Upper Tribunal
(Immigration and Asylum Chamber)

Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15th January 2015	

Before

MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GEORGE JOSEPH CHEGE

Respondent

Representation:

For the Appellant: Ms L Kenny Senior Home Office Presenting Officer
For the Respondent: Mr S Gentili of Islington Law Centre

The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:

i. *is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);*
ii. *if so, does he fall within paragraph 399 or 399A of the Immigration Rules;*

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iii. if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

Compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.

The purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A.

The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8.

It follows from this that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR.

DETERMINATION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of First-tier Tribunal Judge Morgan promulgated on 22nd October 2014 following a hearing on 9th October 2014 to allow the appeal of Mr Chege against a decision to deport him made pursuant to s3 (5) (a) Immigration Act 1971.
2. Permission was granted on the grounds that it was arguable that the First-tier Tribunal had erred in law: "The [sic] overall the findings reached by the IJ were not supported by the evidence and he found compelling compassionate circumstances where none existed, drawing inadequate conclusions about the protection of the public and deterrence from further commission of crime."

Background

3. Mr Chege, a Kenyan citizen, entered the UK aged 26 on 13th January 1995 and claimed asylum. His application for asylum was refused but he was granted exceptional leave to remain until May 2004. In July 2005 he was granted indefinite leave to remain. In 2008 he was convicted of assault and sentenced to 5 months imprisonment and issued with a letter from the Secretary of State warning him that he was liable to deportation as a consequence of having offended but that deportation action was not being pursued at that time. In April 2013 he was convicted of affray and sentenced to 9 months imprisonment. Deportation action was initiated and a decision to make a deportation order was taken on 13th November 2013 and was served on 15th November 2013. The First-

tier Tribunal allowed the appeal "under the Immigration Rules and on human rights grounds".

4. In addition to these two offences, Mr Chege has committed a significant number of other offences: 2 offences against the person; 2 offences against property; 1 theft and kindred offence; 2 public disorder offences; 6 offences relating to police/courts/prisons; 2 drug offences and 8 miscellaneous offences (mainly driving/insurance). His first conviction was on 7th October 1997 and the last conviction immediately prior to the index offence was on 30th July 2010 and he was given a caution on 29th June 2011 for a further offence of affray.

5. Mr Chege was diagnosed HIV positive in 1999. According to the lead GP at Pentonville prison his medical conditions at that time (June 2013) were asthma, HIV infection and anxiety and he recorded that all the conditions were well controlled; he had good prognosis for all conditions "assuming adherence with the prescribed medications". Reports from Dr Maryam Shahmanesh (Senior Clinical Lecturer/Honorary Consultant in sexual health and HIV medicine) stated that Mr Chege has had extremely erratic anti-retro viral use due to "complex psychosocial situation, homelessness and imprisonment". She stated that he would require lifelong treatment and "it is of the utmost importance that he is able to access second line treatment and have the psychosocial stability to support his adherence to his current regimen [sic] for as long as possible". She expressed the opinion that deportation to Kenya would jeopardise his current fragile recovery and that isolation and dramatic change could trigger mental deterioration and erratic engagement with HIV care. In a letter dated 7th October 2014 she stated that she was already seeing evidence that Mr Chege was withdrawing and disengaging and that although he had not ceased adhering to his therapy there was such a risk.

6. Lisa Davies (HCPC Registered and BPS Chartered Forensic Psychologist) expressed the opinion in a report dated 19th May 2014 that Mr Chege would benefit from "urgent psychiatric assessment with specific focus on suicide risk, current mental state and the need for treatment" [sic]. Professor Abou-Saleh (Professor of Psychiatry and Honorary Consultant Psychiatrist) in a report dated 8th October 2014 referred to Mr Chege taking an overdose of his prescribed medication on 26th April 2013 and being discovered by a prison officer. He referred to Mr Chege as saying he tried to hang himself on 3rd May 2013. There is no record of this in the prison medical records. Professor Abou-Saleh stated

> "Mr Chege is currently suffering from mental health problems of depression and cocaine issue, conditions that are aggravated by the threat of deportation and are often associated with demoralisation and hopelessness. I believe he is likely to engage with treatment for his psychiatric conditions if the threat of deportation is removed: Mr Chege had previously engaged with treatment for his psychiatric treatment, which he received from his GP and from HMP medical services.
> Importantly he has attempted suicide in the past and was assessed at high suicide risk when assessed by Ms Lisa Davies in May 2014. In my opinion there is

> a high risk of suicide given his current depressive disorders and ongoing drug misuse and the threat of deportation. He is well supported by his mother with whom he lives. This protective factor has contributed to decreased risk of suicide."

7. Mr Chege was married and has a son born in the UK who is a British Citizen. That marriage broke down many years ago and he has had no contact with his son for many years. There are no contact proceedings. His mother and sister are in the UK. His mother gave evidence at the First-tier Tribunal hearing but his sister did not. From emails it appears that his sister may be in touch with siblings in Kenya but there was little evidence about them other than an email from the sister saying they wanted nothing to do with Mr Chege.

8. Although Mr Chege appealed the decision to deport him on Article 3 and 8 grounds, it was accepted by Mr Gentili before us that Mr Chege did not meet the threshold of Article 3.

9. The First-tier Tribunal found:

> "[16] The key factors identified by Mr Gentili: were the length of the appellant's lawful residence in the United Kingdom, nearly 20 years, and the fact that he has spent well over half of his adult life in the United Kingdom. The fact that all of his close family members are in the United Kingdom and in particular he has been living with his mother who has provided the appellant with significant support. That the appellant has a son in the United Kingdom, now 15 years old, with whom he is still seeking contact. That the appellant no longer has significant ties to Kenya the country of his birth which he has not been back to since coming to the United Kingdom. The appellant's HIV status, diagnosed in the UK in 1999 and the serious consequences to the appellant of the withdrawal of the medication and medical support available in the United Kingdom should the appellant be returned to Kenya. All of these factors are to be weighed in the balance but cumulatively I find that they do not outweigh the public interest in deportation. The only factor in my judgment, which is capable of doing this, is the suicide risk identified within the medical evidence….
> ….
> [19]…I … find there is a significantly increased risk of suicide were the appellant to be informed that he was to be deported to Kenya, arising at all stages of the removal process and following removal. I find these risks are best evidenced in the medical evidence outlined above and the appellant's previous suicide attempts while in prison in the United Kingdom. It is these risks and these risks alone which enable, justify and necessitate a finding that there are exceptional circumstances in this appeal such as to outweigh the significant public interest in deportation. As I have indicated Mr Whitehead, who represented the respondent, did not seek to persuade me that the threshold in *exceptional circumstances* was different to that in *very compelling circumstances* but I find for the sake of completeness that the suicide risk justifies a finding that there are *very compelling circumstances over and above those described in paragraphs 399 and 399A.*
> [20] I have had regard to Part 5A of section 19 of the **Immigration Act 2014.** I have given considerable weight to the public interest question. Section 19 does

not assist the appellant in demonstrating that his removal would be disproportionate. Both representatives accepted that the appellant could not satisfy the requirements of paragraph 117C and in particular the exemptions set out therein, which have now been, adopted partially within the immigration rules. On the contrary these provisions necessitate a finding that the appellant's removal is in the public interest. However as I have indicated the public interest on the particular facts of this appeal is outweighed by the *very compelling circumstances* outlined above."

Legislative framework

10. S19 Immigration Act 2014 inserted Part 5A of the Nationality, Immigration and Asylum Act 2002 with effect from 28th July 2014. All deportation appeals heard after that date, whether the decision to deport or the deportation order was made prior to that date or not, are subject to this new statutory scheme.

11. The amendment to Part 5A reads 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

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

  (a) are less of a burden on taxpayers, and
  (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

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

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

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

(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

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

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires

deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more; "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) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the

sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

12. The Immigration Rules were amended at the same time as s117A to s117D came into effect and read, in so far as relevant to this appeal, as follows:

> "A362.Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
>
> …
>
> 396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.
>
> Deportation and Article 8
>
> A398. These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
>
> (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."

Consideration

13. There had been some discussion before the First-tier Tribunal as to whether the Rules presently in force were the relevant Rules to be considered in determining Mr Chege's appeal or whether the Rules in force at the date of the decision were the relevant Rules. In so far as his appeal was concerned the parties agreed that the outcome would in any event be the same whichever set of Rules was considered. HC 532 provides that "the changes take effect on 28 July 2014 and apply to all ECHR Article 8 claims from foreign criminals which are decided on or after that date". Although this appears on its face to mean a decision by the SSHD, because the Tribunal does not take *decisions* in the context in which that expression is here being used, paragraph A362 refers to the Rules having effect *regardless of when the notice of intention or the deportation order …was served;* the explanatory memorandum at 3.4 and 3.5 talks of harmonisation of the Rules with Immigration Act 2014 and [38] and [39] of YM (Uganda) [2014] EWCA Civ 1292 make clear that irrespective of when the deportation order was signed or a decision to deport made, if the appeal is determined after 28th July 2014, then the Rules in force on that date are the relevant Rules.

14. Mr Chege does not fall within the automatic deportation regime – he has not been convicted and sentenced to detention for a period in excess of 12 months. It was agreed by both parties that he is a foreign criminal as defined in s117D (2) (c) (iii), because he is a persistent offender.

15. The deportation of foreign criminals (s117C (1)) is in the public interest and unless Exception 1 or 2 applies (s117C (4) or (5)) the public interest "requires" deportation. That is however not the end of the required analysis. S117A requires a Tribunal, when called upon 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 when considering the "public interest question" in particular to have regard to the considerations set out in s117B and s117C. S117A (3) further makes clear that the "public interest question" means the question whether an interference is justified under Article 8(2). It is therefore not sufficient to merely consider the factors set out in s117B and s117C in determining whether the interference is justified.

16. There is no contradiction between paragraph A362 which asserts that a claim under Article 8 will *only* [our emphasis] succeed where the requirements of the Rules are met and paragraph 397 which states that a deportation order will not be made if removal would be contrary to the UK's obligations under the Conventions referred to.

17. Paragraph 397 of the Immigration Rules envisages that a deportation order will not be made if removal would be contrary to the UK's obligations under the Human Rights Convention ie under Article 8 in this appeal. If deportation would not be contrary to those obligations then it would only be in exceptional circumstances that the public interest in deportation is outweighed.

18. Paragraphs 398, 399 and 399A of the Immigration Rules apply where a foreign criminal who is liable for deportation claims his deportation would be contrary to the UK's international obligations. Mr Chege, it was agreed, fell within paragraph 398(c) and thus, if he does not fall within paragraph 399 or 399A then the public interest in his deportation would only be outweighed in Article 8 terms "by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A".

19. In the context of this appeal, it was accepted by Mr Gentili both before the First-tier Tribunal and before us that Mr Chege did not fall within either paragraph 399 or 399A: he has neither a partner with whom he has a genuine and subsisting relationship and nor does he have a child with whom he has a genuine and subsisting parental relationship (paragraph 399). He has not been lawfully resident in the UK for most of his life.

20. Although there has been a rule change since MF (Nigeria) [2013] EWCA Civ 1192, it remains plain that the Rules, in so far as deportation is concerned,

remain a complete code for the consideration of whether removal would result in a breach of the UK's obligations under Article 8.

21. As was said in [39] of MF "… the rules expressly contemplate a weighing of the public interest in deportation against 'other factors'…this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account". The Court of Appeal went on to say:

> "42.…the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.
> 43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

22. This approach was approved in AJ (Angola) [2014] EWCA Civ 1636 per Sales LJ at [40]:

> "The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

23. Are the "exceptional circumstances" referred to in paragraph 397 the same as the "other factors" amounting to "very compelling circumstances over and above those described in paragraphs 399 and 399A" capable of outweighing the public interest in deportation referred to in paragraph 398? In our view they are not the same. Although in MF (Nigeria) there is an apparent equating of the two phrases, this was in the context of the rules as they were then drafted, reflecting Strasbourg jurisprudence. In the present rules the question of whether there are "exceptional circumstances" is a question to be asked when and only when it has already been decided that removal would not result in a breach of the UK's obligations under Article 8. The first question to be determined is whether there

would be a breach of the UK's Article 8 obligations and that task is undertaken by assessment through the lens of the rules and Part 5A. This is reflected in the explanatory memorandum that was attached to HC532 (which brought into effect the amendments to the Rules pursuant to the regime introduced by the insertion of Part 5A of the Nationality Immigration and Asylum Act 2002): "outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirements of the rules to be removed from the UK".

24. The purpose of the phrase "very compelling circumstances over and above those described in paragraphs 399 and 399A" ensures that a decision taken by the Secretary of State (and the Tribunal) does not result in a breach of the UK's obligations under the ECHR. This reflects s117A NIAA 2002, which requires particular regard to be had to the criteria in s117B and s117C in determining the "public interest question". It is essential that particular regard and consideration is had to them in the overall assessment of the public interest in deportation.

25. What are "very compelling circumstances over and above those described in paragraphs 399 and 399A" referred to in the closing words of paragraph 398? They can only be circumstances, which are sufficiently compelling to outweigh the public interest in deportation and render such deportation a breach of Article 8. The present Rules set out particular aspects that must be taken into account in the weighing of proportionality; they allow for consideration of other circumstances that may not fall within that rubric but, in the language of the Rules, those circumstances "must be very compelling". The purpose of 398 is to recognise circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within 399 and 399A. It is for reasons that the Rules in the deportation scheme constitute a complete code in relation to Article 8 claims.

26. "Compelling" as an adjective has the meaning of having a powerful and irresistible effect; convincing. In JD (Congo) and others v Secretary of State for the Home Department [2012] EWCA Civ 327, the phrase "some other compelling reason" was considered as one element of the test whereby permission would be granted. Sullivan LJ, at [22] said:

> "...it is important not to lose sight of Lord Dyson's warning [in Cart v the Upper Tribunal [2011] UKSC 28] that "Care should be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case". Undue emphasis should not be laid on the need for the consequences to be "truly drastic".

The annexing of the word "very" indicates the very high threshold that has to be passed to meet the requirements of the Rules.

27. This has the effect that where a person has been sentenced to less than four years imprisonment or the decision to deport has been taken "because, in the

view of the SSHD, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law" (s117D(2)(c), paragraph 398(c)), if they do not meet Exception 1 or 2 (s117C(4) or (5) of NIAA 2002; paragraphs 399 or 399A) there have to be additional 'very compelling circumstances'. Although this appears to be setting a high bar for those who have not been imprisoned for lengthy periods, this only bites if a person does not fall within one of the exceptions (paragraph 398) or is a persistent offender or their offending has caused serious harm. Paragraph 398 codifies Article 8 rights and the displacement of the public interest in deportation.

28. Those individuals who do not come within paragraph 399 or 399A will need to establish very compelling circumstances over and above those described in paragraphs 399 and 399A because nothing else will be weighty enough to outweigh the public interest in deportation.

29. It is at this stage that everything relevant is considered as the decision maker looks at the circumstances not falling within paragraphs 399 and 399A to see whether they outweigh the public interest in deportation. That is the exercise of striking a balance between the competing interests in play, an exercise to be carried out through the lens of the rules, as Sales LJ expressed it, against the backdrop of s117A to s117D of the 2002 Act so that the deportation of foreign criminals is in the public interest and the more serious the offence the greater is the public interest in deportation.

30. Thus the more serious or persistent the offending, the more compelling the circumstances would have to be. This is the consequence of the interplay between s117A(3) NIAA2002, s117C(2) NIAA2002, and paragraph 398 of the Immigration Rules. To construe the Rules in any other way would be to subvert s117A(3) and prevent proper assessment of the UK's obligations under Article 8.

31. In the course of this assessment it is necessary for consideration to be given to broader issues that affect society; the "public interest"; see N (Kenya) [2004] EWCA Civ 1094 [83]:

> "…broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British Citizens who enter and remain in the UK. They include an element of deterrence, to non-British Citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that whatever the circumstances, one of the consequences of serious crime may well be deportation…"

32. In AM [2012] EWCA Civ 1634 Pitchford LJ said [24]:

> Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee

himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder.

33. It follows that the correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider

    a. is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);
    b. if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
    c. if not are there very compelling circumstances over and above those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

    The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8.
    It follows from this that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR.

Mr Chege

34. There is no challenge to the decision by the SSHD that Mr Chege is a foreign criminal because he is a persistent offender.

35. Although the First-tier Tribunal judge refers to s19 Immigration Act 2014 and the immigration rules, he failed to carry out an assessment in accordance with the legal framework we have discussed. He identified that various factors such as length of residence, family, HIV were insufficient to found a successful appeal but then considered that Mr Chege's mental health considerations were sufficient. Although the judge referred to the mental health issues being 'very compelling' there was no identification of this by way of consideration of Mr Chege's criminality. Furthermore the judge failed to factor into his assessment the care Mr Chege would be given during the process of deportation from the UK such as to determine whether that would affect the conclusion that there were very compelling circumstances over and above those in 399 and 399A. The judge failed to assess and consider the public interest in deportation.

36. The assessment was legally flawed and cannot stand.

37. We set aside the decision to be re-made.

38. At the conclusion of the hearing we discussed with the parties the future conduct of this appeal if we were to set aside the FtT decision. It was agreed that if that were the case then the appeal should be remitted to the First-tier Tribunal to be re-heard with no findings preserved.

39. We therefore direct accordingly.

Date

Upper Tribunal Judge Coker