Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000100
[HU/02402/2021; HU/15834/2019; EA/06897/2018]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2022	**On 1 November 2022**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GBOLAGUN AJIBOLA OLAWOYIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr S Walker, Senior Home Office Presenting Officer
For the respondent: Mr S Karim, counsel, instructed by Ineyab Solicitors

DECISION AND REASONS

Background

1. This appeal has a convoluted history.

2. The respondent ("GO") is a national of Nigeria. He was born on 13 September 2018. He applied for a student Visa on 6 March 2007. Although this application was refused, the decision was successfully appealed and GO was issued with a student visa on 3 December 2007 valid until 30 April 2010. Whilst his appeal was ongoing GO entered

the United Kingdom pursuant to a lawfully issued extant visitor's visa. He overstayed. On 24 November 2007 he was arrested in a different identity and found to be in possession of a forged Nigerian passport. He gave false details to the immigration officers. He was made subject to reporting conditions in his false identity; he reported once then travelled again to Nigeria and was logged as an absconder. He returned to the United Kingdom on 31 December 2007 after his appeal in his true identify was allowed having been issued with entry clearance on 3 November 2007.

3. On 29 October 2009, in his true identity, GO applied for a Certificate of Approval for marriage. He married Aditola Ayomide Odesanya (the spouse), a dual British and Nigerian citizen, on 21 April 2009. When he applied for further leave to remain his fingerprints were matched with that of the false identity he previously used.

4. On 24 March 2010 GO was convicted of an offence relating to deception (obtaining leave to enter or remain in the United Kingdom by means including deception) for which he received a 12 month sentence of imprisonment. He was served with a deportation order on 19 July 2010. An appeal against the decision to deport him was dismissed on 5 October 2010 and he became appeal rights exhausted on 20 January 2011.

5. GO thereafter made various applications to revoke the deportation order, all of which were refused, and one of which attracted a right of appeal. This appeal was dismissed on 29 October 2013 and GO again became appeal rights exhausted on 18 February 2014. He voluntarily departed the United Kingdom on 25 September 2016.

6. In the meantime he had a child with his spouse in 2013, and twins were born of the relationship in July 2017. According to her statement of 16 April 2021 GO's spouse moved to Ireland on 25 September 2016 due to her 'job relocation'. GO resided with his family in Ireland and was apparently granted a Certificate of Registration as a family member of an EU national on 9 November 2016 by the Irish authorities.

7. On 7 May 2017 GO was encountered attempting to fly to the UK mainland at Belfast International airport travelling with his British citizen spouse. He was detained and on 17 May 2017 he was removed to Belfast.

The decisions under appeal

8. On 11 June 2018 GO applied for entry clearance as a visitor. This was refused on 28 August 2019 ("the visit decision"). It is not in dispute that the visit decision amounted to a refusal of a human rights claim. GO appealed this decision to the First-tier Tribunal (IAC) pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002

Act"). The visit decision was assigned an appeal reference HU/15834/2019.

9. GO had also applied for an EEA Family Permit. On 6 August 2019 the SSHD refused to issue GO with an EEA Family Permit under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on the basis that the refusal was justified on grounds of public policy and on the basis that GO was subject to a deportation order (Reg 23 of the 2016 Regulations). This decision attracted a right of appeal under Reg 36 of the 2016 Regulations. GO appealed this decision. His appeal reference number was EA/06897/2018 ("the EEA decision"). Both the EEA decision and the visit decision were linked by the First-tier Tribunal.

10. Prior to the substantive hearing before the First-tier Tribunal there was a Case Management Review Hearing ("CMRH") before Judge of the First-tier Tribunal Burnett. On the day of the substantive appeal hearing, 26 April 2021, Judge Burnett additionally considered that he had before him a further human rights appeal concerning a decision of the SSHD dated 4 March 2021 refusing to revoke the deportation order made against GO on 19 July 2010 ("the revocation decision"). Judge Burnett's decision did not contain a First-tier Tribunal reference number in respect of the revocation decision.

11. According to Judge Burnett the revocation decision was served on GO during a Case Management Hearing arising from his two other linked appeals, and that it was agreed between the parties at that Case Management Hearing that:

> "[GO] would appeal against the refusal to revoke the deportation order and waive the procedural requirements, so that the Tribunal could consider all the decisions of the [SSHD]"

12. Email correspondence provided by GO's solicitors indicated that, on 1 April 2021, a Notice of Appeal relating to the revocation decision had been lodged with the First-tier Tribunal following directions issued by Judge Burnett, presumably at the earlier Case Management Hearing.

13. It was therefore Judge Burnett's view that GO had appealed the revocation decision and that the appeal against this decision had been consolidated with GO's two extant appeals (see [2] of the Judge Burnett's decision). Judge Burnett understood that he had before him an appeal against the refusal to revoke the deportation order (see [44]). It also appears from Judge Burnett's decision that the First-tier Tribunal Presenting Officer accepted that the revocation decision was a validly live appeal for determination by the judge (consider his submissions recorded at [18] & [19]).

14. Having heard oral evidence (given remotely) from GO and his wife, and having considered GO's challenge to the EEA decision, Judge Burnett allowed the EEA appeal on the basis that the refusal to issue

the Family Permit was not justified on public policy grounds in accordance with Reg 27 of the 216 Regulations, and on the basis that the extant deportation order was not made under Reg 32(3) of the 2016 Regulations. At [44] Judge Burnett stated:

> "I would note here that given that the refusal of the EEA family permit is contrary to EU law, and the conclusions I have reached regarding the threat posed by [GO], the [SSHD] should apply their own guidance in respect of the deportation order and it should be reviewed in light of this decision. The [SSHD's] refusal to revoke the deportation order does not apply and consider the appropriate principles of EU law. The refusal simply refers to the Immigration rules and section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended)."

15. Then under the heading "Article 8", at [46] the judge stated:

> "I have not considered this aspect further. In my judgment the considerations under the regulations are wider that an article 8 consideration and I have allowed the appeal under the regulations."

16. Although Judge Burnett considered that he had already dealt with the revocation decision, a hearing in respect of this decision, which had now been assigned the reference number 'HU/02402/2021', was nevertheless listed before Judge of the First-tier Tribunal Bennett on 17 December 2021.

17. A note by Ms S McKenzie of the Presenting Officers Unit Central London dated 17 December 2021 suggests that, having discussed with colleagues, she made submissions that Judge Bennett had no jurisdiction to hear the appeal. It is not altogether clear why the submission was made but it appears that it was based on a linkage between HU/15834/2019 and HU/02402/2021 and the fact that an application by the SSHD to appeal HU/15834/2019 was pending before the Upper Tribunal, and the fact that Judge Burnett had already considered "all aspects" and that there was "no further decision left at appeal". I observe that, although initially refused permission to appeal by the First-tier Tribunal, the SSHD was eventually granted permission to appeal by Upper Tribunal Judge Macleman in a decision dated 4 March 2022.

18. There was a brief hearing before Judge Bennett on 17 December 2021. In his written decision, under the heading 'Decision and Directions' Judge Bennett wrote:

> 1. I am satisfied that the appeal hearing on 26 April 2021 proceeded on the footing that Judge Burnett was to determine not only appeals HU/15834/2019 and EA/06897/2018, but also the appeal against the decision to refuse to revoke the deportation order, appeal number HU/02402/2021. Although his determination does not bear the number of that letter appeal, HU/02402/2021, I am

satisfied that it ought to have done. His determination was intended to be a determination of all three appeals.

2. Whether or not Judge Burnett correctly and adequately determined appeal number HU/02402/2021, it is now a matter for the Upper Tribunal to determine on the Respondent's application for permission to appeal. This Tribunal, so far as the matters raised in this appeal are concerned, is now "functus offio". I have no jurisdiction to determine that appeal, it having been determined by judge Burnett as above.

3. In order to avoid further confusion, I direct (insofar as necessary, and if this appeal has not already been done) that the appeal against the decision to refuse to revoke the deportation order, HU/02402/2021 is to be consolidated with the other two appeals HU/1583/2019 and EA/06897/2018. The three appeals to be heard and dealt with at the same time.

4. Judge Burnett's determination was intended to be, and should be treated as, the determination in appeal number HU/02402/2021, as well as that of the appeals numbered HU/15834/2019 and EA/06897/2018."

19. At the 'error of law' hearing before me on 22 July 2022 neither Mr Walker, representing the SSHD, nor Mr Karim, representing GO, made any submissions to the effect that Judge Burnett did not have jurisdiction to deal with the revocation decision, or that the appeal against the revocation decision was not properly before him. Nor did either representative suggest that I did not have jurisdiction to determine the SSHD's appeal against the decision of Judge Burnett. I am satisfied that the appeal against the revocation decision was instituted at the date it was filed with the First-tier Tribunal (rule 19 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014; Akinola & Anor, R (On the Application Of) v Upper Tribunal & Anor [2021] EWCA Civ 1308, at [61]), and that it was a procedural oversight that led to the revocation appeal not being processed and given a reference number in time for the hearing before Judge Burnett, or being given a hearing date after the promulgation of Judge Burnett's decision. I am consequently satisfied that I can consider the SSHD's appeal on the basis of all three decisions that were appealed to the First-tier Tribunal.

The challenge to the judge's decision

20. The grounds of appeal contend that the fact that GO's deportation order was made under UK Borders Act 2007 (the grounds refer to the Immigration Act 1971 but the actual deportation order makes clear that it was made pursuant to s.32(5) of the UK Borders Act 2007, albeit on the basis that GO was liable to deportation under s.3(5) of the Immigration Act 1971 because his removal was conducive to the public good by virtue of s.32(4) of the 2007 Act) did not mean that he

was not "subject to a" deportation order for the purposes of the 2016 Regulations. The grounds note, without any particularisation, that Regs 31 and 32 of the 2016 Regulations overlapped with the Immigration Act 1971. The grounds further contend that the judge failed to consider, in the alternative, whether GO's deportation order may be considered to be an 'exclusion order' within the terms of the 2016 Regulations.

21. The grounds additionally contend that, despite Judge Burnett's awareness of GO's disregard for immigration controls and GO's attempts to circumvent these controls on multiple occasions, the judge failed to consider this as evidence of adverse conduct capable of consideration under Reg 27 of the 2016 Regulations. It was further submitted that the consistency of GO's contravention of immigration controls was in itself strongly indicative of a propensity to reoffend and that potential consequences of that reoffending amounted to a genuine, present and sufficiently serious threat to the fundamental interests of society, as set out in Schedule 1 of the 2016 Regulations, and in particular paragraph 7(a) of that Schedule.

22. In granting permission to appeal Judge Macleman stated, at [2]:

> "Judge Burnett said at [6] that he had before him an appeal against a refusal to revoke a deportation order. He said at [44] that the SSHD should "review" that refusal, which "does not apply and consider the appropriate principles of EU law; but he neither allowed nor dismissed the appeal."

23. Judge Macleman found that, whilst the grounds were "inchoate", they pointed to arguable issues, and he questioned whether the decision was an adequate resolution of the appeal that was before the First-tier Tribunal, or in respect of the interaction between the existence of a deportation order under the 1971 Act (which should be a reference to the UK Borders Act 2007) and the entitlement to a family permit under the 2016 Regulations.

24. At the 'error of law' hearing in heard submissions from both Mr Walker and Mr Karim. I reserved my decision.

Discussion

25. Mr Walker made no further oral submissions in respect of the substance of the SSHD's written grounds and I can deal with the two points expressly and unambiguously raised in the SSHD's written grounds of appeal with relative brevity.

26. Under Reg 23(2) of the 2016 Regulations a person is not entitled to be admitted into the UK if the person is subject to a deportation order or exclusion order. At [32] Judge Burnett referred to the definition of 'deportation order' in Reg 2 of the 2016 Regulations. At [33] the judge stated:

> "In this case the appellant has not been the subject of a deportation order made under regulation 32(3). His deportation order was made under the Immigration Acts. I conclude that the respondent is wrong to simply refer to regulation 23 and the fact of the deportation order. The decision to refuse the family permit needs to be justified on the grounds of public policy, public security or public health in accordance with regulation 27. (see regulation 23(1) above). The respondent has failed to apply the appropriate law to the decision made."

27. With respect to the SSHD's contention that the extant deportation order, which was made under s.32(5) of the UK Borders Act 2007 (on the basis that, under s.32(4) of that Act GO's removal was 'conducive to the public good' for the purposes of s.3(5)(a) of the Immigration Act 1971 because he was a foreign criminal [having been sentenced to a period of 12 months or more]), was nevertheless still a 'deportation order' for the purposes of the 2016 Regulations, this is determined by reference to Reg 2 of the 2016 Regulations. Reg 2 is headed "General Interpretation" and under Reg 2(1), a "deportation order means an order made under regulation 32(3)."

28. Reg 32(3) indicates that, where a decision is taken to remove a person under Reg 23(6)(b) of the 2016 Regulations, the person is to be treated as if he or she were a person to whom s.3(5)(a) of the 1971 Act. It is clear from its construction that Reg 32(6)(b) only applies where a decision is made to remove a person under Reg 23(6)(b). No such decision was made in the instant appeal. The deportation order dated 19 July 2010 was self-evidently not made under Reg 23 of the 2016 Regulations. Moreover, although Reg 32(3) indicates that a person is to be treated as a person to whom s.3(5) of the Immigration Act 1971 applies, this only applies in respect of the process for removing a deportee, and only if a decision is made under Reg 23(6)(b).

29. The SSHD contends that even if the definition of a deportation order under the 2016 Regulations does not include a deportation order made under the non-EEA immigration laws, the EEA deportation order should be treated as an 'exclusion order'. There is no support for this proposition. An 'Exclusion Order' is also defined in Reg 2 of the 2016 Regulations:

> "exclusion order" means an order made under regulation 23(5);

30. No exclusion order has been made against GO under Reg 23(5). Nor can one reasonably be inferred as having been made. It follows that GO was not subject to either a deportation order or an exclusion order as understood by reference to the terms of the 2016 Regulations, he did not fall to be refused admission to the UK pursuant to Reg 23(2) of the 2016 Regulations.

31. The 2nd element of the SSHD's written grounds essentially contends that Judge Burnett failed to properly consider the consequences of GO's earlier contravention of immigration controls and that GO's actions strongly indicated that he had a propensity to re-offend, thereby undermining Judge Burnett's conclusion that GO did not pose genuine, present and sufficiently serious threat to the fundamental interests of society.

32. I find there is no merit in this submission and that the ground is, in reality, a disagreement with a factual conclusion that was rationally open to Judge Burnett and which he supported with adequate reasons.

33. It is apparent from his decision that Judge Burnett was acutely aware of GO's immigration history, including his re-entering the UK in 2017 (see [18] which summarises the SSHD's submissions; [36] & [37] – where the judge found that GO had been less than candid regarding his previous re-entry to the UK) and that he held this against GO (see [40]). Judge Burnett additionally took into account the findings of the previous Tribunals (see [38] & [39]). From [41] onwards however Judge Burnett took into account other relevant factors relating to whether GO posed a genuine, present and sufficiently serious threat to the fundamental interests of society. These included, inter alia, the fact that GO had only ever been convicted of one offence and this was in 2010, the fact that GO had now making lawful attempts to gain entry to the UK and was seeking to address his situation through appropriate legal means, and that no further adverse matter had been brought to the Tribunal's attention. Judge Burnett found that GO's offending did not fall within the 'Bouchereau principle' (R v Bouchereau [1978] QB 732) and, having taken into account GO's previous contravention of immigration controls, he concluded that GO did not have a currently propensity to act in the criminal manner in which he did in the past. In reaching his decision the judge previously referred to Schedule 1 of the 2016 Regulations, including paragraph 7(a) of that Schedule. In my judgment the decision, read as a whole, does not support the SSHD's contention that Judge Burnett failed to consider that the fundamental interests of society included the prevention of unlawful immigration and abuse of the immigration laws, and the maintaining and integrity and effectiveness of the immigration control system and of the Common Travel Area. The judge did not therefore err in law in his conclusion that the respondent had failed to show, to the requisite standard, that the refusal to admit GO into the UK was justified on the grounds of public policy.

34. I am however persuaded that Judge Burnett erred in law at [44] and [46] of his decision, set out at paragraphs 15 and 16 above, for the reasons outlined by Judge Macleman when he granted permission to appeal. The judge had before him 3 decisions; an 'EEA' decision and two refusals of human rights claims. It was incumbent on the judge to

have made decisions in respect of all the appealed decisions before him. His failure to determine GO's human rights claim constituted a material error of law.

Remaking

35. Pursuant to s.12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I now remake the human rights appeal decision of Judge of the First-tier Tribunal Burnett. Both representatives were given an opportunity to make further submissions on the basis of the error of law identified above. There was no objection from either party to the Upper Tribunal 'ring-fencing' the primary factual findings of the First-tier Tribunal. The remaking aspect of the appeal hearing proceeded on the basis that Judge Burnett had not made any legal error in his assessment of the public policy considerations in Reg 27 of the 2016 Regulations and, consequently, that GO was entitled to be admitted to the UK as the spouse of a British citizen who had exercised EEA Treaty rights in another EEA state. Mr Walker made no further submissions in respect of the human rights appeal. Mr Karim submitted that GO's right to be issued with an EEA Family Permit and to be admitted into the UK, in the context of Judge Burnett's factual findings, constituted 'very compelling circumstances' as understood in s.117C(6) of the 2002 Act.

The legal framework

36. The SSHD's refusal to revoke GO's extant deportation order constituted a refusal of a human rights claim, a decision that is appealable under s.82 of the 2002 Act. GO appealed on the grounds that the refusal to revoke his deportation order would be unlawful under section 6 of the Human Rights Act 1998 (s.84(1)(c) of the 2002 Act).

37. The burden of proof rests on GO to prove that the SSHD's decision would breach Article 8 and that he meets the requirements of the Exceptions in s.117C. Once GO has shown that the decision does interfere with Article 8 ECHR rights, it is for the respondent to demonstrate that the decision is proportionate. The standard of proof is the balance of probabilities. In determining the appeal I must have regard to the best interests of GO's children, pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009.

38. Section 117A of the 2002 Act requires a Tribunal, when considering the public interest question, to have regard, in particular, to the factors listed in section 117B, and, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

39. Section 117B reads, so far as relevant:

> **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) …

40. Section 117C lists additional public interest 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.

41. Although s.117C(3) does not make any provision for medium offenders who fall outside Exceptions 1 and 2 the Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 confirmed that Parliament intended medium offenders to have the same fall back protection as serious offenders. This approach has been endorsed in SC (Jamaica) v SSHD [2022] UKSC 15 and HA (Iraq), RA (Iraq) and AA (Nigeria) (Respondents) v SSHD (Appellant) [2022] UKSC 22.

Findings and conclusions

42. It has not been argued that GO meets the requirements of ‘Exception 1’ in s.117C(4).

Exception 2: “unduly harsh”

43. In KO (Nigeria) [2018] UKSC 53 Lord Carnwath considered the meaning of “unduly harsh” for the purposes of s.117C(5). At [23] he stated:

> "On the other hand, the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more."

44. In HA (Iraq), RA (Iraq) and AA (Nigeria) (Respondents) v SSHD (Appellant) [2022] UKSC 22 Lord Hamblen confirmed that Lord Carnwath was not intending to lay down a test involving a 'notional comparator' (i.e., that the unduly harsh test requires a comparison to be made with "the degree of harshness which would necessarily be involved for any child faced with the deportation of a parent" and that undue harshness means a degree of harshness which goes beyond that) (see [31] to [40]). "The reference to the harshness which would be involved for "any child" is to be understood as an illustrative consideration rather than a definition or test" [31]. Lord Hamblen found there was in reality "… no satisfactory way to define what the relevant characteristics of a notional comparator are to be or to make any such comparison workable." [36]. His Lordship also found that a test involving a notional comparator was potentially inconsistent with the duty to have regard to the 'best interests' of the child in question as a primary consideration under s.55 of the Borders, Citizenship and Immigration Act 2009 [37]. A 'notional comparator' approach also gave rise to the risk that a court or tribunal will apply an exceptionality threshold [38], and to a risk that perverse results may occur [39]. The Supreme Court endorsed the approach taken in MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563:

> "… 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

Whether the appellant's deportation would have an unduly harsh impact on his partner and/or on his children

45. In evaluating whether the GO's deportation would have an unduly harsh impact on his partner or their children I have focused on the reality of the children's particular situation (MI (Pakistan) v SSHD [2021] EWCA Civ 1711), and I have not taken into account any matters of public interest in my assessment of undue harshness as Exception 2 (like Exception 1) is self-contained (KO (Nigeria), at [22]).

46. There is no suggestion that GO has anything other than a genuine and subsisting parental relationship with his three children. I find that the best interests of the children are to remain with both their parents. Given that the children are British citizens and entitled to the benefits that flow from this status, and given the evidence contained in the statements of GO and his spouse concerning their family members and friends living in the UK, I find, albeit by a narrow margin, that the best interests of the children would be to live in the UK with both their parents.

47. GO, his spouse and their children currently lawfully reside in Ireland. GO's spouse has lived there since September 2016, some 6 years. GO and his spouse work, and their children attend school. GO's spouse has been involved in church youth groups. The evidence in GO's bundle of documents from the children's schools, church documents and childcare centre suggests that the children are well settled in Ireland. According to GO's spouse's statement they bought a house in April 2019 and made Ireland "a habitable place" for themselves, their children and their businesses. Whilst GO's spouse has described the difficulties she encountered when working as a clinical researcher in the UK in respect of having to travel from Ireland, she previous had other jobs in Ireland as a Project Team Analyst and then Project Manager. She has therefore been able to find employment in Ireland, albeit not in the occupation she would prefer. According to statement of GO's spouse she, GO and their children miss their family and friends in the UK and had "not been able" to go on a family holiday since GO was detained in 2017 having entered in breach of his deportation order. There would however appear to be nothing preventing GO's spouse and their children from travelling to the UK themselves. Nor would there appear, on the face of the documents before me, to be anything preventing the friends and family of GO's spouse and children from visiting them in Ireland. There is no detailed description of the particular impact on the welfare and wellbeing of the children flowing from the decision to live in Ireland, and there is no indication that either GO's spouse or their children suffer from any physical or mental health issues, or are otherwise vulnerable in any particular way. Nor is there any suggestion that their safety and welfare needs are not being met given their lawful residence in Ireland, even if there is no entirely free national health service.

48. Whilst I acknowledge that both GO's spouse and their children are British citizens, and entitled to the benefits that attach to their status, and that they miss having close proximity to their friends and family resident in the UK and the support that such family could provide, I am not persuaded, on the evidence before me, that their decision to live in Ireland has, or is having, a unduly harsh impact on them, even taking account of the best interests of the children as a primary consideration.

"Very compelling circumstances"

49. If a foreign criminal cannot come with Exceptions 1 or 2 in s.117C of the 2002 Act, he can only succeed if he shows that there are "very compelling circumstances" over and above Exceptions 1 and 2 so as to outweigh the public interest in his deportation.

50. A foreign criminal is entitled to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2. He would, however, need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2, or features falling outside the

circumstances described in those Exceptions, which make his claim based on Article 8 ECHR especially strong. In NA (Pakistan) v SSHD [2016] EWCA Civ 662 the Court of Appeal gave the following guidance (at [32]):

> "… 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 kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute very compelling circumstances whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling with the factors described in Exceptions 1 and 2."

51. The threshold for establishing 'very compelling circumstances' is a high one. In Hesham Ali v SSHD [2016] UKSC 60 the Supreme Court stated that in a case where a foreign criminal cannot come within Exceptions 1 or 2 "great weight should generally be given to the public interest in the deportation of such offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed". The Supreme Court in Hesham Ali at [38] stressed the need to respect the "high level of importance" which the legislature attaches to the deportation of foreign criminals.

52. When considering whether there are very compelling circumstances, I must assess the weight that attaches to the public interest. In Akinyemi v SSHD (No. 2) [2019] EWCA Civ 2098 the Court of Appeal stated at [45] that the public interest is "minimally fixed" as it "can never be other than in favour of deportation". Later the Court of Appeal went on to say at [50]:

> "… there can be no doubt, consistent with the Strasbourg jurisprudence, that the Supreme Court has clearly identified that the strength of the public interest will be affected by factors in the individual case, i.e. it is a flexible or moveable interest not a fixed interest. Lord Reed provides the example at [26] of a person who was born in this country as a relevant factor. Applying this approach to the weight to be given to the public interest in deportation on the facts of this case could lead to a lower weight being attached to the public interest."

53. In HA (Iraq) the Court of Appeal stated at [92] that "a potential deportee can rely, as part of the overall proportionality assessment, on the fact that his offence was at or near the bottom of the scale of seriousness" but cautioned at [93] that:

> "It cannot be the case that an appellant can rely on the fact that his offence attracted a sentence of, say, "only" twelve months as sufficient by itself to constitute very compelling circumstances for the purpose of section 117C (6): that would wholly subvert the statutory scheme. But if there were other compelling circumstances in his case the fact that his offence was comparatively less serious could form an element in his overall case that the strong public interest in deportation was outweighed."

54. The Strasbourg cases of particular relevance are well known. They include Boultif v Switzerland (2001) 33 EHRR 50, Üner v Netherlands (2007) 45 EHRR. 14 and Maslov v Austria [2009] INLR 47. The factors identified in [57] and [58] of Üner have been approved subsequently in both European and domestic case law and are uncontentious. These include, the nature and seriousness of the offence(s) committed by the foreign criminal, the length of the foreign criminal's stay in the country from which he is to be expelled, the time elapsed since the offence(s) was/were committed and the foreign criminal's conduct during that period, and the solidity of social, cultural and family ties with the host country and with the country of destination.

55. I bear in mind however that in Akpinar, R (on the application of) v The Upper Tribunal (Immigration and Asylum Chamber) [2014] EWCA Civ 937 the Court of Appeal concluded that Maslov did not establish a new rule of law to the effect that, unless the state can show that there are "very serious reasons" for deporting a settled migrant who has lawfully spent all or the major part of his childhood and youth in the UK, that his Article 8 rights will prevail. Akpinar has been endorsed in Sanambar v SSHD [2021] UKSC 30.

56. Taking into account the various and competing considerations set out above, the basic task for any tribunal or court, as identified by Lord Reed JSC in Hesham Ali at [50] is as follows:

> "In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest... and also consider all factors relevant to the specific case in question."

Assessment of factors in favour of and against deportation

57. Under s.117C(1) of the 2002 Act the appellant is a foreign criminal and his deportation is in the public interest. The sentence of 12 months imprisonment indicates that GO's offence was considered

serious. It consisted of a blatant breach of the UK's immigration laws and involved significant dishonesty relating to GO's assumed identity.

58. The maintenance of effective immigration control is in the public interest, as is the preventing of crime. In assessing the public interest factors I have additionally taken into account the deterrence element of the deportation order (which establishes in the mind of all foreign nationals that the commission of a serious offence will normally precipitate their deportation), and the importance of 'public concern' that those who commit serious offences should not be allowed to remain (or enter) the country.

59. A further factor in favour of the refusal to revoke the deportation order is GO's further breaches of the immigration laws when he entered the UK in 2017. Judge Burnett found that GO lacked candour in his explanation for entering the UK. The judge rejected GO's claim that he sought advice before travelling to the UK and found that GO's actions ".. were a further blatant attempt to circumvent immigration control" and that it demonstrated "continued behaviour in the same vein."

60. I have found that the impact of the refusal to revoke the deportation order would not have an unduly harsh impact on either GO's spouse or their children. I nevertheless note that the spouse and children are British and wish to live in their country of nationality surrounded and supported by their friends and family. The refusal to revoke the deportation order therefore does negatively impact on the Article 8 ECHR rights of both GO's spouse and their children.

61. There has been no legal error in Judge Burnett's finding that GO does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In reaching this decision Judge Burnett took full account of GO's criminal history and his further disregard for the immigration laws. When assessing the public interest I note that GO has only had the one criminal conviction, and that this was in March 2010, some 12 ½ years ago. This is a relatively long period of time. I take into account the fact that GO has not been convicted of any other criminal offence. Judge Burnett additionally considered, as do I, that GO's youngest children were born after his last breach of the immigration laws and that this is a potentially positive protective factor against him committing further offences. This is reinforced by the fact that GO has now acted in accordance with the law and has sought to enter the UK through lawful means. I additionally take into account GO's expression of remorse for his past conviction and breaches of the immigration laws.

62. It is significant that GO's spouse was exercising EEA free movements rights in Ireland and that the First-tier Tribunal found that there was no public policy basis under the 2016 Regulations for excluding GO from the UK. It was not argued by Mr Walker that GO was not entitled

to be issued with an EEA Family Permit, or that he had no right under EU law to enter and reside in the UK as the family member of a British citizen exercising EEA free movements rights in another EEA state (under the 'Surinder Singh' principles – R v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department [1992] ECR I-4265). The existence of GO's free movement right to residence in the UK is a very compelling factor in favour of the revocation of the deportation order.

63. I have considered all relevant circumstances of this case, including the nature and seriousness of GO's offending and his subsequent immigration history, the length of time since his offence was committed, the best interests of his children, his family's links with the UK and his EU free movement right to reside in the UK. I find that the combination of these factors, especially the existing of a right under EU law to enter the UK, constitutes very compelling circumstances such that the public interest is outweighed in the proportionality assessment under Article 8 ECHR.

Notice of Decision

The appeal is allowed under the EEA Regulations 2016

The appeal is allowed on Article 8 ECHR grounds.

Signed D.Blum Date: 21 September 2022
Upper Tribunal Judge Blum