Neutral Citation Number: [2019] EWCA Civ 1139

Case No: C5/2018/2529

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE LINDSLEY
Appeal No DA/00449/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/19

Before :

LORD JUSTICE FLOYD

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE HOLROYDE

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and -

PF (NIGERIA)

Respondent

- -
- -

Rory Dunlop QC and **Jack Anderson** (instructed by **Government Legal Department**)
for the **Appellant**
Abid Mahmood and **Miran Uddin** (instructed by **AM International Solicitors)**
for the **Respondent**

Hearing date: 25 June 2019
Further written submissions: 26 and 27 June 2019

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. Sickle cell disease ("SCD") is a genetic blood disorder resulting from an abnormality in the haemoglobin element in red blood cells, which is prevalent in Africa. Nigeria has the highest burden of SCD in the world: in Nigeria, about 1m people suffer from SCD, with 150,000 births per year of babies suffering from the condition. In addition to longer term medical problems which result in a reduced life expectancy, it typically results in infections and attacks of pain known as "sickle cell crises", for which pain relief and antibiotics (both prophylactic and ameliorative) are given. It is a terrible disease; and one can only have sympathy for those who suffer from it.

2. The Respondent is a Nigerian citizen who has suffered from SCD from birth. He was born and brought up in Nigeria; but came to the United Kingdom in August 1990 when he was 13 years old. He was granted indefinite leave to remain in 2000.

3. He has a lengthy criminal record, including several convictions for drug offences for which he has received substantial prison sentences, the longest being 5 years 8 months' imprisonment imposed for two conspiracies to supply Class A drugs in 2010.

4. In 2013, the Secretary of State made an order for the Respondent's deportation, which the Respondent contested on the ground that his removal would be in contravention of article 8 of the European Convention on Human Rights ("ECHR"). At that time, he was 36 years old and had been in the United Kingdom for 23 years. He had a British partner, and two children who are British citizens. He was also undergoing chronic treatment for his SCD.

5. His appeal was refused by the First-tier Tribunal (Immigration and Asylum Chamber) ("the FtT"); but that decision was set aside by the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") and remade by Upper Tribunal Judge Lindsley in a determination promulgated on 21 May 2018. Judge Lindsley allowed the appeal on the basis that the Respondent's removal would be in breach of both article 3 and article 8 of the ECHR.

6. With permission I granted on 13 December 2018, the Secretary of State now appeals against that determination.

7. Before us, Rory Dunlop QC and Jack Anderson appeared for the Appellant Secretary of State, and Abid Mahmood and Miran Uddin for the Respondent. At the outset, I thank them for their helpful submissions.

The Law

8. By section 3(5)(a) of the Immigration Act 1971, a person who is not a British citizen is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good; and, by section 5(1), in respect of a person liable to deportation, the Secretary of State may make a deportation order requiring him to leave and prohibiting him from re-entering the United Kingdom.

9. The exercise of those powers is governed by sections 32 and 33 of the UK Borders Act 2007 ("the 2007 Act"), which identify circumstances in which the Secretary of

State is required to deport a foreign criminal. So far as relevant to this appeal, they provide as follows:

"**32. Automatic deportation**

(1) In this section "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) …

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) …

33. Exceptions

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies…

…

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights

(b) United Kingdom's obligations under the Refugee Convention.

…

(7) The application of an exception—

(a) does not prevent the making of a deportation order;

> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4.".

The definition of "foreign criminal" in section 32(1) has been maintained throughout various statutory and rule changes (see, e.g., section 117D of the 2002 Act).

10. For the purposes of section 33(2)(a), by section 38(4)(b), "Convention rights" has the same meaning as in the ECHR. Two such rights are in play in this appeal, namely those found in articles 3 and 8.

11. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

12. It is well-established that article 3 may be engaged where removal from the United Kingdom is contemplated in circumstances in which an absence of, or lack of access to, medical treatment in the receiving state will result in a decline in health of the foreign national it is proposed to return.

13. It is equally uncontroversial that article 3 may only prevent removal of a foreign national from the United Kingdom in "very exceptional circumstances". The scope of that phrase in this context was settled so far as domestic law is concerned by the House of Lords in N v Secretary of State for the Home Department [2005] UKHL 31; [2005] 2 AC 296 ("N"). At [50], Lord Hope giving the leading speech set out the test in these circumstances, as derived from the Strasbourg authorities, as follows:

> "…. For the circumstances to be … 'very exceptional' it would need to be shown that the applicant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him to a place which lacked the medical and social services which he would need to prevent acute suffering while he is dying…".

Baroness Hale of Richmond (at [69]-[70]) and Lord Brown of Eaton-under-Heywood (at [94]) framed the test in similar terms. The test was endorsed by the Grand Chamber of the European Court of Human Rights ("ECtHR") in N v United Kingdom (2008) 47 EHRR 39 ("N (ECtHR)"). This so-called "death bed test" was considered to be an appropriate balance between the rights of the individual and the interests of the Contracting States, upon which article 3 places no obligation to alleviate disparities in state provision through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction (see, e.g., N (ECtHR) at [44]).

14. However, the ECtHR has recently revisited where this balance should lie, i.e. what should comprise "very exceptional circumstances" in this context. In Paposhvili v Belgium [2017] Imm AR 867 ("Paposhvili") at [183], the court said:

> "The court considers that the 'other very exceptional cases' within the meaning of the judgment in [N]... which may raise an issue under article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy…".

That is clearly in different terms from those in N. At least to an extent, it appears to widen the scope of "very exceptional circumstances".

15. The consequences of Paposhvili for medical cases in which there is reliance on article 3 have been considered by this court in three subsequent cases: AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64; [2018] 1 WLR 2933 ("AM (Zimbabwe)"), SL (St Lucia) v Secretary of State for the Home Department [2018] EWCA Civ 1894 ("SL (St Lucia)") and MM (Malawi) and MK (Malawi) v Secretary of State for the Home Department [2018] EWCA Civ 2482 ("(MM Malawi)"). The relevant principles were set out in the judgment of Sales LJ (as he then was) in AM (Zimbabwe), with which Patten LJ and I agreed. Those principles were endorsed in the other two cases.

16. The following propositions, relevant to the appeal before us, can be drawn from the cases.

i) Despite the guidance given in Paposhvili, as a result of the principle of *stare decisis* (i.e. the usual rules of precedent in this jurisdiction), the test in N remains binding on this court, and indeed all tribunals and courts in this jurisdiction, subject only to the Supreme Court using its power to overrule it (see AM (Zimbabwe) at [30], MM (Malawi) at [9(i)] and the aptly entitled UT judgment in EA and Others (article 3 medical cases – Paposhvili not applicable) [2017] UKUT 445 (IAC)).

ii) Paposhvili at [183] relaxes the test for violation of article 3 in the case of removal of a foreign national with a medical condition (see AM (Zimbabwe) at [37]-[38], and MM (Malawi) at [9(i)]). Having quoted the relevant part of [183] of Paposhvili, Sales LJ put it thus in AM (Zimbabwe) at [38]:

> "This means that where the applicant faces a real risk of experiencing intense suffering (i.e. to the article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the

> imminence (i.e. likely 'rapid' experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."

In that passage, Sales LJ was expressly paraphrasing Paposhvili, not seeking to redefine it in any way.

iii) Whilst Paposhvili marks a relaxation of the test, Sales LJ considered "it does so only to a very modest extent": the article 3 threshold in medical cases remains high (see AM (Zimbabwe) at [41]-[42], and MM (Malawi) at [9(iii)]).
.

iv) There is a switching burden of proof (see AM (Zimbabwe) at [16], and MM (Malawi) at [9(iv)]). As Sales LJ put it in AM (Zimbabwe):

> "It is common ground that where a foreign national seeks to rely upon article 3 as an answer to an attempt by a state to remove him to another country, the overall legal burden is on him to show that article 3 would be infringed in his case by showing that that there are substantial grounds for believing that he would face a real risk of being subject to torture or to inhuman or degrading treatment in that other country: see, e.g., Soering v United Kingdom (1989) 11 EHRR 439 at [91], which is reflected in the formulations in Paposhvili at [173] and [183]…. In Paposhvili, at [186]-[187]…, the Grand Chamber of the ECtHR has given guidance how he may achieve that, by raising a *prima facie* case of infringement of article 3 which then casts an evidential burden onto the defending state which is seeking to expel him."

17. The Supreme Court has given permission to appeal in AM (Zimbabwe), and I understand that the hearing has been set down for December 2019.

18. Article 8 of the ECHR provides that no public authority will interfere with the right to respect for private and family life except as provided by article 8(2), namely "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". It is uncontroversial that the public interest in deporting foreign criminals generally falls within the categories involving the prevention of crime and public safety.

19. Therefore, as I explained in SL (St Lucia) at [25], although they each seek to translate the value of human dignity and freedom (which is the very heart of the ECHR) into specific rights of individuals and the same factual matrix may coincidentally engage both article 3 and article 8, the focus of and relevant criteria for the two provisions are very different. In particular, it is wrong in principle to consider that an article 3 claim can be treated in the alternative as an article 8 claim with the latter simply having a

"lower" threshold. The threshold criteria are essentially different in nature, not (or, at least, not only) degree.

20. As I described in SL (St Lucia) at [22] and following, the relationship between the article 3 criteria and the article 8 criteria in the context of healthcare cases was considered by this court in MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 ("MM (Zimbabwe)") and GS (India) v Secretary of State for the Home Department [2015] EWCA Civ 40; [2015] 1 WLR 3312 ("GS (India)"), which, in the words of Sales LJ in AM (Zimbabwe) at [6], "brought the test under article 3 and the approach under article 8 into close alignment" in the sense that, if a medical claim fails under article 3, it is unlikely to succeed under article 8. In GS (India), Laws LJ said:

> "86. If the article 3 claim fails (as I would hold it does here), article 8 cannot prosper without some separate or additional factual element which brings the case within the article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in MM (Zimbabwe)… at [23]:
>
> > 'The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported.'
>
> 87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under article 8…".

21. To that, having referred to the same passage from MM (Zimbabwe), Underhill LJ added this (at [111]):

> "I think it is clear that two essential points are being made. First, the absence of inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by

> other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."

22. In SL (St Lucia), it was argued that Paposhvili had in some manner altered the way in which such article 8 claims should be approached. I rejected that argument. Having identified the essential differences between article 3 and article 8, I said this:

> 27. … I am entirely unpersuaded that Paposhvili has any impact on the approach to article 8 claims. As I have described, it concerns the threshold of severity for article 3 claims; and, at least to an extent, as accepted in AM (Zimbabwe), it appears to have altered the European test for such threshold. However, there is no reason in logic or practice why that should affect the threshold for, or otherwise the approach to, article 8 claims in which the relevant individual has a medical condition. As I have indicated and as GS (India) emphasises, article 8 claims have a different focus and are based upon entirely different criteria. In particular, article 8 is not article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria. An absence of medical treatment in the country of return will not in itself engage article 8. The only relevance to article 8 of such an absence will be where that is an additional factor in the balance with other factors which themselves engage article 8 (see (MM (Zimbabwe) at [23] per Sales LJ). Where an individual has a medical condition for which he has the benefit of treatment in this country, but such treatment may not be available in the country to which he may be removed, where (as here) article 3 is not engaged, then the position is as it was before Paposhvili, i.e. the fact that a person is receiving treatment here which is not available in the country of return may be a factor in the proportionality balancing exercise but that factor cannot by itself give rise to a breach of article 8. Indeed, it has been said that, in striking that balance, only the most compelling humanitarian considerations are likely to prevail over legitimate aims of immigration control (see R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 2 AC 368 at [59] per Baroness Hale).
>
> 28. Therefore, in my firm view, the approach set out in MM (Zimbabwe) and GS (India) is unaltered by Paposhvili; and is still appropriate. I do not consider the contrary is arguable."

23. The starting point for consideration of an article 8 claim in this context is now section 32 of the 2007 Act (quoted at paragraph 9 above), which introduced a statutory presumption that the deportation of an offender who has been sentenced to at least 12 months' imprisonment for any crime is conducive to the public good for the purposes

of section 3(5)(a) of the 1971 Act. That presumption can only be rebutted, and automatic deportation constrained, where one of the statutory exceptions applies, including where deportation would be a breach of human rights.

24. These statutory provisions, insofar as they relate to the balance between the public interest in deportation and the human rights of the offender and his family members, have been supplemented by both Immigration Rules and, more recently, further statutory provisions.

25. The relevant rules have regularly changed. Helpfully, the history of these changes until 2012 is set out in the recent majority judgment of Lord Reed JSC in Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799 ("Ali") at [15] and following. I need not repeat that history here. Suffice it to say that, until 9 July 2012, the relevant rules (notably paragraphs 364 and 380) indicated that the public interest in deporting foreign criminals would rarely be outweighed, save in "exceptional circumstances" where deportation would be contrary to the ECHR or the Geneva Convention relating to the Status of Refugees. They therefore acknowledged that deportation might require a proportionality assessment under article 8(2), but did not specifically address how the requirements of article 8 should be considered.

26. That changed on 9 July 2012, when, as a result of Statement of Changes HC 194, an entirely new Part 13 of the Immigration Rules was introduced, to replace the relevant rules with new paragraphs 396-399A. The new rules applied to all those facing deportation after 9 July 2012, regardless of when the notice of intention to deport or deportation order was made.

27. The new rules introduced a structured approach to the consideration of proportionality in deportation cases, including a presumption that the public interest required the deportation of some categories of foreign offender, whilst recognising that article 8 rights might constrain deportation. They imposed a framework informed by the length of sentence, such that those who were sentenced to less than four years' imprisonment could avoid deportation if they could show they fell within particular circumstances identified in paragraph 399 (family life) or 399A (private life). For offenders who fell outside those circumstances, or who were sentenced to four years or more, paragraph 398 provided that "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors", i.e. that, contrary to the general rule that only those who could bring themselves within paragraph 399 or 399A would avoid deportation on article 8 grounds, they could show that it would nevertheless be contrary to article 8 to deport them. "Exceptional circumstances" in this context was held to mean that "very compelling reasons" would be required to outweigh the public interest in deporting such an offender (MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544 ("MF (Nigeria)") at [43], per Lord Dyson MR giving the judgment of the court); in other words, deportation would only be defeated on countervailing article 8 grounds by "a very strong claim indeed" (SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550; [2014] 1 WLR 998 at [54] per Laws LJ).

28. Paragraphs 399 and 399A provided some indication of the sorts of matters which the Secretary of State might regard as very compelling in this context, as did the

Strasbourg jurisprudence. The latter indicated that the following factors would be material: the nature and seriousness of the relevant offences, the length of time elapsed since the offences were committed and the offender's conduct in that period, the solidity of the offender's ties (social, cultural and family) with the host country and the country to which it is proposed to deport him, the age of the offender when he came to the host country and when he committed the offences, the nationality of other persons concerned, the offender's family situation including factors expressing the effectiveness of a couple's family life, whether the offender's partner knew of the offences at the time he or she entered into the relationship, the seriousness of difficulty the partner would likely encounter in the country to which the offender is to be deported, and the best interests of any children including the seriousness of difficulty they would likely encounter in that country (see Ali at [26] and [38]).

29. The policy behind those 2012 rule changes has now been given further effect by statute, namely the Immigration Act 2014. With effect from 28 July 2014, where any court or tribunal is considering the question whether an interference with a person's right to respect for private and family life is justified under article 8(2) ("the public interest question"), Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), inserted by section 19 of the 2014 Act, apply. Like the 2012 Rules to which I have referred, these are "intended to provide a structured approach to the application of article 8 which produces in all cases a final result which is compatible with, and not in violation of, article 8" (Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 662 at [45] per Sales LJ); and they provide an exclusive scheme such that there is no room for a general article 8 evaluation outside those provisions read with the Immigration Rules which supplement them (see NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662; [2017] 1 WLR 207 ("NA (Pakistan)") at [36] per Jackson LJ). That is because, in the Rules themselves, there is provision for not allowing deportation on human rights grounds in circumstances which compel such a conclusion. Again, section 117A(1) confirms that these provisions apply to all circumstances in which the public interest question arises, irrespective of when the deportation order itself was made.

30. In considering the public interest question, section 117A(2) requires the court or tribunal to have regard to the considerations set out in section 117B; and, importantly for this appeal, in cases concerning the deportation of a foreign criminal, also to those set out in section 117C, namely:

> "(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."

31. Given that section 117C(2) provides that there is a direct correlation between the seriousness of offences and the public interest in the deportation of a criminal who commits them, and there is a general correlation between the seriousness of offence and the sentence imposed upon those who commit them, it is unsurprising that the statutory provisions continue to provide for an approach to article 8 claims which is dependent upon the length of sentence that has been imposed upon the potential deportee, with criteria applying to those who are sentenced to at least four years' imprisonment different from those applying to foreign offenders who are sentenced to less.

32. Under section 117C(5), in respect of offenders who are sentenced to less than four years, a deportation order will not be imposed if deportation would be "unduly harsh" upon a child (or partner) with whom the proposed deportee has a genuine and subsisting relationship, i.e. a degree of harshness going beyond what would necessarily be involved for such a person faced with the deportation of a parent (or partner) (KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; [2018] 1 WLR 5273 ("KO (Nigeria)") at [23] per Lord Carnwath of Notting Hill JSC, with whom the rest of the court agreed).

33. Turning to section 117C(6), for offenders who are sentenced to at least four years, or who fall outside the exceptions, the new statutory provisions reflect MF (Nigeria), by adopting the wording "very compelling circumstances" instead of the previous "exceptional circumstances". That is clearly a more stringent test than the "unduly

harsh" test of section 117C(5). At [22] in KO, Lord Carnwath referred to section 117C(6) requiring, "in addition" to the section 117C(5) criteria, "very compelling circumstances". In Secretary of State for the Home Department v JG (Jamaica) [2019] EWCA Civ 982 at [16], having reviewed the relevant authorities, Underhill LJ referred to the need to show that the effect on the relevant child or partner would be "*extra* unduly harsh" (emphasis in the original). However, as Mr Dunlop submitted, that formulation risks masking a difference in approach required by section 117C(5) and (6) respectively: whilst KO held that the former requires an exclusive focus on the effects of deportation on the relevant child or partner, section 117C(6) requires those effects to be balanced against the section 117C(1) public interest in deporting foreign nationals. Under section 117C(6), the public interest is back in play.

34. That does not mean that consideration of "undue harshness" may not be helpful even where section 117C(6) applies. As to the approach to section 117C(6), in NA (Pakistan) at [37], Jackson LJ said this:

> "… [I]t will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within the Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

35. The Immigration Rules were also amended as from 28 July 2014, by Statement of Changes HC 532, to bring paragraphs 398-399A into line with the new statutory provisions. Paragraphs 398-399A now provide (again, so far as relevant to this appeal):

> "398. Where a person claims that their deportation would be contrary to the United Kingdom's obligations under article 8 of the [ECHR], and
>
> > (a) the deportation of the person from the United Kingdom 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 United Kingdom is conducive to the public good and the public interest because they have been convicted of an offence for which they have been sentenced to a period of

imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the United Kingdom 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 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 United Kingdom, and

(i) the child is a British Citizen; or

(ii) the child has lived in the United Kingdom continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would not be reasonable to expect the child to leave the United Kingdom; and

(b) there is no other family member who is able to care for the child in the United Kingdom; or

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

(i) the relationship was formed at a time when the person (the deportee) was in the United Kingdom 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 United Kingdom 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 United Kingdom for most of his life; and
>
> (b) he is socially and culturally integrated in the United Kingdom; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is to be deported.

36. The statutory provisions in sections 117A-117D are, unlike the Immigration Rules (see Ali at [17]), law rather than mere policy. However, both section 117C and the relevant Immigration Rules set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8(2) where there is a public interest in deporting a foreign criminal but countervailing article 8 factors. The force of the assessment in section 117C is, of course, the greater because it directly reflects the will of Parliament. The statutory provisions thus provide a "particularly strong statement of public policy" (NA (Pakistan) at [22]), such that "great weight" should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, "are likely to be a very small minority (particular in non-settled cases)" (Ali at [38]), i.e. will be rare (NA (Pakistan) at [33]).

37. But the required, heavily structured analysis does not eradicate all judgment on the part of the decision-maker and, in its turn, the court or tribunal on any challenge to that decision-maker's decision. It is self-evident that relative human rights (such as the right to respect for family and private life under article 8) can only ultimately be considered on the facts of the particular case. The structured approach towards the article 8(2) proportionality balancing exercise required by the 2002 Act and the Immigration Rules does not in itself determine the outcome of the assessment required to be made in an individual case.

38. Therefore, whether an exception in paragraph 399 or 399A applies is dependent upon questions that require case-specific evaluation, such as whether in all of the circumstances it would not be reasonable for a child to leave the United Kingdom or whether in all of the circumstances there are insurmountable obstacles to family life outside the United Kingdom.

39. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, by section 117C(6) and paragraph 398 of the Rules, the decision-maker, court or tribunal entrusted with the task must still consider and make an assessment of whether there are "very compelling circumstances" that justify a departure from the general rule that such offenders should be deported in the

public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not – indeed, cannot – be taken into account in any general assessment.

The Facts

40. As I have described, the Respondent came to the United Kingdom in August 1990 when he was 13 years old, when he came with his sister on a visitor visa. His visa expired in February 1991, and he remained as an overstayer. In 1996, he had a child, X, with a British citizen, MP, with whom he has had a long-standing intermittent relationship.

41. The Respondent's criminal record began in 1996, when he was convicted on three occasions for various offences for which he received a variety of non-custodial sentences. In June 1997, when he was 20 years old, he was convicted of possession of a Class A drug with intent to supply, and sentenced to four years' detention.

42. In March 2000, he was granted indefinite leave to remain ("ILR") in the United Kingdom.

43. The Respondent's offending continued. In March 2002, he was convicted of using threatening words and behaviour and given a conditional discharge. In November of that year, he was convicted of possessing ammunition without a licence and sentenced to 30 months' imprisonment, and simple possession of cannabis for which a short concurrent sentence was imposed.

44. In 2005, the Respondent applied for British citizenship, which was refused as a result of his failure fully to declare his criminal record.

45. In 2007, he had a second child, Y, with another woman. Y is also a British citizen.

46. In September 2010, after earlier pleading guilty, he was sentenced to 5 years 8 months' imprisonment concurrent on two counts of conspiracy to supply heroin; which triggered, in December 2010, a notice of liability to automatic deportation under section 32 of the 2007 Act.

47. In February 2011, through solicitors, the Respondent responded to the notice submitting that he fell within an exception in section 33, on the basis that his removal would breach his and/or his family's rights under article 8 on account of his ILR, his long residence in the United Kingdom, his long term relationship with MP, and the fact that he had two children, both British citizens who lived here and with whom he had a close relationship. He later made further submissions on the basis that he had SCD, and was receiving on-going treatment which would not be available in Nigeria. In terms of human rights, the Respondent relied upon only article 8. The Respondent also applied for asylum; but he no longer contends that he is entitled to refugee status, and I need say no more about that claim.

48. On 13 February 2013, despite his representations, the Secretary of State made an order for the Respondent's deportation. He appealed; but, in the meantime, was held in immigration detention.

The Appeal Process

49. The appeal process has been, to say the least, long and tortuous.

50. We have not seen the Respondent's original grounds of appeal against the Secretary of State's decision to issue a deportation notice; but we have been told that the ground of appeal was an open human rights ground which neither identified the provision of the ECHR relied upon nor the facts and matters relied upon to show breach. In fact, it initially proceeded on the basis that the Respondent's deportation would breach the article 8 rights of himself and his family.

51. The appeal was allowed by a panel of the FtT (First-tier Judge Herbert OBE and Mr G H Getlevog). In a determination promulgated on 10 July 2013, which seems clearly to have been less than substantively unanimous, it was held that the detrimental effects on his partner and children outweighed the public benefit of his removal, given that the probation officer's report concluded that he posed a low risk of reoffending and a low risk of harm. He was released from detention.

52. The Secretary of State appealed; and, in a determination dated 12 February 2014, a panel of the UT (Mr Justice McCloskey P and Upper Tribunal Judge King), whilst criticising the Secretary of State's approach to the appeal, set aside the FtT determination on the basis that (amongst other things) the two members of that panel "disagreed on virtually all of the main issues", including issues of fact and assessment (see [21]-[22]). The appeal was remitted to the FtT for rehearing.

53. However, the Respondent sought permission to appeal from that determination. That further appeal was dismissed by this court on 12 March 2015 ([2015] EWCA Civ 251). In dismissing the appeal, Sir Stanley Burnton sitting as a judge of this court (with whom Sullivan and Treacy LJJ agreed) said this of the article 8 claim (at [43]):

> "In my judgment, the determination of the [FtT] did not identify, as it should have done, what were the features of the [Respondent's] case that amounted to compelling reasons, or were exceptional circumstances, justifying the success of his appeal. Indeed, I would go further and state that I have been unable to identify in the determination findings of fact that could properly be categorised as exceptional, or amounting to compelling reasons for him to be allowed to remain in this country, given the seriousness of his repeated criminal conduct. I fully recognise that if the judge's factual findings are well founded, there will be a real and damaging impact on his partner and the children; but that is a common consequence of the deportation of a person who has children in this country. Deportation will normally be appropriate in cases such as the present, even though the children will be affected and the interests of the children are a primary consideration. In some cases the family may be able to join the deportee in the country of his nationality, but that was not explored in this case, and I assume was not a real possibility."

The Court of Appeal thus confirmed that the appeal should be remitted to the FtT.

54. In the meantime, in February 2015, the Respondent had a third child, Z, with a third woman. Z too is a British citizen.

55. Then, on 13 December 2016, the Grand Chamber of the ECtHR handed down its judgment in Paposhvili. However, those representing the Respondent did not at that stage consider there was anything in Paposhvili that bore on this case, because N was binding authority and it was accepted that the Respondent did not satisfy the criteria in N.

56. On remittal, after a hearing on 25 May 2017 and in a determination promulgated on 6 June 2017, the FtT (First-tier Judge Metzer) dismissed the appeal. Although several months after Paposhvili, article 3 was not raised, the appeal focusing exclusively on article 8. At [17], Judge Metzer identified the vital issue before him, namely whether the Respondent had established that there were "very compelling circumstances" for the purposes of section 117C(6) of the 2002 Act and paragraph 398 of the Immigration Rules such that his deportation would amount to a breach of article 8. Having briefly set out his offences and his family circumstances (including the fact that his SCD means that he "has times when he is in considerable pain and difficulty", and his removal would lead to distress for his children who could not be expected to move to Nigeria: see [19]-[20]), he concluded that the Respondent had failed to show "very compelling circumstances".

57. The Respondent appealed – still without raising article 3 – and, in a determination promulgated on 7 February 2018, the UT (Lord Boyd of Duncansby sitting as an Upper Tribunal Judge, and Upper Tribunal Judge Lindsley) set aside the determination and retaining the appeal within the UT for redetermination. The tribunal emphasised that the appeal related to article 8, not article 3, so that Paposhvili was irrelevant (see [13]). However, they concluded that Judge Metzer had erred because, in considering the article 8 claim, he had not properly engaged with any systematic assessment of whether there were "very compelling circumstances" in this case, including failing properly to consider the evidence going to the proportionality assessment (see [14]-[17]). There was, for example, no proper consideration of the Respondent's SCD and no proper analysis of the effect his removal would have on each his children, including the evidence of the adult witnesses and expert psychological evidence (see [16]). Mr Mahmood submitted that that reflected his submissions to the tribunal which focused upon the adverse effect that the knowledge that their father (the Respondent) was suffering intensely and then soon dying in Nigeria would have upon the children left in the United Kingdom.

58. Judgment was handed down in AM (Zimbabwe) on 30 January 2018, between the error of law hearing and the remaking hearing in this case. It was that, said Mr Mahmood, which prompted the Respondent to rely on article 3.

59. The remaking hearing was before Judge Lindsley alone. Under the umbrella of the wide ground of challenge in the formal grounds, the Respondent did now rely on article 3; and the Secretary of State apparently made no objection to him doing so. Thus, the judge considered the issues were two-fold: (i) would deportation bring about a real risk of a breach of article 3, and (ii) would it breach article 8?

60. In a determination promulgated on 21 May 2018, first, Judge Lindsley found that deportation would result in a real risk that article 3 would be breached. She accepted

that the Respondent did not satisfy the test in N, i.e. she accepted he was not at real risk of death within a short period of time (see [60]). However, applying Paposhvili (which, following AM (Zimbabwe), she considered she was bound to apply), she concluded that, if the Respondent were deported to Nigeria, there was "a real risk of him rapidly experiencing intense suffering to the article 3 standard because of his [SCD] and the paucity of treatment there…" (see [61]). Her reasons were set out at [61], as follows:

> "… Even in the United Kingdom the [Respondent] is suffering two or three serious and extremely painful life-threatening crises a year requiring hospital admission, and perhaps two more a year which do not require admission to hospital, whilst being subject to constant monitoring and taking prophylactic antibiotics, which the expert medical evidence before me shows would probably not be available to him. Without these drugs he would likely suffer many more infections, and in addition he [would be] likely to suffer from malaria (a condition he has already suffered according to is medical notes) if returned to Nigeria, and would not be likely to find the medical facilities to both provide the heavy-duty morphine pain relief he needs or further antibiotics to treat the infections he has contracted. As a result I can properly conclude that the [Respondent] would face an imminence of intense suffering in the receiving state which would occur due to the lack of treatment which is available in the United Kingdom but is not available in Nigeria."

61. She went on to say that there were no funds to pay for medical treatment in Nigeria, and no close family there to whom the Respondent could turn for nursing and support during a crisis; and thus he also risked being in degrading circumstances because of home conditions during acute crises (see [62]).

62. Although the judge does not appear to have accepted that the shortening of life expectancy met the Paposhvili test in this case, she accepted that there was a real risk of the Respondent dying within a five year period of return (see [60]). In coming to that conclusion she relied particularly upon the evidence of three doctors, the same evidence as that to which she referred in the passage I have quoted in relation to the expected deterioration in his health.

63. Dr Richard Amos is one of the Respondent's treating doctors, who has no first-hand knowledge of the treatment of SCD in Nigeria. However, in a letter to the Respondent's solicitors dated 12 September 2012, he referred to a number of academic papers, including Serjeant GR: Mortality from sickle cell disease in Africa: British Medical Journal 2005; 330: 432-433 ("the Serjeant 2005 paper") which said that the overall effect of high mortality rates, particularly in childhood, is that the median overall survival for patients with SCD in Africa is likely to be less than five years. The original paper was not before the tribunal, nor is it before us now. The other papers referred to by Dr Amos, to which Mr Mahmood especially referred in post-hearing written submissions, largely focused on the very high infant mortality rate for those born in Nigeria who have SCD. Dr Amos said that vital drugs to treat SCD are not available in Nigeria, such as the blood infection prophylactic

phenoxymethylpenicillin (penicillin V) (which the Respondent currently takes daily) and vaccinations. Blood transfusions, he said, are also reported as not being safe.

64. Dr Phillip Abiola is a United Kingdom doctor who works for FEMTA Medical which assists patients abroad (mostly from Nigeria) to obtain medical assistance in the United Kingdom. He said that it was unusual for a SCD patient to live beyond 50 years of age in Nigeria, because facilities were not available to deal with acute crises; and the Respondent would have a significantly reduced life expectancy if he were to be returned.

65. Dr Godwin Sule works with SCD patients at the Karly Medical Clinic in Benin City, Nigeria. He said that for SCD patients in Nigeria, generally speaking, poor medical facilities lead to severe complications and death. 80% of patients die before the age of 35, due to the poor health system and infrastructure. He identified the following as particular problems: lack of immediate adequate medical attention, strikes by medical staff, mosquito-related disease, lack of authentic drugs and difficulties stemming from lack of family support.

66. In his post-hearing submissions, Mr Mahmood referred to other evidence before the tribunal, including a report in the Journal of Interdisciplinary Studies (November 2014), "Building a Solid Health Care System in Nigeria", which stated that the health sector in Nigeria was "comatose" and "a shambles", and that general life expectancy in males is 41 years.

67. Having found that deportation of the Respondent would breach article 3, Judge Lindsley said that it was unnecessary for her to determine any article 8 issue; but she nevertheless proceeded to consider it, and she found that the Respondent's deportation would breach article 8 too.

68. The judge considered the Respondent's "appalling criminal history", including the absence of any definite prospect of rehabilitation, and continued (at [71]):

> "… I find nothing except the medical issues outlined above in the discussion of article 3… can raise, in combination with other factors, a different and sufficient case for the [Respondent's] deportation to also be disproportionate interference with his article 8 rights."

69. She concluded that the deportation would be a disproportionate interference with the Respondent's private life because of the probable medical consequences of his removal as she described in her discussion of the article 3 issue.

70. In respect of family life, she rehearsed the evidence of the Respondent's children and MP (who said that his deportation would "destroy" the children") and of Dr Eldad Farhy, a consultant counselling and psychotherapeutic psychologist who prepared a report dated 7 December 2016 on the likely effect on the children. Dr Farhy concluded that Y would find his deportation "highly upsetting and disruptive", and she is likely to become "upset and her development significantly disturbed". He said that Z would feel that "the state had robbed him of his father". The judge concluded that the fact the Respondent would be subject to "excruciating suffering" on return to Nigeria, and would make his death predictable within five years, would "be over and

above unduly harsh to his children [Y and Z], with whom he has a close and dedicated parental relationship capable of surviving separation in prison" (see [78]). The judge made it clear that these were the only factors, centred on the Respondent's SCD, which made her conclude that there were "very compelling circumstances" for the purposes of section 117C(6) (see [79]).

71. The judge thus found that the Respondent's deportation would breach both article 3 and article 8; and she allowed his appeal from the Secretary of State's decision to make a deportation order against him.

The Grounds of Appeal

72. For the Secretary of State, Mr Dunlop puts forward the following grounds of appeal.

Ground 1: The UT panel erred in its determination of 7 February 2018, in which it held that the Judge Metzer had erred in law in refusing the Respondent's appeal against the deportation order.

Ground 2: In her determination of 21 May 2018, Judge Lindsley erred in applying the test in Paposhvili (rather than the test in N) as the threshold of severity under article 3 of the ECHR.

Ground 3: In any event, in applying the Paposhvili test, Judge Lindsley erred:

i) by making perverse and/or an inadequately reasoned findings that on return (a) the Respondent would "not be likely to find the medical facilities to provide the heavy duty morphine pain relief that he needs", and (b) the Respondent's death within five years would be "predictable"; and

ii) by failing to consider or determine whether the Respondent would suffer "a serious, rapid and irreversible decline" in his health, if he were to be deported to Nigeria.

Ground 4: Judge Lindsley erred in finding that deportation would be a disproportionate interference with the article 8 rights of the Respondent and his family.

73. Under Ground 1, Mr Dunlop submits that the criticism by the UT of the FtT determination was unfounded, because, on examination, Judge Metzer did properly consider all of the evidence and analyse the consequences of deportation for the Respondent's medical condition and for the children. If that ground were to succeed, he submitted, it would not be necessary to consider any of the other grounds: the appeal would succeed, and Judge Metzer's order refusing the Respondent's appeal against the deportation order would be restored.

74. I see the force in that argument; but I would prefer to consider Mr Dunlop's other grounds before returning to Ground 1. I will deal with them in order.

Ground 2: The Applicability of Paposhvili

75. Mr Dunlop submits that Judge Lindsley clearly misunderstood AM (Zimbabwe), rejecting the Secretary of State's submission based on that case that the UT was

bound by N and the new guidance on the article 3 threshold in medical cases given by the ECtHR in Paposhvili was relevant only in the context of whether an appeal, although inevitably refused on the basis of the criteria in N, should be given permission to appeal to give the Supreme Court an opportunity to consider overruling N so far as domestic law is concerned.

76. Before us, Mr Mahmood conceded that the judge erred in this regard; although, he contended that that error was or may have been immaterial because the judge had also allowed the appeal on the alternative article 8 basis.

77. Without any doubt, Mr Mahmood's concession was properly made. With regret, the judge appears to have misunderstood the principle of *stare decisis*, as emphasised in AM (Zimbabwe) at [30] and MM (Malawi) at [9(i)], which requires all courts and tribunals to follow the House of Lords case of N unless and until it is overruled by the Supreme Court. The judge found – as Mr Mahmood again frankly and rightly conceded – that, if deported to Nigeria, the Respondent did not face the risk of imminent death; and thus the criteria in N were not satisfied. On that basis, she was bound to refuse the Respondent's appeal on article 3 grounds. She erred in law in not so doing. The error was clearly material so far as the article 3 claim was concerned.

Ground 3: The Application of the Paposhvili Test

78. However, as I have indicated, if this case does not satisfy the criteria in N but does satisfy those in Paposhvili, then that may be a reason for this court granting permission to appeal to the Supreme Court, or at least staying this appeal pending the outcome of AM (Zimbabwe) in the Supreme Court in which the article 3 threshold will presumably be tested as a matter of domestic law.

79. Judge Lindsley concluded that the Paposhvili test was satisfied in this case; but Mr Dunlop submitted that she erred in making that finding. He contended that she failed to apply the test properly in two respects, namely (i) two of her findings of fact were not open to her on the evidence (see paragraphs 80-87 below), and (ii) she failed to apply the full Paposhvili criteria (paragraphs 88-91 below).

80. As to the first respect, Mr Dunlop submitted that two of the judge's critical findings of fact were legally perverse, in the sense that they could not properly be made on the available evidence, or alternatively they were inadequately reasoned.

81. First, at [61] of her determination, the judge found that the Respondent would "not be likely to find the medical facilities to provide the heavy duty morphine pain relief that he needs". That was a material intermediate finding that led her to the conclusion that the Respondent would risk rapidly experiencing intense suffering to the article 3 standard if he were to be deported. Mr Dunlop submits that there was no evidence before the judge that morphine was not available in Nigeria.

82. In addition, he now seeks to bolster the Secretary of State's case by relying on fresh evidence namely Country of Origin Information in the form of Country Policy and Information Note: Nigeria: Medical and Healthcare Issues (Version 2.0) (28 August 2018) produced for the Home Office by MedCOI, an Asylum and Migration Integration Fund project dedicated to obtaining medical country of origin information reports ("the Med COI Report"). The report says that the infrastructure in Nigeria is

not adequate to look after SCD patients (paragraph 15.1.4), but states that morphine is "widely available throughout the country" (paragraph 13.1.1). Mr Mahmood challenged the reliability of that evidence, as its ultimate source is unknown; but it is independent evidence drawn from research into the situation in Nigeria to the effect that morphine is widely available in Nigeria; and, although produced after the UT determination, there is nothing to suggest that the availability of morphine in Nigeria changed significantly in the course of 2018. The evidence that morphine is widely available in Nigeria is therefore uncontroversial, in the sense that, although there is general evidence about the poor state of healthcare facilities in Nigeria, there is nothing controverting the evidence that morphine is generally available there – indeed, before us, Mr Mahmood again frankly accepted that it is generally available.

83. Mr Mahmood submitted that it was not availability but accessibility to morphine that would be the problem for the Respondent in Nigeria; but, if the Respondent wishes to rely on potential access (rather than availability) difficulties, then he must produce specific evidence of the difficulties upon which he relies, to which the Secretary of State can respond. On the current evidence, there is nothing in this point: there is no evidence that the Respondent will have any particular difficulty in accessing morphine.

84. The availability of antibiotics in Nigeria was not a focus of either party's submissions. The Respondent is currently taking daily penicillin V, and Dr Amos, in his letter of 12 September 2012, says that: "Treatment to prevent serious bacterial infections including daily penicillin V and regular vaccination with Prevener, Pnumovax and Menitorix" are not available in Nigeria. He does not suggest that ameliorative antibiotics are not available to treat infections. Again, if the Respondent wishes to contend that the absence of certain antibiotics in Nigeria will lead to a serious, rapid and irreversible decline in his health that result in him intensely suffering, then that is a case that he must spell out; and to which the Secretary of State must be given an opportunity to respond. On the evidence as it currently stands, such a case – not in the event actively pursued before us – is not made out.

85. The second finding of fact with which Mr Dunlop takes issue is that, on the evidence before her, Judge Lindsley found "there to be a real risk of death to the Respondent within a five year period" (at [60] of her determination); and that his death within that period was "predictable" (at [79]).

86. As I have indicated (see paragraph 63 above), for those findings she relied primarily upon the evidence of Dr Amos derived from his reference to the Serjeant 2005 Paper, but also the evidence of Dr Sule and Dr Abiola. Mr Dunlop submits that that provides no evidential basis for making the finding that the judge did make. He accepts that the medical facilities in Nigeria are not as good as those in the United Kingdom, and that the life expectancy of SCD patients in Nigeria may be significantly lower than in the United Kingdom. However, the judge relied upon a single, second-hand reference from 2005 giving a median figure for life expectancy for those who suffer from SCD throughout Africa which was clearly heavily informed by the very high infant mortality rate – irrelevant in the Respondent's case – to draw an inference in the Respondent's particular case. Even with the (in fact, very limited) supporting evidence of Dr Sule and Dr Abiola, that specific inference cannot be drawn from that general figure even in the unlikely event that that general figure remains good after nearly 15 years.

87. I agree. Mr Dunlop relied upon an article dated 1 July 2016 from a Nigerian on-line news site, "Living with [SCD]", which has as its core message that "People [in Nigeria] with [SCD] can live a normal life and achieve their dreams and aspirations if the condition is well-managed". I see the force in Mr Mahmood's submission that no great weight can be attached to such evidence; although it is at least consistent with Mr Dunlop's main contention that the evidence before Judge Lindsley was not sufficient properly to make a finding that it is predictable that the Respondent's life expectancy would be no more than five years on return. But in any event I agree with Mr Dunlop that, particularly given the high infant mortality rate for those suffering from SCD in Africa and the fact that the five-year life expectancy was merely a median figure (i.e. the value separating the higher half of a data set from the lower half), it is quite impossible to draw the inference drawn by the judge from the evidence available to her. General references to (e.g.) the health care sector in Nigeria being "a shambles" do not assist on this specific point; and the same applies to the additional material to which Mr Mahmood referred post-hearing which emphasises that generally life expectancy in Nigeria is substantially lower than in the United Kingdom. The most that can be said on the evidence, as Mr Dunlop accepts, is that, if he were to be deported, the Respondent's life expectancy would be reduced to some, probably substantial extent.

88. Moving to the second aspect of the application of the Paposhvili test upon which Mr Dunlop focused, he submits that the judge did not apply the correct Paposhvili test, which requires that, as the result of an absence of, or lack of access to, appropriate treatment on return, there is a risk of a "serious, rapid and irreversible" decline in the health of the deportee which causes intense suffering. He submits that the judge did not consider – and certainly did not find – that there would be "serious, rapid and irreversible" decline in the health of the Respondent on return to Nigeria. Although the sickle cell crises and infections he will continue to suffer may become more frequent and more painful, there is no evidence that his underlying condition will decline.

89. Insofar as this submission seeks to divorce underlying condition from symptomology, I do not find it compelling. The question for this court under Paposhvili is whether the judge was wrong to conclude that, if the Respondent were to be deported to Nigeria, due to an absence or the practical unavailability of appropriate treatment, he will suffer a serious, rapid and irreversible decline in his health resulting in intense suffering.

90. In my judgment, on the evidence before Judge Lindsley (and the evidence now before us), that is not a finding that could properly be made.

91. I agree with Judge Lindsley that this is not a case where, upon deportation, death would occur within a short time: indeed, Mr Mahmood did not seek to suggest otherwise. Although morphine and antibiotics are available to treat the inevitable sickle cell crises and infections that the Respondent will continue to have in Nigeria, it is clear from the evidence that health facilities in Nigeria are generally not as good as in the United Kingdom, and, in particular, the facilities for the treatment of SCD are not so good. But that does not make removal to Nigeria of someone who unfortunately suffers from SCD a breach of article 3. The article 3 threshold is still very high; and there is no evidence that the Respondent will suffer anything like the serious, rapid and irreversible decline in his health resulting in intense suffering that is

required by Paposhvili. That is so, whatever the outcome of AM (Zimbabwe) in the Supreme Court may be. Indeed, in my view, serious and painful as the Respondent's condition clearly is, this case falls far short of the article 3 threshold, however it is put.

92. As a result, not only would I allow the appeal on the article 3 ground, I would not grant permission to appeal on the issue to the Supreme Court or issue any stay.

Ground 4: Article 8

93. Finally, Mr Dunlop submits that the judge had no basis for concluding that there were "very compelling circumstances" in this case, such that the deportation of the Respondent would breach the article 8 rights of him and/or his children. The judge gave two grounds for her conclusion.

94. First, at [71], she found that "the medical consequences of his deportation" as she had found in relation to the article 3 ground in themselves would have a disproportionate effect on the Respondent's private life. In my judgment, in making that stark conclusion, Judge Lindsley unfortunately fell into the error identified in GS (India) and SL (St Lucia), by in substance treating the article 8 claim as an article 3 claim with simply a lower threshold.

95. Second, at [78], she found that it would be more than unduly harsh for his children to face his illness and death within five years, such that his deportation would have a disproportionate effect on their family life. Although she also referred to the similar effects on MP, the judge was clear that she considered only the effects on the children were "over and above harsh", and thus satisfied the section 117C(6) test.

96. However, although I accept that section 117C(6) requires an assessment of factors in respect of which the judge below had a wide margin of appreciation, on this issue I find Mr Dunlop's submissions to be compelling. I am persuaded that the judge erred in finding article 8 would be breached if the Respondent were deported.

97. In coming to that conclusion, I have particularly taken into account the following.

i) Whilst honouring the judge's finding that the Respondent, MP and his children have close family ties, as Judge Metzer found, that family life was inevitably "limited" given his periods in custody which were about 12 years in total. For example, Z only saw his father (the Respondent) for one month in the first three years of his life, to 2018. The Respondent and MP have not maintained a family unit, even when he has been at liberty.

ii) As described above, in 2015 this court found that, although the Respondent's deportation would have "a real and damaging impact on [MP] and the children;… that is a common consequence of the deportation of a person who has children in this country" which was not exceptional.

iii) I accept that things have moved on since 2015; and Judge Lindsley had the benefit of further evidence (notably the report from Dr Farhy referred to in paragraph 70 above). X is now an adult. Y is 12 years old, and Z is now 4 years old. Dr Farhy's report dealt with the effects on the children in

paragraph 5. He said that deportation would make Y become "apprehensive, perhaps even anxious or depressed" (paragraph 5.2.1). She would likely be "more upset and her development to be significantly disturbed" (paragraph 5.2.2). Z, being the youngest of the three, is more likely to recover (paragraph 5.2.3). It would "in practical terms mean robbing them [i.e. Y and Z] of their father" (paragraph 5.5.1 of his report). However, the separation of children from a deported parent is an unfortunate but usual consequence of a deportation order. The degree of upset that is contemplated for the children here is unfortunate but clearly not extraordinary; and, in my view, comes nowhere near meeting the unduly harsh test even on the exclusively child-centred approach required by KO, let alone the more stringent "very compelling circumstances" test in section 117C(6) of the 2002 Act.

iv) As Mr Dunlop submitted, the evidence concerning the children did not focus on the effect of the Respondent's illness on them, as did the judge's determination; but it is difficult to see how the Respondent suffering more serious and/or more frequent sickle cell crises in Nigeria could make deportation "over and above" unduly harsh for them. For the reasons I have given, the evidence suggests that the Respondent's life expectancy will be reduced if he is removed to Nigeria; but it does not support a finding that the Respondent will die within the next five years. The fact that the children will, at some stage, have to face the death of their father abroad, again, falls far short of being unduly harsh, let alone a very compelling circumstance.

98. I have considerable sympathy for the Respondent in having to deal with his SCD condition; and every sympathy with his entirely innocent family members. However, I am unpersuaded that the facts of this case identified by the judge in relation to article 8 have any real force; and, in my view, the evidence falls far short of being capable of amounting to even "unduly harsh" for the purposes of section 117C(5) of the 2002 Act let alone "very compelling circumstances" for the purposes of section 117C(6). The Respondent has committed several very serious offences, and in my view the public interest in deporting him as expressed in the statutory provisions and the Immigration Rules overwhelms the rights and interests of the Respondent and his family.

99. The judge consequently erred in concluding that the Respondent's deportation would breach article 8.

Conclusion

100. For those reasons, I would allow the appeal; and, because the evidence only admits one outcome, I would not remit it for rehearing before the UT. Returning briefly to Ground 1, even on the basis that his determination should be read on the assumption that he performed his task properly (see Assad v Secretary of State for the Home Department [2017] EWCA Civ 10 at 27 per Burnett LJ (as he then was)), I accept that the reasoning of Judge Metzer may – and I would go no further than "may" – have been deficient; but his conclusion, dismissing the Respondent's appeal, was in my view inevitable. Any errors on his part were therefore immaterial, and his order dismissing the Respondent's appeal should stand.

101. Therefore, having allowed the appeal, I would simply quash the determinations of the UT promulgated on 7 February and 21 May 2018, leaving in place the determination of the FtT promulgated on 6 June 2017 dismissing the Respondent's appeal against his deportation order. As a result, the deportation order dated 13 February 2013 remains in place.

Lord Justice Holroyde:

102. I agree.

Lord Justice Floyd:

103. I also agree.