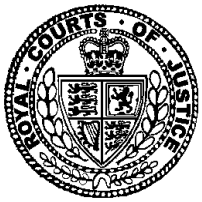

Neutral Citation Number: [2019] EWCA Civ 1763

Case No: C5/2018/2706

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Dawson
HU/27224/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2019

Before:

LORD JUSTICE FLOYD
LADY JUSTICE KING
and
LORD JUSTICE IRWIN

- -

Between:

OH (ALGERIA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Saad Saeed and Basharat Ali (instructed by **Aman Solicitors Advocates**) for the **Appellant**
Rory Dunlop QC (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 3 October 2019

- -

Approved Judgment

Lord Justice Irwin:

Introduction

1. This is an appeal against two decisions of the Upper Tribunal, Immigration and Asylum Chamber ("UT"). The first decision, on 15 December 2017, concluded that the decision of the First-tier Tribunal ("FtT") contained an error of law, quashed that decision and ordered that the decision was to be re-made by the UT. The second decision, of 30 July 2018, dismissed the Appellant's appeal against deportation on the grounds that, as a "foreign criminal" who had been sentenced to more than four years' imprisonment, there were no "very compelling reasons" arising from the Appellant's family life so as to outweigh the public interest in his deportation.

History and Background

2. The first part of the relevant history was summarised by the Upper Tribunal in the Decision and Reasons of 30 July 2018 as follows:

> "3. The claimant is a national of Algeria who has lived continuously in the United Kingdom since 29 September 1995. He had previously entered in July 1988 and left a year later and in May 1991 when he admitted to using a false passport to gain entry. It is not established when he left before his return in 1995. His appeal against an unsuccessful asylum claim was dismissed in May 1998. The claimant successfully applied for leave to remain based on his marriage to HL in January 2000 for which he was granted twelve months' leave to remain in July that year leading to a grant of indefinite leave to remain on 10 July 2003.
>
> 4. The claimant has a long history of criminal offending and there was no dispute to the detailed record in the decision refusing the human rights claim as follows:
>
> > "25. On 16 March 2015 at Kingston-Upon-Thames Crown Court, you were convicted of assault occasioning actual bodily harm, for which you were sentenced on 18 May 2015 to 12 months imprisonment.
> >
> > 26. You also have previous convictions:
> >
> > - On 13 December 1988, you appeared before Bow Street Magistrates Court where you were convicted of criminal damage. You were ordered to pay a fine of £30, costs of £10 and pay compensation of £50.
> >
> > - On 10 October 1996, at Marlborough Street Magistrates Court, you were convicted of failing to provide a specimen for analysis. You were disqualified from driving for 15 months, and ordered to pay a fine of £300 and costs of £30.

- You appeared before Bicester Magistrates Court on 11 October 1996, where you were convicted of driving a motor vehicle with excess alcohol, driving without due care and attention and failing to stop after an accident. In total you were ordered to pay fines of £440, disqualified from driving for 12 months, driving licence endorsed with a total of 10 penalty points and costs of £40.

- On 6 May 1998, at Richmond-Upon-Thames Magistrates Court, you were convicted of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence and common assault. You were ordered to pay a total of £160 in fines, £60 costs and £50 compensation.

- On 18 May 1998, at West London Magistrates Court, you were convicted of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. You received a conditional discharge of 12 months and fined £30.

- At Richmond-Upon-Thames Magistrates Court, you were convicted on 26 August 1998, of destroy or damage property at a value unknown, and two counts of assault on police. You received 1 month imprisonment to run concurrent, and a fine of £150.

- On 25 February 2000, at Isleworth Crown Court, you were convicted of two counts of assault occasioning actual bodily harm and two counts of common assault. You received a total of 8 months imprisonment.

- On 26 February 2002, at Richmond-Upon-Thames Magistrates Court, you were convicted of destroy or damage property and using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. You were ordered to take part in a community rehabilitation order for 18 months, a community punishment order of 120 hours, pay costs of £55 and compensation of £412.70.

- On 14 June 2002, at West London Magistrates Court, you were convicted of using disorderly behaviour or threatening/abusive/insulting words

likely to cause harassment alarm or distress. You were given a £100 fine.

- On 12 September 2002, you were convicted at East Dorset Magistrates Court of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence, two counts of assault a constable, indecent assault on female 16 or over and battery. You received a total of 6 months imprisonment.

- On 28 November 2003, at Richmond-Upon-Thames Magistrates Court, you were convicted of common assault and using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. You were sentence to 5 months imprisonment.

- On 28 January 2004 at Kingston-Upon-Thames Crown Court, you were convicted of causing grievous bodily harm with intent to do grievous bodily harm for which you were sentenced to 8 years' imprisonment.""

3. Following the 2004 conviction, the Appellant was served with Notice of Intention to make a Deportation Order. He appealed. His appeal was dismissed in July 2007. His attempts at further appeal and judicial review failed and he was served with a deportation order of 24 June 2008. Further representations were made but the Secretary of State refused to revoke the Deportation Order on 30 April 2009. The Appellant appealed that decision unsuccessfully to the FtT. Following refusal of permission to appeal, but a successful judicial review of the refusal, the Upper Tribunal dismissed the ensuing appeal on 20 April 2010. Permission to appeal that decision to the Court of Appeal was granted on 5 October 2010, following which the matter was remitted to the Upper Tribunal. On 19 September 2011, the Upper Tribunal allowed the Appellant's appeal.

4. From that point, the Appellant was given successive grants of discretionary leave to remain, the last of which expired on 25 May 2014. Before that expiry, the Appellant applied for further leave to remain. Whilst the Secretary of State was considering that application, the Appellant was further convicted of assault occasioning actual bodily harm. That offence took place on 11 December 2014 and the conviction was on 16 May 2015. The assault was an attack on the Appellant's eldest child, a daughter. It was this conviction which triggered the decision currently appealed.

5. The Appellant's family circumstances are relevant. The Appellant married his wife, a British citizen, on 8 April 1998. They have five children. In the course of the FtT's judgment, findings were made which I now summarise and are unchallenged. The eldest child ("Child A") is a young adult and is in good health. The second child ("Child B") is a daughter, now 17. She has hearing problems and has suffered from anxiety, but is otherwise healthy. The third child ("Child C"), now 8 years old, has had an episode of Bell's Palsy without long-term effects and is otherwise healthy. The fourth

child ("Child D"), a boy now aged 6, has been identified as "having a number of autistic spectrum disorder traits". He experiences behavioural difficulties and can be aggressive and difficult to handle. He is also epileptic, experiencing absence seizures and is on medication for that condition. He has a chromosomal disorder which is linked to his behavioural problems and may in due course cause learning difficulties. He tends to be very active and to be a poor sleeper. The youngest child ("Child E"), a daughter aged 5, has also been diagnosed as having a chromosomal disorder. She has a condition known as PICA, meaning that she will eat inappropriate things. The FtT found that she has to be "constantly watched to ensure that she does not eat anything dangerous". She can be aggressive and her chromosomal disorder may be linked to autism.

6. The Appellant has not lived continuously with his family since his marriage. He first came to the United Kingdom on 4 July 1988, some three months after his marriage. He lived in the UK until July 1989, when he returned to Algeria. He next came to the United Kingdom on 1 May 1991 but was removed to Algeria later that year. He then returned to the UK on 29 September 1995. As indicated earlier, he served sentences of imprisonment in 2000, 2002 and 2003, followed by the long period of incarceration after his conviction in January 2004. In 2012, he spent three months away from the family on a visit to Algeria, with a similar three months period away after the birth of the youngest child in 2014. After his arrest for the assault on his daughter (Child A) in December 2014, he spent five and a half months in prison on remand, prior to sentencing on 18 May 2015. According to the unchallenged findings of the Upper Tribunal:

> "[The Appellant] was released in June 2016, thereafter he lived with his brother. Between August 2016 and February 2017, he lived alone at an address provided by the probation service. [The Appellant's wife] and the children visited Algeria in the summer of 2017 for five weeks."

7. Following the assault on Child A, the Social Services Department applied for and obtained a Non-Molestation Order. Supervised contact with his children took place from August 2015 and was increased, being followed by unsupervised contact. After a time, the Non-Molestation Order was discharged, a step supported by the Appellant's wife. He returned to the family home in February 2017 (FtT Reasons, paragraph 40). The deportation order had been made on 23 November 2016, following a letter from the Respondent to the Appellant of 31 May 2016, seeking representations as to why he should not be deported. In response to that letter, the Appellant submitted Human Rights representations (Article 8) but on 24 November 2016 the Respondent refused the Appellant's Human Rights claim.

8. The Notice of Decision of 24 November 2016 gave as the reasons for deportation not only the conviction of March 2015, but all of the other previous convictions, including notably that which led to the eight-year sentence, and the letter further characterised the degree of public interest in the Appellant's deportation as derived from the eight-year sentence and stated therefore that:

> "The public interest requires your deportation unless there are very compelling circumstances over and above those described in the exceptions to deportation set out at paragraphs 399 and 399A of the Immigration Rules."

Save for one minor point I address below, the relevant paragraphs of the Immigration Rules are in identical terms to the provisions of statute.

The Statutory Provisions

9. The relevant statutory provisions are contained in Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Since for present purposes the meaning of section 117C of the 2002 Act and the relevant part of the Rules is the same, it is helpful to focus on the statute.

10. Section 117A places obligations on a court or tribunal which is required to determine whether a decision made under the Immigration Acts breaches Article 8 rights. Subsections (2) and (3) specify:

> "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 and family life is justified under Article 8(2)"

11. Section 117B sets out matters relevant to the public interest and the weight to be given to private life in defined circumstances.

12. Section 117C is the most important provision for this case. The section reads:

> "**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."

13. Section 117D addresses the interpretation of Part V of the Act. So far as is relevant to this case, it reads:

"**117D Interpretation of this Part**

(1) …

(2) In this Part, "foreign criminal" means 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.

(3) …

> (4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
>
> > (a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
> >
> > (b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;"

Key Findings of the FtT

14. The Respondent was not represented at the hearing before the FtT.

15. The FtT found the Appellant to be "generally a credible witness". He expressed regret for the way he had treated his oldest daughter and emphasised that he had undertaken a domestic violence intervention programme. His relationships had improved and he wished to stay with his family and children: they needed him. The Appellant's wife gave evidence. The FtT did not find her to be "entirely credible". She had sought to minimise her husband's previous violent behaviour. However, the FtT accepted her evidence as to the changes they had seen in the Appellant. He was calmer and more supportive and had started attending school and college meetings. The eldest daughter (Child A) gave evidence that she did not wish her father to be deported. She loved him and forgave him. She felt responsibility and guilt as to his arrest and conviction, which the Tribunal found would be likely to increase if the Appellant was deported. The Appellant's wife gave evidence as to the difficulty she had parenting her five children. Assistance provided by the Social Work Department when the Appellant was in prison was not sufficient and she had struggled. She needed the Appellant at home to assist her, particularly at night. The children's medical condition made it very difficult to cope.

16. The FtT found that the Appellant remained in a genuine and subsisting marriage with his wife and accepted that there was a close bond between the Appellant and his children.

17. In a central part of the decision, the FtT considered the proportionality of the interference with the Appellant's Article 8 rights and the impact of Part 5A of the 2002 Act. The FtT found that the Appellant was "a foreign criminal" (paragraph 47). The FtT considered section 117C and concluded, by reference to the 2004 conviction and the eight-year sentence of imprisonment, that the Appellant fell into the most serious category of "foreign criminal". In considering that conviction, the FtT noted that the offence involved an attack upon a man using a hammer and that this was an offence of causing grievous bodily harm, with intent to cause grievous bodily harm. The FtT noted that nevertheless the Upper Tribunal in 2011 had found that the best interests of the Appellant's children outweighed the public interest in deportation (paragraph 51). The FtT then turned to the most recent conviction in the following terms:

> "52. I turn to consider the nature of the offence that the Appellant was convicted of most recently which has resulted in the Respondent reconsidering the Appellant's situation and making a new deportation order. I find that the most recent offence was serious given that it involved an assault on a minor in respect of whom the Appellant, as her father, was in a position of trust. It is also relevant that the assault took place on [Child A] in her own family home, a place where she should have been able to feel safe. I have considered the sentencing remarks of his Honour Judge Jones. Judge Jones notes that the offence involved the Appellant banging his daughter's head against the bed frame in her bedroom and it included squeezing her, pushing her to the wall, pulling her hair and hitting the back of her neck on several occasions. [The Appellant's daughter] received a number of injuries to her hands, neck and top of the head, and her left and right shoulder, although I note Judge Jones states that none of them were particularly serious. Judge Jones described the offence as a "nasty piece of violence against somebody within your care and within your family" and described [the Appellant's daughter] as a vulnerable individual given that she was in her teens and was living in the Appellant's household. Judge Jones imposed a period of imprisonment of 12 months. He noted that the period of imprisonment imposed would have been less had the Appellant not had the antecedents (previous convictions) which he had. I find that while the offence is serious involving a sustained assault on a child in her own home by her father it is not, given the level of custodial sentence imposed by Judge Jones, an offence which can be seen at the most serious end of the scale."

18. The FtT noted that the Appellant had not been convicted of an offence between 2004 and 2014, but also noted that he had a lengthy criminal record, including other offences of violence (paragraph 53). There were no mitigating factors in relation to the latest offence (paragraph 54). It was a matter of concern that the latest offence had taken place after the earlier successful appeal against deportation and despite the Appellant "being made aware that any further offending may well result in his deportation" (paragraph 55).

19. Having considered those principal facts, the FtT concluded that the Appellant could not benefit from Exception 1 to section 117C(4) and turned to consider Exception 2, namely whether the effect of deportation on the Appellant's partner or children would be "unduly harsh". The FtT concluded that the Appellant could not succeed on the basis of Exception 2 alone, because of the previous sentence of eight years' imprisonment. However, before proceeding to consider whether there were "compelling reasons over and above those described in Exception 2" it was necessary to see whether exception 2 could be satisfied.

20. In paragraphs 63-73 of the Reasons, the FtT considered the facts and the effects of deportation on the Appellant's wife and children. It is not necessary to repeat these paragraphs or summarise them extensively. The FtT considered that it would not be

reasonable to expect this family to move to Algeria with the Appellant (paragraph 63). It was in the best interests of these children to live with both parents (paragraph 64). Here, as later, the FtT considered the eldest daughter as one of those children, although she was already 18 years of age. In extensive passages the FtT considered the impact of deportation on the eldest daughter (paragraphs 65 and 66), concluding that:

> "[A] states that she would not be able to cope if her father was sent to Algeria. While [A] would of course still have the support of her mother and her mother's extended family if the Appellant was deported. I do not find that this would mitigate the guilt and blame that she would feel if her father was deported. She would be likely to carry this with her for the rest of her life and this would affect her emotional wellbeing. I find that the effect of the Appellant's deportation on [A] would be unduly harsh."

21. The FtT then went on to consider the circumstances of the other four children, which I have already summarised earlier in this judgment. The FtT concluded that "the children need more input from their parents than would otherwise be required" (paragraph 72). The FtT then considered the degree of adverse impact on the children and the Appellant's wife. Accepting that the family could be given some support from the wife's family and from the local authority, this would not be "the kind of support that the Appellant could provide". For those reasons the FtT found that the effect of deportation on the wife and children would be "unduly harsh" (paragraph 73).

22. The FtT then went on to consider whether there were "very compelling circumstances" in the case, since the finding that deportation would be "unduly harsh" was a pre-requisite to, but insufficient for, a successful appeal. Given the nature of much of the legal argument advanced before us, it is helpful to quote the relevant three paragraphs in full:

> "75. I have regard to the length of time that the Appellant would face being excluded from the UK. This is a factor which requires to be taken into account as the result of the exclusion would be that the Appellant could not come to the UK to visit his wife and children. Paragraph 391 of the Immigration Rules makes provision in relation to the revocation of a deportation order. It provides that in the case of a person who has been deported following conviction for a criminal offence the continuation of a deportation order against that person will be the proper course in the case of a conviction for an offence for which a person sentenced a period of imprisonment of less than 4 years unless 10 years have elapsed. Where the person was sentenced to a period of imprisonment of at least 4 years the continuation of the deportation order will be indefinite unless it can be shown [th]at the continuation would be contrary to the ECHR or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors. At the very least the Appellant will face a 10 year exclusion from the UK which will limit his ability to see his family and three of his children are still very young and it is more likely that his exclusion would be indefinite. While the family may be able to visit him in Algeria

> they would not be comprising of an adult and 5 children. It is therefore likely that the Appellant and his family would be able to see each other in person very rarely. This would mean that the Appellant's three youngest children, who all have a strong bond with him, would be deprived of a physical presence and the love and affection of their father while growing up. Contact by modern methods of communication is no substitute for a parents' physical presence in the family home. The absence of their father in their formative years would affect the children, in particular, [Child D] who is the only male child and who would have no key male role model in the home.
>
> 76. I also take into account the length of time that the Appellant has spent [in the] UK. The Respondent accepts that he has spent approximately 23 years in the UK which is a very lengthy period.
>
> 77. I find that these factors taken with the other factors considered above amount to compelling circumstances over and above those described in Exceptions 1 and 2. I find that the best interests of the Appellant's children outweigh the very strong public interest in deportation of foreign criminals."

The Proceedings before the Upper Tribunal: Error of Law

23. On 15 December 2017, UTJ O'Connor concluded that the decision of the FtT had been founded on an error of law and that the decision must be set aside. Having summarised the facts and findings below and the law, UTJ O'Connor noted that the Secretary of State advanced two strands of challenge to the decision. The first was that the FtT had failed to provide –

> "… a lawful adequacy of reasoning for its conclusion that there are very compelling circumstances in existence in this case over and above those identified in Exceptions 1 and 2 of section 117C of the 2002 Act and second, that on the facts presented such a conclusion is irrational"

24. UTJ O'Connor noted that it was not for him simply to substitute his judgment for the conclusions of the FtT. He went on to record that he was –

> "… not satisfied that the FtT's reasoning discloses that it gave appropriate weight to the public interest in deportation, in either its assessment of whether it would be unduly harsh for the children to remain in the United Kingdom if the Claimant were deported or in an assessment of whether there are very compelling circumstances over and above those identified in Exceptions 1 and 2." (paragraph 25)

25. There was "nothing in the reasoning … which alerts the reader of the decision to the very significant weight that ought to have been attached to the Claimant's offending" (paragraph 25). Proper analysis of the reasoning could be –

> "… reduced to the fact that the children would be deprived of 'the physical presence and love and affection of their father' whilst growing up and that Child D would have 'no key role model in the home'. These matters, though, far from being very compelling reasons, are the natural consequences of the [Appellant's] separation from the family. Of themselves such reasons are far from compelling." (paragraph 26)

26. A reading of the FtT's decision as a whole did not assist the Appellant (paragraph 27). A close examination of the FtT's reasoning led –

> "ineluctably to the conclusion that the relevant paragraphs are devoid of all but the barest analysis of the consequences of the Claimant's withdrawal from the family home. There are no specific findings made in this regard in relation to Child B, Child C, or Child D and, in particular, there is no analysis of the consequences for Child D of having no male role model in the house. As to Child A, now an adult, it is found that the Claimant's absence will affect her emotional well-being, but there is no particularisation of such conclusion."

27. UTJ O'Connor further noted that there was only limited analysis of the consequences to Child E (paragraph 28). It was only recently the Appellant had returned to the family home after a period of only minimal physical contact with his children, meaning that:

> "One would anticipate there being ample source material to draw upon to demonstrate the circumstance that would prevail in the family home in the [Appellant's] absence." (paragraph 29)

28. UTJ O'Connor also noted that there was considerable emphasis, when considering Exception 2, of the impact on the oldest child (Child A), despite the fact she was not a qualifying child for the purpose of such consideration.

29. For those reasons UTJ O'Connor concluded that there was "insufficient reasoning to bridge the gap between the facts of the case, as they have been found to be, and the conclusion that those facts constitute very compelling circumstances of the type required". Hence the decision of the FtT was set aside.

Upper Tribunal: Re-hearing

30. UTJ Dawson gave his decision and reasons on 30 July 2018. He recited the procedural history and summarised the facts, in respect of which he observed that there was "essentially no dispute" (paragraph 8). UTJ Dawson had the benefit of representation by counsel on both sides, and he summarised the submissions of both sides. The Respondent argued that the lengthy periods of absence on the part of the Appellant demonstrated that the Appellant's wife could cope on her own with the family responsibilities. He invited the Tribunal "to draw an adverse inference from the readiness of the Claimant to go away to Algeria for three months after the birth of" the youngest child. The Appellant's wife's task was certainly not easy but she could manage with the assistance of the wider, extended family. He relied on the "absence of any role by the Claimant in the various medical interventions" and the "proximity of

the schools to the family's house with reference to the Claimant's evidence over the need to collect the children".

31. Mr Saeed for the Appellant argued that family life had continued whilst the Appellant was in prison. The evidence "overwhelmingly" showed a genuine and subsisting relationship. The social worker's view was it was in the best interests of the children that the Appellant should remain. There would be insufficient support for the wife despite the existence of extended family members and any possible support from the local authority. In October 2017, there had been a diagnosis of autism in relation to the second child. "Very compelling circumstances" had been established with reference to those factors.

32. UTJ Dawson then quoted the relevant Rules and sections 117A-117E of the 2002 Act.

33. Rejecting the submissions from Mr Saeed, UTJ Dawson concluded that, despite the earlier appeal against the Deportation Order in 2011, the 2004 conviction did fall to be considered when categorising the Appellant within the Rules or legislation. To that end he quoted from the decision of the Upper Tribunal in *Johnson (Deportation – 4 years imprisonment)* [2016] UKUT 282 (IAC). In reliance upon that decision, which he considered to have set out the correct approach, UTJ Dawson noted that the Appellant had received a warning when he was granted leave of what might well happen should he reoffend and he had done so. He was satisfied that:

> "The effect of the eight-year sentenced imposed in 2004, coupled with the twelve months sentence imposed in 2015, brought the Appellant squarely within the ambit of paragraph 398(a) with the result that the public interest in deportation would only be outweighed by other factors where there are very compelling circumstances" (paragraph 24).

34. After further analysis of the facts, UTJ Dawson concluded:

> "I do not find however that [deportation] would be unduly harsh having regard to the seriousness of his offending history including his reoffending after the warning given with the grant of leave following his successful appeal." (paragraph 29)

35. After dealing with the impact on the Appellant, UTJ Dawson addressed the question of very compelling circumstances in the following terms:

> "32. The public interest in the case before me is even stronger and legislation requires very compelling circumstances over and above those in the exceptions. There are aspects of this case which are out of the ordinary but in my judgment fall short of the very compelling. I find that HL [the Appellant's wife] has been able to cope in the past and will be able to cope in the future. She has others to turn to for support even if that is qualified. She will not be alone. It is accepted that the best interests of the children are for the claimant to remain. Their interests together with all the other factors that weigh in the claimant's favour are not however strong enough to outweigh the strong public interest

> in deportation in the light of his criminal offending. His deportation will be a proportionate interference with the article 8 rights engaged in this appeal."

The Grounds of Appeal

36. The Appellant advanced three grounds of appeal. They are expressed discursively. They can be summarised as follows. On Ground 1 the Appellant submits that there was no error of law in the decision of the FtT, and UTJ O'Connor should not have set aside that decision. On Ground 2, it is submitted that the Upper Tribunal should have decided the appeal in favour of the Appellant. On Ground 3 the Appellant submits that the decision in *Johnson* was wrong. The sentence of eight years' imprisonment was passed fourteen years earlier, and the provisions now contained in section 117C came into being as an amendment to the Immigration Rules seven years later. Following that sentence, an attempt to deport the Appellant failed. On a proper construction of the statute, the Appellant should be categorised with reference to the later conviction and sentence, which had led to or triggered the decision to deport under appeal. Alternatively, the decision was a wrong application of the approach in *Johnson.*

37. Permission to appeal was granted by Bean LJ on 15 February 2019, on two bases: firstly, the issue whether *Johnson* was correctly decided, and secondly, if the "very compelling circumstances" test was inapplicable, it might properly be argued that deportation was "unduly harsh" by reference to *MA (Pakistan)* [2018] 1 WLR 5273[1]. Since the latter ground is contingent on the former, it is helpful to begin with Ground 3, the approach in *Johnson*.

Ground 3

38. There is no doubt that the Appellant is a "foreign criminal" within the definition laid down in section 117D(2). The question is whether he is (or is to be treated as being) "a foreign criminal who has been sentenced to a period of imprisonment of at least four years" within the meaning of section 117C(6). Of course, as a matter of plain language, he is such a person, since he has in the past been given such a sentence. Mr Saeed argues nevertheless that he falls outside that definition.

39. Mr Saeed's central proposition is that the section requires "a connection between the offence that triggers the deportation and the relevant legal test to be met". Section 117C must be construed in the context of the scheme of the statute as a whole. Part V of the 2002 Act was inserted in the statute by the Immigration Act 2014 ("the 2014 Act"). The latter Act was accompanied by explanatory notes. Paragraph 21 of the notes states that "the [2014] Act gives the force of primary legislation to the principles" contained in paragraphs 398 and 399 of the Immigration Rules. Those Rules, and thereafter the statute, set out the expectation of the government, and then Parliament, as to how the Courts will approach the Article 8 rights of "foreign criminals". The government published a Statement of Intent to accompany the 2014 Act. The Appellant relies on part of the wording of the Statement of Intent, at paragraph 67, in which it was said (with reference to these provisions) that there were some offenders who should almost

[1] Particular care is required with the citation of some of the authorities referred to in this judgment. The decision in the Supreme Court was an appeal from *R (MA(Pakistan)) v UTIAC* [2016] 1 WLR 5093, and is reported as cited in the judgment above. However, the parties before the Supreme Court were anonymised as *KO (Nigeria) and Others*, and the case may be referred to as *KO (Nigeria)*. Further, this case must be distinguished from *MA (Pakistan) v SSHD* [2019] EWCA Civ 1252 and *NA (Pakistan) v SSHD* [2017] 1 WLR 207, both cited below.

always be removed because of the seriousness of their "crime". Mr Saeed submits this use of the singular in the Statement of Intent "shows that Parliament's intention when introducing the different thresholds" in section 117C "was to link them to the offence that triggered the deportation and not the offender's entire criminal history".

40. In approaching the application of section 117C(3), (4) and (5), that is to say whether either Exception 1 or Exception 2 may apply, both parties are agreed as to part of the effect of the decision of the Supreme Court in *R (MA(Pakistan)) v Upper Tribunal* [2018] 1 WLR 5273 (otherwise "*KO (Nigeria) v UT"*) . The leading judgment was given by Lord Carnwath, with whom the remainder of the Court agreed. Lord Carnwath identified the two categories of foreign criminal (paragraph 20). He then addressed the "difficult question … whether the specific Rules allow any further room for balancing of the relative seriousness of the offence [emphasis added] beyond the difference between the two categories…" (paragraph 21). The Court concluded that neither Exception 1 nor Exception 2 involved any further consideration of the seriousness of the Appellant's offending, which could not bear on the specifics set out in Exception 1, or the level of "harshness" specified in Exception 2 (paragraph 23). Hence, both parties agree that the seriousness of the offending cannot affect whether or not Exception 2 is established. They are also agreed that, if the relevant foreign criminal falls within the higher category, where "very compelling reasons" are required, then the seriousness of the offending can indeed come into consideration in the balancing exercise, reflecting section 117C(2): "the more serious the offence … the greater is the public interest in deportation …"

41. Mr Saeed emphasised the singular "offence" emphasised in the passage from *R (MA(Pakistan))* quoted above. He submitted that supported the view it was the "trigger" offence only which fell to be considered.

42. A further argument advanced is based on sections 117D(2) and (4). It is said that if it was the case that a foreign criminal, once sentenced to twelve months' imprisonment (section 117D(2)(c)), remained so indefinitely, then section 117D(4) would be redundant, since it cannot be assumed that section 117D(4) only applies to sentences received by a "foreign criminal" before he receives any sentence of twelve months or more.

43. In my view, these arguments are wholly unconvincing. As I have said, the natural meaning of the words in section 117D(2)(c)(i) is: "who has [in the past] been sentenced to a period of imprisonment of at least twelve months". Since, for the purpose of statutory interpretation (see section 6 of the Interpretation Act 1978), there is a general principle that the singular includes the plural unless the contrary intention appears, references to "a period of imprisonment" must be taken to include "periods of imprisonment". Likewise, the arguments that the use of the term "the crime" in the Statement of Intent (setting aside the lack of weight to be ascribed to this), or the term "the offence" in the judgment of Lord Carnwath, necessarily confine the test to the singular, fall at the same fence.

44. Equally, it appears to me that the submission based on section 117D is misconceived. Section 117D(4)(a), for example, could not possibly mean that an offender sentenced to a suspended sentence of imprisonment following release from prison after serving a sentence of twelve months, ceases to be a person "who has been sentenced to a period of imprisonment of at least twelve months". The same would apply in relation to a

person sentenced to an aggregate sentence of 12 months soon after release, say, from a life sentence. It may be that section 117D(4) could have been better expressed in such language as "No person shall be taken to have been sentenced to a period of imprisonment of at least twelve months by reference to (a) a suspended sentence [with the qualification set out in section 117D(4)(a)] or (b) by reason of consecutive sentences amounting in aggregate to that length of time". However, the meaning of the existing statutory language is clear enough, to my mind.

45. Mr Dunlop QC for the Respondent advanced several examples of absurd outcomes of the interpretation advanced by the Appellant. The simplest is to consider the foreign criminal who receives a long sentence of imprisonment, fulfilling the definition; but who, for whatever reason, is not made subject to a deportation order; if he rapidly offends again in a more minor way, can it be said he would thereby diminish or even abolish his status as a foreign criminal for the purposes of Part V of the 2002 Act?

46. Mr Dunlop addressed section 117C(7), the only provision within the statute not mirrored by the content of the Immigration Rules. This confines the consideration of the court or tribunal "to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted". Hence, the court cannot look beyond the reasons given by the Respondent for the decision to deport. Mr Dunlop submits this is absent from the Rules only because those are drafted for the guidance of the decision-maker, whereas the statute guides and limits the approach of the court or tribunal. That seems to me persuasive.

47. In *Johnson* the UT was considering the rules rather than the statute. A similar argument was deployed and rejected. Indeed, the tribunal described part of the argument there, the proposition that a historic sentence of four years' imprisonment could be considered only as part of a history of persistent offending, as "sophistry" (paragraph 21). The UT accepted the straightforward argument that the appellant there had indeed been convicted of "an offence" for which he had been sentenced to at least four years' imprisonment" (paragraph 26). The tribunal went on to indicate that difficult cases might arise, giving the example of a young man acquiring a conviction and long sentence, who subsequently led a blameless life for 40 or 50 years, until a "second short period of imprisonment triggers" the consideration of deportation. In their view that would not remove the individual from qualifying as a foreign criminal in this category, but would be a "paradigm example of a very compelling circumstance sufficient to protect the appellant against expulsion" (paragraph 27). I agree.

48. In the case of *Rexha (section 117C – Earlier Offences)* [2016] UKUT 335 (IAC), the UT again considered a similar argument. The FtT proceeded on the basis that the offence which gave rise to the deportation order was a later offence for which the appellant had been made subject to a conditional discharge, rather than an earlier conviction for which he had been sentenced to four years in prison. The tribunal was considering the 2002 Act. The UT overturned that decision. They noted the decision in *Johnson*, and reached conclusions which were "consonant" with those in *Johnson* (paragraph 12). They saw "no reason for construing section 117C(7) as limiting the considerations relevant to sub-sections (1) to (6) to solely the most recent offence or offences for which the person has been convicted" (paragraph 15). What is required is "careful scrutiny … of those offences which are on the person's criminal record which have provided a reason for the decision to deport. All of those convictions are then

relevant to undertaking the exercise required by section 117C(1) to (6)" (paragraph 15). Again, I agree.

49. Shortly before the hearing, Mr Saeed passed to the Respondent a copy of *MA (Pakistan) v SSHD* [2019] EWCA Civ 1252. He is to be commended for doing so. Although the facts of that case and the arguments presented were somewhat different, this Court considered the reasoning of the Upper Tribunal in *Rexha*, and found it persuasive (paragraph 37).

50. For all these reasons, I would dismiss the appeal on Ground 3.

Ground 1

51. It follows from the analysis and conclusions above that the FtT was obliged to consider first whether deportation would be "unduly harsh" (Exception 2) and then, even if that was established, whether there were "very compelling circumstances over and above those described" in Exception 2. The FtT did follow that approach, in the sense that there was a proper self-direction in those terms, and the tribunal's reasons were structured in that way. The error or errors of law as found by UTJ O'Connor are summarised in paragraphs 23 to 28 above.

52. The Appellant's attack under Ground 1 can be summarised as follows. The Supreme Court in *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60 enjoins a structured approach, balancing the strength of the public interest in deportation of the offender against the impact on family life. That was precisely what the FtT did. They held in mind all the relevant circumstances, including all the previous convictions and sentences. The tribunal applied the five-stage approach laid down in *R (Razgar) v SSHD* [2004] UKHL 27. They addressed the facts fully, analysed matters by means of proper application of section 117C and reached a rational conclusion that all the factors taken together amounted to compelling circumstances.

53. Mr Saeed emphasised the approach laid down by this Court in *NA (Pakistan) v SSHD* [2017] 1 WLR 207:

> "30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8."

In other words, the circumstances which render the consequence of deportation "unduly harsh" may, if extreme enough, amount to "very compelling circumstances".

54. The Appellant's submission is that the attack by the Respondent before the UT represented a "forensic analysis" of the FtT's determination. The obligation on the FtT was to "give his reasons in sufficient detail to show … the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate … there is no duty … to deal with every argument presented…" See *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605 [2002] 1 WLR 2409. The FtT did so.

55. In answer to the Respondent's argument in their Notice, that the FtT had fallen into error by placing emphasis on the impact of deportation on the Appellant's eldest daughter, Child A, although she was no longer a child, Mr Saeed argues there was nothing improper in this. The guidance in *NA (Pakistan)* made it clear that the FtT had to consider any relevant circumstances when addressing the question of "very compelling circumstances".

56. In short, said Mr Saeed, there was no proper basis to overturn the decision of the FtT. The decision of UTJ O'Connor was in truth no more than a disagreement on the facts.

57. Mr Dunlop argues that the UT was correct to find the FtT did not identify adequate reasons why deportation would be "unduly harsh". Given the weight of public interest in deportation of foreign criminals, even before a tribunal considers whether very compelling circumstances arise, consideration of Exception 2 requires detailed analysis and full reasons analysing the impact on the family. Given the prospect of help from extended family and from the State, even though it was acknowledged these would fall short of replacing the contribution of the Appellant, the consequences could not reasonably be said to be "unduly harsh". The UT was right to say so.

58. Moreover, it was clear that the FtT had misdirected themselves in relation to the impact on the Appellant's eldest daughter, which had been a considerable focus under Exception 2. That was a straightforward error of law since she was no longer a child of the family.

59. As to the reasons why "very compelling circumstances" were found to exist, these were clearly inadequate. The weight of public interest in deportation here was very considerable, and full reasons were required, so that the conclusion could be tested. The reasons on this issue were inadequate and thereby revealed the underlying inadequacy of thinking. UTJ O'Connor was right to set the decision aside.

60. In my judgment, the Respondent is correct. This ground also should be dismissed.

61. There was clearly a misdirection by the FtT in considering Exception 2. The Appellant's eldest daughter was not a "qualifying child". Yet she was a major focus of the FtT's thinking under Exception 2.

62. The level of public interest in deporting any foreign criminal is high, as the statute makes clear. I bear in mind that, as the Supreme Court made clear in *R (MA (Pakistan)),* consideration of the extent or seriousness of the parent's criminality falls outside the proper approach to Exception 2. In considering whether deportation would be "unduly harsh", a tribunal must conduct the balancing exercise with the broad (but very high)

public interest in deporting foreign criminals in mind. Looking at the degree of criminality at this stage will lead to confusion.

63. Beyond the error of considering the position of the eldest daughter on Exception 2, it seems to me that the FtT did indeed fail at the stage of considering whether "very compelling circumstances" arose. As a matter of language and logic, this is a very high bar indeed. The tribunal or court concerned cannot properly get to that stage unless and until it has found that the consequences of deportation will be not merely harsh, but "unduly" harsh. This must in effect mean "so harsh as to outweigh the public interest in deportation", that public interest being the general one. It will be obvious that to go beyond that means a close analysis of the offender's criminality, a recognition of the degree to which that elevates the public interest in the specific deportation, and then a clear consideration of whether (in this instance) the impact on family life would represent "very compelling reasons" so as to tip the balance. In my judgment, UTJ O'Connor was right in his decision. The FtT did not proceed clearly enough in that way. I fully accept and endorse the principle stated in *English v Emery Reimbold*. Review of the reasons given by a tribunal must not become a formulaic or "tick-box" exercise. Tribunals are not obliged to write extensive essays or indulge in an anxious parade of learning. However, when approaching a statutory test of "very compelling reasons", a tribunal does have an obligation to be more than usually clear as to why such a conclusion is justified. Apart from any other consideration, full and clear reasoning will be protective of an appellant where such a finding is indeed justified.

64. For these reasons, I would conclude that UTJ O'Connor was right to find an error of law, and dismiss Ground 1.

Ground 2

65. I intend to address this very shortly. In my judgment it is quite unarguable that the conclusion of UTJ Dawson against the Appellant was irrational or indeed wrong. This Appellant has a long criminal record, including very serious offending, and culminating in a further significant offence against his daughter. I accept that life will be difficult for the family in his absence and the impact may properly be described as "harsh", but that is not the test laid down by Parliament. Nor do I see any other basis in which this decision could be said to be irrational or wrong. I would dismiss this ground also.

Lady Justice King:

66. I agree.

Lord Justice Floyd:

67. I also agree.