Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09539/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 May 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Glass, Counsel instructed by Okafor & Co Solicitors
For the Respondent: Mr S Whitwell, Home Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica. His date of birth is 8 November 1991. He came to the UK on 13 April 2007 when he was aged 15. He was granted indefinite leave to remain on 18 November 2008. The anonymity order continues to protect the identity of the Appellant's brother who is a child.

2. On 17 February 2016 he was convicted of causing death by careless driving when under the influence of drugs contrary to s.3A (1) (a) of the Road Traffic Act 1988. On 31 March 2016 he was sentenced to three years' imprisonment and ordered to pay a victim surcharge of £120. The judge, while sentencing the appellant, stated as follows:-

> "[AA], sit there for a moment please. I'm going to make a number of observations which are designed to inform you and the public, and any other interested party, as to how I am approaching sentence in this case.
>
> The courts frequently, too frequently, have to deal with cases such as this where a life has been lost as a result of bad driving, and they are cases that cause great anguish because so often, as in this case, the person responsible for the killing, for the death, is a person with many positive qualities and I read much about you which is to your credit. But a life has been taken, the life of another young man, doubtless of many positive qualities as well; there can be no doubt about that if anyone reads the statement of his mother, a much loved and valued son now dead.
>
> This hearing, these hearings, these sentence hearings, tend to focus very much on the qualities of the defendant and as a result there is a temptation to lose sight of the ultimate responsibility of the sentence exercise. What the judge has to do in sentencing in a case like this is to weigh the culpability of the defendant, to weigh the consequences of the defendant's actions; that's to assess, if you like, the gravity of the crime; and to set that against the positive elements, the mitigation in the case, which is so often, as here a powerful element.
>
> But the court must not lose sight of its responsibility to the wider public and here, here the life has been lost because you were driving when you had been breaking the law and using cannabis. You were undoubtedly influenced by the cannabis you had taken. It affects judgment; it affects one's ability to react quickly to a situation. It makes you think you're a better driver than you are. And couple that with your experience as driving – at driving, couple that with the fact that the driving at the very limit of the permitted speed on that stretch of fast road, add those factors together and it's a potent mix which, as we know when you lost it, killed somebody.
>
> And the court has to pass a sentence that ensures that the public knows that whatever the merit of a defendant, if you drive in those circumstances, affected by drugs just as if you'd been affected by drink, it's an unforgiveable thing to do and the court has to pass a sentence which will make others think twice before they get behind a wheel having had their spliff with their mates before setting out on their journey …
>
> You're a young man, you've got many years of life, productive life, ahead of you and there is no doubt you will be able to make a valuable contribution to society in the future, unlike your friend, whose chance of life has gone."

3. Following the conviction, the Respondent made a deportation order against the Appellant pursuant to Section 5(1) of the Immigration Act 1971 on 5 October 2016. The Secretary of State must make a deportation order in respect of a foreign criminal

under Section 32(5) of the UK Borders Act 2007. There has never been a challenge to the Appellant being a foreign criminal and that his deportation is conducive to the public good for the purposes of Section 3(5)(a) of the Immigration Act 1971.

4. Following the deportation order the Appellant made a claim for asylum. His application was refused on 22 July 2017. The Appellant appeals against the decision of the Secretary of State on 22 July 2017 on human rights grounds. His appeal was allowed by First-tier Tribunal Judge Talbot in a decision that was promulgated on 4 September 2018.

Error of law

5. The decision of Judge Talbot was set aside by Upper Tribunal Judge McWilliam and the Honourable Lord Matthews sitting as an Upper Tribunal Judge following a hearing on 20 November 2018. The panel found that Judge Talbot had materially erred for the reasons expressed at paragraphs 16 and 17 of the decision which read as follows:

> "16. The judge properly directed himself on the law. There is no challenge to his self-direction. The judge was entitled, contrary to the assertions in the grounds, to attach weight to the Appellant presenting a low risk of reoffending and that the trigger offence was a one off. However, the case law and the statutory regime is such that in assessing the weight to attach to be attached to the public interest, the judge's decision cannot be properly understood in the absence of clear and reasoned findings on all limbs of paragraph 399A. There is a structural error in the approach of the judge. This is an error of substance because we cannot rule out that had the judge made clear findings on matters under paragraph 399A, properly applying the law, he would not have reached the same conclusion. For this reason alone, the judge materially erred. It is not necessary for us to engage with all issues raised in the grounds. However, what the judge said at [26] about the public interest being "diminished" causes us concern because we believe this approach to be at odds with the statutory regime which tells us that Parliament has decided that deportation is in the public interest. Under the legislative framework we do not believe that factors other than the seriousness of the offence are capable of changing the weight of the public inters in deportation. The approach of the judge should have been whether the Appellant's Article 8 rights are of such strength that they would outweigh the public interest, and this should be considered through the lens of the Rules and statutory regime. We set aside the decision of the FTT to allow the appeal under article 8.
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> 17. The matter will be listed in the UT for submissions only. The FTT made credibility findings to which there is no challenge. There is no reason in our view to interfere with these when remaking (in the absence of further evidence admitted by the UT from either side which would establish a change in circumstances). The Appellant has not submitted further evidence to date in compliance with the directions of the UT and there was no good reason, brought to our attention why it would be necessary to hear evidence. Ms Ferguson mentioned the Appellant's partner/girlfriend

> wishing to give evidence, but no statement from her had been served in accordance with directions."

Findings made by the FTT

6. Judge Talbot heard evidence from the Appellant and his mother and she made findings as follows:

   (1) There is no doubt that the Appellant has established a private life in the UK having arrived at the age of 15 and continued to reside here for over eleven years.

   (2) There is no doubt that the Respondent's decision will constitute an interference with his private life.

   (3) The public interest in the Appellant's deportation stems from the offence committed on 6 April 2014.

   (4) It is in the Appellant's favour that this was a one-off offence and in all other respects he is of good character.

   (5) The judge took into account the OASys Report of 1 December 2017 which assessed the Appellant as presenting a low risk of reoffending and has been very motivated and very capable of addressing his offending. The judge took into account that he had completed courses whilst in prison addressing drugs issues. There was also a letter from the Appellant's probation officer confirming that he represents a low risk with a low likelihood of reoffending and that he fully engages with his licence, attends appointments on time and is pleasant.

   (6) The other factors in the appellant's favour relate to the strength and quality of his private life. He has resided here lawfully and has had settled status since 2008. He has been involved in studying and working and has made many friendships. The judge made reference to the letters submitted in support from friends and a letter from the Appellant's girlfriend. The judge accepted the Appellant's evidence of family relationships with his mother and his younger brother and accepted the Appellant's mother's evidence about the strength of those relationships.

   (7) The judge considered a letter from the Appellant's brother O's class teacher and head teacher describing the Appellant as being 'deeply involved in his brother's education' and expressing the view that O would find it hard to cope with his deportation.

   (8) The judge accepted that the Appellant has a close "elder brother" relationship with O and that O will miss him.

   (9) The Appellant assists his mother in a practical sense for example by taking O to and from school and being at home to look after O when she is out at work.

   (10) In relation to the Appellant having to live in Jamaica the judge said as follows:

   > "25. The Appellant also asserts that he would not be able to cope with living in Jamaica. He has not visited Jamaica since 2012 and states that he has no

> family there who could provide him with support. I note that he does have a half-sister there and a maternal aunt and uncle. However, I accept that the evidence of the Appellant's mother that these relatives all have their own problems and that they would not be in a position to offer him anything in the way of practical support. I also note the Appellant's evidence that he has mental health problems and this is borne out by the letter dated 23.7.18 from a therapist to whom he had been referred by his GP, confirming that he attends CBT sessions and that he suffers from 'moderate to severe low mood and anxiety."

(11) The judge reached the following conclusions at paragraph 26:

> "26. The Appellant was of good character until the unfortunate incident which resulted not only in the death of his friend but also left him with physical and mental injuries and a lengthy term of imprisonment as well as the deportation decision which is the subject of this appeal. He also had settled status and no adverse immigration history. The public interest in his deportation (as laid down by statute) can only be rebutted where there are 'very compelling circumstances'. I pay attention to the dicta of Lord Reed (as quoted above) that for the Appellant to succeed, the circumstances need not be *'exceptional'* in the sense of being *'extraordinary'* but rather in the sense of being *'a departure from the general rule.'* It is abundantly clear that there is in general a strong public interest in the deportation of 'foreign criminals' but Lord Reed also made clear that the judicial assessment should include *'factors bearing on the weight of the public interest in the deportation of the particular offender'* and ultimately it comes down to a question of proportionality. The public interest in the Appellant's deportation in this particular case is undoubtedly diminished by the fact that he is a settled immigrant since childhood with no adverse immigration history; that it was his first and only offence; and that he has been assessed as having a low risk of reoffending. The Appellant's enforced return to Jamaica will undoubtedly cause great hardship both to him and to his family members in the UK. Weighing up the cumulative factors that I have referred to herein, I am (albeit with some hesitation) drawn to the conclusion that those cumulative factors outweigh the public interest in his deportation and that the Respondent's deportation decision therefore amounts to a violation of his Article 8 rights."

The hearing before the UT

7. Before us the Appellant relied on the original Appellant's bundle that was before the First-tier Tribunal which includes the Appellant's statement and the witness statements from his mother and younger brother, O. In addition, there are letters of support from friends and a report from the Appellant's probation officer and the OASys assessment.

8. There was a further bundle served for the purpose of the hearing before us and this includes a letter from the Appellant's GP of 20 March 2019. She confirmed that the Appellant is a patient receiving treatment for depression and PTSD and that he receives anti-depressant medication. He appears to be stable on this and has been engaging with his GP and also with the chronic pain team. He has previously

engaged with the CPT. The GP stated that in respect of the possibility of him being deported,

> "There is a possibility that this move may well affect his mental health adversely, as his mental health appears to be currently stable. However I am unable to comment about the services available to him over there and how he would be able to engage with them and this what effect deportation would have on his mental health."

9. There was a character reference from the Winchester Project dated 8 March 2019. It is an organisation which has experience working with families, children and young people. The author of the report, Kim Mabbutt, states that the Appellant is a registered family member of the project and has been a positive and active member. He has volunteered his time to help and support of a variety of initiatives and including summer barbeques, Christmas discos, fundraising days and a weekly Winch family meal set up to enable local children and families to build relationships. It is stated that he is a reliable, committed and responsible person. It is stated that the Appellant's younger brother O attends the primary years provision at the Winch. He has significant difficulties socially and emotionally and extremely low confidence and self-esteem. O is now part of the play promise cohort which is a bespoke service for children and young people who need intensive support. The Appellant plays an integral and much needed "father figure role" in his brother's life. He is O's primary carer collecting him regularly from the provision. The Appellant provides a secure trusting foundation to his life and is the only male role model.

10. There was a character reference from the Christian Fellowship Ministries of 23 March 2019. The author of this is Kemar Paul Dickson who describes the Appellant as a "wonderful and polite man and an active member of our church since April 2018." He describes the Appellant helping a young man in need. He states that the Appellant has a strong bond with his family and friends within the community and that he is "Vital in the upbringing of his younger brother, who considers him a strong paternal figure. Losing him would be a detrimental effect on his little brother, which most certainly have an ongoing effect to his future and his family."

11. There was a baptism certificate relating to the Appellant indicating that he was baptised on 19 November 2008. There was a letter from the Holy Trinity Church of England Primary School of 25 March 2019 from the head of pastoral care, Helen Toplis. She states that having worked with O on a regular one-to-one basis she has observed an increase in his emotional vulnerability which over the last couple of months has peaked. She has become aware of the significance of the Appellant on O's sense of stability, safety and guidance and how fearful and anxious O is at the prospect of his brother having to leave the UK. She states that she has met with O and the Appellant and is impressed with the positive influences the Appellant has on O. She opines that the two clearly have "A very strong bond and mutual respect for each other and I am concerned that without his brother's consistent support, influencing guidance, [O] will struggle significantly to the detriment of his emotional wellbeing."

12. There was a second letter from the same school which is undated from Sotira Styllis a year 4 class teacher relating to O. She states that having met O and the Appellant on a few occasions it is clear to see that the Appellant has a positive influence. O talks highly of him and O has spoken on "multiple occasions of his anxiety relating to the prospect of his brother having to leave the country." She is concerned that O will struggle significantly "to the detriment of his emotional wellbeing" should his brother be deported.

13. There was a CAMHS referral form relating to O and the bundle. The referrer's main concern is documented as follows:

> "[O] has said he wants to end his life/some harmful behaviour – hitting his head. Under the heading family's main concern the following is stated 'very attached to older brother and [O] is quite vulnerable. He's been through a lot.' Under the heading any other important information we should know? the following is stated, [O] joined our school this year when mum moved in with her sister. They were previously in Enfield. [O] brother had a serious accident when he was 4. Subsequently his brother served a prison sentence and is now being threatened with deportation. This is very traumatic for [O]."

14. In addition, Ms Glass also relied on a report prepared by Luke de Noronha. At the hearing in November Miss Ferguson who was then representing the Appellant produced the report. The Tribunal was not in a position to remake the decision because of the late service of the report which the Respondent needed time to consider.

15. The report relied on is entitled "Expert report – deportees in Jamaica". It is a generic report. The author is in the third year of a Dip Phil in anthropology at the University of Oxford and his doctoral research focuses on deportation from the UK to Jamaica. The report is undated but he states within it that he has recently returned from Jamaica in November 2016 having spent eight months there. He met over 100 deported persons who had been returned by the British government. He worked with an NGO and a homeless shelter where a number of deported persons live. He spoke with individuals working at government level on issues surrounding deportation and settlement. He describes his research as "ethnographic" and states that his engagement with deportees was intense and highly immersive.

16. The report addresses family support at section 1. It is concluded that those who are most estranged from family in Jamaica and have the thinnest forms of support tend to be those who left Jamaica as children and did not maintain contact with the country of their birth. He opines that without family support and a support network, people who have often forgotten how things operate both practically and culturally in Jamaica tend to face difficulties. There is very little provision for wi-fi in Jamaica. It is expensive and unreliable. Flight tickets for family to visit deportees in Jamaica are expensive and out of reach for most. At section 2, the author addresses crime, violence and extortion and in his opinion "deported persons are especially vulnerable to crime in Jamaica and regularly become targets for robberies and different forms of extortion." In his view deportees are very visible, stigmatised and

vulnerable to crime and that crime in Jamaica is "intensely social". Deportees are vulnerable to crime because they do not know people and people do not know them. Added to this is the intense hostility and stigma attached to deportees as "failed migrants". Deportees who left Jamaica as children and who went to school in the UK are unable to hide from their neighbours the fact that they were deportees. The author states that he has heard from numerous sources cases about deportees being murdered. He addresses reintegration: language, health, housing and employment at section 3 and indicates that whilst the Home Office states that English is the official language in Jamaica this has the potential to be deeply misleading. He addresses health with the comment that he is not qualified to speak confidently on mental health provision in Jamaica. However, it is his experience that poor people in Jamaica struggle to access free healthcare (even emergency care) and that mental health service provision is lacking for ordinary Jamaicans. He addresses housing and states that a vast majority of deported people lived in low income neighbourhoods and almost all felt vulnerable to extortion and robbery. It is likely that males with no family support network will most likely end up living in the homeless shelter which is not a secure place.

17. The author of the report comments on the Home Office booklet entitled 'coming home to Jamaica' a copy of which Ms Glass produced. He stresses that the NGO provisions referenced in that report cannot substantively help people find employment or offer any financial support. They are not yet effective in helping people find employment. The homeless shelter provides people with a place to sleep but nothing beyond that. The booklet overstates the provisions and NGO services available to deportees whilst recognising how difficult it is for deported persons to stay safe and reference was made to page 24 of the coming home to Jamaica booklet which lists dos and don'ts which presents a different picture. In terms of unemployment the unemployment rate is high currently at around 14% and 30% for young adults.

Submissions

18. We heard detailed submissions from both representatives having identified at the start of the hearing the issues namely it was incumbent on the Tribunal to make findings in respect of paragraph 399A of the Immigration Rules.

19. The Appellant's case is that he satisfies paragraph 339A(b) and (c) and that there are very compelling circumstances over and above those described in paragraphs 399 and 399A with reference to paragraph 398(c).

20. Ms Glass indicated that she relied on the findings of Judge Talbot who closely analysed the facts. In relation to 399A(a) she relied on the skeleton argument drafted by Miss Ferguson in which it is asserted that the Appellant has been lawfully resident for almost twelve years which amounts to 44% of his life and therefore the failure to meet the exception by a small margin is not exceptional in itself but combined with other factors may be. Ms Glass submitted that the material point was that he had spent his formative years here. He is socially and culturally integrated in

the UK. Whilst this was a point that Mr Whitwell in submissions conceded, it is in our view necessary to set out Ms Glass' submissions on the point. The Appellant has completed his secondary education here having sat GCSEs in the UK. He attended sixth form college and started a BA Hons degree at Buckinghamshire University. He had worked and studied here prior to offending. He has many friends here who have submitted evidence in support. He has immediate family and extended family members in the UK, his mother's family have lived in the UK since 1950. Ms Glass referred to O the Appellant's younger brother. He has autism and Ms Glass submitted that the evidence establishes a high level of involvement in O's life. She made reference to the terrible accident which led to the Appellant's conviction. She submitted that the Appellant is involved as part of a treatment plan to support O and that he plays a fatherly role. He works as a volunteer helping homeless people and she spoke of his connections with the church including his baptism. She submitted that the Appellant's bonds with family and friends are spiritually and emotionally important to him. O is a child with great needs which is supported by the evidence in the original bundle before the First-tier Tribunal and the Upper Tribunal. He has high dependency and requires one-to-one attention. He has a very strong bond with the Appellant. He has complex emotional needs. She referred us to Judge Talbot's findings in relation to the strength of the Appellant's family ties in the UK and private life generally.

21. In respect of very significant obstacles to integration she relied on the report of Mr de Noronha, taking us to the salient parts. The Appellant has struggled with mental health issues and he receives support here from his GP, from the church and family support. She submitted that he is mentally tortured by what happened and he also has physical injuries. He does not have family who can support him in Jamaica. If he returns there he will be isolated from his family. There will be an impact on O. The Appellant's mother is a single mother. It is according to Ms Glass 'delusional' to believe that the Appellant's family will be able to provide such support to the Appellant in Jamaica. She referred us to isolation, his vulnerability, and the stigmatisation of deportees and difficulties arising from language, crime and homelessness. She submitted that the coming home to Jamaica report puts a gloss on the reality of what is available to deportees in relation to housing, and health services. She submitted that CBT and the support the Appellant receives for depression will not be available to him in Jamaica he will be returning as a vulnerable person where he will be homeless. Ms Glass submitted that all factors cumulatively should lead to the appeal being allowed.

22. Mr Whitwell made submissions. He relied on the Reasons for Refusal Letter. He referred us to the oral evidence of the Appellant and his mother set out in Judge Talbot's decision and that the Appellant has relatives in Jamaica and notwithstanding the judge's findings at [25], his family would be able to offer emotional support if not practical or financial. In respect of paragraph 399A(a) the Appellant does not remotely meet the requirements. He is a year and a half off from being here for most of his life. He conceded that he was socially and culturally integrated on the basis of the Appellant having been granted indefinite leave to remain having been educated here, his work for charities and the relationship he has

with O. However, he did not accept that there would be very significant obstacles to integration. He will be able to have a private life in Jamaica notwithstanding that he has post-traumatic stress disorder and depression. It is not suggested that if he were to be granted leave here he would do anything other than work. It is not clear how his mental health problems would prevent him from having a private life in Jamaica.

23. Mr Whitwell submitted that the expert report it is generic. It does not provide an evaluative assessment of the Appellant's personal circumstances. The report is historic. It is undated. The author states that he recently returned to Jamaica in 2016. The expertise of the author is brought into question. The purpose of the report is as part of the author's doctoral research and the author indicates that he has a specific interest in homophobic violence which is of no materiality to the Appellant. In this respect Mr Whitwell submitted that the fourth, fifth and sixth sections of the report which deal with appealing from Jamaica, LGBTI persons and women have no relevance to the Appellant. Mr Whitwell questions the impartiality of the evidence and questions the sources quoted. He also reminded us that the Appellant's appeal is not under Article 3. It is not suggested that deportation would breach the UK's obligations under Article 3. He accepts that the report, whilst useful, a great deal of weight should not be attached to it. Whether or not the return to Jamaica would be bleak is not the test to be applied. There is in his view emergency accommodation and a social security system and in addition provision of mental healthcare. He asked us to consider very significant obstacles in the context of the Appellant who is a 27- year old man of working age with an employment history who is educated to GCSE level and who started a college course. As a matter of fact, the language in Jamaica is English, the Appellant lived in Jamaica until the age of 15. He referred us to the case law relating to children and that the ages between 4 and 11 are more significant. The Appellant successfully adapted to a move to Europe. He has spent fifteen years of his life in Jamaica. Whilst there may not be practical or financial support available for him, there would be a level of emotional support from relatives there. He made reference to Hesham Ali and that only a very strong case would amount to very compelling circumstances. This is not such a rare case.

The Legal Framework

24.

> "**398.** Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
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> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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."

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) a relationship formed with a qualifying partner,

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) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(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."

25. In the recent case of MS (s.117C (6): "very compelling circumstances") Philippines [2019] UKUT 0122, the Upper Tribunal considered Section 117C (6) following KO (Nigeria) v Secretary of State for the Home Department [2008] UKSC 53. When concluding that whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 in sub-Sections (4) and (5), such as to outweigh

the public interest in the deportation of a foreign criminal, a court or Tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than four years. The Upper Tribunal said as follows at paragraph 8:

> "8. The second point to make is that, as is apparent from that last sentence, the judgment in KO (Nigeria) does not make reference to the respondent's concession before the Court of Appeal in NA (Pakistan) & Ors v Secretary of State for the Home Department [2016] EWCA Civ 662 that the purpose of section 117C(6) is to ensure that in every "foreign criminal" case, Part 5A of the 2002 Act does not operate in such a way as to cause a violation of Article 8. For this reason, section 117C(6) must be read as applying, not only to "four years or more" cases but also to those other foreign criminals who fall within section 117C. As we have noted in RA (Iraq) (HU/00192/2018), which was heard immediately before the present appeal, nothing in KO (Nigeria) casts doubt upon paragraphs 25 to 27 of the judgment of Jackson LJ in NA (Pakistan), where he held that the respondent's concession was correctly made and that the ambit of section 117C (6) extends beyond the written words in the section."

26. The UT decided that it would be incorrect to say that KO compels the finding that s.117C (2) is merely declaratory of the distinction between foreign criminals who have not been sentenced to imprisonment of 4 years or more, and those who have (see [10]). The UT said that the evaluation of very compelling circumstances "calls for a wide-ranging evaluative exercise". The UT stated:

> "17. Viewed in this light, it can readily be seen that the ascertainment of what constitute "very compelling circumstances", such as to defeat the public interest, requires a case-specific analysis of the nature of the public interest. The strength of the public interest, in any particular case, determines the weight that must then be found to lie on the foreign criminal's side of the balance in order for the circumstances to be properly categorised as very compelling. It would, frankly, be remarkable if a person sentenced to four years' imprisonment for fraud had to demonstrate the same circumstances as a person sentenced to life imprisonment for multiple murders.
>
> 18. To say this is not to seek to introduce a "balancing exercise" into Exceptions 1 and 2 and the test of "unduly harsh". The words "over and above", as interpreted by Jackson LJ in NA (Pakistan), underscore the difference in the tasks demanded by, on the one hand, section 117C(4) and (5) and, on the other, section 117C(6)."

27. In NA (Pakistan) v Secretary of State for the Home Department and Ors [2016] EWCA Civ 662 in relation to Section 117C(6) the court said as follows:

> "29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend

that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

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

32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in

> conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.
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> 33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."

28. The UT in MS engaged with the comments of Lord Reed in Hesham Ali v Secretary of State for the Home Department [2016] UKSC about deterrence. It concluded that there is nothing in Hesham Ali that requires a court to eschew the principle of general deterrence, as an element of the public interest, in determining a deportation appeal by reference to section 117C (6). In assessing proportionality the UT considered the Appellant's rehabilitation concluding that following a serious offence, it will not ordinarily count as a significant factor weighing in favour of an Appellant facing deportation as a foreign criminal.

Conclusions

29. We have regard to the three facets of deportation and do not attribute too much weight to the Appellant's risk of reoffending and propensity to reoffend, which is in our view low, if not minimal. We take into account the conclusion of the Upper Tribunal in MS namely that there is nothing in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 that requires a court or Tribunal to assume the principle of public deterrent, as an element of the public interest, in determining a deportation appeal by reference to Section 117C (6). The starting point is that deportation is in the public interest. We take into account that the Appellant was convicted of a very serious offence and the appalling consequences that followed from this. The more serious the offence, the greater the public interest (see s.117C (2) of the 2002 Act). The public interest is unarguably high in this case. The test of compelling circumstances is determined on that basis. The Appellant has committed a serious offence for which he was sentenced to three years imprisonment. We attach weight to the dire consequences of the offence. It is in the public interest to deport the Appellant. However, we conclude looking at factors (that go beyond commonplace incidents of family life) cumulatively and all matters in the round his deportation would breach his rights under Article 8.

30. The Appellant cannot meet the requirements of paragraph 399A in its totality. He satisfies one limb of 399A. He is able to show, to a large margin in our view, that he is socially and culturally integrated in the UK. He came here when a child and we take into account the principles in Maslov v Austria 1630/03 [2009] INLR 47. Whilst he has been here for a significant part of his life he is unable to meet the requirement 399A (a). We find that the Appellant has spent one and a half years short of half his life here in the UK. We do not apply any "near miss" principle to the benefit of the

Appellant; however, the length of time he has been here is of significance. We give significant weight to the fact that the Appellant came here as a child and that he is socially and culturally integrated in the UK to in our view a very significant degree

31. In respect of very significant obstacles to integration we have considered the evidence of Mr de Noronha and the Coming Home to Jamaica booklet which it seeks to undermine. We accept Mr Whitwell's submission in relation to the evidential value of Mr de Noronha's report. It does not deal with the Appellant's individual circumstances. It does not establish very significant obstacles. However, we accept that it establishes that the circumstances for the Appellant on return to Jamaica would be very difficult for him, even bleak, and would result in a significant and distressing level of hardship. Although we do not accept the expert evidence establishes that the Appellant would be destitute and unable to access any healthcare for ongoing mental health problems, we accept that the Appellant's mental health benefits from the support of his family and the support of his GP. We accept that if returned to Jamaica he will not have anywhere near the same level of family support or the same level of professional care which is available to him here. Whilst there is family in Jamaica, the support that they would be able to give to the Appellant, as found by Judge Talbot, would not be practical or financial support. It would in our view amount to very little.

32. We find that the Appellant enjoys a close relationship with his mother with whom he resides. We accept the evidence of a close fatherly relationship between the Appellant and his younger brother, O. There is no reason for us to go behind the findings of Judge Talbot in relation to the Appellant's family life. Mr Whitwell did not seek to challenge the further evidence produced by the Appellant which was not before Judge Talbot. It was not argued by the Appellant that he has a genuine and subsisting parental relationship with O. His relationship falls, in our view, short of this. However, the evidence establishes that the Appellant is a source of parental support to O. The relationship between O and the Appellant is significant and goes beyond that of brothers. Whilst para 398 is of no direct materiality in this case in so far as the Appellant does not claim to have a subsisting and parental role with O, we are in no doubt that the impact of deportation on O would be unduly harsh in the context of 398, applying KO. The evidence that it would be in O's best interests for the Appellant to remain here in the UK with him is overwhelming. O is a British citizen child. We find that he is a vulnerable child. We find that the Appellant is similarly vulnerable. The medical evidence was not challenged. We find that he has ongoing physical and emotional scars from the part he played in the accident that caused the death of his friend. We take into account the Appellant's mother's reliance on the Appellant to help her with O although this has to be seen in the light of the Appellant's incarceration.

33. The Appellant is someone who does not have a criminal profile of significance. He has committed one serious offence that has resulted in very serious consequences. It is not suggested that he was in a criminal gang or that he chose a lifestyle the inevitable consequences of which would lead to criminality. The extent of his criminality is limited to this offence albeit the very serious nature of the

consequences that ensued and the Appellant's high culpability. He was sentenced to three years. The maximum sentence is 14 years. From the sentence received and the sentencing remarks, it can be reasonably inferred that the offence was at the less serious end of the scale, there were mitigating factors accepted by the judge and aggravating features that would have given rise to a greater sentence were not present. These are all matters in the Appellant's favour. There is, in our view, very little risk of him reoffending. This is only one facet of the public interest, but a matter to which we put into the mix. Similarly, we attach some weight to his evidence of remorse and that he is trying to make amends through charitable work.

34. Considering everything that weighs in favour of the Appellant and the circumstances of the offence for the reasons set out above we find that there are very compelling circumstances such as to defeat the public interest notwithstanding the strong public interest in deportation of the Appellant. Having had regard to the seriousness of the offence and the sentence imposed and the need to maintain public confidence in the system of immigration control, the appeal is allowed under Article 8.

Signed *Joanna McWilliam* Date 4 June 2019

Upper Tribunal Judge McWilliam