Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15584/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 6 June 2019	On 26 June 2019

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr P J Lewis instructed by Legal Rights Partnership

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead members of the public identifying the respondent (JK). A failure to comply with this direction could lead to contempt of court proceedings.

2. Although this is an appeal by the Secretary of State, I shall for convenience refer to the parties as they appeared before the First-tier Tribunal.

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Background

3. The appellant is a citizen of Rwanda who was born on 20 April 1964. He has been lawfully resident in the United Kingdom since February 2002 and was granted indefinite leave to remain in 2007. His wife and three daughters joined him in the UK on 1 July 2008. His two elder daughters are aged 22 and 18 and both are in university. His youngest daughter, "M" is 13 years of age.

4. On 9 December 2016, the appellant was convicted at the Swansea Crown Court of one offence of theft. He was sentenced to twelve months' imprisonment.

5. On 21 December 2016, the appellant was served with a notice that it was proposed to deport him in accordance with the automatic deportation provisions in the UK Borders Act 2007. He subsequently made a human rights claim on 12 January 2017 (supplemented by further submissions during 2017). On 17 July 2018, the Secretary of State refused the appellant's human rights claim under Art 8 of the ECHR. On 9 July 2018, the Secretary of State signed a deportation order in respect of the appellant.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. He relied upon Art 8 of the ECHR and his private and family life in the UK. In particular, he relied upon the impact deportation would have on his children's education, including his youngest child M. In relation to M, the appellant relied upon Exception 2 in s. 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002") and that his deportation would have an unduly harsh impact upon her.

7. The appeal was heard by Judge N J Osborne on 11 December 2018. In a decision sent on 10 January 2019, Judge Osborne allowed the appellant's appeal under Art 8. His determination is a lengthy, careful and detailed one. At para 6, the judge set out the appellant's claim as follows:

> "**The Appellant's Claim**
>
> 6. The Appellant claims that:
>
> (i) He has been lawfully resident in the UK since February 2002. He was granted indefinite leave to remain in 2007. His wife and three daughters joined him in the UK on 1 July 2008. The Appellant and all his family would have qualified for naturalisation as British citizens but have been unable to apply because of lack of funds. The family is now rooted and integrated in the UK. The two elder daughters [] aged 22 years and [] aged 18/19 years are both in university studying on undergraduate courses. The youngest child M attends [] in Swansea, has ambitions is to proceed to university in the UK. M remembers life in no other country. It would be unduly harsh for her to relocate to Rwanda. It would be unduly harsh for M to remain living in the UK without her father, the Appellant.

(ii) The Appellant from the outset admitted and accepted his guilt for the one isolated offence that he has committed. The offence was committed in highly unusual circumstances. The Appellant has been forgiven by the victim. The victim has been repaid again, in extraordinary circumstances. The Appellant has shown and continues to show a genuine remorse for his criminal offending. He represents a low risk of reoffending. His conduct since the offending has been exemplary. The Appellant still feels shame and embarrassment. The Appellant's criminal offending has adversely affected his wife's health and the family's finances. Despite his criminal offending, the Appellant's community think no less of him, continue to trust him, and continue to value him. The Appellant is an honest, humble and selfless man whose deportation would be a loss to the community. Deportation in this case would be disproportionate."

8. Then, the judge set out the applicable law in relation to deportation and Art 8, including paras 398 and 399 of the Immigration Rules (HC 395 as amended) and relevant provisions in Part 5 of the NIA Act 2002 at paras 11-29.

9. Then, at paras 30-31 under the heading "The Best Interests of M" the judge said this:

"30. I have undertaken that balancing exercise in the context of Section 55 of the Borders, Citizenship and Immigration Act 2009 and my duty to consider the best interests and welfare of any relevant children in an appeal such as this.

[M], the third child of the Appellant and his wife is now aged 13 years. She is in year nine at [~]. She has lived in the UK for more than ten years. She has never lived anywhere other than in the UK during that ten year period. [The appellant's wife] told me that if it were suggested to M that she had to leave Swansea in South Wales for a life in Rwanda she would consider it to be 'child abuse'. She is fully integrated into her local community. She is a normal teenager who has over the last ten years developed close friendships. She enjoys school. She is ambitious to succeed and to proceed to university like her sisters.

31. This evidence on the part of [the appellant's wife] had the distinct and realistic ring of truth about it. There is no suggestion that the Appellant and [the appellant's wife] are anything other than appropriate, competent, loving parents. It is well-established that children are more likely to thrive if they are brought up in conditions of stability. For the most part that is precisely what these two parents have provided for all three of their children. The Appellant and his wife are a loving couple with a strong marriage. That marriage has withstood the Appellant's absence from the family home in Rwanda whilst he adapted to a life in the UK and has also withstood the difficulties of the Appellant's absence from the family home when he was in prison for a period of six months.

Six months is a long time in the life of a young child. However, ten years in the context of M's life is virtually all the life that she can remember. M has lived in the UK for 80% or thereabouts of her 13 years. She can have little memory of life in Rwanda. All her education to date has been spent in the

UK. She has an established home and an established way of life in Swansea. Whereas I am confident that if she followed her parents to any country in the world, they would do the best they could for her, the fact remains that at this stage in her development and education, having already spent ten years in the UK, it is not in the best interests of M to now relocate to any other country. The best interests of M are a primary consideration in this appeal. M's best interests can be outweighed by other competing factors which also have to be assessed."

10. At paras 32-37, the judge dealt with, what he described in the heading of this section, as "The Unique Features of the Appellant's Criminal Offending" as follows:

"32. In early 2012 [Mr K] was diagnosed with serious kidney failure. He was put on dialysis. He lives in Oxford. At that time the Appellant and his family lived in Reading. They were members of the Seventh Day Adventist Church which used to congregate in Oxford. They visited members of the Seventh Day Adventist Church community in Oxford. That is when the Appellant realised that K was in a critical condition. The Appellant felt the urge to assist [Mr K]. They were not related. They did not know each other until the Appellant became aware of [Mr K]'s plight. The Appellant thought carefully but relatively quickly about the matter and decided to donate his kidney to [Mr K]. On 10 April 2014 the transplant was conducted. After the Appellant donated his kidney, his health was adversely affected. He was unable to work. He and his family suffered financial difficulties.

[Mr K] benefited from the kidney transplant. His health improved. In September 2015 he began a postgraduate course at [~] and now has a Master of Arts degree in development and emergency practice. [Mr K] considers that the Appellant saved his life and wonders how many people would do what the Appellant did for him.

33. In or about March 2012, [Mr D], a well-established friend of the Appellant who was a pastor who attended the same church as the Appellant in Reading and who was applying for asylum in the UK, asked the Appellant if he could use the Appellant's bank account to deposit his own money initially of £2,997.73 but later an additional £20,000 or thereabouts. The Appellant agreed and was pleased to help.

34. Following the Appellant's donation of his kidney as referred to above, the Appellant suffered ill health, time off work, and financial hardship. Gradually, the Appellant used the money in his account which belonged to [Mr D]. The money was spent not on luxuries but for the basics of life. The Appellant always intended to replace the money. When [Mr D] asked for the money earlier than the Appellant expected, the Appellant applied for loans but due to his difficult financial position, was unable to obtain any appropriate loan. The Appellant told [Mr D] the true position. Naturally, [Mr D] was furious with the Appellant who apologised and was ashamed of what he had done. He promised to repay [Mr D] who reported the matter to the police only as a means of pressurising the Appellant to repay those sums which were due.

35. The police brought charges. The Appellant promptly and immediately admitted his guilt and his shame. The Appellant has never resiled from that position. He still acknowledges his guilt and his shame and to a considerable degree is haunted by his offending.

36. In this appeal I have been referred to the mediation settlement which appears in the Appellant's bundle at page 100 and which is signed by [Mr D] and [Mr R] and which document is dated 3 February 2017. Additionally, I have read the statement of [Mr D]. He has forgiven the Appellant, provided that statement for use in these appeal proceedings, and confirmed that he never intended or desired the Appellant to be criminally punished. I have been told that [Mr D] has in fact apologised to the Appellant for putting him through the trauma of criminal proceedings and a period of imprisonment. I have no reason to doubt any of the evidence that has been produced in this appeal. I take it all into careful consideration. These are singularly unusual features of an appeal such as this.

37. The one other offence upon the Appellant's list of previous convictions is failing to surrender to custody at an appointed time on 11 November 2016. Having heard the Appellant's explanation during the hearing, I am satisfied that that was nothing more than a misunderstanding between the Appellant and his solicitors and that although the Appellant failed to surrender, he did so due to naivety and the said misunderstanding rather than any criminal intent."

11. Then, at paras 38 and 39 the judge dealt with the OASys Report and that the appellant's risk of future offending was low.

12. Then, at paras 40-43 the judge dealt with "The Effects of the Appellant's Offending Upon His Family" as follows:

"40. Specifically, the family suffered financially due to the imprisonment of the Appellant. He was unable to contribute to the family income by way of his earnings.

41. [The appellant's wife] was emotionally traumatised by the revelation that her previously faultless husband had committed the material criminal offence. It was at that time that she began suffering from high blood pressure. She continues to suffer in that way, a condition which is controlled by oral medication. The Appellant is aware of the effect that his criminal offending has had upon his wife's health.

42. [The eldest daughter], whilst in her first year of university suffered a breakdown due to the emotional stress she suffered as a direct result of her father's criminal offending. [She] was unable to cope with being away from home and the commitment her studies needed. She dropped out of university in order to recover. She has recovered and is now in her second year at [].

43. The Appellant and his wife therefore have two daughters at university. They are funded by means of a combination of government loans and private funding from the Appellant and [the appellant's wife]. The Appellant is all too aware that if he is deported to Rwanda, the family and

the education of his daughters will be imperilled or at least rendered significantly more expensive. Although it will be possible for all three daughters to continue to be educated with the assistance of loans provided by the government, the Appellant and his wife are committed parents who wish to assist their daughters as much as is possible. That is what they are financially doing. These are all matters which I take into consideration in assessing the proportionality of the Respondent's Decision."

13. At para 44, the judge recognised the appellant's remorse at his offending. Then at para 45 the judge referred to a number of "supporters" from the appellant's church and his friends concerning his contribution to the community. At para 46, the judge identified the nature of the appellant's offending and that the offence was one for which he was imprisoned for twelve months commenting that it was a "relatively lenient sentence for the theft of such a large sum of money".

14. Then at paras 47-51 the judge set out his conclusions in respect of Art 8 and his finding that the appellant's deportation would breach Art 8 as follows:

"47. Pursuant to the judgment in **Hesham Ali [2016] UKSC 16** I have conducted the above structured approach to proportionality on the basis of the facts as I have found them to be on the evidence in this particular appeal, the law as established by statute, and case law. Ultimately, I have to decide whether deportation is proportionate in this particular appeal. I have balanced the strength of the public interest in the deportation of the Appellant against the impact upon the private and family life not only of the Appellant but of the three other present members of his immediate family. I have given appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders which the Appellant undoubtedly is. Having given due weight to the strength of the public interest and the deportation of the Appellant in this appeal, I nonetheless find that the Article 8 appeal is sufficiently strong to outweigh the public interest in his deportation. This particular Article 8 claim for all the reasons I have set out above is very strong and is very compelling (as it was put in **MF (Nigeria) [2014] 1 WLR 544**). That is why I find in all the circumstances of this appeal, the Appellant's appeal must succeed.

48. Having said that, the Appellant should not be under any illusion that if he should commit any further criminal offences, those new criminal offences will be bound to be taken into consideration in any future appeal before this Tribunal which might well in any future proceedings tip the balance against the Appellant. I know because Mr Lewis was careful enough to ensure that the Appellant gave specific evidence upon this issue, that the Appellant is fully aware of what is likely to happen to him if he commits any further offences at all.

49. Applying the relevant law to the established facts I find that the deportation of the Appellant is not proportionate in a democratic society to the legitimate aim to be achieved. On the established facts, I find that there is a breach of the Appellant's rights under the 1950 Human Rights Convention. I conclude that the deportation of this Appellant is not appropriate upon the facts of this appeal.

50. I remind myself of the established and indeed current authority of **Beoku-Betts v SSHD [2009] 1 AC 115**. I find that the five constituent members of this family include the Appellant, his wife, [two older daughters], and M. Even though [the two older daughters] are adults, the fact of the matter remains that they are still part of the family unit. They have not established independent family lives of their own. They are members of the same household albeit that they are presently studying at university. They are largely financed by their parents. That financial contribution made by the Appellant and [the appellant's wife] fulfils the requirements of the well-established case of **Kugathas** (see above) in that insofar as the adult children are concerned there is between them and their parents something more than the usual emotional dependency. In part, it is the emotional difficulties previously suffered by [the eldest daughter] and the health difficulties suffered by [the appellant's wife] coupled with the financial difficulties suffered by the family all due to the absence of the Appellant during his period of imprisonment that would make it unduly harsh for M to continue living in the UK in the absence of her father. Those difficulties previously (and to an extent presently) suffered by this family unit are an indication of the further difficulties that would be suffered were the Appellant to be absent from this family unit for any protracted period of time.

51. For these and for all the other reasons I have set out above, I consider that the Respondent's Decision to deport the Appellant is in all the circumstances not proportionate in a democratic society to the legitimate aim to be achieved."

The Appeal to the Upper Tribunal

15. The Secretary of State sought permission to appeal to the Upper Tribunal on the ground that the judge had failed properly to apply a structured approach to Art 8 as required by s. 117C of the NIA Act 2002: first, by considering whether Exception 1 or Exception 2 in s. 117C(4) and (5) applied; and secondly, if neither applied, whether there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" (s. 117C(6)).

16. Permission to appeal was initially refused by the First-tier Tribunal but on 12 March 2019, the Upper Tribunal (UTJ Grubb) granted the appellant permission to appeal on the basis that it was arguable:

> "that in allowing the appeal the judge failed to consider whether the appellant could rely upon Exception 2 in s. 117C(5) of the NIA Act 2002 in respect of the impact upon his third child if he were deported and, further thereafter (if it were not met) failed to apply the 'very compelling circumstances over and above' test in s. 117C(6)".

17. On 10 May 2019, the appellant filed a rule 24 response seeking to uphold the judge's decision on the basis that the judge was entitled to find that there were "very compelling circumstances over and above those in Exceptions 1 and 2".

18. Prior to the hearing of the appeal, I caused the administration to contact both representatives as the case was due to be listed before me and I had granted the Secretary of State permission to appeal. Both representatives responded that they were content that I should hear the appeal and that was confirmed at the hearing by Mr Howells, who represented the Secretary of State and Mr Lewis who represented the appellant.

Submissions

19. Mr Howells, on behalf of the Secretary of State relied upon the decision of the Court of Appeal in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [36]. There, he submitted, the Court of Appeal indicated that the correct approach was first to consider whether an individual could rely upon either Exception 1 or Exception 2 where he had been sentenced to a period of imprisonment of at least twelve months but less than four years and then, secondly, if he could not, then go on to consider whether there were "very compelling circumstances" over and above Exceptions 1 and 2 applying s. 117C(6) (see [27]). Here, Mr Howells submitted the judge had failed to consider whether either of the Exceptions applied to the appellant and, instead, had simply gone on to ask whether they were "very compelling circumstances". Mr Howells acknowledged that the judge had stated in para 50 that the appellant's imprisonment would "make it unduly harsh for [M] to continue living in the UK in the absence of her father" but it was not clear the basis upon which he had reached that finding. Further, the judge's only reference to the "very compelling circumstances" test in his findings was at para 47 where it was unclear that he had approached it on the basis of whether the circumstances were "very compelling" and were "over and above" those in Exceptions 1 and 2.

20. Mr Lewis, who represented the appellant submitted that the judge had concluded that Exception 2 applied in para 50. However, he acknowledged that in considering M's circumstances, the judge at paras 30-31 had only considered her "best interests". He submitted that the judge had made a sustainable finding on whether there were "very compelling circumstances" and that s. 117C(6) applied and so any error that he may have made was immaterial.

21. In response, Mr Howells submitted that NA (Pakistan) set out the correct approach. The judge had not dealt with "undue harshness" in relation to the appellant's partner and had made no finding whether it was "unduly harsh" for the appellant's partner and his youngest daughter to go to Rwanda.

Discussion

22. There is no doubt that the appellant is a "foreign criminal" to which Part 5A of the NIA Act 2002 applies as he was sentenced to a period of imprisonment of "at least twelve months": in fact, twelve months' imprisonment for the single offence of theft.

23. In determining whether the appellant's deportation was proportionate and therefore whether or not it would breach Art 8, s. 117C sets out a number of "additional

considerations" relevant to the assessment of proportionality. Section 117C(1)-(6) provides as follows:

"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.

…"

24. In NA (Pakistan) which was subsequently approved by the Court of Appeal in NE-A (Nigeria) v SSHD [2017] EWCA Civ 2, the Court of Appeal emphasised that the approach to determining the Art 8 issue in a case such as that of the appellant was, first to consider whether Exception 1 in s. 117C(4) applied or Exception (2) in s. 117C(5) applied. Then, if they did not the court should go on to consider whether there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" as required by s. 117C(6) even though it applied, on its face, only to those foreign criminals who had been sentenced to a period of imprisonment of at least four years.

25. There is no suggestion that Exception 1 applies here. The only Exception which the appellant relied upon was Exception 2. There is no doubt the appellant's wife is a "qualifying partner" (she has ILR) and also there is no doubt that her relationship with the appellant is a "genuine and subsisting relationship". Likewise, M (but not his older children) is a "qualifying child" as she has lived in the UK for a continuous period of seven years or more. Similarly, there is no doubt that his relationship with her is a "genuine and subsisting parental relationship". Exception 2, therefore, upon

which the appellant did rely, applied if the impact upon his wife and youngest child if he were deported would be "unduly harsh".

26. It is clear that the judge made no finding at all in relation to the impact upon the appellant's spouse, nor, did he make any finding in respect of whether it would be unduly harsh for his wife and youngest daughter to return to Rwanda with him. That was an issue as the respondent did not accept it would be unduly harsh for them to live in Rwanda (see [19] of the determination). Mr Lewis, in his submissions, accepted that the judge had made no relevant findings in respect of those matters.

27. In respect of the judge's finding that it would be unduly harsh for M to remain in the UK (presumably with her mother) if the appellant were deported, Mr Lewis acknowledged that in paras 30-31, the judge had only considered M's best interests. That, in my judgment, is entirely correct. Whilst the best interests of M were a primary consideration in determining whether the impact of the appellant's deportation would be unduly harsh upon her, her best interests were not, in themselves, necessarily determinative of whether the impact would be unduly harsh.

28. The correct approach to whether the impact of deportation upon a qualifying child (or indeed upon a qualifying partner) would be unduly harsh was set out in the Upper Tribunal decision in MK [2015] UKUT 223 (IAC) which was subsequently approved by the Supreme Court see in KO (Nigeria) and Ors v SSHD [2018] UKSC 53 at [27]. In MK at [46] the Upper Tribunal said this:

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

29. To the extent that the judge made a finding that it would be "unduly harsh" for M to continue living in the UK in the absence of her father, despite his careful and detailed statement of the relevant law, the judge nowhere sets out the high threshold recognised in MK such that I can be satisfied that he approached the issue of "unduly harsh" in s. 117C(5) with the appropriate high threshold in mind. The judge's reasons, given in para [50], appear to rely upon the effect that the appellant's imprisonment had upon the other members of the family. In particular, the judge refers to the emotional difficulties suffered by the appellant's two elder daughters, the health problems of his wife and the financial difficulties encountered due to his imprisonment. This can only be a reference to the judge's assessment of the evidence at paras 40-43 which I have set out above. It is difficult to see how these difficulties, even if replicated were the appellant deported, can be said to produce an "undue harsh" impact upon M. At least, without further reasoning, any such finding is, in my judgment, unsustainable.

30. Consequently, whilst I do not accept Mr Howells' submission that the judge failed to make a finding in respect of whether it was "unduly harsh" for M to remain in the

UK if the appellant were deported, his finding is not, in my view, adequately reasoned and based upon a correct self-direction as to the high threshold as set out in MK. There is also the difficulty that he made no finding in relation to whether it was unduly harsh for the appellant's wife to remain in the UK without the appellant or for her and M to return to Rwanda with him.

31. Overall, these amounted to errors of law.

32. Mr Lewis submitted that this was immaterial as the judge had concluded, and was entitled to conclude, that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" in any event. The difficulty with Mr Lewis' submission is that if that is what the judge did, his premise was not established. Namely that the appellant fell within Exception 2. Indeed, of course, if the judge considered that Exception 2 applied, then he did not need to go on and consider whether s. 117C(6) applied; the appellant simply succeeded in his appeal because if Exception 2 applied then deportation was not in the public interest. By going on to consider whether there were "very compelling" circumstances, the judge either thought that Exception 2 did not apply (but his finding is to the contrary in para 50), or in approaching the application of s. 117C(6) he did so on the basis that deportation would be unduly harsh upon M but that is a finding he was not entitled to make, in my judgment.

33. That, in my view, undermines the judge's finding in para 47 that the claim was "very compelling". There is, as Mr Howells submitted, no reference in para 47 to the "over and above" part of s. 117C(6). Indeed, the judge's reference to "very compelling" is to the case of MF (Nigeria) v SSHD [2014] 1 WLR 544 which was decided before s. 117C.

34. I accept that there were 'strong' factors in the appellant's favour, not least his altruistic donation of a kidney (see paras 32-33) and his post-offending remorse (see paras 34-37 and 44). However, in truth, without a sustainable finding in relation to Exception 2, it is difficult to conclude that the judge's reasoning that the circumstances, including those not covered by Exception 2, were of such a compelling nature as to outweigh the public interest in any event. The financial circumstances of the family, even without the appellant, were not dire. They have ILR and there is no suggestion that whilst the appellant was in prison they were destitute or unable to survive financially. The judge's reliance upon the desire of the appellant and his wife to fund their daughters' university education underplays the fact, which the judge recognises, that Government loans are available both to his two older daughters and, in the future, no doubt to M.

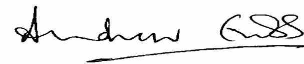
35. For these reasons, the judge erred in law in his approach to Art 8 and the application of s. 117C. Further, he failed to give adequate reasons for concluding, that (in effect) Exception 2 applied and, in any event, that if it did not the appellant had established "very compelling circumstances, over and above" those described in Exceptions 1 and 2.

Decision

36. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of a material error of law. That decision cannot stand and is set aside.

37. It was common ground between the representatives that if that was my conclusion, the proper disposal of the appeal was to remit it to the First-tier Tribunal for a *de novo* rehearing. I agree. Having regard to the nature and extent of fact-finding, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing (with no findings preserved) to be heard by a judge other than Judge N J Osborne.

Signed



A Grubb
Judge of the Upper Tribunal

24 June 2019