships that do exist between the appellant and his children form part of their private lives and that the relationships are significant and important to each of them. Direct contact between them would be exceedingly difficult and rare if the appellant were in Nigeria. None of the children or the appellant has, or is likely, to be able to obtain the necessary financial means to pay for visits [52].

v. Paragraph 399 (b) is concerned with the relationship with a partner in the UK but the appellant has no partner and nothing else arises from this paragraph [53].

vi. Paragraph 399A applies where someone has been lawfully resident in the United Kingdom for "most of his life" and is socially and culturally integrated and there will be very significant obstacles to his integration in the country to which it is proposed to should be deported. At the date of hearing the appellant was 56 having lived in the UK for 28 years and one month. The appellant was not lawfully in the UK during that period when he was subject to the deportation order as the making of that order invalidated any previous leave to remain. The deportation order was made on 25th of March 2007 meaning the appellant was without leave to remain until granted discretionary leave on 26 March 2012 [54].

vii. The appellant can say he socially and culturally integrated into the UK as a result of length of time, together with involvement in his church, and contact with his children [55].

viii. The appellant has no family or other social ties to Nigeria and would arrive as a 56-year-old man with no social support, accommodation, or employment. The applicable test sets a high threshold which the appellant circumstances would not cross. Even if he would not face very significant obstacles he would certainly face very real difficulties [56].

ix. The appellant's crime merited 10 years' imprisonment and gives rise to a very strong public interest in his deportation. Section 117C (2) says the more serious the offence the greater the public interest in deportation. The offence was a long

way beyond the four-year dividing line between serious and medium offences. The public interest in deportation is not dependent on the risk of reoffending [57].

x. The issue is whether the public interest in deportation is outweighed by very compelling circumstances over and above those described in paragraph 399 and 399A [58].

xi. Such circumstances appear to be (1) the offence was committed around 2000 and the appellant has committed no further offences in the 7.5 years since he was released from custody in April 2009, the public interest in deportation can recede with the passage of time [59], (2) had the appellant not been kept in custody unlawfully over two years his crime free period at liberty would have been correspondingly longer [60], (3) when the appellant applied for his first grant of six months discretionary leave to be extended in 2012 the respondent did not make a fresh deportation order merely decided to refuse his leave and remove him. It was reasonable for him and his children to believe at that stage that the threat of deportation was behind him, meaning they could be forgiven for being shocked when his further application for leave to remain in January 2014 was met by the deportation decision made in February 2015 [61], (4) the appellant's relationship with his children did not qualify under 399(a) but is nevertheless important and precious to him and him to them. Although the respondent could argue with the passage of time and ages of the children the relationships are less important than when previous appeals were allowed the appellant may argue that time has enabled relationships which were more tenuous following imprisonment and detention to be strengthened and consolidated [62], (5) aside from his relationship with his children the appellant is socially integrated into the UK and would face real difficulty re-establishing himself in Nigeria [63].

xii. The Judge concludes that for the reasons set out at [59 – 63], taken cumulatively, they amount to compelling circumstances over and above those described in paragraph 399 and 399A leading to a finding the appeal should be allowed [64].

10. The Secretary of State sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but thereafter renewed to the Upper Tribunal following which permission to appeal was granted by Upper Tribunal Judge Kebede on 5 May 2017. The operative part of the grant is in the following terms:

> "... there is arguable merit in the assertion in the grounds that the judge failed to provide adequate reasons for why the appellant's circumstances, as set out at [59] to [63], were very compelling, in particular where he was unable to meet the requirements of the immigration rules. The grounds are arguable and I therefore grant permission."

Error of law

11. It is not disputed that the offence committed by the Mr Anirah is very serious as evidenced by the substantial period of imprisonment and the nature of the offending

which related to drug offences. It is not disputed that attempts by the Secretary of State to remove Mr Anirah have previously failed as a result of findings by the Tribunal that his removal from the United Kingdom at that time would be an unwarranted interference with protected rights pursuant to Article 8 ECHR.

12. It is also not disputed that Mr Anirah is a foreign criminal who has remained liable to be deported from the United Kingdom and that, even if in March 2012 an application was made for further leave on a discretionary basis which was refused without a deportation decision being made but thereafter allowed on appeal on article 8 grounds, the Secretary of State was still lawfully entitled to make a deportation order on 9 February 2015.

13. The Judge identifies within the decision under challenge that Mr Anirah is unable to succeed under the Immigration Rules. The Rules now simply assert at paragraph 397 that a deport order will not be made if it would be contrary to the UK's obligations under the Refugee Convention or the ECHR or if not contrary to those obligations in exceptional circumstances. Paragraphs 398, 399 and 399A then set out the requirements to consider when assessing the Article 8 position.

14. The legal landscape has been recently clarified by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60* (which was concerned with the law pre-the Immigration Act 2014) in which Lord Reed noted that in *MF (Nigeria) [2014] 1 WLR 544* "... the Court of Appeal described the new rules set out in para 23 above as "a complete code" for article 8 claims (para 44). Lord Reed noted that that expression reflected the view that the concluding words of rule 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the article 8 criteria and all other factors which were relevant to proportionality (para 39). On that basis, the court commented that the result should be the same whether the proportionality assessment was carried out within or outside the new rules: it was a sterile question whether it was required by the rules or by the general law (para 45)". Lord Reed then went on to say that "The idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules, and the Rules alone, govern appellate decision-making. Dicta seemingly to that effect can be found, for example, in *LC (China) v Secretary of State for the Home Department [2014] EWCA Civ 1310; [2015] Imm AR 227*, para 17, and *AJ (Angola) v Secretary of State for the Home Department [2014] EWCA Civ 1636*" albeit that Lord Reed reiterated the weight to be given to the public interest in deport cases. Lord Wilson, however, said that "Provided that the phrase (in the Rules) is not misunderstood, there is nothing wrong with an analysis in certain contexts that "exceptional circumstances" will be necessary for a claim under article 8 to prevail". Lord Wilson said that where the appellant's family life with another person was developed at a time when, to his knowledge, his immigration status rendered his ability to remain living in the UK precarious, " his claim to respect for his family life is inherently weak. It is therefore legitimate to describe it as likely to prevail only in exceptional circumstances. The court in Strasbourg has said so. Thus in *Rodrigues Da Silva, Hoogkamer v Netherlands (2007) 44 EHRR 34*, the Strasbourg court said: "39. … where this is the case it is likely

only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8." Lord Wilson added: "In the *MF (Nigeria)* case, however, the Court of Appeal proceeded to make an insignificant but unfortunate error. It held at para 44 that the new rules were "a complete code" which fell to be applied not only by the Secretary of State's case-workers but on appeal by the First-tier Tribunal. It is one thing to suggest that the Secretary of State's rule 398 is relevant to the weight which the tribunal should give to the public interest. By doing so, the tribunal would do no more than, in the words of Lord Bingham in the Huang case, para 16, to accord "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice". But it is another thing altogether to suggest that the rules provide the legal framework within which the tribunal should determine the appeal. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality and said "what has now become the established method of analysis can therefore continue to be followed in this context ... 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".

15. In a more recent decision of in *NE-A (Nigeria) v SSHD [2017] EWCA Civ 239* it was held that there was no inconsistency between the analysis in Rhuppiah and what was said in Hesham Ali. The focus in Hesham Ali was on the rules and it had not been necessary to consider the provisions of s117. Part 5A of the 2002 Act was primary legislation directed to tribunals and governing their decision making. Sections 117A to D were intended to provide for a structured approach to the application of Article 8 which produced in all cases a final result compatible with Article 8. Section 117B(6) was more than a statement of policy to which regard was to be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" was one to which the tribunal was bound by law to give effect. There was no room for any additional element in the proportionality balance under Article 8. Observations in Akinyemi were not to the contrary.

16. The Judge considered whether Mr Anirah is a foreign criminal as defined by s117D (2) (a), (b) or (c); (b) and, correctly, found he was. The Judge then considered whether Mr Anirah fell within paragraph 399 or 399A of the Immigration Rules and found he did not. As a result, the Judge was required to consider whether there were very compelling circumstances over and beyond those falling within 399 and 399A relied upon, and found there were.

17. The basis on which this finding was made relates to the private life enjoyed by Mr Anirah in the United Kingdom primarily between himself and his children.

18. It is submitted by Mr Bates on behalf the Secretary of State that the difficulty with the Judge's findings is that as it was found there was no family life between the children, who are adults, and Mr Anirah, and no element of emotional dependency, the Judge

does not set out in relation to the private life that exists why the same reaches the significant level required to outweigh the public interest.

19. Mr Anirah has spent a considerable period of his life in the United Kingdom but for some of that he was imprisoned which would have had a detrimental impact upon any period of integration. In this case, it is accepted Mr Anirah has not demonstrated that he has been integrated into the United Kingdom for most of his life. In relation to integration into Nigeria, this imports a high threshold referring to the existence of insurmountable obstacles. The Judge found there would be obstacles to integration in Nigeria but does not make a finding that Mr Anirah would face very significant obstacles, even if he faced real difficulties.

20. In relation to the children, the Judge sets out at [52] the living arrangements for the children, now adults, and finds "they will value the time they spend together, the contact they have by telephone or by other electronic means and the advice and support are able to offer each other. There could be no doubt that direct contact between them would be exceedingly difficult and rare if the Appellant were in Nigeria. None of the children, nor the appellant has or is likely to be able to obtain the financial means to pay for visits". The Judge is attacked in the grounds for speculating upon what may occur in the future as there is no evidence what resources Mr Anirah may be able to obtain at some later date nor of the financial prospects of the children. The conclusion that the members of the family would not earn sufficient resources to fund a visit to Nigeria is not made out. The Judge has given inadequate reasons for concluding why the children would not be able to visit their father if they wished to do so at some point in the future.

21. The determination and the challenge fails to adequately set out the nature and frequency of any direct contact. The Judge noted Amber was living an independent adult life in Paris indicating any direct contact would be infrequent and it is not known how often Royston, Valerie and William actually see their father or the nature and quality of any such contact.

22. The Judge also fails to make findings upon whether the contact which is likely to occur by indirect means, such as telephone contact or through electronic means could continue if Mr Anirah is removed to Nigeria and whether there is any impact upon the nature of the private life enjoyed through such an avenue if Mr Anirah is not in the United Kingdom.

23. The decision refers to Mr Anirah arriving in Nigeria as a 56-year-old man with no social support or accommodation or employment but fails to adequately analyse whether the same could be achieved within a reasonable period of time. If the relationship between Mr Anirah and his children is as close as the Judge finds, there was a need to analyse whether there could be any financial support from this avenue or whether Mr Anirah has resources of his own that he could use to support himself whilst he became properly established. The Judge refers to a period of unlawful detention by the Secretary of State which may have given rise to a claim for damages paid to Mr Anirah, of which there is no reference in the decision. It is also the case

that an element of Mr Anirah's private life appears to be his involvement with his local church, but the Judge fails to analyse the nature of any assistance that could be provided through the church network in Nigeria to, again, help during any period in which Mr Anirah was required to re-establish himself.

24. The wording of the Rules is very specific, more than he issues identified in 399 and 399A are required, which imports a higher threshold into the assessment process.

25. The Judge notes the existence of the previous appeals but is was incumbent upon the Judge to consider within the body of the decision what weight could be placed upon those earlier findings in light of the substantial changes that have occurred in relation to the Immigration Rules and statutory provisions to be found in section 117 of the 2002 Act, and to analyse whether those changes are material to the weight the Judge was able to place upon the earlier findings. This exercise has not been shown to have occurred.

26. On behalf of Mr Anirah, Mr Markus asserted this was an attempt by the Secretary of State to relitigate the appeal but such claim has no arguable merit as at this stage the assertion is that an error of law material to the earlier decision has been made, and no more. Mere disagreement with findings made or desire for a different outcome does not amount to arguable legal error as both advocates will be aware. An arguable genuine legal error material to the decision must be established. If so, the Secretary State is arguably entitled to reargue the merits of the appeal.

27. It is accepted by the Secretary a State that Mr Anirah has not offended since 2000 and Mr Markus referred to the decision of the Court of Appeal in *NA (Pakistan) [2016] EWCA Civ 662*.

28. It was accepted by the Court of Appeal in *NA (Pakistan)* that serious offenders, defined as those sentenced to a period in excess of four years, could only escape deportation on Article 8 grounds "in exceptional circumstances [16]".

> <u>(ii) The position under the 2002 Act, as amended by the 2014 Act, and the 2014 rules</u>
>
> 22. Section 117C(1) of the 2002 Act, as inserted by the 2014 Act, re-states that the deportation of foreign criminals is in the public interest. The observations of Laws LJ in *SS (Nigeria)* concerning the significance of the 2007 Act, as a particularly strong statement of public policy, are equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. Both the courts and the tribunals are obliged to respect the high level of importance which the legislature attaches to the deportation of foreign criminals.
>
> 23. Section 117C(2) to (7) of the 2002 Act deals with foreign criminals who resist deportation on Article 8 grounds. The general scheme is similar to that set out in the 2014 rules. Medium offenders can escape deportation if they come within the safety net of Exception 1 (long residence provisions) or Exception 2 (parent/partner provisions). Serious offenders cannot make use of those safety nets, but section 117C(6) provides that they can resist

deportation if "there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

24. A curious feature of section 117C(3) is that it does not make any provision for medium offenders who fall outside Exceptions 1 and 2. One would have expected that sub-section to say that they too can escape deportation if "there are very compelling circumstances, over and above Exceptions 1 and 2". It would be bizarre in the extreme if the statute gave this right to serious offenders, but not to medium offenders. Furthermore, the new rule 398 (which came into force on the same day as section 117C) proceeds on the basis that medium offenders do have this right.

25. Something has obviously gone amiss with the drafting of section 117C(3). In *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, HL, at 592-593, Lord Nicholls (with whom the other members of the Appellate Committee agreed) explained the circumstances in which the courts in interpreting statutes can correct obvious drafting errors. In our view the lacuna in section 117C(3) is an obvious drafting error. Parliament must have intended medium offenders to have the same fall back protection as serious offenders. Mr Tam invited us so to rule.

26. In reaching this conclusion it is important to bear in mind that the new Part 5A of the 2002 Act is framed in such a way as to provide a structured basis for application of and compliance with Article 8, rather than to disapply it: see the title of Part 5A, the general scheme of the provisions in that Part and, in particular, section 117A(1). If section 117C barred medium offenders from asserting any Article 8 claim other than provided for in subsections (4) and (5), that would plainly be incompatible with Article 8 rights (either their own or Convention rights of individuals in their family) in some cases. Equally plainly, it was not Parliament's intention in enacting Part 5A to disapply or require violation of Article 8 in any case. We also place reliance on section 3(1) of the Human Rights Act 1998. That provision requires courts to construe legislation in a way which is compatible with Convention rights, if it is possible to do so. It is possible to do so here. In accordance with the guidance given by Lord Nicholls, the words which need to be read into section 117C(3) so as properly to reflect Parliament's true meaning are clear, namely the same words as appear in sub-section (6) and in para. 398 of the 2014 rules, which came into effect at the same time as part of an integrated and coherent code in primary legislation and the Immigration Rules for dealing with deportation cases.

27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

28. The next question which arises concerns the meaning of "very compelling circumstances, over and above those described in Exceptions 1 and 2". The new para. 398 uses the same language as section 117C(6). It refers to "very compelling circumstances, over and above those described in paragraphs

399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

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 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.

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.

31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."

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."

35. The Court of Appeal said in *MF (Nigeria)* that paras. 398 to 399A of the 2012 rules constituted a complete code. The same is true of the sections 117A-117D of the 2002 Act, read in conjunction with paras. 398 to 399A of the 2014 rules. The scheme of the Act and the rules together provide the following structure for deciding whether a foreign criminal can resist deportation on Article 8 grounds.

36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in *MF (Nigeria)*), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind 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 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 falling 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 in section 117C(6).

38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *&UUML;ner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria?* Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8.

39. Even then it must be borne in mind that assessments under Article 8 may not lead to identical results in every ECHR contracting state. To the degree allowed under the margin of appreciation and bearing in mind that the ECHR is intended to reflect a fair balance between individual rights and the interests of the general community, an individual state is entitled to assess the public interest which may be in issue when it comes to deportation of foreign criminals and to decide what weight to attach to it in the particular circumstances of its society. Different states may make different assessments of what weight should be attached to the public interest in deportation of foreign offenders. In England and Wales, the weight to be attached to the public interest in deportation of foreign offenders has been underlined by successive specific legislative interventions: first by enactment of the 2007 Act, then by promulgation of the code in the 2012 rules and now by the introduction of further primary legislation in the form of Part 5A of the 2002 Act and the new code in the 2014 rules. Statute requires that in carrying out Article 8 assessments in relation to foreign criminals the decision-maker must recognise that the

> deportation of foreign criminals is "conducive to the public good" (per section 32(4) of the 2007 Act) and "in the public interest" (per section 117C(1) of the 2014 Act).
>
> 40. Mr Tam submits that tribunal judges are sometimes losing sight of the principles discussed above. On the basis of the material which we have seen in the present group of appeals, that does appear to be the case. We now turn to examine the detail of the four appeals before us.

29. In relation to the period between the offence and the making of the deportation order, this is not a case in which the Secretary of State has delayed until the order leading to the impugned decision as the immigration history clearly shows that attempts at deporting the appellant have not been successful as a result of appeals being allowed

30. In *Yousuf (Somalia) v Secretary of State for the Home Department [2008] EWCA Civ 394* the Court of Appeal said that the amount of time the Home Office allowed to pass before serving a deportation order did not create any kind of legitimate expectation that the claimant would not be deported, but it did mean that the Home Office, and, in turn, the Tribunal, had to consider a period in which, unlike most deportees who had offended, the claimant had been able to show himself capable of living a law abiding life.

31. It is therefore a factor, as the Judge noted, that the appellant had not offended since 2000 although, for 10 years of that period he would have been subject to imprisonment and a period of release on licence when he had a very strong motive for not reoffending as it would have resulted in his being returned to prison to serve the remainder of his sentence.

32. In relation to the integration issue, Mr Markus refers to the 2013 decision in which it is said it was found that Mr Anirah was integrated into life in the UK although the reason that appeal was allowed was solely on the finding that Mr Anirah's removal to Nigeria would constitute a disproportionate interference with his right to family and private life based upon his involvement with his minor children.

33. It is accepted that in 2013 it was found Mr Anirah had no family or social ties to Nigeria but this, per se, is not the determinative test.

34. Although Mr Markus made submissions regarding the interpretation of article 8 family life, there is no cross-appeal against the finding of the Judge that family life recognised by Article 8 did not exist between Mr Anirah and the adult children.

35. I find, having considered the evidence and the decision under challenge in considerable detail, that the Secretary State has made out that this challenge is more than a mere disagreement with findings of the Judge.

36. I find it has been established that several legal errors have been made as identified in the ground seeking permission to appeal and submissions made. It is arguable the Judge failed to adequately explain why the private life relied upon was strong

enough to displace the public interest in Mr Anirah's deportation in a case in which Mr Anirah could not meet the requirements of paragraph 399 let alone the higher level he was required to demonstrate as a result of his ten-year sentence. When considering whether there were any very compelling circumstances in the case which would lead to the conclusion Mr Anirah should not be deported, is arguable the Judge erred in a manner material to the decision to allow the appeal.

37. The decision of the First-tier Tribunal shall therefore be set aside. The finding of the Judge that Mr Anirah is unable to satisfy the requirements of 399, 399A and had failed to make out the existence of very compelling circumstances over and above those described in paragraph 399 and 399A shall be preserved findings under the Rules. The finding Mr Anirah failed to establish the existence of family life recognised by article 8 between him and his adult children shall also be a preserved finding as shall the finding that the relationship with the children together with the other aspects identified by the Judge form part of Mr Anirah's family life in the United Kingdom.

38. The finding Mr Anirah has no family in Nigeria, no accommodation and no employment shall be a preserved finding although it will be necessary to consider the impact of his return and possibility of re-establishing himself if returned.

39. It shall also be a preserved finding that Mr Anirah has not been convicted of any further offending since the index offence.

40. Reference to the previous appeals can be made in the course of the Resumed hearing although the party seeking to rely upon any early decision will have to prepare a detailed analysis of the relevant legal provisions applicable at that time, the relationship between such provisions and the conclusions of the earlier tribunal's, how such provisions have been supplemented or amended by later decisions/revisions and what impact, if any, that may have upon conclusions previously reached.

41. The following directions shall apply to the future management of this appeal:

    a. List for a Resumed hearing before Upper Tribunal Judge Hanson sitting at Manchester on the first available date after 1 September 2017, taking into account the availability of Mr Markus, time estimate three hours.

    b. No interpreter is required

    c. Mr Anirah shall, no later than 4 PM 25 August 2017, file with the Upper Tribunal and send to the Secretary of State's representative a consolidated, indexed and paginated bundle setting out all the evidence upon which he intends to rely. Witness statements in the bundles shall be signed by the maker, dated, and contain a declaration of truth. Witness statements shall stand as the evidence in chief of the maker who shall be tendered for cross examination and re-examination only. Evidence not filed in compliance with the above time limit shall not be admitted without specific leave of the Upper Tribunal which must be sought on a written application filed before the expiry of the permitted

period explaining (a) who is responsible for the failure to comply with directions, (b) why there has been a failure to comply with directions (c) the evidence it is not possible to file within the specified period and when such evidence will be available to be filed and served (d) the relevance of that evidence to the issues in the appeal (e) what efforts are being made to file the evidence in time (f) whether the other party consents to the evidence being admitted late (g) the impact upon either party of allowing or not allowing the evidence to be filed out of time, and (h) the impact of allowing the evidence upon the hearing date.

Decision

42. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. The appeal shall be listed for a resumed hearing in accordance with the directions made above with a view to the Upper Tribunal substituting a decision to either allow or dismiss the appeal.**

Anonymity.

43. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I do not make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 14 July 2017