Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08237/2008

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 September 2014 and 4 November 2014	**On 12 November 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR A L
(Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Mak a solicitor from MKM Solicitors
For the Respondent: Mr T Wilding a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria who was born on 5 April 1980. He appeals against the respondent's decision of 1 May 2008 to make a deportation order against him. The reasons for this decision are

contained in a letter dated 30 April 2008. The respondent concluded that it was conducive to the public good to make a deportation order against the appellant pursuant to section 3 (5) (a) of the Immigration Act 1971 as amended. The index offence leading to the decision was the appellant's conviction at Bournemouth Crown Court on 3 December 2004 of possessing a class A controlled drug, cocaine, with intent to supply. He was sentenced to 6 years imprisonment.

2. The appellant has other convictions. On 2 July 2001 at Inner London Crown Court he was convicted on two counts of possessing a class A drug, heroin, with intent to supply and three counts of supplying a class A drug, also heroin. He was sentenced to 54 months imprisonment on these charges to run concurrently.

Immigration history

3. There is a lengthy immigration and appeals history. The appellant arrived in the UK in 1991 when he was 11 years old. He joined his parents. His siblings are also living in this country. The appellant and his parents and siblings were granted indefinite leave to remain on 20 September 2000. His parents were naturalised as British citizens on 8 March 2004. His siblings have also become British citizens. The appellant has not become a British citizen.

Appeal history

4. The respondent served a notice of decision to deport the appellant on 8 February 2007. He appealed and his appeal was heard by a panel of the Asylum and Immigration Tribunal ("the first panel") on 16 May 2007. By a determination promulgated on 14 June 2007 his appeal was allowed in circumstances and for reasons to which I will need to return. The respondent applied for reconsideration which was ordered on 27 June 2007. The reconsideration came before Senior Immigration Judge Spencer 3 October 2007. On that day the respondent withdrew the decision of 8 February 2007. The judge recorded that the appeal should be treated as withdrawn since the decision against which it was bought had been withdrawn.

5. The respondent issued the new decision, to make a deportation order, on 1 May 2008. That is the decision which is the subject of the present appeal. The appellant appealed and his appeal was heard by a panel of the Asylum and Immigration Tribunal ("the second panel") on 23 June 2008. The appellant's appeal was dismissed in a determination promulgated on 1 June 2008.

6. The appellant applied for reconsideration which was refused by a Senior Immigration Judge on 17 July 2008. The appellant renewed the application to the High Court and reconsideration was ordered on 13 November 2008.

7. The reconsideration came before Senior Immigration Judge Taylor on 7 January 2009. She found that the second panel had erred in law and adjourned for a second stage reconsideration. That reconsideration came before a panel of the Asylum and Immigration Tribunal ("the third panel") on 10 September 2009. In a determination promulgated on 19 November 2009 this panel dismissed the appellant's appeal both under the Immigration Rules and on human rights grounds.

8. The appellant applied for permission to appeal to the Court of Appeal which was refused by a Senior Immigration Judge on 6 January 2010. The appellant renewed the application to the Court of Appeal where permission to appeal was granted. There has now been a consent order in the Court of Appeal dated 25 November 2010 accompanied by an agreed statement of reasons. The determination of the third panel promulgated on 19 November 2009 dismissing the appellant's appeal was set aside and the case remitted to the Upper Tribunal for reconsideration of all issues. None of the findings of fact made by the third panel are to stand but the findings of fact made by the first panel set out in paragraph 42 of the determination of the third panel are "subject to the appropriate preservation".

9. Following the decision of the Court of Appeal the appeal was not listed for hearing in the Upper Tribunal until 9 September 2014. Mr Mak submits and Mr Wilding does not dispute that during the period between November 2010 and July 2014 when notice of hearing was issued by the Upper Tribunal the appellant's present and former solicitors were in contact with the Upper Tribunal on a number of occasions pressing for the case to be listed for hearing. Eventually, it was discovered that the Tribunal file had been destroyed and efforts had to be made to reconstitute it. Mr Mak submits that during this period the respondent did nothing to press for the appeal to be heard.

The hearings before me

10. The appeal came before me on 9 September 2014. Mr Mak appeared for the appellant and Mr Wilding for the respondent. There was insufficient time for the hearing to be completed that day and I adjourned part heard after hearing evidence from the appellant, his mother and his father. I gave directions which, with a little slippage of time, have been complied with by both parties. The hearing continued and was completed on 4 November 2014.

Documentary evidence and authorities

11. I now have a composite bundle prepared by the appellant's solicitors which, I am told, contains all the relevant material together with written submissions from the appellant, new witness statements from the appellant's partner and his daughter the

Immigration Directorate Instructions chapter 13: criminality guidance in Article 8 ECHR Cases (version 5.0 28 July 2014), the current version of part 13 of the Immigration Rules dealing with deportation, the appellant's authorities bundle, the respondent's skeleton argument, ZZ (Tanzania) v SSHD [2014] EWCA Civ 1404, OH (Serbia) v SSHD [2008] EWCA Civ 694, JO (Uganda) and JT (Ivory Coast) v SSHD [2010] EWCA Civ 10, MM (Zimbabwe) v SSHD [2012] EWCA Civ 135, YM (Uganda) v SSHD [2014] EWCA Civ 1292 and SS (Nigeria) v SSHD [2013] EWCA Civ 550. There were further witness statement submitted by the appellant in his "Remitted Hearing" bundle.

12. I have heard oral evidence from the appellant, his mother, his father, his brother K and his current partner R. They were examined in chief, cross examined and, in some cases, re-examined. I asked some questions for the purpose of clarification. Their evidence is set out in my record of proceedings.

Submissions

13. Mr Wilding relied on his skeleton argument. In relation to the fairness/abuse of process point he submitted that Senior Immigration Judge Taylor's decision was determinative. The first panel allowed the appellant's appeal on the basis that the respondent's decision was incorrect rather than on the merits based on the evidence. The respondent remade the decision on 30 April 2008. The Court of Appeal specifically did not grant permission on the fairness/abuse of process point. It was no longer open to the appellant to argue this. His submission was in three parts and in the alternative. Firstly, I was bound by the decision of Senior Immigration Judge Taylor. Secondly, even if her decision was not binding on me I should follow her reasoning in reaching the same conclusion. Thirdly, the Court of Appeal had not allowed the ground of appeal which would permit this to be argued any further.

14. In relation to the Article 8 grounds, Mr Wilding also relied on his skeleton. He accepted that the appellant had benefited by the delay to the extent that family ties had grown stronger and he had stayed out of trouble for longer. There had not been the sort of delay reflected in EB (Kosovo) v SSHD [2008] UKHL 41. Paragraphs 399 and 399A were not available to the appellant because of the provisions of paragraph 398(a). Even if he could show that he could bring himself within exceptions 1 and/or 2 in section 117C of the Immigration Act 2014 he still needed to go on and show that there were very compelling circumstances over and above these. He had failed to do so. I was referred to LC (China) at paragraph 24 and ZZ (Tanzania) at paragraphs 34 and 35.

15. In reply to my question as to the respondent's position regarding the credibility of the witnesses, Mr Wilding said that there was no

criticism he could properly make of their evidence. He accepted that nothing had happened to call into question the findings of the first panel preserved by the Court of Appeal including the conclusion that the appellant posed in low risk of reoffending. I was asked to dismiss the appeal.

16. Mr Mak relied on his written submissions which I will refer to as his skeleton argument. He did not agree with Mr Wilding's submission and argued that the first panel had allowed the appellant's appeal on the merits. He took me to what he said were the relevant passages in the determination and submitted that there were findings both that there were exceptional circumstances and that it would not be in the public interest to remove the appellant. He accepted that in 2007 at the time Senior Immigration Judge Spencer recorded that the respondent had withdrawn the decision the then unified Asylum and Immigration Tribunal had no power to prevent this from being done. I asked Mr Mak whether, if it was the appellant's position that he had no remedy before the Asylum and Immigration Tribunal he could have applied for judicial review. Mr Mak said that he could not have done so, although he was not able to tell me why this was the case.

17. Mr Mak relied on Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 312 (IAC). He argued that had the respondent sought to withdraw her decision under the current Upper Tribunal procedure rules it would have been an abuse of process. In reply to my question, he accepted that, under the current procedure rules, the Upper Tribunal had a discretion as to whether or not to permit the Secretary of State to withdraw a decision (specifically to withdraw her case). Mr Mak argued that the unfairness/abuse of process point also assisted the appellant in relation to his Article 8 grounds.

18. In relation to the Article 8 grounds, Mr Mak said that the references to the Immigration Rules in his skeleton were the current ones in effect since July 2014. He accepted that paragraphs 398 and 399A did not apply but it was nevertheless important to establish whether the appellant met these criteria. Mr Mak submitted that he did. It could not be said that there was a strong public interest in deportation in the light of all the appellant's circumstances, the respondent's actions and the serious delay. Whilst the delay between the decision of the Court of Appeal and the rehearing was not the fault of the respondent the respondent could have but had not pressed the Upper Tribunal to give a hearing date. The appellant's solicitors had started chasing the Upper Tribunal in February 2011. He accepted that I needed to apply EB Kosovo principles in relation to any delay.

19. Mr Mak submitted that the appellant had always observed his bail conditions. He had not been permitted to work until sometime in

the summer of 2014. He argued that in all the circumstances the appellant had established that there were very compelling circumstances which outweighed the public interest in deportation. The public interest had diminished with the reflection of time (ZZ Tanzania paragraph 28). I was asked to allow the appeal.

20. In reply Mr Wilding accepted that the abuse of process/unfairness point had been touched on by Senior Immigration Judge Spencer. The principles set out in Chomanga were not relevant. He was not suggesting that the appellant's son and daughter should go with him to Nigeria. Their mothers could continue to care for them in this country. The Immigration Directorate Instructions at paragraph 2.5 set out what the respondent meant by "unduly harsh". There was no merit in the point that the Secretary of State should have chased the Upper Tribunal a hearing date.

21. I reserved my determination.

Findings of fact

22. The preserved findings of the first panel set out in paragraph 42 of the determination of the third panel are;

i. The appellant has provided considerable emotional support to his sick daughter (paragraph 13 of that determination).

ii. The offences committed "a long time ago" by the appellant in his youth are irrelevant to the present decision (paragraph 24).

iii. the appellant has strong ties in the United Kingdom, he and his family having lived together here since he was 10 or 11 years old (paragraph 28.

iv. Despite his incarceration the appellant has maintained significant telephone contact with his daughter and would wish, when not detained, to undertake a greater role in her upbringing (paragraph 30).

v. The proposed deportation would render the resumption and development of the appellant's relationship with his daughter that would have ordinarily taken place in the United Kingdom impossible because his daughter could not visit him in Nigeria (paragraph 31).

vi. The proposed deportation would severely emotionally effect of the appellant's daughter and he has, notwithstanding his incarceration maintained a "close" relationship with her (paragraph 32).

vii. That the appellant is close to his parents and siblings and his deportation would interrupt that close relationship. They provide him with supportive and positive influences and his removal will "take him away from that support".

viii. Because of the exceptional and effective family support and more importantly the fact that the appellant is now willing to accept it the risk of him reoffending is low (paragraph 36). (The emphasis is taken from the original).

23. I adopt these findings. However, they are findings which were made following a hearing in May 2007. Whilst correct at that time some of these circumstances have evolved and changed and there are new factors. Mr Wilding did not suggest that the appellant or any of the other witnesses were not credible. I find the appellant and his witnesses to be credible, both those who gave oral evidence and those who submitted witness statements. The evidence contained in the statements of those who did not give evidence is consistent with that of those who did.

24. The appeal history is as I have set out as is the appellant's immigration history and that of his family. I make the following additional findings of fact.

25. Having served his sentence the appellant was in immigration detention until he was released on bail in May 2010. There have been strict bail conditions including weekly reporting and living with his parents. He continues to live with them in south London. He has not been allowed to work until sometime in the summer of 2014 and is not currently working. It is not clear whether he has been able to obtain the documentation he needs if he is to do legitimate work. He is supported by his family. The appellant says that he would like to work as a personal trainer and to earn in order to support himself and his children.

26. The appellant has two children by different mothers. His daughter A was born on 5 March 1998. His son I was born on 20 October 2007. Both were born in the UK and are British citizens. Each of them lives with her or his mother and the appellant is no longer in a relationship with either mother.

27. The appellant sees his daughter A as often as he can, usually every other week. She suffers from sickle cell anaemia and from time to time when she has to be admitted to hospital he spends a lot of time with her in hospital including staying there. She is now 16 and has started attending college. She does not want to socialise with him as much as she once did but the appellant goes to her house every other week and she comes to his parents' house. She lives in Hackney about an hour away by train. Her mother has two other children, a daughter aged 11 and a son aged nearly 2. His

relationship with her mother broke up before A was born. A has a close relationship with the appellant's parents. The appellant speaks to her on the telephone and they send messages to each other most days. There is a witness statement from her in which he says that she needs him and does not want him to be deported. She missed him a great deal when he was away (in prison) and pleads for him to be allowed to stay. There is a witness statement from A's mother which, whilst dated May 2008, confirms the relevant elements of the appellant's evidence at that time.

28. The appellant's son I lives with his mother in Southend but stays with the appellant and his parents every other weekend and for six weeks in the summer holidays. His mother has three other children, twins aged five and a son aged nearly 2. The appellant has been to I's school and attended parent teacher meetings. He has a good relationship with his son who sat through most of the second hearing before me. He enjoys good health. The appellant speaks to him on the telephone most days. The witness statement from I's mother is also dated May 2008 but also confirms the relevant elements of the appellant's evidence at that time

29. The oral evidence from the appellant's parents and brother confirmed the closeness of the relationship between the appellant and his children, his evidence as to the extent of contact with them, the duration of the periods during which they visited or stayed in their home and that they were close to them. The family living in the same home is the appellant, his parents, one brother who gave oral evidence and a sister who did not. The brother K, living in the same home, has a child of his own aged 18 months who does not live with him. The appellant has two other siblings not living at home, a brother who lives most of the time with his girlfriend and a sister who is married and living elsewhere. They are a close family. The appellant, his mother and other members of his family are in touch with the mothers of his children and the relationships with them, if not close, work satisfactorily as do the arrangements for him to see his children.

30. The appellant's mother said and I accept that if the appellant had to go to Nigeria the family could not or would not go with him but they would do all they could to support him. They would send him money but did not think that it would be enough. They no longer had any family in Nigeria and the last time she had been there was in 2003. His father was last there about 18 months ago and hopes to go again. The appellant's father came to the UK in 1985 and his mother in 1987. All of the family are working either full or part-time, apart from the appellant.

31. The appellant's partner R is a British citizen. She has been in a relationship with the appellant for about a year having met him a few months before that. He told her about his criminal record and his

appeal against deportation. She entered into the relationship with her eyes open. She has a full-time job and lives with her mother, father and two sisters. She has no children. She said that were it not for the fact that the appellant had to live at home because of his bail conditions they would be living together. She wants to share her future with the appellant and has a loving relationship with his family.

32. It has not been suggested and I accept that the appellant has not been back to Nigeria since he came to the UK when he was 11.

33. The index offence was the appellant's conviction on 3 December 2004 for possessing a class A controlled drug, cocaine, with intent to supply. He was sentenced to 6 years imprisonment. The previous drug-related conviction was on 2 July 2001 when he was convicted on two counts of possessing and three counts of supplying a class A drug, heroin. He was sentenced to 54 months imprisonment. The Parole Assessment Report dated April 2007 records that the appellant had five previous convictions one of which was the earlier drug-related conviction. He had previous convictions for robbery and a sexual offence involving a 15-year-old girl. I bear in mind that one of the preserved findings is that; "The offences committed "a long time ago" by the appellant in his youth are irrelevant to the present decision". However, I consider it relevant to note that the appellant admitted to the probation officer that he had been involved in supplying drugs for several years. The probation officer accepted that, despite two adjudications against him, the appellant's conduct during his prison sentence had been good and that he had spent his time productively, being given a position of trust.

<u>The unfairness/abuse of process point.</u>

34. In his Notice under Rule 17 (3) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("the 2005 Procedure Rules") Senior Immigration Judge Spencer correctly records, as Mr Mak accepts, that Rule 17(2) of the 2005 Procedure Rules provided that an appeal should be treated as withdrawn if the respondent notified the Tribunal that the decision to which the appeal related had been withdrawn. The 2005 Procedure Rules in force at that time gave the Senior Immigration Judge no discretion in the matter. Once the respondent withdrew the decision that was the end of the matter and of the appeal brought by the appellant. If the appellant considered that this was unfair or an abuse of process then his remedy would have been to make an application for judicial review. He did not do so.

35. The later Tribunal Procedure (Upper Tribunal) Rules 2008, which were not in force at the relevant time, provide that notice of the withdrawal of a party's case will not take effect unless the Upper

Tribunal consents to the withdrawal except in relation to an application for permission to appeal. The fact that a Tribunal might have been in a position to make a different decision at some time after the decision in this appeal is nothing to the point. EG and NG does not assist the appellant. The determination of the first panel was not an unappealed decision of the Tribunal which was binding on the parties. It could not be an unappealed decision in circumstances where, in accordance with the 2005 Procedure Rules, the appeal was correctly treated as having been withdrawn.

36. Furthermore, in her reasons for the decision that there was an error of law in the determination, Senior Immigration Judge Taylor stated, at paragraphs 17 to 22;

> "17. I do not accept that the conduct of the respondent on 3 October 2007 amounted to an abuse of process for the following reasons.
>
> 18. Firstly, the Immigration Rules specifically provide for the possibility that the respondent might withdraw his decision in Rule 17 (2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Where provision is made in the Rules for withdrawal is difficult to see that a decision to do so is an abuse of process.
>
> 19. As we are all aware in this jurisdiction, withdraws do happen, even at a late stage in the proceedings.
>
> 20. The respondent had made a decision which was based on the wrong premise, namely that the court had recommended deportation. There was good reason to withdraw, namely that the decision upon which the appeal was brought was flawed. It cannot be said that the withdrawal was capricious.
>
> 21. Indeed it is not argued that the original decision was not flawed. The complaint is in the timing. Clearly the late withdrawal of a decision causes inconvenience, is a waste of time and resources, and distressing for an appellant who might have been expecting the appeal to go ahead and for it to be resolved. The respondent should organise its affairs so that it does not cause inconvenience, not only to the parties, but to the Tribunal.
>
> 22. However the respondent's conduct does not amount to abuse."

37. I find that Senior Immigration Judge Taylor's decision finally disposed of the point. However, if I am mistaken and it does not have this effect then I would adopt her reasoning and reach the same conclusion.

38. Paragraph 8 of the agreed Statement of Reasons before the Court of Appeal records that; “The appellant did not seek to rely on his first ground of appeal which argued that the respondent’s conduct in relation to the withdrawal of the deportation order at the first stage reconsideration hearing on 3 October 2007 and the failure to take into account the findings of the determination of 14 June 2007 when making the deportation order again on 1 May 2008 amounted to an abuse of the process of the Tribunal. In any event permission to appeal on this ground was refused and the respondent is of the view that this issue should not be raised before the Tribunal upon remittal by this Court.”

39. I find that the appellant has not suffered unfairness and that there has been no abuse of process. Alternatively, the question was resolved by Senior Immigration Judge Taylor and cannot be reopened. In the further alternative, the order of the Court of Appeal means that the issue cannot be raised before me.

Article 8

40. Paragraphs A362, 398, 399 and 399A of the current Immigration Rules provide that;

> “Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
>
> A398. These rules apply where:
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;
> (b) a foreign criminal applies for a deportation order made against him to be revoked.
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or

they are a persistent offender who shows a particular disregard for the law,
the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –
(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and 8
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

117A Application of this Part
(1) This Part applies where a court or tribunal is required to determine
whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
(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).

117B Article 8: public interest considerations applicable in all cases
(1) The maintenance of effective immigration controls is in the public interest.
(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

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.

117D Interpretation of this Part
(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(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) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
has not been convicted of an offence.
(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;
(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

41. In this appeal I find that the appellant has raised Article 8 grounds in the context of deportation under Part 13 of the Rules with the consequence that his claim under Article 8 can only succeed where the requirements of these rules as at 28 July 2014 are met even though the deportation order was served on him before then (YM (Uganda)). The Rules on deportation represent a complete code on Article 8 (MF (Nigeria)) and must now be read in the light of the provisions of the Immigration Act 2014.

42. Because of Paragraph 398(a) the deportation of the appellant is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of at least four years imprisonment. I must consider whether paragraphs 399 or 399A apply and if so whether there are very compelling circumstances over and above those described in paragraph 399 or 399A which outweighed the public interest in deportation.

43. In relation to paragraph 399 I find that, even though he does not live with them, the nature and extent of the appellant's relationship with his two children amounts to a genuine and subsisting parental relationship. Both children are British citizens His daughter was born on 5 March 1998. His son was born on 20 October 2007. The immigration decision in this appeal was made on 1 May 2008. His daughter has lived in the UK continuously for at least seven years immediately preceding the date of the immigration decision but his son has not. I find that it would be unduly harsh for either child to be expected to live in Nigeria. Taking into account all my findings of fact as to the relationship between the appellant and his children I find that it would not be unduly harsh for them to remain in the UK without him. I accept that both of them are close to him, neither wants him to leave and he makes a valuable contribution to both their lives. On the other hand, there is no reason why their good relationship with his parents and other members of his family should not continue if he leaves the UK. The appellant is not their primary carer and both of them live with their mothers and siblings. His relationships with their mothers have come to an end and there is no suggestion that either child is likely to live with him all or most of the time in the future. Some of his communication with his daughter is by electronic means and that could continue. He could in the future use similar means for communicating with his son. I accept that these methods of communication are not as good as face-to-face contact.

44. I accept that the appellant has a genuine and subsisting relationship with his partner who is settled and living here and is a British citizen. That relationship was formed when the appellant was present in the UK lawfully but his immigration status was undoubtedly precarious and she was well aware of this. In the circumstances it is not necessary for me to consider the further requirements of 399(b)(i) or (ii).

45. Paragraph 399A does not apply because, having been sentenced to a period of imprisonment of at least four years, the appellant comes within 398(a), not 398 (b) or (c).

46. Under the provisions of the Immigration Act 2014 I must consider the provisions of section 117B which applies in all cases and 117C which applies in cases concerning the deportation of foreign criminals. In this context; the "public interest question" means the question of whether an interference with the appellant's right to respect for private and family life is justified under Article 8 (2).

47. In relation to section 117B it is the case that the appellant can speak English and he has always been in the UK lawfully. As to section 117C he is a foreign criminal and the deportation of foreign criminals is in the public interest. Because he 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. I find that Exception 1 does not apply because, whilst the appellant has been lawfully resident in the UK for most of his life and is socially and culturally integrated in the UK there would not be very significant obstacles to his integration in Nigeria. I reach that conclusion because, whilst he has not been there since he was 11 years of age he lived there until then and would have grown up with the culture, environment and language. Whilst he does not have any close family in Nigeria his parents have been back to Nigeria and his father expressed the wish to make another visit. He has been supported by his family in this country. I accept that they do not want him to go back to Nigeria but they are prepared to provide him with financial support if he does. I do not accept that this would be inadequate. He is healthy and would be returning on his own with the freedom of action that would entail. I do not accept that he speaks only English and does not speak any of the languages spoken in Nigeria. His skills in speaking a language common in Nigeria may be rusty but he would have spoken language used in that country at least until he was 11. As to Exception 2, whilst I accept that the appellant has a genuine and subsisting relationship with his partner she is not a qualifying partner for the reasons I have given. He has a genuine and subsisting parental relationship with his two children but, again for the reasons I have given, the effect of his deportation on them would not be unduly harsh.

48. The appellant was convicted of both possession and dealing in Class A drugs not once but on two occasions. On the first he was sentenced to 54 months imprisonment and on the second to 6 years. The seriousness of these offences is, because of the length of the sentence for the index offence, at the top end of the scale set out in the Rules. There is a considerable public interest in his deportation. Furthermore, he admitted to the probation officer that he had been involved in supplying drugs for several years. I accept that he had not reoffended since 2004 and that he poses a low risk of reoffending. He has observed his bail conditions over a long period. There have been periods of delay for which he has not been responsible. Indeed, those representing him have pressed for his appeal to be heard and this has taken longer than it should have done. I do not accept that there has been unreasonable delay by the respondent or that the respondent behaved unreasonably in not pressing the Upper Tribunal to list the appeal for hearing earlier. Whilst the delay has meant that the appellant has had a longer period of uncertainty and has not been able to work it has also enabled him to commence, continue or develop his relationships with his children, partner and family and to enjoy those relationships.

49. I find that there the appellant cannot bring himself within Exception 1 or Exception 2. Even if he had been able to do so he has not shown additional very compelling circumstances.

50. I find that the deportation of the appellant would not be contrary to the UK's obligations under Article 8 of the Human Rights Convention. There are no very compelling circumstances in relation to his private and family life which outweigh the public interest in his deportation.

51. I make an anonymity direction in order to protect the interests of the appellant's children. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant, his children, and any other member of his family or anyone in a relationship with him.

52. Previous decisions in this appeal having been set aside I remake the decision and dismiss the appellant's appeal on Article 8 human rights grounds.

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Upper Tribunal Judge Moulden Date 10 November 2014