IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003687

First-tier Tribunal No: HU/52879/2022
LH/00101/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 August 2024

Before

THE HON. MR JUSTICE HENSHAW
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Abimbola Bolaji
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr D. Coward, Counsel (Direct Access)
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 18 April 2024

DECISION AND REASONS

1. This is an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") against a decision of the Secretary of State dated 20 April 2022 to refuse a human rights claim made by the appellant on 23 November 2021.

Procedural background

2. The appeal was originally heard and allowed by First-tier Tribunal Judge Mulready by a decision dated 28 July 2023. By a decision promulgated on 28 February 2024 ("the error of law decision"), Mr Justice Henshaw, sitting with Upper Tribunal Judge Gill, set the decision of Judge Mulready aside, with certain findings of fact preserved, and directed that the matter be reheard in this tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and

Enforcement Act 2007. A copy of the error of law decision may be found annexed to this decision.

3. It was in those circumstances that the matter resumed before us, sitting as a panel, on 18 April 2024.

Factual background

4. The appellant is a citizen of Nigeria born on 10 October 1965. She has a history of using two identities in the United Kingdom; her true identity, Abimbola Bolaji, and a false French identity, Marie Adebanji. Her use of two identities has given rise to a complex immigration history.

5. The appellant was deported to Nigeria in her false identity in 2006, having entered the United Kingdom in that identity. She was deported following her conviction of an offence arising from the use of a false instrument, namely a false French passport in the name of Marie Adebanji, for which she was sentenced to 12 months' imprisonment. Shortly after her deportation, she was granted entry clearance in her true identity, Abimbola Bolaji, having not declared her past criminal or immigration history, or her use of the false Marie Adebanji identity, to the Entry Clearance Officer. In her true identity she returned to the United Kingdom around one month later, in November 2006, in breach of the deportation order to which she was subject. That deportation order remains in force.

6. Once back in the United Kingdom, the appellant made an application for further leave to remain in her true identity. The application was refused, and an appeal against that refusal decision was dismissed by the First-tier Tribunal by a decision promulgated on 20 January 2012. It appears that the judge who heard that appeal was completely unaware of the appellant's false Marie Adebanji identity and its history.

7. In August 2012, the appellant made a further application for leave to remain, again in her true identity, on the basis of her marriage to her husband, Mr Banji Mofolorunsho ("BM"). The application was refused in circumstances that did not attract a right of appeal.

8. In December 2014, the appellant made another application, again on the basis of her marriage to BM, in her true identity. The application was refused on 28 February 2017. Her appeal against the refusal decision was heard and dismissed by First-tier Tribunal Judge Norton-Taylor, as he then was, by a decision promulgated on 22 January 2019.

9. On 23 November 2021, the appellant made a further application on the basis of her marriage to BM, in her true identity. That application was refused, and it is that refusal decision that the appellant now appeals against in these proceedings.

The refusal decision dated 20 April 2022 and the Secretary of State's reformulated position in these proceedings

10. The decision of 20 April 2022 refused the appellant's human rights claim (in her true identity) without making reference to the deportation order to which she was and remains subject. The decision raised no suitability concerns. The application was refused because, in summary, the appellant could not meet the requirements of paragraph EX.1 of Appendix FM of the Immigration Rules. That was because there would not be any "insurmountable obstacles" to her relationship with BM

continuing in Nigeria. The appellant herself would not face "very significant obstacles" to her integration there for the purposes of paragraph 276ADE(1)(vi) of the rules, and there were no exceptional circumstances.

11. We have no explanation as to why the human rights claim was not treated as an application to revoke the deportation order. The most obvious explanation is that the appellant's use of two identities had, once again, eluded the decision maker, although it is not necessary for us to reach findings on that issue. The appellant did not expressly declare her criminal past to the Secretary of State. In fairness, we note that she did declare that she had previously been known as Marie Adebanji, and gave the reason for that as being "out of desperation", but did not elaborate further. The appellant declared in the application that she was of good character.

12. It was only at the point of the "Respondent's Review" before the First-tier Tribunal, dated 21 November 2022, in the course of the appellant's against the refusal of the human rights claim, that the Secretary of State sought to invoke the appellant's criminal past and rely on the deportation order as a reason for the appeal to be dismissed. The Secretary of State considered that the fact the appellant was subject to a deportation order meant that she could not succeed on the basis of the suitability criteria contained in Appendix FM, specifically paragraphs S-LTR.1.1. and S-LTR.1.2. The Secretary of State did not invite Judge Mulready to apply rule 399D of the Immigration Rules, which at the relevant time dealt with the revocation of deportation orders, but instead made oral submissions that the deportation order was relevant to the background landscape of the appeal, while not central to the issues then under consideration.

Principal controversial issues

13. For the reasons addressed we set out below, it is now common ground that the proportionality of the appellant's prospective removal to Nigeria should be determined through the lens of the public interest considerations set out in section 117C of the 2002 Act, concerning the deportation of foreign criminals.

14. Accordingly, the issues in these proceedings are:

a. First issue: Does the appellant satisfy Exception 1 to deportation? See section 117C(4).

b. Second issue: Would the appellant's deportation have an unduly harsh effect on the appellant's husband, BM, either for him to remain here without the appellant, or for him to accompany her to Nigeria?

c. Third issue: Would the appellant's deportation have an unduly harsh fact on her wider family, in particular her grandchildren, in light of the primary care she claims to provide for her grandchildren, jointly with two of her own adult daughters, or otherwise be disproportionate? There is a subsidiary issue as to whether the "unduly harsh" test is engaged in relation to the children of the appellant's adult daughters.

d. Fourth issue: Would the appellant's deportation be disproportionate and therefore unlawful on any other basis? See section 117C(6) of the 2002 Act: "very compelling circumstances over and above" the Exceptions to deportation.

The appellant's case

15. The appellant's case is that she cannot be removed to Nigeria because the entirety of her life, family and support networks are firmly established in the United Kingdom. The length of time for which she has resided in the United Kingdom is such that she now has no remaining links in Nigeria, and would be a stranger in that country. As for BM, his health conditions are such that it would be unduly harsh for him either to remain in the United Kingdom without her, or for him to return to Nigeria with her. Either way, her deportation would have an unduly harsh impact on him. He requires constant support and assistance with basic daily tasks, including getting up and taking his medication. In this country, he is able to access all the medication and treatment he requires. By contrast, in Nigeria nothing would be available to him. As a couple, they would have insufficient funds in order to meet the costs of securing private healthcare, as would be necessary, and their daughters would be unable to remit anything like what would be needed in order for them to be able to survive in the country.

16. The appellant performs a significant role in the lives of her adult daughters and her four grandchildren. The care and support she provides for them is so extensive as to amount to a genuine and subsisting parental relationship. There can be no question that the children could relocate to Nigeria with her, and, on her case, it would be unduly harsh for them to be required to remain here without. Their best interests are overwhelmingly in favour of the appellant being permitted to stay. She performs such a central role in their lives that it would be unduly harsh for her to be deported.

17. Overall, the appellant says her presence is central to the role of not only her husband, but also the wider family unit of which she is firmly at the centre. She is remorseful for the crimes that she committed almost 20 years ago, and presents no risk of reoffending.

Secretary of State's case

18. For the Secretary of State, Mr Tufan highlighted the elevated threshold that an individual must meet in order to demonstrate that the "unduly harsh" test is met. He submitted that it would not be unduly harsh for BM either to remain here without the appellant or to accompany her to Nigeria. He was born in Nigeria and spent most of his life there before relocating to the United Kingdom and later naturalising as a British citizen. He and the appellant would enjoy remitted financial support from their adult daughters in the United Kingdom, who would be able to visit them as necessary. If he chose to stay in the UK, it would not be unduly harsh. He would have access to the care he needs under the NHS. In any event, there was minimal evidence concerning the chronic health conditions the appellant claims that BM experiences. As for the appellant's prospective circumstances in Nigeria, she would benefit from financial support from the Secretary of State upon her deportation which, combined with remittances from the children in the United Kingdom, would enable the appellant to establish herself in Nigeria, at least initially.

19. Mr Tufan also submitted that the appellant cannot claim to have a genuine and subsisting parental relationship with her grandchildren. She performs the role of a grandmother not the role of a parent. In any event, her deportation would not have an unduly harsh impact on the children. They would remain in this country

with their parents. To the extent that the appellant currently provides childcare for them, that would not meet the threshold for unduly harsh, in the event that she is deported. BM is currently still working (albeit an extended sick leave for approximately three months), but nears retirement in any event. Upon his retirement, he will be able to provide the support and assistance to his daughters and grandchildren that the appellant currently provides, in the appellant's absence.

The law

20. The sole ground of appeal is that the appellant's removal from the United Kingdom to Nigeria would be unlawful under section 6 of the Human Rights Act 1998. The appellant's case is that it would be disproportionate for the purposes of Article 8(2) of the European Convention on Human Rights ("the ECHR") for her to be removed from the United Kingdom. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

21. It is for the appellant to establish that Article 8(1) would be engaged by her prospective removal. If she can, then it is for the Secretary of State to establish that her removal would be proportionate for the purposes of Article 8(2). The Secretary of State does so by relying on the public interest considerations contained in Part 5A and the Immigration Rules. In a case where deportation is involved, the appellant must establish, to the balance of probabilities standard, that she meets the relevant exception to deportation, or that there are very compelling circumstances and over and above the exceptions, rendering her removal disproportionate.

22. Part 5A of the 2002 Act contains a number of mandatory public interest considerations to which a court or tribunal must have regard when considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR. The considerations in section 117C apply in all cases concerning the deportation of foreign criminals: see section 117A(2)(b).

23. Section 117C provides:

> "(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."

24. Section 117D defines certain key terms. Section 117D(1) defines "qualifying child" to include British citizen children. "Qualifying partner" means a partner who is a British citizen, or settled in the United Kingdom. Section 117D(2) defines "foreign criminal" to include those, such as this appellant, who have been sentenced to a period of imprisonment for at least 12 months.

25. The term "unduly harsh" in section 117C(5) (and in the predecessor Immigration Rules) has been the subject of much litigation. In *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, the Supreme Court endorsed the decision of this tribunal in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), which described the concept in the following terms, at para. 46:

> "By way of self-direction, we are mindful that '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."

26. That definition was re-endorsed by the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22: see para. 41. See also para. 42:

> "This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is 'acceptable' or 'justifiable' in the context of the public interest in the deportation of foreign criminals involves an 'elevated' threshold or standard. It further recognises that 'unduly' raises that elevated standard 'still higher' - i.e. it involves a highly elevated threshold or standard."

Engagement of section 117C of the 2002 Act

27. We raised with the parties at the hearing whether section 117C(7) means that the section 117C(1) to (6) factors are not engaged, since the decision of 20 April 2022 was not taken by reference to the appellant's criminal history. Neither

party submitted that this was a critical issue, and we do not consider it to be so, for the following reasons.

28. Section 117A(2)(b) provides that in cases "concerning the deportation of foreign criminals" that we must have regard to the section 117C factors. As was held in the error of law decision, this case "concerns" the deportation of a foreign criminal; the appellant is a foreign criminal who is subject to a deportation order, and the case concerns her removal pursuant to it.

29. The purpose of section 117C(7), read with section 117A(2)(b), is to prevent the section 117C factors being applied in a case that *does not* concern the deportation of a foreign criminal. Section 117C(7) protects a non-foreign criminal from having to meet the exacting exceptions to deportation contained in section 117C, in circumstances where the public interest in the deportation of foreign criminals is not engaged, because the appellant is not a foreign criminal, or because the Secretary of State has never sought to rely on the individual's criminal convictions as a basis for their removal. The appellant's deportation order was made on the basis of her criminal convictions. The reason for *that* decision was the appellant's criminal history, and it is on that basis that the section 117C considerations are engaged in the circumstances of this case.

30. In any event, even if the section 117C considerations were not engaged as a matter of statutory construction, in the unique circumstances of this case we would be required to ascribe considerable weight to the Immigration Rules concerning the revocation of deportation orders in any event. It is well established that the Immigration Rules set out the Secretary of State's view concerning the public interest in the maintenance of effective immigration controls and, where applicable, the deportation of foreign criminals. Where the Secretary of State has adopted a policy, contained in the Immigration Rules, based on a general assessment of proportionality, a court or tribunal should attach considerable weight to that assessment: see *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 at para. 46. While the former rule 399D (which was in force at the time of the Respondent's Review) imposed the "exceptional circumstances" threshold for revoking a deportation order, thereby applying a higher threshold than Part 5A, that rule was revoked by HC1160 with effect from 12 April 2023. It has been replaced by paragraph 13.4.4. of the Immigration Rules which more consistently replicates the statutory public interest considerations and exceptions contained in section 117C. The Immigration Rules would be central to our assessment of the proportionality of the appellant's prospective removal in the event that section 117C were not engaged. Since the relevant rule (para. 13.4.4.) and statutory provision (section 117C) are consistent, nothing turns on whether section 117C is engaged, since the considerations to which we would have regard would be the same in any event. Mr Coward did not seek to submit to the contrary, or otherwise to argue for the application of different public interest considerations. It was common ground that we should approach the public interest question under Article 8(2) through the lens of section 117C.

31. We will therefore apply section 117C.

The hearing

32. The resumed hearing took place on a face to face basis at Field House. The appellant relied on an updated bundle. We heard oral evidence from the appellant and BM, and their three adult daughters, Doyinsola Adebanji,

Oyindamola Adebanji, and Damilola Adebanji. Each adopted their witness statements and was cross-examined. For ease of reference, we will refer to the evidence of the daughters by using their first names, intending no discourtesy by doing so.

33. We do not propose to set out the entirety of the evidence given by each witness, nor the contents of the documentary evidence. We will summarise and refer to the relevant evidence to the extent necessary to reach and give reasons for our findings.

34. Naturally, we have considered the entirety of the evidence, in the round and to the balance of probabilities standard, before reaching our decision.

Analysis of the principal controversial issues

35. Article 8 of the ECHR is plainly engaged in these proceedings, on a private and family life basis. The appellant has resided in the United Kingdom, albeit unlawfully, since at least 2006, and prior to her temporary return to Nigeria that year, had been here since 1999. There is no dispute that she is in a genuine and subsisting relationship with BM, nor that she performs an active and extensive role in the lives of her children and grandchildren. The appellant's removal from the United Kingdom would have consequences of such severity so as to engage the operation of Article 8, and interfere with the qualified protected rights the appellant and her family enjoy under Article 8(1).

36. Such an interference would, in principle, be in accordance with the law, in the sense that it would be pursuant to an established legal framework, coupled with a right of appeal to this Tribunal. The interference would, in principle, be capable of being necessary in a democratic society, on the basis of the derogations in Article 8(2).

37. The question that lies at the heart of the analysis we must perform is whether the interference would be proportionate to the legitimate public end that is to be achieved by the appellant's deportation. To answer that question we will, as set out above, turn to the statutory criteria contained in section 117C of the 2002 Act, and replicated in Part 13 of the Immigration Rules. It is against that background that we turn to the principal controversial issues identified above.

Existing findings of fact: Judges Mulready and Norton-Taylor

38. The starting point for our findings of fact is the findings of Judge Norton Taylor at paragraphs 35 to 84 of his decision (see para. 70 of the error of law decision) and the preserved findings of fact reached by Judge Mulready.

39. In summary, the relevant findings reached by Judge Norton Taylor were:

    a. There was no reliable evidence to show that the findings of fact reached by a different constitution of the First-tier Tribunal promulgated on 20 January 2012, that the appellant had close family members in Nigeria, had been displaced. (See para. 62).

    b. The appellant and BM are in a genuine and subsisting relationship. They were previously in a relationship in Nigeria, and married in the United Kingdom in 2012. Their three adult daughters were born to them pursuant to this relationship. (See paras 65 to 66).

c. BM has been aware of the appellant's adverse immigration history from an early stage. He was aware of her use of a false identity in or around 2004, and was aware of her deportation 2006. (See para. 68).

d. There was, at the date of the hearing before Judge Norton Taylor on 7 December 2018, "virtually no independent evidence" about BM's medical conditions. There had been correspondence from a GP about an eye operation that took place in or around September 2018. There was no evidence concerning the outcome of the operation, and Judge Norton Taylor found, therefore, that it had been successful. (See para. 69).

e. BM experiences type II diabetes and hypertension. The witnesses' evidence about this had not been challenged by the Secretary of State before Judge Norton Taylor, and that evidence had been consistent on that issue. However, there were no details concerning the treatment for those two conditions, and the judge accepted that BM was able to take any medication he needed to take . Judge Norton Taylor rejected the evidence of the appellant and BM that the appellant's support and assistance was required for BM to remember to take his medicine. There was no evidence to show that BM experienced mental health problems or forgetfulness. His work involved supporting people with learning disabilities which, "indicates that BM is a capable individual and, in all the circumstances, either does not require the assistance of anyone else to help with medication or, alternatively, would be fully able to use, for example, a dosette box or other reminder in order for him to remain compliant". (See paras 69 to 70).

f. At para. 72, Judge Norton Taylor said:

> "I accept that type II diabetes and hypertension has an effect on [BM's] overall quality of life. However I do not accept that this can be described as anything more significant than [a] relatively minor adverse impact on him. There is nothing to indicate that relevant medication does not have appropriate beneficial effects. [BM] is of course working full-time in what might be described as a relatively demanding line of work. There is no reliable evidence of any other factors which would suggest additional functional impairment, at least to any material extent. It may be the case that in the course of time his health does deteriorate, but I regard that as being simply too speculative at the present juncture."

40. For the reasons set out at para. 71 of the error of law decision, we do not take the findings of fact reached by Judge Norton Taylor at paragraphs 86 and following of his decision into account.

41. Judge Mulready reached a number of findings of fact that have been preserved, and which therefore also form the starting point for our analysis: see paras 61 to 68 of the error of law decision.

42. Judge Mulready's preserved findings relate to the closeness of the relationship between the appellant and her adult daughters and their children, and the genuine and subsisting nature of her relationship with BM. The appellant's evidence before Judge Mulready concerning the appellant's involvement in the

lives of her adult daughters and their children, her grandchildren, had not been challenged by the Secretary of State: see para. 63. Those findings may be found primarily at para. 72 of Judge Mulready's decision. Judge Mulready observed that the time the appellant spends with her family is valuable, and that the appellant provides childcare for her grandchildren. She collects the children from school, and regularly hosts them at the house she shares with BM. The care the appellant provides for her grandchildren means that the children are often at her home and form an integral part of the family life enjoyed by the appellant and BM. Judge Mulready found that the quality of the relationship between the appellant and her grandchildren could not be replicated if the appellant were required to leave the United Kingdom.

43. Those findings form the starting point for our own analysis.

Issue (1): the extent to which the appellant meets Exception 1

44. Exception 1 is incapable of being engaged in relation to the appellant. That is because she has not been lawfully resident in the United Kingdom for most of her life: see section 117C(4)(a). However, we will consider the remaining criteria in this Exception as they are relevant to our overall proportionality assessment under section 117C(6), below.

45. We accept that the appellant is socially and culturally integrated in the United Kingdom (section 117C(4)(b)). She performs a central role at the mosque and has caring responsibilities for BM and her family. She has obtained qualifications in the healthcare sector, fostered a child, and worked previously.

46. We do not accept that there would be very significant obstacles to the appellant's integration in Nigeria for the purposes of section 117C(4)(c)). The concept is well known. See *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152, at para. 14, per Sales LJ (as he then was):

> "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."

47. The reasons the appellant will not face very significant obstacles to her integration in Nigeria are as follows.

48. First, in 2019 Judge Norton-Taylor found that there was no evidence to displace the findings of the First-tier Tribunal in 2012 that the appellant had close family in Nigeria. We accept that 12 years have now elapsed since those findings were

reached. However, aside from bald assertions, there is little evidence to support departing from that view. There is, for example, no evidence that any such family members are unwell or have died, nor that they have moved away. Such evidence would be relatively easy to obtain. There is none.

49. Secondly, the appellant is Nigerian. She spent the majority of her adult life in Nigeria before coming to the UK in her mid to late 30s. She is familiar with the language, culture and customs of Nigeria. She will be well placed to refamiliarise herself with the culture upon her return.

50. Thirdly, we reject the appellant's evidence that she would be exposed to poverty and destitution. She would return with the assistance of the Secretary of State's Voluntary Returns Service, as explained in the refusal letter at page 7, which could cover the cost of flights and provide an initial grant to establish herself upon return. She would benefit from some remittances from her family in the UK; BM remains in work, and her daughters would be able to provide a degree of assistance. We accept that in the event Doyinsola and Oyindamola lose the childcare currently provided by the appellant, the costs of providing alternative children – at market rates – would necessarily limit the extent to which they could provide ongoing, significant financial assistance. But we find that they would be able to provide at least some financial support, albeit at levels lower than they are currently able to. In her evidence, Doyinsola said that she would not be able to provide sufficient support for all of her mother's daily needs in Nigeria, and Oyindamola said that may be able to provide in the region of £50 each month. The appellant has plainly survived for a considerable period in the UK without the right to work and no discernible income. We find that she must have had financial supporters. We find such support would continue, at least to an extent.

51. Fourthly, the appellant is of working age and has a number of healthcare qualifications. She would be able to work in Nigeria.

52. Drawing this analysis together, and stepping back to conduct the required broad, evaluative assessment, we find that the appellant will be able to integrate into Nigerian society upon her return within a reasonable period of time. She will, in due course, be "an insider", in the words of Sales LJ. In time, she will establish her own private life. She will undoubtedly face obstacles of the sort which would accompany any enforced removal. But any such obstacles will not be very significant.

53. The appellant will not face very significant obstacles to her integration in Nigeria.

Issue (2): whether the appellant's deportation would be unduly harsh for BM?

54. The essential question under this issue is whether the appellant meets Exception 2 to deportation on account of the impact on BM. We have summarised the appellant's case concerning the impact of her deportation on BM above.

55. The appellant's witness statements, and those of BM, Oyindamola, Damilola and Doyinsola gave an account that was broadly consistent with that aspect of the appellant's case, although, for the reasons set out below, lacked depth. For example, the appellant's first witness statement said that "I have a husband who is poorly and needs my help looking after him…" And later, "this is the time of my

life when my children and husband need me the most…", and at para. 4 said that the Secretary of State had not considered "the impact on the health and wellbeing of my husband and the devastation [her deportation] will have on the entire closely knit family unit."

56. BM's first witness statement says, on the first page:

> "I am currently suffering from many chronic health conditions such as high blood pressure, diabetes, cataract and sciatica nerve pain. I managed all these conditions with medications, I have had multiple cataract surgeries on my left eye, but my vision is still quite blurry. I constantly need help from my wife to get out of bed every morning and sometimes it's bad that I cry like a baby because the pain is unbearable. My wife has been the one looking after me, cooking my meals, doing my shopping, supporting with house chores and getting me in and out of bed."

57. The written evidence of Oyindamola concerning the support the appellant provides to BM was as follows:

> "My dad has many health conditions such as diabetes, high blood pressure, cataract and hip and joint pain. He constantly manages all this condition [sic] with medication daily of which my mum supports him to manage it effectively. Most times my dad cannot get himself out of bed alone without mum supporting him to stand on his feet with tears in his eyes. My dad has two cataract surgeries, but he still struggles to see with one of his eyes. Without my mum by his side, life would be extremely unbearable and meaningless for my dad because he needs the support physically, emotionally and mentally."

58. Oyindamola provided a similar account in her second witness statement, adding that BM's diabetic retinopathy had further complicated his management "leading to impaired vision and increased reliance on his wife's assistance for activities of daily living."

59. Damilola's witness statement contained a similar passage:

> "My dad has several medical conditions, from diabetes, leg pain and cataract [sic] which he constantly must use medicine to relieve the pain. You can imagine how that would be difficult for my mum, but she still devotes herself to caring for him. My dad completely relies on my mum for cash everything, from cooking, making sure he uses his medication, doctor's appointment [sic] and being there for each other. Their bond is unbreakable, and I can't imagine my mum not being in the same vicinity as my dad."

60. However, we consider that the evidence the witnesses gave on these issues lacked depth, was inconsistent with other aspects of the evidence, and was unsupported by documentary evidence of the sort that, pursuant to the error of law decision, the appellant was on notice that this tribunal would expect to be provided with. At para. 83, the error of law decision outlined the expectations of the Upper Tribunal on this issue:

> "The UT will expect to be updated on BM's medical condition and care needs and the claimant's medical condition. The claimant would be well-advised to ensure that she submits in good time, and no later than the dates specified in the Directions below, any evidence upon which

> she relies in this regard, supported (where necessary) by appropriate up-to-date medical and/or witness evidence as well as evidence as to whether any assistance he may require can be provided, for example, by social services. She would also be well advised to submit independent evidence of the impact on the grandchildren of their being separated from her. The directions below give her six weeks within which to obtain such evidence."

61. The only contemporary documentary medical evidence pertaining to BM's health conditions was a letter from his GP, Dr N Patel, dated 26 March 2024, described as a "factual letter of support for [BM] and his families immigration process based on his medical condition and need for assistance". There was no evidence of the sort the error of law decision said the Upper Tribunal would expect.

62. Dr Patel's letter states that BM has:

> "poorly controlled type 2 diabetes mellitus complicated by diabetic retinopathy, hypertension and sciatica. These conditions significantly impact his daily life and he reports he requires constant support, particularly from his wife."

It goes on to explain that BM receives insulin therapy, and reports that he relies on the appellant for assistance in monitoring his blood sugar levels and insulin administration, and that he has impaired vision. The letter concludes in the following terms:

> "Presently, [BM] is off work sick due to chronic pain related to sciatica, which he reports necessitating support and assistance from his wife for his daily activities."

63. This brief letter from BM's GP is the only contemporary documentary medical evidence concerning the claimed extensive health conditions experienced by BM. We have not been provided with his GP records or any other documentation pertaining to his current ill-health, in particular the reasons he is presently on sick leave from his employment. There are a range of other medical materials in the bundle, including appointment records and extracts from other health records, but they all pre-date these proceedings by a considerable period.

64. In our judgment, these are significant evidential gaps. The appellant was on notice pursuant to para. 83 of the error of law decision that evidence of precisely this sort would be expected. There would plainly be an additional range of medical materials which would be capable of giving far greater detail than the minimal documentary evidence we have been provided with, as stated at para. 83 of the error of law decision. Further, insofar as Dr Patel's letter describes the impact of BM's health conditions on his daily life, it merely describes what BM has *reported* that the appellant has to do to aid him. Taken at its highest, the letter does not purport to state that BM requires the level of assistance that he claims the appellant provides him with as part of a medical diagnosis, but rather merely repeats what BM has reported the appellant does for him.

65. We make no criticism of Dr Patel by making these observations; the contents of the letter simply record what BM reported to his GP. But the letter is far removed from the sort of medical evidence one would expect in proceedings such as this in order to demonstrate that the "unduly harsh" threshold has been met. Dr Patel's

letter does not describe the nature and extent of the "constant support" required by BM from the appellant.

66. Of course, as we have noted above, Dr Patel's letter does refer to BM being on a period of sick leave, but that raises more questions than it answers. In our judgment, it is significant that BM has not left work altogether as a result of his claimed chronic health conditions, but rather is part-way through a defined period of absence on medical grounds. In his oral evidence, BM told us that he had been signed off work for three months. That being so, it begs the question, as raised at para. 66(i) of the error of law decision, as to how BM has been able to work in a demanding role such as his, namely helping children with learning disabilities, in circumstances when his evidence to this tribunal has been that he requires constant help from the appellant with all daily activities. If that were so, one would expect the appellant to have been unable to work at all, rather than simply having been signed off work for a relatively short period of time.

67. The appellant's adult daughters do not live with the appellant and BM. There is no suggestion that they are present when BM wakes at the beginning of the day, nor that they are there when the appellant provides him with daily assistance while he is crying out in pain, as he wrote in his witness statement, and as stated by Oyindamola and Damilola. That being so, it is difficult to ascribe much weight to this aspect of their evidence; we find that the witnesses have reported what they had been told by their parents. While we accept that each of the appellant's daughters gave evidence in a manner intended to assist the tribunal, it is difficult to ascribe significant weight to this aspect of their evidence. Their accounts feature in their first witness statements; those statements were written for the hearing before Judge Mulready, in March 2023. They therefore pre-date BM's recent period of sick leave, and were written at a time when BM was still working. That being so, the observations in the error of law decision at para. 66(i) remain apposite: it is not clear how BM would simultaneously be unable to perform daily tasks of self-care, while working in a role that involved taking young people from school, taking them to withdraw money, providing two to one support when out in the community, and helping with two to one personal care. We therefore ascribe minimal weight to this aspect of their evidence.

68. We therefore are not satisfied that the appellant has demonstrated that it would be unduly harsh for her husband to remain here in her absence on account of his health conditions.

69. We do not consider that the impact of having to remain in the United Kingdom in the appellant's absence would be unduly harsh for BM on any other account. We accept that he is in a genuine and subsisting relationship with the appellant. They are clearly devoted to one another, and cherish their role in the wider family unit, namely their daughters and grandchildren. If the appellant were removed and BM remained here in her absence, there would be a significant emotional void in BM's life. He would lose his life partner. His life would change significantly. He would be without the day-to-day support and assistance that many married couples provide to each other. He may have to assist with the childcare of his grandchildren to an extent he does not presently do so, to make up for the impact of the appellant's absence. There would be an element of sorrow on account of seeing his grandchildren lose the daily presence of their grandmother (and see below concerning the second issue, and the best interests of the children). However, we do not consider that these factors amount to an unduly harsh impact on BM. The concept of "unduly harsh" involves an elevated

threshold. It is not merely something that is undesirable, uncomfortable or unwelcome. It is a threshold which must be judged by reference to the public interest in the deportation of foreign criminals. When viewed in that way, the undesirability of the appellant's deportation from BM's perspective is not capable of amounting to being "unduly harsh", even when combining the cumulative impact of the factors we have set out above.

70. We now consider whether it would be unduly harsh for BM to accompany the appellant to Nigeria.

71. It would plainly be undesirable for BM, and the wider family unit, for BM to accompany the appellant to Nigeria. We accept that BM has some health conditions that are treated with routine medication available from his GP. However, there is no evidence before us that the treatment currently enjoyed by BM in the United Kingdom would not be available in Nigeria, or that it would be unduly harsh for other reasons to expect him to relocate to that country. We accept that the healthcare currently enjoyed by BM is available to him free at the point of access through the NHS. The same level of provision, for no cost at the point of access, is highly unlikely to be available in Nigeria. However there is no expert evidence before us demonstrating that BM would be unable to secure the routine medications that he requires, upon his return to Nigeria with the appellant. Even if some funding were required, the appellant would benefit from an initial relocation grant from the Secretary of State which could be shared with BM, and his daughters would be able to remit some money to him and their mother, as they have been doing for some time.

72. BM and the appellant are of Nigerian descent. They have spent the majority of their lives in the country. In 2012, the First-tier Tribunal found that the appellant had family in Nigeria. Before Judge Norton Taylor, there was no evidence to displace that starting point, and we find that there is no evidence to displace that starting point before us, either. While the appellant told us that she has no remaining family in Nigeria, we struggle to accept this aspect of her evidence. It is inconsistent with the previous findings of fact in 2012, and Judge Norton Taylor's findings of fact reached in early 2019. Those findings represent our starting point. Not only is that aspect of the appellant's case at odds with the previous findings of fact, but we find it hard to accept that the appellant's evidence on this issue as credible. We remind ourselves that she has sought to maintain a double identity for a considerable length of time. She has a conviction for dishonesty, which she has failed to declare to the authorities of the United Kingdom, and, having done so, has re-entered the United Kingdom in breach of a deportation order prohibiting her from doing so. We find it difficult to treat the appellant as a witness of truth in this respect.

73. We accept that the appellant and BM would largely have to "start again" in Nigeria, in the event that BM chose to accompany the appellant upon her deportation, in the sense that it would take some time to settle down. That would be a challenging process, we accept. But we do not accept that it would be unduly harsh. The appellant and BM would be returning to the country of their birth, where they lived for the majority of their lives before relocating to the United Kingdom. There is some family support in the country, pursuant to the preserved findings of fact. They would benefit from some, albeit limited, remittances from their family in the United Kingdom. They would be able to re-establish themselves in a manner consistent with local standards of living within a reasonable period of time. Bearing in mind the public interest in the deportation

of foreign criminals, the impact that that would have upon the appellant and BM may well be harsh but it would not be unduly so.

Issue (3): Would the appellant's deportation have an unduly harsh effect on her wider family?

Best interests of the children

74. We commence our analysis of this issue by determining the best interests of the children involved in these proceedings. There are four minor children who will be affected by the appellant's deportation; Doyinsola has two daughters, J1 (aged 9) and G (aged 5). Oyindamola also has two children, A (aged 4) and J2 (aged 2) (the ages are those given when the witness statements were drafted).

75. We take as our starting point Judge Mulready's preserved findings of fact: see para. 42, above. The appellant provides extensive childcare support for all four grandchildren. We accept that she performs the role of a nanny in their lives; indeed, that is the term used by Oyindamola in her second witness statement. The appellant provides regular childcare, collects the children from school, takes them to appointments, and performs a central role in their lives. Doyinsola works as a nurse and regularly performs lengthy shifts making the childcare provided by her mother an essential feature of her working life: she has a partner, but his role involves shiftwork. Oyindamola also works in healthcare, but has an office-based role, which requires her to spend some time at work premises, and other times working from home. When she goes into the office, her mother provides childcare. Again, her mother's role is an important part of her working life. Oyindamola does not have a partner. We do not underestimate the role that the appellant provides in helping her to get through daily life whilst bringing up two children alone.

76. The best interests of each of the children involved in these proceedings, individually and collectively, are for the appellant to remain in the country. The appellant provides childcare for her grandchildren, and while we do not accept that she is their primary carer, she is plainly a significant feature of their day-to-day family lives. We have read a letter from J1 describing the warmth and affection with which she loves her grandmother, and with which her grandmother loves her. It is in the best interests of all the children for the appellant to be allowed to remain in the United Kingdom, for this arrangement to continue.

No parental relationship between the appellant and her grandchildren

77. As far as the appellant's role in the lives of her grandchildren is concerned, we do not accept that she is in a parental relationship with the children.

78. In their oral evidence, Doyinsola and Oyindamola sought to present the appellant as the primary carer of their children. We disagree with this characterisation of their mother's role as being that of the children's primary carer. Guidance on that issue in this jurisdiction may be found in *R (on the application of RK) v Secretary of State for the Home Department (s.117B(6);* "*parental relationship*"*)* [2016] UKUT 31 (IAC). *RK* concerns determining the presence of a "parental relationship" for the purposes of section 117B(6) of the 2002 Act. The parties were agreed that the concept of a "genuine and subsisting parental relationship" in section 117B(6) and 117C(5) is identical, and we can draw from the guidance in *RK*. The relevant extract from the judicial headnote is as follows:

> "2. Whether a person who is not a biological parent is in a 'parental relationship' with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has 'stepped into the shoes' of a parent.
>
> 3. Applying that approach, apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual, but not impossible, for more than 2 individuals to have a 'parental relationship' with a child. However, the relationships between a child and professional or voluntary carers or family friends are not 'parental relationships'."

79. A significant factor is thus whether a carer has "stepped into the shoes" of a parent. See para. 44:

> "If a non-biological parent ('third party') caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has 'stepped into the shoes' of a parent.

80. We accept that the appellant is not as far removed from her grandchildren as the non-biological third party referred to in *RK*. However, there is no evidence before us that the appellant "stands in the shoes" of the children's parents; each child is in the primary care of their mother, Doyinsola and Oyindamola respectively. The appellant is a hands-on grandmother. She is central to many aspects of the cohesion of the wider family unit. She supports her daughters in their roles as mothers. But she does not stand in the shoes of her daughters to assume a role of parental responsibility. There is no evidence, for example, that she has any responsibility in relation to key decisions concerning the lives of the children. Her role is that of a hands-on grandmother. She has a warm and close bond with her grandchildren. She provides support to the children's parents. But she does not have a parental role in relation to the children herself.

81. That being so, Exception 2 is incapable of being met in relation to any of the appellant's grandchildren. Her relationship with the children is not a genuine and subsisting *parental* relationship. Section 117C(5) is incapable of being engaged.

82. Similarly, Exception 2 is incapable of being met in relation to the appellant's adult children. Doyinsola, Oyindamola and Damilola have all attained the age of majority. None of them is a "qualifying child" as defined by section 117D(1). Each is over the age of 18.

83. In any event, we do not consider that the appellant's deportation would have an unduly harsh impact on the appellant's adult daughters.

84. Each of the appellant's children has attained the age of majority. Each lives separately. We accept that the appellant provides childcare to Doyinsola and Oyindamola. We have already found that it is in the best interests of the children for the appellant to remain living in this country. While we do not underestimate

the impact that the loss of such assistance will have on the appellant's daughters, we do not consider that that will have an unduly harsh impact.

85. In the case of Doyinsola, she explained that wrap-around childcare would be unaffordable, and that the shifts worked by her and her partner mean that they are even more reliant on the appellant. We accept this to an extent (although note there is no income and expenditure analysis, nor has the prospect of free or subsidised childcare been explored in relation to J2, who may be eligible given his age), but we do not consider that the impact of remaining in the UK without the appellant would unduly harsh. There is no evidence before us about whether either Doyinsola or her partner could change roles or shifts, to accommodate childcare needs, in the appellant's absence. There is nothing to suggest that the wider family unit could not help, including Damilola.

86. Life would be more challenging for Oyindamola since she is a single parent and her children are younger. However, she lives separately from the appellant and has formed her own family unit. Working parents are eligible for some free childcare in the UK for pre-school children. Again, there are no details as to why such provision would not be available to make the adjustment to the appellant's absence easier, particularly in relation to J2. We accept that the impact would be very difficult, but we do not consider that it reaches the "unduly harsh" elevated threshold.

87. We do not consider the impact on Damilola to reach the "unduly harsh" threshold. She is single and does not live with her parents. The loss of her mother would be significant, but not unduly harsh.

88. While we do not underestimate the impact on the appellant's daughters of their mother being returned to Nigeria, we do not consider the impact upon them to reach the elevated "unduly harsh" threshold. To the extent her return would have a harsh impact on her daughters, it would not be unduly so.

Issue (4): Would the appellant's deportation be disproportionate and therefore unlawful on any other basis?

89. For this part of our analysis we address whether there are "very compelling circumstances over and above" the Exceptions to deportation. Pursuant to *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, while section 117C(6) is not expressly engaged in relation to a foreign criminal sentenced to less than four years' imprisonment, that is an obvious drafting error. Parliament cannot have intended so-called medium offenders to be denied the benefit of an overall ECHR-compliant proportionality assessment in circumstances when serious foreign criminals (that is, those sentenced to at least four years' imprisonment) enjoy the benefit of such an assessment.

90. Factors in favour of the appellant's deportation include:

    a. The deportation of foreign criminals is in the public interest (section 117C(1));

    b. The appellant does not satisfy any of the statutory exceptions to deportation;

    c. The appellant's deportation would not be unduly harsh on BM, her children or her grandchildren;

d. The appellant has persistently and dishonestly sought to evade immigration controls;

e. The appellant is subject to a deportation order;

f. The private and family life built up by the appellant attract little weight;

g. While the appellant would face some obstacles to her integration in Nigeria, she would not face very significant obstacles to her integration;

h. BM would be able to accompany the appellant to Nigeria and the effect on him would not be unduly harsh;

i. If BM chose to remain in the appellant's absence, it would not be unduly harsh for him to do so.

91. Factors mitigating against the appellant's deportation include:

a. The best interests of the appellant's grandchildren are for her to remain in the United Kingdom;

b. The appellant has a close relationship with her daughters and grandchildren that could not be replicated in the event of the appellant's deportation;

c. The appellant's deportation would be very disruptive for the whole family. Two of the appellant's adult daughters would no longer be able to call upon her for childcare, which would lead to financial and emotional hardship;

d. BM would face a significant emotional void in the event of the appellant's deportation, if he were to remain in her absence. If he were to accompany the to Nigeria, the move would be disruptive. The level of healthcare provision would be likely to be less in Nigeria than in the UK, and it would be unlikely to be free at the point of access;

e. The offending for which the appellant's deportation is pursued took place a considerable period ago and there is no evidence that the appellant has re-offended

92. in our judgment, the factors militating in favour of the appellant's deportation outweigh those mitigating against it. The public interest in the deportation of foreign criminals is in the public interest. None of the statutory exceptions to the appellant's deportation are met, and she does not meet the requirements of the Immigration Rules. There is an additional public interest factor in these proceedings in that the appellant's re-entered the United Kingdom in breach of a deportation order, exploiting the dishonest foundations that she laid by the commission of the main offence for which her deportation was pursued in the first place. While her deportation would undoubtedly be deeply disruptive for the broader family, the impact is not such as to amount to a "very compelling circumstance over and above" the statutory exceptions to deportation. The private and family life established by the appellant during the currency of her unlawful residence attracts little weight. While the appellant, and her family, will find the disruption to their family life challenging and difficult, both collectively and individually, the reality is that the only reason that the appellant's family and private life has been established is through the appellant's defiance of the deportation order to which she was subject as long ago as 2006. In our judgment, the cumulative force of these factors is capable of outweighing the best interests of the children involved in these proceedings. We note that the children are one

step removed from the appellant; they are her grandchildren, and, as we have found above, none of them are in a parent-child relationship with the appellant.

93. Drawing these factors together, therefore, we conclude that the appellant's deportation would be proportionate. The appellant may be deported from the United Kingdom without breaching the United Kingdom's obligations under the European Convention on human rights.

94. This appeal is dismissed.

Notice of Decision

The decision of First-tier Tribunal Mulready involved the making of an error of law and is set aside.

We remake the decision, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 by dismissing the appellant's appeal against the Secretary of State's decision dated 20 April 2022 to dismiss her human rights claim.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 August 2024

ANNEX – ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003687
First-tier Tribunal No: HU/52879/2022

THE IMMIGRATION ACTS

Before:

THE HON. MR JUSTICE HENSHAW
UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department — Appellant

And

Abimbola Bolaji — Respondent

(ANONYMITY ORDER NOT MADE)

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer.
For the Respondent: Mr C Coward, of Counsel.

Heard at Field House on 22 November 2023 and 6 February 2024

Decision and Directions

1. The Secretary of State appeals against the decision of Judge of the First-tier Tribunal Mulready (hereafter the "judge") who, in a decision promulgated on 28 July 2023 following a hearing on 13 July 2023, allowed the appeal of Ms Abimbola Bolaji (hereafter the "claimant"), a national of Nigeria born on 10 October 1965, on human rights grounds (Article 8) against a decision of the respondent of 20 April 2022 to refuse her human rights claim of 23 November 2021 for leave to remain as the spouse of Mr Banji Mofolorunsho, a British citizen (BM).

2. As at the date of the decision appealed against and the date of the hearing before the judge, there was an extant deportation order against the claimant. The deportation order was made on 21 September 2006.

3. However, the decision letter did not treat the claimant's human rights claim as an application to revoke the deportation order. The decision letter did not mention the deportation order at all, not even in the narration of the claimant's immigration history. The decision-maker did not apply ss.117A-D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). The decision-maker applied to the claimant's application the criteria applicable to applicants who are *not* subject to a deportation order. The claimant's private life claim was therefore considered under para 276ADE of the Immigration Rules. In relation to the family life claim, the decision-maker stated that the claimant's application did not fall for refusal on suitability grounds and that she did not meet the eligibility requirements (because she did not have leave). The decision-maker then considered EX.1(b) of Appendix FM, i.e. whether there were insurmountable obstacles to family life continuing outside the United Kingdom (the 'insurmountable obstacles' test) and decided that EX.1(b) was not satisfied.

4. The Secretary of State's review dated 21 November 2022 drew attention, inter alia, to the fact that the "*immigration history*" section of the decision letter did not set out the claimant's full immigration history. It proposed a schedule of issues, including "*whether there are grounds to revoke the deportation order made on 21 September 2006 and enforced on 9 October 2006*" (para 1). The review letter stated, inter alia, that the claimant had entered the United Kingdom in breach of the deportation order; that the relevant immigration rule was para 399D of the Immigration Rules (para 2); and that the claimant had not shown that there were very exceptional circumstances to outweigh the public interest in deportation (para 12).

5. Para 399D was considered by the Upper Tribunal (Lane J, the then President, and Upper Tribunal Judge Norton-Taylor) in Binaku (s.11 TCEA; s.117C NIAA; para 399D) [2021] UKUT 00034(IAC). The Upper Tribunal made it clear that para 399D has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6) of the 2002 Act and that the structured approach to be undertaken by a tribunal considering an Article 8 appeal *"in the context of deportation"* begins and ends with Part 5A of the 2002 Act (head-notes (8) and (9) of Binaku).

6. It appears therefore that the Secretary of State's reviewer was unaware of the decision in Binaku which was published on 11 February 2021.

7. At the hearing before the judge, it was agreed by Mr Coward, who represented the claimant, and the Secretary of State's representative (hereafter the "Presenting Officer") that the correct test was the 'insurmountable obstacles' test in Appendix FM.

8. The judge found that there were insurmountable obstacles to family life between the claimant and BM continuing in Nigeria for the purposes of EX.1(b) of Appendix FM. She therefore concluded that the claimant met the requirements of the Immigration Rules and, applying TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, she allowed the appeal.

9. The mistakes on the part of the Home Office were further compounded by the fact that the Secretary of State's grounds of appeal to the Upper Tribunal referred to para 399D of the Immigration Rules and made no mention of ss.117A-D of the 2002 Act.

10. We have to decide whether the judge was correct to apply the 'insurmountable obstacles' test or whether she should have applied the 'unduly harsh' test in s.117C(5).

11. The arguments in favour of the former, in summary, are that the decision that was the subject of the appeal before the judge was a decision which treated the claimant's human rights claim in the same way as a human rights claim by an individual who was not the subject of an extant deportation order, and which therefore focused on whether the claimant

satisfied EX.1.(b) of Appendix FM; and not a decision which considered her human rights claim under ss.117A-D of the 2002 Act.

12. The arguments in favour of the latter, in summary, include the fact that there is an extant deportation order against the claimant and that ss.117A-D is mandatory in all cases "*concerning the deportation of foreign criminal*s" (s.117A(2)(b)).

13. At the commencement of the hearing on 22 November 2023, we observed that it appeared to us that the judge should have applied the 'unduly harsh' test in s.117C(5). The hearing thereafter proceeded on that day on the basis that the 'unduly harsh' test in s.117C(5) was the test that the judge should have applied, without objection by either party. Having reserved our decision at the end of the hearing on 22 November 2023, we decided on reflection to re-list the appeal for a further hearing in order for the parties to address us specifically on whether the correct test was the 'insurmountable obstacles' test or the 'unduly harsh' test. The appeal was therefore re-listed to be heard on 6 February 2024.

14. We deal with the parties' submissions in greater detail below. For the present, it is sufficient to say that Ms Everett submitted that the judge should have applied the 'unduly harsh' test in s.117C(5). Mr Coward submitted that the judge was correct to apply the 'insurmountable obstacles' test. In the alternative, he submitted that she did apply her mind to the 'unduly harsh' test. In the further alternative, Mr Coward submitted that the judge's detailed findings of fact could be relied upon by this Tribunal in re-making the decision in the claimant's favour applying the 'unduly harsh' test. The alternative submissions were argued on the basis, first, that Judge of the First-tier Tribunal Norton-Taylor (as he then was), who had dismissed a previous appeal by the claimant, had applied the 'unduly harsh' test, which was the judge's starting point: and therefore in giving her reasons for departing from Judge Norton-Taylor's decision, the judge was in substance applying the 'unduly harsh' test herself; and second, on the basis that the judge's very detailed findings amounted in effect to a finding that the 'unduly harsh' test was satisfied even though she did not use the words "unduly harsh".

15. In view of Mr Coward's submissions, it is necessary to summarise or quote the decisions of Judge Norton-Taylor and the judge at some length. We set out first the immigration history.

(A) Immigration history

16. We have taken the following immigration history from paras 3-9 of the decision of Judge Norton-Taylor, paras 2-11 of the judge's decision, the Secretary of State's grounds and the grant of permission by the Upper Tribunal.

17. The claimant entered the United Kingdom in 1999 using a false French passport in the name of Marie Mudinet Adebanji. In June 2003, she attempted to make an application for a driving licence using the false identity. She was discovered and arrested. She then left the United Kingdom in 2004 and returned to Nigeria using (it appears) the false French passport. From there, she made an application in her true identity for entry clearance as the spouse of a British citizen, Mr VR. She did not disclose in her application her use of a false identity in the past. In 2004, she re-entered the United Kingdom using (it seems) the false identity once again.

18. The claimant continued to use the false identity once back in the United Kingdom. On 27 April 2006, she was convicted of an offence of shoplifting and fined £200. On 25 May 2006 (the Secretary of State's grounds) or 22 June 2006 (para 4 of the decision of Judge Norton-Taylor), she was convicted of an offence of using a false instrument, namely the false French passport, and sentenced to 12 months' imprisonment. The criminal proceedings were conducted on the basis that the claimant was Marie Mudinet Adebanji, i.e. the false identity.

19. On 5 July 2006, the entry clearance application from 2004 was finally decided and entry clearance granted, valid until 2008, although the claimant was in fact in the United Kingdom then. The decision-maker was unaware of the claimant's repeated use of the false identity.

20. On 10 July 2006, the claimant was notified by the Secretary of State of a decision to make a deportation order against her. On 21 September 2006, the deportation order was signed. All of this occurred with the Secretary of State believing the claimant to be Marie Mudenit Adebanji. On 9 October 2006, she was deported to Nigeria in her false identity.

21. In November 2006, the claimant re-entered the United Kingdom, this time in her true identity and using the entry clearance granted in July 2006 on her application in 2004. When she arrived in the United Kingdom, she did not disclose the fact of her convictions or her deportation. Prior to the expiry of the leave granted pursuant to the entry clearance, she made an application for further leave to remain as the spouse of Mr VR. In December of the following year, fingerprint checks were carried out and the connection between the claimant and the false identity was finally established. Immediate removal action was not taken.

22. Following another unexplained delay, the application for further leave to remain was refused on 21 July 2011, but that decision was not served. Following further correspondence with the claimant's then representatives, in which it was stated that the relationship with Mr VR had broken down, the application was re-refused. The claimant appealed. The appeal was dismissed in a decision promulgated on 20 January 2012, the judge hearing that appeal being completely unaware (through no fault of his own) of the claimant's history of deception.

23. In August 2012, the claimant made another application for leave to remain, this time on the basis of her marriage to BM. They had married earlier that same month. The application was refused with no right of appeal. Judicial review was threatened and then proceeded with, coming to an end in November 2014.

24. In December 2014, another application was made which was refused on 28 February 2017, following yet another delay.

25. The claimant's appeal against the decision dated 28 February 2017 was dismissed by Judge Norton-Taylor in a decision promulgated on 22 January 2019.

26. On 23 November 2021, the claimant made another application for leave to remain as BM's spouse. That is the application that was refused in the decision dated 20 April 2022 which was the subject of the appeal before the judge.

(B) <u>The relevant framework</u>

27. The wording of section 117A-D and of para 399D that we set out below applied as at the date of the decision of Judge Norton-Taylor, the date of the decision in the instant appeal and the date of the hearing before the judge.

28. Sections 117A-D provide, to the extent relevant, as follows:

> **"117A** *Application of this Part*
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B *Article 8: public interest considerations applicable in all cases*

…

117C *Article 8 additional considerations in cases involving foreign criminals.*

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where— …

(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) …

117D Interpretation of this Part
(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;
…
"qualifying partner" means a partner who—

(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who –
  (i) has been sentenced to a period of imprisonment of at least 12 months,
  (ii) has been convicted of an offence that has caused serious harm, or
  (iii) is a persistent offender.

(3) …
(4) …
(5) … "

29. Para 399D of the Immigration Rules reads:

> "399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances."

(C) The decision of Judge Norton-Taylor

30. Judge Norton-Taylor did not have the benefit of the decision in Binaku. The decision that was the subject of the appeal before him applied para 399D (para 13 of Judge Norton-Taylor's decision). The parties agreed before him that para 399D applied (para 16 of his decision).

31. Judge Norton-Taylor found, inter alia, as follows:

(i) The claimant had acted "*with determined dishonesty in respect of her dealings with virtually every authority/agency with whom she has had contact"* (para 35). When she left the United Kingdom in 2004, she did so "*probably to try and avoid criminal proceedings arising from the driving licence matter and returned to Nigeria using the false identity*" (para 38). She made the 2004 application for entry clearance in her true name and dishonestly failed to disclose her previous deception (para 39). She then re-entered the United Kingdom in 2004 using the false identity (para 40) and continued to use the false identity in the United Kingdom (para 41). She failed to disclose her true identity during the criminal proceedings that led to her being convicted on two separate occasions in 2006 (para 42). She maintained her false identity up until and including her deportation from the United Kingdom in October 2006 (para 43). In November 2006, she used the entry clearance granted in her own name to re-enter the United Kingdom (para 58) in breach of the properly served deportation order (para 57) and practised yet more deception by failing to inform the immigration officer of her deportation or any other aspect of her adverse history (para 58). Although it was to the claimant's real credit on a humanitarian level that she took care of an orphan, D, whose own mother had passed away, she deliberately failed to tell the local authority and the Family Court about her immigration history as regards the use of the false identity and the deportation order (para 82).

(ii) The claimant was dishonest in not revealing any of her adverse history during the course of the appellate proceedings in 2012 and that, *"(g)iven the serious problems with the [claimant's] overall credibility, it is difficult to ascertain whether any of the foundation for [the 2012] appeal was in fact true*" (para 61) although Judge Norton-Taylor was willing to accept that there had been a previous relationship which had broken down in 2010 and that the claimant had three adult daughters with BM.

(iii) Judge Norton-Taylor noted the findings of the judge in the 2012 appeal that the claimant had, at least in early 2012, close family members living in Nigeria and that there was no reliable evidence before him (Judge Norton-Taylor) to show that that was no longer the case (para 62). At para 84, he noted her own oral evidence that she had aunties and other extended family in Nigeria. He said that his finding on this issue was therefore in line with that of the 2012 Tribunal.

(iv) The claimant was in a genuine and subsisting relationship with BM (para 64). They married on 20 August 2012 and had been living together since 2010/2011 (para 66). Judge Norton-Taylor accepted that BM would be applying for naturalisation as a British citizen in the near future (para 67). He found that BM had been aware of the claimant's adverse immigration history from an early stage; that BM was aware of the claimant's use of a false identity in either 2004 or sometime thereafter; and that he was aware of her deportation in 2006 (para 68).

(v) In relation to BM's health difficulties, Judge Norton-Taylor said, at paras 69-72, in summary as follows: that he had virtually no independent evidence about BM's medical difficulties; that he accepted that BM had had an eye operation but in the absence of evidence as to why he had had an eye operation and the outcome, he found that the operation was successful and that there were no complications arising. He found that the fact that BM was back at work showed that he had essentially fully recovered from the procedure. He found that BM did not require any particular assistance from others in relation to his eyesight. He accepted that BM suffers from Type II diabetes and hypertension but he had not been provided with any details as to treatment for these two conditions and therefore assumed that relevant medication had been prescribed and was being taken. He rejected BM's oral evidence that the claimant had to remind him of what medication to take, given the lack of evidence to show that BM suffers from mental health problems or forgetfulness and taking into account that his work involves supporting people with learning disabilities. He did not accept that BM's Type II diabetes and hypertension had an effect on his overall quality of life that was anything more significant than relatively minor adverse impact. There was no reliable evidence of any additional functional impairment to any material extent. Although it might be the case that in the course of time BM's health would deteriorate, Judge Norton-Taylor regarded that as being simply too speculative at that juncture.

(vi) Judge Norton-Taylor accepted that the claimant had a close bond with her three daughters, who were British citizens and all financially independent. He found that the financial support being provided by two of the daughters (of a total of between £450 and £500 per month) could continue if the claimant were deported to Nigeria (paras 73-78).

32. Judge Norton-Taylor accepted that the claimant's separation from BM, her daughters and D would cause very real distress to all concerned (para 91); that if BM chose to go to Nigeria this would also cause him and those he would be leaving behind considerable upset and worry (para 92); that although the claimant's two grandchildren would be upset if their grandmother had to leave, they were both very young and there was no reliable evidence to indicate that their wellbeing would be seriously damaged by the claimant's absence from their day-to-day lives. He concluded that their best interests would not be adversely affected by the claimant's deportation; alternatively, if their best interests were adversely affected, this could not be to any significant extent, on the evidence before him. Weighing up all of the factors, he concluded that the claimant's appeal could not succeed "*in the context of the Rules"* (paras 96-106). Para 101, in which Judge Norton-Taylor referred to the 'unduly harsh' threshold reads:

> "101. In light of my findings of fact, **BM could, if he so chose, go to Nigeria with the Appellant. This would not be easy, but it would certainly not be unduly harsh or anything more significant than that. Even if he decided to remain here, I conclude that this would not constitute undue harshness and certainly not a very exceptional circumstance."**
>
> (Our emphasis)

33. Judge Norton-Taylor also found that the claimant's appeal could not succeed in relation to Article 8 outside the Immigration Rules, for reasons which he gave at paras 107-113. It is necessary for us to quote paras 109-113 which read:

> "109. Whilst I fully accept the existence of family and private life in this country (something that is inherent within the assessment under the Rules), there is nothing that can properly be said to be relevant at this stage which has not already been considered under paragraph 399D.
>
> 110. I conclude that the [claimant] cannot succeed on the wider Article 8 assessment.

111. **I will deal with a point which, whilst not raised at the hearing, may appear to represent something of an oddity in the contents of section 117C of the 2002 Act. There is no express equivalent to the elevated threshold in paragraph 399D in respect of those who illegally re-enter the United Kingdom in breach of a deportation order. It cannot be the case, however, that someone in that category who fails under the Rules can then seek to rely on one of the less onerous exceptions under section 117C on the basis that they received a sentence of less than 4 years. This could not be a sensible interpretation of the overall structure and intent of the relevant provisions.**

112. In case it was said that the [claimant] could rely on the unduly harsh test under section 117C(5) (sub-section (4) clearly being inapplicable), I conclude that it would not be unduly harsh for BM to move to Nigeria, or for him to be separated from the [claimant].

113. On my findings, his medical issues are not particularly significant. He has known about the [claimant's] immigration predicament for years now. He is originally from Nigeria. He, like the [claimant], would be able to receive financial support from his children in the United Kingdom. **Alternatively, he would not suffer unduly harsh effects if he remained here.** There are family members to help, if needed. He is still working and able to provide for himself."

(Our emphasis)

(D) The judge's decision

34. The judge set out the positions of the parties in relation to the issues in the case at paras 21-23, which show that the very clear position of the Secretary of State was that the existence of the deportation order was a *factor* to be considered and that the judge had to decide whether there were insurmountable obstacles to family life with BM continuing outside the United Kingdom. Paras 21-23 of the judge's decision read:

"21. **Ms Lafoye [the Home Office Presenting Officer] confirmed that the [Secretary of State's] position is now that the previous deportation order is a factor to be considered** when considering her application for leave to remain as a spouse, and should result in refusal because the existence of the extant deportation order means she falls foul of the suitability requirements in S-LTR.1.2 of Appendix FM to the Immigration Rules. **Ms Lafoye and Mr Coward agreed that as [the claimant] did not meet those suitability requirements, she could not succeed under paragraph 276ADE1(vi) of the Immigration Rules, and so any question of very significant obstacles to integration in Nigeria was not relevant in this appeal.**

23. **… in closing submissions Ms Lafoye stated that she relied on the [Secretary of State's] review, which referred to rule 399D of the Immigration Rules and the question of revocation of the deportation order as an issue in dispute.** [The claimant] has not made an application to revoke the deportation order. **The [Secretary of State's review stated that the [claimant's] application was not treated as an application to revoke the deportation order, and Ms Lafoye confirmed during the hearing this was correct. This is therefore not an appeal against a refusal to revoke a deportation order and the question of revocation is not before me. The deportation order is however a relevant part of the landscape in this appeal.** It means [the claimant] does not meet the suitability requirements in the Immigration Rules, as I have set out above, and therefore cannot meet the requirements in paragraph 276ADE. **It means also that in the event of an Article 8 balancing exercise, there is very heavy weight on the [Secretary of State's] side of the balance sheet, and only very exceptional circumstances on the [claimant's] side would be capable of tipping the balance in her favour."**

(Our emphasis)

35. In reaching her findings, the judge considered, inter alia, and took account of, the oral evidence of the claimant, BM, and two of the claimant's daughters. She set out the oral evidence in considerable detail at paras 36-59. In relation to the medical evidence, she said, at paras 61 and 62:

> (i) A letter dated 16 December 2019 confirmed that the claimant had been diagnosed with severe osteoarthritis. A letter dated 10 September 2020 stated that she had been referred to the talking therapy service; a letter dated 28 January 2021 stated that she was to have physiotherapy in the NHS; a letter dated 10 February 2021 stated that she was to have a colonoscopy; and a letter from her GP dated 11 April 2022 stated that she had been diagnosed with depression and had been prescribed daily medication and talking therapy.
>
> (ii) BM had been diagnosed with diabetes and had problems with his eyesight. He had had multiple operations and treatment for diabetic retinopathy in both eyes. In particular, the judge referred to a letter dated 17 July 2019 confirming that BM had had laser treatment for diabetic retinopathy in both eyes and left eye cataract surgery; a letter confirming uncomplicated surgery had taken place because of a right tractional retinal detachment associated with diabetic retinopathy; and a letter dated 25 November 2020 confirming that he was to have an appointment with the physiotherapist on 9th December. She also referred to a letter from the eye treatment centre at Whipps Cross NHS hospital dated 1 February 2021 confirming that he had attended the clinic there and was given a number of diagnoses in relation to his eyes, including in his right eye pseudo macular hole, proliferative diabetic retinopathy, tractional retinal detachment associated with diabetic retinopathy, pre retinal haemorrhage associated with diabetic retina paper, high risk proliferative diabetic retinopathy, vitreous haemorrhage, and vitreo macular traction; and in his left eye the diagnoses included stable treated proliferative diabetic retinopathy, and mild non proliferative diabetic retinopathy. The judge noted that this letter recorded that retinal laser scars was visible on both eyes; both eyes suffered from mild diabetic macular oedema; and that BM had had multiple operations on his eyes.

36. The judge said (para 65) that she had carefully considered the decision of Judge Norton-Taylor and treated it as a starting point. She summarised the findings of Judge Norton-Taylor at para 66. She said (at para 67) that the claimant's circumstances had changed considerably since the hearing before Judge Norton-Taylor. Para 67 reads as follows, with the main points emboldened by us and with sensitive material omitted:

> "67. I note the previous Tribunal decision was approximately four years and six months ago, and since then the [claimant's] circumstances have changed considerably, and I take those new facts arising since the last decision into account. **The [claimant] now has four grandchildren, whereas then she had only two. The older two are now four years and six months older than they were then, which is a significant length of time in the life of a young child.** They are school children now, with the social life, journeys to and from school, sports days, and school activities that entails, and **the [claimant] playing a significant part in their lives,** including by providing the free, trusted childcare which enables her daughters to go to work. **The [claimant's] health has declined, and she now suffers from depression for which has been prescribed medication, and severe osteoarthritis for which she has received physiotherapy**. The previous judge rightly foretold the possibility of the [claimant's] **husband's decline in health,** and unfortunately that has indeed taken place. There is **extensive medical evidence before me,** which was generated after the previous hearing and so could not have been before the previous judge, which provides the details of that deterioration and is consistent with his evidence as to his physical difficulties in caring for himself without the [claimant's] support. The [claimant's] evidence and his evidence, which was unchallenged, plausible, detailed and consistent with the medical evidence, and which I accept, is that **he now requires support from her as a result. Her sister in law has now sadly passed away, and there was no mention of other relatives remaining in Nigeria,** though I accept there were some there in

2012 which was over 10 years ago; and […] has disclosed sensitive allegations […], which were unchallenged evidence before me, not in evidence before the previous judge, and relevant to […]. These are significant and sufficient reasons to depart from some of the findings of the previous judge."

37. The judge made her findings at paras 68-72 and her conclusion at para 73. Paras 68-73 read (the main points being emboldened by us):

"Findings

68. The [claimant's] husband is a British citizen. He has considerable familiarity with Nigeria – he was born there, has lived there, he had at least one family member living there until recently, and he speaks Yoruba.

69. However **his health difficulties are serious, and chronic,** as detailed in the medical evidence above. For those difficulties he has received support and treatment, free of charge, from a multiplicity of NHS services including the muscular skeletal clinic, and medical staff with expertise in ophthalmology, physiotherapy, and surgery. **Whilst there is healthcare available in Nigeria, as detailed in the CPIN, this is not the same as the considerable free healthcare that the [claimant's] husband accesses in the UK.**

70. **The [claimant's] husband is a father of three adult daughters, a grandfather of four grandchildren, and has a fatherly role in relation to another young man** who is resident in the UK. **All of these relatives of his are British citizens, resident in the UK, and he sees them regularly. Two of his grandchildren stay overnight at his house for a few days every week and all four of them spend time at his house together every weekend.**

71. **He would suffer emotional hardship were he to be parted from the [claimant] t**hrough her return Nigeria and his remaining in the UK, but considering his health, and his close family connections with his children and grandchildren in the UK, **I consider it entirely plausible that he would not move with her to Nigeria.** His evidence and the [claimant's] evidence were consistent and mutually corroboratory on the point. It is not realistic to expect [BM] to leave the free healthcare he needs and receives, as is entirely his right as a British citizen, and his home, his children and grandchildren, his job, and the country of his citizenship in which he has been resident for many years, to relocate to Nigeria. **I accept therefore that he would not go with the [claimant] to Nigeria, and so an analysis of whether there are insurmountable obstacles to her family life with her husband continuing outside the UK means an analysis of whether those obstacles are present if the [claimant] lives in Nigeria, and her husband lives in the UK.**

72. The [Secretary of State] suggests their family life can continue by modern means of communication. **The [claimant] and her husband's family life is far more than communicating.** Their family life includes the time they spend physically together as husband as wife and the **sharing of a home as husband and wife**. It includes **her care for him and her assisting him with his tasks of daily living,** it includes the role they play together in the lives of their grandchildren and children, it includes the **[claimant's] childcare to the grandchildren** which takes place in the home she shares with the [claimant] , and it includes the **emotional support they provide to one another in person**. There is no realistic possibility of this being continued by email, telephone, and video calls. **The [claimant] cannot assist her husband to wash himself unless she is physically with him. She cannot collect their grandchildren from school** and bring them home to the house she shares with her husband, for them both to enjoy the time with their grandchildren, unless she is physically in the UK. **The care she provides for her husband and the childcare she provides for her grandchildren which means they are very often at home with her and her husband, are an integral part of this couple's family life, which would stop were she to move to Nigeria.** Their being in separate countries, and the consequences that flow from that, mean there would be insurmountable obstacles to the continuing of their family life together. **These are very significant difficulties and they cannot be overcome, because there is no realistic prospect of this day to day support and care continuing by email, telephone and video calls, even were it supplemented by his visits to Nigeria. It would also generate serious hardship for the**

> **[claimant] and her husband. She would be living alone in Nigeria without her husband and the children and grandchildren she has devoted herself to caring for over many years; and he would be without his wife as he is at the point of retirement, facing the medical difficulties detailed above, and without the physical and emotional support she provides to him.**
>
> Conclusion
>
> 73. This means that the definition in paragraph EX.2 of insurmountable obstacles in paragraph EX.1.(b) is met in this case, and the [claimant] meets the requirements of the Immigration Rules. Applying TZ and PG, her appeal succeeds.

(E) The correct test

38. Ms Everett accepted that the Secretary of State had made mistakes. The Home Office should have treated the claimant's application for leave to remain as an application to revoke the deportation order but had failed to do so. At the hearing before the judge, the Presenting Officer incorrectly accepted that the applicable test was the 'insurmountable obstacles' test. The Secretary of State's grounds referred to para 399D, which does not apply pursuant to head-note (8) of Binaku. She could not offer any explanations for these mistakes. Nevertheless, it is not correct for us simply to proceed on the basis that the applicable test is the 'insurmountable obstacles' test as opposed to the 'unduly harsh' test.

39. Ms Everett submitted that, although the judge applied the 'insurmountable obstacles' test through no fault of her own, the fact is that the claimant's success in her appeal on the basis of a finding by the judge that there were insurmountable obstacles to family life continuing in Nigeria could not result in the Secretary of State granting her leave to remain. This is because there is an extant deportation order. In order for the claimant to be granted leave to remain, the deportation order would have to be revoked. The deportation order cannot be revoked unless the claimant succeeds in her appeal on the correct basis, in Ms Everett's submission. It does not avail the claimant that she succeeded in her appeal on an incorrect basis.

40. Ms Everett therefore submitted that the correct test was the 'unduly harsh' test as opposed to the 'insurmountable obstacles' test.

41. Mr Coward submitted that the Secretary of State had treated the claimant's application as an application for leave to remain and not as an application to revoke the deportation order. It follows, in his submission, that the judge was correct to apply the 'insurmountable obstacles' test. She cannot be criticised for applying the test that the Secretary of State had applied in the decision letter and which the Presenting Officer had agreed before her was the correct test.

42. We have carefully considered the parties' submissions and ss.117A-D. As has been said on several occasions, the Tribunal is bound to apply ss.117A-D in deportation cases (for example, head-note (4) of Binaku). The question is whether this extends to a case in which the Secretary of State's decision did not deal with a human rights claim under ss.117A-D. Although Ms Everett did not refer us to any authorities in support of her submissions, her submissions were helpful in our consideration of s.117A(1) and (2).

43. Section 117A(1) provides that Part 5A applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998.

44. There is no dispute that the decision was made under the Immigration Acts and that the judge was required to determine whether the decision breached the claimant's rights under Article 8 and as a result would be unlawful.

45. Section 117A(2) is important, in our view. We repeat it here:

> "(2) In considering the public interest question, the court or tribunal must (in particular) have regard —
>
> (a) in all cases, to the considerations listed in section 117B, and
> (b) **in cases concerning the deportation of foreign criminals,** to the considerations listed in section 117C."

(Our emphasis)

46. There is no dispute that the claimant is a foreign criminal

47. The wording of s.117C as a whole does not lend itself readily to a case in which the individual subject to a deportation order has been removed or where the individual has re-entered the United Kingdom in breach of a deportation order. The Tribunal in Binaku considered the authorities and the phrase "*cases concerning the deportation of foreign criminals*" in s.117A(2)(b) and concluded (at para 88) that s.117C applies equally to all three aspects of the deportation regime: pre-removal; exclusion from the United Kingdom once the individual has been removed; and efforts to remove an individual who has re-entered the United Kingdom in breach of deportation order.

48. We are dealing with a different scenario. The claimant's application for leave to remain on human rights grounds was not treated by the Secretary of State as an application to revoke the deportation order and therefore ss.117A-D was not applied by the Secretary of State in the consideration of her application. Her application was instead treated by the Secretary of State as an application for leave to remain under the Immigration Rules, so Appendix FM was applied instead. The parties both agreed before the judge that the correct test was the 'insurmountable obstacles' test.

49. Nevertheless, success by the claimant in her appeal before the judge on the basis that there were insurmountable obstacles to family life continuing in Nigeria could not lead to a grant of leave to remain for as long as the deportation order is extant, as Ms Everett correctly submitted. The only way in which she can obtain leave to remain is to succeed on a basis that leads to the deportation order being revoked, i.e. on the basis that she satisfies at least one of the two Exceptions provided for in s.117C or (if the Exceptions do not apply) if there are very compelling circumstances over and above the Exceptions pursuant to s.117C(6) (which applies whether the sentence was more or less than four years: NA (Pakistan) v SSHD & Ors [2016] EWCA Civ 662 paras 24-27).

50. It follows that this case must be regarded as a ""*case[] concerning the deportation of foreign criminals*" within s.117A(2)(b). Given that ss.117A-D are mandatory, it follows that the Tribunal is obliged to apply s.117C.

51. Expressing the point more generally, we consider that a judge hearing an appeal on human rights grounds by an individual who is the subject of an extant deportation order must apply s.117C in deciding whether the decision is in breach of the individual's human rights, irrespective of whether the Secretary of State has done so in the decision letter. That is because an appeal on human rights grounds by an individual who is the subject of an extant deportation order falls within s.117A(1) and is also a "*case[] concerning the deportation of foreign criminals*" within s.117A(2)(b).

52. It follows that, by virtue of s.117A, the judge was in our view obliged to apply s.117C, notwithstanding the many errors on the part of the Secretary of State as described above and notwithstanding that the parties before her agreed that the applicable test was the 'insurmountable obstacles' test in Appendix FM.

(F) Whether the judge applied the 'unduly harsh' test

53. Before we deal with the judge's decision on this issue, it is relevant to note that, as Binaku makes clear at para 71, the threshold in para 399D is higher than the threshold in s.117C which, in turn, is plainly higher than the threshold for the 'insurmountable obstacles' test in Appendix FM. It is clear from the decision of Judge Norton-Taylor that he applied the para 399D threshold. It is also clear from para 111 of his decision that he was aware that the para 399D threshold was higher than the threshold for the 'unduly harsh' test.

54. Mr Coward submitted that, given that Judge Norton-Taylor applied the 'unduly harsh' test and that the judge in the present case used Judge Norton-Taylor's findings as the starting point from which she departed, the judge applied the 'unduly harsh' test. We cannot accept this. In giving her reasons at para 67 of her decision for departing from the decision of Judge Norton-Taylor, the judge's mind was plainly directed at the threshold for the 'insurmountable obstacles' test. That is abundantly clear from the fact that she had earlier set out (at para 22) the issues that the parties had agreed were in dispute and were to be decided by her. Given that it is plain from the express terms of her decision that she was applying the 'insurmountable obstacles' test, it is impossible to infer that she had applied the 'unduly harsh' test merely by virtue of having stated that Judge Norton-Taylor's decision was her starting point and having noted that Judge Norton-Taylor had made findings about whether the decision in the appeal before him was unduly harsh.

55. For the same reasons, we cannot accept Mr Coward's alternative submission, that the judge's very detailed and thorough reasoning equated to an application by her of the 'unduly harsh' test although she did not use the words "unduly harsh". Whilst we acknowledge that her reasoning is detailed and thorough, it is nevertheless clear, as we have said, that her mind was directed to the lower threshold that applies in deciding whether there are insurmountable obstacles. The s.117C(5) threshold is higher than the test for establishing that the are insurmountable obstacles, and not by a small margin.

56. We therefore reject Mr Coward's alternative submission as well.

57. Finally, we are satisfied that the judge's decision cannot be saved by reason of the fact that she said at para 23 of her decision that she treated the deportation order as a factor weighing heavily in favour of the public interest. This cannot cure the fact that she did not apply the s.117C(5) threshold.

58. At the hearing on 22 November 2023, Mr Coward submitted that the judge was in a specialised Tribunal and can taken to know what the correct test was. In our view, there is no substance in this submission, given that it was agreed before the judge that she should apply the 'insurmountable obstacles' test and that she said in terms that that is the test she applied.

59. For all of the reasons given above, we are satisfied that, through no fault of her own, the judge erred in law by applying the wrong test. An application of the wrong threshold is material because the facts of the claimant's case are not such that it can be said that an application of the correct test would inevitably have led to the same conclusion.

60. We therefore set aside the decision of the judge.

(G) What findings stand in the re-making of the decision on the appeal

(i) The judge's decision

61. We have a discretion in deciding what findings made by the judge should stand in the re-making. However, we remind ourselves that the claimant should not be lightly deprived of findings of fact that are in her favour.

62. The judge's findings of fact and her assessment of whether the facts are such that there are insurmountable obstacles within EX.1(b) of Appendix FM are bound up with each other. We agree with Ms Everett that it is difficult to separate them. Nevertheless, we have considered the judge's decision very carefully to decide what findings can stand.

63. There is no dispute that the claimant has a close relationship with her adult daughters, BM and her four grandchildren. The evidence given before the judge concerning the claimant's involvement in the lives of her adult daughters and her grandchildren was not challenged, as we understand it.

64. Whilst the judge's assessment of the evidence we have referred to in the preceding paragraph stands on the evidence that was before her, updating evidence will be necessary. This can be done in the form of supplemental witness statements to be adopted at the commencement of oral evidence by the witnesses at the next hearing.

65. However, the Secretary of State is not precluded from challenging any issues arising from the updating evidence if it is conflict with evidence that was given before the judge or before Judge Norton-Taylor.

66. Having carefully considered this matter, we have decided not to permit the judge's findings about BM's medical condition and whether he needs the claimant's assistance in caring for himself to stand, nor do we permit the findings of the judge about the appellant's medical condition to stand. Our reasons are as follows:

(i) Although the judge said at para 67 that the claimant's evidence and BM's evidence was *"unchallenged, plausible, detailed and consistent with the medical evidence"*, she did not reconcile BM's evidence that he could not climb the staircase, could not go into the shower and needed his wife to give him a wash with his evidence that his part-time work supporting people with learning disabilities involved taking people out from school, taking them to withdraw money, taking them for holidays, taking them out with two-to-one support, and helping them at home with two-to-one personal care. This issue was specifically drawn to the judge's attention by the Presenting Officer, as is clear from the last sentence of para 64 of her decision, and was relied upon in the Secretary of State's grounds.

(ii) We have noted that the most recent medical evidence in relation to BM was a letter dated 1 February 2021 (AB/77), i.e. nearly 2 ½ years before the hearing date before the judge. This letter appears to be incomplete. An important part of this letter, under the heading "*Management plan/comments*", is missing. Apart from the letter at AB/83 which concerns an appointment at the retina clinic and a letter at AB/87 concerning an eye operation on 15 December 2020, both of which provide some information about the condition of BM's eyes, the remaining letters are to do with appointments for various matters. In any event, there was no up-to-date medical report from the consultant(s) responsible for the treatment of BM's eyes and other medical conditions describing his condition as at the date of the hearing and how it impacted upon his ability to function.

(iii) The most recent medical evidence in relation to the claimant herself was a letter dated 11 April 2022 (AB/58) from her GP, i.e. 1 year 4 months before the date of the hearing before the judge. This letter stated that the claimant had been diagnosed with depression and had had talking therapy. There was no up-to-date medical evidence about the state of her mental health and whether she was still taking medication for depression. A letter dated 26 February 2021 stated that she had had a colonoscopy on two occasions but that the results were inconclusive due to bad bowel preparation (AB/62). There was no evidence to indicate whether this was repeated and, if so, the outcome. There was evidence of osteoarthritis in the right thumb but the letter is dated 16 December 2019 (AB/71), over 3½ years old as at the date of the hearing before the judge, and nothing to indicate whether the management plan proposed in the letter (for the claimant to have an x-ray guided injection) was completed; and, if so, the outcome. There was no report that explained whether the claimant had any material functional disability as a consequence. The remainder of the letters are for various appointments with nothing to show the outcome of any investigations. There was nothing to show that the claimant was still having physiotherapy at the date of the hearing before the judge or how any condition she was suffering from impacted upon her ability to function.

(iv) For the above reasons, it is clear that the judge's findings on the medical conditions of the claimant and BM were made on very limited medical evidence that was in any event old. A further 7 months have elapsed since the date of the hearing before the judge.

67. We make it clear that we do not rely upon anything we have said in the preceding paragraph to reach our conclusion that the judge materially erred in law. We have taken these matters into consideration only in order to decide the ambit of the re-making of the decision on the claimant's appeal in the exercise of our discretion.

68. The judge's very detailed summary of the oral evidence she heard, at paras 36-59 stands as a record of the evidence given before the judge.

(ii) The decision of Judge Norton-Taylor

69. Judge Norton-Taylor set out his findings of fact clearly at paras 35-84. At para 85 onwards, he began his assessment of whether the facts were such that the para 399D threshold was met, making some further findings of fact along the way.

70. In our judgement, paras 35-84 of the decision of Judge Norton-Taylor can therefore readily be used as a starting point pursuant to the guidance in Devaseelan v Secretary of State for the Home Department * [2002] UKIAT 702.

71. However, para 85 onwards of the decision of Judge Norton-Taylor will need to be treated with care. It will be necessary to ignore any findings of fact at para 85 onwards that constitute his assessment of whether the para 399D threshold is met. For example, paras 88 and 90 can be treated in the same way as paras 35-84 but clearly not para 101.

(H) The re-making of the decision on the appeal

72. The first question is whether we can and should re-make the decision on the material before us. If we are able to re-make the decision on the appeal and conclude that the decision on the claimant's appeal from the Secretary of State's decision should be re-made by allowing her appeal, then Mr Coward invited us to do so. If we are unable to allow her appeal, he asked us to remit the appeal to the First-tier Tribunal.

73. Mr Coward submitted that there were sufficient findings in the judge's decision in relation to BM to satisfy the 'unduly harsh' test. In particular, he drew our attention to the fact that BM would be without his wife at the point in his life when he will be retiring. He needs her help to wash himself. She would not be able to assist him in this regard if she left the United Kingdom. The need to wash oneself is a basic need. In his submission, it is difficult to see how it could not be unduly harsh for BM to remain in the United Kingdom without the claimant. In his submission, it beggars belief that the Secretary of State's position in the grounds is that social services can step into the void left by a spouse, especially given that in the instant case the claimant would be leaving BM who is retiring and is unable to wash himself. The nature of the claimant's input into the lives of her daughters and her grandchildren also requires her physical presence. He submitted that the older children would be torn apart if the claimant had to leave the United Kingdom.

74. However, we are unable to re-make the decision on the material before us and conclude the appeal in the claimant's favour given. First, the medical evidence is now quite old as we have explained above. Secondly, and as the Secretary of State's grounds of appeal contend, the judge did not reconcile BM's evidence that his condition is such that he needs the claimant to wash him, with his oral evidence that his part-time work supporting people with learning disabilities involved taking people out from school, taking them to withdraw money, taking them for holidays, taking them out with two-to-one support, and helping them at home with two-to-one personal care. As we have said, this issue was specifically drawn to the judge's attention by the Presenting Officer.

75. Mr Coward's submission about BM's care needs ignores the fact that social services can and do provide such services to people who are unable to care for themselves. On the material before us and given the lack of any up-to-date medical report, it is not clear why (if BM does need such care) he cannot reasonably be expected to receive it in the same way.

76. Mr Coward's submissions regarding the impact on the claimant's children and grandchildren ignore the fact that there is no independent evidence of the impact on the children of the claimant leaving the United Kingdom.

77. For all of the reasons given above, we are unable on the current evidence and findings to find in the claimant's favour on the exception in S.117C(5) nor are we able to decide in her favour on the issue in s.117C(6).

(I) The issues in the re-making of the decision on the appeal

78. The issues to be decided at the next hearing are whether the claimant satisfies at least one of the Exceptions in S.117C and, if not, whether there are very compelling circumstances over and above the Exceptions. The exception in s.117C(5) concerns only the claimant's relationship with BM. In relation to her relationship with her grandchildren, it is difficult to see on the material before us at the present time how the exception in s.117C(5) can apply and therefore it seems to us that the claimant's relationship with her grandchildren will fall for consideration under para s.117C(6) if s.117C(6) is reached.

(J) The Tribunal to re-make the decision

79. We turn now to decide whether the decision on the claimant's appeal should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal.

80. We are mindful of the fact that the claimant succeeded in her appeal before the judge. This is a factor in favour of remittal. However, the Tribunal has the benefit of the judge's detailed summary of the oral evidence and very detailed findings of fact by Judge Norton-Taylor in relation to the claimant's history. As we have said above, there is no dispute that the claimant

has a close relationship with her adult daughters, BM and her four grandchildren. The evidence given before the judge concerning the claimant's involvement in the lives of the grandchildren was not challenged, it seems to us.

81. It is therefore difficult to say that this case falls within para 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. An additional factor in reaching our decision on this issue is the fact that, for the reasons we have given above, it is necessary to treat para 85 onwards of the decision of Judge Norton-Taylor with care when applying the guidance in Devaseelan, in the event that it becomes necessary to take account of para 85 onwards of his decision.

82. In all of the circumstances, we have decided that the decision on the claimant's appeal should be re-made in the Upper Tribunal.

83. The UT will expect to be updated on BM's medical condition and care needs and the claimant's medical condition. The claimant would be well-advised to ensure that she submits in good time, and no later than the dates specified in the Directions below, any evidence upon which she relies in this regard, supported (where necessary) by appropriate up-to-date medical and/or witness evidence as well as evidence as to whether any assistance he may require can be provided, for example, by social services. She would also be well advised to submit independent evidence of the impact on the grandchildren of their being separated from her. The directions below give her six weeks within which to obtain such evidence

DIRECTIONS

1. The appeal to be listed for a resumed hearing on the first available date four weeks after this "Decision and Directions" is sent to the parties. No interpreter will be booked unless the claimant notifies the Upper Tribunal in writing within five days of the date on which the Notice of Hearing is sent that an interpreter is required and the language of interpretation.

2. Within five days of the date on which the Notice of Hearing is sent, the claimant to notify the Tribunal of the number of witnesses who will give oral evidence.

3. Any evidence that the claimant seeks to rely upon must be served **no later than 14 days before the hearing date**. The claimant's bundle must include:

    a. Witness statements of the evidence to be called at the hearing, such witness statements to stand as examination-in-chief so that it is unnecessary for any supplementary questions (beyond the witness confirming identity and address).

    b. A paginated and indexed bundle of all documents to be relied upon at the hearing. Essential passages must be identified in a schedule, or highlighted.

    c. A skeleton argument, dealing with the relevant issues and citing relevant authorities.

4. **If the time limit specified in Direction 3 is not complied with, the claimant is required to make an application (before expiry of the time limit specified in Direction 3) for time to be extended and for permission to be rely upon any material served after expiry of the that time limit.**

Signed: Upper Tribunal Judge Gill

Date: 22 February 2024