Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13936/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 16th July 2021	**On 20th October 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS O Y H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Christina Nicholas, instructed by Quintessence Solicitors
For the Respondent: Ms Julie Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of

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her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant is a citizen of Nigeria born on 28th February 1981 and she appeals the Secretary of State's decision of 16th July 2019 to refuse her human rights claim. This followed the Secretary of State's refusal to revoke her deportation order. The appellant had been convicted on 4th October 2005 of one count of using a false instrument (false passport and visa) and was sentenced to ten months' imprisonment and recommended for deportation to Nigeria under Section 3(6) of the Immigration Act 1971. In 2007 she married her British national husband in Nigeria and the couple have two British children born in 2008 and 2010. The appellant in 2017 made an application to have her deportation order revoked on the basis of her human rights. No decision was forthcoming and by 9th April 2019 her husband and two children relocated to the United Kingdom.

2. The appellant challenged the decision of First-tier Tribunal Judge M A Khan dated 16th November 2020 dismissing her appeal. That decision was set aside for inadequate reasoning and the matter resumed in the Upper Tribunal before me for remaking.

The Secretary of State's Refusal

3. It is acknowledged in the reasons for refusal letter that the appellant first made an application to revoke the deportation order two years prior to the appellant's British spouse and children moving to the United Kingdom in 2019. The Secretary of State's refusal letter noted that the appellant was convicted on 4th October 2005 at Isleworth Crown Court, and she was recommended for deportation.

4. Her application was considered under **Ruiz Zambrano v Office national de l'emploi (Case C-34/09) EU:C:2011:124; [2012] QB 265**. It was acknowledged that both the children had British citizenship and that the appellant considered that if the deportation order remained in force, she would be unable to "render the maternal obligations she owes to her British children who have entitlement to reside in the UK". It was also acknowledged that the father was visually impaired and receiving medical treatment in the United Kingdom and with the submissions was enclosed a certificate of vision impairment dated 24th October 2018 completed by an ophthalmologist at St Thomas' Hospital which assessed the husband to be severely sight-impaired ("blind"). The appellant's husband also has type 2 diabetes. Notwithstanding that, it was considered that the children had resettled in the UK and were living with their father and that **Zambrano** would not be engaged because the appellant was not their primary carer and there was no requirement for them to leave the UK.

5. Under Article 8 of the ECHR, it was stated that the Immigration Rules at paragraph A362 and paragraphs A398 to 399D set out the practice to be followed by officials acting on behalf of the Secretary of State when considering an Article 8 claim made

by a foreign criminal. Additionally, Parliament's views were set out at Sections 117A to 117D in Part 5A of the Nationality, Immigration and Asylum Act 2002.

6. It was concluded that the appellant had been convicted of an offence which had caused "serious harm", as evidenced by the court recommendation for the appellant's deportation and that the appellant "committed an offence involving the deception of the immigration authorities at port when the maintenance of an effective immigration system is paramount for the security of the UK and protection of its citizens". It was considered that the appellant's deportation was required unless an exception applied. The Secretary of State considered Section 55 based on all the information supplied and it was noted that the appellant was able to live with her children in Nigeria in a functioning family unit providing for their welfare and best interests.

7. It was not considered that it would be unduly harsh for the children to relocate to live with the appellant in Nigeria, their country of origin where they had previously lived with her. They would be able to assert their nationality in their country of birth and they will have retained their familiarity with Nigerian culture and social norms and could resume their education there. Article 8 did not guarantee the country in which the family life may be maintained.

8. Further, the relationship with the appellant's husband was formed and developed in Nigeria and progressed to marriage and these matters did not indicate that the conditions for her in Nigeria were unduly harsh.

9. It was not considered it would be unduly harsh for the children to live in Nigeria. She had lived in Nigeria for twelve years and had successfully established herself there.

10. Even if the appellant's husband did not wish to relocate to Nigeria it would not be unreasonable for the children to maintain contact with their father from abroad through modern means of communication and through his visits to Nigeria. The children could additionally receive remittances from their father in the UK to support them in Nigeria and then, should they wish to, return to the UK to take up their right of abode.

11. Alternatively, the children could live in the United Kingdom with their British father and thus assert their British nationality and benefit from any relevant rights and entitlements which such status confers.

12. The appellant had not provided evidence of further details of the children's current circumstances in the UK, including evidence of their residence here and the current caring arrangement. It was unclear when the children entered the UK and there was no evidence to conclude that the appellant's presence was needed to prevent the children from being ill-treated or their health or development being impaired. While the appellant's husband had vision impairment, there was no indication of Social Services or other agencies being involved and the school expressed no concern about the children's welfare.

13. It would appear that the appellant's husband had had vision issues for some time and was considered that there was no evidence of any adverse material impact upon the children arising from the appellant's removal from the UK.

14. She claimed to have a family life with her husband and thus paragraph 399(b) of the Immigration Rules was considered. It was accepted she had married a British citizen and it was additionally accepted that he was currently resident in the UK but no documentary evidence demonstrating a subsisting relationship had been provided, including photographic evidence, and no dictated statement or supporting letter form the appellant's sister had been furnished.

15. It was not accepted it would be unduly harsh for the appellant's husband to live in Nigeria. He had only recently returned to the UK, having married and fathered both of the children, and he had extensive experience of living in Nigeria.

16. He could receive a remittance from his sister to aid his resettlement in Nigeria.

17. It was not accepted it would be unduly harsh for the appellant's husband to remain in the UK even though she had been deported. He could enjoy the various rights and entitlements in the UK and is clearly accessing the National Health Service provisions in respect of his visual impairment without any undue hindrance and could access state support. He could also access charitable support. There was no evidence that he was dependent on the appellant and that they could remain in contact with both the appellant and her children.

18. The appellant did not meet the three limbs of paragraph 399A of the Immigration Rules. She was not socially and culturally integrated in the United Kingdom, and it was clear that there were no significant obstacles to her living in Nigeria. She worked as a banker and could seek other forms of employment should she wish to do so if they were compatible with childcare needs. She was currently living apart from her husband and her claimed children and it was considered she could maintain contact with these family members through modern means of communication.

19. It was not considered that there were very compelling circumstances which applied to her deportation.

20. In deportation cases the legitimate aim was the prevention of crime or disorder whereas in removal cases it was the maintenance of effective immigration control. Greater weight should be afforded to the public interest in deportation cases.

21. The Secretary of State observed that in a case of automatic deportation full account should be taken of the strong public interest in removing foreign citizens convicted of serious offences and also the prevention of further offences was a consideration but also the deterrence of others from committing crime in the first place. Deportation of foreign criminals expressed society's condemnation of serious criminal activity and served to maintain a robust immigration system in which

fraudulent use of documents to seek personal gain or circumvent legitimate immigration control was not to be tolerated.

22. She had failed to demonstrate that she had any relatives or other close ties in the UK.

23. Her husband's medical issues were considered in detail. It was noted he had been diagnosed with "advanced open angle glaucoma in both eyes". It was concluded that the treatment was comprised of a small variety of eye drops and that these were available in Lagos. The Home Office Country Policy and Information document Nigeria: Medical and healthcare issues dated 8th August 2018 indicated there was a general presence for specialists in ophthalmology in Nigeria.

24. It was not accepted that there were very compelling circumstances which outweighed the public interest in maintaining the deportation order against her.

25. Consideration was given to the application to revoke the deportation order and it was noted that Section 32(6) of the UK Borders Act 2007 stipulated that the Secretary of State may not revoke a deportation order made in accordance with Section 32(5) of that Act unless:

    (a) an exception under Section 33 applies;

    (b) the application for revocation is made while the foreign criminal is outside the United Kingdom; or

    (c) Section 34(4) applies.

26. It was not accepted that her case fell under Section 33 as she was not under the age of 18 and Section 34(4) did not apply as the Secretary of State had decided to refuse her application for revocation of deportation order which was signed on 17th January 2006.

27. Part 13 of the Immigration Rules provided a framework for considering whether a deportation order should be revoked under paragraph 390 of the Immigration Rules.

28. The Secretary of State concluded that given the nature of her conviction, sustaining the deportation order signed against her was in the general public interest by maintaining a robust and effective system of border control and deterring those who wished to abuse it.

29. The Secretary of State applied paragraph 391 but asserted that having reviewed her submissions on a case-by-case basis, there were no reasons to warrant revocation.

30. The Secretary of State also applied paragraph 391A but found there was no evidence of very compelling circumstances to outweigh the significant public interest in maintaining the deportation order.

31. Finally, the Secretary of State recorded that the representations had been considered but she had not provided evidence of very compelling circumstances over and above as described in the exceptions to deportation.

32. The application was refused.

33. It was made clear she did not have a right of appeal against the decision to refuse to revoke her deportation order but a right to appeal attached to the refusal of her human rights claim.

The Hearing

34. At the hearing before me, Ms Nicholas submitted that there was no question of any propensity for criminal conduct and this appellant was working as a bank manager, which implied honesty. She had spent a long period after her deportation in Nigeria and had been convicted for less than one year. Paragraph 391A applied to her circumstances. There had been expiry of ten years since the making of her deportation order. The appellant had been convicted of a relatively minor offence and she filed the claim owing to new circumstances. Her situation had changed dramatically. The Secretary of State had considered her case but applied human rights elements under Sections which were not applicable but helpful as a template. Her husband had left Nigeria as his eyesight was worsening and he expected to be helped and the children had joined him. Now his sight had deteriorated, and he could not take care of his children. He could not be construed as the main carer and the analysis was flawed. It was submitted that Section 117C only applied to the pre-deportation stage and paragraph 391A was determinative.

35. Ms Isherwood submitted that there were a lot of gaps in the evidence and in the employment letter at page 86 of the bundle the appellant used a different surname which was signed as Scott. There was again a different surname on the employment contract. The husband was a Nigerian national and it should be noted that the children spent the majority of their time in Nigeria and came to the UK in 2019. There was no evidence with respect to **Zambrano** that the appellant is the primary carer. She does have a deportation order and was a foreign criminal and looking at the Rules under paragraphs 398 and 399, she could not succeed. The appellant's husband did have a certificate of visual impairment, but the Personal Independence Payment was positive regarding the husband that he had no difficulty in communicating and hearing. Simply, there was a desire to come to the UK and there were school reports which stated that the children were not affected by the circumstances. They had previously set up their family in Nigeria.

36. Owing to the choice of leaving Nigeria the parents had shifted the responsibility of primary care to the father and there was no evidence to show with reference to **Zambrano** that the appellant ultimately was needed. There was no compulsion on the husband to leave. There was no evidence that the husband could not manage without the mother and he was in receipt of public funds and public services.

37. Ms Nicholas suggested that the allegations regarding different names and criminality checks were insufficient and new. They were not contained in the refusal letter. It was possible to infer that a blind man would need the assistance of his family because he had come to the UK not just as a lifestyle choice but because he was in desperation to save his sight.

Analysis

38. The provisions of the UK Borders Act 2007 set out as follows:

"32 Automatic deportation

(1) In this section "foreign criminal" means a person–

(a) who is not a British citizen [or an Irish citizen]1 ,

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

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that–

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

39. On reading Section 32 of the UK Borders Act 2007 ("the 2007 Act") in relation to automatic deportation it would appear that the appellant was inaccurately classified, in the reasons for refusal letter, as being subject to the automatic deportation provisions because she had not been sentenced to a period of at least twelve months under Section 32(2) of the 2007 Act and further did not fall within the parameters of Section 32(3) of the 2007 Act. It was not suggested that the appellant met the definition of a serious criminal under Section 72 of the Nationality, Immigration and Asylum Act 2002.

40. Under the Nationality, Immigration and Asylum Act 2002 Part 5A, however, the appellant can be classified as a foreign criminal.

41. The material parts of the Nationality, Immigration and Asylum Act 2002 set out the definition of foreign criminal as follows:

"117D Interpretation of this Part

(1) In this Part -

…

(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) ...."

42. The decision by the Secretary of State recorded that the appellant was considered to have caused serious harm as shown by the recommendation of her deportation because she had committed an offence involving the deception of the immigration authorities at port when the maintenance of an effective immigration system is considered paramount for the security of the UK. Further to **Mahmood v Secretary of State for the Home Department [2020] EWCA Civ 717** the views of the Secretary of State, as to serious harm, are a starting point and the reasoning of a decision letter may be compelling; but ultimately the issues that arise under Section 117D(2)(c)(ii) will be a matter for the First-tier Tribunal. Provided the Tribunal has taken into account all relevant factors, has not taken into account immaterial factors and has reached a conclusion which is not perverse, its conclusions will not give rise to an actionable error of law. It was not argued before me that the appellant was not a foreign criminal

43. Moreover, it can be seen that the Secretary of State found that the appellant had caused serious harm, not least because of the sentencing remarks. Those sentencing remarks were not before me but the refusal letter, in relation to classification of the use of a false passport and visa as an offence which has caused serious harm, I accept, is justified and legitimate because of the very significant public interest in maintaining a robust and effective system of border and immigration control.

44. I acknowledge that this appeal is made on human rights grounds and there is no appeal against the revocation of the deportation order itself, nonetheless, Section 117C also governs human rights appeals of foreign criminals following applications for revocation of a deportation order as per **IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932 and SSHD v EYF [2017] EWCA Civ 1069**

45. Section 117C sets out as follows

*"**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 -

…

(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) …."

46. The Immigration Rules set out as follows

"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) ***the interests of the community,*** *including the maintenance of an effective immigration control;*

(iv) the interests of the applicant, including ***any compassionate circumstances****.*

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

> (a) *in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or*
>
> (b) *in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,*
>
> *Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.*
>
> *391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order."*

47. **ZP (India) [2015] EWCA Civ 1197** suggests, at paragraph 22, that paragraphs 398 and 399 do not apply retrospectively to applications to revoke deportation because of the existence of paragraph 390A of the Immigration Rules.

> *"Paragraph 390A. In broad terms the effect of this paragraph is evidently to apply the 'deportation and article 8' regime of paragraphs 398-399A – which is in practice concerned with foreign criminals[3] – not only to the initial decision whether to make a deportation order but also to a decision whether to revoke such an order once made. …*
>
> *In my view the rule-maker has deliberately provided separately for the two separate situations, with paragraph 390A applying to pre-deportation revocation applications and paragraph 391 to post-deportation applications. (In its post-hearing submissions the Government Legal Department sought to rely on paragraph A398 of the Rules, which was introduced (by Statement of Changes HC 532) with effect from 28 July 2014, to support the contrary conclusion. But, as Mr Biggs submitted, a paragraph which was not in force at the date of the UT's decision can have no bearing on the analysis[4]. I need not in those circumstances set out the terms of paragraph A398, though I should record that at first sight it would not appear to support the Department's submission even if it had been in force.)"*

48. Paragraph 24 of **ZP**, however, indicates that where there is a consideration of human rights grounds retrospectively, and despite paragraphs 398 - 399A being prospective, a different approach is not required as a matter of substance.

> *"24. It does not, however, in my view follow that paragraph 391 requires a fundamental difference in approach in considering post-deportation revocation*

*applications from that which is followed in considering pre-deportation applications under paragraphs 390A/398-399A. It is true that the structure of paragraphs 398 (at the relevant time [5]) and 391 is different. In the case of the former the Secretary of State has set out herself to formulate the approach required by article 8, whereas in the case of the latter she has stated her policy but acknowledged that it should not apply where that would lead to a breach of the ECHR (in practice, article 8)[6]. It is also true that there are some minor differences of wording.[7] But the difference in drafting structure does not require a different approach as a matter of substance, since we know from MF that the exercise required by paragraph 398 is the same as that required by article 8. Likewise, while the use in the sweep-up exception of the phrase '**other** exceptional circumstances [involving] compelling factors' no doubt implies that it is only in such circumstances that the Secretary of State's general policy will be displaced by article 8, that too is consistent with the approach in MF. As for the differences in wording, they may be vexing to the purist but they are plainly not intended to reflect any difference of substance. The exercise required in a case falling under paragraph 391 is thus broadly the same as that required in a case falling under paragraph 390A or paragraph 398. Decision-takers will have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the applicant's private and family life; but in striking that balance they should take as a starting-point the Secretary of State's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there are compelling reasons to do so.*

25. *Mr Biggs argued that a fundamental difference between the decision whether to make a deportation order in the first place and the decision whether to revoke a subsisting order short of the prescribed period – and, particularly where, as here, the applicant has been deported – is that in the latter case the public interest in maintaining the order will generally diminish with the passage of time and that that must be borne in mind in striking the proportionality balance. I would accept that up to a point. Where there are compelling factors in favour of revocation the applicant's case is – other things being equal – bound to be stronger if they have already been excluded for a long period. But I would not accept that the passage of time can by itself be relied on as constituting a compelling reason for early revocation. It is inherent in the making of a deportation order that there must be a period before the deportee becomes eligible for re-admission: otherwise it would be a mere revolving-door. Mr Biggs did not contend that the ten-year prescribed period applicable to foreign criminals sentenced to between one and four years' imprisonment was itself irrational or that it inherently involved any breach of article 8. That being so, the default position must be that deportees should 'serve' the entirety of the prescribed period in the absence of specific compelling reasons to the contrary.*

Note 5 It has been changed since.

Note 6 We can ignore the Refugee Convention and the sweep-up exception because paragraph 398 (and thus also paragraph 390A) is in terms only concerned with cases where article 8 of the ECHR is in play.

Note 7 For example, paragraphs 390A and 398 refer simply to 'other factors', as opposed to 'compelling factors' in paragraph 391; and although in the former case the language of 'compelling' is introduced by the Court in *MF (Nigeria)* the actual phrase used in para. 43 is 'very compelling' and the reference is to 'reasons', not 'factors'."

49. Interestingly **Secretary of State v SU [2017] EWCA Civ 1069** confirmed, following the reasoning in **ZP (India)** at paragraph 22, that paragraphs 398 -399A applied where the appellant has yet to be deported and that this followed from the express terms of paragraph 398. In other words, paragraphs 398 did not apply to this scenario.

50. Subsequent to the decision considered under **ZP (India)** paragraph, A398 was introduced under the rubric 'Deportation and Article 8' and states

> "*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.*

51. Although Paragraphs 398, 399 and 399A of the Immigration Rules only apply if the appellant is classified as a foreign criminal under the Immigration Rules it can be seen from above, under Section 117D the appellant can indeed be classified as a foreign criminal. **OLO and Others (para 398 – "foreign criminal") [2016] UKUT 00056 (IAC)** held that although there was no definition of 'foreign criminal' in the Immigration Rules the Explanatory Notes from the 2014 Act fortified the view that the meaning of "foreign criminal" within the Rules should be considered consistently with the definition under the 2002 Act.

52. It was held by Underhill LJ in **ZP (India)** at [24] that continuation of the order was 'the proper course' unless continuation would be contrary to the appellant's human rights or there were other exceptional circumstances. **ZP India** however addressed a case where the appellant had applied for revocation *prior* to the expiry of the prescribed period. In this case, the appellant has applied for revocation *post* the prescribed ten-year period.

53. Further, reflecting **Hesham Ali [2016] UKSC 60** at paragraph 60, **HU** confirmed that when making a proportionality assessment, the starting point was the Secretary of State's assessment of the public interest reflected in the prescribed period and the court should only order revocation after a lesser period if there were compelling

reasons to do so. This indicates that the Secretary of State accepts as the 'cut off' the time period of 10 years following which there is no presumption.

54. Paragraph 399, which contains the equivalent to Exception 2 of Section 117C, 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*
>
> *...; 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.*

55. To reinforce the point that the concept of undue harshness applies under Section 117C or paragraph 399 to applications to revoke deportation orders, in **<u>IT (Jamaica) v Secretary of State for the Home Department</u> [2016] EWCA Civ 932**, the Court of Appeal considered the a case of a deportee who wished to return to the United Kingdom and who applied for the revocation of the deportation order. The Court held that section 117C of the 2002 Act applied to the appellant and Arden LJ at paragraph 2 of the judgment referred to "effectively common ground that, under section 117C of the Nationality, Immigration and Asylum Act 2002 … the deportation order may only be revoked if its retention is determined to be "unduly harsh" ("in relation to those not sentenced to a period of imprisonment over 4 years"). I make clear as observed in **<u>KO</u> (Nigeria) [2018] UKSC 53** 'unduly harsh' does <u>not</u> equate with the elevated 'very compelling circumstances' but this does not undermine the point that Section 117C applied.

56. At [27] of the judgment in **<u>KO</u> (Nigeria)**, the Court expanded upon what is meant by "unduly harsh" by reference to **<u>MK (Sierra Leone) v Secretary of State for the Home Department</u> [2015] UKUT 223 (IAC)** as follows:

> *"…'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."*

57. With reference to Section 117C, following **HA (Iraq) [2020] EWCA Civ 1176 in** terms of undue harshness it was held that *'it is not possible to identify a baseline of "ordinariness"*. At paragraph 52 of **HA (Iraq)** Underhill LJ said this

> *"The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders."*

58. In **IT (Jamaica)** at paragraph 57 it was confirmed that there should be no difference in the standard of unduly harsh when either considering making a deportation order or revoke one.

59. In this case, the deportation order was imposed on 17th January 2006 and on 17th February 2006 the appellant was removed from the UK. The appellant married her spouse in Nigeria in 2007. The appellant submitted a human rights claim and an application to revoke the deportation order on 17th February 2017. That application was now over four years ago, and it has been over ten years since the imposition of the deportation order.

60. The appellant has two British citizen children born on 27th August 2008 and 27th August 2010 who entered the United Kingdom in January 2019 with their visually impaired (blind) father. Photographic evidence was produced of the family together, the father and husband attended the hearing before me and there was a letter from the children. I accept that the relationship between the appellant and sponsor is subsisting. Had it not been subsisting I think it most unlikely the husband would have attended the hearing to support his wife after the lapse of 4 years. There is a letter on file dated 7th October 2019 from a consultant and ophthalmologist from Moorfields Eye Hospital confirming that the appellant's husband, who was then 50 years old, had "advanced primary open angle glaucoma which affects both eyes". There was confirmation in that letter that he was due for a "trabeculectomy and MMC" (Mitomycin C) but was unable to attend because he was unable to commit to the surgery and weekly follow-up as he had no support on childcare. This letter referred to his need for social support in the absence of his wife.

61. The best interests of the children are a primary factor, under section 55 of the Borders Citizenship and Immigration Act 2009, although not paramount and are not a trump card. No other consideration can be treated as inherently more significant; The children were brought to the UK in January 2019 and the older child EH was described in his school report when in Year 6 in 2019 as having made a good group of friends and having settled well. A letter dated 23rd July 2019 from Essex county

Council confirmed that he was to be placed at a secondary school in Essex from September 2019. Presently he would be in Year 8 and there was confirmation from Basildon Lower Academy that he had entered the school in Year 7.

62. The younger child was confirmed to have entered primary school in Year 4 and would now be in Year 6. Although I was not presented with any social worker's report as to the effect the separation from the mother was having, there was a letter from the younger daughter's school, and the children attend different schools, that the father had failed to collect the child until after 6pm one evening and was to be charged for staff overtime. A joint statement from the children underlined that their father 'has a hard time taking care of us and the home because of his bad sight' and that 'he cannot do this alone'. This also confirmed that the appellant their mother attended to their 'homework, cooking, clothes and so many other things [their father] cannot see'. Without their mother their family felt 'empty'. Indeed, each time they spoke over the phone they felt 'sad' because they 'missed her'. This letter was written by hand in a child's cursive script and in very simple language and I accept that it reflects the feelings and wishes of the children themselves.

63. The witness statement from the father confirmed that he had been having great difficulty in coping with the children because of his medical condition. He confirmed (which is evident from the documentation) that the children were at two different schools and he attested to the difficulty of the 'school run'. He missed appointments and was sometimes late to collect the children. That is evidenced. He confirmed that he no longer had the assistance of his sister and her three children as they had moved from her home because of overcrowding. The documentation recorded that this had been temporary accommodation. Even if he had remained on speaking terms with his sister, which he maintains he does not, it would still be difficult for her to assist now that the family have moved to Essex. The absence of any statement from the sister is thus explained to my satisfaction.

64. The Personal Independence Payment ("PIP") award to the husband dated April 2019 and sponsor (an award given to those with disabilities) recorded difficulties with preparing a simple meal, eating and drinking and managing treatments and further washing. It also noted with regard to mobility that he could not follow the route of a familiar journey without assistance. I record these details not because I find that it would be unreasonable for the appellant's husband to return to Nigeria where he has lived for many years, but to acknowledge the real difficulties he must have in caring for the children even though they are growing older. Contrary to the decision letter under appeal that the appellant's sight is only affected in one eye, the appellant's spouse is listed by Guys' and St Thomas' Hospital on 11th October 2018, as having 'advanced cupping' to both 'optic nerve heads'. As set out in the PIP documentation he cannot read signs or symbols and needs assistance to feed himself. In other words, inevitably the care of the father will fall to the children which, in my view, at their age is unduly harsh.

65. The best interests of the children are to be in one family unit. They are at an age where the older child has embarked upon his secondary school career and from the

documentation, I accept he will have settled and made friends and the younger child is a female who no doubt will need the support of her mother. They are teenagers and of different sexes. I do not accept that being apart from their mother is a long term solution particularly in view of the husband's and father's health.

66. I accept that these children have now integrated into the United Kingdom and it would not be reasonable to expect them to relocate to Nigeria. A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent, **Zoumbas v SSHD [2013] UKSC 74.** Thus, although they only came to the United Kingdom in 2019, they are British citizens, and the older child is settled in his secondary education. Again, as held in **Zoumbas** 'The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country'. That said, **Patel (British citizen child - deportation) [2020] UKUT 45 (IAC)** held that

> *"Nationality (in the form of British citizenship) is a relevant factor when assessing whether the 'unduly harsh' requirements of section 117C(5) are met. However, it is not necessarily a weighty factor; all depends on the facts".*

67. The children are Nigerian as well as British and will miss the full experience of their Nigerian heritage and extended family there. Nigeria does have an education system. I accept that the children must have been educated in Nigeria, but they have now been in the UK for a considerable period as a percentage of their lives.

68. It is not the children's fault that they have been relocated in the UK and clearly long-distance contact with their mother is upsetting for them and their care needs are compromised by the blindness of their father. That separation is I find unduly harsh in the circumstances.

69. Should I be wrong about the fulfilment of the criterion of 'unduly harsh' I nonetheless must proceed to consider whether there are 'very compelling circumstances over and above the exceptions', **Hesham Ali [2016] UKSC 60**.

70. I take into account my findings on undue harshness above. It has now been over ten years since the appellant's deportation was signed and the Secretary of State raised no additional countervailing factors as to why the appellant's deportation order should be maintained.

71. Although it was suggested that the papers from the bank were in a different name, in this case on the evidence there was a letter in the name of Anna Scott, I do note that the letter from Sterling Bank dated 20th May 2019 confirms the appellant's promotion to assistant manager and her name in that letter is given as Hassan Oluwabukola, which is the name used in her appeal, and that payslips in the same name from March 2019 to August 2019 were produced linked to the appellant. Indeed, the marriage certificate confirms the various names of the appellant. The appellant also produced a "police character certificate" (with fingerprints) for the purposes of her employment dated 28th October 2019. I accept therefore it is unlikely that she would have committed further offences and be employed by a bank.

72. The appellant was convicted once with a sentence of ten months in prison. Her offence, albeit serious, was neither violent nor sexual nor involved drugs. I acknowledge that the deportation was as a result of a court recommendation, but I was not provided with the court's sentencing remarks and contrary to the decision letter it would appear that the automatic deportation regime does not apply to the appellant.

73. That is not to undermine the weight to be attached to the public interest expressed through the deportation order. Assessing the public interest in deportation does not just involve the likelihood of reoffending but also includes having regard to the deterrent element and the significance of deportation as an expression of society's revulsion at the offending and weight should be given to it. The immigration rules themselves set out the position of the Secretary of State.

74. Paragraph 391 of the Immigration Rules refers to the continuation of the deportation order as being 'the proper course' 'unless 10 years have elapsed since the making of the deportation order'. This appellant has 'served' the ten years since the imposition of her deportation order.

75. Paragraph 391A states that 'in other cases' revocation will not normally be authorised unless the situation has been materially altered either by a change of circumstances or by fresh information not previously before the Secretary of State.

76. It is clear that the circumstances have altered considerably. There are two British citizen children who are in the United Kingdom whom I have found it would be unduly harsh to be removed to Nigeria owing to their schooling and other factors I have detailed above.

77. Albeit the weight to the public interest may have lessened, in a case where the appellant has been deported for an offence which has caused serious harm, there remains weight to be attached to the public interest. The approach to be adopted was succinctly set out by the Senior President in **EYF (Turkey) [2019] EWCA Civ 592**. It was accepted as per **SU** that 'there is no presumption either way after the 10 years have elapsed' and that each case needed to be considered on the merits. Additionally, **EYF** noted that paragraph 391(a) was amended subsequent to **ZP**, and stated as follows:

> *"28. Within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy. That is consistent with the decision of this court in ZP (India). Once the ten year period has elapsed it becomes easier to argue that the balance has shifted in favour of revocation on the facts of a particular case because the presumption has fallen away; but that does not mean that revocation thereafter is automatic or presumed. The question of revocation of a deportation order will depend on the circumstances of the individual case".*

78. It remains the case that the appellant was convicted and sentence for an offence of subverting the immigration system and given the nature of the offence the Secretary

of State correctly that there is an interest in maintaining a robust and effective system of border control and in deterring those who wish to abuse it. Nonetheless, the Secretary of State has herself set out the 'prescribed period' with which the appellant has complied, and she has made a formal application for revocation of the order.

79. When assessing proportionality, I must also have regard to Section 117B. In considering the public interest question, which is whether the interference with the right to respect for someone's private of family life is justified, I must have regard to the following:

(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.

80. The relationship between the appellant and her partner was not formed when she was in the UK unlawfully because they were married in Nigeria on 17th March 2007 and the children were born following that. It was accepted at paragraph 31 of the Secretary of State's decision that the relationship was formed when the appellant was in Nigeria. The relationship has been developed abroad in Nigeria and thus weight must be given to the relationship under Section 117B (4). I also take into account that the children particularly the older child has entered a stage of his education such that it would be unreasonable to expect him to relocate.

81. I accept that the appellant speaks English as she has lived in the UK and her family speak English. She has demonstrated that she has worked as a bank employee in

Nigeria and thus I accept that she is not at present financially dependent on the state and that as a bank employee it is very likely that she will find work and be independent. She does not appear to have had significant health issues on the basis of her working history. Language and finance are however neutral factors.

82. I also consider the Article 8 rights of the appellant's husband and her children**,** **Beoku-Betts v SSHD** [2008] UKHL 39**. T**here are compassionate circumstances not least the apparently worsening health of the appellant's husband and because of the increasing strain on the children. I have found the impact on the children to exclude the appellant would be unduly harsh and in view of the overall circumstances I find there are compelling circumstances.

83. Turning back to paragraph 391, it has now been over ten years since the appellant's deportation order was signed. In this particular appeal that there have been significant material changes since the imposition of the deportation order. The Secretary of State raised no additional countervailing factors as to why the appellant's deportation order should be maintained. Although it was submitted in the reasons for refusal and submissions that the protection of society against serious crime is so important that it can properly be given greater weight in the balancing exercise, and a robust system maintains public confidence, I have explored that the seriousness of that offence as reflected in the sentence of 10 months in prison and the fact that the appellant would not be subject to the automatic deportation provisions. I have considered all the factors outlined including giving weight to the public interest above and conclude that the maintenance of the deportation order, in other words to exclude the appellant from the UK, is in breach of her human rights.

84. For completeness it is clear that there is no compulsion for the appellant's husband to leave the UK and as such there is nothing to suggest that EU law is engaged; that family life is adversely affected will not of itself constitute a factor capable of triggering the Zambrano principle, **DH (Jamaica) and AB (Morocco) [2012] EWCA Civ 1736**.

85. The Appellant's appeal is allowed on the basis that the refusal of the Appellant's human rights claim made in the context of the decision refusing to revoke the deportation order is unlawful under Section 6 Human Rights Act 1998 (Article 8 ECHR).

Notice of Decision

The appeal is allowed on human rights grounds.

Signed H Rimington Date 17th October 2021

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award owing to the complexity of the appeal.

Signed Date

Upper Tribunal Judge Rimington