Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14947/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 December 2018	**On 15 March 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER
DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

FELIX [E]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Collins, Counsel instructed by Sentinel Solicitors
For the Respondent: Mr Y. Vanderman, Counsel instructed by the GLD

DECISION AND REASONS

1. We have both contributed to the drafting of this decision and are grateful to Counsel for their helpful submissions.

Issues arising

2. The first issue that arises is whether, following his conviction of two offences for which he was sentenced to six months' imprisonment

respectively, the appellant is to be treated as a foreign criminal within the statutory definition of a foreign criminal found in s.117D(2) of the Nationality, Immigration and Asylum Act 2002 as inserted by s.19 of the Immigration Act 2014 ('the 2002 Act').

3. If the appellant is a foreign criminal, then it is accepted that the unduly harsh test to be found in s.117C of the 2002 Act must be applied. If the appellant is not a foreign criminal, then it is submitted on his behalf that the reasonableness test contained in s.117B(6) of the 2002 Act must be applied. By contrast, Mr Vanderman submitted on behalf of the Secretary of State, that even if the appellant is not a foreign criminal, the appellant remains liable to deportation and for that reason s.117B(6) does not apply, and the correct course is to consider whether the decision under appeal breaches Article 8 of the ECHR.

Background

4. The appellant is a citizen of Nigeria. He was born on 15 January 1969. He is now 50 years old.

5. The appellant entered the United Kingdom ('UK') illegally in June 2006, aged 36 in order to be with his partner ('K') and their daughter S. K has dual citizenship: she is a Democratic Republic of Congo ('DRC') national and a British national. The appellant met K in the DRC in 2003 when he was working there trading in second-hand cars. They began a relationship, but the appellant had to travel to Nigeria for a short while on business. When he returned to the DRC, K had fled the country because of a fear of persecution.

6. K arrived in the UK on 26 September 2003 and claimed asylum immediately on arrival. On 15 December 2004 she was granted indefinite leave to remain ('ILR') as a recognised refugee. When on a business trip in Denmark in 2006, the appellant resumed contact with K and discovered that she had given birth to their child, S, in 2004.

7. Having resided in the UK illegally for many years, on 15 October 2010 the appellant applied to remain on the basis of his human rights, but this was refused on 13 November 2010.

8. On 9 May 2011, the appellant was convicted of attempting to open a bank account using a false passport and sentenced to six months imprisonment at Blackfriars Crown Court. Efforts to remove him resulted in his appeal being allowed on article 8 grounds by First-tier Tribunal Judge Elvidge. This was followed by the grant of discretionary leave ('DL') for three years until 9 May 2015. He made a further in-time application for leave to remain on the basis of his private and family life. This application was outstanding on 19 January 2016 when he was convicted at Wood Green Crown Court of employing an impersonator to sit his driving theory test. The offence

was classified as a conspiracy to make a false representation for which he was later sentenced to a period of six months imprisonment.

9. K was naturalised as a British citizen in 2009. DNA evidence before Judge Elvidge established that the appellant is the father of S. S is now aged 14 but will turn 15 soon. She was born in Belfast and is a British national. She has always resided in the UK. Since the appellant's arrival in the UK in June 2006, the family have lived together as a unit, save for the periods of the appellant's imprisonment in 2011 and 2016, until his removal from the UK in May 2016.

10. Proceedings were initiated to deport the appellant and on 13 May 2016 the Secretary of State certified his claim under s.94B of the 2002 Act, after which his deportation to Nigeria followed later on in May 2016. We have not been told the exact date this took place.

11. K and S remained in the UK, as they are entitled to do as British citizens, when the appellant was deported in 2016. They have not lived as a family unit since then. K has explained in a supplementary witness statement that the family is unable to afford for her and/or S to visit the appellant in Nigeria and their circumstances have been very difficult financially and emotionally, without him in the UK. K works as a care assistant on a 'zero-hours' contract and has to rely upon public funds when her income is very low. The appellant appears to have not settled into life in Nigeria and will be unable to provide a stable home for K and S. He has been unable to afford to pay for them to visit him and struggles at times to buy credit for his phone. This is consistent with K's evidence before the First-tier Tribunal at a hearing on 19 April 2017: she said that the appellant has not been working and relies upon his sister to accommodate and financially support him. First-tier Tribunal Judge Ross did not consider the principal facts in the case to be disputed and concluded that the appellant has a family life with K and S, and played a significant role in S's upbringing. Judge Ross however drew attention to Judge Elvidge's decision allowing the appellant's human rights appeal in October 2011. Judge Elvidge did not accept the history of the development of the relationship between K and the appellant but nevertheless found that the family unit was genuine, and it would not be in S's best interests to return to Nigeria, where she had never lived and where there was no evidence as how the family could support themselves. Judge Ross found that the appellant's offending had caused serious harm and as such he had to consider whether it would be unduly harsh to expect S and K to live in Nigeria with the appellant. Judge Ross drew attention to the fact that Judge Elvidge was obliged to apply the reasonableness test at the relevant time, but he had to apply the different unduly harsh test. Judge Ross did not accept that the high threshold required by the unduly harsh test was met.

12. For the reasons he gave in a decision sent on 23 February 2018, Upper Tribunal Judge Jordan set aside Judge Ross's decision as disclosing an error of law. It is in this way that the appeal comes before the Upper Tribunal.

13. Before us, both parties agreed that this became an out-of-country appeal which the Tribunal has jurisdiction to hear and determine. The parties also agreed that the legal issues to be determined are those summarised above and the facts are no longer in dispute.

The decision letter

14. The decision letter of the Secretary of State, upon the basis of which this appeal proceeds, was made on 13 May 2016. In dealing with the appellant's human rights claim, the decision-maker expressly limited his reasoning to a consideration of whether the appellant had been convicted of an offence which caused serious harm (page 4). He accepted that the appellant had a genuine and subsisting relationship with S and K. The decision-maker went on to assert that it was a matter of choice as to whether S and her mother relocated to Nigeria in order to maintain family life. It was said that S, then aged 12, having been born in the UK, was at an age when she was young enough to adapt to life in Nigeria. Although it was accepted that the appellant's deportation was likely to result in "*some negative emotional impact on"* on S, she would continue to live with her mother without the necessity for face-to-face contact with her father. In any event, other forms of contact could be maintained. Accordingly, the decision-maker rejected the appellant's contention that the consequences of his removal would violate his human rights or those of K and S.

15. The decision-maker did not assert that the appellant was a persistent offender. However, in paragraph 20 of the determination, Judge Ross found that the appellant was a persistent offender (although it is not clear whether this claim was advanced by the Presenting Officer). The skeleton argument submitted by the Secretary of State in support of the appeal before us also relies upon the appellant being a persistent offender. However, at the hearing before us, Mr Vanderman on behalf of the Secretary of State, correctly in our view, confirmed that it was not the Secretary of State's case that the appellant was a persistent offender. He submitted that Judge Ross seemed to have dealt with the issue "*on his own motion*".

The sentencing remarks

16. The sentencing remarks of the Judge who dealt with the 2016 offence at Wood Green Crown Court include the following:

> "These offences are very serious. The purpose of the theory test is to ensure that everyone who ends up with a driving licence is

> fit to do so and I quote Lady Justice Hallett who, in turn, quotes a probation officer that:
>
> > 'A proliferation of persons unfit to drive but empowered by virtue of fraudulently obtained licences can only spell disaster for the road using public and society'.
>
> We simply cannot have unlicensed and uninsured drivers let loose on the public in London and so these offences all call out for a strong element of deterrence."

17. In paragraph 20 of his decision, (apart from his erroneous finding that the appellant was a persistent offender), Judge Ross found the appellant's offending has caused serious harm and did so in reliance upon the sentencing judge's remark that the offence was very serious.

Legal framework

2002 Act

18. The introduction of Part 5A into the 2002 Act imposes a statutory duty upon a court or tribunal to pay regard to the considerations listed in s.117B. They include in summary, the public interest in "the maintenance of effective immigration controls" (subsection (1)); the public interest in those seeking to enter being able to speak English (subsection (2)), and in being financially independent (subsection (3)); the little weight to be accorded to private life or relationships established when a person was in the country unlawfully (subsection (4)), or when immigration status was precarious (subsection (5)); and:

> "(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."

19. However, in cases concerning the deportation of foreign criminals, a heightened burden is placed upon those seeking to avoid removal in the form of additional considerations set out in s.117C. The effect of the additional criteria in s.117C is to add additional weight to the public interest question and thereby to reduce the relative weight that is to be attached to any private or family life that the appellant has acquired. Section 117C states as follows:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where -

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in 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."

20. Section 117D(2) provides as follows (our emphasis):

"(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) <u>has been convicted of an offence that has caused serious harm</u>, or

(iii) is a persistent offender."

21. By virtue of s.117D(4)(b), the definition of a period of imprisonment excludes a person who has been sentenced to a period of imprisonment of 12 months by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time.

Accordingly, the process by which the appellant has found himself to have fallen foul of ss.117A-D is because the Secretary of State considered him to have been convicted of an offence that has caused serious harm pursuant to s.117D(2)(c)(ii).

Immigration Rules

22. The Immigration Rules, applicable to both courts and tribunals but also applicable to the Secretary of State, reflect the contents of the 2002 Act but in somewhat different form. The statute and the Rules are to be interpreted in a manner consistent with each other - see paragraph 17 of *Chege ("is a persistent offender")* [2016] UKUT 187 (IAC) (Andrews J and Southern UTJ), a decision to which we will return later. The Rules deal with "Deportation and Article 8" in the following manner:

> "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, <u>in the view of the Secretary of State, their offending has caused serious harm</u> 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…"

23. It is to be noted that the question whether "the effect" of C's deportation would be "unduly harsh" on a qualifying child (section 117C(5)) is broken down into two parts in paragraph 399(ii). It is also noteworthy that the phrase "in the view of the Secretary of State" in paragraph 398(c) of the Rules is omitted from s.117D(2)(c)(ii).

24. In *KO (Nigeria) and others v the Secretary of State for the Home Department* [2018] UKSC 53 (24 October 2018) the Supreme Court concluded that the statutory consideration of reasonableness in s.117B(6) and unduly harsh in s.117C was confined to focussing on the position of the child, which did not involve a wider consideration of the public interest in removing foreign offenders and others.

The Secretary of State's policy guidance and views

25. Serious harm is defined in the Policy Statement known as *Criminality, Article 8 ECHR Cases*, published on 22 February 2017 ('the policy guidance'). Serious harm is "*at the discretion of the Secretary of State*" and defined in these terms:

> "An offence that has caused serious harm means an offence that has caused serious physical or psychological harm to a victim or victims or that has contributed to a widespread problem that causes serious harm to a community or to society in general."

26. The composite nature of serious harm in this definition is evident. There is no suggestion in the present appeal that the appellant's offence has caused serious physical or psychological harm to a victim. Hence, the Secretary of State's focus has been upon the second limb, in relation to which he accepts there are three aspects, all of which must be met. Firstly, there has to be a widespread problem. Second, the offending must have contributed to this. Third, the problem must cause serious harm to society or a part of it.

27. The policy goes on to state that "*where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm*". It is undisputed that this appellant's offending has not involved any violence, drugs or sex.

28. In *SC (Zimbabwe) v the Secretary of State for the Home Department* [2018] 1 WLR 4474; [2018] EWCA Civ 929, the Court of Appeal gave consideration to the nature of the discretion exercised by the Secretary of State. In doing so, it disagreed with its own decision in *LT (Kosovo) and another v the Secretary of State for the Home Department* [2016] EWCA Civ 1246 in which Laws LJ had suggested that the tribunal should afford significant weight to the Secretary of State's view of serious harm and this remained unaffected by Part 5A of the 2002 Act. In *SC (Zimbabwe)* McCombe LJ (with whom Lindblom and Leggett LJJ agreed) said this at paragraph 19:

> "The LT case was concerned solely with the application of 398(c) of the Rules. With respect to the short obiter dictum in the last sentence of the passage quoted, I do not agree. It seems to me to be quite clear that once the matter comes before a tribunal or a court, what has to be applied is section 117D (C) of the Act. The words of that provision are the words which Parliament has chosen to enact, without more. The three elements of that paragraph of the subsection are in clear terms and do not require any gloss to be put upon them by the reference to the Rules. The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment."

Submissions

29. Mr Vanderman submitted that significant weight should be given to the Secretary of State's view that the appellant's offending caused serious harm. He invited us to prefer the reasoning contained in *LT (Kosovo)* over *SC (Zimbabwe)* on the basis that the former addressed a 'serious harm' case similar to the instant case, and the latter addressed a 'persistent offender' case. He argued that it followed from this that we should only depart from the Secretary of State's view if we consider it to be irrational.

30. Mr Vanderman accepted that the appellant's offending has not caused serious physical or psychological harm but that it has contributed to a widespread problem that causes serious harm to society. He submitted that it was not necessary for the Secretary of State to rely upon any evidence to support that proposition because it was merely a "*matter of social and moral judgment*".

31. Mr Collins submitted that there was no evidence to support the submission that the appellant's offending contributed to a widespread problem and that we should find that the appellant is not a foreign criminal for the purposes of s.117D.

32. After hearing submissions from both Counsel, we indicated that the appellant does not meet the definition of a foreign criminal in s.117D

of the 2002 Act and we invited the parties to address us on the correct legal test to be applied in those circumstances.

33. Although initially Mr Vanderman agreed with Mr Collins' submission that the correct test is that of reasonableness as set out at s.117B(6), after a short break and having taken instructions, he submitted that s.117B(6) is not applicable because notwithstanding our decision that the appellant is not a foreign criminal, he remains liable to deportation.

34. As we have indicated above Mr Vanderman did not dispute the factual framework advanced on behalf of the appellant. He submitted that the appellant's immigration history and criminal offending must be balanced against the impact upon K and S, and that a more traditional balancing exercise under Article 8 should be taken in this case because the matter falls outwith s.117B(6).

35. We reserved our decision on this issue, and now provide our reasoning.

Discussion

Foreign criminal

36. We must first resolve the dispute between the parties regarding the role of the Secretary of State's view on whether the offending has caused serious harm.

37. We entirely agree with McCombe LJ's reasoning in *SC (Zimbabwe)* that once the matter comes before the Tribunal, what has to be applied is s.117D of the 2002 Act. We acknowledge that the question in *SC (Zimbabwe)* was whether that appellant "is a persistent offender" for the purposes of s.117(2)(c)(iii) and not whether (as here) he "has been convicted of an offence that has caused serious harm" for the purposes of s.117D(2)(c)(ii). In our view, McCombe LJ's reasoning at paragraph 19 (as set out above) applies with equal force to both provisions. Indeed, he made specific reference to applying the wording found at s.117(2)(c), without more. He went on to make it clear that the Secretary of State's view and the sentencing judge's remarks may be of assistance but in deciding "*whether an offence has caused serious harm or whether an offender is a persistent offender*" he "*could not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment*". It would be very surprising if there were to be different approaches to the Secretary of State's views on whether a person is a foreign national, dependent upon whether ss.(ii) or (iii) of s.117D(2)(c) is relied upon. If, as McCombe LJ decided, and we accept, the Tribunal must decide ss. (iii) for itself, it must also decide ss. (ii) for itself. In *KO (Nigeria)* at [22], the Supreme Court adopted this parity of approach to its analysis of exceptions 1 and 2 in s.117C of the 2002 Act.

38. Mr Vanderman relied upon the different approach was adopted in *LT (Kosovo)*. This was described by Laws LJ as a "*paragraph 398(c) case*". That involved a consideration of the regime in place under the umbrella of the Immigration Rules alone, and prior to the insertion of Part 5A in the 2002 Act. Laws LJ concluded that in a paragraph 398(c) case the Tribunal should accord significant weight to the Secretary of State's view of serious harm. He observed that he could not see that this approach was undermined by the provisions in ss.117C and D. McCombe LJ made it clear that he did not agree with this "*short obiter dictum*". We add that not only was Laws LJ dealing with a case with a different legal framework, he does not appear to have heard any argument on the difference in approach the new statutory regime supported. In particular, his attention does not appear to have been drawn to the omission of the phrase "*in the view of the Secretary of State*" from s.117(2)(c)(ii), when that appears in the Rules (as highlighted by Laws LJ at [19] of *LT (Kosovo)*).

39. The statutory definition and the words Parliament has chosen to enact, must be applied. We must decide for ourselves whether the appellant has been convicted of an offence that has caused serious harm. We entirely accept that the views of the Secretary of State including his policy guidance and the judge's sentencing remarks are likely to be of assistance and should be taken into account when we conduct our own assessment.

40. We turn firstly to the judge's sentencing remarks. There is no definition of serious harm within the 2002 Act. That may trigger a tempting reliance upon the definition of serious harm in other statutory and non-statutory contexts. However, there is a danger in importing language from one context into another. As Judge Jordan said in his setting aside decision, it is commonplace for a sentencing judge, before imposing a sentence of imprisonment, to categorise the offence as serious. Indeed, were it not so, a sentence of imprisonment would not be imposed. A similar point is made in paragraph 46 of *Chege* where the court was invited to draw analogies in which the words "persistently" or "persistent offender" were used in the context of sentencing for youth offending. The Tribunal stated in paragraph 47:

> "However, it would be very unwise for this Tribunal to import the interpretation placed on a phrase used in another statute, in a context to which very different policy considerations apply, into part 5A of the 2002 act, even if the words used are identical."

41. In addition, in *LT (Kosovo)* at [16-18] Laws J rejected the submission that the definition of serious harm in the Criminal Justice Act 2003 could be imported to paragraph 398(c).

42. Importantly, unlike the sentencing judge, for these purposes, we are not concerned with the seriousness of the offence itself but whether it has caused serious harm. In the course of his decision finding that there was an error of law in Judge Ross's decision, Judge Jordan described the sentence itself as '*in almost all cases [amounting] to the acid test*.' On hearing submissions from both counsel, we find that remark to overstate the significance of the sentence, suggesting as it does that the length of the sentence is determinative. It is, of course, often the only means by which an outsider will see reflected the seriousness of the offending. However, the greater the information that is provided about the nature of the offence, the more likely it is that the decision-maker is able to form his own view as to its seriousness, taking into account the sentence and the judges sentencing remarks, but not becoming over-reliant upon the length of imprisonment.

43. In his setting aside decision Judge Jordan also spoke of there having to be additional elements which might be identified by acknowledging the position in these colloquial terms: '*notwithstanding the lenient sentence that has been imposed in this*

case, the sentence does not reflect the true gravity of the offending and the serious harm that has been caused.' These additional elements are identified in the policy guidance by identifying: (a) the causing of serious physical harm; (b) the causing of serious psychological harm; (c) a contribution to a widespread problem that causes serious harm. This tripartite categorisation must be seen as a coherent whole with each category assisting to define the type of harm that is being addressed. It is either serious physical or psychological harm both of which are readily established by the appropriate evidence. Alternatively, although the serious physical or psychological harm may not have been established in the case of an individual, by parity of reasoning, the harm is of an equivalent level of severity by reason of its being a widespread problem seriously harming the community.

44. The corollary of this position is that a decision-maker must be extremely cautious in identifying a particular type of case which does not come within the policy guidance. In particular, he must avoid lowering the threshold of serious harm. To do so would run the risk of the Secretary of State using serious harm as the means of categorising an individual as a foreign criminal to the extent that it would no longer be necessary for that individual to have been sentenced to 12 months or to be a persistent offender. All offending harms society or else it would not be considered an offence. Serious harm is an elusive concept or, at least, an elastic one. It might well be argued bad driving, shoplifting, deception or violence of any sort each causes a serious impact upon our social and economic life. Were the Secretary of State to categorise shoplifting as a widespread ill that causes serious harm, he may be entitled to do so, at least if he properly reasons that decision. However, unless he does so, it would not be open to a tribunal to reach that conclusion intuitively. Hence, the significance of the policy guidance. That does not mean that there cannot be cases where a decision-maker is entitled to conclude the offending has contributed to a widespread problem and has caused serious harm but there should be some form of evidence to support it.

45. The Secretary of State has clearly rested his case that the appellant's offending has caused serious harm upon the definition of serious harm in the policy guidance we have described at (c) of paragraph 44 above i.e. the appellant's 2016 offence has contributed to a widespread problem that has caused serious harm to the community or society in general. We invited Mr Vanderman to take us to any evidence or policy guidance to support the proposition that being involved in a conspiracy to commit fraud by seeking to benefit from the use of an impersonator in a driving theory test has contributed to a widespread problem. Mr Vanderman submitted that there was no need for any specific evidence or policy guidance because the Secretary of State was entitled to adopt that view as a matter of social and moral judgment. In this respect Mr Vanderman relied upon

the rejection of the submission in *LT (Kosovo)* that the Secretary of State was obliged to give additional reasoning for his view that drugs offences are serious offences and cause serious harm. Laws LJ referred to the Secretary of State's "*long standing policy that suppliers of illegal drugs will be candidates for deportation*" at [22] and concluded at [24] that the view that supplying Class A drugs causes serious harm did not require narrative reasons or a particular expertise and "*is a matter of social and moral judgment*". We reject Mr Vanderman's reliance upon the bare assertion that the Secretary of State was entitled as a matter of social and moral judgment to reach the view he did in this case, without more. Such an assertion is subjective, vague and unsupported by any evidence (in the public domain or otherwise) or policy guidance

46. There are additional difficulties with Mr Vanderman's submission. Firstly, the offending in this case does not have any bearing upon the Secretary of State's longstanding and well-known policy that convictions involving violence, drugs and sex are viewed very seriously and as causing serious harm. The policy guidance refers to this type of offending and no other. We appreciate that the policy guidance should not be read as if it is a statute. We have already accepted that there may be cases and examples capable of meeting the definition of serious harm, which are not expressly referred to within the policy guidance. However, where by way of example, the supply of Class A drugs gives rise to a sentence of under 12 months, the Secretary of State is entitled to rely on his longstanding policy and his views based upon this, in order to express a clear social and moral judgment. There is no corresponding policy or clear expression of the Secretary of State's view in relation to offending involving fraud within driving tests. In offending involving the supply of drugs the Secretary of State is able to point to his longstanding general policy and the policy guidance itself. It is these that express his social and moral judgment. In this case the Secretary of State has been unable to point to anything other than a bare assertion that the appellant's offence has contributed to a widespread problem.

47. Second, we have not been taken to any evidence to link this type of offending to a widespread problem. The sentencing judge quoted Hallett LJ as being concerned that with the apparently potential disaster that may be caused by a proliferation of persons unfit to drive. That must undoubtedly be true. The behaviour that led to the 2016 offence clearly has the potential to cause serious harm to society. We have however been taken to nothing to support the proposition that there is in fact a proliferation of such persons as a consequence of this type of or related offending. There was no evidence of a widespread problem and the imposition of a deterrent sentence does not, without more, establish it.

48. As set out above, where the definition of foreign criminal is found amongst a number of categories, those additional categories must

inevitably inform the meaning of the others. A person who has been sentenced to 12 months imprisonment, which is expressly confined to immediate sentences of imprisonment sets a level of offending which is clear-cut and easily intelligible. Perhaps less so, but nevertheless objectively verifiable, is the category of the persistent offender. Clearly the nature of the offending is likely to be less serious than offences which attract a 12-month sentence of imprisonment. It is not, therefore, the nature of the individual offences rather the sheer number of them. Within this system of categorisation are offences which, by definition, attract less than 12 months imprisonment and which do not fall into a pattern properly described as persistent offending. Nevertheless, since the consequences of being found within this category are the same for the persistent offender or the person sentenced to 12 months, there must be a parity between them. It is only in this way that s.117D is maintained as a coherent structure. In other words, the offending, though different, must be capable of being viewed in a similar manner to the offending identified by reference to a sentence of 12 months or the activities of a persistent offender.

49. Both parties relied upon the decision of the Upper Tribunal in *Chege*. As the title suggests, this was a decision that centred upon section 117D(c) (iii) and what is meant by a persistent offender. Its consideration of subparagraph (ii), namely a person who has been convicted of an offence which has caused serious harm, is peripheral to the decision. However, it is an example of the type of offending that properly fell to be classified as persistent offending. Mr Chege had, over a period of 15 years committed 25 offences resulting in 16 convictions for which he had been sentenced to short custodial sentences of between 4 and 9 months (but never as long as 12 months) including at least 2 offences of affray. No suggestion was made in the decision letter that Mr Chege's offending had caused serious harm, see paragraph 22 of the decision. The decision in *Chege* is but an example. There will be cases, of course, where the period of offending will be less, perhaps much less, where the number of offences will be smaller, perhaps much smaller and where the number of convictions will be fewer, perhaps much fewer and still the appellant will properly be classified as a persistent offender. However, it provides an insight into the parity of reasoning that is required in order to maintain a coherent definition of a foreign criminal. It must at least set off an alarm-bell when assessing the appellant who is not a persistent offender and whose record of offending consists of two offences, each meriting a sentence of six months, albeit separated by a period of five years.

50. Drawing these strands together, we consider that the following principles are useful in cases where the Secretary of State asserts that the appellant is to be treated as a foreign criminal notwithstanding the fact that he has not been sentenced to a period

of 12 months immediate imprisonment or more and is not a persistent offender:

(i) Although it is at the discretion of the Secretary of State whether he considers an offence to have caused serious harm, it is, on appeal, for a tribunal to make up its own mind, albeit it must have due regard to the Secretary of State's views;

(ii) Policy guidance provided by the Secretary of State is the lawful means by which the Secretary of State identifies the type of offending that he considers to cause serious harm;

(iii) Whilst the remarks of the sentencing judge are a material consideration, they must be seen as made in a different context from that of Part 5A of the 2002 Act;

(iv) The description of the offence by the sentencing judge as a serious offence or a very serious offence is of limited assistance when a tribunal is required to consider whether the appellant has contributed to a widespread problem that affects and seriously harms society or a part of it;

(v) The question whether the appellant is a foreign criminal because he has contributed to a widespread problem that seriously harms society or a part of it, should be assessed within the context of the other categories of persons classified as foreign criminals.

51. We are not satisfied that the appellant's 2016 offence has caused serious harm. The Secretary of State conceded that there was no psychological or physical serious harm caused and focussed upon the offence having contributed to a widespread problem. We have been taken to no evidence that the 2016 offence contributed to a widespread problem. We entirely accept that conspiracy to defraud government departments is a serious issue and inimical to the public interest, with the potential to cause serious harm. However, the policy guidance is correct in so far as short of serious physical or psychological harm to an actual victim or victims, any serious harm to the wider community or society must involve offending that has contributed to a widespread problem. That level of serious harm can be said to be equivalent to the other statutory definitions of a foreign criminal in s.117D, and is not present in this case.

S.117B(6)

52. Having concluded that the appellant is not a "foreign criminal" because his offending has not caused serious harm, the Secretary of State is no longer entitled to maintain the view that he is "liable to deportation". This is because the Secretary of State's view that the appellant's deportation is conducive to the public good is solely predicated upon his contention that the appellant was convicted of an offence which has caused serious harm. The latter provides the

gateway to the former. No other reasoning is offered in the decision letter.

53. We invited Mr Vanderman to explain how it could be said that the appellant remained liable to deportation when we had found that the very basis of that view could no longer be properly maintained. Mr Vanderman was unable to do so other than to take us to the Immigration Act 1971 which provides at s.3(5):

> "A person who is not a British citizen is liable to deportation from the UK-
>
> (a) if the Secretary of State deems his deportation to be conducive to the public good…."

54. This does no more than define who is liable to deportation. Although the Secretary of State deemed the appellant's deportation to be conducive to the public good, this was predicated upon the Secretary of State's view that the appellant had been convicted of an offence which has caused serious harm. The Secretary of State can no longer properly maintain that view in light of our findings. It follows that the appellant is no longer liable to deportation and the question that we must decide for the purposes of s.117B(6) is what is reasonable for S. In assessing that question we must take into account her best interests. We have no doubt that S's best interests require her to remain in the UK by a significant margin. She is a British citizen. She was born in the UK. She has resided in the UK and nowhere else for nearly 15 years. The evidence from her parents, which has not been disputed, is that her father has been unable to set himself up financially in Nigeria and is living in difficult conditions there. Her mother K is also a British citizen. She is also a DRC citizen but not a Nigerian citizen. She was recognised as a refugee and has already had to move her entire life from one country to another.

55. In *KO (Nigeria)* the Supreme Court made it clear that it is relevant to consider where the parents are expected to be, since it will normally be reasonable for the child to be with them. That argument is less strong the older the child is and the more deep-rooted her ties are to a particular country, as in this case. In any event, can it be properly said that the mother, a British citizen, can be expected to follow the father to Nigeria? In answering that question it is relevant to consider the "real world" in which S and her parents find themselves– see [19] of *KO (Nigeria)* and [27] of *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 72 (IAC) (Lane J, President and Gill UTJ). In *JG* the Upper Tribunal carefully considered *KO (Nigeria)* and concluded (as set out in the headnote) that s.117B(6) requires a tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case , and ask whether it would be reasonable to expect her to do so.

56. This is not a case in which both parents are expected to leave the UK. The mother is a British citizen and has clearly chosen to remain in the UK with S. She has opted not to join the appellant in Nigeria and has provided evidence that the family is simply unable to afford to do so. The mother is not a Nigerian national and her unwillingness to go to a country she has never been to and is not a national of, having already left the country of her birth as a result of persecution, is understandable. S therefore finds herself lawfully living with her mother in the UK, her mother having made a decision to remain in the UK. S's best interests strongly favour remaining in the UK and her mother's decision must be viewed in this context.

57. S continues to suffer the deleterious consequences (financially and emotionally) of not living with her father. The natural expectation might be for a young child to accompany her mother in joining her father in Nigeria, but S is nearly 15. In any event, as set out above we are required to hypothesise that S would leave the United Kingdom, even though it is very clear that she has not left (even though that has meant separation from her father since his removal) and will not leave. We are satisfied that it will be very difficult for S to adjust to life in Nigeria at her age and stage of education, particularly bearing in mind the difficult and unstable conditions the appellant is living under in Nigeria. We acknowledge that S is unlikely to have language issues in Nigeria as English is her first language but she is likely to suffer as a result of the disruption to her long-standing and settled academic and social environment. When all the circumstances of the case are viewed cumulatively including S's age; stage of education; best interests; choices made by her mother and reasons for them; likely difficult family circumstances in Nigeria; we are satisfied that it would not be reasonable to expect S to leave the UK. We also note that there has been no dispute that although the appellant has lived apart from K and S for over two years their relationship remains genuine and subsisting. As such, and in accordance with s.117B(6) the public interest does not require the appellant's removal.

58. This appellant has already been removed pursuant to the "remove first, appeal later" provisions. It cannot be properly (and was not) argued that a person who is removed on the basis of being a foreign criminal but is subsequently found not to be such, cannot benefit from an application of s.117B(6) when a tribunal considers his out of country appeal.

Conclusion

59. We are therefore satisfied that:

    (i) The appellant is not a foreign criminal;

    (ii) It cannot properly be said that he is liable to deportation;

(iii) The appellant has a genuine and subsisting relationship with S, a qualifying child;

(iv) It would not be reasonable to expect S to leave the UK.

60. It follows that the appellant meets the requirements of s.117B(6) of the 2002 Act. The structured approach to ss. 117A-117D produces in all cases a final result which is compatible with, and not in violation of Article 8 of the ECHR – see [36] of *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58. We therefore allow the appellant's Article 8 appeal.

Decision

61. We remake the decision by allowing the appellant's appeal on human rights grounds.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date: **12 March 2019**