**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/10838/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 May 2019** | **On 12 June 2019** |

**Before**

**MR JUSTICE MURRAY, SITTING AS AN UPPER TRIBUNAL JUDGE**
**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AA**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**
For the Appellant: Ms S Kotas, Home Office Presenting Officer
For the Respondent: Mr D Bazini, Counsel, instructed by Cardinal Solicitors

**DECISION AND REASONS**

1. The Secretary of State for the Home Department (hereafter SSHD) appeals against the decision of Judge of the First-tier Tribunal O'Callaghan (the judge) who, in a decision promulgated on 19 March 2019, allowed the appeal of Mr AA (hereafter claimant) against the SSHD's decision of 6 May 2018 to refuse his human rights claim.

**Background**

2. We summarise the salient features of this appeal. The claimant is a national of Ghana who was born in Germany in 1986. He entered the UK in December 1987 aged 18 months as a dependent of his mother. He was left with a maternal aunt when his mother returned to Germany and was placed in foster care in January 1988, where he remained until 1991. The claimant returned to his mother's care when she re-entered the UK in 1991. The claimant's father concluded his medical studies in August 1991 and visited his wife and the claimant in the UK before commencing employment in South Africa. He died in 1994. The claimant's mother applied for Indefinite Leave to Remain (ILR) outside of the immigration rules in 2002 and this was ultimately granted on 10 December 2003, the claimant being granted leave in-line with his mother as her dependent child. He was 17 years old at the time.

3. The claimant has ten criminal convictions. These are a matter of record and are set out in the judge's decision at [15] to [20]. All of these convictions, bar the index offences for which he was sentenced on 13 June 2011, attracted non-custodial sentences. The index offence concerned charges laid against the claimant in January 2010 relating to the selling of prohibited weapons and ammunition. The claimant pleaded guilty to one count of selling or transferring a prohibited weapon (smooth-bore revolver), for which he received a custodial sentence of 5 years imprisonment, and a 2nd count of conspiracy to sell ammunition without being registered under the Firearms Act 1968, for which he received a consecutive one-year sentence.

4. The claimant was released from custody on 26 April 2013 and his licence period expired on 28 April 2016. The claimant commenced a B.Sc. (Hons) degree in business management in February 2014 and secured a 2:2 in 2018. He intended to commence a master's degree in business entrepreneurship in May 2019.

5. In 2014 the claimant met SH, a British citizen born in 1993. They married on 20 February 2019 and, at the date of the First-tier Tribunal hearing, both resided with her father.

6. The claimant was arrested on 13 October 2017 and charge the next day with one count of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861, but he was informed by the CPS on 31 October 2017 that a decision had been taken to discontinue the charge because there was insufficient evidence to establish a realistic prospect of conviction.

7. On 2 November 2017 the SSHD notified the claimant that he was liable for deportation. On 6 May 2018 the SSHD served on the claimant a decision making him the subject of a deportation order and refusing his human rights claim. The claimant had therefore lived in

the community for approximately 4 years and 7 months when the SSHD informed him of his liability to deportation, and approaching 5 years at the date of the SSHD's decision, and almost 6 years at the date of the First-tier Tribunal hearing. The claimant appealed the SSHD's decision refusing his human rights claim to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

## The decision of the First-tier Tribunal

8. It is accepted by both parties that the judge's decision is well structured and detailed. The judge set out the various documents served by the parties including a principal and supplementary bundle provided by the claimant. The judge noted at the outset of the hearing that the SSHD had been unable to comply with a direction of the First-tier Tribunal issued on 14 November 2018 to file and serve the relevant sentencing remarks. The Presenting Officer explained that, due to the age of the index conviction in 2011, there was no likelihood of the Sentencing Judge's remarks being obtained.

9. The judge set out the basis of the claimant's appeal (that there existed "very compelling circumstances" by reference to paragraph 398 of the immigration rules outweighing the public interest in his deportation) and accurately recorded the burden and standard of proof. The judge summarised the documentary and oral evidence provided by the claimant, SH, the claimant's mother (FG), and his mother-in-law (GG).

10. The judge's factual conclusions and supporting reasons are found at [67] to [106]. His decision as a whole, and his conclusions in particular, are interspersed with references to various authorities, legal principles relating to deportation of serious offenders (including three important facets relating to the general public interest – see [75]), and relevant legislative provisions (including s.117C of the 2002 Act).

11. We summarise the judge's findings pertinent to this appeal. At [84] the judge noted the SSHD's inability to provide the sentencing remarks. At [86] the judge accepted the claimant's account of presenting a letter to the Sentencing Judge in which he expressed his deep remorse and confirmed his realisation as to the severity of his actions. The judge found that the mandatory minimum sentence was imposed on the claimant and, on balance, accepted the claimant's evidence that the Sentencing Judge identified a real hope in respect to his rehabilitation.

12. At [90] the judge noted that the claimant had only lawfully resided in the UK from the age of 17 years and 5 months, and at [92] he noted that the claimant could not therefore meet the three conjunctive

requirements of paragraph 399A of the immigration rules and s.117C(4) of the 2002 Act.

13. At [93] the judge purported to determine "the true nature of the [claimant's] private life" in the UK. The judge stated,

> "… That he has previously committed crimes does not mean, *per se*, that he is not now integrated into this country and his local community. I find to the appropriate standard that the [claimant] is fully integrated into United Kingdom society. He has never visited Ghana and lived in Germany only for the first eighteen months of his life. He knows of life in no other country but this one. Both he and his wife enjoy a circle of friends in this country and they live as a law-abiding family unit. The securing of a degree establishes that he has been a diligent student in recent times. I accept to the required standard that the [claimant] has demonstrated remorse for his offending, both at his sentencing hearing and before the Tribunal, and he has sought to develop a life in this country that is both law-abiding and rewarding."

14. The judge gave detailed consideration in the remainder of [93] and in [94] to the incident surrounding the claimant's arrest in 2017 and concluded that this incident did not undermine the nature and quality of the claimant's integration.

15. At [96] the judge accorded "some weight" to the claimant's ability to integrate into Ghanaian society. "Though it is not determinative in nature, it is a relevant factor when undertaking the proportionality assessment exercise and enjoys some weight." At [97] the judge noted that the claimant had never visited Ghana and that his formative and adult years had been spent in the UK. The claimant had built up no connections with Ghana through familial, friendship or school links that could aid him in securing accommodation or employment. The judge found, and it was not challenged, that the claimant could not speak a local Ghanaian language. The claimant had "virtually no command of Twi or any other Ghanaian language beyond a few words and phrases." The judge accepted that English was spoken in Ghana but found that the general population was aided in everyday life by speaking one or more of the local languages. At [98] the judge found FG to be a credible witness and accepted her evidence that neither she nor the claimant had any contact with his father's family and that, having left Ghana in 1979, she enjoyed virtually no contact with her own extended family and that all her siblings had relocated to Europe. The judge consequently found there were very significant obstacles to the claimant's integration upon deportation to Ghana.

16. At [99] the judge found that the claimant's relationship with SH commenced when he enjoyed settled status in the UK. Following his release from custody the claimant had lived in the UK for approaching a year when he met SH. The judge noted that the SSHD had taken no steps to indicate an intention to deport him at this time, and indeed

that the claimant had travelled to and from Amsterdam in 2016 and experienced no problems when passing through immigration control on return. The judge found that the relationship between the claimant and SH was established when she reasonably believed that he was someone who would be permitted to remain in the UK indefinitely and that he had paid his due to society.

17. At [101] the judge found SH to be "a very impressive witness" and accepted that she and the claimant were in "a strong, loving relationship". The judge considered SH's claim to be suffering ongoing anxiety "with great care" given the absence of any medical evidence. The judge accepted that SH continued to suffer symptoms of anxiety due to the claimant's deportation proceedings and recent news relating to fertility treatment. The judge accepted that SH's present inability to have a child was having a significant impact on her emotional and mental health, and that emotionally and mentally she was clinging to the possibility of successfully pursuing IVF treatment and that she held significant subjective concerns, following her own research, as to whether IVF could be successfully pursued in Ghana.

> "I find that it [sic] this subjective belief impacts upon her anxiety and would continue to do so if she relocated to Ghana. In all of the circumstances and being mindful as to her debilitating history of anxiety, I find that compelling circumstances exist in relation to her not being required to accompany her husband to Ghana and to be required to do so would breach her own protected article 8 rights. It would be unduly harsh for her to leave the protection of her own family and also her husband's mother to whom she is close, particularly at a time when she is seeking fertility treatment through the NHS. I observed that she continues to reside with her father and has never lived independently of at least one of her parents. I find that the [claimant's] deportation would be an emotional body blow to [SH], both in relation to her anxiety and her desire to start a family, in circumstances where she has suffered various vicissitudes in life and has placed her emotional attachment to the [claimant] as a core element in her life. In such circumstances, the effect of the [claimant's] deportation upon [SH] would be unduly harsh."

18. From [102] onwards the judge considered whether there were "very compelling circumstances" within the terms of s.117C(6). Throughout his assessment the judge reminded himself of the "great weight" that must attach to the public interest in deporting foreign national offenders. In applying the very compelling circumstances test the judge considered, at [104], his findings of fact made in relation to the "exceptions" under the immigration rules. The judge noted that the claimant had spent all but 18 months of his life in this country, that he had never been to Ghana, that he had undertaken his education in the UK, that he was "deeply integrated" and that there would be very significant obstacles to his integration in Ghanaian society. Against this the judge weighed the seriousness of the claimant's index

offence, but also placed in the balance the evidence that the claimant's rehabilitation was very strong.

19. At [105] the judge accepted the claimant's account of the circumstances of his index offence and found that he had been targeted by a criminal gang member because of his vulnerability at the time. The judge additionally noted that most of the prior offending had been relatively low-level. The judge noted that the claimant had removed himself from his previous "chaotic lifestyle" and that he had turned his life around. The judge noted that, since his release, the claimant had pursued his education with aims of running his own business. The judge accepted that the claimant had "… undergone a significant rehabilitative transformation and that he has done so over several years when the [SSHD] was not seeking to deport him. His efforts to rehabilitate are therefore not linked to seeking to avoid deportation, having commenced long before the [SSHD] gave notice of his intention."

20. Then at [106] the judge stated,

> "I have clearly in mind both the need to deter foreign criminals from committing serious crimes such as the selling of firearms and ammunition, that deportation is an expression of society's revulsion at serious crimes and the need to build public confidence in the treatment of foreign criminals who have committed such crimes. However, upon considering all of the evidence, which I have detailed with care in this decision, and having focused on the relevant public policy factors in favour of deportation, I find that the high threshold has been met in this matter. That the [claimant] will be exiled from the only country that he knows, his lack of personal connection to Ghana, his present insight as to his previous offending behaviour, his strong rehabilitation transformation, his age at the time of the index offence and subsequent maturity, his recent educational attainment, his family life with his wife, his wife's health and his genuine remorse are cumulatively factors that establish his case as being one of those rare cases as identified by Lord Reid in *Hesham Ali* where very compelling circumstances arise resulting in it not being in the public interest that he be deported to Ghana."

21. The judge allowed the human rights appeal.

## The challenge to the judge's decision

22. The original grounds are, to some extent, discursive. They essentially contend however that the judge improperly took into account mitigating factors relating to the index offence, that he was not entitled to conclude that the effect of the claimant's deportation on his wife would be unduly harsh, that the judge erred in finding that the claimant was socially and culturally integrated, that it was not open to the judge to find very significant obstacles to his integration

in Ghana given that English was widely spoken and in light of his educational achievements and the absence of any medical issues, that the judge failed to fully appreciate the public interest factors in play, and that the judge consequently erred in finding that there were very compelling circumstances.

23. In granting permission to appeal judge of the First-tier Tribunal Pickup stated,

> "It is arguable that the judge erred in the assessment of the unduly harsh threshold test and in consequence the requirement to demonstrate to the higher threshold of very compelling circumstances. It is also arguable that the strong public interest in removing the [claimant] has not been adequately taken into account.
>
> All grounds may be argued."

24. The SSHD's challenge to the judge's decision has been refined in a skeleton argument prepared by Mr Kotas dated 2 May 2019, and further amplified by him at the "error of law" hearing. Paragraph 3 of his skeleton argument reads,

> 'The SSHD submits that notwithstanding what was an otherwise carefully reasoned and detailed determination, the FTTJ nevertheless erred in law in several distinct respects, and that such errors cumulatively render the ultimate conclusion unsafe, and accordingly that the decision should be set aside by the Upper Tribunal.'

25. At the outset of the hearing Mr Bazini invited us to find, as a preliminary matter, that Mr Kotas' skeleton argument advanced new grounds that were not contained in the initial grounds of appeal and in respect of which Mr Kotas had not sought permission to amend. We invited Mr Bazini to identify the grounds he claimed were new, and we heard from Mr Kotas in reply. With the exception of paragraph 6 of Mr Kotas' skeleton argument (which dealt with a factual matter not raised in the grounds), we considered that the four grounds now advanced by the SSHD were readily identifiable in the initial grounds.

26. We summarise the grounds advanced by Mr Kotas. The first ground contends that the judge erred in law in relation to his findings at [86] regarding the index offence. In the absence of the actual sentencing remarks the judge was not rationally entitled to accept the claimant's assertion that he expressed remorse for his criminal offending to the Sentencing Judge, or that the Sentencing Judge accepted that the claimant would make a positive change in his life upon release, or that the Sentencing Judge expressed real hope as to his rehabilitation. Nor was the judge entitled to rely on Court of Appeal decisions where heavier sentences were imposed on other individuals with no previous convictions and who had also entered guilty pleas as there may have been other reasons for the sentences passed in those cases. The

judge's findings on these issues, which spoke to mitigation, were said to be speculative and therefore unsafe.

27. The 2nd ground contends that the judge erred in law in finding that the claimant had fully integrated into United Kingdom society, and that he erred in law in finding that there would be very significant obstacles to his integration in Ghana. The judge ignored not only the claimant's index offence and consequent incarceration for 3 years, but also the totality of his previous criminal offending which spanned nearly 10 years, from 2002 to 2011. Such criminality militated heavily against any suggestion that the claimant was integrated into society. Notwithstanding the claimant's conduct upon release from detention, it was incumbent on the judge to assess this issue globally. There was said to be an absence of evidence of the claimant's integration other than his undertaking a degree and his relationship with his wife. The judge failed to attach any weight to so-called "generic features" that may assist the claimant upon his return to Ghana such as his good health, his educational achievements, and his capacity to work. Nor had the judge considered that it may take "a reasonable time" for such integration to take place. The judge failed to appreciate the stringent nature of this test, and failed to undertake a broad, evaluative assessment.

28. The 3rd ground contends that the judge placed undue weight on the claimant's rehabilitation. Court of Appeal authority (**Binbuga (Turkey) v Secretary of State for the Home Department** [2019] EWCA Civ 551) indicated that rehabilitation or lack of re-offending should carry little or no material weight in establishing 'very compelling circumstances'. There was said to be nothing on the facts of the instant appeal to show that the claimant's rehabilitation required weight. To the extent that the judge accorded strong weight to the claimant's rehabilitation, he erred in law.

29. The 4th ground of challenge contends that the judge erred in law in relation to his findings relating to the claimant's private life. The judge failed to properly acknowledge that, for a substantial period, the claimant was present in the UK without leave. Little weight should have been given to his private life pursuant to s.117B(5). In reliance on **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) it was further submitted that the claimant's offending imperilled his settled status rendering it precarious. The judge additionally attached undue weight to the IVF treatment undertaken by the claimant and his wife which was commenced at a time when he was facing the real prospect of deportation. The fact of IVF treatment had been held in other cases to not amount to "very significant obstacles" and, given that the "very compelling circumstances" test was an even higher threshold, the judge erred in law by attaching undue weight to this feature.

30. We were invited to find that the cumulative effect of the identified errors of law rendered the determination unsafe sufficient for it to be set aside.

## Discussion

31. We consider each of the grounds, individually and cumulatively. Following the Case Management Review Hearing on 13 November 2018 judge of the First-tier Tribunal Peart issued directions requiring the SSHD to file and serve the sentencing remarks. At the start of the First-tier Tribunal hearing the Presenting Officer indicated that, because of the age of the conviction, there was no likelihood of the sentencing remarks being obtained. There was therefore limited independent evidence before the judge relating to the circumstances of the claimant's index offence. The nature and circumstances of the index offence were nevertheless relevant considerations when determining the existence of very compelling circumstances (**KO (Nigeria)** [2018] UKSC 53). Moreover, in **Barry** [2018] EWCA Civ 790 (at [57]) Lord Justice Singh rejected a submission by the Secretary of State that it was not permissible for a First-tier Tribunal judge to give weight to matters of mitigation in the context of an appeal involving a deportation order.

32. At [86] the judge recorded the claimant's assertion that he presented a letter to the Sentencing Judge expressing his remorse. According to the claimant the Sentencing Judge found him to be remorseful and accepted that he would make a positive change to his life upon release. In assessing this evidence, the judge observed that the claimant was articulate and, noting that the provision of a letter of remorse was a common occurrence in the Crown Court where a custodial sentence was likely, accepted that the claimant would have taken steps to present a letter to the Sentencing Judge. This is a conclusion the judge was unarguably entitled to reach for the reasons given. Observing that the claimant's behaviour since his index offence strongly suggested he possessed real insight into the inappropriateness of his earlier behaviour, the judge also accepted that the claimant conveyed such sentiments to the Sentencing Judge. We can detect no irrationality or other element of unlawfulness in the way the judge reached this conclusion.

33. The claimant's assertion that the Sentencing Judge identified a real hope as to his rehabilitation was not inherently implausible. The judge observed the claimant giving evidence and was in the best position to assess the reliability of that evidence. The judge accurately noted that the claimant received the mandatory minimum sentence under the relevant legislative provisions. We did not understand Mr Kotas to suggest otherwise. As only the mandatory minimum sentence was imposed, the judge accepted, "on balance", the claimant's evidence that the Sentencing Judge identified a real hope as to rehabilitation.

The judge reinforced his finding by noting that the Court of Appeal had regularly upheld heavier sentences in matters concerning the sale of guns and ammunition. In our judgement the judge made findings of fact that were open to him based on the evidence before him and for the reasons given. We accept that it is not usually helpful to compare the facts of one case with another, and that few details were given by the judge in respect of the Court of Appeal case he identified by way of example. We are nevertheless satisfied that this did not undermine the judge's assessment of the circumstances of the offence and the sentence.

34. We consider the second ground. In reaching his conclusion that the claimant was socially and culturally integrated into the UK we are not persuaded that the judge failed to consider his incarceration for 3 years or the totality of his previous criminal offending spanning nearly 10 years. From [14] to [21] the judge accurately set out the history of the claimant's criminal convictions. This suggests that the judge was mindful of the full extent of the claimant's criminality. This observation gains support at [93] where the judge stated that the previously committed crimes did not mean, *per se*, that the claimant was not now integrated into the UK and his local community. The judge was therefore aware of, and took into account, the totality of the claimant's criminality. We observe that the claimant had not received custodial sentences in respect of his other criminal convictions. We accept that the issue of the claimant's cultural and social integration must be considered "in the round", including his past conduct. The issue is however to be determined, having regard to the entirety of the claimant's conduct, as at the date of the hearing. A qualitative test must be applied when assessing the degree of social and cultural integration (**AM (Somalia) v The Secretary of State for the Home Department** [2019] EWCA Civ 774).

35. At the date of the hearing the claimant had been living in the community following his release on licence for almost 6 years and had, as observed by the judge, led a law-abiding life. The judge observed that both the claimant and his wife enjoyed a circle of friends in the UK and they lived as a law-abiding family unit. The judge noted that the securing of a degree established that the claimant had been a diligent student. We observe that the claimant had invested heavily in his education. The judge found that the claimant demonstrated remorse for his offending and that he sought to develop a life in this country that was both law-abiding and rewarding. The judge noted that the claimant had lived in the UK since he was 18 months old and that he knew of life in no other country but this one. The judge was demonstrably aware that the claimant only secured lawful status when aged 17 (at [92]). In our view the judge took account of all relevant circumstances and approached the question of integration from a global perspective. The

judge was entitled to place greater weight on the nature and quality of the integrative links established by the claimant since release, and it was open to him to find that any break in the claimant's integration caused by his criminality had been regained following his release in 2013. In reaching our decision we note the absence of any challenge to the judge's assessment of the incident in 2017 that led to the claimant's arrest.

36. Both **SSHD v Kamara** [2016] EWCA Civ 813 and **AS v SSHD** [2017] EWCA Civ 1284 considered the concept of "integration" in s.117C(4)(c) of the 2002 Act and paragraph 399A of the immigration rules. In **Kamara** Sales LJ, with whom Moore-Bick LJ agreed, stated, at [14],

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment 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."

37. In **AS** Lord Justice Moylan rejected a submission that so-called "generic" factors, such as intelligence, health, employability and general robustness of character, were irrelevant when assessing a person's ability to integrate, and held that such factors can be relevant to whether there are very significant obstacles to integration as they form part of the "broad evaluative judgment" (at [58] and [59]). The Court of Appeal rejected a submission that whether someone is "enough of an insider" is to be determined by reference to their ties to the country of proposed removal.

38. In light of the above principles, and for the following reasons, we are not persuaded that the judge failed to undertake the requisite broad assessment, with particular reference to "generic" factors, when he found "very significant obstacles" to the claimant's integration in Ghana. At [96] the judge indicated that he had accorded some weight to the claimant's ability to integrate in Ghana. Whilst it would have been preferable if the judge had expressly identified the factors underlying this ability to integrate, we are nevertheless satisfied that the judge had firmly in mind the generic factors referred to in **AS**. A submission that another judge erred in law by failing to refer explicitly in his reasons to the facts that an appellant was a young man in good

health and capable of working was rejected in **Kamara**. At [20] Sales LJ stated,

> "… these were all matters of which the Tribunal was plainly aware. It knew Mr Kamara's age and had seen him give evidence; and in any event no-one had suggested that he was anything other than what he appeared to be on the papers, i.e. a young man in good health and capable of working. Since there was no issue about any of this and there could be no real doubt about the Tribunal's awareness of the position, the Tribunal did not have to state these things in terms in its reasons to show that it had taken them into account. In the context in which it gave its decision, it is clear that it has done so."

39. We are likewise satisfied that the judge was acutely aware of these factors and that they were, albeit by implication, recognised at [96] of his decision. By his reference to **Kamara** the judge was mindful of the approach he was required to adopt when assessing the existence of very significant obstacles. At [97] the judge then identified various factors supporting his conclusion that, despite attaching some weight to the claimant's ability to integrate into Ghanaian society, there nevertheless existed very significant obstacles to his integration. These included the fact that the claimant had never visited Ghana, that he had no connections within the country through familial, friendship or school links that could aid him in securing accommodation or employment, that he did not speak a local Ghanaian language, and that while English was spoken in Ghana, the general population was aided in everyday life by speaking one or more the local languages. At [98] the judge found that the claimant's mother had no contact with her husband's family or Ghana and that she enjoyed virtually no contact with her own extended family in Ghana. In the absence of any clear misdirection we do not find that the judge's conclusion was one he was not rationally entitled to reach.

40. In considering Mr Kotas' 3rd ground we first note that, whilst the judge found the evidence relating to the claimant's rehabilitation to be strong, he did not expressly accord "strong" weight to that rehabilitation. It is nevertheless apparent that the judge has accorded some weight to the fact of rehabilitation in his assessment under s.117C(6).

41. In **RA (s.117C: "unduly harsh"; offence: seriousness) Iraq** [2019] UKUT 00123 (IAC) the President of the Upper Tribunal (IAC) considered arguments on the issue of rehabilitation. At [32] and [33] he had this to say.

> "As the Court of Appeal pointed out in Danso v Secretary of State for the Home Department [2015] EWCA Civ 596, courses aimed at rehabilitation, undertaken whilst in prison, are often unlikely to bear material weight, for the simple reason that they are a commonplace; particularly in the case of sexual offenders.

> As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256, paragraphs 48 to 56). Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will *never* be capable of playing a significant role (see LG (Colombia) v Secretary of State for the Home Department [2018] EWCA Civ 1225). Any judicial departure from the norm would, however, need to be fully reasoned."

42. **RA (Iraq)** received approval in the Court of Appeal in **Binbuga (Turkey)**. As the extract makes plain, neither the Upper Tribunal nor the Court of Appeal suggested that rehabilitation can never be capable of playing a significant role, but the circumstances in which it is likely to be able to make a significant contribution are rare (see also **Taylor v SSHD** [2015] EWCA Civ 845). The judge's overall assessment of the claimant's rehabilitation was however conducted in the context of the SSHD's delay in initiating any deportation proceedings (see [99] and [105], where the judge refers to the claimant's rehabilitative transformation having occurred over several years when the SSHD was not seeking to deport him.) Mr Kotas accepted that there was no explanation for the SSHD's failure to initiate deportation proceedings for 4 years and 7 months following the claimant's release into the community, and that some 7 years and 1 month had passed between the claimant's conviction and the respondent's decision to deport him.

43. It is clear from **EB (Kosovo)** [2008] UKHL 41, a decision considered by the judge at [99], that a delay may enable an individual to demonstrate that they have genuinely rehabilitated, as well as to develop closer personal and social ties and establish deeper roots in the community, and that if months or years pass without an attempt made to remove an individual an expectation will grow that the authorities do not intend to remove the person, and that a significant and unexplained delay may reduce the weight to be attached to the public interest. In **RJG v SSHD** [2016] EWCA Civ 1042 (at [54] the Court of Appeal accepted that, in principle, a substantial delay on the part of the Secretary of State in pursuing the deportation of a person convicted of serious crime could be an important factor in determining the proportionality of the deportation, both because it might reflect on the weight to be given to the public interest in deportation and because of its effect on the individuals concerned. In **MN-T (Colombia) v SSHD** [2016] EWCA Civ 893, a case involving an individual who entered the UK as 9 years old in 1977 and received an 8-year sentence of imprisonment, there was a delay of 5 years

between her release and the start of deport action. At [35] the Court held,

> "I agree that rehabilitation alone would not suffice to justify the Upper Tribunal's decision in this case. If it had not been for the long delay by the Secretary of State in taking action to deport, in my view there would be no question of saying that "very compelling circumstances over and above those described in Exceptions 1 and 2" outweighed the high public interest in deportation. But that lengthy delay makes a critical difference. That lengthy delay is an exceptional circumstance. It has led to the claimant substantially strengthening her family and private life here. Also, it has led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over the last 13 years. This is one of those cases which is on the borderline. The Upper Tribunal might have decided either way. The Court of Appeal would not have reversed the Upper Tribunal's decision if the Upper Tribunal had decided that because of the high public importance the claimant must be deported. In the event the Upper Tribunal decided this matter in favour of the claimant. This was, in my view, an evaluative decision within the range which the Upper Tribunal was entitled to make. I therefore conclude that the Upper Tribunal was entitled to hold that there were in this case very compelling circumstances over and above those described in Exceptions 1 and 2, which outweighed the high public interest in deportation."

44. At [40] to [42] of **MN-T** the Court of Appeal rejected the respondent's submission that the issue of delay, in the context of a deportation decision, was incapable of reducing the public interest. The Court explained that, if during a lengthy period the criminal becomes rehabilitated and shows himself or herself to have become a law-abiding citizen, he poses less of a risk or threat to the public, that the deterrent effect of the policy is weakened if the Secretary of State does not act promptly, and that it hardly expresses society's revulsion at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport.

45. Having regard to the aforementioned authorities, and in light of the relevance accorded by the judge to the SSHD's delay and the particular circumstances in which the claimant was able to demonstrate his rehabilitation, we find, on the specific facts of this appeal, that the claimant's rehabilitation was capable of having weight attached to it when considering the existence of 'very compelling circumstances' over and above the exceptions in the relevant immigration rules and s.117C(4), and that the judge did not commit an error of law in according some weight to the applicant's rehabilitation.

46. We consider Mr Kotas' 4th ground. Mr Kotas contends that the FtJ failed to properly acknowledge that the claimant was resident in the UK for a substantial period without leave and that little weight should

have been accorded to his private life pursuant to s.117B(5). The judge was however demonstrably aware of the length of the claimant's unlawful residence. At [90] the judge specifically acknowledges that the claimant has only lawfully resided in the UK since he was 17 years and 5 months old. Then at [92] the judge acknowledges that the claimant could not succeed on the first requirement of paragraph 339A of the immigration rules or s.117C(4)(a) of the 2002 Act as he had spent less than half his life lawfully present in the UK. This element of the grounds has not been made out.

47. Mr Kotas relies on **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) in support of the proposition that, although the applicant was settled when he committed his criminal offences, his course of criminal conduct was sufficient to render his status precarious.

48. Headnote (5) of **AM (Malawi)** reads,

> "*(5) In some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious.*"

49. The comments that a person with ILR, or indeed a person who has obtain citizenship, could still be regarded as having a 'precarious' immigration status, was obiter dicta as the appellant in that case did not have ILR. **AM (Malawi)** was considered by the Supreme Court in **Rhuppiah** [2018] UKSC 58. At [44] the Court stated,

> "The answer to the primary question posed by the present appeal is therefore that everyone who, not being a UK citizen, is present in the UK and who has leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5)."

50. Then at [47] the Court stated,

> "The facts of the present case do not enable this court to appraise the further suggestion in the *AM* case that even a grant of indefinite leave to remain might yield a precarious immigration status in the circumstances identified at para 39(e)[1] above. The reader will however have noted that the suggestion derives partial support from the decision of the ECtHR in the *Butt* case, summarised at para 33 above."

51. We accept Mr Kotas' submission that the comments in **AM (Malawi)** are of persuasive force, even though they were purely obiter. There

[1]Paragraph 39(e) of the Court's judgment summarised headnote 5 of **AM (Malawi)**, that even a grant of indefinite leave to remain might render the person's status precarious if the grant had been obtained by deception or if he or she had embarked on a course of criminal conduct which would justify its withdrawal

was however no detailed exploration in **AM (Malawi)** itself of the circumstances in which a person with ILR may nevertheless, because of their criminal conduct, have their immigration status imperilled. Each case must be decided on its own facts. In the present appeal, although the claimant's core offence was undoubtedly serious, the question whether the judge should have approached his immigration status on the basis that it was precarious must, in our judgment, be informed by all material circumstances, including the respondent's significant delay in informing the applicant that he may be deported (specifically considered by the judge at [99]). We do not consider that the applicant's immigration status could be considered to be precarious if, after a period of 4 years and 7 months following his release into the community, the respondent has entirely failed to initiate any deportation proceedings. We consequently find the judge did not err in law by failing to regard the claimant's immigration status as precarious.

52. Mr Kotas also submits that the judge erred in law by placing "undue weight" on the fact that the claimant and his wife were undergoing IVF, described as a "purely elective medical procedure", given that such a factor has been held to not amount to a "very significant obstacle" in the context of EX.1.

53. The attribution of weight to particular elements of a case will not usually amount to an error of law unless such attribution was irrational, or unless, in attaching that weight, the judge misdirected himself in respect of a legal requirement or a legal test. We are not persuaded that the judge made any such misdirection, or that his attribution of some weight to the IVF treatment was irrational. That a desire to continue fertility treatment in the UK does not amount to a "very significant obstacle" under EX.1 of the immigration rules, does not mean that it is an irrelevant consideration when determining either the issue of undue hardship, or in determining whether there are very compelling circumstances over and above Exceptions 1 and 2 such as to render a decision disproportionate under Article 8. At [101] the issue of IVF treatment constituted just one of a number of factors holistically considered by the judge. The judge carefully evaluated SH's evidence, who he found to be "a very impressive witness", noting that her present inability to have a child was having a significant impact on her emotional and mental health, and that she held "significant subjective concerns" as to whether IVF treatment could be properly pursued in Ghana. We do not regard these observations as irrelevant considerations, and we find the judge was rationally entitled, when undertaking a rounded assessment of the impact on SH and the existence of very compelling circumstances in s.117C(6), to attach some weight to the issue of IVF treatment.

54. Mr Kotas's skeleton argument did not directly address the judge's "unduly harsh" assessment, and he made no specific oral submissions

on this point. We have nevertheless carefully considered the judge's reasoning at [101]. Although there was no medical evidence, the judge considered the symptoms described by SH and her description of her own anxieties. The judge was entitled, having found SH to be an impressive witness, and having considered her evidence and her description of the symptoms she experienced, to his conclusion that she suffered from anxiety. The judge was additionally entitled to find that SH's subjective belief that she would be unable to successfully pursue IVF treatment in Ghana would continue to impact upon her anxiety if she relocated to Ghana, a country she had never visited, and that this would significantly impact on her emotional and mental health. The judge considered SH's personal circumstances, that she had never lived independently of at least one of her parents, her relationship with her parents and the claimant's mother, and that, having suffered various vicissitudes in life, she had "placed her emotional attachment to the [claimant] as a core element in her life". In circumstances where it has not been suggested that the judge misdirected himself in respect of the legal test for undue harshness, we are satisfied that, whilst another judge may have reached a different conclusion, the judge was rationally entitled to conclude that the deportation decision would have an unduly harsh impact on the claimant's wife.

55. Mr Kotas submitted that the judge's cumulative errors rendered his decision unsafe. We find that the judge did not make any errors of law. We find, in any event, that the judge's overall conclusion, that there were very compelling circumstances over and above Exceptions 1 and 2 in s.117C(5) that outweighed the public interest, was one he was entitled to reach on the evidence before him and for the reasons given. The judge demonstrably focused on the need for very compelling circumstances over and above those in Exception 1 and 2 throughout his decision (e.g. [68], [77], [91], [93], [102], [104], [105], [106]). He accurately directed himself in respect of the legal approach to the very compelling circumstances test ([102]) and made specific reference to the authority of **NA (Pakistan) v Secretary of State for the Home Department** [2016] EWCA Civ 662. The judge was aware that the threshold under s.117C(6) was a very high one ([78], [79], [80], [83]). The judge accurately directed himself in respect of the public interest considerations ([75], [82], [103], [106]), and was acutely aware of the seriousness of the claimant's offending ([83], [85], [104], [106]).

56. The judge took account of a wide range of factors, including his findings under the Exceptions themselves ([104]). He noted that the claimant had never been to Ghana and lacked any personal connection with the country, that he spent all but 18 months of his life in the UK, that he was deeply integrated and that there would be very significant obstacles to his integration. The judge took account of the circumstances of the applicant's offending, the evidence of his

rehabilitation given that it was occasioned by a significant and unexplained delay by the respondent, his current circumstances, his relationship with SH and the impact on her of his deportation and her health. The judge weighed all these factors against the strong public interest factors ([104] to [106]).

57. Whilst it might be said that the judge's conclusion was a generous one, we are tasked with determining whether he made an error on a point of law. We cannot set aside the judge's decision simply because another judge may have reached a different conclusion. We do not find that the decision was perverse, or that the judge failed to attach weight to relevant matters, or that he took into account irrelevant factors. We can detect no legal error in the judge's assessment, and consequently we dismiss the SSHD's appeal.

## Notice of Decision

**The First-tier Tribunal's decision does not contain any error of law.**
**The SSHD's appeal is dismissed.**

## Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 June 2019

Upper Tribunal Judge Blum