Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06179/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2019	**On 18 December 2019**

Before

UPPER TRIBUNAL JUDGE O'CONNOR
UPPER TRIBUNAL JUDGE PLIMMER

Between

KMM
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Jones, Counsel
For the respondent: Mr Whitfield, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has appealed against the respondent's refusal of his human rights claim in a decision letter dated 24 April 2017. This was accompanied by a deportation order of the same date.

2. The appellant, a citizen of Zimbabwe, was born on 13 September 1991 and is therefore now 28 years old. In a decision sent on 27 February 2019, the First-tier Tribunal ('FTT') dismissed the appellant's appeal on human rights grounds. In a

decision sent on 12 July 2019, a different panel of the Upper Tribunal ('UT') found that the FTT's decision contained a material error of law ('the error of law decision'). The FTT's decision was set aside with directions for the decision to be re-made by the UT at a resumed hearing, which we now do.

Background

3. The FTT made comprehensive findings of fact having heard from the appellant, his father ('J'), his partner ('E'), E's mother ('S') and a friend ('ET') and having considered expert reports from (i) a country background expert on Zimbabwe, Professor Jeater ('the country expert report') and (ii) an independent social worker, Mr Horrocks ('the ISW'). These findings of fact were not challenged or cross-appealed by the respondent and it was agreed by both parties at the 'error of law' hearing that they constitute preserved findings in relation to article 8, ECHR. Although those findings are set out in the error of law decision, it is convenient to summarise them here. There are slight differences between the two summaries. The appellant has a very lengthy immigration history, and minor mistakes have been made within the voluminous documentation. We are satisfied that this summary is the most accurate and in any event, having been reviewed by the parties before us, not in any dispute.

   (i) The appellant arrived in the UK on 16 September 2002 with his younger brother, when he was 11 years old in order to join his parents (both Zimbabwean citizens). At the time the appellant was treated as a dependent of his parents and given leave to enter until 28 August 2003. The parents were granted three years' discretionary leave ('DL') to remain in the United Kingdom ('UK') on 15 August 2003, following a successful appeal on human rights grounds.

   (ii) The appellant and his family members' DL was thereafter extended until 2013, when the family members (apart from the appellant) were granted indefinite leave to remain ('ILR'). On 3 January 2013 the appellant's leave was reviewed but due to his offending at the time, a decision was made not to grant him ILR but to extend his DL to 2 January 2016. By contrast, the appellant told us that his brothers were given ILR in 2013. That summary of the family's immigration status at the time seems entirely plausible and in accordance with the respondent's relevant policies at the time - they would have had amassed ten years lawful residence in the UK.

   (iii) The appellant applied for ILR in an application dated 30 December 2015, based on his ten years' lawful residence in the UK. This application was referred to the criminal casework team as a result of his criminal offending, and resulted in the decision under appeal.

   (iv) The appellant's criminal offending is set out in his 'PNC' record, and began at an early age. In October 2005, when he had just turned 14, he was cautioned by the police for assault. When he was 15, in April 2007 he was convicted of robbery. In 2008, he was convicted of two separate offences: failure to surrender to custody at the appointed time and theft of a vehicle.

In 2011 (when he was 19), he was convicted of various driving offences and possession of Class A drugs. The appellant was disqualified from driving and received an 18 month prison sentence suspended for 18 months with an unpaid work requirement. He failed to comply with that requirement and on 3 January 2012 (when he was 20) magistrates activated six weeks of his suspended sentence. In April 2012, he was again convicted of various driving offences including driving whilst disqualified and uninsured, and possession of class B drugs. The appellant was sentenced to a community order and unpaid work requirement. On 31 July 2012 he was convicted of failing to comply with the requirements of a community order.

(v) On 7 October 2013 the appellant was convicted of aggravated burglary of a dwelling, committed on 18 April 2013 (when he was 21). The sentencing judge identified aggravating features including the victims being at home, violence being used, a knife being present, a significant degree of planning and being equipped with blindfolds and cable ties. The sentencing judge had no doubt that the victims were severely traumatised by the offending and placed the offence within the highest category of the sentencing guidelines. This resulted in the imposition of a sentence of imprisonment of ten years, which was upheld on appeal by the Court of Appeal.

(vi) The appellant met E when they were teenagers in 2008. Their relationship has strengthened with time and survived the appellant's imprisonment between 2013 and 2018. They began cohabitating in 2011 and got married in 2015 (after the appellant had been convicted and was serving his sentence of imprisonment). In June 2012 (prior to the commission of the 2013 offence) the couple had a son, Y, who is now 7 years old. The appellant recommenced living with Y and E in November 2018. The FTT accepted that notwithstanding the appellant's imprisonment, he maintained an unusually strong relationship with Y, and Y's behaviour had greatly improved since his father's release from imprisonment. The FTT accepted the ISW's evidence that there is a significant risk that E (who works as a social worker) would suffer an emotional breakdown if the appellant is deported, which may in turn lead to the breakdown of the family unit and potentially Y moving to live with his grandmother, S.

(vii) The appellant has no family left in Zimbabwe. The FTT accepted that the appellant is unlikely to find formal or informal employment in Zimbabwe and therefore likely to be destined to the 'squalid' lodger-type accommodation available in Harare, if he can persuade someone to take him in, otherwise he will be in the homeless / shanty town population. He will be in a slightly better position relative to the population there, due to his limited financial support from the UK. The FTT found that the appellant's return to Zimbabwe would be best described as "*deportation amounting akin to exile*" as opposed to "*deportation amounting to return*".

(viii) The FTT also accepted that the appellant's efforts to change and rehabilitate are "*exceptional*" and "*overwhelming*". His medium risk of re-offending is based entirely upon 'static' factors only. Although the appellant pleaded

not-guilty to the 2013 offence and maintains that position, he accepts that his conviction was still his fault and arose as a consequence of his lifestyle and associates at the time. The appellant's attitude and actions since his conviction can be characterised as a "*model of rehabilitation*". Although the appellant has only recently been released from prison, his commitment to his future life with his family and his relationship with his son are "*exceptional*".

(ix) Prior to his imprisonment, the appellant was working with his uncle as a decorator, and since his release from prison, has been offered employment, once he is legally able to take this up.

UT error of law decision

4. The UT concluded that although the FTT's decision was detailed and carefully drafted, it materially erred in law in:

   (i) concluding that because the appellant does not have ILR, he is not a 'settled migrant' for the purposes of the guidance given in Maslov v Austria [2008] ECHR 546;

   (ii) failing to direct itself to the role played by the flexibility provision in s.117A(2)(a) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), when attributing weight to the appellant's private life for the purposes of s.117B(5) and s.117C(6), in the manner anticipated as possible in Rhuppiah v SSHD [2018] UKSC 58; [2018] 1 WLR 5536 at [36].

5. The UT panel rejected Mr Jones' submission that there could only be one result when the correct law was applied to the FTT's comprehensive findings of fact. The panel found that whilst there were features of the appellant's private life in the UK that might be capable of being viewed as "*particularly strong*" when assessed holistically, there were factors that went in the opposite direction and the FTT did not make a clear finding on this issue, either way. In addition, the panel was satisfied that the FTT's error of law in its approach to Maslov and s. 117B(5) infected its obiter conclusion at [141] that it would have allowed the appeal, but for its concern that it was obliged to attached "little weight" to private life.

6. The panel therefore made it clear that the UT would need to re-evaluate the nature and degree of the appellant's private life in the UK, make a decision on the weight to be attached to it, apply the FTT's other findings of fact in the light of the evidence available as at the date of the resumed hearing, in order to apply the ultimate test applicable in this case as set out at s.117C(6) of the 2002 Act.

Hearing

7. At the beginning of the hearing we clarified the evidence available to us. This included the bundle before the FTT, a supplementary bundle containing updated witness statements and an updated ISW report, and a bundle of updated country background evidence on Zimbabwe.

8. Mr Jones acknowledged that although article 3, ECHR was relied upon before the FTT, the conclusion that there would be no breach of article 3 (see [99] and [100] of the FTT decision) was not appealed. Although Mr Jones' skeleton argument mooted the possibility of resurrecting the article 3 argument on the basis of the United Nations description of the conditions prevailing in Zimbabwe as bordering on an humanitarian crisis in a report dated 29 November 2019, he clarified that he did not wish to do so and was content to simply rely upon article 8, ECHR to support his contention that the appellant's appeal should be allowed on human rights grounds.

9. The representatives agreed that there was no dispute that the appellant was continuously lawfully resident in the UK from the date of his arrival (albeit his stay was precarious as he did not have settled status), subject to the deportation provisions of the Immigration Act 1971, following service of the deportation order. In any event, both representatives agreed that this appellant's immigration status in the UK should be considered to have been entirely lawful, albeit precarious.

10. Mr Jones called the appellant and E to confirm their updated witness statements. Mr Whitwell cross-examined the appellant briefly but did not cross-examine E. We asked a few short questions.

11. Before hearing submissions, we gave both representatives additional time to consider their position in the light of further authorities, including *inter alia*, GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 and CI (Nigeria) v SSHD [2019] EWCA Civ 2027.

12. Mr Whitwell relied upon a comprehensive skeleton argument. He acknowledged that conditions in Zimbabwe would be difficult for the appellant but submitted that with financial support from the UK, the appellant would be in a better position than many and able to afford the basics. He invited us to find that the public interest in this case is very strong and could not be outweighed by the cumulative impact of the compelling circumstances.

13. Mr Jones also relied on a comprehensive skeleton argument. Mr Jones submitted that we should approach this appeal in a similar manner to the FTT, save that we must make our own findings regarding the weight to be attached to private life. He argued that we should find that there are "*particularly strong features*" to the private life in question, to justify a flexible approach and in order to attach more than "little weight" to private life. To support this submission Mr Jones drew particular attention to the following: the appellant's length of lawful residence for well over half his life, which included much of his education; the appellant's private and family life blurred in this case; his strong social and employment ties; the appellant retained a strong British cultural identity albeit he retained some links to Zimbabwean culture (but would nevertheless be an outsider there); incarceration has not materially impacted the strong quality of the appellant's private life and the strength of his attachments; he has been strongly supported by friends with a very positive influence on him who have been prepared to offer him

meaningful employment; his good behaviour in prison and strong links maintained during imprisonment such that the quality of the appellant's integration did not reduce during his imprisonment.

14. Having reached the finding regarding the weight to be attached to private life urged upon us by Mr Jones, he submitted that we should then allow the appeal. This is because the FTT stated clearly that it would have allowed the appeal but for the "little weight" provisions regarding private life. Mr Jones asked us to note that although the appellant committed a very serious criminal offence, the FTT accepted he was rehabilitated. Mr Jones asked us to find that the combination of the appellant's private and family life was very strong. In support of this, he drew our attention to the FTT's findings, in particular: Exception 1 met by a large margin; Exception 2 met in relation to E and Y (although Mr Jones noted that the FTT was clear that the relevant the s.117C(6) threshold could not be met by reference to family life alone); particularly strong features of private life; the appellant's family and private life as he knows it will cease and he will live in Zimbabwe in 'exile'.

15. After hearing helpful submissions from both parties, we reserved our decision, which we now give with reasons.

Legal framework

16. The proper approach to the relevant article 8, ECHR balancing exercise in a case such as this, where a deportation order has been made against a foreign national, is to be found in paragraphs 398-399A of the Immigration Rules and Part 5A (s.117A-D) of the 2002 Act. We agree with the reasoning of Leggatt LJ (with whom the Senior President of Tribunals, Ryder LJ and Hickinbottom LJ agreed) in CI (Nigeria) at [20] and [21], that it is generally unnecessary for a tribunal to refer to the Immigration Rules in a case such as this where there is no dispute that the relevant provisions are reflected within Part 5A. We therefore turn immediately to the text of Part 5A.

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

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

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

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

…

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

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

…"

17. S. 117B is followed by this at s. 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…"

18. The error of law decision comprehensively sets out the relevant legal framework, beyond the 2002 Act. At the hearing before us, there was no real dispute between the parties as to the applicable law. The dispute turned entirely upon the application of the facts to the governing legal test in s.117C(6), as informed by the remainder of Part 5A. We therefore only summarise the relevant principles derived from the authorities relevant to an article 8 claim based upon family and private life, brought by a foreign criminal who has been sentenced to imprisonment of four years and over i.e. a 'serious offender', who came to the UK when he was a child and has lawfully resided here for a lengthy period.

    (1) The provisions in Part 5A, taken together are intended to provide a structured approach to the application of article 8, and "*set the intended balance of relevant factors in direct statutory form*" (see [14] of KO (Nigeria) v SSHD [2018] UKSC 53; [2018] 1 WLR 5273) and produces a final result compatible with article 8 - see KE (Nigeria) v SSHD [2017] EWCA Civ 1382; [2018] WLR 2610, at [25] and Rhuppiah v SSHD [2018] UKSC 58; [2018] 1 WLR 5536 at [36].

    (2) The correct test to apply for serious offenders, such as this appellant, is to be found in s.117C(6). If, in applying s.117C(6), the conclusion is reached that the public interest requires deportation, the Tribunal is bound in law to give effect to this and there is no further need for a proportionality assessment.

    (3) Generally, only "*a very strong claim indeed*" will be successful - see Hesham Ali v SSHD [2016] UKSC 60, [2016] 1 WLR 4799 at [38] and the public interest "*almost always*" outweighs countervailing considerations of private or family life in a case involving a 'serious offender' – see Hesham Ali at [46] and KE (Nigeria) at [34].

    (4) The public interest is movable and in certain cases must be approached flexibly for the reasons outlined in Akinyemi v SSHD [2019] EWCA Civ 2098 ('Akinyemi No. 2') at [39] to [52]. A full assessment of the public interest must then be balanced against an assessment of the article 8 factors said either on their own or cumulatively to constitute "very compelling circumstances" for s.117C(6).

    (5) Although s.117C(6) sets an "*extremely demanding*" test, it nonetheless requires "*a wide-ranging exercise*", so as to ensure that Part 5A produces a result compatible with article 8 - see NA (Pakistan) v SSHD [2016] EWCA Civ 662, [2017] 1 WLR 207 as applied in MS (s.117C(6)): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC), [2019] Imm AR 769 at [16] and RA (s.117C: Unduly Harsh; offence: seriousness Iraq) [2019] UKUT 123 (IAC), [2019] Imm AR 780 at [22]. The wide-ranging evaluative exercise required under s.117C(6) clearly includes an application of the principles in the Strasbourg authorities to ensure compatibility with the UK's obligations under Article 8 of the ECHR - see NA (Pakistan) at [29] and [38].

    (6) Of particular relevance to this case, is the line of Strasbourg authorities addressing the nature and scope of private life as set out in Uner v The Netherlands [2006] 45 EHRR 14 and the guidance in Maslov – see the

summary in Akinyemi No. 2 at [46]-[51] of the Supreme Court's approach to the Strasbourg authorities in Hesham Ali. This is because having come to the UK and resided here lawfully during his childhood and beyond, the appellant is entitled to be considered a 'settled migrant', and in any event for this background to inform the balancing exercise in his favour – see the error of law decision at [35] to [39] and the more recent analysis in CI (Nigeria) at [103]-[114]. However, it is inappropriate to treat the judgment in Maslov as if it is legislative text with a 'bright line rule' – see [111]-[112] of CI (Nigeria).

(7) The wide-ranging exercise required means that a serious offender is permitted to rely upon matters relevant to one or both exceptions in s.117C(3) as well as his ability to meet these in conjunction with other factors collectively, when assessing s.117C(6) – see NA (Pakistan) at [32]. Although the exceptions are self-contained and exclude further consideration of the public interest (see KO (Nigeria)), in order to determine whether the public interest is defeated by "very compelling circumstances", a case-specific analysis of the public interest is necessary – see MS at [17] to [20].

(8) The list of relevant factors to be determined when conducting an article 8 balancing exercise and therefore the exercise required by s.117C(6) is not closed – see GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 at [31]. In particular, the concept of private life, as set out in the Strasbourg authorities such as Uner and Maslov is wide and includes social ties with relatives – see CI (Nigeria) at [57] to [59].

(9) Following Rhuppiah, those persons with anything less than ILR, have a "precarious" immigration status for the purposes of s.117B(5), and it follows that more than "little weight" can only be given to their private life where there are "*particularly strong features*". Although private life developed over many years during childhood tends to take on a special and compelling character, s.117B(5) applies to children as well as private life developed as a child and all relevant factors must be viewed holistically – see the error of law decision at [49].

(10) The guidance in Rhuppiah, including the flexible application of s.117B(5) wherein the private life in question has "*particularly strong features*", is relevant to the assessment of private life for the purposes of s.117C(6). At this stage, an assessment of both private and family life is necessary, and care must be taken not to apply s.117B(4) to family life – see GM (Sri Lanka) at [35].

Discussion

FTT's findings

19. As we have already observed, the respondent did not seek to cross-appeal the FTT's findings of fact. When we conduct the ultimate evaluation under s.117C(6), we apply those findings of fact but must do so by reference to all the evidence available to us as at the date of the hearing (the reference to the date of decision at

[59] of the error of law decision was clearly a typographical error). In doing so, the overall evaluation of the largely accepted factual matrix when applying the test in s.117C(6) is for us, as we are re-making the decision.

20. In the 'error of law' decision, the panel observed that whilst the FTT highlighted features of the appellant's private life in the UK that might be capable of being viewed as "*particularly strong*" when assessed holistically, there was no clear finding to this effect and a clear finding on this is necessary. It follows that it is important that we directly address whether in this particular case there is sufficiently strong private life to enable a flexible approach to s. 117B(5), as explained in Rhuppiah. This in turn informs the degree of flexibility when assessing the requisite weight to be given to private (but not family) life for the purposes of s.117C(6).

21. We do not accept Mr Jones' submission that if we identify that there are "*particularly strong features*" of the appellant's private life, the appellant's appeal must be allowed, because that was the FTT's "*default position*" or at least what it indicated it would do - see [141]-[143] of the FTT's decision. The approach is much more nuanced than that. The identification of "*particularly strong features*" of private life simply means that more than "little weight" can be given to private life and a more flexible approach is warranted. The overall nature and degree of the appellant's private life and the weight to be attached to it, remains a matter for us. The ultimate decision on whether there are the requisite "very compelling circumstances" over and above the exceptions is also an evaluative judgment for us to make. The FTT did not explain with any degree of particularity how much weight it would have given private life or address the extent to which the appellant's private life blurred into his family life. In addition, Mr Jones acknowledged in his skeleton argument that the error of law decision made it clear that although the FTT found Exception 1 to be met by a considerable margin, the UT would need to make its own private life assessment because the FTT focused on conditions in Zimbabwe, and less so on the appellant's private life established *in the UK*.

22. The FTT confessed that it did not regard the exercise to be undertaken in the appeal to be straightforward – see [139] of the FTT decision. Having erred in law in its approach to Maslov and Rhuppiah, and therefore to private life more generally, it remains for us to undertake an assessment of private life that it is accordance with the authorities, and to then weigh this in the balance when re-making the decision.

Public interest

23. We begin with the public interest. This is a flexible concept, as a matter of general principle – see s.117C(2) of the 2002 Act. The offence committed by this appellant, which carried a custodial sentence of ten years, is without doubt at the more serious end of the spectrum, and as such there is a greater, and in our view a prima facie very significant and powerful public interest in his deportation. In so

finding, we have taken into account the comments of the sentencing judge. We acknowledge that the sentencing judge declined to attach significance to the appellant's previous offending but we agree with the FTT's observation at [136] of the FTT decision, that it carries some weight when assessing the strength of the public interest, albeit relative to the 2013 burglary, it is of comparatively minor severity. We nonetheless attach weight to the undeniable fact that prior to the 2013 offence, the appellant regularly and repeatedly offended from the age of 14 up until his lengthy imprisonment when he was 21, in the manner set out in his 'PNC' record.

24. We have also approached the public interest in the light of the reasoning in Akinyemi No. 2 at [39] to [52], and the conclusion that there will be cases where the person's circumstances in an individual case can reduce the legitimate and strong public interest in removal, albeit that the number of these cases will necessarily be very few, having regard to the legislation and the Immigration Rules. As emphasised by Ryder LJ at [42] and [43], the facts of Mr Akinyemi's case were unusually stark because: (i) he had lived in the UK since *birth*; (ii) with an *entitlement* for most of that period to acquire British citizenship, and; (iii) he had no significant social or cultural links with the country to which he was to be deported. The facts of the present case, save for (iii) are materially different and cannot properly be described as unusually stark.

25. We note that Ryder LJ considered Mr Akinyemi's residence in the UK for his entire life to be "*materially different from the paradigm foreign criminal who arrives in the UK from another state and then commits crimes: a circumstance where the need for foreign nationals to appreciate the consequence of criminal conduct in terms of expulsion is much more obvious*" – see [33]. The context of the instant case does not necessarily fit neatly into the "*paradigm foreign national*" case described above because the appellant came to the UK lawfully as a child and remained in the UK lawfully. For reasons relating to this and the conditions prevailing in Zimbabwe, the FTT accepted and we take into account that the consequences of deportation for this appellant would not be a return to a 'home' state but would be more akin to 'exile'.

26. On the other hand, the appellant must have been aware that however British he may have felt, he was not a British citizen and was not even entitled to ILR. His status in the UK was initially dependent upon his parents' own precarious immigration status in the form of DL. When he became an adult (he became 18 in September 2009), his status became even more precarious – whilst he could rely upon his length of residence, ILR was unlikely given his criminal offending. Although this knowledge as a child must carry less weight for obvious reasons, such knowledge as an adult is more significant. This appellant must have known that his status in the UK was precarious. The appellant's case was reviewed on 3 January 2003 (when he was 21), at which time he was only given DL despite amassing the requisite ten years long residence in the UK. By contrast, at that stage his brothers and parents were granted ILR, following their ten years residence in the UK. Notwithstanding the clear signal to the appellant that his

immigration status was precarious, he committed the very serious burglary offence very shortly after this in April 2013.

27. In addition, whilst we do not go behind the FTT's findings as to the obstacles the appellant would face if deported to Zimbabwe, it cannot be said that he has never known any environment other than that of the UK (as in Akinyemi No. 2). He was born in and spent a part of his formative childhood in Zimbabwe and then lived in a household in the UK with his Zimbabwean parents and siblings, with associated Zimbabwean food and culture. He continued to benefit from the love and support of his Zimbabwean parents during his childhood and this continues (unlike Mr Akinyemi who lost his mother at age 14).

28. We now turn to the issue of the appellant's rehabilitation and risk of re-offending. The FTT noted that the appellant's risk of re-offending was assessed in an OASYS report dated 13 June 2007 to be 'medium'. We have not been taken to any other evidence from the probation service to undermine this. The FTT summarised the detailed evidence regarding the appellant's good behaviour in prison, pursuit of only positive, law abiding contacts and positive attitude – see [73] to [86]. This is entirely consistent with the numerous supporting letters from prison officers and those working with the appellant in prison in the FTT bundle. The FTT regarded the appellant's rehabilitation to have been "*truly exceptional*". We do not go behind the FTT's findings. However, the appellant has only been out of prison since August 2018 (about 18 months) and has not been 'tested' outside of the prison environment for a very lengthy period or even a significant period of time in the context of the lengthy period that he offended. This must be considered in the context of his background as a person who started committing crimes at a young age and this offending escalated and continued into his adulthood. The nature and extent of this offending is difficult to explain. The appellant has cited immaturity and bad influences yet at all relevant times he had clear support from loving parents, in addition to support from a loving and aspirational partner, and a large extended family. He was working at the time and did not have any mental health issues. We also note that the appellant was released on licence, which would carry with it a strong incentive not to commit further offences.

29. Nonetheless, we attach weight to the positive strides the appellant has taken to evidence his rehabilitation during his imprisonment and upon release in 2018 (as found by the FTT), but agree with the FTT that this carries limited weight in the overall analysis. It is now well-established that rehabilitation is only one facet of the public interest and as noted by Hamblen LJ (with whom Floyd LJ agreed) in Binbuga v SSHD [2019] EWCA Civ 551, [2019] Imm AR 5 at [84] "*rehabilitation involves no more than returning an individual to the place society expects him to be*". The appellant has made laudable efforts to progress his rehabilitation but his overall risk of reoffending must take this into account. We are satisfied that the history and nature of his offending in all the circumstances is such that he remains at a medium risk of re-offending. If the probation service had materially altered its analysis of risk from the 2017 OASYS report we would have expected this evidence to be placed before us and drawn to our attention.

30. The s.117B factors mostly weigh in the appellant's favour as it is not disputed that the appellant speaks English and has genuine employment offers available to him to enable him to be self-sufficient, and we take these matters into account, albeit they are largely neutral.

31. Having considered all the matters relevant to the public interest both generally and in this individual case, and the extent to which these factors are connected to the legitimate aim of preventing crime and disorder and maintaining immigration control, we are satisfied that the public interest in the appellant's deportation remains very strong.

Family life

32. We bear in mind the FTT's detailed findings under the sub-heading 'family situation' from [46] to [70] of the FTT decision. In particular, the FTT accepted that Y's relationship with the appellant is "*unusually strong*" and their separation would lead to "*seriously adverse consequences on Y's development*". E's mental health, her care for Y, and her career would all "*seriously suffer*". The impact upon E and Y would be "*both more than would necessarily be involved for any child or partner whose parent or partner was faced with deportation, and more than that which is acceptable or justifiable even in the context of the high public interest engaged*". The ISW report dated 27 October 2019 supports this analysis and describes the relationship between the appellant and Y as having become even closer since he resumed cohabitation. We accept Mr Horrocks' assessment that the appellant's return to the family home has led to an overall improvement in the emotional well-being of both E and Y. The FTT accepted that it would be unduly harsh for E and Y to live in the UK without the appellant, and also unduly harsh for them to live in Zimbabwe, such that Exception 2 is met, in relation to the appellant's relationships with *both* E and Y. As the FTT observed, the appellant's strong and committed relationships with E and Y (which have involved much perseverance to sustain) would effectively end, as even communication would be infrequent / unreliable given the prevailing conditions in Zimbabwe. Our assessment has taken all of these matters into account. We accept that Exception 2 is met as at the date of the hearing before us. We now turn to consider whether there is evidence to support the claim that the disruption to family life goes over and above the level of undue harshness. We are obliged to consider this for s.117C(6) and we do so now.

33. We begin by acknowledging that Y's best interests to continue to have a dedicated and positive father carries significant weight and is a primary consideration. The appellant was Y's primary carer before his imprisonment and has resumed that role after his release. However, we note that the FTT was cautious about elevating the impact on family life beyond undue harshness – see [140] of the FTT decision. We note that Exception 2 has been met vis a vis *both* E and Y and this is relevant when assessing "very compelling circumstances" on a cumulative basis. We proceed on the basis that the effect of deportation on the appellant's family life with both E and Y would be unduly harsh, but we are satisfied that this threshold has only just been met, for the reasons we outline below.

34. E and Y have had the active support of a very close large extended family unit during the entirety of Y's life including the appellant's incarceration, and they will be able to depend on this again, if the appellant is deported. We note that E is very close to her mother S, and at the time of the FTT hearing saw her on a daily basis – see [46] of the FTT decision. This has changed to weekends according to Mr Horrocks' report. Although it would not be ideal and there would be practical difficulties involved, we are satisfied that if necessary, E could turn to S on a more regular basis. E has recently moved to live closer to S and confirmed in evidence to us that they are only a 10 minute drive away. We accept that E and S have demanding jobs and S has 18 grandchildren, and in the circumstances, support from S will be difficult. We are nonetheless satisfied that notwithstanding these difficulties, E's extended family will be able to play an important role in supporting and assisting both E and Y, in the absence of the appellant. The FTT made it clear that there is a "*wide and positive family network on E's side*", without any history of 'family criminality' – see [64] of the FTT decision. We agree with the FTT's observations that the adverse impact of the separation will be keenly felt by E and Y, but that E together with her family will be able to protect Y from the very worst outcomes. Like the FTT we do not accept that Y is at any meaningful risk of being lost to gang culture in the absence of the appellant. We have noted that Y is said to have been emotionally damaged by the separation with his father when he was imprisoned, but again we are satisfied that he will have plenty of family members to assist him navigate what will be an inevitably difficult period. Y will also benefit from being able to maintain links with his paternal family and Zimbabwean heritage whilst living in the UK, as the appellant's family also live nearby.

35. We have taken into account Mr Horrocks' caution that E's mental health may be adversely impacted by the appellant's deportation and have noted the FTT's findings in this regard, including E's history of depression. However, again E will be able to turn to her own family and the various statutory agencies for assistance. We note the absence of any current medical evidence that E suffers or is at risk of suffering from any serious mental health condition.

36. We emphasise that the protective factors identified above in no way undermine the FTT's finding that Exception 2 is met, and we have proceeded on that basis. Rather, these serve to explain why in our view, the effect of the appellant's deportation on *both* E and Y only just meet the high threshold required by Exception 2. In this regard it is relevant to note that E began her relationship with the appellant when he only had DL. More significantly, E continued that relationship and took steps to strengthen it, when she knew that the appellant's immigration status was precarious *and* at a time that he continued to flout the law through criminal offending (with the inevitable result that his immigration status became even more precarious). We fully acknowledge that Y cannot be blamed for any of this and that this history in no way undermines the current strength of the family relationships. However, it is a relevant matter to accord some limited weight to when assessing the effect on family life holistically – see Rhuppiah at

[27]-[35]. However, for completeness, we would have reached the same ultimate conclusion had we left this factor out of account.

37. Exception 2 focuses entirely upon the effect of deportation upon a qualifying child and / or partner. It is no way addresses the fact that this appellant's *own* meaningful and close family life with them and his extended family members will effectively cease. We have factored the broader impact of deportation upon family life for all concerned (the appellant, E, Y, the appellant's parents and extended family, E's extended family) and are satisfied that it cannot be said that the effect of deportation on family life goes "over and above" the threshold of undue harshness. As we have set out above, we are satisfied that the effect on E and Y only just meets the standard imposed by the concept "unduly harsh" and the effect on the extended family members will be much less significant, as the appellant has been living independently for a lengthy period.

Private life

38. The FTT found that Exception 1 was met and there is no reason to go behind this finding. Mr Jones acknowledged that the updated country background evidence on Zimbabwe is merely consistent with the FTT's findings, and as set out above, he made no application to resurrect reliance on article 3.

39. Although the FTT found that Exception 1 was met, (a) and (b) were accepted by the respondent and the FTT therefore (understandably) focussed on the likely conditions for the appellant in Zimbabwe for the purposes of (c) i.e. whether there would be very significant obstacles to his integration in Zimbabwe – see [22]-[45] and [105]-[108] of the FTT decision. As noted above, the FTT was not prepared to find that the appellant's circumstances in Zimbabwe would be so serious that there would be a breach of article 3. It is relevant to consider the reason for this: unlike the vast majority of Zimbabweans, the appellant would be able to benefit from financial support from his parents. Although likely to be small, the appellant will have adequate financial resources to obviate destitution in Zimbabwe.

40. We bear in mind the FTT's findings, but must make a decision as to the nature and extent of the appellant's private life and the weight to be attached to it for ourselves, in the light of the FTT's error of law in its application of Maslov and Rhuppiah, leading to the obiter conclusions from [141] onwards. We must consider the totality of the appellant's social ties, including his identity and relationships. In CI Nigeria Leggatt LJ explained that the nature and scope of the concept of private life is wide from [57]:

> "… The nature and scope of the concept was explained by the Grand Chamber of the European Court of Human Rights in *Üner v The Netherlands* (2006) 45 EHRR 14, para 59, when it observed that: para 59, when it observed that:
>
> > "… not all [settled] migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of article 8.

> However, as article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of article 8." (citations omitted)
>
> 58. Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European Court. Thus, in the Üner case at para 58, the court considered it "self-evident" that, in assessing the strength of a foreign national's ties with the "host" country in which they are living, regard is to be had to "the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."
>
> 59. The European Court returned to this theme in Maslov, stating (at para 73) that:
>
> > "… when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult."”

41. It is convenient to consider the wide concept of private life in this case and the weight we to attach to it under sub-headings we set out below.

Length, lawfulness and surrounding circumstances of residence in the UK

42. It is undisputed that the appellant has lawfully resided in the UK for most of his life from the age of 11, and he therefore falls within the description of being in a “*special situation*”, as described in Uner. In addition, as observed at [49] of the error of law decision “*private life developed by a child over many years tends to, and usually does take on a special and compelling character*”. However, the private life developed by this appellant is weakened by his criminal offending and flouting of punishments from the age of 14. This behaviour continued and escalated

notwithstanding the positive family and other relationships in his life. The appellant may have concluded his primary education and completed his secondary education in the UK, but Mr Jones did not draw our attention to any secondary school qualifications he achieved, which tends to indicate the appellant did not achieve any worthy of note. That would be consistent with the appellant's history of juvenile offending.

43. Zimbabwe has changed fundamentally since the appellant's departure and most meaningful ties to his country of birth have been severed. The FTT described the obstacles to integration going *"well beyond"* the "very significant obstacles" threshold and assessed his deportation as being akin to 'exile'. This must of course be viewed in context, as pointed out above, when addressing the public interest. This is not a case in which the appellant has no knowledge of and has never lived in his country of origin. He grew up with his Zimbabwean family. This is also a case in which the appellant has never had ILR and because of his criminal offending was most unlikely to obtain it. The reality is that this appellant's immigration status was precarious in fact as well as in law. His criminal offending (even before the 2013 offence) was such that he was most unlikely to obtain ILR, notwithstanding his ten years lawful residence.

44. Having considered all these matters in the round we are satisfied that the appellant's arrival to the UK as a child and his length of stay, together with the finding that he has no practical ties to Zimbabwe beyond his heritage and will have to face very difficult conditions there detrimental to his 'physical and moral integrity', are significant matters to take into account when assessing the overall strength of his private life. The Strasbourg line of authorities predicated upon Maslov, entirely support that approach.

Nature and extent of integrative links to the UK

45. It is undisputed that the appellant is socially and culturally integrated to the UK. The FTT accepted the appellant to be *closely* socially and culturally integrated to the UK but did not consider this in any detail, relative to the likely conditions he would face in Zimbabwe.

46. We accept the evidence before us that the appellant firmly regards himself as British in every aspect including his language, culture and identity, and that is more marked because of his lack of ties in any meaningful sense with his country of birth. The appellant is deeply familiar with and entrenched in the British way of life, as are his family members. This is unsurprising as he was brought up and educated in the UK from the age of 11, and has therefore resided here for 17 years.

47. Whilst we accept the appellant is clearly socially and culturally integrated in the UK, the nature of his links to the community have not been entirely positive. He began offending and associating with pro-criminal individuals at the young age of 14. The appellant continued to offend during his teenage years. Although he came to the UK at a young age, the strength of his positive connections and social ties have been weakened by his criminal associations from a young age. He

demonstrated a disdain for the rule of law and the punishments handed down to him. His offending carried on into his adulthood and he committed a very serious offence when he was 21. By this time, he had been with his partner for a number of years and had a child. Yet this, combined with the support of his extended family and his employment at the time, were insufficient to prevent the commission of a serious offence as an adult. In addition, the appellant has spent a significant part (five years) of his adulthood in prison. As noted in CI (Nigeria) at [61], periods of imprisonment represent time spent excluded from society during which the prisoner has little opportunity to develop social and cultural ties. We note that in this case, the appellant's ties to his partner and child have continued throughout his imprisonment and strengthened upon his release. To the appellant's credit, he has severed ties with those associates whom he perceived to represent a negative influence post-conviction and retained positive friendships as set out in witness statements and letters of support in the bundle before the FTT. These friends have shown a belief in the appellant by offering him concrete employment that the appellant is keen to take up, if permitted to do so. The appellant clearly spent significant periods as a juvenile and in early adulthood interacting with negative pro-criminal associates. Whilst the appellant's social and cultural integration has not been destroyed by reason of his lengthy period of offending and imprisonment, we are in no doubt that it has been weakened by these matters.

48. In reaching this conclusion, we have taken into account that the appellant's links to Zimbabwe are marginal and the FTT's acceptance that there would be very significant obstacles to the appellant's integration to Zimbabwe and assessment at [108] that this goes "*well beyond the necessary threshold*". This is supported by the updated country background evidence before us. However, it does not follow that a person who has ceased to be socially and culturally integrated to his country of origin must have very strong integrative links with his adopted country. As noted in CI (Nigeria) at [72] a person may actually not be socially and culturally integrated anywhere. We emphasise that is not the position here. We are satisfied that the appellant's length of residence, which began when he was a child, together with his upbringing, education and family relationships are such that he has been and remains socially and culturally integrated in the UK. However, his history of offending and lengthy imprisonment have weakened his integrative links and the overall strength of his private life.

S. 117B(5) – "little weight" – "particularly strong private life"?

49. We have considered the above matters and given particularly careful attention to the matters highlighted by Mr Jones in his skeleton argument and during his oral submissions to support his submission that the appellant has demonstrated a "*particularly strong*" private life in the UK: lengthy residence; British identity, culture and language; no meaningful ties to Zimbabwe; strong immediate and extended family ties; friendship / social ties; past employment and future employment opportunities; adverse consequences for physical and moral integrity.

50. We have carefully considered all aspects of this appellant's private life in the round, in support of Mr Jones' submission that it is sufficiently significant, such that notwithstanding the appellant's "precarious" immigration status, his private life can carry more than "little weight", in the manner explained in Rhuppiah.

51. We accept that this is a case that can be described as a 'hybrid' because it involves both family / private life considerations of note, hence the FTT's conclusions (which we accept as at date of hearing), that both Exceptions 1 and 2 are met, and that family life blurs into private life. We note the observations in GM that s.117B(5) only operates in relation to private life not family life. However, when considering whether there are "*particularly strong features*" of the private life in question, we consider that the need to flexible (to ensure Article 8 compliance) as well as realistic, means that we are entitled to consider those aspects of family life that shape the nature and degree of social ties and relationships as part of private life. We remind ourselves that this wording in s. 117B(5) is not to applied inflexibly. Indeed, the form of words adopted by Lord Wilson is predicated upon the recognition that s.117A(2) provides a degree of flexibility.

52. We accept that the appellant's social ties necessarily involve those family ties that do not constitute 'family life' for the purposes of Article 8 i.e. his relationship with extended family members. We also accept that it is unrealistic to completely 'hive off' the appellant's article 8 'family life' with E and Y from his private life altogether. The reality of the situation is that the appellant's family life in the more general sense blurs into his private life. This is perhaps more pronounced in this case because the appellant met his now wife when they were 15 and 16 respectively, and also had a child together when they were young. His wife and her family are all British citizens and thoroughly British in cultural terms. He is also close to his own parents. As pointed out by Mr Jones, the unwavering support provided to the appellant by his parents, E and her wider family has continued throughout his imprisonments and thereafter during the course of the deportation proceedings. However, when assessing the strength of the appellant's private life, the focus must be on *his* private life. Contrast that with a proper assessment of family life, which necessarily involves a consideration of the family life shared by all the relevant members – see Beoku-Betts v SSHD [2008] UKHL 39, [2008] 3 WLR 166. We have therefore focussed upon this appellant's private life in the UK but note that it has been moulded by the social ties he has with his immediate and extended family members.

53. We return to the language of s.117B(5). We are not satisfied that the private life established by the appellant in the UK, when his immigration status was precarious i.e. from the age of 11, contains "*particularly strong features*" in the sense explained in Rhuppiah. The FTT was clear in its assessment that the appellant was able to demonstrate that he met requirement (c) of Exception 1 by a considerable distance. This focuses upon the conditions in Zimbabwe and to a lesser extent on the fact that the appellant will be an outsider there. However, for the purposes of s.117B(5) our attention must focus on the private life the appellant has developed *in the UK*. In the circumstances, we wish to emphasise that nothing

we say here should be interpreted as undermining our acceptance that the three conditions in Exception 1 are met, and that (c) is met by some distance. We entirely accept that this private life has strong features for all the reasons submitted by Mr Jones. When viewed holistically, we consider that the appellant's overall private life in the broadest sense has however been substantially weakened by his long history of criminal offending and imprisonment, and does not have "*particularly strong features*". To put it bluntly, the appellant has been in the UK for a lengthy period since the age of 11 and developed *inter alia*, social, cultural, family, relationship and employment ties, but he has been regularly involved in repeated criminal behaviour from the ages of 14 to 21, and was in prison from the ages of 21 to 26. He is now 28.

54. It therefore follows that we attach "little weight" to the appellant's private life in the UK. If we are wrong, and the appellant's private life as we have set it out above, has "*particularly strong features*" such that we should apply more than "little weight" to it, we would not be minded to attach great weight to it in the overall balancing exercise, as a result of the inevitable impact of the appellant's significant and protracted period of criminal offending and imprisonment.

Overall approach to private life

55. Drawing the strands of private life together: Exception 1 is met; requirement (c) of Exception 1 is met by some distance, with the appellant having lawfully lived in the UK since his childhood; we attach "little weight" to the appellant's private life *established in the UK*, even bearing in mind its 'hybrid' nature, influenced as it is by family life.

S. 117C(6) - very compelling circumstances over and above exceptions 1 and 2

56. We hope that we have carefully set out the wide-ranging enquiry we have undertaken. We now address all the relevant matters together in order to apply the relevant test pursuant to s.117C(6) of the 2002 Act. We begin by repeating a summary of the 'pros' in favour of there being "very compelling circumstances" in this case: Y's best interests; Exception 1 is met; the appellant has not just been lawfully present in the UK for the majority of his life but came to the UK lawfully as a young child; Exception 2 is also met in relation to *both* E and Y; there is therefore the combination of Exception 1 and 2 and the blurring between private and family life in this case; the circumstances for the appellant in Zimbabwe will be very difficult indeed; the appellant has evidenced laudable efforts toward rehabilitation; he is supported not just be his immediate family members but also by extended family members and friends.

57. We have explained why the appellant's private life established in the UK does not contain "*particularly strong features*", albeit he meets the requirements of Exception 1. We have also outlined why do not consider that the appellant's family life with his qualifying child and qualifying partner can be described "very compelling circumstances, over and above those described in" Exception 2. We entirely accept that there may be cases where the combination of meeting the two

exceptions may tip the balance, even where each considered discretely cannot be said to reach the "over and above" threshold. We now address whether the combination of Exceptions 1 and 2 being met, together with all the aspects of private life and family life not specifically included in those exceptions, can be said to give rise to "very compelling circumstances over and above those described in exceptions 1 and 2". Relevant matters outside of Exceptions 1 and 2 include *inter alia*, the appellant's own family life ending, the effect of his deportation on extended family members particularly his parents and E's mother, private life in its widest sense including the "special situation" the appellant is in by virtue of having been in the UK lawfully for most of his life, *since his childhood*.

58. We are satisfied that notwithstanding the cumulative impact of the appellant meeting Exceptions 1 and 2 together with all the other 'pros', the high threshold required by s.117C(6) has not been met in this case. Our conclusion would be the same, even if we concluded that there are "*particularly strong features*" of private life present such that more than "little weight" could be attached to the private life in question. As the FTT observed at [140] if the appellant had received a shorter sentence or been involved in a less serious offence, the approach may have been more favourable to him. However, the ten year sentence signals a very strong public interest. We have already considered other factors relevant to the public interest in the round and reached the conclusion that the public interest in this case remains very strong. When that is weighed against the nature and degree of the appellant's private and family life (both viewed in their widest sense) on a cumulative basis, we are not satisfied that this is one of those rare cases where the extremely demanding threshold in s.117C(6) is met. The effect on E and Y will be unduly harsh and the appellant will have to give up his British life and family and start a new life in Zimbabwe in very challenging conditions indeed. However, it must also be remembered that the public interest in support of deportation in this case is very strong and each of the main protagonists are currently in good health and will continue to have other committed family members to support them (albeit the appellant from a distance) through the very difficult challenges likely to result from the appellant's deportation.

Conclusion

59. The appellant is a 'serious foreign criminal' and in order for his appeal on article 8 grounds to succeed he must meet the extremely demanding test in s.117C(6). For the reasons we have provided above, we are satisfied that the public interest in this particular case requires deportation because when all the relevant factors are considered in the round, it cannot be said that there are "very compelling circumstances over and above those described in Exceptions 1 and 2".

Decision

60. We dismiss the appeal on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date: 16 December 2019

ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06179/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 10 June 2019

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE REEDS
UPPER TRIBUNAL JUDGE PLIMMER

Between

KMM
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Jones, Counsel
For the respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Introduction

1. On 3 October 2016 the respondent made an order that the appellant is deported from the United Kingdom ('UK'), following his conviction for aggravated burglary, for which he received a sentence of imprisonment of ten years. The

respondent refused the appellant's human rights claim in a decision letter dated 24 April 2017.

2. The appellant, a citizen of Zimbabwe, appealed this decision to the First-tier Tribunal ('FTT'). In a decision sent on 27 February 2019, the FTT dismissed his appeal on human rights grounds, and the appellant has now appealed, with permission, to the Upper Tribunal.

FTT decision

3. The appellant's background in set out in detailed chronological order in the FTT's very detailed (143 paragraphs) and carefully drafted decision. The FTT made comprehensive findings of fact having heard from the appellant, his father ('J'), his partner ('E'), E's mother ('S') and a friend ('ET') and having considered expert reports from (i) a country background expert on Zimbabwe, Professor Jeater and (ii) an independent social worker, Mr Horrocks ('the ISW'). These findings of fact have not been the subject of any grounds of appeal on the part of the appellant or any cross-appeal on the part of the respondent. It is convenient to summarise those findings at the beginning of this decision and we do so below.

   (i) The appellant arrived in the UK on 16 September 2002 when he was 11 years old in order to join his parents (both Zimbabwean citizens). They had been granted leave to remain in the UK following a successful appeal on human rights grounds. The appellant was granted discretionary leave ('DL') for a three-year period in 2003 together with his siblings, and he continued to benefit from DL until 2 January 2016. The appellant's parents were granted indefinite leave to remain ('ILR') in 2012. The appellant's application for ILR dated 30 December 2015, based on his ten years' lawful residence in the UK, was refused as a result of his criminal offending.

   (ii) The appellant's offending began at an early age. In 2005, when he was 14 years old, he was convicted of robbery. In 2008, he was convicted of stealing a motor car. In 2011, he was convicted of various driving offences and possession of Class A drugs. In 2012, he was again convicted of various driving offences. None of these convictions resulted in a sentence of imprisonment.

   (iii) On 7 October 2013 the appellant was convicted of aggravated burglary of a dwelling, committed on 18 April 2013, when he was 21 years old. The sentencing judge identified aggravating features including the victims being at home, violence being used, a knife being present, a significant degree of planning and being equipped with blindfolds and cable ties. The sentencing judge placed the offence within the highest category of the sentencing guidelines and imposed a sentence of imprisonment of 10 years. When sentencing the appellant, the judge declined to attach significance to the appellant's history of offending before this.

   (iv) The appellant met E when they were teenagers in 2008. Their relationship has strengthened with time and survived the appellant's imprisonment

between 2013 and 2018. They began cohabitating in 2011, when E was studying for a degree in social work, whilst working part-time. She now works as a social worker. Prior to his imprisonment, the appellant was working with his uncle as a decorator. In June 2012 the couple had a son, Y. He was therefore six years old at the date of the FTT hearing. Cohabitation of course stopped when the appellant was imprisoned in 2013. Although he was released on 17 August 2018, at the time of the FTT's hearing, the appellant was residing in a bail hostel albeit it was envisaged that he would be moving to live with Y and E, once they obtained approval from the probation service and an address more suited to them as a family.

(v) There was compelling evidence from a variety of sources including the ISW, E and S, that notwithstanding the appellant's imprisonment, he maintained an unusually strong relationship with Y, and Y's behaviour had greatly improved since his father's release from imprisonment. The FTT accepted ISW's evidence that there is a significant risk that E would suffer an emotional breakdown if the appellant is deported, which may in turn lead to the breakdown of the family unit and potentially Y moving to live with his grandmother, S.

(vi) The appellant has no family left in Zimbabwe. On return to Zimbabwe the appellant will have limited financial support on a short to medium term from his parents, who are of modest means. Overall, the general situation described by Professor Jeater was accepted, such that the appellant is unlikely to find formal or informal employment in Zimbabwe and therefore likely to be destined to the 'squalid' lodger-type accommodation available in Harare, if he can persuade someone to take him in, otherwise he will be in the homeless / shanty town population. He will be in a slightly better position relative to the population there, due to his limited financial support from the UK.

(vii) The evidence relevant to the appellant's efforts to change and rehabilitate are "*exceptional*" and "*overwhelming*". His medium risk of re-offending is based entirely upon 'static' factors only. Although the appellant pleaded not-guilty to the 2013 offence and maintains that position, he accepts that his conviction was still his fault and arose as a consequence of his lifestyle and associates at the time. The appellant's attitude and actions since his conviction can be characterised as a "*model of rehabilitation*". Although the appellant has only recently been released from prison, his commitment to his future life with his family and his relationship with his son are "*exceptional*".

4. The FTT did not accept that the appellant's return to Zimbabwe would breach Article 3 of the ECHR. This finding has not been appealed and we need say no more about it. We now turn to the FTT's findings in relation to Article 8 of the ECHR.

5. The FTT comprehensively and carefully addressed the 'pros' and 'cons' using 'the balance sheet' approach, by reference to the relevant considerations contained in

ss. 117A-D of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and the Strasbourg jurisprudence summarised by Lord Reed in Hesham Ali v SSHD [2016] UKSC 60. The FTT's assessment of the evidence makes extensive reference to ss. 117A-117C of the 2002 Act and for convenience we set out the relevant extracts at this juncture. These fall within Part 5A of the 2002 Act, which was inserted into it, with effect from 28 July 2014, by section 19 of the Immigration Act 2014. Part 5A is headed "Article 8 of the ECHR: Public Interest Considerations" and includes the following:

> "117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -
>
> (a) breaches a person's right to respect for private and family life under article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard -
>
> (a) in all cases, to the considerations listed in section 117B …
>
> (3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> The maintenance of effective immigration controls is in the public interest.
>
> …
>
> (4) Little weight should be given to -
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious
>
> …"

6. S. 117B is followed by this at s. 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 FTT correctly acknowledged that as the appellant is a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires his deportation unless he is able to demonstrate that there are "*very compelling circumstances, over and above those described in Exceptions 1 and 2*" pursuant to s. 117C(6) of the 2002 Act.

8. The FTT set out in comprehensive terms the circumstances in support of the 'pros' side of the scale under helpful sub-headings. We summarise these below.

(i) The FTT accepted that exception 1 was met. The fact that the appellant was lawfully resident in the UK for most of his life and culturally and socially integrated here was not in dispute. The FTT accepted that there would be very significant obstacles to the appellant's integration to Zimbabwe and commented at [108] that his circumstances "*go well beyond the necessary threshold*".

(ii) There are factors identified in Maslov v Austria [2008] ECHR 546 relevant to the 'pros' side of the balance sheet which prima facie increase the weight to be given to the appellant's private life: although the appellant has not spent the major part of his childhood in the UK, he arrived in the UK when he was 11 and spent a significant part of his childhood in the UK; he has spent the majority of his life in the UK and is closely socially and culturally integrated in the UK; his links to Zimbabwe are very minor and he faces very significant obstacles to integrating there, such that his deportation will be akin to 'exile'. However, although the appellant's residence in the UK has been lawful, he has not benefitted from ILR. As such his stay has been "precarious" and his private life can only carry "little weight" – see s. 117B(6) of the 2002 Act and Rhuppiah v SSHD [2018] UKSC 58.

(iii) It would be unduly harsh for E and Y to live in the UK without the appellant, and also unduly harsh for them to live in Zimbabwe such that exception 2 is met, regarding the appellant's relationships with both E and Y. The appellant's relationships with E and Y would effectively end. Y's best interests to continue to have a dedicated and positive father carries significant weight and is a primary consideration. Y's relationship with his

father is "*unusually strong*" and their separation would lead to "*seriously adverse consequences on Y's development*". E's mental health, her care for Y, and her career would all "*seriously suffer*". The impact upon E and Y would be "*both more than would necessarily be involved for any child or partner whose parent or partner was faced with deportation, and more than that which is acceptable or justifiable even in the context of the high public interest engaged*".

(iv) However, when addressing the weight to be attached to the relationship between the appellant and E holistically, the appellant's precarious immigration status when the relationship commenced, is a factor that reduces the weight to be attached to it.

(v) The appellant's rehabilitation has been "*truly exceptional*" but carries limited weight in the overall analysis.

9. The FTT then turned to the 'cons' i.e. the factors weighing in favour of deportation and focussed on his serious offence, that carried a ten-year sentence. The FTT made it plain that it had not lost sight of the nature and effect of the offence on the victims.

10. The FTT finally applied these findings in relation to the 'pros' and 'cons' to the relevant test set out at s. 117C(6) of the 2002 Act under the heading "*very compelling circumstances*". The FTT made it clear at [141] that "*had those 'pros' been taken in combination with the appellant's private life considerations, with the latter not being reduced by his lack of settled status*", it would have allowed the appeal. In its final paragraph at [143], the FTT considered that its "*assessment of the effect of s. 117B(5) and the relevant authorities*" was that it was "*obliged*" to place little weight on "*private life considerations*", which "*cannot add such weight to the family life considerations as to meet the elevated threshold as exists in the present appeal*" and concluded "*for that reason, the appellant cannot meet the requirements of s. 117B(6) and the appeal must be dismissed.*"

Grounds of appeal

11. Although there are seven written grounds of appeal, at the hearing before us, Mr Jones reformatted these to four grounds:

(1) The FTT erred in law in its approach to the role of the potential exceptional features of the appellant's private life, including his long residence in the UK as a minor, and in these circumstances erred in law in its application of Rhuppiah (supra) and Maslov (supra).

(2) In decreasing the weight to be attached to the relationship between the appellant and E (because of E's awareness of the precariousness of the appellant's immigration status when the relationship commenced) the FTT erred in law.

(3) The FTT's ultimate conclusion was irrational because the appellant was able to meet "*multiple exceptions*" and on any rational view this is sufficient to meet the s. 117C(6) test.

(4) The FTT applied an elevated threshold not warranted by the wording of s. 117C(6).

12. In a decision dated 3 April 2019, PJM Hollingworth granted permission to appeal, observing inter alia that the FTT attached too much weight to the element of precariousness in the overall context.

13. The respondent submitted a relatively detailed rule 24 notice dated 10 May 2019, in which it was submitted that there is no material error of law in the FTT's decision.

Submissions

14. At the hearing before us, Mr Jones relied upon the reformulated grounds of appeal I have set out above, as well as a skeleton argument. Mr Jones acknowledged that the decision is a very careful one albeit containing the obvious and significant legal error summarised in ground one. This ground was the primary focus of Mr Jones' oral arguments. Mr Jones submitted that the FTT erred in law in failing to consider the exceptional features of the appellant's private life, on the basis that he did not have ILR or 'settled status', when Rhuppiah confirms that a consideration of the exceptional features of private life may well be necessary for those without ILR. Mr Jones also submitted that in requiring 'settled status' as a pre-requisite for the operation of the principles set out in Maslov, the FTT erred in law.

15. Mr Jones invited us to conclude that there could only be one result when the law is applied to the FTT's comprehensive findings of fact: the appellant's private life contains exceptional features and when these are factored in alongside all relevant matters, the appeal must be allowed.

16. Mr Lindsay relied upon the rule 24 notice and made detailed submissions in response to Mr Jones' skeleton argument and oral submissions. Mr Lindsay reminded us that the decision must be read as a whole, and that when it is, it is sufficiently clear that the FTT considered whether the appellant's private life contains exceptional features globally but concluded that it did not. It is for this reason that the FTT declined to override the normative guidance in s. 117B(5), and not because the FTT considered itself obliged not to do so as a result of the appellant not having 'settled status'.

17. Mr Lindsay also submitted that Mr Jones was incorrect to submit that but for the need to attach little weight to the appellant's private life, the FTT would have allowed the appeal. Mr Lindsay drew our attention to MS (s. 117C(6); "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) and argued that when finally considering very compelling circumstances including the conclusion reached vis a vis the possibility of allowing the appeal, the FTT was not at that juncture balancing the seriousness of the offending. Mr Lindsay therefore invited us to dismiss the appeal. If we were minded to find an error of law, Mr Lindsay submitted that we should remake the appeal by finding that the private life in

question was "*very far*" from having the necessary exceptional qualities, such that little weight should be given to it, with the result that the appeal is dismissed.

18. Both parties considered that there was no need to hear further evidence or make further factual findings, in the event that we found an error of law, albeit each representative adopted an entirely different position on the result that followed.

19. At the end of the submissions we reserved our decision, which we now provide with reasons.

Applicable law

20. This appeal concerns the proper approach to s. 117B(5) of the 2002 Act in a deportation case involving a foreign criminal who has been sentenced to imprisonment of four years and over (in relation to which the appropriate test is contained in s. 117C(6)), in which it is accepted, *inter alia*, that Exception 1 in s. 117C(4) is met and the appellant came to the UK as a minor.

21. The approach to s. 117B(5) in a non-deportation case was addressed in Rhuppiah, wherein Lord Wilson said this at [49] (our emphasis).

> "It was in section 117A(2)(a) of the 2002 Act that Parliament introduced the considerations listed in section 117B. So, in respect of the consideration in section 117B(5), Parliament's instruction is to "have regard … to the consideration [that] [l]ittle weight should be given to a private life established by a person at a time when the person's immigration status is precarious". McCloskey J suggested in para 23 of the *Deelah* case, cited in para 21 above, that the drafting "wins no literary prizes". But, as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of "little weight" itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:
>
> > "53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question …"

22. The statutory provisions at s.117A-C provide a "*particularly strong statement of public policy*" - see NA (Pakistan) v SSHD [2017] 1 WLR 207 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*" (see Hesham Ali v SSHD [2016] UKSC 60 at [38], i.e. will be rare - NA (Pakistan) at [33]. In SSHD v KE (Nigeria) [2017] EWCA Civ 1382, per Hickinbottom LJ emphasised at [34] that in a case involving at least four years imprisonment, any decision-maker:

> "…must attach very considerable weight to the general assessment of the public interest in deporting foreign criminals, now directly adopted by Parliament in statute, under which such a sentence represents a level of offending in respect of which the public interest almost always outweighs countervailing considerations of private or family life, only being outweighed by countervailing factors which are very compelling (see Ali at [46])…."

23. In MS the President of the Upper Tribunal, Lane J (sitting in a panel with UTJs Gill and Coker) considered the correct approach to s. 117C(6) with the benefit of the guidance provided in KO (Nigeria) v SSHD [2018] UKSC 53 and NA (Pakistan) (supra), and said this:

> "16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
>
> 17. Viewed in this light, it can readily be seen that the ascertainment of what constitute "very compelling circumstances", such as to defeat the public interest, requires a case-specific analysis of the nature of the public interest. The strength of the public interest, in any particular case, determines the weight that must then be found to lie on the foreign criminal's side of the balance in order for the circumstances to be properly categorised as very compelling. It would, frankly, be remarkable if a person sentenced to four years' imprisonment for fraud had to demonstrate the same circumstances as a person sentenced to life imprisonment for multiple murders.
>
> 18. To say this is not to seek to introduce a "balancing exercise" into Exceptions 1 and 2 and the test of "unduly harsh". The words "over and above", as interpreted by Jackson LJ in NA (Pakistan), underscore the difference in the tasks demanded by, on the one hand, section 117C(4) and (5) and, on the other, section 117C(6).
>
> 19. Furthermore, as Mr Pilgerstorfer pointed out, the effect of the judgment in NA (Pakistan), in bringing all foreign criminals within the ambit of section 117C(6), means that it is difficult to see how the test of very compelling circumstances can operate differently, depending upon whether the foreign criminal has, or has not, been sentenced to imprisonment of at least 4 years. In order for it to do so, yet further words would have to be assumed to be written into the section, over and above those mandated by the Court of Appeal's judgment.
>
> 20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether

there are very compelling circumstances, as required by subsection (6), 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. Nothing in KO (Nigeria) demands a contrary conclusion."

24. The wide-ranging evaluative exercise required under s. 117C(6) clearly includes an application of the principles in the Strasbourg authorities. As NA (Pakistan) holds, the s. 117C(6) exercise is required to ensure compatibility with the UK's obligations under Article 8 of the ECHR. In addition, the judgment in NA (Pakistan), given by Jackson LJ, reads:

> "29. … The phrase used in section 117C (6), in para. 398 of the 2014 … does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. … [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
>
> 30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8."

25. In Maslov (supra), the Grand Chamber said this:

> "71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are:
>
> - the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination.

> 72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult (see, for instance, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 19, § 44, and *Radovanovic v. Austria*, no. 42703/98, § 35, 22 April 2004).
>
> 73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec (2001)15 and Rec (2002)4 (see paragraphs 34-35 above).
>
> 74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 *in fine*).
>
> 75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

26. Following Rhuppiah (supra), those with anything less than ILR, have a "precarious" immigration status for the purposes of s. 117B(5). It is therefore fully acknowledged on the appellant's behalf that his immigration status in the UK has been lawful but precarious. For most of his life he held DL and has never benefitted from ILR. Lord Wilson acknowledged at [49] of Rhuppiah that the court defined "*precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under Article 8 will be unable to escape*". Lord Wilson however made two important additional points by way of qualification: (i) inbuilt into the concept of "little weight" in s. 117B(5) is a small degree of flexibility, and; (ii) s. 117A(2)(a) provides the limited degree of flexibility recognised as required to ensure compliance with Article 8 and necessarily enables certain private life cases to succeed. Lord Wilson approved of the approach adopted by Sales LJ in the Court of Appeal: where a case has "*particularly strong features*" of private life and is an "*exceptional case*" the "*generalised normative guidance*" in s. 117B(5) may be "*overridden*".

27. Rhuppiah does not specifically address the position of foreign criminals, and in particular those whose private life in the UK enables them to meet the three requirements in Exception 1 of s. 117C(4). There is a prima facie tension between Exception 1 and s. 117B(5). The latter demands that "little weight" is given to

private life in the UK established when a person's immigration status is lawful but precarious, and entirely looks backwards. The former is underpinned by a recognition that private life in the UK may lead to a breach of Article 8 provided that, inter alia, it was established when the person's immigration status was lawful. The first and second requirements of Exception 1 look backwards to private life established thus far in the UK, but the third looks forward to the likely circumstances that await the person in another country.

28. Of course lawful status can be entirely precarious and is in fact so if anything less than ILR. As this case illustrates, a person may have been lawfully resident for the entirety or at least most of his life in the UK, albeit without ILR. We know from [21] and [22] of KO (Nigeria) that Exception 1 is "*self-contained*" and "*leaves no room for further balancing*". In other words, a foreign criminal sentenced to less than four years who is able to meet the three requirements in exception 1, is entitled to have his Article 8 appeal allowed. There is no additional obligation to conduct a balancing exercise that attaches little weight to that appellant's private life in the UK or balances private life against the public interest, including the seriousness of the offending.

29. The position is entirely different in a case such as this one where the foreign criminal is sentenced to four years imprisonment and over. The wide-ranging evaluative exercise required by s. 117C(6) necessarily includes an application of the public interest considerations in s. 117B and a balancing of the public interest, including the seriousness of the offending – see the clarification provided by Lane J in MS (supra). Mr Jones submitted, without any objection from Mr Lindsay, that the approach in Rhuppiah applies with equal force to a s. 117C(6) case such as this one i.e. whilst the Tribunal is obliged to attach little weight to private life established in the UK when immigration status was precarious, this should be flexibly applied so as to enable the normative guidance to be disapplied or applied in a more flexible manner than "little weight" might at first blush suggest, in cases wherein the private life in question has particularly strong features. This is most likely to bite in foreign criminal cases where the requirements of Exception 1 are met.

Error of law discussion

Ground 1

Little weight / precarious immigration status / Maslov

30. We now turn to the FTT's approach to this appellant's private life. The FTT accepted that the three requirements for Exception 1 to apply were met and these increased the weight on the private life side of the 'balance sheet'. The first two relate to private life in the UK and were not in dispute, having been conceded by the respondent in the decision letter. It was therefore undisputed that the appellant lawfully resided in the UK for most of his life and is socially and culturally integrated here. Although undisputed, it is clear from reading the decision as a whole, that the FTT considered the appellant to be *firmly* socially

and culturally integrated to the UK, notwithstanding his lengthy period of imprisonment. The FTT found the appellant to have a strong family life with E and Y and to have made exceptional efforts to rehabilitate. In addition, at [110] the FTT attached weight to "*the appellant's arrival as a child, his length of stay, and the depth (as opposed to the mere existence) of his social and cultural integration in the UK*". By contrast, the FTT found the appellant to have virtually no practical ties to Zimbabwe beyond his heritage.

31. The third requirement in Exception 1 focuses upon the appellant's likely private life in Zimbabwe. The FTT addressed the circumstances in Zimbabwe for this appellant in detail at [22] to [45]. This led to the conclusion at [108] that the obstacles to integration "*go well beyond*" the "very significant obstacles" threshold and the assessment at [111(b)] that the appellant's deportation would amount to "*exile*". The latter finding must have been informed not just by the FTT's conclusions as to the appellant's dire circumstances in Zimbabwe but also (albeit to a much lesser extent) by the comparative strength of the appellant's private life in the UK.

32. The FTT found that two matters decreased the weight to be attached to private life at [112]: (i) Maslov added the word 'settled' as "*a qualifier*", and this is consistent with Rhuppiah; (ii) as the appellant's stay has been precarious throughout "little weight" can be attached to his private life by virtue of s. 117B(5).

33. The FTT then noted at [113] that Rhuppiah was handed down after the hearing but it was unnecessary to hear further submissions because Mr Jones (who also represented the appellant before the FTT) anticipated the arguments and identified as a 'critical issue' in support of the flexible approach to s. 117B(5), the fact that the appellant was a minor for a long period in the UK and his siblings were granted ILR. The FTT then quoted Lord Wilson's reasoning at [49] of Rhuppiah, before saying this at [114]:

> "I decline to override the normative guidance. The only basis upon which to do so would be to recognise particularly strong features of the private life in question, in an exceptional case, such as to prevent misapplication of Article 8. Yet it is the Strasbourg court itself in Maslov that has added the qualifier of 'settled' and the analysis of the authorities at paras 30-34 of Rhuppiah shows beyond doubt that this label does not attach to the appellant. Parliament's normative guidance at s. 117B(5) is, on the present facts, consistent with the wider case law on the weight carried by private life. The appellant's private life, and by extension the interference that removal would cause, must therefore carry 'little weight' in his support."

34. Of the FTT's 143 paragraphs, this is perhaps the least clearly drafted. The overwhelming majority of the FTT's decision displays an admirable attention to detail and the relevant legal framework to be applied in this difficult and fast-changing area of law. We therefore agree with Mr Lindsay that [114] should not be read in isolation, and the decision must be read as a whole. Having done so, we are unable to accept Mr Lindsay's submission that the FTT's reasons for

declining to apply the "*normative guidance*" in s. 117B(5) are lawful or consistent with authority. Although the FTT stated that "*the only basis*" to "*override the normative guidance*" would be to "*recognise particularly strong features of the private life in question*", the FTT appears to have concluded that irrespective of any strong features of private life, the normative guidance could not be flexibly applied or "*overridden*" for the reasons set out in [114]. These contain errors of law for the reasons set out below.

35. The FTT has misunderstood the principles to be derived from Maslov, and in particular the correct approach to the use of the term, 'a settled migrant'. The FTT has erroneously assumed that the Grand Chamber's reference to 'a settled migrant' in [75] of Maslov, excludes those whose immigration status is anything less than 'settled' for the purposes of UK law i.e. those with ILR. Although many of the Strasbourg authorities that have since applied the Maslov guidance concern those who have a form of permanent residence, this is not a pre-requisite. Rather, the Strasbourg court has used the term 'a settled migrant' to informally describe a migrant who has lawfully spent all or most of his childhood in the host country. That is a distinct concept from a migrant who has 'settled status' in the UK, by virtue of having acquired the formal status of ILR.

36. That this is the correct approach is apparent from reading the judgment in Maslov in full. Maslov builds upon earlier Strasbourg authorities summarised at [68] to [70] of the Grand Chamber's decision – see in particular the summary of the Grand Chamber's judgment in Uner v the Netherlands ECHR 2006-XII. The judgment then goes on to clarify that it is important to take into account particular factors when applying the general principles including: age of the person concerned; when the offences were committed, and; whether the person came to the EU country as a child. The Grand Chamber then repeats the Uner guidance that "*regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there…*". It is noteworthy that the court in Uner referred to the special situation of aliens with lengthy residence and not those with permanent residence or settled status. It is against that background that the court in Maslov sought to summarise its guidance at [75]. Although Mr Maslov had been granted an unlimited settlement permit in Austria, this formed no part of the court's enunciation of the general principles. Although this was referred to at [86] when applying the principles to the case, this merely provides commentary on the basis of Mr Maslov's lawful residence. The focus of the general principles in Maslov is squarely upon the timing, length and lawfulness of residence. It is unlikely to be a coincidence that such an approach is replicated in the wording of s. 117C(4)(a).

37. There is support for this interpretation of the phrase 'a settled migrant' in Maslov in the domestic authorities, which emphasise the requirement of mere lawful residence as opposed to the person needing to have been lawfully resident in a manner akin to ILR or settled status in the UK, in order to benefit from the general principles set out in the Strasbourg authorities culminating in Maslov – see JO (Uganda) v SSHD [2010] EWCA Civ 10 at [18], [31] and [52]; DM

(Zimbabwe) v SSHD [2015] EWCA Civ 1288 at [34-35]; Akinyemi v SSHD [2017] EWCA Civ 236 at [43]. In addition, in Hesham Ali the Supreme Court makes it clear at [25] and [99] that 'a settled migrant' in this context refers to a person who has been granted a right of lawful residence (even if not permanent) in the host country.

38. The FTT was wrong to state that Rhuppiah "*shows beyond doubt*" that the label 'settled migrant' does not attach to the appellant. It is generally understood that the term 'settled migrant' clearly applies to a person who has been granted a right of lawful residence for a lengthy period since childhood, such as this appellant. That was certainly the view of their Lordships in Hesham Ali, and Mr Lindsay did not argue otherwise. After all, if the appellant or Ms Rhuppiah had ILR, the approach to s. 117B(5) would have been straightforward: it would be inapplicable.

39. It follows that when the FTT considered at [112(a)] and [114] that the Strasbourg court deliberately added the word 'settled' as "*a qualifier*" to the general principles so as to exclude those who do not have settled status or ILR, it erred in law. Insofar as the FTT considered the possession of ILR to be a pre-requisite to having particularly strong private life features, it erred in law and acted inconsistently with Rhuppiah.

40. The FTT also erred in law in ignoring the role played by s. 117A(2)(a) of the 2002 Act and the provision for flexibility, as explained by Lord Wilson at [49] and [50] of Rhuppiah. The FTT failed to consider the extent to which, in all the circumstances of the case, it was necessary to adopt a flexible approach in order to act consistently with Article 8. This is because the FTT did not consider itself entitled to be flexible beyond the wording of s. 117B(5). As noted in Rhuppiah the concept of "little weight" in s. 117B(5) itself provides a small degree of flexibility but more significantly s. 117A(2)(a) provides an overarching limited degree of flexibility, so as to ensure that decision-makers are not put in a strait-jacket which constrains them to determine claims inconsistently with Article 8 and the Strasbourg principles relevant to it.

41. In conclusion, although the FTT's decision is detailed and carefully drafted, it erred in law in:

    (i) concluding that because the appellant does not have ILR, he is not a 'settled migrant' for the purposes of the guidance given in Maslov;

    (ii) failing to direct itself to the role played by the flexibility provision in s. 117A(2)(a), when attributing weight to the appellant's private life for the purposes of s. 117B(5) and s. 117C(6), in the manner anticipated as possible in Rhuppiah.

Materiality of error of law

42. Although Mr Lindsay relied upon the rule 24 notice, he did not refer to the submissions within it during his clear and creative oral submissions. Mr Lindsay

did not attempt to argue that the FTT was correct to conclude that settled status is a necessary pre-requisite in order to flexibly address private life in accordance with the approach approved of in Rhuppiah and as permitted by virtue of s. 117A(2)(a). Rather, Mr Lindsay submitted that the FTT's observations in relation to Maslov did not result in any *material* error of law because it is implicit from reading the decision as a whole that the FTT rejected the submission that there were particularly strong features of private life in this particular case. In Degorce v Commissioner for HMRC [2017] EWCA Civ 1427, Henderson LJ referred to the relevant test when having found an error of law, the Upper Tribunal is exercising its discretion whether to set aside the FTT's decision at [95] (our emphasis):

> "I would accept the submission of Mr Gibbon that, if the Upper Tribunal finds an error of law to have been made, it then has a broad discretion whether or not to set aside the decision of the FTT. That is the clear import of the words "may (but need not) set aside", and in my view it would be wrong in principle to interpret the scope of this discretion by reference to the previous law on tax appeals under TMA 1970. TCEA 2007 set up a new tribunal structure, and the provisions of section 12 apply to all chambers of the Upper Tribunal, not merely to the Tax & Chancery Chamber. That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision."

43. We do not accept Mr Lindsay's submission that the FTT's observations in relation to Maslov and disinclination to approach private life flexibly, did not result in any *material* error of law, or his submission that in any event the FTT rejected the submission that there were particularly strong features of private life. Firstly, at no point in its carefully drafted decision did the FTT expressly state that there are no particularly strong features of private life. Rather, when the decision is read as a whole, the FTT has at various points highlighted features of the appellant's private life that might be viewed as strong – see [110] of the FTT's decision as quoted at paragraph 30 above.

44. Second, it is difficult to see how the FTT could conclude at [141] that the appellant's private life was in itself was capable of tipping the balance in order for the appeal to be allowed in a s. 117C(6) case involving (on any view) a very serious criminal offence, if the FTT was of the view that the private life in question was not strong. For convenience we repeat the FTT's finding at [141]:

> "But had those 'pros' been taken in combination with the appellant's private life considerations, with the latter not being reduced by his lack of settled status, I would have allowed the appeal."

45. Mr Lindsay invited us to find that the conclusion at [141] omitted any reference to the need to balance the seriousness of the appellant's offending. We entirely accept that in a s. 117C(6) case, there is a requirement to address not merely

whether the foreign criminal was sentenced to imprisonment of four years or more but also the seriousness of the particular offending and to balance the strong public interest in support of deportation against the circumstances over and above Exceptions 1 and 2 – see MS (supra). We are satisfied that this is precisely what the FTT did. At [138] the FTT properly directed itself to NA (Pakistan) as to the need to consider all matters collectively to determine whether the high public interest in deportation could be displaced. The FTT regarded it as sufficient in the particular appeal to measure the seriousness of the offence by the ten year sentence imposed at [135], having already set out in full the seriousness of the offence at [15] and [16]. It follows that when addressing the s. 117C(5) test specifically at [138] and [139], the FTT began by directing itself to the accepted principle that it will be rare for the high public interest to be outweighed. The FTT then turned its attention to the appellant's family life at [140]. Although the FTT accepted that Exception 2 was met, it concluded that because the sentence is so lengthy (and the offence so serious) the appellant's family life in itself was insufficient to meet the s. 117C(5) test. This also demonstrates the FTT's self-direction to the seriousness of the appellant's offending when addressing the s. 117C(5) test.

46. It follows that the FTT's [141] flows directly from the paragraphs preceding it, in which the public interest was expressly considered. When the decision is read as a whole we are entirely satisfied that this FTT meant what it said – it would have allowed the appeal if it was entitled to attach more than "little weight" to the appellant's private life. This is repeated at [142]. Although the FTT did not directly refer to the high public interest in the appellant's deportation at [141] and [142], when [134] to [143] are read together, it is clear that the FTT's conclusion that it would have allowed the appeal if more weight could be attached to the appellant's private life, was reached having correctly balanced the seriousness of the offending.

47. Third, the FTT expressly stated that it was bound to reduce the weight or attach little weight to the appellant's private life by reason of his lack of settled status, and for no other reason – see the wording used at [112(a)], [114], [141] and [142] of the FTT's decision.

48. Fourth, the FTT made no findings on the matters contended by Mr Jones to support his submission that the normative guidance should be disapplied. These included the following: it was critical that the appellant's siblings and parents were granted ILR, and; the appellant's private life in the UK was established when he was a child as he came to the UK when he was 11. The FTT did not reach any clear view on whether these aspects of the appellant's private life contained particularly strong features. This is because the FTT erroneously considered that as the appellant was not a 'settled migrant', that was the end of the matter.

49. For the avoidance of doubt, we accept that private life developed by a child over many years tends to, and usually does take on a special and compelling character.

However, we reject the submission that the FTT was wrong to decline to disapply s. 117B(5) solely on the basis that it does not apply to minors. If that is correct, the legislation could have made that clear. When provided with an opportunity to consider the weight to be attached to private life developed as a child in the UK, the Court of Appeal in SA (Afghanistan) v SSHD [2019] EWCA Civ 53, approached the matter as turning on the particular facts of the case and concluded at [32] that the facts of that case did not demonstrate particularly strong features of private life capable of outweighing the normative guidance in ss. 117A and 117B. When assessing whether private life contains strong features, it is unlikely that any one factor is determinative, rather private life must be viewed holistically and each case will turn on its facts. This includes private life that was developed in the UK as a child. In addition, we agree with the submission in the rule 24 notice that any attempt to ascribe a particularly strong private life to the appellant solely by reason of his being close to obtaining ILR is not well-founded.

50. Fifth, it is important to note that private life is an elusive and wide-ranging concept. It blurs into family life. Although the rule 24 notice submits that the appellant cannot on any view be said to have a particularly strong private life, that is unsupported by the FTT's own reasoning. The rule 24 notice makes the obvious point that the appellant's imprisonment demonstrates a lack of integration with society. However the appellant's lawful lengthy residence since a child, together with his education, connections to the UK and absence of meaningful connections elsewhere were considered sufficient by the respondent to concede the first two requirements in Exception 1, within his decision letter.

51. We therefore reject Mr Lindsay's submission that a proper reading of the FTT's decision demonstrates that it found an absence of particularly strong features of private life. We also reject the submission that the accepted facts of this case could on no legitimate view form the basis of such a finding. We are satisfied that the errors of law we have identified might have made a difference to the FTT's decision and are material and the FTT's decision must be set aside.

Other grounds of appeal

52. Given our conclusions on the first ground of appeal (as reformulated), there is no need to address the remaining grounds of appeal, but we do so briefly for completeness.

Ground 2

53. We do not accept that the FTT committed any legal error in concluding that the precariousness of the appellant's immigration status at the time he commenced his relationship with E reduced the weight that could be attached to that relationship – see the summary of the relevant authorities in Rhuppiah at [27] to [35]. In any event, it is clear that the FTT reduced the weight to a minimal degree having found that the effect on E would be of such a serious nature that Exception 2 was met.

Ground 3

54. We do not accept that the FTT's ultimate conclusion was irrational. For the reasons provided the legal errors were confined to the approach to the appellant's private life alone, and it is this that that infected the ultimate conclusion.

Ground 4

55. We reject Mr Jones' submission that the FTT applied an elevated threshold when observing at [140] that although the effect of the appellant's deportation upon E and Y would be unduly harsh, the consequences could not be described as "*catastrophic*". The FTT was merely commenting that whilst the effect would be unduly harsh, in the sense explained in KO and would therefore satisfy Exception 1, because the case fell within s. 117C(6), the appellant needed to show something over and above that. In short, the appellant needed to show that the impact on E and Y would be "*extra*" unduly harsh – see [16] of JG (Jamaica) v SSHD [2019] EWCA Civ 982, per Underhill LJ. The FTT was entitled to find on the evidence available to it, that the appellant was unable to do so.

Re-making the decision

56. Mr Jones invited us to conclude that there could only be one result when the law is applied to the FTT's comprehensive findings of fact: the appellant's private life contains particularly strong features and when these are factored in alongside all relevant matters, the appeal must be allowed. Mr Lindsay contended that the FTT concluded that the appellant's private life did not contain particularly strong features, and the appeal must therefore be dismissed. We have already provided our reasons for rejecting Mr Lindsay's submission, and we now turn to Mr Jones' submission.

57. Whilst the FTT has highlighted features of the appellant's private life in the UK that might be capable of being viewed as particularly strong when assessed holistically, there has been no clear finding to this effect. We acknowledge that the FTT found Exception 1 to be met by a considerable margin. However, the FTT focused its attention on the third requirement in Exception 1, relevant to the appellant's circumstances in Zimbabwe, and not his private life in the UK. We are satisfied that the FTT's error of law in its approach to Maslov and s. 117B(5) has infected its obiter conclusion at [141]. It is unclear whether the FTT attached little weight to the entirety of the appellant's private life, both in the UK and if returned to Zimbabwe. We have already made it clear that s. 117B(5) is directed at the former only. If the FTT properly directed itself to the authorities on the approach to private life in the UK, it cannot be said that it would have inevitably concluded the appeal in the appellant's favour. There are clearly obvious factors in support of the appellant having a particularly strong private life but these must be viewed in context. He remains a young man who has spent a very significant period of his time in the UK in prison, and as such appears to have no employment or community ties (beyond his family) since 2013.

58. In order to re-make the decision, it is important that we directly address whether in this particular case there is sufficiently strong private life to enable a flexible approach to s. 117B(5), as explained in Rhuppiah. This in turn informs the degree of flexibility to be applied to private life both for the purposes of Exception 1 and s. 117C(6).

59. In addition, we note that when re-making the appeal we must do so on the basis of the circumstances as at the date of decision. Both representatives made it clear that they were content to rely solely on the FTT's findings of fact and factual evaluations. These should clearly be preserved. However, the appellant was released from prison in August 2018 and at the date of the FTT hearing in October 2018 was residing in a bail hostel. It would assist us to have a clearer picture of his current circumstances and in particular an updated addendum report from the ISW, in relation to his family life.

60. Given the extensive preserved factual findings, and the likelihood that the further evidence will be limited, we are satisfied that in all the circumstances it is appropriate for the decision to be remade by us in the Upper Tribunal ('UT'). We have therefore given directions, which are set out below.

Decision

61. The FTT's decision contains an error of law and we set it aside.

62. The decision shall be remade in the UT.

Directions

(1) By 4pm on 12 August 2019, the appellant shall file and serve an indexed and paginated bundle containing updated evidence relied upon including witness statements and an updated addendum report from the ISW.

(2) By 4pm on 29 August 2019, the respondent shall file and serve a position statement that explains whether any of the updated evidence is disputed.

(3) The hearing shall be listed on the first date after 16 September 2019.

(4) Two weeks before the adjourned hearing the appellant shall file and serve a skeleton argument.

(5) One week before the adjourned hearing the respondent shall file a skeleton argument.

(6) Liberty to apply FAO UTJ Plimmer.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
8 July 2019