Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06132/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 February 2019	**On 08 March 2019**

Before:

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE GILL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr H A
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: In person.
For the Respondent: Mr Z Malik, of Counsel, instructed by the Government Legal Department.

ANONYMITY

We make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
We make this order in order to protect the identities of the appellant's minor children.
The parties at liberty to apply to discharge this order, with reasons.

DECISION AND REASONS

1. This is the re-making of the decision on the appeal of Mr H A who, for convenience, we will refer to hereafter as the "appellant". The appellant is a national of Iraq born on 2 April 1980. His appeal against a decision of the Secretary of State (who we shall

hereafter refer to as the "respondent") of 26 February 2018 (hereafter the "February 2018 Decision Letter") to refuse his human rights claim lodged on 23 January 2018 and therefore to maintain a deportation order signed against him on 31 May 2017 was allowed by Judge of the First-tier Tribunal Gurung-Thapa on human rights grounds in a determination promulgated on 1 October 2018 following a hearing on 13 August 2018. Permission to appeal to the Upper Tribunal was granted by the Upper Tribunal in a decision dated 11 December 2018.

2. At a hearing on 15 January 2019 before Lane J (President) and Upper Tribunal Judge Coker, the Upper Tribunal decided that Judge Gurung-Thapa had materially erred in law in reaching her decision to allow the appellant's appeal on human rights grounds (Article 8). The Upper Tribunal decided to set aside the judge's decision.

3. This appeal was then re-listed for hearing on 13 February 2019 and 15 February 2019 in a list comprising three other appeals (including MS (Philippines) (PA/09214/2017)) which raised issues that required consideration of the judgment of the Supreme Court in KO (Nigeria) and others v SSHD [2018] UKSC 53.

4. The appellant's family life claim is based in his relationship with his partner, Ms NT, a British citizen born on 22 October 1985, and their three children born, respectively, on 17 October 2011, 6 May 2014 and 8 November 2016. The appellant also has a step-daughter (born on 21 April 2004) who is his partner's child. The step-daughter does not live with the appellant and his partner. She lives with his partner's mother who lives nearby. The step-daughter visits the appellant and his partner and also stays with them at weekends. The appellant's private life claim is based on private life developed since he first entered the United Kingdom on 7 July 2000 and difficulties he says he will experience on reintegration in Iraq.

5. The respondent made the deportation order following the appellant's conviction on 15 March 2010 at Chelmsford Crown Court of two offences of assisting unlawful immigration and possessing an improperly obtained identity card and one offence of failing to surrender to custody at the appointed time, for which he received a total sentence of 16 months' imprisonment. According to the judge's sentencing remarks, the appellant was trying to arrange the illegal entry into the United Kingdom of his mother and brother.

Applicable provisions

6. Given that the appellant received a sentence of at least 12 months, he falls within the definition of "*foreign criminal*" in s.117D(2) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). As a consequence, s.117C of the 2002 Act is applicable.

7. Furthermore, given that this appeal is an appeal against the respondent's decision in the February 2018 Decision Letter to refuse the applicant's application for leave to remain on human rights grounds and to maintain the deportation order made against him on 31 May 2017, paras 390, 390A and 391A of the Immigration Rules apply. Para 390 provides that an application for revocation will be considered in the light of all of the circumstances including: (i) the grounds upon which it was made; (ii) any representations made in support of the revocation; (iii) the interests of the community, including the maintenance of effective immigration control; and (iv) the interests of the applicant including any compassionate circumstances.

8. Para 390A states that, where para 398 applies, the Secretary of State will consider whether para 399 or 399A applies and, if it does not, it will be only in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

9. As can be seen from the relevant provisions, which are set out in the Appendix to this decision, s.117C makes provision for two exceptions which are available in cases where a foreign criminal has not been sentenced to a period of imprisonment of 4 years or more. Exception 1 as set out in s.117C(4) is the private life exception and Exception 2 as set out in s.117C(5) is the family life exception. Para 399A of the Immigration Rules sets out in more detail the criteria to be satisfied in relation to Exception 1. Para 399(a) and (b) set out in more detail the criteria to be satisfied in relation to Exception 2.

10. Section 117C(6) provides that, in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. Para 398 makes a similar provision.

11. However, the Court of Appeal held, in NA (Pakistan) and others v SSHD [2016] EWCA Civ 662, that foreign criminals who have not been sentenced to a period of imprisonment of at least 4 years may also seek to establish that there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

The issues

12. The respondent accepts that the appellant's partner and his children are British citizens.

13. In relation to Exception 2, the respondent accepted in the February 2018 Decision Letter that the appellant has a genuine and subsisting relationship with his partner and his children and that it would be unduly harsh for the partner and the children to relocate to Iraq.

14. The respondent did not accept that the appellant satisfied any of the criteria for Exception 1 to apply, nor did he accept that there were very compelling circumstances, over and above Exceptions 1 and 2.

15. Accordingly, the issues before us are as follows:

    i) In relation to Exception 2, whether it would be unduly harsh for the appellant's partner and/or his children to remain in the United Kingdom without him.

    ii) Whether Exception 1 applies.

    iii) If Exceptions 1 and 2 do not apply, whether there are very compelling circumstances, over and above the exceptions.

16. The appellant is entitled to succeed in his appeal if he satisfies any one of (i)-(iii) above.

Immigration history

17. The appellant entered the United Kingdom clandestinely on 7 July 2000. He claimed asylum on the same day. His asylum claim was refused on 15 August 2003. His appeal against the decision was dismissed on 19 January 2004. He exhausted his appeal rights on 5 February 2004.

18. Both before and after his convictions of 15 March 2010, representations were made to the Secretary of State on his behalf. Following his convictions in May 2010, he was notified of his liability to deportation, the first such notice being dated 29 April 2010. Eventually, on 31 May 2017, a deportation order was signed against him. By a decision dated 1 June 2017 (hereafter the "June 2017 Decision Letter"), his further claim to fear persecution and his human rights claim were refused. He lodged an appeal against the refusal on 16 June 2017 but withdrew his appeal on 26 September 2017 on the basis that he had a pending application with the Home Office.

19. On 23 January 2018, the appellant lodged an application dated 20 November 2017 for leave to remain ("LTR") under the 10-year family and private life rules. His human rights claim and application for LTR under the 10-year route were refused for reasons given in the February 2018 Decision Letter. The respondent therefore decided not to revoke the deportation order. The instant appeal is an appeal against the decision to refuse the appellant's human rights claim in the February 2018 Decision Letter.

20. Para 5 of the February 2018 Decision Letter states that the appellant had been removed to Geneva in October 2008 but was encountered in the United Kingdom on 10 June 2009. The appellant does not accept that he was removed from the United Kingdom in 2008.

21. It is clear that the appellant has never had leave to enter or remain in the United Kingdom.

22. The appellant was released from his prison sentence in October 2010 but he was then held in immigration detention until December 2010 when he was released.

"Error of law" decision on 15 January 2019

23. The Upper Tribunal set aside the decision of Judge Gurung-Thapa because it considered that the judge had failed to give adequate reasons for finding that it would be unduly harsh for the appellant's partner and his children to remain in the United Kingdom without the appellant. The Upper Tribunal decided that it would determine all issues afresh.

Documentary evidence

24. Judge Gurung-Thapa had before her a bundle of documents submitted under cover of a letter dated 3 August 2018 by Taj Mughal Solicitors who were then the appellant's representatives. In addition, we have before us the respondent's bundle.

Hearing on 15 February 2019

25. At the commencement of the hearing on 15 February 2019, the appellant confirmed that no further evidence or witness statements had been submitted following the hearing that took place before Judge Gurung-Thapa.

26. The appellant gave oral evidence in English, which he spoke fluently. He also addressed us in response to Mr Malik's submissions.

Summary of the appellant's oral evidence

27. The appellant said that he has lived in the United Kingdom since he was 20 years old. He is now 38 years old. He has therefore lived in the United Kingdom for *"more or less"* half of his life, particularly if the first seven years of his life in Iraq, which he does not recall, are deducted in the calculation of his age.

28. The appellant has lived with his partner since 2006. His partner was only 19 years old when he met her. She is now 33 years of age. Their relationship has lasted 13 years. They are not lawfully married but they went through a religious marriage ceremony in 2009. His partner is a British citizen. He has three children with his partner. The children are all British citizens. His eldest daughter is 7 years old. He has cared for his children and nursed them all of their lives. They have never lived apart. He also has a step-daughter who is a British citizen. His step-daughter lives with his partner's mother.

29. Under cross-examination, the appellant initially accepted that he entered the United Kingdom illegally. Although he accepted that his asylum claim was dismissed in 2004, he said that he did not know that he had no lawful basis to be in the United Kingdom thereafter because of his lack of English, the lack of an explanation and because he was promised that his case would be resolved one day. He has made several attempts to regularise his immigration status.

30. On being pressed, the appellant said that he did not know when he entered the United Kingdom in a lorry that he was entering illegally, although he now understands that he had entered illegally. He then said, on the one hand, that he realised when his appeal was dismissed in 2004 that he had exhausted his case, and, on the other hand, that, when he received the judge's decision dismissing his appeal, he did not have a clear picture because there are many cases of people being refused leave but later being granted leave.

31. Asked if he knew, at the time that he began his relationship with his partner in 2006 and when he married her in a religious marriage ceremony in 2009, that he had no lawful basis to be in the United Kingdom, the appellant said he had never understood the meaning of "*lawful*". It was his understanding that he was not present in the United Kingdom illegally in circumstances where the Home Office knew where he was and he was signing on. The respondent knew his true name, identity and nationality and had his genuine Iraqi passport which was issued by the Iraqi Embassy in 2015. The passport, which expires in 2021, has been in the possession of the respondent since 2015. If the respondent had wanted to arrest him and deport him, he could have done so.

32. The appellant said that he has never received a copy of the deportation order that was issued against him. He has never received any copies of any deportation notices, although he has asked the Home office to provide him with copies.

33. When asked again whether he knew that he had no leave to be in the United Kingdom in 2009, the appellant said he did. However, there was no law against a person who was present illegally in the United Kingdom entering into a relationship.

34. The appellant said that he was granted a work permit from 2001 to 2008 and from 2012 to 2016. He got in touch with the Criminal Casework Directorate and was sent a work permit showing the occupations that were prohibited and the occupations that were permitted.

35. The appellant is not currently working but his partner is working with a company in Manchester as a credit controller. She has worked with the company for 5 to 6 years. His partner currently works full-time. Her hours of work are from 9.15 a.m. to 4.45 p.m.

36. The appellant said that his partner was not present at the hearing before us because she had gone to work. This was because her request for a day off work was refused by her employer and also because she had to drop the children off to school and nursery and pick them up at the end of the day.

37. The appellant said that, whilst his partner is at work, he drops his elder two children at school and his youngest child at nursery. He also picks the children up from school and from nursery.

38. The appellant's partner had said in her witness statement that she had an accident in 2007. The appellant confirmed that his partner is currently in good health. She is not suffering from depression. She has no mental health issues. She suffered from depression after she had a still-birth when he was in prison. She stopped taking medication for depression 2 or 3 years after he was released from detention. He had no medical evidence to support his assertion that his partner had suffered from depression.

39. The appellant confirmed that he was confident that the contents of his witness statement dated 2 August 2018 were true. Asked whether para 14 of his statement, where he confirmed that his partner was suffering from depression which "*has been significantly worsened*" following the stillbirth of their child in 2010 and that she was on prescribed medication, was false, the appellant said that he miswrote para 14: he meant to say that he confirmed that his partner was *not* suffering from depression and was *not* then on medication. He denied that he was trying to mislead the Tribunal.

40. The appellant's children are in good health. The children attend after-school clubs. The school is in same road as their home, 100 metres away. It would be possible for the children to attend the after-school club every day if necessary.

41. Asked whether, if he were to leave the United Kingdom, his partner would be able to continue working and at the same time look after his children, the appellant said that it would be a struggle financially. He did not know how his partner or his children would cope mentally. It is one thing for her to manage without him for the one day that he had to attend his hearing but quite a different thing to expect her to manage without him for 18 years. His partner's father has passed away. Her mother lives about 15-20 minutes' drive from his home. However, it was not possible for her mother to help her because her mother is 67 years old and she is looking after his step-daughter who lives with her. His step-daughter is his partner's daughter. There was no medical evidence concerning the health of his partner's mother, although the appellant's partner had said in cross-examination at the hearing before Judge Gurung-Thapa (para 31 of Judge Gurung-Thapa's decision) that her mother "*suffers from health conditions*".

42. The appellant said that his partner has two brothers who have their own families. The elder brother, who is a prison officer in Redditch, has four or five children. The younger brother, who is not very reliable, has six children by four or five women. His partner's siblings had not provided witness statements because they had not been asked to do so.

43. Asked whether para 12 of his partner's witness statement, where she said she would be unable to work if the appellant were to leave the United Kingdom, was incorrect in view of his oral evidence at the hearing before us, the appellant said that it would be difficult for her to work. She may work part-time or she may not work at all.

44. The appellant denied that he was removed to Geneva in 2008. He said that the judge who decided his appeal had asked the respondent to provide evidence that he had been removed to Geneva but no such evidence was provided.

45. The appellant said that he could not return to Iraq. The situation in Iraq was very bad in 2003 and it is still a war zone at present.

Submissions on behalf of the respondent

46. Mr Malik submitted that the appellant could not meet Exception 1 because he simply had not lived in the United Kingdom for most of his life. The phrase "*most of his life*" means that a claimant must have lived in the United Kingdom for at least half of his life, pursuant to para 53 of SC (Jamaica) [2017] EWCA Civ 2112. It is misconceived for the appellant to suggest that he had lived at least half of his sentient life in the United Kingdom. The phrase "*most of his life*" involves a quantitative evaluation and not a qualitative evaluation. A simple mathematical calculation must be undertaken. Mr Malik submitted that, further and in any event, the appellant had not lived in the United Kingdom lawfully, as he has never had leave to enter or remain. In addition, he had not suggested that there would be very significant obstacles to his reintegration in Iraq.

47. In relation to Exception 2, Mr Malik accepted that the evidence shows that the appellant cares for his children and that there is a loving relationship between him and the children. The respondent does not contend that the children should leave the United Kingdom. Mr Malik accepted that the appellant's removal from the United Kingdom may well end his relationship with his partner and perhaps even the children. However, this would be the usual consequence of deportation. Whilst the circumstances described by the appellant may well give rise to difficulties, the threshold for undue hardship is not reached even if the evidence given in the witness statements of the appellant and his partner is accepted. The threshold is a high one, as is clear from the Supreme Court's judgment in KO (Nigeria).

48. Mr Malik submitted that there were nevertheless difficulties with the evidence in the two witness statements and the appellant's oral evidence. At para 14 of his witness statement dated 2 August 2018, the appellant confirmed that his wife was suffering from depression, that she was taking medication and attending courses, which contradicted his oral evidence before us that she stopped taking medication 2 to 3 years after he was released from prison in 2010. Mr Malik submitted that the appellant's evidence in his witness statement was simply false and that he was seeking to mislead the Tribunal.

49. In addition, Mr Malik submitted that it was clear from the appellant's oral evidence that his partner would be able to continue working as her hours of work would enable her to drop the children off to school and nursery and pick them up after their after-school club. The children are in good health. There is no suggestion that the appellant's presence is needed and no suggestion that the appellant would not be able to maintain contact with his children and partner.

50. Mr Malik submitted that, as the appellant entered the United Kingdom in a lorry, he knew that he was entering unlawfully. He had accepted in evidence before us that he had no lawful basis to be in the United Kingdom after the dismissal of his appeal in 2004. He therefore knew he had no basis to be in the United Kingdom when he entered into his relationship with his partner and when he went through a religious marriage ceremony with her.

51. Although Mr Malik accepted that the respondent had not adduced evidence to show that the appellant was removed to Geneva in 2008, he submitted that this makes no difference. Mr Malik submitted that, even if the appellant was not removed in 2008, he cannot meet the two exceptions nor can he show that there are very compelling circumstances, over and above the two exceptions.

The appellant's submissions

52. In relation to Exception 1, the appellant submitted that he had lived in the United Kingdom for more or less half of his life, "*give or take*". He has completely integrated into society in the United Kingdom and has adapted well. He did not know any English when he arrived but now speaks English fluently. He has obtained a Masters qualification in Construction Project Management, a course which was paid for by his partner's father. He knew Iraq when he left Iraq in 2000. He does not know Iraq now. He has 'married' a black woman and his children are of mixed race. They would not even be able to visit him in Iraq. There is discrimination in Iraq.

53. If the appellant were to leave the United Kingdom, his children would suffer financially and emotionally. He submitted that more crimes are committed by children of single parents. His deportation would also impact upon his partner. She would have to give up work. His partner and his children would then become a burden upon the state. If he were to remain, he would be able to obtain employment. If deported, there would be a 10-year ban.

54. Iraq is a war zone. The Foreign and Commonwealth Office advises British citizens not to travel to Iraq unless absolutely necessary.

55. The appellant said that he was released from his prison sentence nine years ago but he has not been removed. He had asked the Home Office to explain what steps were taken to remove him. He was told that the delay was because of the situation in Iraq. The respondent has had nine years to remove him. During that time, he has been improving his family life and his private life. However, he has been unable to work due to his immigration status and unable to travel. He is unable to take his children on holidays abroad.

56. In the criminal justice system, a sentence of 16 months is spent after 4 years. It has now been 9 years since he was released from his prison sentence but he is still being punished for his crime by this deportation action.

57. The appellant submitted that it would underestimate his relationship with his partner if little weight were to be given to it. His relationship with his partner has always been a subsisting one.

58. We reserved our decision.

ASSESSMENT

59. Before we begin our assessment, we make it clear that we have taken into account all of the documents that are in the bundle that was before Judge Gurung-Thapa and in the respondent's bundle. These include documents from a school and a nursery confirming that the appellant's children attend their institutions and that the appellant drops off his children and picks them up. There is also a letter of support from a family friend (page 61 of the bundle that was before Judge Gurung-Thapa) as well as several photographs. We have also taken into account the witness statement of the appellant dated 2 August 2018 and the witness statement from his partner dated 2 August 2018, although it is clear from the appellant's oral evidence before us that some matters have moved on. For example, the appellant said at para 15 of his witness statement that his partner was working 3 days a week whereas it is clear from his oral evidence that she is now working full-time. We have also taken into account the oral evidence that Judge Gurung-Thapa heard to which she referred, for example, at paras 29 and 31 of her decision.

Exception 1

60. It is necessary for the appellant to show that he has been lawfully resident in the United Kingdom for most of his life. As at the date of the hearing before us, he was 38 years 11 months old. He first arrived in the United Kingdom on 7 July 2000 at the age of 20 years 3 months.

61. We decide the appeal on the basis that the appellant was not removed to Geneva in 2008. The appellant said at the hearing before us that Judge Gurung-Thapa had asked for evidence that he was removed to Geneva but no such evidence was provided.

62. The appellant submitted that he had lived in the United Kingdom for *"more or less"* half of his life and that, given that he does not recall his life in Iraq during the first seven years of his life, he had lived in the United Kingdom for more than half of his sentient life.

63. We reject his submission which, in our judgment, is misconceived. It is clear from para 53 of the Court of Appeal's judgment in SC (Jamaica) that "*most of his life*" is a quantitative concept and not a qualitative concept. The word "*most*" connotes more than half. Given that the appellant is now aged 38 years 11 months old, he must show that he has lived in the UK for at least 19 years 5 months. Even if he was not removed to Geneva in 2008, he has lived in the United Kingdom for 18 years 8 months. This is less than half of his life and therefore it cannot be said that he has lived in the United Kingdom for most of his life.

64. In addition, the appellant cannot satisfy Exception 1 for an alternative reason. He has never had leave to enter or remain. He therefore cannot show that he has been lawfully resident in the United Kingdom.

65. Accordingly, we have concluded that Exception 1 does not apply.

Exception 2

66. At para 23 of its judgment in KO (Nigeria), the Supreme Court said:

> "23. … the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level…. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent…."

67. At para 27, the Supreme Court approved of the guidance given in MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC) as to the meaning of the phrase "*unduly harsh*". Para 27 reads:

> "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
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> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

68. The respondent accepted that the appellant has a genuine and subsisting relationship with his partner and his children. Indeed, based on the documentary evidence before us and the appellant's oral evidence, we have no difficulty in finding that he has a close and loving relationship with his partner and his children. It is clear that he is very much a "*hands-on*" father who is involved in the lives of his children, dropping them off to school and nursery every day and picking them up. We accept that they share other everyday activities that are part of normal family life. At para 11 of his witness statement, he says he is engaged with the religious, educational and physical development of his children. He takes his daughters swimming, to their dance classes and to football. We accept his evidence in this regard.

69. We accept that, if the appellant is removed, his partner and children will be emotionally and psychologically affected. His partner says, at para 4 of her witness statement, that she is emotionally and physically dependent upon the appellant. We accept her evidence. She also says that the appellant attended counselling sessions with her when she suffered from depression following the still-birth of their child in 2010. She says that the children, including her daughter by another father, absolutely adore the appellant. We are prepared to accept that the appellant plays the role of a father in the life of his step-daughter, given that there is nothing to suggest that her biological father has any involvement in her life.

70. Plainly, it would be in the best interests of all the children if the appellant remained in the United Kingdom. They currently have a stable environment with the appellant and his partner playing their individual roles. If the appellant is removed, we accept that this would have a significant impact on the children as well as his partner.

71. However, there is no evidence before us to show that the emotional and psychological impact on the appellant's partner and/or his children would be anything other than that which is ordinarily to be expected by the deportation of a partner/parent.

72. If the appellant is removed, his partner would be left to cope with looking after the children, attending to their many needs as they grow up and dropping them off at school and their various activities, without the appellant's help.

73. The appellant was keen to point out that his partner would not be able to look to her siblings for help or her elderly mother who is already looking after the appellant's step-daughter. Nonetheless, his partner and the children are all in good health, although the partner previously had an accident and had previously suffered from depression. Although it is clear that the appellant's partner is now working full time, her hours of work are such that he accepted that it would be possible for the children to attend after-school clubs every day and for his partner to drop the children off before work and pick them up after work.

74. It was only when it was put to the appellant that para 12 of his partner's witness statement, to the effect that she would be unable to work if the appellant were to leave the United Kingdom, must be incorrect in view of his oral evidence that the appellant said that it would be difficult for his partner to continue working full-time if he were to leave the United Kingdom.

75. In our view, even if it were the case that it becomes difficult for the appellant's partner to continue working full-time or at all, this is no more than the difficulties faced by many single parents working part-time or full-time. It is simply not enough to reach the threshold of undue hardship.

76. It is very likely that the appellant's removal would result in his separation from his partner and his children for at least 10 years, if not permanently. It is far from ideal that the appellant's family in the United Kingdom would only be able to maintain contact with him through Skype and by telephone. These means of communication are no substitute for the appellant's physical presence in the United Kingdom and his day-to-day involvement in the lives of his partner and children.

77. We accept the appellant's evidence that it would be difficult for his partner and his children to visit him, due to financial constraints. He also said that, as his partner is black, he would have concerns for his partner and children as they would not be accepted in Iraq as a mixed race family. The appellant did not submit background evidence to show that his partner and children would experience discrimination in the Iraqi Kurdish Region ("IKR") in northern Iraq, his place of origin, if they were to visit him there. Nevertheless, we accept that, due to his subjective concerns and due to the financial constraints, the likelihood is that the appellant's removal will bring to an end the ability of his children and partner to be in his physical presence for the foreseeable future.

78. Having considered everything in the round and having taken into account the best interests of the appellant's children as a primary consideration, we find that it would not be unduly harsh for the appellant's children to remain in the United Kingdom without him, given the elevated threshold that applies as explained in MK (Sierra Leone). We further find that it would not be unduly harsh for the appellant's partner to

remain in the United Kingdom without him, having given her circumstances separate consideration.

79. Accordingly, we have concluded that Exception 2 in relation to the appellant's children does not apply and, further, that Exception 2 in relation to the appellant's partner does not apply.

Very compelling circumstances, over and above the exceptions

80. In SSHD v OP (Jamaica) [2018] EWCA Civ 316, the Court of Appeal said, at para 17, that:

> "17. A tribunal that is considering the circumstances of a serious offender should first of all consider whether any of those circumstances are of the kind described in the exceptions. It should then consider whether any of the factors identified are of such force, whether by themselves, or taken in conjunction with any other relevant factors not covered by the exceptions to satisfy the 'very compelling' test"

81. In NA (Pakistan), the Court of Appeal held that a deportee could rely, by way of very compelling circumstances, on factual matters falling within the scope of the exceptions and that a person whose circumstances fell exclusively within the exceptions might still be able to demonstrate very compelling circumstances if the factual matters which fell within the exceptions went well beyond what was necessary to make out a bare case under the exceptions. In other words, a foreign criminal can rely on matters within or outside the scope of the circumstances described in the exceptions, but would need to rely on features which made their Article 8 claim "*especially strong*" in the case of an offender sentenced to a period imprisonment of less than 4 years but at least 12 months (para 29 of the judgment) and "*an especially compelling kind … going well beyond what would be necessary to make a bare case of the kind described in Exceptions 1 and 2*" in the case of an offender sentenced to a period of imprisonment of at least 4 years (para 30 of the judgment).

82. At paras 33 and 34 of NA (Pakistan), the Court of Appeal said:

> "33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
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> 34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:
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> > "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.""
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> (our emphasis)

83. We therefore take into account the factual matters we have considered above, in relation to Exception 2 and whether it would be unduly harsh for the appellant's partner and/or his children to remain in the United Kingdom without him.

84. As we said earlier, the appellant was unable to establish Exception 1 because he had not been lawfully resident in the United Kingdom for most of his life. However, he relies upon his integration in the United Kingdom and the difficulties he says he will experience in reintegrating in Iraq.

85. We therefore consider whether there are features of his private life claim that have such great force for Article 8 purposes that, taken together with the features of his family life claim relied upon in connection with Exception 2, make his Article 8 claim especially strong. He has not relied upon any features which do not fall within the ambit of Exceptions 1 and 2.

86. As we said above, the appellant has lived in the United Kingdom for some 18 years 8 months, having arrived at the age of 20 years 3 months. He is now 38 years 11 months old. We find that he will have established private life during the period of his lengthy residence in the United Kingdom. There is some evidence, in the form of the letter of support at page 61 of the bundle that was before Judge Gurung-Thapa and the photographs that are contained in that bundle that he has some friends and associates. However, the evidence before us is limited. We find that his private life in the United Kingdom is not particularly strong, notwithstanding the length of his residence.

87. The fact that the appellant was convicted of the offences for which he received his sentence of 16 months does not, of itself, mean that he is not socially and culturally integrated in the United Kingdom. He is heavily involved in the lives of his partner and children who, as British citizens, have links with the community. There are photographs of the appellant and his family attending a wedding and other social events. He has obtained a Masters qualification in Construction Project Management. He demonstrated a high proficiency in the English language at the hearing before us. On the whole of the evidence before us, we accept that he is socially and culturally integrated in the United Kingdom, albeit that, as we have said above, the evidence before us is such that we find that his private life in the United Kingdom is not particularly strong.

88. Throughout the time that the appellant has established his private life in the United Kingdom, he has not had settled status. The appellant attempted to suggest in oral evidence that he did not know at the time of his entry into the United Kingdom that he was doing so illegally and that he did not know he was present in the United Kingdom unlawfully because he was always signing on and the respondent knew his whereabouts. We have no hesitation in rejecting his evidence in this regard as wholly incredible, for the following reasons:

    i) The appellant entered the United Kingdom illegally in a lorry. We find it wholly incredible, in these circumstances, that he did not know at the time of his entry that he was entering illegally. We are fortified by the fact he was later convicted as a result of his attempts to secure the illegal entry into the United Kingdom of his mother and his brother.

ii) His evidence that he had never understood the meaning of "*lawful*" and that it was his understanding that he was not present in the United Kingdom illegally because the Home Office knew where he was and because he was signing on, is wholly incredible in view of the fact that he made various applications to be permitted to remain in the United Kingdom and the Home Office corresponded with him, as we set out at para 90 below.

iii) His evidence that he has never received a copy of the deportation order that was issued against him and that he has never received any copies of any deportation notices is incredible, given that he appealed against the June 2017 Decision Letter.

89. We find that the appellant knew full well at the time of his entry that he was entering the United Kingdom illegally and that he has known throughout his residence in the United Kingdom that his residence was unlawful. We give little weight to the appellant's private life established in the United Kingdom whilst he has been present unlawfully, pursuant to s.117B(4) of the 2002 Act.

90. The appellant stressed at the hearing that the respondent has delayed in removing him. He said that his Iraqi passport, which he said was issued in 2015, has been in the possession of the respondent who he said has failed to remove him notwithstanding that he has been signing on and the respondent was aware of his address. The appellant was convicted on 15 March 2010. Nearly nine years have elapsed since. However, we have noted, from paras 6 to 16 of the February 2018 Decision Letter as follows:

i) The respondent notified the appellant of his liability to automatic deportation on 29 April 2010. He did not respond as he claimed that the document did not have his correct details.

ii) On 16 September 2010, his legal representatives stated that his life would be in danger in Iraq due to his partner's ethnicity in the United Kingdom.

iii) On 14 October 2010, a notification of his liability to deportation was re-served with the correct person details. On 19 October 2010, his legal representatives stated that he came to the United Kingdom to claim asylum and that he still feared return on that basis. In addition, he claimed that his life would be in danger due to the ethnicity of his wife and that his removal would be in breach of Article 8.

iv) On 29 March 2012, his legal representatives made further submissions in reliance upon Articles 2, 3 and 8 and the judgment in Zambrano [2011] EUECJ C-34/09.

v) On 17 May 2013, the appellant was served with a status questionnaire to which he replied stating "*No evidence has been submitted as it has not been requested anywhere in the questionnaire".*

vi) On 4 June 2013, the respondent wrote to the appellant stating that the onus was on him to provide evidence of what he was seeking to rely on. The letter gave him two weeks in which to respond.

vii) On 18 June 2014, the appellant was served with a further status questionnaire.

viii) On 2 September 2016, the appellant was sent a decision to make a deportation order by recorded delivery. On 28 September 2016, the decision letter was returned to the Home Office as "*un -called for*".

ix) On 23 November 2016, he submitted a family/private life claim under the 10-year route, LTR(E) application.

x) On 1 June 2017, he was served with the June 2017 Decision Letter which refused his application of 23 November 2016, the deportation order having been issued on 31 May 2017.

xi) On 16 June 2017 the appellant lodged an appeal but he withdrew the appeal on 26 September 2017 as he had a pending application with the Home Office.

xii) On 23 January 2018, the appellant submitted a Family/Private life 10-year LTR(E) application dated 20 November 2017 which was considered in the February 2018 Decision Letter.

91. We find that the above history shows that the respondent has acted with reasonable promptness in dealing with the appellant's case. We find that the appellant has contributed to the delays by making various applications, including a claim to fear persecution in Iraq because his mother had allegedly threatened him on account of his mixed race 'marriage'. The June 2017 Decision Letter considered his asylum claim in detail. His appeal against the decision was withdrawn and he has not pursued his claim that he still fears persecution in Iraq in the instant appeal.

92. In these circumstances, it does not behove the appellant to raise the respondent's delay in removing him, in our judgment. More importantly, we are satisfied that the public interest in his deportation is not reduced to any significant extent solely as a consequence of the delay.

93. In any event, the effect of the delay was that it enabled the appellant to strengthen his private life ties in the United Kingdom and his family life, which we have considered in reaching our overall conclusions in this appeal.

94. In his witness statement, the appellant expressed his regret for committing the offences of which he was convicted in March 2010 and said that he has not been convicted of any other offences since.

95. However, in Danso v SSHD [2015] EWCA Civ 596, the Court of Appeal said, at para 20, that rehabilitation and the lack of subsequent offending are not uncommon and do not contribute greatly to the existence of very compelling circumstances required to outweigh deportation, although it may amount to an important factor in a few cases.

96. In our view, there is nothing in the appellant's case which justifies treating the fact that he has not committed any further offences as an important factor or one which contributes in any way in his favour in our assessment of whether there are very compelling circumstances, over and above the exceptions. This is not one of the few cases in which rehabilitation and the lack of subsequent offending amount to an important factor. This is because the appellant has not produced anything to suggest that these considerations should be regarded as important factors in his particular case.

97. In his submissions, the appellant said that he had served his sentence and his sentence has become spent, and yet he is still being punished for his crime. This is an empty point, given that the criminal justice system and the system of immigration control serve different functions.

98. In considering the appellant's circumstances on return to Iraq, we remind ourselves of para 14 of the judgment of the Court of Appeal in SSHD v Kamara [2016] EWCA Civ 813, which reads:

> "14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

99. We noted that, according to the June 2017 Decision Letter, the appellant was born in Suleimaniya in northern Iraq in the IKR. In his oral evidence before us, he said that the respondent is in possession of his Iraqi passport, issued by the Iraqi Embassy in 2015 and valid until 2021.

100. The country guidance in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) was considered by the Court of Appeal in AA (Iraq) v SSHD [2017] EWCA Civ 944. The revised country guidance is to be found in the Annex to the Court of Appeal's judgment. It is clear from the revised country guidance that the appellant, being an Iraqi Kurd who originates from the IKR, would be returned to the IKR.

101. In his witness statement dated 2 August 2018, the appellant said that he is not in contact with any relatives in Iraq. We treat his evidence that he is not in contact with any relatives in Iraq with great scepticism, for the following reasons:

i) According to the June 2017 Decision Letter, he had claimed to be in fear of his mother who he said had threatened him on account of his mixed race 'marriage'. His appeal against the respondent's decision in the June 2017 Decision Letter to refuse his asylum claim was withdrawn and he has not pursued this aspect of his case in the instant appeal.

ii) His evidence at the hearing before us that the respondent had delayed in removing him is disingenuous given the various applications that he made and the letters that were sent to him by the Home Office, as we have set out above.

iii) We agree with Mr Malik that the appellant attempted to mislead the Tribunal at para 14 of his witness statement dated 2 August 2018 where he confirmed that his partner was suffering from depression, that her condition had significantly worsened following the stillbirth of their child in 2010 and that she was on prescribed medication. It is clear that that evidence cannot have been true at the date of his statement given his oral evidence that his partner stopped taking medication 2 or 3 years after he was released from detention in 2010. We do not

accept his explanation that he miswrote para 14, i.e. that he had meant to confirm that his partner was *not* suffering from depression and she was *not* then on medication. This would simply make no sense of the sentences in question bearing in mind, in particular, that he said that his partner's condition had significantly worsened.

iv) As we have said above, his evidence at the hearing that he did not know when he entered the United Kingdom that he was entering illegally is incredible, given that he entered in a lorry clandestinely.

102. However, even if the appellant is not in contact with his mother and brother and even if he chooses to relocate in the IKR away from the place or town where they live, we note:

i) He is a Muslim by religion and a Kurd by ethnic origin.

ii) He studied in Suleimaniya until 1998.

iii) He was employed from October 1998 until 2000, during which time he worked illegally in Suleimaniya selling alcohol and tobacco between Suleimaniya and Iran.

iv) In the determination of his asylum claim, which was dismissed in January 2004, the judge noted that he spoke Kurdish Sorani (para 12 of the June 2017 Decision Letter).

v) As he has a valid passport, we find that he will be to establish his identity and origin in seeking employment in the IKR.

vi) Whilst in the United Kingdom, he has obtained a Masters qualification in Construction Project Management, a qualification which will stand him in good stead in seeking employment in the IKR.

103. Whilst the general security situation in the IKR may not be ideal, it cannot be said that the situation in the IKR is a war zone, as the appellant contended at the hearing. The current country guidance does not suggest that the situation is such that, in general, returns to the IKR would be in breach of Article 3 or would expose an individual to a real risk of serious harm.

104. Whilst we note that the appellant said that he has no assets or property in Iraq and that he would be destitute there, we see no reason why he should not be able to obtain some employment in the IKR to support himself.

105. When the appellant left Iraq, he was 20 years old. He was therefore old enough to understand the way of life in the IKR. He said in oral evidence that he does not know Iraq now. However, we do not accept that he has lost his cultural ties with the IKR and his knowledge of the way of life in the IKR.

106. In all of the circumstances, and for the reasons given above, we are satisfied that the appellant would not experience very significant obstacles in his reintegration in Iraq.

107. The appellant has not relied upon any factual matters that do not fall within the scope of Exceptions 1 and 2.

108. As we said above, this appeal was one of four appeals listed to enable the Tribunal to consider how s.117C should be construed following the judgment of the Supreme Court in KO (Nigeria). In MS (Philippines) (PA/09214/2017), we decided that a court or tribunal engaged in determining whether there are very compelling circumstances, over and above the exceptions, must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations.

109. The appellant attempted to secure the illegal entry into the United Kingdom of his mother and brother. This is a serious offence which strikes at heart of the United Kingdom's system of immigration control. There is a strong public interest in deterring people from committing offences which undermine the United Kingdom's system of immigration control. We attach due weight to the public interest in general deterrence and the maintenance of immigration control.

110. Having taken into account everything and having given such weight as we consider appropriate to the relevant factors, we have concluded that the appellant has failed to show that there are features of his case that make his Article 8 claim especially strong. We are not satisfied that there are very compelling circumstances which would make the appellant's deportation a disproportionate interference with his Article 8 rights and those of his partner and his children, considering their circumstances individually and collectively.

111. We therefore re-make the decision on the appellant's appeal by dismissing it.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law.
We set it aside and re-make the decision in the appeal by dismissing it on human rights grounds.

Signed
Upper Tribunal Judge Gill

Date: 15 February 2019

APPENDIX

Sections 117C and 117D (to the extent relevant) provide as follows:

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) …

(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.

Paras 390, 390A, 391, 391A, 398, 399 and 399A of the Immigration Rules provide as follows:

Revocation of deportation order

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
  (i) the grounds on which the order was made;
  (ii) any representations made in support of revocation;
  (iii) the interests of the community, including the maintenance of an effective immigration control;
  (iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that

the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
(a) …, or
(b) …
Unless, in either case, ...

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

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 four 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; or

(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.