Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00359/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 March 2019	**On 12 June 2019**

Before

LORD UIST
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K A G
[ANONYMITY ORDER MADE]

Respondent

Representation:
For the appellant: Ms Alice Holmes, a Senior Home Office Presenting Officer
For the respondent: Mr Taimour Lay, counsel instructed by Duncan Lewis solicitors

DECISION AND REASONS

Anonymity order

The Upper Tribunal has made an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether

directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the appeal of the claimant against his decision to make a deportation order against him pursuant to section 32 of the UK Borders Act 2007, following the claimant's conviction for robbery in 2010 which resulted in a 3-year custodial sentence. The appellant is a citizen of Trinidad and Tobago.

Background

2. The claimant was born in Trinidad in 1983. The claimant met his now wife, who is a British citizen, when she was on holiday in Trinidad in 2004 and they had an off-and-on relationship between 2006 and 2009. The claimant's wife had a number of holidays to Trinidad, none longer than 2 weeks, and was not familiar with its customs or culture.

3. In 2008, the claimant came to the United Kingdom as a visitor. He would have been 25 then. He returned to Trinidad at the end of his visit in 2009, but he entered the UK again on a visit visa in 2009 and this time he did not embark. In 2009 his now wife joined him in the United Kingdom and he moved in to her Council maisonette in London.

4. On 18 August 2010 the claimant committed the index offence of robbery, in which he was convicted of being one of a group of 10 men who attacked a lone man on his way home, stealing a bag containing 5 passports and a mobile phone from him. The man was on his mobile phone and distracted; the judge regarded him as vulnerable. He was 'attacked and hit, punched and robbed in a very nasty and unpleasant way' by the group of men, and the claimant was later identified by clothing he wore at the scene, and found to have the 5 passports which had been stolen in the attack.

5. The appellant was a man of previous good character, but the sentencing judge took a very serious view of the offence. He noted that the claimant had defended the case and therefore received no credit for an early guilty plea. He found the robbery to be at level 2, with a starting point of 4 years, and a range of 2-3 years. He imposed a 3 year sentence, noting that 'this was a very nasty incident and probably occurred because you were without money and footloose, and had attached yourself to a gang'.

6. On 4 February 2011 the Secretary of State served the claimant with a minded to deport letter. In reply, the claimant made representations based on his family and private life under Article 8 ECHR. At that time he had one child from a former relationship in the United Kingdom, and one in Trinidad and Tobago, also from a former relationship, as well as his relationship with his then partner, now his wife, who had two children of her own. They were not married and had no children together.

7. The claimant and his wife are in a committed relationship, after some initial difficulties. They married in June 2013. Duncan Lewis made further representations in 2011, 2013, and twice in 2014, so the Secretary of State would have been aware that the claimant had married his wife and that she was pregnant with their first child.

8. On 30 January 2014 the Secretary of State made a deportation order, and it was served on the claimant on 14 February 2014.

9. The following six children are potentially affected by the claimant's circumstances:

   (i) The claimant's 15 year old son from a former relationship, born in 2003, who lives in Trinidad with his mother and her other two children. They speak by telephone or Skype every week and he has visited the United Kingdom at Christmas 2012 for two weeks to spend time with his step-siblings and his United Kingdom extended family.

   (ii) The claimant's nine year old son, born in 2010 from a relationship with a woman in the United Kingdom during 2009/2010. That relationship is over, but he sees the child, who will now be nine years old. Both mother and child are British citizens.

   (iii) The claimant's wife's two children from a former relationship: her 20 year old daughter born in 1999 and her 14 year old son born in 2004. Their father is in the United Kingdom and his consent would be needed if the son, still a minor, were to travel to Trinidad and Tobago and live there. Both of the wife's children are British citizens.

   (iv) The claimant's children with his wife: their four year old daughter born in the United Kingdom in January 2015 and their one year old son born in June 2017, who is now nearly two years old. Both children are British citizens.

10. The claimant and his wife, and all four of the children in their household, are Catholics and worship locally at St Ignatius Catholic Church.

First-tier Tribunal decision

11. On 22 September 2014 First-tier Judge Canavan (as she then was) allowed the claimant's appeal, both under the Immigration Rules HC 395 (as amended) and Article 8 ECHR.

12. The judge made the following relevant findings of fact and credibility. She found that the claimant had regular contact with his son in Manchester from a previous relationship; that he was present in the child's life, provided him with emotional support and was an important influence as a father; that the boy spends time with the claimant, his wife and their children at weekends and in the school holidays and that his wife buys the boy toys and other items when she can. The judge found that it would be important for this child to maintain regular personal contact with his father and that it would be in his best interests to remain in the United Kingdom and for the

claimant, his father, to remain here and continue to provide him with ongoing practical and emotional support.

13. The judge found that the claimant had been living in the same household as his step-children for four years, that he saw them on a daily basis, but they had very limited and sporadic contact with their natural father. She accepted that the claimant had taken on a *de facto* role as their father.

14. The Secretary of State accepted that it was likely to be in the best interests of all three of these children, the boy in Manchester and the step-children, his wife's children, to remain in the United Kingdom and in the care of their respective mothers. They were all British citizens and it was in their best interests to be brought up by, or in contact with, the claimant. There was another child on the way, but at that date the couple had no children together yet.

15. The judge found that the claimant presented a low risk of reoffending, noting a letter from his Offender Manager confirming that he complied with the conditions of his supervision and 'presented with a positive and respectful attitude'. The judge did not have the OASys report before her, but considered that its absence indicated that he was not considered a sufficient risk for an OASys report to be prepared. We do have the OASys report and will consider its contents.

16. The judge found that it would be unduly harsh on the wife and children for the family to be fractured on a long-term basis by his deportation from the United Kingdom and that his removal would breach the United Kingdom's international obligations under Article 8 ECHR. At [39] in her decision, she wrestled unsuccessfully with the new section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) and how that related to paragraph 398 of the Immigration Rules. She accepted that the claimant was a foreign criminal under sections 32 and 33 of the UK Borders Act 2007 but found that he had brought himself within one of the Exceptions in section 33(2) thereof and that automatic deportation was not required.

17. The judge allowed the appeal under the Immigration Rules and on human rights grounds.

Permission to appeal

18. The Secretary of State appealed to the Upper Tribunal, arguing that the First-tier Tribunal had not properly balanced the public interest against the claimant's circumstances, relying on *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550 and arguing that the claimant had not shown that there were very compelling circumstances over and above the circumstances set out at Exception 1 and Exception 2 in section 117C and/or paragraphs 399 and 399A of the Rules, such that paragraph 398 was triggered. The public interest outweighed the best interests of all three children, two of whom were not the claimant's natural children, and the other one did not live with him.

19. Permission to appeal was granted on the basis that the First-tier Judge had not identified the very compelling circumstances referred to in paragraph 398. Permission to appeal was granted on all grounds.

Upper Tribunal hearing [2015]

20. The appeal to the Upper Tribunal was heard by Mrs Justice Carr DBE and Upper Tribunal Judge Conway. In their decision, sent to the parties on 6 January 2015, they found no material error of law in the decision of the First-tier Tribunal. They noted that it was accepted that the claimant could not bring himself within paragraph 399 or 399A (and therefore, at least by implication, Exceptions 1 and 2 in section 117C).

21. They considered that the judge had applied the correct legal principles and reached a sustainable conclusion, for proper reasons, that deportation would be a disproportionate interference with the claimant's family life under Article 8 of the ECHR.

22. The Upper Tribunal dismissed the Secretary of State's appeal and upheld the decision of the First-tier Tribunal. The Secretary of State appealed to the Court of Appeal.

Court of Appeal

23. On 30 May 2017 Jackson LJ, with whom Rafferty LJ and Kitchin LJ agreed, gave judgment allowing the appeal. The neutral citation for their judgment is *KG (Trinidad) v Secretary of State for the Home Department* [2017] EWCA Civ 789. The Court of Appeal considered that the First-tier Tribunal had fallen into error in failing to apply the test set out as Exception 1 or Exception 2 in section 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) and paragraph 398 of the Immigration Rules:

> "24. …the judge simply did not apply that test. Instead, she applied the less stringent test set out in the previous version of the Rules. The judge carried out a freestanding Article 8 analysis. She had placed on one side of the scales the high public interest in deporting foreign criminals. She placed on the other side of the scales the personal circumstances of the claimant, his wife and the children. She did not focus on the question whether there were 'very compelling circumstances over and above those described in Exceptions 1 and 2'. …
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> 26. …both before the First-tier Tribunal and before the Upper Tribunal, the claimant conceded that he did not fall within Exceptions 1 or 2. That issue was therefore not the subject of evidence or argument before those Tribunals. In these circumstances, I do not believe that this Court on hearing a second appeal can reopen that question. On the other hand, if we decide to remit this case to the Upper Tribunal for a re-hearing, at that stage the claimant certainly should be permitted to withdraw the concession. …
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> 29. In my view, it does not follow from the findings of fact made by the judge that the test set out in the statute and the Rules had been satisfied. I do not propose to comment on the specific facts in any detail because I have come to the conclusion that there must be a re-hearing with evidence. …

> 31. In those circumstances, if my Lord and my Lady agree, this Court will allow the Secretary of State's appeal and direct as follows: (1) this matter should be remitted to the Upper Tribunal with a direction that the First-tier Tribunal failed to apply the correct statutory test; (2) the Upper Tribunal is to rehear [the claimant's] appeal against the deportation order. That rehearing should proceed on the basis of such further evidence as the parties wish to adduce; (3) at the remitted hearing, the claimant will be at liberty to withdraw his concession that he falls outside Exceptions 1 and 2. No doubt Counsel will be able to agree the precise wording on the basis of the substance which I have just outlined."

The Court of Appeal remitted the appeal to the Upper Tribunal and directed a rehearing of the appeal in the Upper Tribunal.

24. The Court of Appeal specified that it was open to the claimant to withdraw his concession that he could not bring himself within either Exception 1 or Exception 2 in section 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) and/or paragraphs 399 and 399A of the Immigration Rules.

Upper Tribunal proceedings [2017-2019]

25. The appeal was listed before Upper Tribunal Judge King on 23 August 2017, but the claimant was unable to attend the hearing as three days earlier, on 20 August 2017, he had received a stab wound and was not well enough to attend. The wound was not deep, but it had required treatment.

26. The hearing of the appeal was adjourned to 17 April 2018, and panel directions were given. The claimant made a legal aid application but did not receive a response until 12 December 2017; there were issues with expert evidence which were not resolved until February 2018, and the selected independent social worker was unable to offer an appointment to see the children until 19 May 2018.

27. On 9 April 2018 Upper Tribunal Judge Dawson reluctantly adjourned the hearing again, directing that the claimant file a statement of case and indicate whether he did wish to withdraw the section 117C/paragraph 399 and 399A concession, and a number of other matters.

28. The appeal was heard on 11 July 2018 before Mr Justice Goss and Upper Tribunal Judge Kopieczek, who dismissed the appeal. However, pursuant to rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008 [as amended], on 15 February 2019, Upper Tribunal Judge Kopieczek set aside that decision in the light of the judgment of the Supreme Court in *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53, and invited representations thereon.

29. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing (27 March 2019)

30. At the hearing before us, there was no further oral evidence but we received statements of case from both parties and admitted into evidence the following documents: an

OASys report, up to date to April 2012; the report of Alison Tyrell, who describes herself as an independent social worker; and witness statements from the claimant, his wife, her two children and from her grandmother, who brought the wife up and to whom she and the claimant refer as her mother.

31. We have had regard to all these documents, and to the evidence to which our attention was drawn at the hearing, as well as the parties' oral and written submissions.

OASys report November 2011 (reviewed post-release April 2012)

32. The OASys assessment is up to date to 11 April 2012. The claimant is recorded as having maintained that he had no direct involvement in the offence, despite his conviction as a participant. He admitted that he had been keeping bad company, with a group of 10 or so much younger men with whom he played football in the park, but had severed all links with that group of friends now. He enjoyed drinking alcohol on social occasions but did not consider that he had an alcohol problem. One evening, the gang attacked an unknown man and stole from him a bag which contained five passports and a mobile telephone. The claimant knew it was not the first time they had done this kind of thing; the author of the OASys report considered that raised some concerns, as the claimant had continued to associate with the group, although he knew of their previous criminal activities.

33. The victim was very distressed: he was a man with an Eastern European-sounding name, who spoke only broken English. He had a deep cut above his right eye and needed medical treatment for his injuries. The claimant felt sorry for the victim and said that his only involvement was to have ridden his bicycle around the park, taken back the bag with the passports in it and gone looking for the man to return them but without success. The claimant was arrested later, in possession of the passports, mobile telephone and bag, which looked bad and that was why he had been convicted despite his not guilty plea. We note that the sentencing remarks say that at court the claimant denied that the bicycle was his.

34. The claimant said he was brought up in Trinidad but completed his education in the United Kingdom. He had no qualifications and had difficulty finding a job. He had previously worked as a barber, and had been working part time as a handyman for a year before his arrest in 2010. In prison, he had worked as a wing cleaner, and completed a first aid course. In Trinidad, the claimant had been a qualified electrician, a job he left to visit his now-wife in the United Kingdom. The claimant said that the reason he overstayed in 2009 was that he had lost his own passport, and that he had never previously been in trouble. They had known each other for eight or nine years but only got together in 2010 and married in 2013. He had lost his passport in 2009 so he could not go back to Trinidad and was totally reliant on his fiancée for food and lodgings. He was not struggling with his finances before his arrest, and had no debts. He said that there was no resentment within the relationship at his inability to work and provide for his family. At 5.6 the claimant said 'he would like to return to Trinidad as can resume work as electrician there, and his wife intended to move as well (she has family there as well)'.

35. The risk prediction scores were very low indeed: 4-7% in the first year, 8-13% in the second year. We take note that the claimant was of previous good character and has not re-offended in the seven years since his release.

Independent Social Worker's report

36. The claimant relies on an independent social worker's report from Alison Tyrell, BA (Hons) Social Work, dated 14 April 2018. Ms Tyrell is employed as a social worker in adult social care, as a best interest assessor. She has also undertaken independent social worker reports for various courts and tribunals since 2012. She says in her report that she has experience of assessing people with no recourse to public funds and unsettled immigration status, including those who are HIV-positive or have experience of trauma, torture, sexual, physical and psychological abuse.

37. Ms Tyrell's report was based on a two hour meeting with the claimant, his wife, the claimant's step-children (his wife's adult daughter and 14-year-old son) and their two young children, now aged four years and one year old. She approached her task principally on the basis that the claimant would be deported to Trinidad and Tobago without his family members.

38. Ms Tyrell did not have any contact with the natural father of the wife's children, although apparently he is in the United Kingdom, nor with those children's paternal siblings and relatives. She was not given contact details for the claimant's two previous partners in Trinidad and Manchester, nor the sons he has by each of them. She did not speak to any of the wife's relatives: the grandmother and grandfather who raised her, her uncle and aunt in London, who are more like siblings to her, or her mother, her mother's new partner, and the two half-siblings the wife has from her mother's current relationship. Ms Tyrell did see the witness statement from the claimant's former partner in Manchester which described the relationship between the claimant and her son, and between the boy and the rest of the extended family.

39. Ms Tyrell's report notes that the claimant's wife had a complex family history, having been brought up by her grandparents, because her mother could not care for her adequately, having lifelong mental health and substance misuse issues. The wife's mother had become pregnant very young and handed the claimant's wife over to be brought up by her own parents when she was six months old. The wife's mother left her parents' home when the wife was an infant; she is involved with another addict and the wife's contact with her natural mother is 'sporadic' and 'unreliable'.

40. The wife's natural father was not really involved in her childhood or her adult life, but her mother had gone on to have three more children, two of whom survived, while one died in infancy. One, now age 21, had grown up in care but was now in independent living arrangements in south London. The wife had contact with both of them.

41. The claimant's wife also had four other uncles and aunts, with whom she was brought up as a sibling. One had gone to live in America; one had died; but she had contact with both of the others, who live in Enfield and Hatfield, and with their children.

42. The claimant's wife's grandparents, who had brought her up, were now elderly and were estranged from each other, though they still shared accommodation. Her 76 year old grandmother was no longer working and had some mobility difficulties, but she was able to have the 14-year-old boy at least four evenings a week after school, and would cook meals for the claimant's wife to take home, and generally support the wider family arrangements.

43. Ms Tyrell assumed that if the claimant's wife accompanied the claimant to Trinidad and Tobago, she would lose contact with her grandparents, her two surviving siblings, and her uncle and aunt in London and all of their children. Ms Tyrell asserted, without any detailed reasoning, that in Trinidad the claimant's wife would suffer a decrease in her mental health and well-being as she was used to the stability and security which her efforts had achieved for the family.

44. The claimant's wife expected to have financial difficulties if she remained in the United Kingdom without him. Childcare costs in the area were prohibitive. The claimant's wife had been able to accommodate and provide financial security for herself and the children, giving them the emotional and practical support they needed to succeed, but it was not clear to Ms Tyrell whether she could replicate this for the children if she moved with the claimant to Trinidad and Tobago. Her 14 year old son was about to start his GCSE examinations and his education would be disrupted if he left.

45. Ms Tyrell understood that the claimant's step-children regarded the claimant as their 'father' but her elder child, the daughter, was already an adult. She had work, studies and friends in the United Kingdom and some extended family members here. The younger child, a son, had a father in the United Kingdom whose consent for him to live abroad was regarded as unlikely, suggesting that he does still have a relationship with his father. Both children saw their natural father and paternal siblings only infrequently but if they went with the claimant to Trinidad and Tobago that opportunity for direct contact would be lost.

46. If the claimant's wife were to move to Trinidad and Tobago with the younger two children, neither of whom is yet of school age, Ms Tyrell considered that there would need to be a referral to social care in respect of the 14-year-old boy. She did not interview his natural father or his paternal siblings. Nor did she investigate whether he could live with his mother's grandmother, two streets away, who already has him four or more evenings a week after school and cooks for the extended family.

47. As regards accommodation and finances, Ms Tyrell noted that the family lived in a ground floor Council maisonette, with two bedrooms for the six of them. The wife's grandparents lived close by, just a couple of streets away. The claimant had moved in with his now wife during 2009. The natural father of the elder two children in the house paid no maintenance and the claimant was not permitted to work, so finances for the family depended on the claimant's wife and her adult daughter. The claimant found that difficult and undignified; he would rather be working, and if he did the wife hoped that she could work less and spend more time with the children.

48. The claimant's wife worked as a Health Records Library Clerk at Moorfields Eye Hospital in London, having returned early from maternity leave following the birth of her youngest child, for financial reasons. The household finances were based on her income from that job, child benefit for her three minor children, and child tax credit. Her elder daughter was also working at the Moorfields Library, and contributing to the family income.

49. The care for the younger children was provided by the claimant. The claimant's wife considered that she would need to pay for 70 hours of childcare per week if the claimant were not available to help; if she could not afford childcare, she would have to stay home and live on benefits. We note that there was no investigation by the independent social worker as to what the extended family might be able to do to help her.

50. If they all went to Trinidad and Tobago, the claimant said that his own parents and siblings would not offer them financial support or accommodation, even in the short term. His son in Manchester would not be allowed by his mother to come and live with him in Trinidad. The claimant and his wife did not feel that it was realistic to relocate the family to Trinidad, but if the wife remained behind without him, she would have financial difficulties and would lack the physical, emotional and practical support which the claimant gave her.

Claimant's witness statement [8 June 2018]

51. The claimant relied on his witness statement of 8 June 2018, in which he emphasised his closeness to all his children and extended family members in the United Kingdom. He said that his wife's grandmother helped by cooking regularly for the family and providing financial support when needed. The claimant washed the clothes, did the vacuuming and took the youngest child to nursery. They were a family unit and separation was unthinkable. The family in the United Kingdom needed him; his son in Manchester could not come to Trinidad and Tobago as his mother would not allow it; his step-children were settled, one in work and one at school; and his younger children were too young to do without him.

52. The claimant's mother and father still lived in Trinidad and Tobago, in the family home, and were still married. When he had lived there the claimant worked odd jobs and lived at home, with his parents' financial support. They had a 3-bedroom house but they were letting the unused rooms for additional income and would not be able to give him financial support if he returned. He considered that if he returned, he would find it difficult to get work as he would not know people and would be treated as a tourist after 10 years in the United Kingdom.

53. Trinidad and Tobago was not a safe country and the claimant did not want to raise his children there. When his wife visited for a holiday years ago, before they were married, she developed a heat rash. He thought that his family would not be able to adjust to the culture, leaving behind their lives and their education: everything was different, the weather, the food, bathing with a bucket and cup, and so on.

Claimant's wife's evidence

54. The claimant's wife had also provided a witness statement, which said that she was born in London, the only child of a troubled mother who has mental health and drug addiction problems. She was raised by her grandparents, along with her four other uncles and aunts. The claimant's wife has lived all her life in the United Kingdom and her 76 year old grandmother is here, as are her work and her friends. She has no immediate family in Trinidad.

55. The claimant's wife's grandfather is a self-employed electrician, separated from her grandmother but still sharing a house with her; he is neither able nor willing to look after her grandmother. Her grandmother takes care of all the household expenses with her pension; the claimant's wife is her carer, for whatever she needs on a daily basis, and they live only two roads apart.

56. The claimant's wife met the claimant on a visit to Trinidad in 2004, returning in 2006 for a two week holiday, when their relationship began. The claimant came here on a six months visit visa in August 2008, returning to Trinidad and Tobago in February 2009. The claimant was then living with his previous partner, but they also continued to be in a relationship. Between 2006 and 2009, they continued to meet both in Trinidad and the United Kingdom, the relationship becoming exclusive in 2009, when the claimant moved in to her Council flat. The couple got engaged in July 2010, but waited three years to marry as they were unaware that they did not need permission from UKVI to marry. It is clear that the claimant's wife knew he was here irregularly from at least 2010 (see [2] of her statement). They did nothing about his status 'because [the claimant's wife] was scared'.

57. While the claimant was detained pending trial and during his imprisonment, the claimant's grandmother helped with the children, picking them up from school and so on. She is more fragile now, since 2012 when he came out of prison, and she calls on the claimant's wife whenever she needs anything. During the claimant's pre-trial detention and imprisonment, his wife told his step-children that he had returned to Trinidad for a while to sort out a few things. The children did not question the explanation, but they found it difficult to cope without him. The claimant had then been their father figure for just over a year. The claimant would send cards and letters, and call when he could, but it was not enough.

58. The claimant was not released until 21 March 2012, his licence having begun on 18 February 2012, but that was followed by a period of immigration detention. For the next two years, until their first child together was born, the claimant's wife worked full time in retail and supported the family. For the last part of 2014 she was unemployed and claiming benefits to support the family. She began to work at Moorfields Eye Hospital in December 2014, for just three months before her maternity leave began in February 2015, but returned to work after two months as her maternity pay was not enough to support the family financially. She is still working.

59. The claimant undertook full-time care of the baby girl, who was just two months old when his wife returned to work in February 2015. The family could not function

without him; it would break them emotionally and physically, and Skype or other technology was no solution. The claimant's wife considered that it was not her eldest - daughter's responsibility to care for her own brother and her step-siblings; it would be unfair on her and stop her working, and she was only just establishing a life for herself.

60. The 14-year-old had a strong bond with the claimant, who would attend parents' evenings for both his step-children, accompany the boy to football practice, and spend time going swimming or bike riding with him. When the claimant's son who lives in Manchester came to stay on weekends or holidays, they would all do family activities together.

61. The claimant's wife said that she would not feel safe if she relocated with the children to Trinidad, due to the crime rates there. The son in Manchester and the claimant's wife's elder daughter would not come, in any event. She did not think that her elder son's father would consent to him leaving the United Kingdom, although their contact was sporadic. The claimant's wife would have to choose between her marriage and the children. She loved the claimant with all her heart and did not want to be separated from him or their children.

Other witness statements

62. The bundle contains witness statements from the claimant's step-daughter, who says she would miss him and that he is a great family figure. She does not want the family to break up and is not willing to live in Trinidad.

63. The claimant's step-son says that he only sees his natural father very rarely and that the claimant is a good father, always there when needed, supportive of him, and giving him good advice. He particularly enjoys the claimant watching him play football: they have 'boy time' afterwards and go for something to eat. He has repeatedly asked his natural father to come and watch him play, but 'he never turns up'.

64. The Manchester-based mother of the claimant's 10-year-old son says that father and child have regular contact and have a lot of fun together. The claimant is his only father figure; he keeps his promises and never lets the boy down. If the claimant were to be removed, journeys to Trinidad would be prohibitively expensive and they would not be able to go often. The relationship would start to fade, and the boy was just of an age when he was beginning to really need fatherly support and advice.

65. A witness statement from the claimant's wife's grandmother says he is a very good husband and father, willing to help whenever possible. Whenever she called him, he always came, and he put his family first at all times, wanting the best for them. Her own children (the wife's uncle and aunt) were jealous of the bond she had with the claimant. The claimant had grown up and matured; she was very proud of him and considered him her son. The two of them helped the grandmother with shopping and household tasks. She would be unable to visit them in Trinidad and Tobago as she was old and had mobility difficulties.

Upper Tribunal hearing

66. At the Upper Tribunal hearing, we had the benefit of skeleton arguments for the respondent from both Ms Holmes and Ms Rhona Petterson, another Senior Home Office Presenting Officer. The claimant relied on a skeleton argument prepared for the July 2018 hearing, from which it is clear that he had withdrawn his concession that he could not bring himself within either Exception 1 or Exception 2 in section 117C.

67. We have had regard to both the oral and written submissions, which are a matter of record, and to all the documents to which our attention was drawn.

Legal framework

68. Section 117C so far as relevant is 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."

69. We have regard to *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53 and we remind ourselves of the need to take a 'real world' approach to the situation, on the basis that the public interest requires the claimant's removal, and then to consider the best interests of the children and the effect upon them of his removal. We are also guided by the decision of the Upper Tribunal in *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), handed down on 13 February 2019, in which the judicial headnote is as follows:

> "*(1) In KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53, the approval by the Supreme Court of the test of "unduly harsh" in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, formulated by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), does not*

mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it.

(2) The way in which a court or tribunal should approach section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State [2016] EWCA Civ 662.

(3) Section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of KO (Nigeria); namely, those who have not been sentenced to imprisonment of 4 years or more, and those who have. Determining the seriousness of the particular offence will normally be by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation; but the ultimate decision is for the court or tribunal deciding the deportation case.

(4) Rehabilitation will not ordinarily bear material weight in favour of a foreign criminal."

70. We turn first to the decision of the Court of Appeal in *NA (Pakistan).* This claimant is a 'medium offender' as defined at [14] in the judgment of Lord Justice Jackson, who gave the judgment of the Court. Medium offenders can escape deportation under the Rules if they can bring themselves within the safety nets in paragraph 399 or paragraph 399A of the Rules. Only paragraph 399 is potentially applicable here. In the amended statutory scheme, medium offenders need to bring themselves within Exception 1 or Exception 2 (in this case, only Exception 2 has been argued). The current version of paragraph 398 of the Rules provides for 'very compelling circumstances' over and above the Exceptions, on Article 8 proportionality grounds (see [27] in *NA (Pakistan)*).

71. At [32]-[34], the Court of Appeal found that such 'very compelling circumstances' must be more than, say, ageing parents in poor health or the natural love between parents and children, and that although the best interests of children carry great weight,

> "…it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals."

72. At [36], the Court of Appeal tells us how to proceed:

> "36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in *MF (Nigeria)*), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act."

73. With this guidance, we proceed to examine the facts of this appeal.

Analysis

74. We approach this appeal on the basis that the error of law decision has been made and that it is our task to remake the decision on deportation and Article 8 ECHR, starting from the findings of fact made by Judge Canavan, but having regard to the new evidence advanced by the claimant. We begin with section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended). We note that the appellant's concession that he cannot meet Exception 1 or Exception 2 has been withdrawn as the Court of Appeal suggested.

75. In this case, the claimant is a foreign criminal and his deportation is in the public interest. The offence in question was undoubtedly serious. We note the very low risk of future harm in the OASys report and that the claimant had no previous offences and has not offended again in the seven years since his release. That is to the claimant's credit, but not dispositive of the appeal. The appellant has not acknowledged his responsibility for the offence of which he was convicted, without which there can be no rehabilitation: in any event, applying *RA,* rehabilitation is unlikely to avail him.

76. The claimant received a sentence of three years for his offence, making him a medium offender. Under section 117C(3), the public interest requires his deportation unless he can bring himself within one of the Exceptions. The claimant has been in the United Kingdom only since 2009 (ten years) and is now 35 years old. Exception 1 does not avail him as he has not been lawfully resident in the United Kingdom for most of his life.

77. We turn, therefore, to Exception 2. It is accepted that the claimant has a genuine and subsisting relationship with his wife, who is a qualifying partner as she is a British citizen, and with all of his British citizen children, and his step-children, who also are British citizens. The question for the Upper Tribunal is whether the effect of his deportation on his wife and those children would be unduly harsh.

78. We accept, as did the First-tier Tribunal, that there is family life between the claimant, his wife, her children, and his three children in the United Kingdom. We accept that the wife does not wish to live in Trinidad and Tobago and that she will find it difficult if he leaves, both financially and emotionally. We are not as much assisted by the independent social worker report as we had hoped, due to the narrow focus which the social worker applied, interviewing only the primary family group and none of the extended family, not even the grandmother, who lives so nearby.

79. What is apparent is that the claimant's wife has worked extremely hard to blend her complicated family ties and to allow all the children to know each other and to feel welcome in her home. She has made contact with her uncle and aunt in the United Kingdom and their children, and kept up contact, albeit with difficulty, with her own mother and her step-siblings, and she is close to, supportive of, and supported by her 76 year old grandmother, who brought her up, has one of the children after school, cooks for her and lives just two streets away in rather difficult domestic circumstances. There is no investigation in the social work report as to whether the claimant's wife, if he is removed, could combine forces with her mother, or receive support from her

uncle or her aunt in London, to assist her with the younger children, nor, indeed, whether her elder daughter could assist.

80. There is also no evidence that the effect on the claimant's children and step-children would be more than 'duly harsh' as the Supreme Court put it in *KO (Nigeria).* The Court of Appeal in *NA (Pakistan)* found that the desirability of children being with both parents was 'not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals'. We consider that the 'unduly harsh' test in Exception 2 is not met.

81. We ask ourselves, therefore, whether there are any exceptional circumstances over and above Exception 1 or Exception 2, which make the claimant's removal a breach of the United Kingdom's obligations under Article 8 ECHR. We do not find that there are: the evidence before us concerns the familial network and its operation and that has been taken into account already in the consideration of Exception 2.

82. It follows, therefore, that the strong public interest in the deportation of foreign criminals outweighs the family life in this appeal and that the claimant's appeal must be dismissed.

DECISION

83. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law. We set aside the previous decision. We remake the decision by dismissing the claimant's appeal.

Date: 3 May 2019 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson