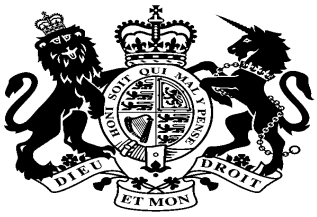

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14176/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 22 January 2019	**On 14th May 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Y S

Respondent

(ANONYMITY DIRECTION MADE)

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the appellant: Mr P. Duffy, Senior Home Office Presenting Officer
For the respondent: Mr L. Garrett, instructed by Templeton Legal Services

DECISION AND REASONS

1. For the sake of continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant entered the UK on 08 September 2001 using a false passport and claimed asylum. The protection claim was refused on 01 November 2001. An appeal was dismissed on 16 May 2002 and permission to appeal was refused. His appeal rights became exhausted on 18 June 2002. The appellant remained in the UK in the knowledge that he had no leave to remain. On 13 April 2007 he made further submissions to the Secretary of State on the basis that he was in a relationship and had two children. The appellant was listed as an absconder on 14 December 2007 after failing to report.

3. The Secretary of State made a deportation order under section 5(1) of the Immigration Act 1971 on 09 July 2009 following the appellant's conviction for possession of class C drugs, for which he received a sentence of 12 months' imprisonment. The Asylum and Immigration Tribunal dismissed the appeal in a decision promulgated on 24 September 2009. Permission for reconsideration was subsequently refused. His appeal rights became exhausted on 27 October 2009.

4. It is unclear whether the appellant was reporting in the period after the deportation appeal or whether any steps were taken by the Secretary of State to enforce the deportation order. None are recorded in the immigration history provided by the respondent. On 13 January 2012 the appellant was convicted for failing to provide a specimen. He was fined and disqualified from driving for two years. The respondent wrote to the appellant on 25 September 2012 to ask for an update on his family life in the UK. The appellant responded on 17 September 2012. On 12 April 2013 the appellant made an application to revoke the deportation order, which was refused on 09 September 2013. The appellant did not lodge an appeal. Further submissions were made in 2013, 2014 and 2016, but the respondent refused to treat them as a fresh human rights claim in a decision dated 24 June 2016. Following judicial review proceedings, the respondent made a fresh decision.

5. The appellant ("YS") appealed the respondent's decision dated 28 June 2018 to refuse a human rights claim in the context of deportation proceedings.

6. First-tier Tribunal Judge Hawden-Beal ("the judge") allowed the appeal in a decision promulgated on 19 October 2018. The judge accepted that the appellant was in a genuine and subsisting relationship with his three children (at least two of whom are British). At the date of the First-tier Tribunal hearing the children were 13 years old (twins) and 11 years old. They attended the hearing and wanted to give evidence although they did not do so. The judge considered the letters they wrote in support of the appeal, which she found to be "compelling reading". The children's mother gave evidence. Although the appellant is no longer in a

relationship with their mother the judge accepted that they parent the children together. The appellant is recorded as having two other children by different mothers. It appears that he did not rely on a relationship with those children for the purpose of these proceedings.

7. The judge referred to the relevant provisions of the immigration rules and emphasised that the public interest required the appellant's deportation because of his convictions. She considered whether it was 'unduly harsh' for the children to be separated from their father. She made clear that the children's interests were a primary consideration although not the only consideration. She weighed their rights against the fact that the appellant had never had leave to remain in the UK and had broken the law [38]. The judge took into account the fact that the children's mother also suffered from ill health and relied on the appellant to support her in raising the children [39]. She reminded herself of the stringent nature of the test [40]. The judge then went on to consider the nature of the appellant's criminal offending. She noted that he had not reoffended in relation to drugs for 10 years and that the risk of reoffending was low. Although she noted the conviction in 2012, she observed that he was given the lowest fine possible [41]. The judge observed that the deportation order was made in 2009, but the respondent had taken no steps to remove the appellant since then. She noted that the respondent did not appear to be "imbued with a sense of urgency" to deport him [42]. The delay in decision making, and the lack of action to remove the appellant indicated that there was "not a pressing public interest in his removal". During the period of delay the appellant and his children had strengthened their family life together such that it was unduly harsh to separate them from their father [43].

8. The judge was "very conscious of the lack of status of the mother" and agreed that a *Zambrano* issue might arise. It could not be assumed that the mother would be allowed to stay in the UK if the appellant was removed. In such circumstances British children might be forced to leave the area of the European Union [44]. She directed herself to the decision in *MM v SSHD* [2016] EWCA Civ 450, *AJ v SSHD* [2016] EWCA Civ 1012 and *CT v SSHD* [2016] EWCA Civ 488 and reminded herself that there must be something more than the usual separation caused by deportation. She was satisfied that the uncertainty surrounding the mother's status … is the 'something more'." At least one of the parents needed to have status in the UK to safeguard the children's welfare [45]. She concluded:

> "49. In the circumstances, I am satisfied that the above factors are sufficiently compelling and therefore exceptional so as to make the decision to deport him disproportionate and thus outweigh the public interest in his deportation."

9. The Secretary of State appeals the First-tier Tribunal decision on the ground that the judge's finding that it would be 'unduly harsh' on the children was perverse given the stringent nature of the test. The judge relied on the mother's lack of status as a determinative factor in concluding that the stringent threshold was met in this case. However, it was unlikely that she was at risk of removal because it would be open

to her to apply for a derivative residence card on *Zambrano* grounds if the appellant is deported.

Decision and reasons

Error of law

10. The judge directed herself to the relevant legal framework in a careful and well-reasoned decision [27-32]. The appellant was sentenced to 12 months' imprisonment so it was open to him to argue that he came within one of the exceptions to deportation outlined in the statutory scheme contained in section 117C of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") and the respondent's policy set out in paragraph 399(a) of the immigration rules.

11. There is no challenge to the judge's finding that the appellant has a genuine and subsisting parental relationship with his three children [35]. Although the respondent's grounds asserted that the judge failed to consider whether the children could relocate to Sierra Leone with their mother (who is a Jamaican citizen and no longer in a relationship with the appellant) Mr Duffy did not argue this ground at the hearing and confined his submissions to the assertion that the judge's overall conclusion was perverse. He was quite right not to pursue the argument because it is clear from the decision letter that the Secretary of State already accepted that it would be unduly harsh to expect the children to live in the country to which their father would be deported. It is also clear that the Home Office Presenting Officer reaffirmed the concession at the First-tier Tribunal hearing [17]. The only issue before the judge was whether it would be unduly harsh for the children to be separated from their father if they remained in the UK.

12. The judge considered the correct test of whether the effect of deportation would be 'unduly harsh' on the appellant's three children. She made clear that she was aware of the stringent nature of the test [40]. At the date of the hearing she considered relevant case law from the Court of Appeal in *MM v SSHD* [2016] EWCA Civ 450, which suggested that the assessment of the 'unduly harsh' test should include consideration of "the deportee's criminal and immigration history" [45]. The judge referred to what was said by the Court of Appeal in *SSHD v CT (Vietnam)*[2016] EWCA Civ 488 and came to the following conclusion at [45]:

> "…*'Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in his deportation. Something more is required to weight in the balance….'* and in this case, I am satisfied that it is the uncertainty surrounding the mother's status which is the 'something more'. At least one of the parents have to be given status here in the UK, in order to safeguard the children's welfare and their future and I am satisfied that the exception in paragraph 399(a) applies."

13. Although the judge was entitled to consider many of the factors that she did in assessing whether it would be unduly harsh to separate the children from their father, it seems clear from this section of the decision that the uncertain immigration

status of the children's mother was the key element that the judge found tipped the case into the realm of unusual and compelling circumstances over and above the usual harsh effects of deportation on children.

14. We conclude that there is some difficulty with this finding. Having accepted that it would be unduly harsh to expect the children to relocate to Sierra Leone, the only question was whether it would be unduly harsh for the children to be separated from their father. The exact wording of paragraph 399(a) is whether it would be unduly harsh for the children to "remain in the UK" without the person who is to be deported. The theoretical question contained in the rules assumes that the children would remain in the UK.

15. In the theoretical situation that the judge was asked to consider, it was reasonable to infer that, in the absence of the father, the Jamaican mother's claim to residence rights as the primary carer (as she would become) of two British children is likely to be strong. On behalf of the respondent, Mr Duffy accepted that if the appellant was removed there "didn't seem to be much uncertainty about the position of the mother with reference to derivative rights of residence". If the mother became the primary carer in the appellant's absence, then the effect of her removal to her country of nationality would be to require European Union citizen children to leave the area of the EU with her. In these circumstances it is difficult to see how the lack of current status of the mother at the date of the hearing was likely to impact on the issue that needed to be determined, which was whether it would be unduly harsh for the children to remain in the UK without their father.

16. We note that the judge considered a number of factors that were relevant to the balancing exercise under Article 8, and quite clearly found that the combination of factors was "sufficiently compelling and therefore exceptional so as to make the decision to deport him disproportionate" [49]. In light of these wider findings we have considered whether the judge's conclusion nevertheless is sustainable. However, we conclude that the decision must be set aside because (i) the key point upon which she concluded that the circumstances were sufficiently compelling amounted to an error of law that appeared to make a difference to the outcome of the decision; and (ii) given changes in the law following the Supreme Court decision in *KO (Nigeria) v SSHD* [2018] WLR 5273 it is desirable to remake the decision on the basis of the current law.

Remaking

17. We have decided that it is possible to remake the decision without a further hearing. At the hearing before the Upper Tribunal Mr Duffy was content for the Tribunal to go on to remake the decision without another hearing. Although Mr Garrett suggested that a further hearing would be necessary, we do not consider that it is. The factual circumstances are not in dispute. The appellant is not prejudiced given the outcome of our decision.

Best interests of the children

18. It is not possible to assess the exceptions to deportation contained in section 117C(5) and paragraph 399(a) of the immigration rules without an evaluation of the best interests of the children. An assessment must be conducted in every case where an immigration decision is likely to impact on the welfare of a child.

19. In assessing the best interests of the children in this case, we have considered the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration although they may be outweighed by the cumulative effect of other considerations.

20. The respondent must have regard to the need to safeguard the welfare of children who are "in the United Kingdom". We take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

21. Three children are affected by the decision to deport the appellant. His eldest children, A and B, are 13-year-old twins who are British citizens. His youngest daughter, C, was born in the UK and is 11 years old. Although she is eligible to register as a British citizen it is unclear whether she now has British citizenship. Nevertheless, she has been continuously resident in the UK for a period of more than seven years.

22. The First—tier Tribunal judge was satisfied that the appellant had a genuine and subsisting parental relationship with all three children since birth. In his statement, the appellant said [4]:

> "I have a strong bond and connection with my children. I was present from birth and have been in their lives ever since. They are a part of me and I am a part of them."

23. The evidence of the children's mother also confirmed that the appellant had been fully involved in their upbringing albeit they are no longer in a relationship. She said that his separation from the family following his conviction was difficult for all of them. She was a single mother without status in the UK struggling to care for three children. She said that she was resentful of the difficulties that the appellant caused

the family as a result of his actions and that it took time to build trust between them after he was released from prison. However, in her view the appellant had proven himself to be a "wonderful and caring father and a reformed individual". The children's mother said that she had been battling with depression for a number of years and that his assistance with childcare had been very helpful. She was unable to afford to apply for an extension of her leave to remain in 2017. As a result, she lost her job. She and the children faced a difficult period of homelessness. Social services refused to help them. They had been reliant on a friend to support and accommodate them. She found their circumstances very stressful, which exacerbated her depressive episodes. The First-tier Tribunal judge acknowledged that there was evidence to show that the children's mother had been treated for anxiety and depression, was being treated for high blood pressure and investigated for possible angina.

24. The First-tier Tribunal judge also described the evidence from the children as "compelling reading". The children are of an age where their voices should be considered. It is worth setting out some of their evidence as part of this assessment. In B's letter to the Tribunal she emphasised that she had a right to a relationship with her father. She described the relationship with her father and urged the authorities not to separate them. She said:

> "Every night before we go to bed my dad would kiss us and make sure we would have a goodnight sleep. Without him I can't sleep and my mind would be on him 24 hours a day for 365 days a year. How would you feel if someone was forcing you to leave your father that you love very much? I know it wouldn't feel that nice. So why do it to us children. If you do, me and my siblings would be heartbroken and would never forget the day you did.
>
> If you do, we would have to grow up without a father figure in our life. As for us would be hard because we have had one in our life since we were born. He was the first one to hold me when I was born, also my first words were 'daddy'. He has been in my life from the second I was born and he has never left my side since, through thick and thin. He had promised us 'no matter what, he would never leave us' and you are trying to force him to break it and leave us."

25. In another letter to the Tribunal B said:

> "Without my father a part of me will be lost and I just wouldn't feel like myself no more. Finally, if our mom is gone out because she is busy we will need someone to feed us, love us, to entertain us, have their up and down day with us and most importantly educate us when we are not at school, and that's a job done magnificently by my father. He has been with us since day 1 and never left us. So PLEASE let my dad stay."

26. In one of A's letters to the Tribunal he said:

> "I am writing to you to try and convince you not to deport my dad. In this letter you will find reasons for not sending him back and my distinct feelings on this whole situation.
>
> You should not deport my dad because he plays a huge part in our life for example he brings myself and my sisters to school every morning. Also my dad has enrolled us in a local mosque to expand our knowledge by learning Arabic.
> ….

> Article 9 UNICEF rights of the child: children must not be separated from their parents unless it is in their best interests."

27. In another letter he said:

> "My dad always goes the extra mile for us. For example at the end of year performance he told he that he would not make it but he still came. My dad always comes through for me and my sisters. Like when we have football matches and he tells us we can't go. But the last minute he always says that we can go. So those are a few reasons why I like my dad and I would not give him up for anything in the world."

28. The youngest child, C, also wrote several letters to the Tribunal. In one, she said:

> "I'm writing to express myself and my feelings about my dad. I'm writing to you to say that I need a dad in my life. What if your dad was sent away? How would you like it without a dad in the same country for life? Firstly, I have a right to see my dad and if you send him back [you will take] my rights away. Also, whoever sends him back would also be taking all of our rights I would also be feeling unhappy without a dad because he does everything for me. The main reason and things he does for me is that he makes sure I'm safe and hes always at the school gate on time. When I come outside hes always there showing me a big smile that I could never forget and the smile makes my heart melt. My dad is appart of me hes my life, my blood, my heart and hes up there in my mind and he would never be forgotten." (sic)

29. In another letter she said:

> "I want my dad to stay please don't take my dad away from me I am so stress without my dad I keep crying for my dad he is apart of my life. I can't live without him he apart of me he looked after me so please let my dad stay. He is a good dad he does every thing for us. He looks after us. He promises us things and he does not break. He takes us places he cares for us he loves. He does all the things we want to do. (sic)"

30. A letter from the assistant head teacher of C's school dated 12 July 2018 said the following:

> "I am writing this letter to confirm that Mr [YS] has a very active and crucial role in the care and upbringing of this three children…
>
> I have worked at [the school] since 2014 and in that time Mr [YS] has supported his children by taking them to and from school, ensuring that they are well presented, providing packed lunch and being available to collect them from after school clubs. He has also supported [C] with her involvement with a local football team and has ensured that she has made excellent progress in developing her athletic and social skills. He attends parent's evenings, workshops and special school events and is always willing to attend specific meetings to discuss and formulate plans to support her learning.
>
> [C] sometimes displays challenging behaviour in school and Mr [YS] has gone over and beyond in his support for us in our work with his daughter. In the past I have rung home to ask for a parent to come in to school and Mr [YS] has come right away to help us support his daughter's behavior (sic). Mr [YS]'s behavior (sic) management with his daughter is effective; he is calm but firm and always follows through consequences which help us immeasurably in our behavior management in school. This support has been vital in helping [C] to overcome many challenges with her behaviour and learning which has been pivotal to

> her continuing her education at this school. Without his constant influence and support I fear this progress will not continue and this positive change and development will be compromised, affecting [C]'s future.
>
> Mr [YS] is a very dedicated and loving father who takes his responsibility for his three children very seriously which is to be applauded as he provides them with the support and guidance which is vital in ensuring their development into well rounded members of our society."

31. Having reviewed the evidence we have no hesitation in finding that it is in the children's best interests to be brought up by both parents. The evidence shows that the appellant is a positive influence in their life and takes an active role in their upbringing. The evidence shows that, aside from a short period in prison, the appellant has been an involved and supportive father to his children. The family bonds between the appellant and his children clearly are strong. The separation of the appellant from his children for a prolonged period would have a detrimental impact upon them. As British citizens, at least two (possibly now all) of the children have a right to remain in the UK and to all the benefits and advantages that this status brings. We conclude that the best interests of the children point strongly towards the status quo i.e. being brought up by both parents in the UK.

Findings in the context of the legal framework

32. Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that it incompatible with a Convention right. This duty is placed on the Secretary of State as well as courts and tribunals. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position on Article 8 of the European Convention. The complicated provisions relating to private and family life and the separate provisions relating to deportation bear little resemblance to the approach taken by the European Court of Human Rights when conducting a balancing exercise under Article 8. The Strasbourg court conducts a holistic assessment of all the relevant circumstances of a case weighing the individual's circumstances against the public interest considerations without separating different aspects of a claim. We are bound to assess the appeal with reference to the immigration rules and relevant statutory provisions, but it must always be remembered that those provisions are intended to give effect to, and are said to be compatible with, the underlying principles enshrined in Article 8 of the European Convention: see *NA (Pakistan) v SSHD* [2016] WLR(D) 662 [38-39].

33. Part 5A of the NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the 'public interest question' a court or tribunal must also have regard to the issues outlined in section 117C in cases concerning the deportation of foreign criminals. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention of Human Rights.

34. The statute makes clear that deportation of foreign criminals is in the public interest and that the more serious the offence committed the greater is the public interest in deportation. However, the statutory scheme also sets out circumstances in which the public interest in deportation is outweighed because a person meets one of the stated exceptions.

35. The appellant was sentenced to a period of imprisonment of 12 months and is eligible to argue that he comes within one of the exceptions to deportation outlined in section 117C(5) of the NIAA 2002. It is not disputed that the appellant has a genuine and subsisting relationship with qualifying children. The public interest in deportation is outweighed if the effect of deportation would be 'unduly harsh' on the appellant's children. In *KO (Nigeria) v SSHD* [2018] 1 WLR 5273 the Supreme Court confirmed that the assessment must be focussed on the position of the children but emphasised the elevated threshold in cases involving the deportation of foreign criminals.

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

36. The starting point for this assessment is our finding that it would be contrary to the best interests of the children to be separated from their father. However, the Court of Appeal in *NA (Pakistan)* noted that the inevitable consequence of deportation is for children to be separated from a parent even though it is contrary to their best interests. The Supreme Court in *KO (Nigeria)* made clear that something more than the usual harsh effect of deportation on a child is needed to reach the elevated threshold of 'unduly harsh' to meet the requirement of section 117C(5) of the NIAA 2002.

37. Focussing solely on the evidence relating to these children, we can see that they have a close and loving relationship with their father. The relationship is long standing since birth. They have benefited from their father's presence in their lives for a sufficiently long period of time to show that the love and support he provides is real and enduring. It seems clear from the evidence given by the children that they would be devastated if they were no longer to receive the same level of care and support

provided by their father. Although they are now of secondary school age, they are no so old that they are imminently approaching adulthood. To continue their relationship with their father at a distance solely by way of modern means of communication would be wholly inadequate given the current level of support that he provides.

38. There is no evidence to show that any of the children suffer from serious health or developmental problems. Although the school mentioned that C has had some behavioural problems, there is little detail as to the cause or extent of those problems. However, the evidence does show that her father plays a key part in managing the emotional problems that she is experiencing.

39. The evidence shows that the children's mother has a history of anxiety and depression. Although the medical evidence does not go so far as to assess the likely impact of the appellant's removal on her ability to care for the children, it is reasonable to infer that the additional strains of caring for three children alone are likely to at least maintain or possibly exacerbate the difficulties that she faces with her mental health. In turn, this is likely to impact on the children in a negative way.

40. It is clear that the appellant plays an important part in the children's lives. He has been a stabilising factor at a time of instability when their mother has faced problems with her immigration status and housing. The children have faced a recent period of homelessness with their mother. It is in their interests to maintain what stability they currently have. We conclude that the cumulative effect of the entrenched relationship between the appellant and his children, the mental health issues faced by the children's mother, C's existing emotional difficulties and the recent instability in the children's lives all indicate that further upheaval would have an unduly harsh effect on the children. Whilst none of these factors would be sufficient, taken alone, we conclude that the combined effect of these circumstances is such that it would be unduly harsh on the children to be separated from their father over and above the usual negative effects of deportation. For these reasons we conclude that the appellant meets the requirements of section 117C(5) of the NIAA 2002 or 399(a) of the immigration rules.

41. In the alternative, we turn to consider whether there are 'very compelling circumstances' to outweigh the public interest in deportation. Although the precise wording of section 117C(6) of the NIAA 2002 only purports to apply this test to foreign criminals who have been sentenced to a period of imprisonment of four years or more, the same provision in the immigration rules clearly shows that the 'very compelling circumstances' test is an alternative consideration if a person fails to show that they meet the requirements of the exceptions. The combined effect of the decisions in *NA (Pakistan)*, *KO (Nigeria)* and the most recent decision of the Upper Tribunal in *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 00123 is that section 117C(6) must be read to apply to all cases involving deportation.

42. The rules and statutory framework must be read to be compliant with Article 8 of the European Convention. Significant weight must be given to the public interest in deportation but whether there are 'very compelling circumstances' that outweigh the public interest will depend on the individual circumstances of each case.

43. The courts have repeatedly emphasised that significant weight should be given to the public interest in deportation. However, that is not to say that the weight to be given to the public interest in deportation is uniform or monolithic. The more serious the offending behaviour; the greater the weight is placed on the public interest in deportation. The less serious the offending behaviour; the more readily an individual's compassionate or compelling circumstances might outweigh the public interest in deportation. In other words, the assessment under section 117C(6) of the NIAA 2002 and paragraph 398 of the immigration rules more closely resembles the overall balancing exercise undertaken by the Strasbourg court when assessing whether the interference with a person's private or family life is justified and proportionate under Article 8(2) of the European Convention. After all, that is the stated intention of the statutory scheme.

44. The appellant entered the UK illegally on a false passport in September 2001 and claimed asylum on arrival. His asylum claim was refused and a subsequent appeal was dismissed. All rights of appeal became exhausted by June 2002. The appellant remained in the UK and started a family in the full knowledge that his immigration status was precarious and that he had no expectation that he would remain in the UK. A and B were born in 2005 and C was born in 2007. In the meantime, the appellant was listed as an absconder by the immigration service. The appellant only came to the attention of the authorities in July 2008 when he was arrested by police and charged with possession of Class C drugs with intent to supply. On 22 October 2008 he was sentenced to 12 months' imprisonment. The appellant received a further conviction for failing to provide a specimen (being in charge of a motor vehicle) on 13 January 2012, but as the First-tier Tribunal judge noted, the fine of £115 was minimal although he was banned from driving for two years. A second conviction is a matter that must be given weight, but in the scheme of criminal offending, it was fairly minor.

45. The combined effect of the appellant's immigration history and his convictions is such that significant weight must be placed on the public interest in deportation. In assessing what weight must be given to the public interest considerations we take into account the fact that the appellant has never had leave to remain and would be liable to removal in any event. The fact that he was convicted of a criminal offence relating to drugs is a serious matter that must be given weight, but the sentence of 12 months' imprisonment is at the lower end of the sentencing scale. The overall picture shows an isolated offence that was serious enough to justify a period of imprisonment. There is no pattern of persistent or serious offending and no further convictions since 2012.

46. Unlike the other exceptions to deportation, whether there are 'very compelling circumstances' that might outweigh the public interest in deportation involves a holistic assessment of all the circumstances of the case. In assessing the appellant's individual circumstances, we taken into account the fact that he has lived in the UK for a period of 18 years. Over this time it is likely that he has established ties to the UK. However, we give little weight to any private life that the appellant might have established during a period when his immigration status was precarious.

47. In assessing the weight to be placed on the public interest considerations we also take into account the course of subsequent events. The respondent began deportation proceedings as long ago as December 2008. The appellant went through a process of appeal, which was dismissed and by October 2009 his appeal rights were exhausted. However, since then the history indicates that the respondent did not appear to consider that there was a pressing social need to enforce the deportation order. No action was taken to remove him. The appellant made further representations to the respondent in 2011, which after some correspondence between the parties, resulted in a refusal to revoke the deportation order in September 2013. The appellant did not appeal the decision but it seems that still no action was taken to remove him. Further representations were made in late 2013, 2014 and in 2016. The respondent did not make a decision to refuse to treat the further submissions as a fresh human rights claim until June 2016. This was challenged and eventually resulted in the decision that is the subject of this appeal, which is dated 28 June 2018.

48. Some of the delay might be attributed to the appellant failing to pursue avenues of appeal or in pursuing legitimate avenues of challenge. However, the history set out above paints a picture of general inaction by the respondent that is not commensurate with the weight that is said to be placed on the public interest in deportation. During the period of delay in further decision-making the appellant's continuing relationship with his children became more entrenched. Though cases involving very young children have their own considerations, the age of the appellant's children is such that they have now benefited from a particularly long-standing relationship with their father. The family ties between father and children are more entrenched and enduring that they would have been if action to remove the appellant pursuant to the deportation order had been taken promptly.

49. We have already found that the best interests of the children point strongly in favour of them remaining in the UK with both parents. We have also found that the effect of separation from their father would be unduly harsh given the long-standing and entrenched relationship that they have developed since birth. We have also noted other compassionate circumstances affecting the children such as their mother's mental and physical health problems and the instability that they have suffered as a result of their parents' precarious immigration status. Further disruption in the form of prolonged separation from their father is likely to have a significant and long-term impact on the welfare of the children.

50. We bear in mind that the test of 'very compelling circumstances' reflects the strong case that is needed to outweigh the significant weight that must be placed on the public interest in deportation. The assessment under section 117C(6) of the NIAA 2002 and paragraph 398 of the immigration rules is more akin to a balancing exercise where appropriate weight can be given to the public interest depending on the individual circumstances of a case.

51. In this case we have found that the appellant's offence was at the lower end of the scale and that it did not form a pattern of offending behaviour. We weigh against that the cumulative effect of the appellant's length of residence (albeit little weight is placed on it with reference to his private life), the length and depth of his family life during the long period in which deportation proceedings have been pending, the fact that it would have an unduly harsh effect on not just one, but three children, who need continuity in their lives following a recent period of instability. We remind ourselves that the provisions contained in the statutory scheme are intended to be compliant with a proper application of Article 8 of the European Convention. In assessing whether a fair balance has been struck between the undoubted weight that must be placed on the public interest in deportation and the individual circumstances of this case, we conclude, like the First-tier Tribunal judge before us, that the cumulative effect of the appellant's circumstances is sufficiently compelling, to outweigh the public interest in deportation on the facts of this particular case.

52. For the reasons given above we conclude that removal of the appellant would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed  Date 09 May 2019

Upper Tribunal Judge Canavan