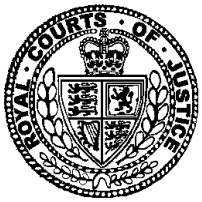

Neutral Citation Number: [2019] EWCA Civ 2098

Case No: C5/2018/2912

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (Immigration and Asylum Chamber)
Mr. Justice Goss & Upper Tribunal Judge Kopieczek
DA005742014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2019

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE MOYLAN
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

Remi Akinyemi	**Appellant**
- and -	
The Secretary of State for the Home Department (No 2)	**Respondent**

- -
- -

Mr. Richard Drabble QC and Mr. Ranjiv Khubber (instructed by **Turpin and Millar LLP**) for the **Appellant**
Mr. William Irwin (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: Thursday 17 October 2019

- -

Approved Judgment

Sir Ernest Ryder, Senior President:

1. This is an appeal by Mr Remi Akinyemi ('the appellant') against the determination of Goss J and Judge Kopieczek sitting in the Upper Tribunal Immigration and Asylum Chamber ('UT') dismissing the appellant's appeal against the decision of the Secretary of State to make a deportation order against him. The determination of the UT followed a re-hearing ordered by the Court of Appeal as a consequence of an earlier successful appeal which is now reported as *Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236, [2017]; 1 WLR 3118.

2. This new appeal turns on two grounds for which permission was given by Simon LJ on 27 February 2019:
    a. Firstly, whether the UT misdirected itself with respect to the public interest in the deportation of foreign criminals; and
    b. Secondly, whether the UT misdirected itself as to the establishment of very compelling circumstances needed to overcome a deportation order.

3. At the conclusion of the hearing the appeal was allowed and the outstanding issues were remitted to be heard by a new tribunal with a different constitution. These are my reasons.

Factual Background

4. The appellant was born in the UK on 21 June 1983. He has never left this country. His parents were both Nigerian nationals who first came to the UK as students. His father was granted indefinite leave to remain in October 1987 and became a British citizen in October 2004. His mother died in 1999 when he was a teenager and was in the UK lawfully, though her precise legal status is not known.

5. The appellant is the youngest of three siblings. His elder brother was born in Nigeria but became naturalised in the UK in 2000. His other brother was born in the UK, and due to the operative legislation at that time, was a British citizen from birth. Even though born in the UK, the Appellant did not acquire British nationality as an automatic result of being born here due to legislative changes that occurred just before his birth. Despite for many

years being entitled to British citizenship, the appellant never took steps to acquire it. He has not become a British national and remains a Nigerian national by virtue of his birth.

The appellant's offending history

6. The appellant has committed a large number of offences since his teenage years. He has in all over twenty convictions for 42 offences. The following are of most significance:

    a. On 5 July 2007 he was convicted of causing death by dangerous driving for which he was sentenced to four years imprisonment. The circumstances were that he suffered an epileptic fit while driving and lost control of his car and killed a cyclist. He knew that he suffered from epilepsy, and he was also driving while disqualified.

    b. On 31 January 2013 he was convicted of four counts of possession of heroin with intent to supply, one count of possession of diamorphine with intent to supply and one count of driving while disqualified. He was sentenced to a total of three and a half years' imprisonment.

7. Other convictions for which he has been sentenced include:

    a. Two convictions in 2000 for possession of a knife;

    b. A conviction in 2001 for conspiracy to rob at knifepoint;

    c. Five convictions in 2005 and 2006 for driving while disqualified and while uninsured, for which the sentences included short periods of imprisonment;

    d. A conviction in 2010 for possession of class A and class B drugs, for which he was fined; and

    e. A conviction in 2011 for using a vehicle while uninsured, taking a vehicle without consent and driving while disqualified, for which he was sentenced to four weeks' imprisonment.

8. Most recently, the appellant has been convicted of both driving and drug related offences. He was convicted on 18 March 2016 for driving while disqualified and sentenced to 20 weeks' imprisonment suspended for two years. On 15 June 2017, he was convicted of another offence of driving a vehicle while uninsured and fined for committing a further offence during the operational period of the suspended sentence. On 31 August 2017 he was ordered to serve the balance of the suspended sentence having committed further drug related offences.

Personal History

9. The Appellant has struggled with mental health problems and depression from a young age. The death of his mother when he was aged 14, as well as a false accusation of rape that was made against him, had a significant impact upon him. He takes anti-depressant and anti-epilepsy medication, and undertook a course of counselling in May and June 2019, which it is said has helped him.

10. The appellant has not offended since January 2017, something which he attributes to the relationship that he has with his partner, with whom he has been living for over 2 years. The relationship is regarded as genuine and long term. He has also in recent times become closer to his father, with whom he has contact either face to face or by telephone every day. In oral evidence given to the UT, the appellant spoke of opening up more than he used to and trying to build his confidence. His father spoke of the appellant as 'a kind boy', and that nothing about the appellant's behaviour now gave him cause for concern.

11. The appellant's partner described her relationship with the appellant as being really good. She said they had been together for nearly three years, and that in recent times he has sought medical help, was coming to terms with his illness, and had finally grown into the man he wanted to be.

12. The appellant has a significant history of suicide attempts. That history was set out by Ms Lisa Davies, a consultant forensic psychologist, in a report dated 2 January 2018. While at HM YOI Feltham the appellant began self-harming and was placed on suicide watch. He attempted suicide while on bail, and on a separate occasion made a suicide attempt

after release from prison. Ms Davies' report indicates a severe level of current depressive symptomatology and a moderate risk of suicidal ideation. She has concerns regarding the impact that removal to Nigeria and the absence of familial support would have upon his mental health. While she considered that the appellant was at a moderate risk of committing suicide at present, her opinion was that this would increase to a significant risk should he be deported to Nigeria.

Procedural History

13. Following the appellant's conviction in 2011, the Home Office wrote to inform him that consideration had been given to making a deportation order in his case. He was told that a decision had been taken not to do so at that stage but that if he committed further offences he would be at risk of such an order being made.

14. On 25 March 2014 the Secretary of State made the decision to make a deportation order against him pursuant to section 32(5) of the UK Borders Act 2007, following his conviction on four counts of the supply of a class A controlled drug. The letter explaining the decision to deport explicitly relied on the earlier conviction of causing death by dangerous driving in July 2007 and stated that the only reason the Secretary of State had not taken action at that point was that the conviction had not been notified to the Home Office because "it was believed that he was a British citizen".

15. On 02 April 2014 the appellant gave notice of his appeal to the First-tier Tribunal against the decision on the basis that his deportation would be in breach of his rights under article 8 of the European Convention on Human Rights. By a determination of the First-tier Tribunal promulgated on 29 August 2014, Judge Thanki allowed his appeal.

16. The Secretary of State appealed to the UT. By an order dated 24 November 2014 Judge Kekic set aside the decision of the First-tier Tribunal and directed a hearing with a view to remaking the decision. That hearing took place on 19 January 2015. By a determination promulgated on 13 February 2015 Judge Kekic dismissed the appeal against the deportation order.

17. The appellant appealed to the Court of Appeal and was granted permission to do so by Underhill LJ on 24 July 2015. The Court of Appeal allowed the appeal against the UT's decision on 4 April 2017 and remitted the case back to the UT for a *de novo* hearing.

The Applicable Legislation

18. Under section 32(5) of the UK Borders Act 2007 (BA 2007), the Secretary of State is obliged to make a deportation order in respect of foreign criminals, subject to the exceptions at section 33. Section 32(4) provides that such deportation is conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971 (IA 1971).

19. The appellant seeks to rely on the exception at section 33(2)(a) BA 2007, where deportation would breach a person's rights under the European Convention of Human Rights ('ECHR'). At issue is article 8, the right to respect for private and family life, home and correspondence. Where a court or tribunal determines whether a decision made under the Immigration Acts breaches a person's rights under article 8, Part 5A (sections 117A – 117D) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) apply.

20. Section 117A NIAA 2002 provides, as relevant, that:

> (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, and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private life and family life is justified under Article 8(2).

21. Section 117B is entitled "Article 8: public interest considerations applicable in all cases". It provides, as relevant, that:

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

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English – (a) are less of a burden on taxpayers, and (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(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.

22. Section 117C is entitled "Article 8: additional considerations in cases involving foreign criminals". It provides, as relevant, that:

(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.

23. The Court of Appeal in *NA (Pakistan) v Secretary of State for the Home Department* [2017] 1 WLR 207 has previously held (at [25] to [27]) that there was an obvious drafting error in section 117C(3). The consequence of that decision is that section 117C(3) is to be read in conjunction with section 117(6), as follows: "the public interest requires C's deportation unless Exception 1 and 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

The Immigration Rules

24. Immigration Rules ('the Rules') have been made by the Secretary of State under Section 3(2) of the Immigration Act 1971. The interaction of article 8 ECHR with the revocation of deportation orders is set out in Part 13 of the Rules at paragraphs A362 to 400. The Rules are consistent with Part 5A of the NIAA 2002. The core provisions of the Rules, in paragraphs 398 to 399A, closely follow sections 117C(3) to (6) NIAA 2002.

25. Paragraph 398 is as follows:

> Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

26. Paragraph 399 of the Rules applies where paragraph 398 (b) or (c) is engaged, if -

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

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

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

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

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

27. Paragraph 399A is as follows:

"This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

Decision Appealed

28. The UT dismissed the appellant's appeal against the Secretary of State's decision to make a deportation order. The tribunal identified the issue in the appeal as follows: [it] "boils down to the narrow issue of whether the seriousness of his offence and offending is sufficient to overcome the points in his favour". In the UT's judgment at [19], it was acknowledged that because the appellant is a 'foreign criminal' who has been sentenced to a period of imprisonment of at least 4 years, the tribunal had to have regard to the statutory provision in Part 5A NIAA 2002, namely, that the public

interest requires his deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.

29. The Tribunal came to the following conclusions:

a. Taking into account the assessment made by Lisa Davies, Consultant Forensic Psychologist, following her 3 hour interview of the appellant on 20 December 2017, it was satisfied that there is a medium risk of reoffending by the appellant. Although there is evidence of a change of attitude by the appellant, he was still prepared to continue to commit offences after he formed the relationship with his partner.

b. "The risk of reoffending is not the only, or even the most important factor, to be taken into account in terms of the public interest…the depth of public concern about the facility for a foreign criminal's rights under article 8 to preclude his deportation is a significant factor to be taken into account" (see the UT's judgment at [25]).

c. The appellant is socially and culturally integrated in the UK, although the extent of that is marred by his repeat offending. He has family connections here that have, particularly in relation to his father, strengthened in recent times and, although he has not acquired British citizenship, his presence in the UK has not been unlawful.

d. The appellant has never been to Nigeria and has no family or personal connections there, and it would be very difficult for the relationship with his partner to continue without her relocating with him and she will not relocate.

e. To remove the appellant would not be unduly harsh in terms of separation from his partner. In any case, the appellant needs to show very compelling circumstances because of the sentence of imprisonment of 4 years.

f. The appellant must have some cultural ties with Nigeria, where English is the official language, which is the only language he speaks. The tribunal was

impressed with his 'personable character' and stated that he will be able to gain employment opportunities.

g. The report of Lisa Davies, indicating the moderate current risk of suicide, increasing significantly in the event of forcible removal to Nigeria, was noted. The tribunal observed that no free-standing Article 3 ECHR claim had been relied upon in relation to the suicide risk. The tribunal went on in that context to rely upon an OASys report and the lack of oral evidence on the question by the appellant to doubt whether there is a real risk of suicide in the event of deportation to Nigeria.

h. For many years, the appellant has committed serious offences, and continued to commit serious offences and drive unlawfully even when warned of the potential consequences with regard to his immigration status within the UK. While the tribunal noted recent efforts to improve his attitude, it had no doubt that the appellant still presents a significant risk of continuing to offend, and remains a significant risk to the public. It held that the very strong public interest in deportation was manifest.

30. In coming to its conclusion, the UT looked at all of the matters it had described together and considered whether there were very compelling circumstances over and above those described in the provisions of section 117C of the 2002 Act. It noted that in order for the public interest in deportation to be outweighed there would have to be a "very strong claim indeed" (see, for example: *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 at [38]). Ultimately the UT was not persuaded that there was.

Discussion

31. The appellant submits that the UT's treatment of the public interest consideration was fundamentally flawed. As it's reasoning in the judgment at [25] demonstrates (see [29b] above), the UT either added the depth of public concern about whether article 8 rights tended to preclude deportation of a foreign national criminal as an additional

factor to the public interest or wrongly described it as a significant factor on the facts of this case.

32. In doing so the UT purported to rely on Lord Wilson's treatment of that factor in *Hesham Ali* at [70] where Lord Wilson accepted that "the very fact of public concern about an area of law, subjective though that is, can add to the court's analysis of where the public interest lies".

33. The context of this case, which it is submitted is very different from that being referred to by Lord Wilson, is that the appellant has lived his entire life in the UK. That is 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.

34. The appellant submits that the facts of this case should have led the tribunal to reduce the weight of the public interest in deportation rather than to increase it or describe it as being significant. This flawed view altered the balance struck by the tribunal and also its assessment of the consequences of deportation: this would not be a return to a home state for the appellant but "an exile from the only country the appellant can call home".

35. Mr Irwin appeared on behalf of the Secretary of State and we are grateful to him for the quality of his submissions in particular in response to a note from Mr Richard Drabble QC and Mr Khubber which developed the final form of this appeal at the beginning of the hearing. Mr Irwin submits that there is no error in the UT's treatment of the public interest factor as being a significant one on the facts of this case. In particular, he submits that:

    a. The UT was correct to identify that neither Exceptions 1 or 2 in Part 5A NIAA 2002 applied to the appellant with the consequence that the public interest required deportation unless there were very compelling circumstances over and above those described in Exceptions 1 and 2. They are not present in this case.

b. The public concern element of the public interest, addressed by the UT in it's judgment at [25], should be considered in the round as just one element of the public interest consideration. It is not to be considered in isolation. Other factors play a part in that assessment. One factor which must be taken into account is that it is plainly contrary to the public interest to permit to remain in the UK a man who has committed serious crimes and poses a risk of reoffending causing serious harm to members of the public.

36. In so far as the appellant relies upon the fact that he has been lawfully in the UK since birth, the Secretary of State submits that this is only a factor in the balance. In particular, the appellant had the chance to apply for British citizenship and did not take it so that he falls to be considered as a foreign criminal. He cannot use the fact that he could have made such an application to obtain any privilege that would have attached from the grant of citizenship.

37. The Secretary of State submits that the appellant's case is not exceptional. There are examples of the deportation of a person who has lived for most of his life in the UK notwithstanding that his formative years have been spent here. There is no fundamental distinction between a foreign criminal who has come to a host state and one who was born here. The public interest in the deportation of a 'home grown' criminal is not fundamentally different and the legislation makes no distinction.

38. Accordingly, he submits, there was no error in the UT's approach to assessing public interest and no corresponding error in the article 8 balancing exercise undertaken having regard to Part 5A NIAA 2002.

39. I agree with the persuasive submissions made on behalf of the appellant by Mr Drabble which, in summary, are as follows. The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a *moveable* rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will

necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules. I agree with the appellant that the present appeal is such a case.

40. In support of that general proposition, it is necessary to go back to the facts of this case and this court's reasoning in the first appeal. First, one has to be careful to identify as a relevant fact that the appellant was in the UK lawfully for the whole of his life. It was a feature of the first appeal to this court that the UT had wrongly factored into the balance that his residence was unlawful or at least that it had the character of "the absence of any lawful leave" (see *Akinyemi* at [30] and [31]). The conclusion of this court was unequivocal: subject to the deportation provisions of the 1971 Act, the appellant was "irremovable" because "he was in breach of no legal obligation by being here" (see Underhill LJ at [35]).

41. Second, and as a consequence of those facts, Underhill LJ went on to hold (at [47]) that the UT was wrong to direct itself "that little weight should be attached to the fact that [the appellant] had been in the UK his whole life and to rely also…on his presence being unlawful". These conclusions are part of the context of this case and are the starting point for future determinations.

42. It is worth citing in full Underhill LJ's reasoning that can be found at [49] because it predicts the issue that we have to determine in this appeal:

> "…The judge's misdirection went to the central issue in the case and one which required a peculiarly sensitive assessment. The facts are unusually stark because A had indeed lived here since birth, with an entitlement for most of that period to acquire British citizenship, and had no significant social or cultural links with the country to which he was to be deported: we were referred to no reported case in either the domestic or Strasbourg case law which could be regarded as substantially similar. In those circumstances the assessment of the weight to be given to the fact that A had never known any environment other than that of this country was of central importance; and it cannot be safe to conclude that the judge was unaffected by her direction that it should be given little weight because his presence had throughout been unlawful."

43. Putting to one side the first UT's misdirection, I respectfully agree with Underhill LJ's description of the facts and the assessment of the weight of the public interest that is to be undertaken in this case.

44. The Secretary of State has pointed to the plain words of the legislation and the Rules and says that there is nothing there to support a distinction being drawn between a foreign criminal who enters this country and offends and one who was born here and offends. If Parliament or the Secretary of State intended such a distinction to be drawn it would have been easy to articulate that in the instruments we must apply. I am not persuaded that this is the case and, in any event, the principles which underpin that legislation and the manner in which the factors that are to be considered in a balance between the public interest in favour of deportation and article 8 have been extensively analysed in the Supreme Court.

45. Dealing first with the legislation. There is on the face of section 117C NIAA 2002 a flexible or moveable quality to the public interest in deportation that is described albeit that the interest must have a minimally fixed quality. It is minimally fixed because at section 117C(1) the public interest as described can never be other than in favour of deportation. It is flexible because at section 117C(2) the additional consideration described is as follows: " The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal".

46. I entirely accept that part 5A of the NIAA 2002 reinforces the statement of Executive policy that is to be found in the Rules and "sets the intended balance of relevant factors in direct statutory form" (per Lord Carnwath JSC at [14] in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273). The court must apply it. However, I do not accept that the underlying principles relevant to the assessment of the weight to be given to the public interest and article 8 have changed. On this question, the treatment of the Strasbourg case law by the Supreme Court is important. In the judgment of Lord Reed JSC in *Hesham Ali*, with whom the majority agreed, there is at [25] and [26] a detailed analysis of the Strasbourg case law focussing, *inter alia*, on the *Boultif* criteria (*Boultiff v Switzerland* (2001) 33 EHRR 50 at [48]), the additional factors set out in *Uner v The Netherlands* (2006) 45 EHRR 14 at [58] and the analyses of the ECtHR in *Maslov v Austria* [2009]

INLR 47 at [72] to [75] and *Jeunesse v The Netherlands* (2014) 60 EHRR 17 at [105]. Relevant to the issue in this case, and by reference to that jurisprudence, Lord Reed comes to the following conclusion at [26]:

> "…when assessing the length of a person'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 makes a difference whether the person came 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. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive."

47. In Lord Reed's analysis of the Immigration Rules he comes to the same conclusion, namely that there are factors which can bear on the weight of the public interest in deportation. At [38] he says:

> "The implication of the new rules is that paragraphs 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private and family life does not meet the requirements of paragraphs 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words by a very strong claim indeed…The Strasbourg jurisprudence indicates relevant factors to consider, and paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the

> particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life."

48. Lord Reed returns to the question in his summary at [50] in the following terms:

> In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give weight to Parliament's and the Secretary of State's assessments of the strength of the *general public interest* (emphasis added) …and also consider all factors relevant to the specific case in question."

49. Although Lord Kerr JSC differs from the majority in some of his reasoning, he comes to the same conclusion in his judgment, a conclusion which is not doubted by anyone else. At [164] he says:

> "The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation. I do not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals but a claim that this has a fixed quality, in the sense that its importance is unchanging whatever the circumstances, seems to me to be plainly wrong in principle, and contrary to ECtHR jurisprudence."

He continues at [165]:

> "It is important for the decision-maker to scrutinise the elements of public interest in deportation relied upon in an individual case, and the extent to

> which these factors are rationally connected to the legitimate aim of preventing crime and disorder. That exercise should be undertaken before the decision-maker weighs the public interest in deportation against the countervailing factors relating to the individual's private or family life, and reaching a conclusion on whether the interference is proportionate."

50. In my judgment there can be no doubt, consistent with the Strasbourg jurisprudence, that the Supreme Court has clearly identified that the strength of the public interest will be affected by factors in the individual case, i.e. it is a flexible or moveable interest not a fixed interest. Lord Reed provides the example at [26] of a person who was born in this country as a relevant factor. Applying this approach to the weight to be given to the public interest in deportation on the facts of this case could lead to a lower weight being attached to the public interest.

51. I am strengthened in my view by the conclusion of the ECtHR in *Maslow v Austria* (supra), one of the cases relied upon by the Supreme Court in *Hesham Ali.*
In that case, the court said at [74]:

> "Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Uner* cited above, #55), including those who were born in the host country or moved there in 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, of their childhood in the host country, were brought up there and received their education there (see *Uner*, #58 *in fine*)."

52. The balancing exercise described by the Supreme Court was not undertaken by the UT. Instead, the UT anchors its approach (at [25]) of its decision on Lord Wilson's description of the depth of public concern as a factor (at [70] of *Hesham Ali*). Lord Wilson's words were not expressly adopted by the other members of the Court in *Hesham Ali* and are inconsistent with Lord Kerr's analysis at paragraphs [167] and [168] where he disavows any rational connection between 'societal revulsion' and the legitimate aim of preventing crime and disorder. Although I would prefer Lord Kerr's analysis, I can limit my reasoning to saying that Lord Wilson's observation is made in a different context to the facts of this case and that it is either inapplicable to the facts

or would not tend to strengthen the weight of the public interest in deportation in this case.

53. The UT's approach to the public interest and the proportionality balance that is to be undertaken were accordingly flawed. The exercise of considering the strength of the public interest by assessing the factors in the case has not been undertaken. In particular, the extent to which a foreign criminal who was born in the UK and has lived here all his life must be considered alongside all the other factors that relate to the public interest in deportation before that is balanced against an assessment of the article 8 factors. For these reasons, ground one of this appeal succeeds.

54. Given my conclusion on ground one of this appeal, it is not necessary to deal in detail with ground two. It is important however to sketch out the areas of concern so that they can be addressed at the new hearing. The appellant submits that the UT failed to adequately evaluate all relevant factors when considering whether 'very compelling circumstances' had been established under section 117C(6) NIAA 2002. In particular, the UT failed to address whether he would face 'very significant obstacles' to integration in Nigeria pursuant to section 117C(4)(c). The appellant contends that this is a particularly important error given that the UT appears to accept that the first and second limbs of Exception 1 are met (see UT's judgment at [27], referred to above at [29] of this judgment).

55. Further, the appellant submits that UT's conclusion that the appellant "must have some cultural ties" to Nigeria is a wholly inadequate evaluation of the 'very significant obstacles' limb of Exception 1 on the evidence.

56. The appellant also submits that the UT made a material error when assessing whether it would be 'unduly harsh' on the appellant's partner were a deportation order to be made, for the purposes of Exception 2. That is because the UT relied on the decision of the Court of Appeal in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617, [2016] ImmAR 954 and, in particular, the need to consider the appellant's immigration and criminal history when making that evaluation, whereas more recently the Supreme Court in *KO Nigeria and others v Secretary of State for the Home Department* [2018] UKSC 53 [2018] 1 WLR 5273 has explained that that approach to the Exception is wrong.

57. Finally, the appellant points to an unfortunate confusion in the UT's assessment of the risk of re-offending. The tribunal's approach to the appellant's future risk was confused. In the judgment at [24] the UT relies upon a recent expert report to describe the risk of further offending as a "medium risk". Whereas at [32] and without any explanation, the UT describes the risk as "significant".

58. The Secretary of State submits that the UT came to conclusions of fact and assessments or evaluations that were available to it on the evidence. It is also submitted that even taken at their highest, as submitted by the appellant, the article 8 factors do not amount to a very strong claim. The correct approach to Exception 2 may have changed since the UT came to its decision but that would not have made a difference to the overall evaluation and balance.

59. These questions among others will now be re-tried and no doubt carefully considered. In that circumstance I need do no more than re-iterate the words of Sales LJ in *Kamara v Secretary of Sate for the Home Department* [2016] EWCA Civ 813, [2016]4 WLR 152 at [14] so that they might be heeded by other decision makers:

> "The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

60. For these reasons the appeal was allowed and remitted to the UT for a re-hearing.

Lady Justice Nicola Davies:

61. I agree.

Lord Justice Moylan:

62. I also agree.