Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10695/2017**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 18th April 2018 (before UTJ Bruce)	**On 19 March 2019**
And 18th December 2018	

Before

UPPER TRIBUNAL JUDGE COKER

Between

DW

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For DW: Mrs Barton instructed by Mica Services
For the Secretary of State: Mr Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as DW. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. For the reasons given in her decision signed on 23rd April 2018, Upper Tribunal Judge Bruce found that First-tier Tribunal Judge P Chambers had materially erred in law in allowing DW's appeal against the respondent's decision to refuse his human rights claim. The SSHD had taken a decision that the deportation of DW was conducive to the public good.

2. The chronology is well known to the parties and is set out in UTJ Bruce's decision and does not have to be repeated here save in so far as it is relevant to my decision.

3. In essence the SSHD's case is that the deportation of DW, a Liberian citizen born in 1968, is conducive to the public good because he was convicted of a very serious crime in the USA for which he was sentenced to more than four years imprisonment and that he had deliberately concealed that fact when he sought entry to, leave to remain and then nationality in the UK. Since any leave he had obtained had been obtained by deception, there was in this case very great weight to be attached to the public interest in the maintenance of immigration control.

4. DW's case was that he has an established family life with his British wife and their five British children; that given the length of time that has elapsed since he committed the very serious offences and that he was addicted to class A drugs at the time of the commission of the offences, his deportation would be disproportionate and contrary to the UK's obligations under Article 8 ECHR.

5. I heard no oral evidence. I had a bundle of documents filed on behalf of DW; a skeleton argument filed by Mrs Barton on the morning of the hearing and I heard oral submissions from both representatives. Mr Bates, no doubt because he was aware of the presence of two of DW's children in court, did not read out relevant passages from the documentary evidence but directed my specific attention to them. During Mrs Barton's submissions I asked her to consider whether, given the tenor of her submissions, she thought it appropriate for two of DW's children to remain in court. After consultation with her lay client the two children left the court.

6. The statutory framework applicable to foreign criminals does not apply directly to DW because he is not a foreign criminal as defined by s117D Nationality Immigration and Asylum Act 2002 and UK Borders Act 2007[1]. The assessment of the proportionality of the decision to refuse the human rights claim of DW is informed by the same underlying structure and concepts. DW's appeal is an appeal against the refusal of his human rights claim. It is not an appeal against a decision to deport. Whether an individual is a foreign criminal, as defined in the 2007 Act or the 2002 Act or as determined by the SSHD, is a factor that is taken into account in reaching a decision on the appeal, as are any criminal convictions or other behaviour.

7. Both parties addressed me on the issues before me namely, firstly, whether the departure of DW from the lives of the children and/or his wife would be unduly harsh and, secondly, whether there were very compelling circumstances over and above that fact.

8. There is no doubt but that DW and his wife, and he and his children, have a genuine and subsisting relationship. Their relationship commenced after his arrival in the UK in October 2001 and after he had been granted exceptional leave to remain; they were married on 25th July 2003. Their children were

[1] See Note below

born in 2004, 2006, 2008, 2010 and 2014. According to Professor Zeitlin's report, DW has two older children; one born in Liberia in 1984 and the second born in 1991 in either the USA or Liberia. There was no evidence before me of any contact between DW and them, where they are now or what involvement he has had in their lives.

9. As can be seen from the chronology, DW was arrested in 1988 in the USA on suspicion of committing offences in 1983. He escaped custody and fled the USA. He was then extradited from the Netherlands to the USA in December 1993 and convicted in January 1995 of two counts of robbery with a firearm/imitation firearm for which he received a minimum five year/maximum twenty year sentence of imprisonment. On release, having completed his sentence, he was deported to Liberia in 1998. He changed his name to DW (he says lawfully), obtained exceptional leave to remain in the UK in his acquired name in 2001, was granted ILR in 2006 in his acquired name having failed to disclose his conviction, naturalised as a British Citizen in 2007, was deprived of his citizenship in 2015 and his appeal against deprivation was dismissed in 2017. He did not disclose his original name in the applications made and so the fact of his offending and his immigration history in the USA and the Netherlands was unknown to the UK authorities.

10. The skeleton argument relied upon by Mrs Barton addresses whether it would be unduly harsh to separate DW from his children and wife. It does not address what very compelling circumstances there are over and above those submitted facts. In her oral submissions she relied heavily upon the impact upon the children of separation, the difficulties his wife would face in terms of employment, her mental health and general living problems as a single mother, the length of time since the index offence (1983 and not 1995 as Mrs Barton submitted), that he has qualified as a mental health nurse and contributed to society and his health problems.

11. Mr Bates confirmed that there was no expectation or requirement or intention on the part of the Secretary of State that DW's wife and/or the children should leave the UK with him; they are lawfully resident in the UK and are British Citizens. The SSHD accepted that they have well-established lives in the UK, they have never been to Liberia and for them to go to Liberia with their father/husband would be unduly harsh. But he submitted that separation and family split is the outcome and an expected outcome of criminal offending by those who are not British Citizens. Mr Bates submitted there was nothing in the reports relied upon by DW that indicated that the effect of that split on the children following the departure of DW from the UK would be unduly harsh; the indications in the reports were that it would be harsh but that was nothing more than to be expected where families are split as a result of criminal behaviour. He submitted that there was nothing significant in the documents and reports relied upon that could result in a finding that there were very compelling circumstances. He drew attention to the significant public interest in removing DW – it is not only the act of removal but also the introduction of a 10 year ban that serves the public interest; the deterrence effect on other offenders carries significant weight over and above the effect on the individual.

12. The evidence before me was that if DW is deported, the children will remain in the UK with their mother. Their mother works (according to the report dated August 2018 by Professor Zeitlin) as a mental health support worker between 7am and 3pm; at present DW plays a significant role in the children's day to day care (as he has all their lives) and this would cease on his deportation. The home they live in is owned subject to a mortgage. Although Ms Barton submitted that the house would be re-possessed and the family would become destitute, this was not supported by evidence in the bundle. There was no valuation of the house, no current outstanding mortgage statement, no indication of whether any enquiries had been made to extend the period of the mortgage to reduce the payments due and no evidence, other than assertion, that the wife would be unable to maintain her current income level. The mortgage statement in the bundle seems to indicate a monthly payment of just under £300 per month. Mrs W does not state in her witness statement how much she earns per month. Although she states she has a sister in the UK and that the sister would not be able to assist she does not state where the sister lives or what requests she has made of her sister in terms of for example childcare assistance. In her witness statement she says that she thinks she would not be able to work, would become destitute, lose her home and have to claim benefits but there is a lack of adequate or sufficient evidence to provide support for those assertions. There is no indication of what possible alternative working arrangements she could put in place or whether she has made any enquiries about possible childcare assistance. My attention was not drawn to any documentary evidence that could support those assertions. DW was in detention in the USA for 7 months in 2008 at which time the couple had three children. According to the social work report Mrs W left her job to look after the children during that time. It is not apparent from the documents in the bundle whether she was renting accommodation at that time or whether they had bought the house subject to a mortgage. What is not asserted is that they became destitute and homeless. The submission that she and the children would become destitute and homeless is speculative and with no supportive evidence that was drawn to my attention and I do not accept that submission to be made out.

13. An independent social work report was relied upon dated 27th November 2018. Ms Pearce, who prepared the report is clearly an experienced social worker with many years' experience. Mr Bates did not challenge her expertise but rather submitted that the conclusions drawn by her were either not indications of his removal being unduly harsh or were speculative. The report describes the distress of the children at the thought of separation from their father as well as their concern about his ill health and whether he would be able to access the medication he requires. The report portrays their anxiety and their concern that he would be alone and sick. The report also portrays the role he plays in their lives. He is clearly a "hands-on" dad and has been throughout their lives save for the 7 months he was detained in the USA in 2008. Ms Pearce draws attention to the impact that separation would have had on the children given their ages at that time. This involvement in their lives is particularly strong given the health scares of one of the children who was born premature and the anxiety because of

another child's fits. It seems that since Professor Zeitlin prepared his report, DW has ceased working and Mrs W now works night shifts because he is there. Prior to him ceasing work they would organise their shifts so that the children were always with one of them. There was no corroborative evidence about this change in work or, presumably, of the change in income – a surprising omission given the submissions as to destitution and homelessness. There is no doubt, on the basis of the report, that he is a major and significant person in their lives, that he provides stability and encouragement and that his loss from their daily lives would have a significant impact upon them.

14. But her report also seems predicated upon it being accepted by her (or at least "*so likely*") that Mrs W would not be able to cope, that she would withdraw into herself, that she would lose her job and the family would become destitute and homeless. Her conclusions that the children need not only physical attributes such as food, clothing and housing but also emotional stability, significant relationships and security are self-evident and something that all children require. That his departure will be of adverse impact upon the children is an inevitable consequence of DW's deportation and separation from the family.

15. Ms Pearce refers to the risk that the oldest girl child will take on caring responsibility on behalf of her mother but there is no evidence other than her assertion that such would be the case. There is little indication in the report of that child referring to this possibility during the interview she had with Ms Pearce – an interview that is recorded in the report as being one with that took place with that child and the two children younger than her, for a total of two hours. Ms Pearce's reference to "research" indicating that this child would be affected by her mother's low mood and anxiety is followed by her statement that the child would be vulnerable to taking on caring responsibilities. The reference to "research" is vague but in any event seems obvious – any child is going to be affected by his or her mother's mood. I can see no relevant or significant support for the conclusion in the report prepared by Ms Pearce that this oldest girl child would be vulnerable to taking on caring responsibilities.

16. Ms Pearce spent 2 hours talking with the three younger children and one hour talking with the youngest. There is no record how long she spent talking to the oldest child although there is a record of some of the things he said. She concludes that the teenage years for the two older children will be particularly challenging for them, that one of the younger children appears to be having nightmares about the loss of her father and the overall sense of abandonment the children will feel will contribute to the harshness of the effect on the children of their father's deportation. These are matters that will affect all children who are separated from a loving parent.

17. The report by Ms Pearce exaggerates some elements of their behaviour with no reference to why she has reached that conclusion nor reasoning to support it – for example she states that the departure of DW from the UK would *"be completely devastating"*, that there would be a *"significant deterioration in the behaviour of at least [one of the children]",* that there

would be *"an emotional and psychological impact on them beyond their childhood and adolescence and well into their adulthood (if not throughout their adulthood)".*

18. The report by Professor Zeitlin, a child and adolescent psychiatrist interviewed the family – other than the four-year old - on one day. The report does not say how long he interviewed them for or how long he spent with each child other than to say that "*sufficient time was spent with each of the four older children to make an overall assessment of each child's current state and relationship to the father*". There is little in the report that is of much significance or assistance in determining whether the separation of the children from their father would be unduly harsh. The report confirms that none of the four children interviewed showed any signs of major psychiatric illness. He describes the future departure of their father would be akin to mourning with *"some (his emphasis) recovery back to a normal state over approximately a year. However, there is a significant probability, given their statements and anxiety about losing him, of longer-term effects including indication depression particularly in the older children. Difficulty in their management and loss of his described positive input is also likely to damage their progress."*

19. Professor Zeitlin considers the fits of the fourth child and refers to the child presenting a *"more complex picture".* The reason for the fits has not been identified, his MRI brain scan was normal and the child remains under three monthly check-ups with the paediatric unit at Salford Hospital. Neither Ms Pearce nor Professor Zeitlin nor the witness statements of DW and his wife or the skeleton argument by Ms Barton or the bundle of documents provide any further information or documentation in relation to the reference in the CAMHS referral for the fourth child that "*Social Services have been involved in the past"*. Professor Zeitlin concludes that this child has increased need for support whatever the cause, although the extent and nature of that support is unclear.

20. It is difficult to place much weight on Professor Zeitlin's report given that much of the report is little more than a repetition of what he has been told. Nevertheless, I am satisfied that it does provide support for the contention that DW is a father who plays a very significant role in the children's lives and has done so since their birth save for 7 months in 2008.

21. In *KO (Nigeria)* [2018] UKSC 53, the Supreme Court held, per Lord Kerr paragraph 23 that

> "One Is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor …. can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

22. In this case, the criminal offending took place some 25 years ago at a time when DW was a Class A drug addict. After fleeing the USA, prior to conviction, he was diagnosed as suffering from PTSD as a result of his experiences in war-torn Liberia and on his extradition to the USA he was placed in prison in the mental health unit where he was treated. There is some inconsistency in the documentation whether he was treated for drug dependency or PTSD or both, but it is nevertheless apparent that he did receive mental health treatment. He has not been charged or convicted of any offence since then. Nevertheless, these matters cannot, in accordance with *KO*, be taken into account in determining whether his departure from the UK, leaving the children behind, would be unduly harsh upon them. Nor can the fact that he entered the UK in an acquired name, failed to disclose his name change and conviction when applying for leave to enter/remain, failed to disclose his conviction when applying for citizenship and failed to disclose his conviction when applying for registration as a mental health nurse be taken into account in deciding whether it would be unduly harsh for the children to be separated from him.

23. This is not a case of a man with occasional or even regular frequent contact with his children. This is a case of a man with day to day, full time caring responsibilities for his children throughout virtually the whole of their lives. Their ages range from 4 to 14. There are five children. The child born in 2010 has been referred to CAMHS although it is not at all clear whether he has been accepted as a referral or what treatment he requires, if any. All five children are suffering from anxiety about their father's health and about separation. Their mother coped in the past during a 7- month separation and has no recorded health problems. I do not accept the family would be destitute or homeless or reliant on benefits or that their mother would be unable "to cope" if he were to leave the UK. Other than seven months separation when three of the children were very young and two had not been born, DW has been fully integrated in their lives to a far greater extent than the vast majority of fathers. I have not, in reaching my decision, taken account of the length of time since DW's criminal offence, the nature of the offence, the failure by him to disclose his criminal activity on entry and stay in the UK or the use of an acquired name change to obtain leave to remain in the UK or British Citizenship.

24. I have borne very much in mind that these children are totally innocent of any wrong-doing on the part of their father and that they have considerable anxiety about his future and that they have no ability to influence or affect that future. I have taken into account that these children are unlikely, on the evidence before me, to see their father for at least 10 years following his deportation. But the evidence before me amounts to little more than that they will suffer distress. It is plainly in their best interests to remain in the UK, the country of which they are citizen and within which their whole social and private lives have developed. The older children are at school and any move to a country of which they know nothing would inevitably cause great hardship. Even though the younger children may not have developed their own lives outside the family unit, they remain part of a family of siblings who have. It cannot reasonably be concluded that the best interest of the

children do not lie in the UK. The respondent did not seek to argue that proposition.

25. The position is therefore that it is in the best interest of the children to remain in the UK. It is, self-evidently, in their best interest to remain as part of a family unit with their mother and father. The respondent has not argued that the children could reasonably relocate to Liberia. The "real world" position is that unless, for some unspecified reasons, the appellant and his wife decide that the children should go to Liberia, they will remain her in the UK with their mother. It will undoubtably be harsh for these children to be separated from their father who has been in their lives for virtually the whole of their lives. Nevertheless, the evidence before me did not point to a conclusion that the effect on the children would be *unduly* harsh. That test has a high threshold, as reiterated in *KO (Nigeria).* The factual matrix in this case as regards the children and his wife simply does not reach that threshold.

26. In so far as the relationship with his wife is concerned, it was formed when he had exceptional leave to remain because of the situation in Liberia at that time. DW submits he was advised by his then solicitors not to disclose his conviction and so he did not. The SSHD submits that had his conviction been disclosed he would not have been granted indefinite leave to remain or, subsequently, citizenship.

27. DW's witness statement states that he is not sure that submission by the respondent is correct because he was granted leave to remain and indefinite leave to remain because of the SSHD's country policy in connection with Liberia and exceptional leave to remain was in force at that time. The policy has not been produced. It would seem unlikely that the commission of a serious non- political crime would not impact upon the grant of indefinite leave to remain although of course the country policy in connection with Liberia at that time – both for the grant of exceptional leave to remain and for the grant of indefinite leave to remain – may have been such that leave would have been granted. No specific point was taken by Mr Bates in connection with this other than to rely on what is said in the decision letter.

28. DW's solicitors have not disclosed the policy they rely upon in order to advise DW that the SSHD's position is not correct. I have taken the view that in the absence of the policy showing the contrary, the position taken by the SSHD in the reasons for refusal of the human rights claim is correct; DW was aware of the position taken and he has had ample opportunity to provide evidence to support his submission.

29. On the basis that he would have been granted exceptional leave to remain had he disclosed his conviction and/or name change, I conclude that DW's immigration status at the time of entering into his relationship was precarious. I do not accept, in the absence of evidence to the contrary which ought, if DW's solicitors are correct, to be available, that DW would have been granted indefinite leave to remain.

30. Even if his status was not precarious, I do not accept that it would be unduly harsh for his wife to be in the UK without him. It is unclear on what basis his wife obtained her indefinite leave to remain; whether that was because of the birth of the children, because her husband had leave to remain in the UK or her own length of residence. No point was taken on her status by the SSHD and I make no finding, adverse or otherwise upon her status and its impact on this appeal.

31. I accept the departure of her husband from the UK would be difficult for her; would cause her stress and anxiety but not that she would be destitute or homeless. Nor do I accept she would find looking after the children unduly harsh. She has looked after them previously by herself and other than a vigorously expressed desire not to have to do so again, there was no significant evidence before me that she would be unable to do so. Professor Zeitlin's report states that she works 7am to 3pm. There is no indication in the documents before me, other than assertion by her in her witness statements and to the social worker, that she would have to give up work. As said earlier, there is nothing to suggest that she has made enquiries about changing her hours or obtaining assistance with childcare for the younger children. I do not accept her assertion, in the absence of any other evidence, that she would have to give up work.

32. I have also considered the appellant's private life as established in the UK. He has been in the UK since October 2001. He arrived aged 33. He is now aged 50. He has not spent most of his life in the UK.

33. The SSHD does not appear to be saying that DW would not have been granted exceptional leave to remain, as he was in 2001, if he had disclosed his name change and criminal convictions. He is saying that he would not have been granted indefinite leave to remain and thereafter citizenship. I conclude that although his immigration status is and always has been precarious, he was lawfully in the UK during the currency of his exceptional leave to remain. It was during that time that he met his wife and their first two children were born. These are however no more than neutral factors in the assessment of whether there are very compelling circumstances over and above his separation from his children. Other neutral factors are that he has worked almost the whole time he has been in the UK, that he has not visited Liberia since 2001, that he speaks English, that he and his wife are financially able to support themselves and their children, that he has qualified as a mental health professional. He has been disciplined by his professional association, such proceedings arising out of his failure to disclose his convictions and his name change. Whilst serious, these are part of the lack of candour on his part and are thus factors that weigh against him albeit not significantly given the weight of the other matters.

34. Mrs Barton submitted that DW was socially and culturally integrated into the UK having lived in the UK for almost 18 years and that there were very significant obstacles to integration into Liberia because he has not visited there since he came to the UK, has no ties or family there, no home, no job and no savings; he has medical problems and would be unable to access the medical treatment he requires. She submitted he has not broken any

immigration rules, has been law abiding, has been employed for the majority of his time in the UK and is a qualified mental health nurse. There are various letters of support in the bundle attesting to his profession, his church involvement and that he is overall a kind, well-respected and positive person. law abiding.

35. I do not accept Mrs Barton's submission that DW has not broken immigration rules or that he has been law abiding. He has failed to disclose material matters which were critical to his continued stay in the UK. Although not arrested or charged with any criminal offence whilst in the UK, his failure to disclose his name and conviction led to him obtaining indefinite leave to which he was not entitled; that is use of deliberate deception to secure an immigration advantage to which he was not entitled.

36. I accept that he is socially and culturally integrated in the UK. The many letters attesting to his character, the work that he does both in the church and as a mental health nurse are all evidence of a person who is socially and culturally integrated into the society in which he now lives and has lived for some 18 years. Although Mrs Barton says he has no family or other ties in Liberia, he did have a son there and he may have two sons there. There was nothing said by him in his witness statement about this and there was nothing in the social workers report about those children – who will now be adults. That nothing has been said about them does not mean they are no longer there or that he has no contact with them. A failure to refer to existing family members cannot automatically lead to a finding that they are not able to help, especially given the lack of candour this appellant has demonstrated in the past. Nevertheless, in this case, given the length of time that he has been in the UK, the care with which he looks after his five UK children, I am prepared to accept that he no longer has contact with them whether they are in Liberia or not.

37. That he has no savings, no home, no job, knows no-one in Liberia and has not been there since 2001, as submitted by Mrs Barton, does not mean that there would be very significant obstacles to him integrating there. He has a recognised qualification. According to the FCO Travel Advice extract in the bundle, there are poor medical facilities. The Borgen Project report in the bundle refers to a plan by the Government of Liberia, supported by the World Bank and United Nations to reconstruct the healthcare system including a new infrastructure and medical centres. There was very little detail in the bundle, but it was not apparent that DW, a qualified health care professional with good references, would not be able to find employment.

38. DW has medical problems. He is diagnosed with 'severe left ventricular systolic function (heart failure)' and has been under the care of the cardiologist and heart failure team. He is prescribed medication which, according to his GP is known to improve life expectancy and he is reviewed regularly by the heart nurses. Mrs Barton directed my attention to the BMC Health Services Research (September 2016) as evidence that DW would not be able to receive the medication and treatment he requires. However the project report is a comparison between rural and remote healthcare utilization. It does not deal with access to medication in urban or densely

populated areas and nor does it identify whether and to what extent he would have access to the drugs he requires. I was not directed to evidence that showed that he could *not* obtain the drugs he was currently prescribed or could *not* access the treatment he requires. The background paragraphs of that report indicate that the Liberian Government chose to implement reconstruction of health services around a Basic Package of Health Services. In 2003 only 10% of the population had access to such services in 2003 yet by 2010 it was stated that 80% of government clinics were estimated to meet the minimum standards (free of charge) focussing particularly on maternal and child health, communicable diseases and mental health. In the absence of evidence to the contrary, the burden of proof being upon DW, I am satisfied that he would be able to access such treatment as he requires – medication and check-ups.

39. The evidence before me does not show that there would be very significant obstacles to DW's integration to Liberia. I am satisfied that he does not meet the criteria in Exception 1.

40. These findings are not however the end of the consideration to be undertaken. The deportation of a person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years; the public interest will only be outweighed by other factors where there are very compelling circumstances over and above the exceptions described in the exceptions to deportation[2]. As referred to above, the appellant is not a foreign criminal as defined by Part 5 Nationality Immigration and Asylum Act 2002 but the considerations to be taken into account are similar for those convicted of crimes outside the UK as I have explained above.

41. The issue that now arises here is how to evaluate whether there are very compelling circumstances over and above the exceptions to deportation. *KO*, which was only concerned with foreign criminals who had been sentenced to less than four years imprisonment, was considering how to evaluate the term unduly harsh in the context of criminality. Paragraphs 20 to 23 of *KO* appear to leave open whether, in considering 'very compelling circumstances', s117C(2) (that the more serious the offence the greater the interest in deportation) is imported into that deliberation or whether, as for the two Exceptions, there is no further balancing required other than as occurs within the 2 Exceptions.

42. I have taken the view that very compelling circumstances over and above the two Exceptions does require consideration of all of the circumstances in determining whether there are very compelling circumstances over and above those described in Exceptions 1 and 2, including the nature and seriousness of the offence. Exceptions 1 and 2 are defined both in the Immigration Rules and in the statutory framework. Exception 1 is described in *KO* as self-contained and nothing turns on the seriousness of the offence. *KO* concludes that it would be surprising if Exception 2 was structured in a different way. On the other hand, 'very compelling circumstances over and

[2] Paragraphs 398 and 399 Immigration Rules; section 117C Nationality Immigration and Asylum Act 2002.

above' are not subject to a close definition. In the Immigration Rules, the phrase appears as part of the sentence *"…the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above…"*. In the 2002 Act there is a requirement for deportation *unless* (my emphasis) there are very compelling circumstances (undefined) over and above.

43. An alternative interpretation is that an offence that has resulted in a prison sentence of four years or more is, when considered under s117C(1) and (2) the gateway into s117C(6) and the very compelling circumstances either exist or do not exist in isolation from and irrespective of the length of sentence or nature of offence. In my view that interpretation would lead to injustice and improper findings as to the proportionality of the human rights decision; there would be no point at which all the circumstances that relate to the individual whose appeal is being determined could be legitimately considered.

44. I take the view that my interpretation is supported by the view taken in *Hesham Ali* [2016] UKSC 60.

45. *Hesham Ali* concerned appeals relating to deportation based on Article 8 ECHR and the Immigration Rules that came into effect in July 2012. Although those Immigration Rules have since changed, the principles in *Hesham Ali* have not been distinguished in *KO*. Lord Reed, with whom Lord Neuberger, Lady Hale, Lord Wilson, Lord Hughes and Lord Thomas agreed, gave the lead judgment in *Hesham Ali*; Lord Kerr dissented. Lord Wilson, Lord Reed and Lord Kerr also heard *KO* and agreed with the lead judgment given by Lord Carnwath, as did Lord Briggs. Of those principles in *Hesham Ali*, the following are of relevance:

> Some of the factors listed in these cases [*Boultif v Switzerland (2001) 33 EHRR 50, Uner v Netherlands (2006) 45 EHRR 14, Maslov v Austria [2009] INLR 47*] relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive.[26]
>
> [foreign offenders who have received sentences of at least four years] will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test (my emphasis), by very compelling circumstances: in other words by a very strong claim indeed, as Laws LJ put it in *SS (Nigeria).* The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders….they can include factors bearing n the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private of family life. [38]
>
> [the Tribunal should attach considerable weight to the assessment of the Secretary of State] in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private of family life….the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling. [46].

> 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 that is very strong indeed – very compelling…will succeed. [50]
>
> In particular, tribunals should accord respect to the Secretary of State's assessment of the strength of the public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case before them…It remains for them to judge whether on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate. [53]

46. The public interest in the deportation of DW is very strong and weighty. DW committed a very serious crime for which he received a sentence in excess of 4 years. It seems that there was some plea bargaining which resulted in him pleading to two counts. It was accepted he did not have a firearm but that he gave an impression that he had a firearm. For the victim this would have made little difference – their terror can hardly be imagined. There is no victim impact statement and whether such things existed in the USA in the 1980s is unknown. But such a statement is not needed to be able to identify with the terror they would have inevitably felt. He was also convicted of escaping from custody. Again, a very serious offence which undermines the criminal justice system. That he was eventually dealt with in the criminal justice system does not reduce or negate the seriousness of these offences. Those are not the only public interest issues. DW failed to disclose his criminal convictions to the UK authorities. Although he asserts that his convictions were disclosed to the UK authorities in about 2009, that was disbelieved during his citizenship deprivation appeal. By failing to disclose his convictions and name change he acquired settlement in the UK and citizenship, although he has been stripped of the latter. These matters together result in a very strong public interest in his deportation, as said by the Secretary of State. That public interest includes not only removal but the deterrent effect of deportation – this is not a matter of deterrence from criminal offending but ensuring that it is adverse to the public interest that a person who has been convicted of a serious crime cannot, by changing his name and failing to disclose that which ought to be disclosed, remain in the UK.

47. Very strong and compelling factors are required to outweigh that public interest. The impact on the children is not enough, in fact it can be said, given the particular public interest in DW's deportation because of his offending and immigration history, that it is not nearly enough.

48. As paragraph 49 of *Hesham Ali* makes clear, the difference between lawfully settled migrants facing deportation and those unlawfully in the UK or seeking admission can be taken into account in an assessment of the fair balance.

49. In the light of my findings above the matters that that could fall into the rubric of very compelling circumstances are:

- He is drug free and has been since at least 1988;

- He has committed no further offences since 1983;
- the violent offence was some 25 years ago;
- he has resided in the UK since 2001;
- he was aged 15/16 when he committed the offence(s) which led to his conviction;
- he is an integral member of his family and the departure of him from the children's lives would be of considerable significance to his children and his wife and will cause them significant distress;
- his family life which is strong, genuine and subsisting has been established several years after his criminal offending and there is no indication that it has been formed in order to evade or avoid immigration control.

50. A compelling circumstance is a powerful and irresistible force compelling one outcome. Very compelling circumstances must be even more than this. Distressing as it is, applying this test in reaching a conclusion on the proportionality of the decision to deport DW, it cannot be concluded that there are very compelling circumstances such as to defeat the decision to deport.

51. The appeal is dismissed.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by dismissing it

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Upper Tribunal Judge Coker Date 15th March 2019

NOTE

1. In both the UK Borders Act 2007 and the Nationality, Immigration and Asylum Act 2002 a foreign criminal is defined as a person who has been convicted and sentenced in the UK. In the Rules, there is no stated requirement the criminal offence(s) should be limited to UK convictions only.

2. The Immigration Rules, in so far as relevant to this appeal, read as follows:

> **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) ….
> (c) ….
> 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.

3. As *Charles (human rights appeal: scope)* [2018] UKUT 00089 (IAC) explains, if an appellant has any criticism of the Secretary of State's decision making under the Rules or various Immigration Acts, s/he will, if the circumstances engage Article 8(2), be able to advance those criticisms in the Article 8 appeal and, specifically when considering the proportionality of the decision.

4. The SSHD is required to make a deportation order (s32(5) UK Borders Act 2007) if an individual is a foreign criminal as defined in ss32(1), (2) and (3) of the 2007 Act, which reads as follows:

> 32(1)In this section "foreign criminal" means a person—
> (a)who is not a British citizen,
> (b)who is convicted in the United Kingdom of an offence, and
> (c)to whom Condition 1 or 2 applies.
> (2)Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
> (3)Condition 2 is that—
> (a)the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
> (b)the person is sentenced to a period of imprisonment.

5. 'Foreign criminal' is defined in s117D *for the purpose of Part 5A* (my emphasis) of the 2002 Act and, in so far as is relevant to DW, reads as follows

> 117D (2)In this Part, "foreign criminal" means a person—
> (a)who is not a British citizen,
> (b)who has been convicted in the United Kingdom of an offence, and
> (c)who—
> (i)has been sentenced to a period of imprisonment of at least 12 months,
> **....**

6. The definition of a foreign criminal for the purpose of s117D of the 2002 Act therefore includes a person who is a foreign criminal as defined by s32(2) of the 2007 Act.

7. S117C of the 2002 Act sets out the additional matters to be taken into account where an individual is a foreign criminal (as defined in the 2002 Act) in deciding whether the deportation would breach the UK's obligations under Article 8.

8. The Immigration Rules, ss117A-D of the 2002 Act and the SSHD's policies and guidance set out the various matters that are to be taken into account when considering the proportionality of a decision to grant or refuse a human rights claim. In accordance with s5(1) Immigration Act 1971

("1971 Act"), where a person is liable to deportation under s3(5) or (6) of the 1971 Act, the SSHD may make a deportation order against him. s3(5), in so far as is relevant to DW reads as follows

> A person who is not a British Citizen is liable to deportation from the United Kingdom if –
> (a) The Secretary of State deems his deportation to be conducive to the public good;
> (b) …

9. The decision whether to make a deportation order against someone who is not a 'foreign criminal' as defined in the 2002 Act or the 2007 Act is a decision to be taken by the SSHD. That decision is not predicated upon the individual being a foreign criminal as defined in the 2002 Act or the 2007 Act but is a decision to be taken by the SSHD on the basis that he deems the individual's deportation to be conducive to the public good. That decision by the SSHD is not amenable to challenge in a statutory appeal but, as per *Charles (human rights appeal: scope)* [2018] UKUT 00089 any alleged deficiencies in that decision can be addressed in the human rights statutory appeal rather than by way of parallel judicial review proceedings.

10. "Foreign criminal" in the context of the 2007 Act is a term of art which requires certain criteria to be fulfilled. Similarly, in the 2002 Act it is a term of art, albeit with other criteria. In the Immigration Rules which are not to be construed with the same exactitude as a statute but as an expression of the SSHD's policy, they are simply words denoting that a person is a criminal and a foreigner.

11. There is no contradiction in this approach:

    (a) If an individual has committed crimes which bring him within the 2007 Act, he is a foreign criminal for the purpose of the making of an automatic deportation order;
    (b) If an individual meets s117D (2) (which will include those who are foreign criminals as defined by s32(2) of the 2007 Act), he is a foreign criminal and his appeal will include consideration by the Tribunal of the matters set out in s117C;
    (c) If the Secretary of State has decided that an individual's deportation is conducive to the public good (a 1971 Act deportation decision), whether or not he has been convicted of a criminal offence, the Rules govern the approach to be taken in the human rights appeal.

12. The Rules cover, in a designated section, deportation and Article 8. Paragraph A398 of the Rules refers to "foreign criminal". Paragraph 398 of the Rules refers to "a person". It must be that the word person includes not only individuals who are foreign criminals as defined in the 2002 Act and the 2007 Act but other individuals who, in the view of the SSHD, are liable to deportation under the 1971 Act. This will include "foreigners" who are also "criminals". Paragraph 398 of the Rules imports the language of the 2002 Act and thus the consideration to be undertaken in assessing the UK's obligations under Article 8.

13. It is unsurprising that the SSHD, in deciding whether an individual is liable to deportation under the 1971 Act, should draw upon the legislative intention relating to UK convictions. Hence the deportation section in the Rules is not only concerned with UK convictions but also convictions abroad (paragraphs 398(a) and (b) of the Rules). This must include consideration of s117C of the 2002 Act in determining the appeal against the rejection of the human rights claim. The assessment in a human rights appeal by the Tribunal will include, as per *Charles,* consideration of any submissions regarding the SSHD's decision.

14. Paragraph 398(c) does not refer to convictions but to offending. This appears to be a deliberate distinction to criminality as evidenced by conviction. There is no requirement for a criminal conviction; it is the SSHD's view as to whether the behaviour is such as caused serious harm or amounts to being persistent offending. This approach chimes with the concept of a broad discretion available to the SSHD; the discretion to take a deportation decision under the 1971 Act.

15. Where an individual does not fall within the 2002 Act or 2007 Act definition of foreign criminal but the SSHD has taken a decision under the 1971 Act, his decision and his view as to the circumstances that led him to that decision are matters that will be considered by the Tribunal in determining the proportionality of the human rights decision.

16. Drawing this together:

- A decision by the Secretary of State to make a deportation order under the 1971 Act is not predicated upon an individual being a “foreign criminal” as defined by the 2002 Act or the 2007 Act.
- “Foreign criminal” is a term of art in the 2002 Act and the 2007 Act whereas in the Rules the words simply denote that the individual is a “foreigner” and a “criminal”.
- Paragraph 398 of the Rules applies not only to foreign criminals as defined in the 2002 Act and the 2007 Act but also to other individuals who in the view of the Secretary of State, are liable to deportation because of their criminality and/or their offending behaviour.