Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22319/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 18 February 2020	**On 20 March 2020**

Before

UPPER TRIBUNAL JUDGE CRAIG
UPPER TRIBUNAL JUDGE L SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ADENITI [E]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms R Bassi, Senior Home Office Presenting Officer
For the Respondent: Ms D Reville, Counsel instructed by D J Webb & Co Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the decision of First-tier Tribunal Judge Wylie dated 31 May 2019 and promulgated shortly thereafter following a hearing at Harmondsworth on 21 May 2019 in which Judge Wylie allowed the appeal of Mr [E] against the Secretary of State's decision to deport him. For ease of convenience throughout this decision we refer to the Secretary of State who was the original respondent as "the

Secretary of State" and to Mr [E], who was the original appellant, as "the claimant".

2. The claimant is a national of Nigeria who was born in this country on 26 July 1994. His birth certificate is contained within the Secretary of State's bundle (at page 33) which confirms that he was born in Edgware General Hospital and that at that time his father and mother lived in Finchley. The evidence within the file showed to the satisfaction of this Tribunal that he was in this country from his birth until certainly about 2001 because there is reference to various medical appointments and dental appointments within that time. It is also clear from the evidence that he was in this country by July 2003 because a medical appointment was made for him on that date and he started at primary school the following September. He apparently, and this is common ground, then went to Nigeria in 2004 returning to the UK in 2007 when he was 13 years old. The evidence of the claimant is that as far as he can recollect he was in the UK throughout the period of his childhood until he left for Nigeria in 2004, just before his tenth birthday, but the Secretary of State's case is that he left the UK before then because her records apparently show, although the Tribunal has not seen direct evidence on this, that he was granted a multi-entry visa in Lagos, Nigeria in 2002. We will have to make findings on this in due course. It is common ground that between 2004 and 2007 he was in Nigeria and that he returned to this country in 2007 aged 13.

3. Thereafter this claimant has amassed a significant number of criminal convictions, some thirteen in all, from being convicted aged 16 in October 2010 of criminal damage and a Section 5 Public Order Act 1986 conviction through to convictions in January 2018 for battery and criminal damage. During that period, he has amassed some thirteen convictions in total spanning offences of dishonesty, possession of offensive weapons including a bladed article, a drugs offence and offences of violence including a number of offences of battery (two in 2017 and one in 2018). He also has a conviction for criminal damage.

4. Rather unsurprisingly, following his most recent conviction in January 2018 the Secretary of State made a decision to deport him. This decision was made in August 2018. As already indicated above, the claimant appealed against this decision and it was his appeal against this decision which was allowed by Judge Wylie in her decision which is now under challenge, permission to appeal having been granted on 19 December 2019 by First-tier Tribunal Judge Povey.

5. We have been greatly assisted by written submissions prepared on behalf of both parties and also by the succinct and persuasive arguments advanced orally before us.

ERROR OF LAW

6. The first issue we have to decide is whether or not Judge Wylie's decision contains a material error of law. There were a number of arguments raised before her including that, despite the number of offences

committed, the claimant was not a "persistent offender" for the purposes of Section 117C of the Nationality, Immigration and Asylum Act 2002 and also that the effect on the claimant's son who is now 6 years old would be "unduly harsh", such that the claimant ought not to be deported because he would fall within Exception 2. Although the judge rejected the submission advanced on behalf of the claimant that the claimant was not a persistent offender, she nonetheless found that the effect on the claimant's child would be in her view "unduly harsh", such that it would not be lawful to deport him.

7. For ease of reference we set out Section 117C of the Nationality, Immigration and Asylum Act 2002 (added by the Immigration Act 2014) which provides 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.
>
> (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 sub-Sections (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".

By Section 117D(2) a "foreign criminal" is defined as meaning a person –

> "(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender".

8. Although this claimant has amassed such a large number of convictions, he has never been sentenced by a criminal court to any period of imprisonment other than suspended sentences and so he does not fall within Section 117D(2)(c)(i). So far as (ii) is concerned, it is not asserted that any of the offences of which he has been convicted have in themselves caused "serious harm".. The Secretary of State however considered that he did fall within sub-Section (iii) being a persistent offender.

9. So far as this aspect of the claimant's appeal is concerned, there was no challenge within the Rule 24 statement or otherwise made on behalf of the claimant to the judge's finding that he was a "persistent offender", although it is now argued on behalf of the claimant that in light of the few months that have elapsed since that hearing it might be arguable that whatever the position was at that time the claimant should not now be regarded as a persistent offender. However, that aspect of Judge Wylie's decision not being challenged, the sole issue so far as the error of law hearing is concerned is whether or not the judge's finding, and the reasoning on which that finding is said to be based, that the effect on the child of the claimant's deportation would be "unduly harsh" is sustainable.

10. There are two aspects of this finding with which the Tribunal has to be concerned. The first is whether it would be unduly harsh for the child to leave with the claimant and go with him to Nigeria. The second is whether in the event that the child stayed in the UK it would be unduly harsh for him to be separated from his father while remaining in the UK. At paragraph 49, Judge Wylie found that "[r]ealistically, the child would remain in the United Kingdom, and the question is whether or not it would be unduly harsh for the child if the appellant was deported".

11. The judge's reasons for finding that the effect on the child would be unduly harsh are extremely succinct and are set out at paragraphs 50 and 51 of her decision as follows:

> "50. The evidence of the appellant and the child's mother was that the appellant currently provides much of the daily care of the child during the week. This was supported by the letter from the school noted above, and the comments of the social worker. There was a possibility that the mother could not continue her current full-time work if she had to be solely responsible for child care which

> would adversely affect the family finances. This, though unfortunate, could not be held to be excessively harsh.
>
> 51. However I accept the evidence that the child has a particularly close relationship with his father as his main carer for most of the week. At his age, he would be very conscious of the loss of his father. It would be difficult for him, at his age, to enjoy a meaningful relationship through telephone or modern means of communication. The view of the social worker is that long term separation from his father would cause him emotional harm".

Then, at paragraph 52 the judge found as follows:

> "52. In the circumstances of this child, I find that it would be unduly harsh for him if the appellant was deported".

12. The Secretary of State in her grounds submits that this finding is inadequately reasoned. The letter from the social services which is referred to at paragraph 46 of Judge Wylie's decision which was dated 3 October 2018 includes the following:

> "during my interactions with [the claimant's son], he has spoken warmly of his father. [He] has shared how he enjoys going to the park with his father at weekends, and that [the claimant] helps him with his numbers and learning at home. [The child] appears to have a warm, happy active relationship with his father and in my opinion a long term separation would cause him emotional harm. It is also my understanding that [the child's] care is shared between [the claimant] and [the claimant's partner] with him helping with the school drop offs and football training at the weekend. I believe that the family will struggle without the care and support that [the claimant] provides to his son".

13. Then at paragraph 47, as already indicated, the judge gives her reasoning why the claimant's partner would not go to Nigeria which was that "she has her extended family all in the United Kingdom, she has employment here, and has lived all her life in the United Kingdom, she has never visited Nigeria".

14. At paragraph 48 the judge gives her reasons why it would be unduly harsh to separate the child from his mother to go to Nigeria with his father which are unsurprising. By reason of what appears below, it is not necessary to consider this aspect because the effective challenge is to the judge's decision that the effect on the child of remaining in this country without his father would be unduly harsh such that the claimant's appeal against deportation should be allowed.

15. There have been a number of recent cases in which the issue of how the courts and Tribunal should consider whether the effect on a child is "unduly harsh" as defined within Section 117 has been considered, of which currently the most important is the decision of the Supreme Court in *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53 in which the Supreme Court held that when considering this issue a court or Tribunal should concern

itself only with the effect on the child and should not factor into the words "unduly harsh" any consideration of the offence or offences by reason of which it had been felt right to deport an applicant. It is right to say that in this decision the Supreme Court sets the threshold of what is said to be "unduly harsh" very high. At paragraph 27, the court refers with approval to a decision of this Tribunal (the former President McCloskey J and UTJ Perkins) in *MK (Sierra Leone) v SSHD* [2015] UKUT 223 where at paragraph 46 the Tribunal had referred to the "evaluative assessment" required by the Tribunal as follows:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher".

16. Just prior to citing that case with approval at paragraph 23, the Supreme Court had stated as follows:

> "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 …".

17. In a subsequent Court of Appeal decision, in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 giving the decision with which all the court concurred, Holroyde LJ stated as follows, at paragraph 34:

> "It is therefore now clear that a Tribunal or court considering Section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner **would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation** [my emphasis]. Pursuant to Rule 399, the Tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him".

18. We also take account of another post *KO* decision of the Court of Appeal, *SSHD v KF (Nigeria)* [2019] EWCA Civ 2051 in which Baker, LJ (with the

Senior President of Tribunals in agreement) endorsed the position taken in *PG (Jamaica)* and stated at [30]-[31] that:

> "30. Furthermore, and with respect to the First-tier Tribunal judge [who had allowed the appeal], I consider that his conclusion on the evidence about the respondent's family that his deportation would be unduly harsh is unsustainable in the light of Lord Carnwath's analysis of the proper interpretation of Exception 2 in s.117C(5), namely that:
>
> > '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.'
>
> Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that 'there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years' is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a 'fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child' and that he was entitled to take judicial notice of that fact. But the'fact' of which he was taking 'judicial notice' is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.
>
> 31. For those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what Parliament has decided, and it is important to bear in mind the observations of Hickinbottom LJ in PG (Jamaica) at paragraph 46:
>
> > 'When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with the other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of ECHR. It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will.'

19. In other words, before Judge Wylie could properly find that it would be unduly harsh for the claimant's child (she did not consider the position of the claimant's partner in her decision) to remain in the UK without the claimant it was necessary to consider to what extent, if any, the position of this claimant's son would be different from that which one would ordinarily expect to be the position when any parent is deported. In our judgement also, insofar as the judge considered that the relationship between a son and his father was so close as to be a "particularly close relationship" it was incumbent on her to set out the reasoning why this relationship was so much closer than would normally be expected as to make the effect on the child not just "harsh" but "unduly harsh" having in mind the very high threshold which it is clear from the decisions of the Supreme Court and Court of Appeal referred to above must be met.

20. In answer to the Tribunal's concerns as to what the reasons may have been, Ms Reville on behalf of the claimant suggested that it could only be in reliance on the evidence which was contained in the witness statement of the claimant and also the report from social services already referred to. That evidence is set out at paragraphs 25 to 37 of the witness statement and refers to how the claimant gets his son up for school and they have fun, that he enjoys brushing his teeth with him, they have breakfast together, they play football together, and pray together as well, they go to school and listen to gospel music, the claimant walks his son up to school and he then picks him up after school and he checks to see whether he has any homework to do and sometimes they do the homework together. The family all pray together before going to bed and the son has inherited the claimant's love of Arsenal Football Club and cheers whenever Arsenal score. The claimant also intended to teach his son how to play the piano. It is sadly the case as Hickinbottom LJ mentioned in his concurring judgment in *PG (Jamaica)* at paragraph 46 that there will always be disruption and hardship and distress suffered by an innocent child when a parent is deported. What Hickinbottom LJ said at paragraph 46 was as follows:

> "46. When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in Section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of the ECHR. It is important that decision-makers and, when their decisions are challenged, Tribunals and courts honour that expression of Parliamentary will …".

21. Hickinbottom LJ concluded by acknowledging in that particular case that "unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness".

22. Given the high threshold which applies in cases such as this, the reasoning set out within Judge Wylie's decision is in our judgement clearly

insufficient such that the decision that she made is not sustainable and will have to be remade.

REHEARING

23. After the Secretary of State had been granted permission to appeal against the decision of the First-tier Tribunal standard directions were sent to the parties which made it clear that the parties were expected to be prepared in the event that an error of law was found to continue the hearing immediately thereafter. Furthermore, under the Rules the parties are required to seek permission to adduce further evidence if either of them wishes to do so. The claimant chose not to attend and furthermore no application was made to adduce any further evidence. In the circumstances and Ms Reville did not seek to persuade the Tribunal otherwise it was appropriate to rehear the case and remake the decision in reliance on the evidence already submitted.

24. Very helpfully prior to the hearing before this Tribunal today Ms Reville had prepared a skeleton argument in the event that the Tribunal was to rehear the appeal today. This was supplementary to the Rule 24 arguments which had already been submitted. This is a comprehensive and exceptionally well-argued document and sets out fully the basis upon which the claimant's submissions are now made. Ms Reville supplemented this skeleton argument in oral arguments before us.

25. Essentially Ms Reville had three grounds on which she now sought to argue that the appeal should succeed. The first was that notwithstanding the finding which had previously been made by Judge Wylie that this claimant was a "persistent offender" because this Tribunal was obliged to consider the position as it is now and in light of the further time which had elapsed since Judge Wylie had given her decision the claimant now ought not to be regarded as a persistent offender. The second ground was that this Tribunal should find on the evidence that the effect of the removal of the claimant from this country while the claimant's child remained would be unduly harsh on that child. Thirdly, and in any event there were very compelling reasons why this claimant should not be deported.

Persistent Offender

26. Essentially the claimant relied heavily on what was said to be the ratio of *SC (Zimbabwe)* [2018] EWCA Civ 929 in which (and this is set out at paragraph 10 of Ms Reville's skeleton argument) it was held that the wording of Part 5A of the Nationality, Immigration and Asylum Act 2002 does not "compel any particular weight to be given to the Secretary of State's view" that someone is a persistent offender. Reference was made to the court in *SC (Zimbabwe)* endorsing the reasoning given by the Upper Tribunal in *Chege ("is a persistent offender")* [2016] UKUT 187 in which the Tribunal at paragraph 51 had specifically said that:

> "There may be circumstances in which it would be inappropriate to describe someone with a past history of criminality as being a

> 'persistent offender' even if there was a time when that description would have been an accurate one".

27. Examples are given at paragraph 52 of *Chege*. The example given there though was of a person who "in his youth had committed a number of offences between the ages of 14 and 17 but in adulthood had led a blameless existence for 20 years". At paragraph 53 the Upper Tribunal in *Chege* had said that:

> "Put simply, a 'persistent offender' is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision up to a certain time before it, or that the continuity of the offending cannot be broken".

28. In other words, Ms Reville submitted that, even though she could not now challenge Judge Wylie's finding that at the time she made her decision the claimant was a "persistent offender", he should no longer be regarded as being so. This was because he had now been out of trouble for a period in excess of two years which showed that although prior to his previous conviction he might have been regarded as a "persistent offender" that should now not be regarded as being the position.

29. Unfortunately, Ms Reville was obviously unaware of the fact that during the period in which the claimant had not been convicted of an offence he had been in immigration custody for some period (it seems this was between July and August 2018). If she had been aware of that she would obviously have brought it to the attention of the court because Ms Reville is known to this Tribunal as an advocate who understands and always complies with her obligations as counsel. Furthermore, it appears that the claimant has been on immigration bail since that time so it is perhaps unsurprising that he has not been in further trouble during this period. Moreover, the period of time since Judge Wylie reached her decision that the claimant **was** a "persistent offender" is so limited and the number of offences and their variety is so large that rationally we do not feel able to reach any conclusion other than that in the circumstances of this particular case this claimant clearly remains a "persistent offender" and accordingly a "foreign criminal" for the purposes of Part 5A of the 2002 Act and also the Immigration Rules.

Is the effect on the claimant's child "unduly harsh"?

30. It is not necessary for the purposes of this decision to consider whether or not it would be "unduly harsh" for the claimant's son to go with the claimant to Nigeria in the event that the claimant is to be deported. We note Judge Wylie's finding that the claimant's partner would not go with him, and in these circumstances even though it may not have been unduly harsh for his partner to go with him, it is difficult to disagree with the finding that Judge Wylie made that it would be unduly harsh for the British child to separate from his British mother in order to go with his father to Nigeria. However, the real issue in this case is the effect on the child of remaining in this country while his father is removed to Nigeria and whether that can be said to be unduly harsh.

31. Our starting point as has been made clear from the authorities referred to above is that there is considerable public interest in deporting foreign criminals which the claimant is. It is also the case that as the courts have made clear there will almost always and certainly most often be considerable distress caused to a child when his or her parent is removed. What we would have to find to support a conclusion that the effect on the child is unduly harsh (and this is without reference to the extent of the criminality involved) is that the effect on the child would be beyond that which would be in the words of the previous President of this Tribunal as set out with approval in *KO* "uncomfortable, inconvenient, undesirable or merely difficult". It has to be beyond "something severe, or bleak". As our former President stated (approved by the Supreme Court in *KO*) "harsh … is the antithesis of pleasant or comfortable". That Tribunal also noted "Furthermore, the addition of the adverse 'unduly' raises an already elevated standard still higher".

32. We have summarised what the claimant has said to be his relationship with his child earlier and in our judgement it does not in essence go beyond what one would normally expect to be the relationship between a father who is taking his child to school and spending time with him while his mother works (as is frequently the case because in such circumstances it is almost always or it is very often the case that the father is not allowed to work). In this case perhaps the relationship is not even as close as will often be the case because as the claimant makes clear in his statement upon which reliance is now placed he also is undergoing a course in sports management at university during the day and so his involvement with his child is before school and after school and sometimes the child has to remain at a club after school until the claimant can collect him. There is nothing in the evidence which could justify us in finding that the elevated threshold has been reached. As Hickinbottom LJ made clear in *PG (Jamaica)* already referred to above, children in these circumstances "will inevitably be distressed" and the result for the innocent children of people like this claimant is often very sad but is a regrettable bi-product of the need to deport foreign criminals. Certainly, in the circumstances of this case we have no hesitation whatsoever in finding that the threshold is not reached by a very large margin.

Are there very compelling circumstances over and above those set out within the exceptions such that this claimant should not be deported?

33. Ms Reville rightly submitted that the Tribunal should following the decision of the Supreme Court in *Hesham Ali v SSHD* [2016] UKSC 60 adopt a "balance sheet" approach whereby the Tribunal should weigh up the various factors both for and against deportation. As already indicated, the starting point must be the very great public weight which must be given to Parliament's intention that absent "very compelling circumstances" this country needs, and it is very much in the public interest to deport foreign criminals, which by reason of his persistent offending, this claimant is.

34. The factors on which Ms Reville relies in order to support her argument that there are very compelling reasons why the claimant should not be deported are as follows:

    (a) the length of time the claimant has been here;

    (b) the strength of his family relationships with his partner and his son;

    (c) the fact that the offences while numerous were all relatively minor;

    (d) the relationship that he has with his partner was founded (it is said) when he thought he was in this country lawfully and indeed thought that he was a British citizen;

    (e) his social and cultural integration in this country; and

    (f) that there will be very significant obstacles to his integration in Nigeria were he to be sent there.

35. I deal with these factors in turn.

Length of time the claimant has been here

36. It is the claimant's case that having been born in this country in 1994 he remained here till 2004 until just before he was 10 and then went to Nigeria for about three years before returning to this country in 2007. The Secretary of State's case based upon what is said within her records to be an application and grant of a multi-visit visa in 2002 is that at the very least the claimant was out of this country for some time between 2001 to 2003.

37. Looking at the evidence contained in the file we are satisfied on the balance of probabilities that the claimant was in the UK from 1994 to 2001. There are recorded visits and appointments with the doctors and dentists and so on which suggest this is the case. However, there is a gap between 2001 to 2003 and interestingly there is an absence of schooling until 2003 when the claimant was recorded as having **started** primary school. There was a medical appointment apparently booked for him in July 2003 although he did not go. Given that a child would be expected to start primary school at the age of 7, we are not satisfied that the claimant has established on the balance of probabilities or at all that he was actually within this country between 2001 and 2003 and consider it more likely that he in fact returned to this country from Nigeria in late 2003 where he stayed for about a year before as his school record makes clear he left. It is common ground, as already stated that from 2004 to 2007 the claimant was in Nigeria. In any event, we do not believe that this makes a great deal of difference to his case, because even if he had been in this country up until 2004, he left before his tenthbirthday and so on any view would not have been here sufficiently long to have been entitled to British citizenship if an application had been made on his behalf at that time.

Strength of family relationships in the UK with his partner and his children

38. We accept that the claimant has a relationship with both his wife and his son. So far as a relationship with his son is concerned we have considered the strength of this relationship when considering whether the effect on the child would be "unduly harsh". Ms Reville argues as she is entitled to that even if the strength of that relationship is not sufficient that the effect on the child of his departure could be said to be "unduly harsh" nonetheless it is a factor which can be taken into account in conjunction with other factors when considering whether there are very compelling reasons why the claimant should not be removed. It is argued on behalf of the claimant (and we deal with the fourth factor which we are asked to take into account) that the strength of the family relationship should be looked at on the basis that the claimant believed that he was a British citizen and that it was only when he was 18 that was after his juvenile convictions but before his other convictions that he realised that he was in fact a national of a foreign country. In these circumstances it is submitted this Tribunal should give less weight to what is said at Section 117B of the 2002 Act where at sub-Section (4) that "little weight should be given to – (a) a private life, or (b) a relationship formed with a qualifying partner, that it is established by a person at a time when the person is in the United Kingdom unlawfully" or to what is said at (5) that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious".

39. It may be the case because the evidence is not completely clear on this that for a substantial period of time the claimant was in this country he had a valid visa to be here, but certainly as a matter of fact his immigration status in this country was precarious. Furthermore, we are unable to accept what the claimant says in his witness statement which is that he was not aware that he was not a British citizen until he was about 18 because it is common ground that when he returned to this country in 2007 he did so by presenting a Nigerian passport which had a visa allowing him to come to the UK. It is apparently the claimant's case that somebody else organised the obtaining of his passport and visa and that he had nothing to do with it, but on any view when he arrived in this country aged 13 at Heathrow he would have gone to the entry point which is open to foreign nationals and not to the entry point where he would have gone if a UK or other EU national. We have to consider this issue on the balance of probabilities, and we consider it far more likely than not that this claimant was aware at that time, that is when he came to this country in 2007, that he was not a British national.

Were the offences all relatively minor?

40. Although the claimant was not at any time sentenced to an immediate period of imprisonment, in our view these offences could not be described, when seen in their totality as "all relatively minor". As already indicated above they include offences of dishonesty (not just the frequent offences of travelling on the railway without a ticket which deprives the Exchequer of revenue to which the Exchequer is entitled, but also of attempted theft), offences of battery, that is violence, possessing offensive weapons,

including a bladed instrument, with potentially extremely serious consequences, a drugs offence and also criminal damage. We do not regard these offences, in totality as being "relatively minor"; indeed, they are sufficiently serious that we have found it correct (as did Judge Wylie before us) to uphold the Secretary of State's view that this claimant is indeed a "persistent offender" and thus a "foreign criminal".

Relationships formed when he thought he was a British citizen

41. As indicated above we have set out our findings with regard to this under the discussion regarding the strength of his family relationships.

Social and cultural integration

42. Clearly the claimant is to some extent socially and culturally integrated into the UK, but the strength of this integration must be viewed in the context of his serious offending and we do not regard this as of any great weight.

Are there very significant obstacles to the claimant's integration within Nigeria?

43. We find it interesting in this case when considering the evidence of in particular the claimant's uncle, who has spent some time in Nigeria that although he refers to relatives of the claimant who are in Nigeria, he does not deal with where various other relatives are or might be. At paragraph 4 of his statement he says this:

> "My brother Rotimi is the only sibling I know who lives in Nigeria. He is 44 years old. He does not have a job and has not had any formal education. Although he has not received a formal diagnosis, I feel that he might be autistic. Rotimi struggles with daily tasks and is a slow learner. I recall that my parents were concerned that he might have a mental health condition. I therefore have to support him financially as much as I can. If it was not for me, I do not think he could survive".

44. Curiously he says nothing about his parents, that is the claimant's grandparents, and nor does he say where his sister (that is the claimant's mother) is save that he does not know of her whereabouts because "we have not been in contact for years after she mistreated [the claimant]".

45. All we do know is that the claimant's uncle who maintains that he cares for the claimant, has sufficient financial resources to be able to help a brother in Nigeria of whose whereabouts he knows, and there is no reason to believe that he could not also provide some assistance to the claimant as well. Indeed, it is not part of Ms Reville's case advanced on the claimant's behalf that the claimant would be destitute within Nigeria.

46. The claimant may know few people in Nigeria, but English is a language widely spoken within Nigeria and there is nothing within the papers to suggest that any difficulties that this claimant might have on return to

Nigeria would be significant, let alone "very significant". There is no basis in our judgement upon which we could properly find that this claimant would not be able within a reasonable period to find his feet and exist and have a meaningful normal life within Nigeria and we so find.

47. Accordingly, having weighed up all the factors, none of which are particularly unusual in deportation cases against the very large public interest in deporting foreign criminals, and having regard to our duty also to where necessary take account of the level of offending and accepting that even taken together these offences are not as serious as some people who are deported having received very considerable sentences of imprisonment, nonetheless balancing all the factors together we are quite satisfied that by a very large margin there cannot be said to be "very compelling reasons" why deportation in the circumstances is disproportionate. It follows that this appeal must be dismissed and our decision is accordingly as follows:

Decision

We set aside the decision of First-tier Tribunal Judge Wylie as containing a material error of law and remake the decision dismissing the claimant's appeal on all grounds.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 18 March 2020