Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10721/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 11 January 2019	**On 14 February 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KEVIN KIARIE

Respondent

Representation:
For the Appellant: Mr Kotas, Home Office Presenting Officer
For the Respondent: Mr R Khubber, Counsel, instructed by Turpin and Miller LLP

DECISION AND REASONS

1. This is a resumed hearing following a decision of Upper Tribunal Judge Kebede, dated 23 October 2018, finding that the First-tier Tribunal judge had failed to give proper appreciation to the high threshold that needed to be met to establish 'very significant obstacles' and had thus erred in law.

2. In short, First-tier Tribunal Judge O'Rourke initially disposed of this deportation appeal on 13 March 2018, finding in favour of the appellant. He concluded that there would be very significant obstacles to the appellant's

integration into Kenya, and as a result, found that the appellant met one of the Exceptions in paragraph 399A of the Immigration Rules (hereafter 'the Rules').

3. The Secretary of State appealed that decision to the Upper Tribunal. On 23 October 2018, Judge Kebede allowed that appeal, noting that while she found no error of law in the judge's decision on social and cultural integration, she did find that the judge had erred in law by falling into speculation about a number of factors (as set out in paragraph 17 of her decision, dated 23 October 2018) and that as a result, the First-tier Tribunal's decision to allow the appeal under paragraph 339A of the Rules, and consequently under Article 8 of the European Convention on Human Rights ('ECHR'), with reference to section 117C (3) and (4) of the Nationality, Immigration and Asylum Act 2002 (as amended) (hereafter, 'the NIAA'), was not sustainable and needed to be remade on a full and proper assessment of the facts and with a proper consideration of the high test of 'very significant obstacles'.

4. It is against the above background that this matter was listed before us. We are grateful to both representatives for their assistance in this matter.

Overview

5. By way of introduction, we repeat the findings of fact made by Judge Kebede on 23 October 2018 (the decision of which is annexed hereto):

> "3. The appellant is a citizen of Kenya born on 28 October 1993. He arrived in the United Kingdom on 27 January 1997, aged 3 years, together with his mother and was included as a dependent in her application for asylum, which was refused on 30 May 1997. Appeals against that decision and a further decision on 14 August 2001 were unsuccessful, but the family were eventually granted indefinite leave to enter the UK, outside the immigration rules, on 20 October 2004.
>
> 4. Between 20 September 2013 and 2 May 2014 the appellant received four convictions for ten offences, including: possession of a controlled drug – class B – cannabis; possession of a controlled drug with intent to supply – class A – heroin; possession of a controlled drug with intent to supply – class A – cocaine; and commission of further offences (possessing a controlled drug – class A – crack cocaine and possession of a controlled drug – class B, – cannabis) during the operational period of a suspended sentence order. He was sentenced on 2 May 2014 to 2 years imprisonment, implementing the suspended sentence previously made. On 28 July 2014, the appellant was served with a liability to automatic deportation and he responded by raising Article 8 grounds. On 10 October 2014, a Deportation Order was signed against him and on the same day the respondent refused his human rights claim and certified the claim under section 94B of the Nationality, Immigration and Asylum Act 2002.…
>
> 5. A new decision was made on 23 August 2017, in which the appellant's human rights claim was refused, but with an in-country right of appeal. The appellant appealed against the decision. His appeal was heard in the First-tier Tribunal on 13 March 2018 by Judge O'Rourke and was

> allowed in a decision promulgated on 26 March 2018. The Secretary of State has been granted permission to appeal that decision."

6. The above facts were not in dispute before us. We find accordingly.

7. By way of further background, the apparent delay between the decision to deport the appellant in October 2014 and the intervening period was taken up with a series of appeals against the Secretary of State's decision to certify his case, thus granting the appellant only the right to an out of country appeal, which culminated in the judgement in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42.

8. The issues that we must now determine, as agreed by both parties, are firstly, whether or not there would be 'very significant obstacles' to integration on return to Kenya; and secondly, if not, whether there are any 'very compelling circumstances' above and beyond the Exceptions.

The law

9. The appellant was made the subject of a deportation order under section 5(1) of the Immigration Act 1971 because he is classed as a 'foreign criminal' (as defined by section 32(1) of the UK Borders Act 2007).

10. Paragraph 398 of the Rules provides that where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the ECHR, and -

> "(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;
>
> … 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."

11. There was no dispute between the parties that in this regard the tribunal should focus upon paragraph 399A, which provides:

> "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."

12. On 28 July 2014, section 19 of the Immigration Act 2014 came into force and

amended the NIAA by introducing a new Part 5A (SI 2014/1820). Section 117A(2)(b) provides that, in considering the public interest (*per* para 398 of the Rules, above), the tribunal must have regard to the considerations listed in sections 117B and 117C.

13. This provides as follows:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) ...
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) …
>
> **117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—

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

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

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

(5) …

(6) …

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

14. It can be seen that Exception 1 reflects the provisions of paragraph 399A of the Rules. It is for the appellant to demonstrate his case in this regard, including any interference with his human rights. If that is established, it is then for the appellant to show that any interference is justified. The burden of proving contested facts rests on the appellant and the standard of proof in relation to this ground of appeal is the civil standard of a balance of probabilities.

Preliminary findings

15. With regard to Exception 1, we find (and it was not disputed before us) that, firstly, the appellant has been lawfully resident in the United Kingdom for most of his life (a matter the decision letter served by the Home Office on 23 August 2017 accepted). He has now lived in the UK for over 20 years. He arrived here when he was 3 years of age and his family were granted indefinite leave to remain in 2004. Notwithstanding the periods of proven criminality, he has resided lawfully within the UK for most of those 20+ years.

16. Secondly, he is socially and culturally integrated into the United Kingdom. He went to school here. He grew up in the UK. His immediate family, his work and his interests are in the UK. Pursuant to the finding of Judge Kebede on 23 October 2018, we find there was no error of law in First-tier Tribunal Judge O'Rourke's decision on social and cultural integration.

17. For the avoidance of doubt, it was not argued before us that the appellant had any parental relationship with a child; nor was it advanced that he had any genuine or subsisting relationship with a qualifying partner. Exception 2 therefore had no application. We find accordingly, and therefore have only considered Exception 1.

18. The above findings narrow the issue before us to primarily considering whether there would be *very significant obstacles* to the appellant's integration into the country to which it is proposed he is deported, namely Kenya. If the appellant

succeeds on this point, the rest of the appeal essentially falls away, and the tribunal does not need to go on to consider the further test of 'very compelling circumstances.'

Evidence

19. We received prior to the hearing a court bundle, on behalf of the Home Office, that included the case management history of this matter; an appeal determination made in relation to the appellant's mother, Jane Catherine Enganasa, dated 14 July 1999; subsequent 'reasons for refusal' letters; the judge's sentencing remarks from the criminal offending, dated 2 May 2014; the signed deportation order, dated 10 October 2014; Police National Computer ('PNC') records; and other documents submitted in support of the appeal to the Upper Tribunal.

20. Further, we received from the appellant's representatives a bundle, dated 6 March 2018, which included a statement from the appellant and a statement from the appellant's mother (both also relied upon at the hearing below), and a PNC report, which detailed the appellant's offending up to August 2017.

21. In addition to the above, we received a skeleton argument on behalf of the appellant, dated 9 January 2019; and a comprehensive bundle of authorities setting out much of the relevant law.

22. We heard evidence from both the appellant, who adopted his witness statement dated 5 March 2018 and gave oral updates by way of evidence; and we heard from the appellant's mother, Mrs Enganosa, who also adopted her witness statement, dated 7 March 2018, and provided answers to further questions.

23. There is one matter that did not arise at the hearing. In the bundles identified above, both parties provided copies of a PNC printout. Both essentially ran to 23 August 2017 and identified the period of offending outlined above. However, at the previous hearing at the Upper Tribunal, the Home Office presenting officer provided an updated PNC. That showed 3 further and subsequent offences, namely possessing a controlled drug – class A, cocaine; possessing a controlled drug, class B, cannabis/cannabis resin; and possessing a controlled drug – class A – heroin; for which the appellant had been given, on 29 June 2018, a conditional discharge for 2 years.

24. The evidence now provided to the tribunal did not reflect this. Judge Kebede had commented upon this evidence in her initial decision, dated 23 October 2018. Therein, at paragraph 13, she referred to the said PNC record as including updates that had not been before the First-tier Tribunal. She paid no regard to that updated PNC at the initial hearing, firstly, because she was solely concerned with whether the decision of the First-tier Tribunal contained a material error of law; and secondly, because the subsequent convictions had occurred only after the first hearing had taken place.

25. It was however of potential relevance to the issues we were having to decide. Firstly, it went to credibility; secondly, it showed a possible propensity to reoffend. It is, in part, for this reason that Judge Kebede gave this direction on 23 October 2018:

> "No later than 14 days before the date of the next hearing, any additional documentary evidence relied upon by either party is to be filed with this tribunal and served on the opposing party, together with the relevant application under rule 15 (2 a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) ('the TPR')."

26. Principal Resident Judge O'Connor had given similar directions on 14 September 2018.

27. For reasons that are not immediately apparent, the Home Office failed to comply with these directions. As a result, neither party referred to, nor were asked about, the subsequent convictions. Rule 15(2A) of the TPR provides as follows:

> "(2A) In an asylum case or an immigration case— (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party— (i) indicating the nature of the evidence; and (ii) explaining why it was not submitted to the First-tier Tribunal; and (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence."

28. The Home Office's failure to serve this PNC properly upon the appellant's representatives or the tribunal is on one view, unfortunate. We have decided that we should put to one side the contents of this new PNC. It was not before the judge at first-instance, no evidence has been given about it, it does not directly assist us with the question of 'very significant obstacles' to integration upon return to Kenya, and it will therefore play no part in our final decision. Such an approach is also consistent with the view Judge Kebede took in October 2018.

29. Importantly however for these purposes, the appellant's representative indicated during the course of the hearing before us that he did not rely upon a low risk of re-offending in his submissions. That is a concession we do appropriately bear in mind.

The respective submissions – very significant obstacles

30. Mr Kotas, on behalf of the Home Office, referred to the case law considering 'very significant obstacles', in particular, *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, and the conclusions therein (about which there was some agreement between the two representatives), namely that the concept of integration into the country to which it was proposed an individual

be deported, as set out in section 117C (4) and paragraph 399A, was a broad one:

> "14. … The idea of 'integration' calls for a broad evaluative judgement to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

31. This, Mr Kotas advanced, needed to be looked at through the lens of this particular case: '*a person is not integrated the moment he lands on the tarmac….it takes time to build up a variety of human relationships and that does not happen overnight*'. He observed that the appellant was of good health, had a number of work skills, spoke English (one of the official languages), and in part could rely on his parent's heritage and his own nationality and knowledge. These were all highly relevant, it was submitted, to the conclusion he invited us to reach, namely, that if there were obstacles, they were not significant, and certainly not very significant.

32. It was accepted on behalf of the Secretary of State that Mrs Enganosa's account of the grandmother's circumstances was honest. His grandmother was his main relative in Kenya. She had dementia and was financially supported by Mrs Enganosa who sent payments for rent. Mr Kotas also accepted that the appellant did not have a wider family there. He further conceded that there would be no financial support forthcoming for the appellant from family members, either in Kenya or in the UK. That having been said, he advanced that there was accommodation in Kenya, albeit at his grandmother's home and not ideal, but that the appellant would not be 'street homeless'. He would be able to make ties. He would be able to integrate.

33. These submissions reflected to a degree the grounds of appeal, which suggested that the appellant would be able to establish a private life in Kenya. It was a country that was known to him and his family members, it was a country he had visited, and that if required, family members could accompany him to help him establish himself if required. There was no proper basis, it was submitted, for advancing that no one could be removed to Kenya because they were not fluent in both official languages. One language, the language of commerce and government, namely English, was sufficient.

34. These submissions flowed, it was advanced, from paragraphs 47-59 of *S. v Secretary of State for the Home Department* 2017 EWCA Civ 1284, where it was held that generic factors can be of significance and can clearly support the conclusion that the person will not encounter very significant obstacles to integration.

35. The contra submissions on behalf of the appellant also rested on *Kamara (supra)*, reiterating the need for a broad evaluative judgement. Counsel, Mr Khubber, suggested that the appellant had lived in the UK since the age of 3 and lacked any tangible links to Kenya, which was at best known to him as a holiday destination. He had no family or familial links or friends in Kenya, and that made the appellant in reality an outsider, without anyone who could afford him assistance on return.

36. Further, it was suggested he had no knowledge of the local language, namely Swahili. While it was accepted that English was an official language and was widely spoken in commerce and government, it was advanced on the appellant's behalf that he would inevitably suffer disadvantage in terms of employment, social interaction and personal development in lacking the second official language.

37. His lack of maturity was also relied upon. It was suggested that the appellant did not have the robustness of character and independence of mind that would support him in integrating in a foreign land. This combined with the lack of financial support his parents in the UK were able to give, (something his mother was able to confirm in evidence, as a result of her having to provide funds to his grandmother in Kenya and their own limited income) meant integration would not be possible. It was also submitted that the appellant had a limited education and no particular specialist skills, meaning he could not compete in the employment market effectively.

38. Further, it was said that the appellant had a huge link with the UK and a huge lack of a link with Kenya and its characteristics. His links to Kenya could only be based on his parents' nationalities and was limited to holiday periods. It was advanced that while he had now matured away from his offending ways, this did not mean he was robust in terms of integration. The concession made by the Home Office supported the assertion that there was a lack of any family to turn to. His grandmother was seriously ill and had dementia, it was simply not realistic that he lived in her rented residential property.

39. This meant there was no tangible structure for him. Simply put, Mr Khubber asked: how would he survive? He had limited skills, limited education, and lacked the robustness of character to live independently. Taken together, it was suggested that the higher threshold of very significant obstacles was reached, particularly if one took a more nuanced approach, including when considering the Article 8 dimension, and what were described as the unusual circumstances of this case.

The tribunal's findings in relation to 'very significant obstacles' to integration

40. We accept and find that the appellant is integrated into UK society both through his family and no doubt socially (he has lived here for over 22 years).

41. We accept that he has resided here lawfully for most of that time, from the age of 3 up until the age of 15. We also find that he has a strong relationship with his family, including his younger brother, and we accept it is unlikely that his family members would be able to relocate to Kenya for any great period, being long-term settled in the UK. We also accept that he was young when the offending took place and that he is now financially independent and in work.

42. Further, it was conceded on behalf of the Secretary of State that the appellant's mother, Mrs Enganosa, had given an honest account of the remaining family in Kenya – or lack of – a concession we did not seek to go behind. We also accepted that the appellant did not have a wider family there. We further found that there would be no financial support forthcoming for the appellant from family members, either in Kenya or in the UK.

43. We find that the above individual factors can be viewed cumulatively, and, adopting the background circumstance set out in *Kiarie and Byndloss* (supra) [at 53], that '*the proposed deportations would be events of profound significance for the future lives of Mr Kiarie, his parents and siblings*'.

44. While we bear in mind the above obstacles to integration, it is however necessary to also consider the other aspects of the submissions we received. The conclusions we draw are as follows:

    a. It was suggested on his behalf that the appellant lacked both an education and specialist skills. In our finding, the evidence suggests that the appellant had benefited from the education he received growing up in the UK, both primary and secondary (as borne out by paragraph 8 of his witness statement, dated 5 March 2018), culminating he told us in GCSEs in science, physics, grade C, biology, grade C, maths grade C, English, grade C, and geography, grade D. Furthermore, he went on to college where he studied an extended level III business diploma. The OASYS report, dated 3 June 2015, states that he did not complete this, but in any event, in our view, his level of education and interest in business was likely to serve him well in terms of employment prospects upon relocation.

    b. In terms of lacking specialist skills, we noted that he had had a number of jobs in the UK according to his witness statement, including as a painter and decorator, delivery driver, and as a mechanic. Latterly, he had found employment as a full-time forklift driver. This, in our finding, suggests not only an ability to drive, but an ability to learn new skills and a degree of resourcefulness.

    c. We concluded that he would be able to take that skill-set and his qualifications and experience to Kenya, and both would likely advance his job prospects and integration.

    d. Further, in our finding, his ability to speak to his parents about life in Kenya and thereby increase his knowledge of the situation there,

including Kenyan culture, would stand him in good stead, both in terms of integration and acceptance. His mother and father originate from Kenya and are Kenyan nationals The appellant accepts in his statement that he has discussed Kenya with his father *'because of the situation in Kenya being on the news'*, and while he says he had no interest in the country in the past, one is entitled to infer from that that since the deportation question has arisen, he has shown more of an interest.

e. It is apparent that notwithstanding the passage of time since they left, both parents would have had considerable insight into life in Kenya, some of which would have filtered through to their son. (In her statement, dated 7 March 2018, his mother, Mrs Enganasa, refers to the fact that she grew up in Kenya, went to school in Nairobi, and then went to secretarial college before finding employment with an auditing company in Nairobi. A previous tribunal (14 July 1999) found she had worked there as a secretary for about 10 years). In evidence, the appellant's mother also stated that she discussed with her son news stories about Kenya generally; adding that they saw things on the news and he asked questions about Kenya, *'why it was like that? why it was different? and why people lived there?'* Mrs Enganasa knows the person who looks after and lives with her mother. She told the tribunal she talks to that person on the phone. She is familiar with the area her mother lives in; she pays rent on a property there. She continued to have contact therefore with Kenya; and can continue to discuss with her son the social norms and cultural differences in society there.

f. We do not therefore accept that the appellant does not have any tangible links with or knowledge of Kenya. It appears to us, by virtue of his parents' heritage and his own nationality that he has grown up with a connection to that country. His grandmother lives there. At a time, *per* his mother's witness statement, cousins and more distant family members also lived there.

g. While not conclusive, it is relevant that he has holidayed there and visited Kenya. (We note that in his statement, dated 5 March 2018, the appellant states: '*I have never been outside the UK since I arrived over 21 years ago*'. He makes no mention of visits or holidays to Kenya. However, his mother confirms in her statement: '*the only experience Kevin has of Kenya is as a holiday destination. It has been over 5 years since Kevin was there. When he has gone it was on short family holidays. We would stay in a hotel or apartment*'. This implies that the appellant has been on more than one occasion to Kenya.)

h. We therefore accepted the submission on behalf of the Home Office that his parents would be able to discuss and prepare the appellant for life in Kenya in order to aid in the process of integration and in becoming an insider. His lack of familial support there could in part

be met through regular contact with his parents through modern means of communication. Planning, research and emotional assistance from his parents would all aid in his integration and acceptance.

i. At 25 years of age we cannot find any dependency in terms of his relationship with his parents/siblings or vice versa, other than the normal relationship he would have as an adult person with his immediate family. We concur with the decision letter, served on 29 August 2017, in that whilst it is acknowledged that the appellant's deportation will have an impact on his younger brother, the need to protect the interests of children (set out in section 55 of the Borders, Citizenship and Immigration Act 2009), would not outweigh the decision to deport him. The appellant has no parental responsibility for his younger brother who can remain in the care of his parents and they can continue to provide him with support. The appellant can continue to remain in contact with him and the rest of his family via telephone or the Internet. They will also have the opportunity to visit him in Kenya or elsewhere – outside of the United Kingdom – should they wish to do so.

j. We found his representatives assertion that the appellant could not speak Swahili, and therefore was at a disadvantage, was overstated. The appellant spoke one of the main official languages, English, and it was accepted that that was the language of business and government. We found that the appellant's knowledge of the English language was likely to serve him well both in terms of employability and in terms of integration more widely.

k. While the appellant asked the tribunal '*not to send him away because of mistakes I made when I was younger and immature*', this implied he felt he was now more mature. He confirmed at para 23: '*I am more mature and more aware. I am now motivated and have ambitions to be someone to make something of my life*', and at paragraph 24: '*I am my own person now. I'm not someone who like before, could be easily led, who would just take chances because of greed or wanting to please someone. I now listen to those people I can trust. I have learnt to make the right decisions in life*'. In our finding, taken together with his employment, his age (mid-twenties) and his life experiences to date, these statements demonstrated the appellant did have the maturity to cope and develop if required to do so in Kenya.

l. Nor did we accept that he lacked a robustness of character. He had been dealing drugs since being a teenager, he had served time in prison, he had secured employment and, according to his statement, had entered into a relationship with a girlfriend and her family. There were no apparent adverse health issues, (no evidence was produced of any mental well-being issues or physical health concerns). There was nothing to immediately suggest that he lacked

> the degree of robustness or ability to adapt and manage in new surroundings. While we understood that most mothers would have concerns in this regard, we did not see his maturity or character as being a bar to his integration or acceptance as an insider into Kenyan society.

45. In making a broad evaluative judgement, as *per Kamara*, we struggled to find the very significant obstacles required. While we acknowledge that there are likely to be some obstacles, including a lack of family in Kenya and a requirement to arrange accommodation and employment, we did not see this as amounting to either a significant or a very significant obstacle in terms of integration as an insider for the reasons outlined. The obstacles we did identify were largely not dissimilar to any person relocating and could be generally overcome by a resourceful 25-year-old in good health with some planning. Their significance was considerably diluted as a result.

46. In so concluding, we further note that there was at times a lack of evidential support in terms of some of the claims advanced, notwithstanding the amount of time that this appeal has been extant, and the burden placed upon the appellant. While not determinative to our final conclusion, we merely observe that no statement has been produced by the appellant's father, Mr Peter Kiaro. We were unable therefore to see tested the assertion that he had no family in Kenya. Further, we received no evidence from the appellant's sister, Christine Kiarie, who is also resident in the UK. We received no evidence from his claimed girlfriend, Sarah Williams. We received no medical evidence about his health in terms of any lack of robustness. We received no detailed evidence of his current income or savings.

47. We do not ignore the profound significance for the future lives of the appellant, his parents and siblings in the proposed deportation. It may be both inconvenient and emotional. There will be an element of upheaval and initially there may be a culture shock. However, in our judgement, when considering very significant obstacles, the threshold is high. As was said in *Parveen v Secretary of State for the Home Department* [2018] EWCA Civ 932 at paragraph 9: *'… I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval"* and in *Secretary of State for the Home Department v Olarewaju* [2018] EWCA Civ 557 [at 26] the Court confirmed that a culture shock is not the same as a very significant obstacle; and nor is the age of an individual i.e. their relative youth, determinative of the question of very significant obstacles.

48. We had little difficulty in concluding that, having performed a broad evaluation, there were not very significant obstacles to the appellant's integration and there was no proper reason to conclude that he would not after a reasonable period become an insider in the sense intended by the legislation.

49. As neither Exception applies to the appellant, section 117C(3) prevails and this

states that the public interest requires the appellant's deportation. The principle enshrined in section 117C(1) must be given decisive weight. Parliament has circumscribed the conditions to be met under which a person may be able to resist deportation and those conditions have not been met in this case (see para 14 of *NE-A (Nigeria) v SSHD* [2017] EWCA Civ 239, where the Court of Appeal held that the new sections reflected Parliament's assessment of the public interest).

Very compelling circumstances over and above the Exceptions

50. The second limb in terms of the law we were invited to apply therefore became relevant: namely, whether there were *very compelling circumstances* over and above the Exceptions that meant the appellant should not be deported to Kenya.

The respective submissions – very compelling circumstances

51. On behalf of the respondent, the Home Office presenting officer submitted that there was nothing compelling or particularly unusual about the appellant's circumstances. While the appellant may currently be living at home, the Article 8 claim to family life could not be based upon the relationship between him and his parents. Other than the normal emotional ties that adult children have with their parents, it was suggested there was nothing unusual or compelling about the appellant's situation. Further, it was submitted that while the appellant may have a girlfriend, that relationship should be regarded as precarious and had only started after the deportation procedure had commenced.

52. In terms of the longevity of his residence in the UK, it was submitted on behalf of the Home Office that that matter went to the issue of significant obstacles. While Mr Kotas accepted that the appellant had been lawfully resident in the UK for most of his life, none of this he said, even taken cumulatively, amounted to very compelling circumstances and there was nothing powerful or irresistible in effect to displace the public interest, which in the Home Office's submission ought to prevail.

53. In reply, it was submitted on behalf of the appellant that the test of very compelling circumstances, like the test before, required a global assessment of a combination of factors and that in the context of *NA (Pakistan) v Home Secretary* [2017] 1 WLR 207, the tribunal was entitled to take into account Article 8 when considering the Part 5 framework. In particular, Mr Khubber drew our attention to paragraph 30, which suggested that if an individual could point to factors identified in Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, 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 the application of Article 8.

54. Further, we were invited to consider *Uner v Netherlands* 2007 45 EHRR 14 and *Maslow v Austria* [2009] INLR 47. It was advanced that the European Court's case law and subsequent cases provided a steer in relation to the criteria to be applied. In a case like the present one, where the person to be expelled is a young adult who had not yet had a family of his own, the relevant criteria, per para 71 of *Maslov* were: the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; and the solidity of social, cultural and family ties the host country and with the country of destination.

55. Mr Khubber invited the tribunal to take into account that it was closer to exile, bearing in mind the circumstances, age and impact in terms of deportation.

The tribunal's findings in relation to 'very compelling circumstances'

56. While we understood the points the appellant's representative relied upon, on the facts of this matter, we could not agree that there was sufficient support for there being 'very compelling circumstances':

    a. We remind ourselves of the Court of Appeal's decision in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 where the Court found, at paragraph 33, that 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 incidence of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.*'

    b. In our finding, the appellant is at an age where he should be able to function independently away from home, including in Kenya. He is of good health. At 25 he is at an age where he has time to create a new life for himself. He is able-bodied. He would be able to function on a day to day basis and, in our view, build up valuable private life ties there.

    c. We did not see the appellant as being solely dependent on his family, either here or abroad. He could apply for deportation assistance (*per* the decision letter). He has shown a capacity to find work. His family could help initially with setting himself up in Kenya (if needs be) and he could remain in communication with them through methods such as the Internet, telephone, and the like.

    d. We view the nature of his offending to be serious – so serious that he received a two-year prison sentence. That is not simply our view, but reflects the sentencing comments made at the time. The Crown Court judge referred to some of the offending as being 'very serious'. He was an adult when he committed these crimes. Further, there is a

history of drug dealing and offending that dates back on the appellant's own evidence to the age of 15. The effects of drugs on society are well documented. They can have a devastating effect on people's lives and damage the fabric of society. A risk of reoffending in our judgement remains, (particularly bearing in mind his counsel's acceptance that he does not rely upon a low risk of re-offending). In his sentencing remarks the Crown Court judge records that the appellant was also in breach of an earlier order to perform unpaid work *'on repeated occasions'*.

e. In addition to the drugs offences, we find that in September 2013 the appellant was also convicted of resisting or obstructing a constable, using a vehicle while uninsured, driving otherwise than in accordance with a licence, and failing to surrender.

f. Even bearing in mind the passage of time, and the fact that the appellant has now served his sentence and was younger at the time, none of the offending history reflects well upon the appellant or helps create a landscape of compelling circumstances. Other than the expression of regret contained in the witness statement, the appellant has produced little evidence of rehabilitation or an understanding of his actions. We find that his offending demonstrates a lack of regard for both the laws of the UK and the society in which he lives, where people are expected to respect and abide by those laws. Importantly, in this regard in *KO (Nigeria)* 2018 UK C 53, the Supreme Court held that there was no room for further balancing of the relative seriousness of the appellant's acts, beyond the 2 categories.

57. For the reasons we have already identified, we do not consider the arguments advanced by the appellant to be compelling. We took into account the tests in *Maslov*, as we were invited to do, but observe that in *Akpinar, R (on the application of) v the Upper Tribunal (Immigration and Asylum Chamber)* [2014] EWCA Civ 937 the Court held that *Maslov* was not intended to create a new rule of law or create an objective hurdle to be surmounted by the State in all cases to which it applied; irrespective of the other factors involved. A balancing exercise was still required (see paragraph 30 – 32 and 53 of *Akpinar*).

58. Finally, we bear in mind the Supreme Court's indication in *Kiarie and Byndloss* [at 55]:

> "55. The third is that, particularly in the light of this court's decision in the *Ali* case, every foreign criminal who appeals against a deportation order by reference to his human rights must negotiate a formidable hurdle before his appeal will succeed: see para 33 above. He needs to be in a position to assemble and present powerful evidence. I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters:

> (a) the depth of the appellant's integration in UK society in terms of family, employment and otherwise;
>
> (b) the quality of his relationship with any child, partner or other family member in the UK;
>
> (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise;
>
> (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the UK;
>
> (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case,
>
> (f) any significant risk of his re-offending in the UK, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform."

59. His integration into the UK, relationships with his family and other concerns, which rest in favour of the appellant for the purposes of this appeal do not, in our judgement, outweigh the public interest in terms of his deportation. In this matter, there are more than sufficient reasons that overcome such circumstances and therefore dilute any matter that might otherwise be considered compelling. We accept, as per paragraph 20 of *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596, that there is a strong public interest in the deterrent value of deportation.

60. This was also reflected in *Hesham Ali v Home Secretary* [2016] UKSC 60 (the case being referred to in the above paragraph of *Kiarie and Byndloss*), where Lord Reed stated at paragraph 46:

> "It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. … great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above."

61. At paragraph 50 he went on to conclude that,

> "… 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."

62. Finally, in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, the Court of Appeal suggests "*something very*

compelling which will be exceptional is required to outweigh the public interest in removal" (para 42).

63. In conclusion, we struggled to find any sufficiently compelling circumstances, even, as we were encouraged to do, viewing the different elements cumulatively.

Article 8

64. The public interest considerations set out at section 117B identify the matters the tribunal and /or court at first instance should take into account in all cases when considering Article 8.

65. Importantly for these purposes, sections 117A – 117D of the NIAA, taken together, are intended to provide for a structured approach to the application of Article 8, which, in the words of Sir Stephen Richards in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239 at paragraph 14, '*produces in all cases the final result, which is compatible with Article 8', (*see also paragraph 36 of *NA (Pakistan)*).

66. As a result, this appeal by the Secretary of State must succeed and the appellant's Article 8 appeal must fail.

Notice of Decision

The Secretary of State's appeal to this Upper Tribunal is allowed.

Mr Kiarie's appeal is dismissed.

No application was made for anonymity in this appeal. The general rule is that hearings are held in public and judicial decisions are published (*A v BBC* [2014] UKSC 25) and we saw no reason to depart from the general rule in this case.

Signed 

Date 4 February 2019

Deputy Upper Tribunal Judge Sutherland Williams
Upper Tribunal Judge Kebede