IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006350
First-tier Tribunal No:
HU/00218/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 July 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUBANGA MULENGA KAUSENI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms Young, Senior Presenting Officer
For the Respondent : Mr Vokes, Counsel instructed on behalf of the respondent.

Heard at (IAC) on 10 May 2023

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal(Judge Dieu) promulgated on 8 November 2022. By its decision, the Tribunal allowed the appellant's appeal against the Secretary of State's decision dated 10 January 2022 to refuse his human rights claim in the context of the decision made to deport him from the United Kingdom.

2. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

3. The First-tier Tribunal did not make an anonymity order and no grounds have been advanced on behalf of the appellant to make such an order.

4. The factual background can be summarised as follows.

5. The appellant is a national of Zambia born on 12 April 1995. He entered the United Kingdom on 12 July 2005 as a dependent of his mother who was in the UK as a work permit holder. The appellant held entry clearance as a work permit dependent from 30 June 2005 until 19 February 2010.

6. On 18 March 2010, the appellant was granted indefinite leave to remain. Since that date, the appellant has committed criminal offences. It is not entirely clear from the decision of the FtTJ as to the chronology of the appellant's offending, however as taken from the record contained in the respondent's bundle the appellant was convicted by pleading guilty to 2 separate sets of offences. On 7 August 2017 at the Crown Court he was convicted of false imprisonment, assault on a person thereby occasioning actual bodily harm and burglary which he was sentenced to 56 months in imprisonment. The FtTJ set out the sentencing remarks at page 3 of his decision. In respect of Count 1, the false imprisonment, the appellant was sentenced to 56 months imprisonment and imposed concurrent sentences on count 2 (assault occasioning actual bodily harm), count 3 (burglary). In addition, the appellant was sentenced to 8 weeks imprisonment in respect of a suspended sentence, which was to be served consecutive to the term of 56 months. That was for an offence of driving whilst disqualified.

7. It appears from the sentencing remarks that the appellant was convicted (pleaded guilty) to further offences for which he received a sentence of 52 months imprisonment on 15 May 2018 although the offences were committed between May and July 2017 before the offences of false imprisonment and other associated offences. Those offences related to the appellant being sentenced for involvement in the supply of heroin for which he received a sentence of 52 months imprisonment which was to run consecutive to the sentence he was already serving. This was on the basis that the sentencing judge considered that they were offences of a different type and therefore notwithstanding his incarceration for the offence of violence which he was serving, that the sentence should be served consecutively. The sentencing remarks were provided in a separate document and were summarised in the decision letter.

8. As a result of his criminal offending, the appellant on 18 January 2018 was served with a notice of liability to deportation decision (ICD. 4934) and on 20 February 2018 a deportation decision and deportation order was made against the appellant in accordance with section 32 (5) of the UK Borders Act 2007. On 24 May 2021 the appellant sent representations to the respondent and in a decision dated 10 January 2022, the respondent refused his human rights claim.

9. The FtTJ set out the respondent's decision between pages 2 –12 of his decision. The decision considered the private and family life established by the appellant but concluded that the appellant's deportation was conducive to the public good and in the public interest because he had been convicted of offences for which he had been sentenced to a period of imprisonment of at least 4 years. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest required the appellant's deportation unless there were very compelling circumstances over and above those described in the Exceptions set out at paragraphs 399-3099A of the Immigration Rules. For the reasons set out in the decision letter, the respondent concluded that there were no very compelling circumstances, over and above those described in the Exceptions to deportation.

10. The appeal came before the FtTJ Dieu on 15 September 2022. In a decision promulgated on 8 November 2022 the appellant's appeal was allowed. The FtTJ set out the issues that it was agreed by the parties he was determine at paragraph 9, which were as follows:

(a) Whether the appellant met the test of very compelling circumstances under section 117C(6),

(b) Whether the decision was a disproportionate interference with the appellant's private and family life in the UK,

(c) Whether the decision breach the appellant's right under Article 3 of the ECHR.

11. In respect of the first issue identified, the FtTJ noted that the appellant did not have a qualifying partner or child but that his case fell to be considered on the basis of "very compelling circumstances" and the private and family life he has in the UK. The FtTJ set out the evidence relevant to the appellant's private life established in the United Kingdom. The FtTJ referred to the appellant's medical condition of epilepsy which had begun following a brain tumour and subsequent brain surgery. The FtTJ found that he had no family that he was in contact with in Zambia and that return to Zambia would be "stressful" and that "stress is a trigger for his epilepsy." The judge also found he struggled with depression.

12. At paragraph 24 the judge set out the expert report from the country expert whom he was satisfied was a suitably qualified expert and was a report which was not disputed by the respondent (see paragraph 16 of the FtTJ's decision). The summary of that expert evidence was taken from that report and set out between paragraphs 24 (a)-(h).

13. At paragraph 25 the FtTJ concluded that "having taken all of this into consideration I am satisfied that there are very compelling circumstances. I find that the appellant is likely to face difficulties in getting a consistent supply of his required medication and the societal attitude towards him is likely to be one of stigma and discrimination and hostility. He will be vulnerable especially when he has a seizure, and he will need support. He is estranged from Zambia since the young age of 10 and does not speak the languages. He is socially and culturally integrated in the UK, despite his offending, and has a close relationship with his mother. I find the taken as a whole, all of those circumstances satisfy me that section 117C(6) is capable of being met."

14. The FtTJ therefore found that to deport the appellant would be a disproportionate interference with his private and family life in the UK based on Article 8 grounds (see paragraph 26). For the reasons set out between paragraphs 27 – 30, he did not find that the appellant could meet article 3 on medical grounds.

15. Earlier in his decision between paragraphs 17 – 18, the FtTJ made findings on section 72 of the NIAA 2002 although not expressly raised. He recorded that it was accepted on behalf of the appellant that he had been convicted of a particular serious offence. It was not accepted that the appellant was a danger to the community. The FtTJ considered that this issue was an "entirely moot question" but for the sake of completeness reached the conclusion that section 72 was not invoked and that whilst stated that he accepted that the appellant had committed a particularly serious offence, he did not accept that the appellant constituted a danger to the community the purposes of that provision having taken into account his assessed risk of reoffending as low – medium and that he was now living in circumstances quite different from before. The judge found that his mother was alert and kept an eye on him, that the appellant was aware of this, he had gained insight and was remorseful about his past offending (see paragraph 18).

16. Following that decision, the respondent sought permission to appeal which was granted by FtTJ Easterman on 22 November 2022 for the following reasons:

> "I read the entire decision with care, the judge reaches his decision starting in paragraph 22, having identified the appellant does not have a qualifying partner or child, he seems to go straight whether there are very compelling circumstances over and above exception 1. The judge heavily relies on a report from Dr Windtrup whose findings he sets out in paragraph 24. At paragraph 25, those findings are found to be very compelling circumstances, with no comparison with that there are simply very significant obstacles, with no real balancing the high weight to be given to deporting foreign criminals, especially those with sentences of 4 years or more. In my view it is arguable that the decision discloses an error of law."

17. Before the Upper Tribunal Ms Young appeared on behalf of the respondent and Mr Vokes of counsel, who had appeared before the FtTJ, appeared on behalf of the appellant. I am grateful to both advocates for their clear and helpful submissions.

18. Ms Young relied upon the written grounds of challenge which was supplemented by her oral submissions. It is not necessary to set out the written grounds of challenge as they are a matter of record. Ms Young submitted that when looking at the decision the only relevant part of the decision or assessment is that set out at paragraph 25, and that the FtTJ had compounded the assessment of whether there were "very compelling circumstances". She accepted that the judge set out section 117C at paragraph 16 – 17 but that was insufficient to demonstrate that the correct test had been applied. She submitted that whilst the 1st limb was accepted by the respondent as set out at paragraph 20, there was no acceptance that the appellant was socially or culturally integrated nor that there were very significant obstacles to his integration to Zambia as set out in the decision letter. The decision demonstrated that there was no adequate reasoning as to how the appellant was socially or culturally integrated nor was there any finding or assessment of whether there were very significant obstacles over and above Exception 1.

19. In her oral submissions, she stated that the grounds highlighted that at paragraph 25 the judge was satisfied that there were very compelling circumstances but that the FtTJ had not carried out the proper legal assessment required to make that finding at paragraph 25, and that even taking into account paragraphs 24 and 25 there were nothing in those paragraphs to indicate what was over and above the appellant's case to satisfy the very compelling circumstances test.

20. In this respect Ms Young referred to the decision in HA (Iraq) and others v SSHD [2022] UKSC ("HA(Iraq"). She submitted that the FtTJ had not carried out the balancing exercise and needed to consider all the relevant circumstances including the assessment of the public interest and strong public interest in deportation taking into account the seriousness of the offending, the length of the sentence. She submitted that the very compelling circumstances test was a proportionality assessment that involve weighing up the facts and on any fair reading of the decision that had not been done and was a material misdirection in law.

21. She further submitted that it was insufficient to set out the law at paragraph 21 and that it needed to be applied in the correct way and this had not been done. In conclusion, she submitted the decision was flawed from material error of law in relation to Exception 1 of the very compelling circumstances test.

22. She submitted that in relation to paragraph 1 of the rule 24 response, the reference made in the grounds to paragraph 40 (4) was nothing more than a typographical error.

23. Mr Vokes relied upon the rule 24 response and also supplemented that written document by his oral submissions. It is not necessary to set out at this stage rule 24 reply as it is a matter of record and I confirm that I take it into account. In his oral submissions, he submitted that the reference in the respondent's grounds was not a typographical error as there was no paragraph 40 (4) and therefore was likely to come from someone else's decision. He further submitted the ground 1 failed because it did not address the decision and the points made in rule 24 response was that it demonstrated a standard formulation of grounds.

24. Mr Vokes submitted that the approach taken by the FtTJ was agreed by the parties and summarised at paragraph 9 and that it was a clear direction. He submitted that in light of the case law that he had set out in rule 24 response, the primary concern was the statute and that the grounds by citing the decision of MF (Nigeria) and the two-stage approach misses the legal point entirely of what had to be decided.

25. Mr Vokes submitted that the FtTJ recorded the evidence and that whilst Ms Young submitted that the judge had not considered the public interest in deportation the FtTJ had recorded it in the decision concisely in the representations made by the presenting officer set out at paragraphs 15 and 16. Thus the FtTJ clearly had in mind the public interest.

26. He further submitted that the presenting officer did not dispute the appellant's medical condition and the expert evidence set out at paragraph 24 and summarised there was in line with that. Furthermore at paragraphs 17 – 18 the FtTJ addressed the section 72 issue and accepted that he had committed a particularly serious offence and therefore the judge had in mind what the position was in relation to his offending. In his decision he also set out the test of very compelling circumstances at paragraph 22 was therefore clear about the test to be applied. Paragraph 24 summarised the expert evidence which did not appear to be in dispute. At paragraph 25 the judge stated, "taking all of this into consideration" and therefore was referring to the earlier assessment therefore considered all the factors in the case stating that taken as a whole all the circumstances satisfy section 117C(6) and is capable of being met.

27. Mr Vokes submitted that the respondent's submissions were really a disagreement with the decision and that the judge had heard the evidence. Whilst a different tribunal might reach a different decision, he submitted the evaluation of facts should not be interfered with. He submitted that the judge could have made matters clearer but there was a thread from paragraph 22 onwards.

28. He submitted that the grounds were defeated because the FtTJ had undertaken what he was required to do and when the decision was read as a whole there would be nothing to lead anyone to consider that there was a material error of law.

29. By way of reply Ms Young submitted that the submissions made on behalf of the respondent were not a mere disagreement and that they challenged the decision of the FtTJ that he had not correctly applied or reasoned the legal test as he was required to do. The FtTJ had not carried out the balancing exercise which was required of him weighing all the circumstances as he should have done which

included the strong public interest. She argued that whilst it was submitted on behalf of the appellant that paragraph 15 demonstrated that he had taken into account the public interest, that was insufficient and was not addressed in the balancing exercise principally set out at paragraphs 25 and 26,nor even when reading the decision as a whole. The decision should be set aside.

30. At the conclusion of the hearing I reserved my decision.

The legal framework:

31. For the purposes of this appeal, the relevant legal framework concerns Art 8 of the ECHR and Part 5A of the NIA Act 2002 and, principally, as it applies in deportation cases. A "foreign criminal" for the purposes of these appeals is a person who is not a British citizen, is convicted in the UK of an offence, and who is sentenced to a period of imprisonment of at least 12 months - see section 32(1) of the UK Borders Act 2007 ("the 2007 Act"). There is no dispute that the appellant falls within the definition of a "foreign criminal."

32. By section 117A(1), Part 5A of the 2002 Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts (such as a decision to deport a foreign criminal) would breach a person's right to respect for private and family life under Article 8 ECHR. In such a case "the public interest question" is defined as being whether an interference with a person's right to respect for private and family life is justified under article 8(2) ECHR: see section 117A(3).

33. When considering the " public interest question," a court or tribunal "must (in particular) have regard" in "all cases" to the considerations in section 117B, and in "cases concerning the deportation of foreign criminals" to the considerations in section 117C: section 117A(2).

34. Section 117B provides that the maintenance of effective immigration controls is in the public interest (117B(1)); that it is in the public interest and in particular in the interests of the economic well-being of the United Kingdom that persons seeking to enter or remain in the United Kingdom are "able to speak English" (117B(2)) and are "financially independent" (117B(3)); and that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the UK "unlawfully" (117B(4)) or to a private life established by a person when the person's immigration status is "precarious" (117B(5)).

35. Section 117C provides:
"117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where –
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

Discussion:

36. When beginning the assessment of whether the decision of the FtTJ involves the making of an error on a point of law, I take into account the points properly made by Mr Vokes both in his oral and written submissions that it is well established law that the Upper Tribunal when carrying out its assessment should exercise judicial restraint.

37. As recognised in HA (Iraq) at paragraph 72, it is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:

> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
>
> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
>
> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

38. Turning to the grounds, the submissions made in the written grounds and the oral submissions made on behalf of the respondent challenge the FtTJ's assessment of whether there were "very compelling circumstances over and above those described in Exceptions 1 and 2" and that the FtTJ made a material misdirection of law.

39. Mr Vokes makes the general submissions that firstly, the approach the appeal was agreed between the parties as recorded at paragraph 9 of the FtTJ's decision in relation to section 117C (6) which is consistent with the decision of HA (Iraq). Secondly, that the respondent's grounds concentrate on the rules and older case law and the relevance of them was not pointed out. Thirdly, the grounds amount to no more than a disagreement with the decision and that the grounds provide no sustainable argument but merely an assertion that the case did not show "very compelling circumstances."

40. Having considered the written grounds, the written submissions and the rule 24 response and the oral submissions made by both advocates in the context of the decision of the FtTJ, I am satisfied that the decision of the FtTJ involved the making of an error on a point of law which was material to the outcome for the reasons set out below.

41. Dealing with the legal framework, there is no dispute that the appellant fell within the definition of a "foreign criminal." Foreign criminals who have been sentenced to terms of imprisonment of at least four years (described in the authorities as "serious offenders") can avoid deportation if they establish that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" - see section 117C(6) of the 2002 Act ("the very compelling circumstances test").

42. In particular, this appeal is concerned with the provision in s.117C of "very compelling circumstances over and above those described in Exceptions 1 and 2". It is common ground that the appellant by virtue of his sentence was properly described as a " serious offender" and the FtTJ was required to apply s.117C and s 117C(6) in determining the issue of whether the appellant's deportation would be disproportionate and a breach of Art 8 of the ECHR.

43. When assessing the written grounds there is some criticism of them. They set out large quotes from legal authorities which are unnecessary. At paragraph 4 of the grounds reference is made to paragraph 40 (4) of the FtTJ's decision where no such paragraph exists. Ms Young on behalf of the respondent submits that paragraph 4 is simply a typographical error in reply to the submission made by Mr Vokes that the grounds appear to either be directed to an entirely different case or were standard formalised grounds. The grounds of challenge in any appeal before the Upper Tribunal really matter as they form the basis of the argument advanced and therefore should be succinctly and accurately written. Nonetheless when reading the written grounds it is not the case that they are directed to an entirely different case as they plainly refer to a challenge to the decision of FtTJ Dieu as reference is made to paragraph 25 of his decision which is the operative and concluding paragraph of his decision.

44. Furthermore I do not accept the criticism advanced by Mr Vokes that the written grounds by concentrating on the application of the Immigration rules is wrong in law.

45. The Immigration Act introduced sections 117C – 117D as Part 5A of the 2002 Act, "expressing the intended balance of relevant factors in direct statutory form" (as set out in KO(Nigeria) at paragraph 14). They list the public interest considerations that must be considered by a court or tribunal relevant to determining whether a person's right to respect for private and family life in Article 8 ECHR is unjustifiably interfered with by the deportation of the person concerned (see S117A).

46. The effect of section 117C is substantially reproduced in the Immigration Rules in paragraphs 398-399 although there is greater detail, for example when considering the provisions in relation to Exception 2. Paragraph 398 sets out 3 categories of foreign criminals - the appellant falls within the category of "serious offender" having been convicted of a sentence of imprisonment at least 4 years. Paragraph 399A contains the equivalent to Exception 1 which sets out the relevant private life factors.

47. Whilst the respondent's grounds cite authorities about the regime which preceded the coming into force of Part 5A in 2014 and the change in the Rules, the underlying principles relevant to the assessment and weight of the public interest remain and the requisite balancing act referred to in the case law as the " balance sheet approach". The purpose of the new provisions was to give statutory force, accompanied by some rewording to those principles. This is reflected in the position that on 28 July 2014 (the same date that the 2014 Act came into force), the Immigration Rules were amended so as to harmonise with part 5A of the 2002 Act.

48. Whilst Mr Vokes criticises the reference to older case law in the grounds, the underlying principles relating to the issue of weight to be given to the public interest is unchanged. For example, see section 117C(6) as inserted by the 2014 Act as stated by the Court of Appeal in NA (Pakistan) where the observation of laws LJ in SS (Nigeria) concerning the significance of the 2007 Act as a particularly strong statement of public policy is equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. Both Courts and Tribunals are obliged to refer to the high level of importance the legislature attaches to the deportation of foreign criminals (see paragraph 22 of NA (Pakistan)).

49. Whether or not the respondent referred to the Immigration Rules or section 117C and the Exceptions, the real question is whether the FtTJ applied and demonstrated by his reasoning and assessment that he applied the correct legal test under section 117C(6)and carried out the requisite balancing exercise when reaching his decision that the deportation of the appellant was disproportionate (see paragraph 26 of the FtTJ decision).

50. Whilst the grounds refer to a two -stage test citing the older decision of MF (Nigeria) Ms Young on behalf of the respondent in her oral submissions clarified the written grounds at paragraphs 5 – 7. She submitted that whilst the FtTJ acknowledged at paragraph 22 that the "very compelling circumstances are those over and above", the FtTJ failed to apply that test in his assessment at paragraph 25, and even taking into account paragraphs 24 and 25, there was nothing to indicate in his reasoning as what constituted those compelling factors over above the appellant's case to satisfy the legal test.

51. In addition Ms Young submitted that applying the decision in HA (Iraq), the FtTJ fell into error because he had failed to carry out the balancing exercise by considering the relevant circumstances and weighing them against a very strong public interest in deportation. In this respect she submitted that there was no assessment of the seriousness of the offences committed nor was there any reference to the public interest by its length of sentence or the nature of the offences and that by failing to do so the FtTJ materially erred in law.

52. In his written submissions at paragraph 4, Mr Vokes submitted that the UT should find on the draft Grounds of appeal and not on any other points which are formulated at the hearing. However the oral submissions of Ms Young do not constitute new points but are a permissible clarification of the written grounds of

challenge. It is entirely open to the respondent to refer to the decision of HA (Iraq) and I note that in the Rule 24 response that decision is also cited (see paragraph 2). Furthermore notwithstanding the earlier criticisms, the grounds when read in their entirety do seek to challenge the assessment made by the FtTJ at paragraph 26 that the appellant's deportation is disproportionate on the basis that the FtTJ has not carried out the requisite balancing exercise in which the assessment of the public interest has properly been evaluated so that the "very compelling circumstances" identified are reasoned so as to sufficiently outweigh the strong public interest in deportation (I refer to the case law cited at paragraph 7 of the grounds and the requisite threshold referred to at paragraphs 8 – 9 of the respondent's grounds). I would also add that the issues for this appeal were succinctly set out in the grant of permission made by FtTJ Easterman.

53. Addressing those submissions, I am satisfied that the FtTJ's assessment of S 117C(6) demonstrates a fundamental failure to apply the correct test. Whilst Mr Vokes submitted that the FtTJ set out the provisions of S117C at paragraph 21 and at paragraph 22 the FtTJ stated that he had to "bear in mind that the very compelling circumstances of those over and above relevant to his case" I accept the submission made by Ms Young that it is not a matter of reciting the provisions but demonstrating in the ensuing analysis that the correct test has been applied.

54. In this context Mr Vokes submits that the FtTJ clearly had in mind the public interest pointing to paragraph 15 of the decision. However a careful reading of the decision demonstrates that at paragraph 15 the FtTJ was doing nothing more than summarising the submissions made on behalf of the respondent that there was a strong interest in the appellant's deportation and that there were 3 very serious offences and that the more serious the offence, the greater the public interest. Rather than demonstrating that the FtTJ had in mind the public interest, paragraph 15 demonstrates that the FtTJ was expressly addressed as to the strength of the public interest by reference to the factual circumstances of this particular appellant's case, which was a submission consistent with the provisions of section 117C (1) and (2) which the FtTJ subsequently failed to address.

55. I also do not accept that the reference made at paragraph 18 was sufficient to demonstrate that the FtTJ undertook a proper assessment of the public interest. Paragraph 18 addressed the issue raised under section 72, which was not relevant in this appeal but more fundamentally the application of S117C(6) required the FtTJ to carry out a full proportionality balancing exercise which included what weight should be given to the public interest side of the scales. When assessing whether there were very compelling circumstances, there was no self-direction or otherwise of the very high threshold applicable as the respondent submits in he grounds nor any self-direction in accordance with section 117C(2), that the more serious the offence committed, the greater the public interest in deportation. Sections 117C(1) and (2) set out the position regarding the "public interest" as follows:

> "(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."

56. In HA (Iraq), at paragraphs 60 -62, the Court addressed the issue of the seriousness of the offence as follows:

"The seriousness of the offence

60. The seriousness of the offence is a matter which the court is required to take into account when carrying out a proportionality assessment for the purposes of the very compelling circumstances test.
61. This is made clear by section 117C(2) which states that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."
62. This is also consistent with the Strasbourg jurisprudence. The first of the factors listed in *Unuane*, drawing on the ECtHR's earlier decision in *Boultif,* is the nature and seriousness of the offence."

57. On any careful consideration of paragraphs 25 and 26 there was no assessment undertaken or any consideration of the seriousness of the offences committed. In relation to the seriousness of the offences, the issue of weight as to the nature of the offending in addition to the sentence imposed is a relevant consideration (see paragraph 70 of HA (Iraq) citing the decision in Unuane at paragraph 87, "the court has tended to consider the seriousness of the crime in the context of the balancing exercise under Article 8 of the Convention not merely by reference to length of sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences committed by the applicant in question and their impact on society as a whole. In this context the court has consistently treated crimes of violence and drug related offences as being the most serious end of the criminal spectrum."

58. Here there were principally 2 different types of offending, and it appears that they were in close proximity to each other and constituted very different types of both serious violence and drugs as indicated by the sentencing remarks and that as a result of the nature of the offending they warranted consecutive sentences.

59. Thus the appellant was not to only serve 56 months in total but that period with a second consecutive period of 52 months.

60. Furthermore, the matters referred to at paragraph 25 were conclusory, in that there was no indication of the particular nature of the public interest involved or any assessment of the weight which it attracted . Nor was there any analysis of the relevant factors which constituted very compelling circumstances or why they were " over and above" Exception 1. Whilst the FtTJ found that he had not been in Zambia since the age of 10 and did not speak the key languages and would have difficulty getting a consistent supply of medication coupled with a negative societal attitude, it was not explained how those factors met the legal test and as Ms Young submitted how they were "over and above" the Exceptions. Nor did the FtTJ apply the correct test and the balancing exercise by reference to the public interest (see decision of the Upper Tribunal in MS (s 117C(6); " very compelling circumstances") [2019] UKUT 122 at paras 16-17 which referred to the issue of whether there were very compelling circumstances, over and above those described in Exceptions 1 and 2 was not a hard edged question but on the contrary called for a "wide ranging evaluative exercise" to ensure that Part 5A of the 2002 Act produces a result compatible with its obligations under Article 8 of the ECHR and 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 in the

foreign criminal side of the balance in order for the circumstances to be properly characterised as very compelling.

61. For those reasons, the grounds are made out that the decision of the FtTJ involved the making of an error on a point of law which was material to the outcome. It is set aside.

62. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

63. In considering the remaking of the appeal I have taken into account the nature of the error of law identified. As set out, paragraph 25 of the FtT decision which was the primary paragraph based on the summary of the expert report earlier set out at paragraph 24, did not demonstrate by its reasoning as to why there were very compelling circumstances or explain with any accompanying reasoning why they were “over and above” the exception. Further the FtTJ erred in law in the light of the failure to carry out the requisite balancing exercise which was fundamentally flawed by the failure to make any assessment of the public interest which set out the weight attached to it when carrying out the balancing exercise as to why on its facts outweighed the strong public interest.

64. I have also considered the practice statement recited and the recent decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512. I am satisfied that the decision should be set aside and should be remitted to the FtT for a hearing. I have reached that conclusion because the balancing exercise is a holistic exercise and may be best considered by both hearing and considering the evidence. Given the appellant’s release date of February 2022 it is likely that there will be other relevant and up to date evidence which he would wish to rely upon as to his personal circumstances including his medical condition, and life experiences and I consider that when applying the overriding objective set out in the Procedure Rules and in fairness for the appellant, the correct course is for the appeal to be remitted to the FtT.

65. I am satisfied that in light of the fact findings which will be necessary, the appeal falls within paragraph 7.2 (b) of the practice statement. I therefore remit the appeal to the First-tier Tribunal for that hearing to take place. I preserve the finding made at paragraph 23 that the FtTJ found that the appellant had no family that he was in contact with in Zambia and also that he does not speak the key languages of Zambia (see paragraph 25). The expert evidence did not appear to be in dispute before the FtTJ as summarised at paragraph 24 although it will be necessary for an assessment of those issues as part of the overall assessment and balancing exercise undertaken to reach an overall decision. Beyond that I do not preserve any other findings of fact as to do so I consider would unnecessarily bind the FtT when undertaking its own assessment.

Notice of Decision:

66. The decision of the FtTJ involved the making of a material error of law and is set aside and is remitted to the FtT for a rehearing.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

11 July 2023