Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16906/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2022	**On 09 June 2022**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

OLUMIDE OLAWALE OYEDIRAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Al Rashid, Counsel, instructed by Carlton Law Chambers
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to s.12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 the Upper Tribunal remakes the decision of Judge of the First-tier Tribunal Neville who, in a decision promulgated on 16 March 2020, allowed the human rights (Article 8 ECHR) appeal of Mr Olumide Olawale Oyediran ("appellant") against the decision of the Secretary of State for the Home Department ("respondent") dated 30 July 2018 refusing his human rights claim.

2. Judge Neville found that the appellant was a persistent offender but that he fulfilled the requirements of 'Exception 1' in s.117C(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")) in that he had (i) lawfully resided in the UK for more than half his life; that he was (ii) socially and culturally integrated; and (iii) that he would face very significant obstacles to his integration in Nigeria, his country of nationality.

3. In an 'error of law' decision issued on 28 January 2021 the Upper Tribunal found that, whilst Judge Neville was entitled to find that requirements (i) and (ii) above had been met, he made a legal error in his assessment that the appellant met requirement (iii). The appeal was retained in the Upper Tribunal and adjourned for a further hearing to remake the decision.

Background

4. I summarise the salient features of this appeal. The appellant, a national of Nigeria born on 19 September 1993, entered the UK on 8 May 2006 aged 12 years and 7 months pursuant to a grant of Indefinite Leave to Enter ("ILE") accompanied by his mother and younger siblings (his father was already lawfully settled in the UK). He and his family reside in London.

5. On 18 April 2009, when he was 15 years old, the appellant committed an offence of oral rape on a 14-year-old girl and received a custodial sentence of 3 years in a Young Offender Institution. The appellant was also made subject to a Sex Offender Notification Requirement for an indefinite period. The respondent decided to make a deportation order against the appellant but he successfully appealed this decision before the First-tier Tribunal. His appeal was allowed on Article 8 human rights grounds in a decision promulgated on 30 September 2011 ("the 2011 decision").

6. The appellant has been in a relationship with Ms Christine Hayles ("partner") since they started dating in September 2017. They have a child together who was born on 24 November 2019. I understand from the appellant's statement dated 20 April 2022 that the Probation Service did not consider the partner's residence in Birmingham to be a suitable place for his residence. The appellant currently resides in his family's residence in London.

7. According to a Police National Computer ("PNC") printout dated 20 April 2022 the appellant has a total of 21 convictions in respect of 33 offences. These include, in addition to the rape offence, offences relating to possession of drugs, possession of a psychoactive substance with intent to supply, failure to comply with community orders, theft, vehicle offences and assaulting a police constable. Only his rape conviction resulted in a custodial sentence.

8. In light of the appellant's criminality the respondent served the appellant with a decision to deport letter dated 6 January 2017. The appellant responded to this letter via his solicitors on 23 January 2017 making representations against the making of a deportation order that amounted to a human rights claim.

9. In her decision refusing the appellant's human rights claim dated 19 July 2018 (but served on 30 July 2018) the respondent considered the appellant to be a persistent offender and stated that he had no partner or children. The respondent considered information submitted by the Metropolitan Police Service which suggested that the appellant's level of criminality had escalated and that he appeared to have immersed himself in a criminal lifestyle revolving around drug dealing. The respondent believed that the appellant's presence was not conducive to the public good. The respondent did not consider that the appellant had lived in the UK lawfully for most of his life, or that he was socially and culturally integrated in the UK, or that there would be very significant obstacles to his integration in Nigeria (the three requirements of paragraph 399A of the immigration rules, reflected in 'Exception 1' in s.117C(4) of the 2002 Act).

The decision of the First-tier Tribunal and the Upper Tribunal's 'error of law' decision

10. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the 2002 Act. His appeal was heard on 2 August 2019. Judge Neville's decision was promulgated on 16 March 2020.

11. Judge Neville considered a bundle of documents prepared by the appellant containing, *inter alia*, statements from the appellant, his parents, his sisters and his partner. The judge heard oral evidence from both the appellant's parents, his sister (Mabel) and his partner.

12. At the outset of the First-tier Tribunal hearing the Presenting Officer accepted that the respondent had lawfully lived in the UK for most of his life. The remaining issues in contention were whether the appellant was a persistent offender, whether he was socially and culturally integrated in the United Kingdom, whether there were very significant obstacles to his integration in Nigeria, and, if he was unable to satisfy Exceptions 1 and 2 in s.117C of the 2002 Act, whether there were very compelling circumstances over and above the circumstances described in the two Exceptions such as to render his deportation a breach of Article 8 ECHR.

13. Applying the guidance set out by Leggatt LJ in CI (Nigeria) v SSHD [2019] EWCA Civ 2027 Judge Neville found that the respondent was socially and culturally integrated in the UK. In doing so the judge noted that the respondent entered the UK when 12 years of age and that he had never returned to Nigeria. Judge Neville noted that the

respondent continued to enjoy his private life in the UK through contact with his family members and with his relationship with his partner, that he enjoyed going to the gym and simply spending time socialising. Judge Neville referred to evidence that the appellant was training to be a peer mentor to assist those using illegal drugs. Judge Neville accepted that the appellant had been volunteering as a trainee estate agent and had received an offer of full-time employment once he was allowed to work, and that he had a genuine desire to work if he was granted permission to do so. Judge Neville considered the respondent's offending and noted that he had received no further custodial sentences. The context of his 2018 conviction relating to possession of nitrous oxide with intent to supply occurred when he attended a music festival which was "an overt act of immersion in the culture and society of the UK." Judge Neville asked himself, by reference to paragraph 77 of CI (Nigeria), whether, having regard to the appellant's upbringing, education, employment history, history of criminal offending and imprisonment, relationships of family and friends, lifestyle and any other relevant factors, he was socially and culturally integrated in the UK. The judge stated, "I have no hesitation in finding that he is so integrated."

14. In the 'error of law' decision the Upper Tribunal found that Judge Neville was entitled to find, for the reasons he gave, that the appellant was socially and culturally integrated.

15. Judge Neville additionally concluded that the appellant would face very significant obstacles to his integration in Nigeria if deported. In so doing, and for the reasons given in the 'error of law' decision, Judge Neville fell into legal error. The judge's finding that the appellant's lack of significant education would not afford him work in Nigeria's economy, and the finding that the appellant's claimed inability to speak minority tribal languages would prevent him accessing low skilled work, were not supported by clear or independent evidence. There was, for example, no background or expert evidence relating to employment opportunities in Nigeria and no evidence was given on these points. There was additionally little evidence to support the judge's finding that the respondent would only receive "minimal" financial support from his family in the UK. No details had been provided of the financial circumstances of the appellant's family in the UK or their ability to financially support the appellant. Judge Neville additionally failed to support his finding that Nigeria would be culturally unfamiliar to the appellant with adequate reasoning. The appellant left the country when he was 12 years, not as an infant, and maintained good relationships with his parents in the UK (unlike the appellant in CI (Nigeria)). There was an insufficient evidential basis entitling the judge to conclude that the appellant would be culturally unfamiliar with Nigeria, especially given that he found that the appellant gave little specific evidence of his ability to cope culturally.

16. Judge Neville's decision was set aside in respect of his assessment of s.117C(4)(c) only. The appeal was adjourned to be remade at a further hearing before the Upper Tribunal. Following the issuance of directions the respondent consented to the Tribunal's consideration of the appellant's relationship with his child and partner at the remaking hearing.

The re-making hearing

17. The appellant provided a consolidated bundle for the remaking hearing that included the entirety of the First-tier Tribunal bundle and, *inter alia*, a skeleton argument, a 2nd statement from the appellant's partner dated 15 October 2021, evidence of their child's birth certificate and family photos, and some medical notes relating to the appellant's father. Just prior to the hearing supplementary statements from the appellant and his mother, dated 20 April 2022 and 21 April 2022 respectively, were provided. On the day of the hearing the appellant produced some written evidence obtained from the Ministry of Justice relating to probation service appointments obtained pursuant to a Subject Access Request, and a letter dated 24 April 2022 indicating that the appellant had just successfully completed a short course on Temporary Road Management Training.

18. The respondent produced an updated PNC printout dated 20 April 2022 and an Oasys report dated 18 December 2020.

19. I recorded the oral evidence from the appellant, his partner (who gave her evidence remotely via Microsoft Teams) and his mother (Beatrice Oyedirn), and the oral submissions made by Mr Al-Rashid on behalf of the appellant and by Ms J Isherwood on behalf of the respondent. I have read and considered with care all the documents before me even if they are not specifically identified later in this decision. Both parties are aware of the evidence, both written and oral, that was before the Tribunal. This evidence is, in any event, a matter of record. I shall refer to this evidence only in so far as it is necessary for me to lawfully determine the appellant's human rights appeal.

Legal framework

20. Under s.117A of the 2002 Act, in considering whether an interference with a person's right to respect for private life and family life is justified under Article 8(2) ECHR, I must have regard in all cases to the considerations listed in s.117B, and in cases concerning the deportation of foreign criminals, to the considerations listed in s.117C.

21. S.117B includes the considerations that:

    (1) The maintenance of effective immigrations 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.

…

22. S.117C is entitled “Article 8: additional considerations in cases involving foreign criminals” and provides that:

(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”.

23. The statutory framework is a “complete code” and “...the entirety of the proportionality assessment required by article 8 can and must be conducted within it”: HA (Iraq) v SSHD [2020] EWCA Civ 1176, at [27].

Findings of fact and conclusions

“Persistent offender”

24. Judge Neville found the appellant was a persistent offender. Mr Al-Rashid submits that I can re-determine whether the appellant continues to be a persistent offender in light of the period of time that has elapsed since the hearing before Judge Neville and in light of the appellant’s conduct and the birth of his child. I agree that I can revisit the issue of whether the appellant is a persistent offender.

25. I acknowledge that a persistent offender is someone who “keeps on breaking the law”, and being a persistent offender is not a permanent status (Chege v. SSHD [2016] UKUT 187 (IAC)). The Court of Appeal in SC (Zimbabwe) v SSHD [2018] EWCA Civ 929 (at [25]) agreed with the following extract from Chege:

> “53. Put simply, a "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. Whilst we do not accept Mr Malik's primary submission that a "persistent offender" is a permanent status that can never be lost once it is acquired, we do accept his submission that an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.
>
> 54. Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time."

26. I have carefully considered the decision of Judge Neville. He considered the history of the appellant’s offending and took into account, as I do, the appellant’s explanation for the difficulties he

encountered following his release from the custodial sentence imposed for the rape offence. Following the appellant's conviction for possession of cocaine and assault on a police constable (committed on 15 January 2017) the appellant sought help from a drug rehabilitation charity through his probation officer and underwent sessions at Blenheim CDP (a drug and alcohol action team) which included drug testing. A letter from the Lewisham Drug & Alcohol Recovery Service which was produced around May 2019 described the appellant as having "moved on from using illicit drugs" and that he was being trained to be a key worker.

27. Judge Neville was not aware that the appellant was convicted (on a guilty plea) of an offence of Possession of a Class B controlled drug (Cannabis/cannabis resin) on 11 November 2019, in respect of an offence that occurred on 19 July 2019 (a little over 2 weeks before the First-tier Tribunal hearing). The appellant received a fine of £80 in respect of this conviction, and he had to pay a victim surcharge of £32. Whilst I take into account the fact that this was not a serious offence, as reflected in the sentence, and that it was committed 2 years and 10 months ago, it does demonstrate that the appellant continued to involve himself in criminality. The drugs offence committed in July 2019 undermines the assertion in the May 2019 letter that the appellant had moved on from using drugs.

28. I have additionally considered the appellant's conviction of 22 July 2020 for failing to comply with his sex offender notification requirements on 17 January 2020. Mr Al-Rashid submitted, in reliance on Chege (at [55]), that the appellant's offences must be sequential (i.e. not properly regarded as part of the same incident), and that as the conviction on 22 July 2020 related to a sex offender notification requirement imposed in respect of the rape conviction, it was not a new offence as it related to the earlier incident. I reject this submission. Whilst the imposition of the notification requirement stemmed from the 2010 rape conviction, the breach of that requirement was an entirely separate offence. The July 2020 conviction is "not properly regarded as part of the same incident" (Chege (at [55]).

29. I have taken into account the appellant's explanation for this conviction, detailed in his statement of 20 April 2022 and in the Subject Access documents relating to telephone appointment in April 2020. He maintains that the offence occurred due to confusion as he believed his Probation Officer had made the necessary arrangements in respect of his residence following his family's eviction and after the rejection of his partner's Birmingham residence as being suitable. The fact remains however that the appellant received a further conviction 1 year and 9 months ago. The appellant maintains that the Sentencing Judge recognised the circumstances of this latest offence by giving him a suspended sentence. The suspended sentence nevertheless related to a sentence of 6 months imprisonment which

was wholly suspended for 18 months, and the appellant was subject to a curfew requirement for 12 weeks with an electronic tag.

30. Mr Al-Rashid submitted that the appellant has not committed a criminal offence since the birth of his son and that the birth had a very significant impact on him. The failure to comply with the notification requirements conviction did however occur after the birth of his son. Furthermore, the appellant's drugs offence committed on 19 July 2019 occurred when he would have been aware that his partner was pregnant with their child (the anomaly scan was conducted on 18 July 2019). Knowing that he would be a father did not prevent him from engaging in criminality. Whilst it is to be hoped that the birth will have a impact on the appellant's desire to continue offending, having considered the totality of his offending in respect of his 21 convictions for 33 offences between December 2010 and July 2020, including his convictions in 2013, 2014, 2015, 2016, 2017, 2018, his 5 convictions in 2019 and his conviction in 2020, I am satisfied, having regard to the test in Chege, approved in SC (Zimbabwe) and Binbuga v SSHD [2019] EWCA Civ 551, that the appellant is someone who keeps breaking the law and that he has not kept "out of trouble for a significant period of time" (Binbuga, at [46]), and that, in the absence of an established period of rehabilitation, he therefore remains a persistent offender.

Exception 1: "very significant obstacles"

31. It is accepted that the requirements of s.117C(4)(a) and (b) have been met (the appellant has been lawfully resident in the United Kingdom for most of his life, and he is socially and culturally integrated in the United Kingdom).

32. I now consider whether the appellant meets the requirements of s.117C(4)(c). In SSHD v Kamara [2016] EWCA Civ 813 ("Kamara") and AS v SSHD [2017] EWCA Civ 1284 ("AS") the Court of Appeal considered the concept of "integration" for the purposes of s.117C(4)(c). In Kamara Sales LJ, with whom Moore-Bick LJ agreed, stated at [14]:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable

> time a variety of human relationships to give substance to the individual's private or family life."

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

34. In making my "broad evaluative judgement" I take into account the fact that the appellant entered the UK as a young child aged 12 and that he has never returned to Nigeria. Although his experience of life in Nigeria was as a young child, he still left the country at an age when he would have had some memories of the country and would have retained some cultural familiarity, particularly given that he continued to live with his family with whom he has always enjoyed a good and supportive relationship. Nor has any challenge been made to the assertion in the Reasons For Refusal Letter that the appellant went to school in Nigeria.

35. I take into account the fact that the appellant has no formal employment experience, and that, due to the immigration bail conditions imposed by the respondent, he has been unable, through no fault of his own, to undertake any employment. I have few details of the educational qualifications achieved by the appellant. No issue was however raised with the information contained in the OASys report that the appellant achieved nine GCSEs at grades B-C including maths and English, and that he undertook a National BTEC Level 3 course in engineering at 6th form college before this was interrupted by his rape conviction. The appellant informed the Probation Service that he had no problems with the numeracy, reading or writing. In his first statement the appellant explained that he enrolled at GSM London University to undertake an Enterprise and Small Business Development course and that "things were positive" for him for a while before he attended a few parties and started to fall back into his old habits. A letter from Tunde Oluwole, Company Director of 'Here To Help' Estate Agents, presented to the First-tier Tribunal, indicated that the appellant had been volunteering as a Trainee Estate Agent and referred to his "natural hunger and determination to want to succeed" and that he began learning at a much faster pace than was expected. The recent letter indicating that the appellant had successfully completed a short course on Temporary Road Management Training is further evidence of his ability to learn new skills. Having regard to this evidence I find that the appellant is an intelligent and resourceful individual who is capable of searching for and undertaking employment in Nigeria.

36. At the hearing before me the appellant stated that, although he could not speak Yoruba, his mother spoke it to him at home and he was able to understand it. He therefore has some ability to understand a common language in Nigeria, although I appreciate his ability to communicate in it is restricted. Nor has any challenge been levelled against the assertion in the Reasons For Refusal Letter that English is the official language of Nigeria. The appellant has not produced any independent evidence that his lack of proficiency in Yoruba would materially inhibit his ability to find low-level or unskilled employment, or that he would be in any way restricted in finding such employment if he only spoke English. There was little cogent evidence before me that the appellant's limited knowledge of Yoruba and his clear proficiency in English would in any way inhibit him from establishing new Article 8 ECHR private life relationships in Nigeria.

37. There was no evidence before me to suggest that the appellant was anything other than a fit and healthy young man. I accept the appellant's claim, made in his oral evidence, that he had asthma and, when growing up, that he used an inhaler. There was however no independent medical evidence that his condition was serious or that it would constitute an impediment to his deportation to Nigeria. There was no medical evidence before me that asthma medication was not available in Nigeria.

38. The evidence before Judge Neville from the appellant and his family was that, although they had some extended family in Nigeria, the UK family had lost touch with them. I accept the evidence from the appellant's mother that she only returned once to Nigeria after leaving in 2006, that this was for her mother's funeral some time in 2016, and that she resided in a hotel during the two-week duration of her visit.

39. There was however evidence that, at least to some extent, undermined the assertions made on the appellant's behalf that there was no available support at all for him in Nigeria. In his oral evidence the appellant said that he had a maternal uncle in Nigeria but the family in the UK had not talked to this uncle for years. The appellant did not know why there had been a loss of contact. The appellant claimed that he met his maternal uncle in Nigeria when he was young. In her oral evidence the appellant's mother denied having a brother. She also denied having any extended family at all in Nigeria. The appellant's mother did not know why he said she did have a brother. This inconsistency undermines the claim that there was no remaining distant family in Nigeria. The appellant's mother also claimed that, although she left Nigeria when she was in her late 30s, she had not had any friends after she left school in Nigeria and that she had not established any friendships in that country until the time she left. Whilst I cannot entirely exclude the possibility that this assertion is true, I find it very unlikely that the appellant's mother would not have formed any friendships at all after leaving school until

she left the country in her late 30s. It seems to be improbable that a married woman with a child would have no friends at all.

40. There were further inconsistencies concerning the evidence from the appellant's mother. Contrary to the appellant's assertion that his mother spoke to him in Yoruba, in her oral evidence she claimed that she only spoke to him in English. I find this inconsistency was an attempt by the appellant's mother to present him as being less capable of integrating into life in Nigeria than is actually the case. When the appellant's mother was asked whether he would keep in contact with the appellant's partner and his child if he was deported she claimed, somewhat incredibly, that "it will be too much for me" even though it was ascertained that she could continue to maintain contact through remote means. She then claimed that she did not have a good relationship with her grandson and that her grandson "doesn't know me." This evidence was in stark contrast with that of the appellant's partner. Ms Hayles claimed in oral evidence that she would "definitely" keep in contact with the appellant's family in the UK if he was deported and she said that she and the appellant's mother "have a very good relationship." Whenever the appellant's partner and child come to London they stayed in the appellant's family is home. I find that the evidence from the appellant's mother was designed to paint a bleaker picture of the impact of his deportation on her relationship with her grandchild than the actual reality. This reduces the weight I am able to attach to the evidence from the appellant's mother.

41. Approaching the assertion of the appellant's mother that there was no one in Nigeria who could provide him with any support in light of the other credibility issues arising from her evidence (such as whether she spoke Yoruba to the appellant and the nature of the relationship with the mother of her grandchild), I find that I can attach little weight to the mother's assertion that she has no contacts at all in Nigeria. It is more likely than not that the appellant's family do retain contact with persons in Nigeria, or would be in a position to re-establish such contact.

42. In his oral evidence the appellant confirmed that he had been receiving financial support from his family since before 2020. He candidly stated in his oral evidence that he would receive financial support from his sister Susan, and sometimes from his other sister Mabel, if he was deported, and that his mother was working and would also financially support him. The appellant's mother confirmed in oral evidence that she worked as a Care Assistant with the NHS. Despite the issue of financial support being relevant to the making of an error of law by the First-tier Tribunal, there was no independent written evidence of the financial circumstances of the appellant's mother and his sisters. In light of the oral evidence I find that the appellant would receive financial support from his family members in the UK, as least in the short-term to enable him to access suitable

accommodation while he looks for employment. Although I note the possibility of the appellant availing himself of funding that could be provided via the Voluntary Returns Scheme, in the absence of clear evidence as to this possibility I do not take it into account.

43. Having considered the evidence relating to the obstacles the appellant would face in integrating into life in Nigeria, including, *inter alia*, his absence from the country since the age of 12, his state of health, his educational achievement, his ability to understand Yoruba, and the financial support he would receive from his family in the UK, and applying the test established in Kamara and recently reiterated in Lowe v SSHD [2021] EWCA Civ 62, I find that the appellant would not face 'very significant obstacles' if deported to Nigeria and that he would achieve an understanding of how life in Nigerian society operated and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in Nigerian society and to build up within a reasonable time a variety of human relationships to give substance to his private or family life.

The best interests of the appellant's child

44. I have borne in mind that section 55 of the Borders, Citizenship and Immigration Act 2009 mandates that the best interests of any relevant child must be a must be a primary consideration, although not always the only primary consideration and the child's best interests do not of themselves have the status of the paramount consideration and can be outweighed by other factors (ZH (Tanzania) v SSHD [2011] UKSC 11).

45. I will consider the impact of the appellant's deportation on his child later in this decision. I am however satisfied that it is in the child's best interests for the appellant to remain in the UK. briefly, this is because the appellant has a genuine and subsisting parental relationship with his child and that, although they are not living together, he has regular contact with his son, both physically and remotely. I accept the written evidence from the appellant's partner that the appellant has established a very good relationship with his son and that he has always been present in his son's life, and that the appellant has a positive influence on his son's behaviour.

Exception 2: "unduly harsh"

46. 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."

47. In HA (Iraq) v SSHD [2020] EWCA Civ 1176 Underhill LJ explained at [44]

> "…"unduly" is directed to the *degree* of harshness required: some level of harshness is to be regarded as "acceptable or justifiable" in the context of the public interest in the deportation of foreign criminals, and what "unduly" does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not primarily on how to define the "acceptable" level of harshness. It is true that he refers to a degree of harshness "going beyond what would necessarily be involved for any child faced with the deportation of a parent", but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would "necessarily" be suffered by "any" child (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category."

and later at [51] –[53]:

> "…The underlying question for the Tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest in the deportation of foreign criminals.
>
> …
>
> 53. … It is inherent in the nature of an exercise of the kind required by Section 117C (5) that Parliament intended that Tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of be of more than limited value."

48. Underhill LJ went on at [56] and [57] to say that the test does indeed require a foreign criminal to establish a degree of harshness going beyond a threshold "acceptable" level. It will go beyond what would necessarily be involved for any child faced with the deportation of a parent but that does not mean that there is an identifiable baseline impact which is acceptable. The effect on a child will depend on an almost infinitely variable range of circumstances. Decision-makers must carry out a fact-sensitive assessment evaluating the impact of a foreign criminal's deportation on his children and then deciding whether the effect is not merely “harsh” but “unduly harsh”. By way of example only, the degree of harshness of the impact “may be affected by the child's age; by whether the parent lives with them…; by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child”.

Whether the appellant’s deportation would have an unduly harsh impact on his partner

49. There was no challenge at the remaking hearing to the genuineness or subsistence of the appellant’s relationship with either his partner or their child. The appellant currently lives in London with his mother and siblings, and his partner and their child live in Birmingham. There was generally consistent evidence between the appellant and his partner in respect of how often they see each other physically (it was approximately every two weeks until the current issues with the partners health). When they are not visiting each other the appellant maintains contact with his partner and child through FaceTime, phone calls and other forms of social media. The appellant and his partner have been in a relationship since September 2017.

50. I accept that the appellant’s deportation would adversely affect the appellant’s partner. Whilst there is no evidence that contact between them would be severed by reason of the appellant’s deportation, the nature of their intimate relationship cannot be replicated when they are living in different countries. I additionally take into account that the appellant’s partner was herself raised without a father involved in her upbringing and that this negatively affected her life. I also take into account the negative emotional impact on the appellant’s partner that would flow from the absence of a father figure in her son’s life. I additionally take into account the information provided in the ‘Statement of Fitness for Work For social security or Statutory Sick Pay’ notes provided by the appellant’s partner indicating that she suffers from low mood, fatigue and stress and Symptomatic Anemia.

51. The oral evidence before me indicated that the appellant’s partner lived with their child and her mother in Birmingham in a two bedroom

property, and that she had extended family including cousins who the appellant believed lived near to her. The appellant stated that his partner got on well with her mother, and she reinforce this evidence by saying that her main support comes from her mother but that she also had cousins that provided support. The appellant's partner stated that she had a very good relationship with her mother. I find that the appellant's partner does have a network of support upon whom she can rely if the appellant is deported, and that this network provides emotional and financial support.

52. There is no evidence before me that the appellant's partner has any particular vulnerability or that the appellant's deportation would prevent her from maintaining both her own safety and welfare, and that of her child. Whilst I understand she currently suffers from anaemia and is not fit to work, there was little in the way of detailed medical or psychological evidence relating to the impact on her of the appellant's deportation. It was the appellant's evidence that his partner was very stressed because of what was happening and that if he was deported it would affect his son if his partner was not well. There was however no independent evidence as to the precise nature or seriousness of her condition, and there was no such evidence tending to suggest that she would be unable to ensure the safety and welfare of her child if he was deported.

53. Applying the test in KO (Nigeria), as understood in HA (Iraq), I do not find that the appellant's deportation would have an unduly harsh impact on his partner.

Whether the appellant's deportation would have an unduly harsh impact on his child

54. I have already accepted that the appellant enjoys a good parental relationship with his son. I note the evidence that, amongst other things, the appellant and his son play together and watch television shows together. I have also found that it is in the child's best interests for the appellant to remain in the UK. this is a primary consideration, although it is not the paramount consideration. I take into account the evidence from the appellant's partner that he exerts a positive influence on his son's behaviour and that the son is "beyond happy and flourishes most when he is in his father's presence."

55. I have already expressed by concerns at [40] above in respect of the inconsistent evidence between the appellant, his mother and the appellant's partner in respect of the relationship between the appellant's mother and her grandchild and between the appellant's mother and the appellant's partner. I further note that in her 2nd statement the appellant's partner stated (at [2]) that "over the past couple of years our families have started to become intertwined." I have not found the appellant's mother to be a generally credible witness. In find, in reliance on the evidence from the appellant's

partner, that the appellant's deportation would not prevent the child from continuing to enjoy contact with the appellant's family.

56. There was no evidence that the child had any particular vulnerabilities, or that he was in anything other than good health. Whilst the appellant's deportation would prevent him and his son from physically being together (and I do not underestimate the importance of close physical proximity in a father-son relationship), it was not suggested that contact between them would be entirely severed if the appellant was deported. I take into account the evidence that, prior to the current onset of the partner's anaemia, the appellant saw his partner and child approximately every two weeks and that their contact in the intervening period was by remote means.

57. I take into account the fact that the appellant's partner and their child live with her mother and that the appellant's partner enjoys a good relationship with her mother. I additionally take into account the evidence from the appellant's partner that she has the support of her cousins. I find that this support will continue even if the appellant is deported. There was no independent evidence before me that the appellant's deportation would in any way inhibit the ability of the child's mother to ensure his safety and welfare.

58. In evaluating whether the appellant's deportation would have an unduly harsh impact on his child I have focused on the reality of the child's particular situation (MI (Pakistan) v SSHD [2021] EWCA Civ 1711). I don't doubt that there will be emotional harm to the child if the appellant is deported, and I take into account that emotional harm is equally as significant as other forms of harm. However, having regard to the child's specific circumstances, including the fact that the appellant does not live with the child, the absence of any particular vulnerability in respect of the child, the existence of a network of support from the child's mother and her family ensuring his safety and welfare, and the absence of evidence that deportation would severe all links between the appellant and his child, and taking into account the best interests of the child, I find that the degree of emotional harm of the appellant's deportation on the child would not amount to being unduly harsh.

"Very compelling circumstances"

59. If a foreign criminal cannot come with Exceptions 1 or 2 in s.117C, 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.

60. 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."

61. 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] and the Court of Appeal in HA (Iraq) at [32] both stressed the need to respect the "high level of importance" which the legislature attaches to the deportation of foreign criminals.

62. 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]:

> "In my judgment 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."

63. 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."

64. 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.

65. 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."

Factors in favour of deportation

66. The appellant is a foreign criminal. It is, therefore, in the public interest that he be deported (section 117C(1)). The public interest includes the need to protect society from those who have engaged in serious criminal behaviour and who pose a danger to society, deter criminal behaviour, discourage foreign nationals in the UK from believing that they can commit serious crimes and yet be allowed to remain, and to maintain public confidence in the immigration system and in respect of all these issues.

67. For reasons already given I have found the appellant to still be a persistent offender. I remind myself that he has 21 convictions in respect of 33 offences, and that he was convicted for his last offence, for failing to comply with his notification requirements under the Sexual Offences Act 2003, on 22 July 2020. The appellant's first

offence of rape was clearly very serious, although his conviction dates from 6 December 2010 and occurred when he was still a minor.

68. The OASys report available to me was completed on 18 December 2020 and relates to a series of offences committed on 23 March 2019. According to the OASys report, the factual details of which were not challenged by the appellant at the hearing, the offences committed on 23 March 2019, which concerned a failure to provide a specimen for analysis, using a vehicle while uninsured and speeding, occurred when the appellant was in a car being driven at speeds between 90 mph and a 105 mph. When stopped he gave a false name to the police. The vehicle smelt of cannabis and the appellant gave a roadside good blood test that was positive for cannabis. These offences were committed when the appellant was still the subject of a 12 month suspended sentence order. The OASys report also describes the offence of assaulting a Police Constable on 15 January 2017 which involved the appellant being chased by a police officer. He stopped and came towards the Police Officer with a clenched first and, when caught, attempted to punch the Officer. The appellant also bit the police officer on the left hand.

69. According to the OASys report the appellant was in the high category in respect of the probability of proven re-offending, and in the high category in respect of the probability of proven non-violent re-offending, although in the low category in respect of the probability of proven violent-type reoffending. He also posed a low risk of serious harm to children and to known adults, although he posed a medium risk of serious harm to the public. In assessing the OASys report I take into account the fact that the report was made in December 2020 before the birth of the appellant's child.

70. At the hearing the appellant accepted that he had breached a number of the sentences imposed on him through the years. I additionally noted that the appellant has used a number of aliases and lied to the police when he was asked to give a specimen in respect of the road traffic offences in 2017 (he claims to be diabetic, but this was not true).

Factors against deportation

71. According to the OASys assessment the appellant did not present a risk of harm to females under the age of 16. The rape offence occurred 10 years prior to the Assessment and there had been no evidence to suggest that he had been in contact with the victim and no similar offences had occurred. Overall he was considered to be at high risk of reoffending (although at low risk of violent reoffending), and to pose a medium risk of serious harm to members of the public.

72. The OASys assessment also found that the offences committed by the appellant in March 2019 did not indicate an escalation in seriousness

of previous offending, nor did they form part of an established pattern of offending, although this must be read in the context of his further convictions on 11 November 2019 and 22 July 2020. Once again, I have regard to the fact that the OASys report was written before the birth of the appellant's child, and that the birth is likely to be a factor reducing the appellant's criminal inclinations. I have additionally considered the evidence that the appellant, if permitted to remain in the UK, will seeking to relocate to Birmingham, thus removing himself from the negative criminal associations in London. I find that the appellant does receive support from his mother, with whom he lives with his four sisters (the evidence before me relating to the appellant's father indicates that he has a serious alcohol problem, and that he has not lived in the family home since around May 2021). I have additionally considered the appellant's stated intention to work if permitted to do so, supported by evidence such as the letter from the estate agent and the document indicated his successful completion of a short course on Temporary Road Management Training. I note that the appellant, although being trained to act as a mentor for New Direction, did not actually become a mentor.

73. I have taken into account the previously preserved findings that the appellant has lived in the UK for more than half his life, and that he is culturally and socially integrated. Although I have found that there will be no very significant obstacles to his integration in Nigeria, I nevertheless take into account that he will encounter difficulties, that he has not returned to the country since leaving as a 12 year old, and that he had no real experience of undertaking employment.

74. Although I have found that the impact of the appellant's deportation on his partner and his child will not be unduly harsh, I nevertheless take into account the fact that there will still be a significant negative impact caused by the separation. I remind myself, when assessing whether very compelling circumstances exist, that it is in the child's best interests for the appellant to remain in the UK. I have also considered the cumulative effect of the obstacles the appellant will encounter in Nigeria together with the impact of his deportation on his partner and his child when assessing whether very compelling circumstances exist.

Conclusion on 'very compelling circumstances'

75. I have balanced the factors in favour of the appellant's deportation with those against. In balancing the competing factors I acknowledge the difficulties the appellant is likely to encounter if deported to Nigeria, although he will receive financial support from his family in the UK and he is capable of looking for and obtaining employment. Whilst it is in his son's best interests that he continues to live in the UK, and whilst there will clearly be harm caused to his relationship with his partner and his child, I find that the degree of harm, when balanced against the strong public interest in his removal, for the

reasons identified above, do not establish the existence of very compelling circumstances rendering his deportation disproportionate under Article 8 ECHR.

Notice of Decision

The appellant's Article 8 ECHR human rights appeal is dismissed.

Signed D.Blum Date: 18 May 2022

Upper Tribunal Judge Blum