Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02766/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2021	**On 2 March 2022**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe, Counsel, instructed by ABS Solicitors LLP
For the Respondent: Mr S Whitwell, 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 him or any member of their 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. This is a re-making of the appellant's Article 8 ECHR appeal brought in the context of deportation proceedings.

2. The remaking is required following the decision of the Upper Tribunal dated 10 August 2020 which set aside the decision of First-tier Tribunal Hollingworth dated 19 December 2019.

Background

3. The appellant is a national of Bangladesh, born in 1969. He is currently 52 years old.

4. The appellant came to the UK in 1976 to settle with his parents. He was aged 7 years and 2 months' old at the time and has remained here lawfully since then. It is undisputed that the appellant has lived in the UK lawfully for 45 years.

5. The appellant married in 1995. His wife, BA, was living in Bangladesh at the time and subsequently came to the UK to join the appellant. The couple have five children:

    - ZU, a son born in 1996, now aged 25
    - ZA, a daughter born in 1997, now aged 24
    - MY, a daughter born in 2002, now aged 20
    - SA, a son born in 2004, now aged 17
    - YU, a son born in 2013, now aged 8 years old.

6. In addition to his immediate family, the appellant's mother who is 88 years' old also lives in the UK. The appellant's six siblings are also in the UK.

7. On 7 December 2012 the appellant was convicted of nine offences of possession/control of a false/improperly obtained ID card or relating to another or apparatus for making ID cards. The offence involved being in possession of false rubber stamps for endorsing travel documents. The appellant was given a suspended sentence of imprisonment of 8 months, wholly suspended for 12 months. He was also required to do unpaid work for 100 hours and given a supervision requirement.

8. On 26 May 2017 the appellant was convicted of conspiring to do an act to facilitate the commission of a breach of UK immigration law for which he was sentenced to 12 years' imprisonment. This was reduced on appeal to 9 years' imprisonment. The appellant was part of a network which smuggled illegal migrants out of the UK in lorries. The sentencing judge described the operation as "a wicked and abhorrent trade" which "preyed on vulnerable individuals" for financial gain. The appellant was found to be an organiser, involved at a high level in the network.

9. Following that conviction, in line with s.32(5) of the UK Borders Act 2007, on 28 January 2019 the respondent made a deportation order against the

appellant. The respondent also refused the appellant's Article 8 ECHR claim on 30 January 2019.

10. The appellant appealed against the decision refusing his human rights claim. After a hearing on 6 November 2019, First-tier Tribunal Hollingworth dismissed the appeal in a decision issued on 19 December 2019.

11. The appellant appealed against the First-tier Tribunal decision and was granted permission to appeal to the Upper Tribunal in a decision dated 20 February 2020. In a written submission dated 6 July 2020, the respondent conceded that the decision of the First-tier Tribunal disclosed a material error on a point of law such that it had to be set aside to be re-made.

12. In a decision issued on 10 August 2020, made on the papers, the Upper Tribunal found an error of law in the decision of the First-tier Tribunal in the terms conceded by the respondent and set it aside to be remade. The parts of the First-tier Tribunal decision requiring remaking were identified in paragraph 11 of the error of law decision:

> " The respondent made a number of concessions on error of law. Firstly, the decision of the First-tier Tribunal was in error in failing to take into account in the very compelling circumstances assessment the (extant) finding that the appellant's deportation would be unduly harsh for his minor children and the particular features of his private life where he has been in the UK lawfully for 43 years and has returned to Bangladesh only five times in that period. Secondly, the First-tier Tribunal also erred in the approach to the assessment of social and cultural integration in the UK. Thirdly, the decision contains no assessment of whether the appellant would face very significant obstacles to integration in Bangladesh. Fourthly, the decision also failed to assess the impact of deportation on the appellant's five children cumulatively in the very compelling circumstances assessment."

13. From November 2019 to March 2020 the appellant was allowed out of prison for town and home visits. These visits ceased in 2020 because of the Covid 19 pandemic. The appellant was released on licence on 19 April 2021 and has lived at the family home since then.

14. The appeal was reheard on 12 October 2021. The appellant, his wife and the appellant's younger daughter, MA, gave oral evidence. Mr Whitwell and Mr Pipe made concise and focused oral submissions for which I was grateful, Mr Pipe also providing a helpful skeleton argument.

The Law

15. Part 5A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) sets out the legal framework that must be applied to an Article 8 ECHR claim brought in the context of a deportation order.

16. Section 117A of the 2002 Act provides, insofar as material, that:

> "(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in Section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private life and family life is justified under Article 8(2)".

17. Section 117C is entitled "Article 8: additional considerations in cases involving foreign criminals". It is the central provision in this appeal and provides:

"(1) The deportation of foreign criminals is in the public interest.

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

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

(4) Exception 1 applies where -

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

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

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

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

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very

> compelling circumstances, over and above those described in Exceptions 1 and 2".

18. There have been a significant number of cases addressing the correct interpretation and application of these provisions, including how to approach an assessment of very compelling circumstances. A summary of the principles relevant to this appeal is set out here.

19. The statutory framework is a "complete code" and "... the entirety of the proportionality assessment required by article 8 can and must be conducted within it": HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 at [27]. That means that I must also take into account Strasbourg case law and I set out the main cases below.

20. The appellant has received a sentence of 9 years' imprisonment and is a "serious" offender. He cannot rely on the Exceptions in s.117C(4) and (5) to show that it is not in the public interest that he is deported. The appellant is required to demonstrate "very compelling circumstances, over and above those described in Exceptions 1 and 2" as set out in s.117C(6). This is a demanding test. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, the Supreme Court set out at [46] that:

> "... a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life"

Hesham Ali at [38] and HA (Iraq) at [32] set out the need to respect the "high level of importance" which the legislature attaches to the deportation of foreign criminals. It remains the case, however, that if an appellant cannot come within the Exceptions in s.117C(4) and (5), notwithstanding the "great weight" attracting to the public interest, "it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed"; Hesham Ali at [38].

21. The Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 at [37] provides guidance on how to approach the very compelling circumstances assessment:

> "In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other

relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

22. In CI (Nigeria) v SSHD [2019] EWCA Civ 2027, at [62], Leggatt LJ provided guidance on the s.117C(4)(b) assessment and whether social and cultural integration in the UK can be broken by criminal offending and imprisonment:

> "62. Clearly, however, the impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature and frequency of the offending, the length of time over which it takes place and the length of time spent in prison, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. In that regard, a person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots in this country than someone who has moved here at a later age. It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK. No doubt it is for this reason that the current guidance ('Criminality: Article 8 ECHR cases') that Home Office staff are required to use in deciding whether the deportation of a foreign criminal would breach article 8 advises that:
>
> > 'If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated'".

23. As to section 117C(4)(c), the concept of "integration" into the proposed country of deportation was considered in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 at [14] where Sales LJ explained in a now well-known passage:

> "… the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-today basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life"

24. When assessing undue harshness for family members in the event of deportation, the description of the elevated test set out in MK (Sierra

Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) has been approved by the higher courts:

> "... 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 additional adverb "unduly" raises an already elevated standard still higher."

In [52] of HA (Iraq) the Court of Appeal cautioned against conflating "undue harshness" with the still higher test of "very compelling circumstances"; [52]. The underlying concept is of an "enhanced degree of harshness sufficient to outweigh the public interest in the medium offender category"; see [44] of HA Iraq.

25. When considering whether there are very compelling circumstances, an assessment of the particular weight that attracts to the public interest is required. The public interest is "minimally fixed" as it "can never be other than in favour of deportation"; [45] of Akinyemi v Secretary of State for the Home Department (No. 2) [2019] EWCA Civ 2098. The public interest is flexible, however; Akinyemi No.2 at [50].

26. Concerning rehabilitation, [141] of HA Iraq provides:

> "… the weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that … the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern."

27. The Strasbourg cases of particular relevance are well known. They include Boultif v Switzerland (2001) 33 EHRR 50, Üner v Netherlands (2007) 45 EHRR. 14 and Maslov v Austria [2009] INLR 47. Maslov provides in paragraph 74:

> "Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 *in fine*)."

28. The Supreme Court in Sanambar v Secretary of State for the Home Department [2021] UKSC 30 identified at [46] that Maslov does not set down a "condition subsequent" to the Üner criteria of a requirement for "very serious reasons" justifying deportation.

29. The Supreme Court in Sanambar at [18] and the Court of Appeal in [106] of CI (Nigeria) set out the important distinction in European Court case

law, for example in Jeunesse v The Netherlands [2004] 60 EHRR 17, between settled migrants with a right of residence in the host country and those without such status. In paragraph 112 of CI (Nigeria), Leggatt LJ identifies:

> "… the distinction of principle drawn in the case law of the European Court is between the expulsion of a person who has no right of residence in the host country on the one hand and, on the other hand, expulsion which involves the withdrawal of a right of residence previously granted."

30. The factors identified in [57] (the Boultif criteria) and [58] of Üner have been approved subsequently in both European and domestic case law and are uncontentious. Of relevance here are (i) the nature and seriousness of the offence committed by the appellant (ii) the length of the appellant's stay in the country from which he or she is to be expelled (iii) the time elapsed since the offence was committed and the appellant's conduct during that period (iv) the appellant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life and (v) whether there are children of the marriage, and if so, their age. There is an obvious overlap between these factors and the statutory provisions set out in s.117C.

31. Notwithstanding the potential complexities raised by the case law, there is a basic task to be undertaken, identified by Lord Reed JSC in [50] of Hesham Ali:

> "In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest. . . and also consider all factors relevant to the specific case in question."

Analysis: Article 8 ECHR

Exception 1 – s.117C(4)

Factor (a): lawful residence

32. It undisputed that the appellant has been lawfully resident in the UK for most of his life. He came to settle with his parents in 1976 when he was aged 7 years' old and has remained here with indefinite leave to remain (ILR) ever since, a period of 45 years. This is unarguably a very extended period of lawful residence. This aspect of Exception 1 is met to high degree and this must be taken into account in the very compelling circumstances assessment.

Factor (b): social and cultural integration

33. It is equally unarguable that the appellant is socially and culturally integrated in the UK. As above, he came here aged 7 years' old, was educated here and has lived here for 45 years. He has inevitably built up significant social and cultural links here. There are over 50 letters of support in the appellant's bundle as evidence of this and none of that material was challenged by the respondent in cross-examination or submissions. Letters from family members show him playing a significant role in their lives. One example is the letter from his older sister at page 581 of the appellant's bundle which sets out how he acted as a father figure to her children as her husband suffered from mental health problems, attending his nephew's graduation and giving away his niece at her wedding. A letter from a cousin at page 584 describes how the appellant supported the cousin's father after a stroke and made the funeral arrangements when the father died. Thereafter he continued to support his cousin's children with their studies and applying for jobs. There are similar examples from other relatives. There are also numerous letters from the community in and around Luton confirming his positive involvement including voluntary work with young people.

34. The respondent's own guidance indicates that residence in the UK from childhood makes it "unlikely that offending alone would mean a person is not socially and culturally integrated". Even after taking into account the appellant's offences and term of imprisonment at the highest, I do not find that they are capable of breaking the strong social and cultural integration that the appellant has established since he came to the UK in 1976. This aspect of Exception 1 is also strongly met and must attract weight on the appellant's side of the balance in the very compelling circumstances assessment.

Factor (c): very significant obstacles to integration in Bangladesh

35. I must also assess whether the appellant will face very significant obstacles to reintegration in Bangladesh. I accept that his knowledge of Bangladesh and ability to function there will be limited as he left the country when aged 7 years' old and has lived in the UK since then. It is not disputed that he has visited Bangladesh on only five occasions since he came to the UK. The report of Dr Iqbal dated 23 September 2019 sets out that the appellant returned in 1983, 1994, 1995, 2003 and 2009. The visits were for a few weeks other than in 1983 when the appellant's father took the family back to Bangladesh for 8 months. The appellant would have been approximately 13 or 14 years' old at the time of that extended visit and therefore has some experience of Bangladesh as an older child.

36. I accept that having come to the UK at the age of 7 years' old the appellant does not read or write Bengali to any useful level, notwithstanding the 8 month period he spent in Bangladesh as a teenager. The evidence of the appellant and his family on this point was not challenged by the respondent. I accept that being unable to read and write

in Bengali would mean that the appellant would find it difficult to get many types of work in Bangladesh and would have difficulty negotiating day to day life, for example being unable to read notices, correspondence and so on.

37. The appellant accepts that he can speak Bengali. This is clearly demonstrated by the fact that this is the language he uses to communicate with his wife who has limited English and he also speaks to his mother in Bengali. It is also evident from the letters of support relied upon by the appellant that he has extensive contacts within the Bengali community in the UK and it is reasonable to assume that he speaks Bengali more frequently than just doing at home. His links to that community are also shown by the fact that, as set out in the sentencing remarks, the victims were from "principally the Bengali community". It is therefore not the case that he has lost meaningful connections to his cultural background. The appellant confirmed that all of his children have been to Bangladesh to visit their family there and this also indicated to me that the family has not lost all ties to the country or links with their Bengali background.

38. I accept that the appellant does not have any relatives of his own in Bangladesh. His father is deceased and his mother and six siblings have lived in the UK since the 1970s. It was not suggested that there are any family properties or finance still available to him in Bangladesh. The appellant and his wife, BA, confirmed, however, that she still has family in Bangladesh. Her mother is deceased but her father lives there in his village with another wife and two daughters from that marriage. They are supported by BA's brother who lives in Qatar. I accept that BA's family in Bangladesh would not be able to offer the appellant financial support given that they are dependent on other relatives and that they could only provide very limited practical support given their straitened circumstances. I accept that BA's full sisters are married and living in different parts of the country with their husbands' families and could not provide any support.

39. The appellant did not consider that relatives in the UK would be able to assist him given that he was already in debt and his family were in financial difficulty following his prison sentence. His evidence was that he had personal debts of approximately £30,000 to £40,000, owed to family and friends. The OASys report at paragraph 5.6 sets out his view that his family were "in no rush to get the money back from him." The appellant and his wife also confirmed that she owed money to her own family, having struggled to support the children and maintain the family home whilst the appellant was in prison. I accept that the appellant and his wife have these debts. There was nothing, however, suggesting that the families of the appellant and his wife would not be prepared to continue to assist them financially, whether the appellant was in the UK or Bangladesh. As above, the materials contained a very large number of supportive letters from relatives in the UK and from people the appellant knows in the Luton area. As well as the possibility of this wide network

being able to provide some basic financial support if the appellant returned to Bangladesh, it was also my view that some of them would have contacts there who could assist the appellant with basic practical support on return, including finding some form of employment.

40. The appellant set out in his most recent statement that he had ankle fusion surgery in February 2020. He maintained that this prevented him from walking very far and lifting and would need physiotherapy to recover from the operation. He was concerned that this would limit his ability to find work in Bangladesh and that he would not be able to afford any treatment. I was not provided with any up-to-date medical evidence commenting on the ankle surgery or providing information on the appellant's progress two years after the operation, how long any further recovery might take and any ongoing need for physiotherapy. Without that medical evidence, I did not find that this was a factor capable of adding meaningful weight to the question of very significant obstacles to reintegration.

41. The forensic psychiatric report of Dr Iqbal dated 23 September 2019 set out in the conclusion that the lack of a close network in Bangladesh and distress at the harm caused to his family could put the appellant's mental health at risk on return. I do not doubt the appellant's distress at the suffering caused to his family by his imprisonment and accept that he will experience the same if he is deported. This will diminish any quality of life he might establish in Bangladesh but it was not my view that the evidence concerning the appellant's mental health and emotional state showed that this was a factor that would significantly undermine his ability to reintegrate.

42. Bringing these considerations together, I accept that the appellant has a limited knowledge of how life is lived in Bangladesh given the limited time that he has spent there. Against that, he speaks Bengali and has remained within Bengali culture to quite an extensive degree in the UK. He has extensive contacts and support within the Bengali community in the UK and could draw on them to find some links and support on return to Bangladesh. That can provide some mitigation to his limited options for employment because of his inability to work using written Bengali. It is my conclusion that he has retained a familiarity with the language and culture of Bangladesh and will have a basic level of support there from his supporters in the UK or contacts that they can assist him with in Bangladesh, that will enable him to manage to become "enough of an insider" on return to reintegrate. I accept that this will involve real hardship but not so as to amount to very significant obstacles to reintegration. The appellant's profile is such that he would "have a reasonable opportunity to be accepted" in Bangladesh and develop a private life.

43. For these reasons, I do not find that s.117C(4)(c) is met. This is not a factor that can assist the appellant materially in the very compelling

circumstances assessment, albeit I take into account that his circumstances on return to Bangladesh will be hard.

Exception 2 – s.117C(5)

44. There is no challenge to the finding of the First-tier Tribunal that the appellant's deportation would be unduly harsh for the appellant's wife and minor children. In addition to the evidence of the appellant and his family, the First-tier Tribunal accepted fully the conclusions set out in a forensic psychiatry report dated 23 September 2019 from Dr Muhammad Iqbal, a clinical psychology report dated 8 June 2019 from Dr Louise Roberts and an independent social work report dated 10 June 2019 of Ms Sonnika Hakh. The evidence was consistent regarding the significant suffering experienced by all members of the appellant's family arising from his conviction and imprisonment and the prospect of his deportation. The evidence also addressed all members of the family rather than merely those within the provisions of s.117C(5) and it is expedient to consider the position of all the family here as a result, not just the appellant's wife and minor children.

45. The First-tier Tribunal set out details of the hardship experienced by the appellant's family in paragraphs 5 to 7 of the decision and made clear and strong findings in paragraphs 11 and 12 that the appellant's deportation would be unduly harsh. The appellant had played a big part in family life where his wife spoke little English and he supported the children in a great deal of their engagement with the world outside of the family home. After he was imprisoned, the appellant's wife became unwell with anxiety and depression and was unable to manage the family finances. She had to borrow money and eventually found work as a cleaner but was unable to manage to keep the family home in a reasonable state of repair. Her hardship was increased by seeing all of her children suffering and becoming "messed up" as a result of the appellant's convictions.

46. The minor children, SA and YU, experienced serious difficulties as a result of the appellant's imprisonment. SA developed serious behavioural problems at school, including fighting, was excluded on numerous occasions and was eventually permanently excluded. His behaviour after transferring to another school was a little better, assisted to some extent by his paternal uncle being a teacher at the new school. His behaviour at home was also very difficult. The social work report commented on it being evident that he was "experiencing turmoil and instability" because of his father's imprisonment.

47. YU, the youngest child, was aged 3 years' old when the appellant went to prison. He was very attached to his father and became distressed, anxious and withdrawn. He cried for extended periods and woke up at night looking for his father. He was seen by an educational psychiatrist who recommended ways for the family to support him and deal with the extent to which he had begun to cling to his mother in the absence of his father. He was referred to counselling in the form of play therapy sessions in

September 2020. The family also arranged for the youngest child to speak to his father daily to try to deal with his distress.

48. The older children in the family also experienced hardship when the appellant was sent to prison. The oldest son, ZU, dropped out of university, including giving up a work placement in Dubai, and found work as a car salesman in order to support his mother and the rest of the family. ZA estranged herself from the family because she could not deal with the distress she experienced when the appellant went to prison. MU did less well in her examinations than had been predicted, experienced panic attacks and required psychological support as a result of the anxiety she experienced after her father was imprisoned. MU's also developed physical health problems, experiencing stomach pains which led to an operation, chronic joint pain and she received a diagnosis of a lymphatic disorder. She found dealing with her health problem additionally hard as, normally, her father would accompany her to appointments but she had to go alone.

49. The First-tier Tribunal concluded that the evidence showed that the appellant's imprisonment had had a "corrosive impact" on his family and:

> "… that the impact on the Appellant's family has gone well beyond that to be expected in the usual course of events in the light of the absence of the Appellant and in anticipation of the loss of the Appellant as a member of the family unit in the United Kingdom."

The updated evidence provided for the remaking of the appeal was consistent with the evidence before the First-tier Tribunal. Prior to his release from detention in April 2021, the appellant was granted town and home leave. The new witness statements described the positive effect these developments had on all members of the family, particularly the youngest child. The descriptions in the witness statement of BA dated 5 October 2020 of YU's behaviour in response to these opportunities to see his father were very moving. YU would wake up early, asking for his father's favourite foods to be cooked for the visits, hugging the appellant very tightly and kissing him repeatedly during the visits, staying with his father even when he went to the toilet. He had to be physically separated from the appellant at the end of visits, would not speak to anyone, not even to his father when he telephoned after the family had returned home. The appellant had been able to begin providing emotional support to the children and his wife did not feel the full burden of supporting the family fell on her. The same witness statement sets out equally credible and compelling evidence about the positive effect on all members of the family from the appellant's town and home visits.

50. The respondent did not dispute the evidence that after the appellant was released from detention in April 2021, all of the family benefitted greatly. The oldest son had returned to full-time education. SA' s behaviour at school and at home improved. SA indicated in his statement dated 22 July 2021 that after his father had come home he had helped him to pass two exams that he had had to re-sit. The same statement sets out his fear of

the very adverse consequences that he would experience were the appellant to be deported. BA set out in her statement dated 27 July 2021 that YU had become less anxious but he remained very attached to his father, as if he feared he might not come back if he let him out of his sight. Instead of causing difficulties, he had begun to get up early to go to school as he knew that his father would be taking him. All of the family remained very concerned at the possibility of the appellant's deportation. BA said this in her statement dated 27 July 2021:

> "Naturally I am worried for all my children and I am terrified that deportation will further destroy my children's mental and physical health and impact their ability to achieve what they want in life. [SM]'s return has given us a taste of what life used to be like and we are desperate for this period in our lives to end and to be able to live without fear of his deportation."

51. As the First-tier Tribunal did, I accept the evidence concerning the suffering experienced by the appellant's wife, the two minor children and the older children. The evidence of their difficulties is clear, consistent and very credible.

52. I must also take into account, however, some of the comments made by Dr Roberts in the clinical psychology report dated 8 June 2019. Paragraph 24 refers to BA seeking and receiving support from her sister in Bangladesh with whom she speaks regularly, "finding this a helpful way of managing difficulties that she encounters". In paragraph 25 Dr Roberts identifies that BA's religious beliefs also provide her with support and "a feeling of contentment". Dr Roberts found that BA "did not display maladapted coping strategies such as substance misuse or self-harm"; see paragraph 26. In paragraph 27 Dr Roberts identified that BA "appears to have a good support network", referring to a sister-in-law, friends and neighbours who had been emotionally supportive and to financial support from the appellant's family. Her sister-in-law and a neighbour had helped her to go to the dentist. BA "described talking openly with her close friends and neighbours about her difficulties and feeling the benefit of the emotional support that they provided". In paragraph 32 Dr Roberts states:

> "In spite of BA's understandable distress, she has a range of adaptive coping strategies in addition to internal and external protective factors in managing stress and difficulties. Although this does not mean that SM being deported would not be extremely upsetting for her, it does mean that she has psychological resources to draw upon if this were to happen".

53. In paragraph 33 Dr Roberts identifies that BA's "strong secure attachments in her formative years" were also a protective factor in managing future difficulties. She identifies in paragraph 34 that BA does not have a history of mental illness and had received emotional support from primary care services for her stress levels, a further preventative factor against further deterioration. Dr Roberts goes on to indicate in paragraph 35 that:

> "At times of high stress or significant life events, BA has displayed resilience".

54. The final paragraph of the report, at 36, indicates:

> "If SM were to be deported then this is likely to be extremely distressing for BA and she is likely to experience ongoing feelings of stress and anxiety in managing such a significant life event. Her attachment history, psychological resilience, adaptive coping strategies and range of internal and external protective factors will be conducive to BA managing such an event".

55. This evidence indicated to me that notwithstanding the inevitable and high degree of suffering amounting to undue hardship that BA will experience if the appellant is deported, she has some personal resources and a network of practical and emotional support that can assist her to manage her difficulties to some extent.

56. I should indicate that I did not find that the additional social work report of Ms Khumalo dated 11 July 2021 added anything useful to the earlier reports and the evidence of the appellant's family. The report is marked throughout by opinions that are outwith the writer's expertise, that are unsupported by evidence, and inappropriately expressed, tendentious statements. One example is in paragraphs 2.3 to 2.4:

> "2.3 [SM] might have committed a crime which is not good behaviour however, the guidance goes on to explain that a "persistent offender" as a repeat offender who shows a pattern of offending over a period of time. This can mean a series of offences committed in a short timeframe, or which escalate in seriousness over time, or a long history of minor offences."
>
> 2.4 [SM] told me that he has not been a "persistent offender" and as he explained in his statement."

It is unclear why Ms Khumalo addresses the issue of persistent offending at all. It is not a factor relevant to this appeal. Even if it were a relevant factor, the question of whether someone is a persistent offender is a legal matter for the Tribunal, not a social work from a hospital social work team. Referring to the appellant's offences as "not good behaviour" shows a serious lack of understanding of the significance of a sentence of 9 years' imprisonment. Nothing identifies the "guidance" that is referred to.

57. Paragraph 9.1 shows very similar shortcomings:

> "9.1 It is important in SM's case to reconsider whether SM is a is a [sic] prolific offender even though he made a mistake which ended up in prison".

as does paragraph 15.3:

> "Looking at [SM]'s situation, I would like to give him the benefit of the doubt that the risk of him reoffending following his imprisonment maybe minimal

> as I would like to believe he has learnt a lesson from his behaviour and mistake."

58. The report contains repeated, unsupported opinions on a variety of matters outside the expertise of the writer. In paragraph 6.11 Ms Khumalo makes a bare statement that "my professional opinion as a Social Worker is that [SM] can be rehabilitated whilst in the UK and also be allowed to work for his family to minimise further problems". Nothing in the report explains the basis for this conclusion. Ms Khumalo's cv does not indicate that she is qualified to provide a professional opinion on rehabilitation. In section 8 of the report Ms Khumalo considers whether the legal test of "reasonableness" in separating the children from their father is met. That is not the assessment that has to be made here. There is another reference to unidentified "guidance". This section also refers to the reasonableness of "forcing" the children returning to Bangladesh. That is not in issue here. Ms Khumalo repeats this error concerning the children going to Bangladesh in paragraph 22.2 of the report, setting out in tendentious language that "This will be a cruel decision or option to be given to the family as a whole". There are further inappropriate and inaccurate comments on legal matters in paragraphs 8.7 and 8.10.

59. Even when the report addresses matters that are properly within its scope, the comments are frequently generalised and inappropriate. Paragraph 9.6, for example, states:

> "I believe fathers, like mothers, are pillars in the development of a child' emotional wellbeing. Children look to their fathers to lay down the rules and enforce them and this is also due to my own personal experience as a mother who lives with the father of my children".

A professional opinion on the role of each parent in a child's development should rely on more than personal opinion and experience.

60. The poor quality of the new social work report does not detract from the findings above that the appellant's family have suffered a great deal as a result of his conviction and would do so again if he is deported. The circumstances for the appellant's wife and two minor children would be unduly harsh if he is deported and s.117C(5) is therefore met. This must be weighed on the appellant's side of the balance in the very compelling circumstances assessment. The difficulties of the older children must also be taken into account in that assessment.

61. I turn now to the issue of very compelling circumstances: section 117(C)(6) of the 2002 Act. This is the "over and above" issue.

Factors in favour of deportation

62. It is now well understood that the weight that attracts to the public interest in deportation of a foreign criminal is minimally fixed and increases with the seriousness of the offending. The appellant's index offence is obviously extremely serious as it attracted a sentence of 9

years' imprisonment. There is also the conviction in 2012 when the appellant was found in possession of false passport stamps and received a sentence of 8 months', suspended for 12 months. It was not suggested that the earlier offence made a material difference to the weight attracting to the public interest in the context of the seriousness of the index offence.

63. The appellant was initially sentenced to 12 years' imprisonment but this was reduced to 9 years' on appeal to the Court of Appeal. I took that reduction into account when considering the remarks of the sentencing judge. The comments relevant to the appellant were as follows:

> "As you are all aware, this case involves a conspiracy to facilitate a breach of Immigration Law by non-EU citizens. The period in the indictment is basically over a five-month period from January until June 2015.
>
> I've heard many submissions in relation to participation, in particular the difference in numbers of trips taken, but I think it is actually important to just bear in mind what this conspiracy was about. Here, the nature of the conspiracy was that it was attempting, and indeed achieving, the circumvention of the rules that governed movement, and therefore clearly I look at the totality of the conspiracy and the overall gravamen of the offence.
>
> It undoubtedly was clearly highly organised. It was a professional operation. As far as I can see, it had the sole motive of considerable financial gain by those concerned. Clearly there would have been a level of apportionment, of which I am unaware and I do not speculate.
>
> But it had specifically preyed upon vulnerable individuals, from principally the Bengali community, and when doing so you – as being principally the organisers, and enforcers to some extent – that you applied a ruthless cynicism and arrogance against your fellow men.
>
> You disregarded border controls. And as we are all aware, border controls are not only there to ensure our economic welfare but it is there to ensure the security and safety of the nation.
>
> It is estimated by the prosecution – and I do underline the word here, estimated – that the financial benefit would be in the region of approximately 1.2 million pounds each year. But as I have already said, in reality the Crown can only estimate the benefit. There is a suggestion that there have been other trips, but I only sentence you on what … that has been placed before me. But here, to show the level of organisation, there have been various destinations, were being offered literally à la carte, like a menu. Some destinations were more expensive than others. Paris featured significantly in the discussions as a focal point. And clearly that was disclosed by what I will call electronic communications by several of the conspirators.
>
> By way of an example: six hundred pounds was the going rate for the cost of such a trip, for people to be taken out of the country. But other destinations within Europe were being offered as options. Italy was one thousand two

hundred pounds. And as I say, other destinations were Romania, Germany and Spain.

The modus operandi or method of operation was the collection of individuals from various locations in Britain.

One can see, for example, with regards to [SM], there was a reference about the Birmingham group. Those individuals were then subsequently be transferred to London.

They then would be taken through London, utilising a safe house, as was the case of [SM] of [KM], on the 27th April. They would be taken to that safe house when necessary, and then taken by pre-arranged routes, by taxis, to delivery points. Those delivery points were invariably in Kent, where the migrants – as they have been called – were transferred to lorries, driven by drivers of various European nationalities. Those nationalities vary considerable … considerably Romanian, Bulgarian, German to name but a few.

That is the generality of the conspiracy. I am not going to go into the details of what was said or not. The facts are well-known to all parties. For the assistance of others, if it becomes necessary, there is an extremely useful opening note and other documents, which I urge to be seen.

I have taken into account all points in mitigation.

I have read, and indeed I have marked up, all the references for every particular defendant, and it is perfectly clear that many of these individuals, in particular the taxi drivers, have come to this country and provided a safe environment for their children – if I may use that phrase – who, to the credit of the family, have gone on to participate in a meaningful and proper way within our society.

…

I have, by way of generality – and I want that to be underlined – subdivided the offenders here into three categories: firstly, organisers, or what I would perceive to be main conspirators; secondly, individuals who assisted in the implementation of a conspiracy; and then the drivers and [KM].

Consequently, I now deal with the four who I consider were fundamentally important to this conspiracy. I deal firstly with [G].

[G] was seen to be boasting and bragging with regard to the under-cover journalists, demonstrating his ability to move individuals out of Britain. It was perfectly clear that he was demonstrating a blatant disregard for all the rules and procedures which he was aware of.

He was equally informed by one of the undercover journalists that one of them would wish to go to Iraq/Syria in what could be described as a Jihadi capacity. This was an opportunity for him to say, demonstrating perhaps an element of morality, that he would not be involved.

It is perfectly clear that he indicated that he didn't care what anybody else did, and I consider that to be a significant aggravating feature in his sentence.

I, as I say, I have taken into account everything that has been said but, when I look at this matter and his particular position, the appropriate sentence here is a sentence of nine and a half years' imprisonment.

…

[SM], I sat through this trial and it would be fair to say that I looked at your case with care, and in my view there was always the hand of you involved in a major way.

I am not going to go through the minutiae of the 'phone contacts that you made on your 7503 number, or indeed the attribution of the other two telephones. Suffice it to say, in my judgment you were heavily involved, and as heavily involved as [G].

In relation to yourself, it was brought to my attention after your conviction – and I want that clearly noted – that you are a gentleman who has got one significant series of convictions.

On the 7th December 2012 I understand that you were either found guilty or pleaded guilty to offences which demonstrated again your utter disregard for this country's welfare, and indeed any border controls. You were found guilty in having various items, which were false British High Commission rubber stamps from Dhaka. You had other documents, such as … or other items such as false Bangladeshi passports validity extension stamps. You had other stamps that clearly were there to ensure the circumvention of our border controls.

I am not going to go into the details but, in my judgment, it is perfectly clear in relation to that offence you were quite determined to circumvent, as I say, all border controls.

I make no observation to the sentence that you received, namely eight months' imprisonment suspended for twelve months, but it clearly did not in any way dissuade you from pursuing what you achieved in this conspiracy until you were arrested. I consider that previous conviction to be a significant aggravating feature.

Therefore, the sentence in your case – and bearing in mind you did not plead guilty, you contested this case to the end – the sentence in relation to you will be one of twelve years' imprisonment.

…

I have various observations that I wish to make in relation to this case as a whole.

This has been a lengthy investigation and there have been many difficulties but the one thing that is perfectly clear to me is that this case has been well-prepared and has involved many man hours. It has equally been well

> presented, and in relation to that, I mean not only the prosecution but the defence, and I extend my thanks to counsel in relation to it.
>
> Moving on to the inquiry in The Sun newspaper itself. It is not normal for a judge to make comment about an investigation involving the public interest from a newspaper. It's perfectly clear, when this is done, it is done with the twin lodestars of increasing circulation, but in my judgment there should be a proper and genuine appreciation of the work undertaken by The Sun newspaper and exposing what I describe as this most wicked and abhorrent trade."

64. There is a stark contrast between the sentencing remarks and the appellant's comments on his offence. The OASys report dated 30 July 2021 sets out:

> "[SM] states that there were 9 others involved in the case, but he only knew one of the other co-defendants as he used to rent a shop to him below his office in London. [SM] states that he knew what the others were doing but did not know how, and he was simply directing people he knew (friends and family) to the others."(2.7)
>
> "[SM] states that his friends and families, who had overstayed their visas, came to him because they wanted to leave the country and start a new life in another country. He states that he believed he was helping them, and although he knew it was wrong he considered it okay for the 'greater good'. Although [SM] states that he was only the middle man in regards to payments, he denies getting paid at all for his involvement." (2.8)
>
> "[SM] claims he was not getting paid, but was simply the 'middleman' who would pass the money on to his associates once the victims confirmed they had successfully left the country."(2.14)

The appellant made similar statements in his oral evidence before me. Paragraph 5.6 of the OASYs report shows that the writer of the report did not accept the latter claim as to there being no financial gain, stating that "illegal earnings was (sic) a source of income for him prior to his custodial sentence."

65. The OASys report also sets out that the appellant continues to deny responsibility for the earlier offence of possessing false passport stamps, setting out in paragraph 2.12 that:

> "[SM] has denied any knowledge of these stamps, claiming that a friend of his who was at that time in custody had asked that he look after a bag for him. He told me that the bag was placed in his office by another friend of his on behalf of the man in custody. [SM] states that he did not know what was in the bag and was not curious, and having had no previous involvement in criminal activity he was not of the mind set to assume that a friend would involve him in committing an offence."

66. I was concerned by the appellant's continued denial of the true nature of his offending. These denials are recorded and noted in the OASys report, however, so have been factored into the professional assessment of the

risk of reoffending which found the appellant to be a low risk. The OASys report dated 30 July 2021 shows an Offender Groups Reconviction score (OGRS), an indicator of probability of reconviction within 2 years' of release, was found to be low, with a 6% risk of reoffending in the first year after discharge and an 11% risk in the two years after discharge. The appellant's risk of reconviction for non-violent offending on the OASys General Predictor score (OGP) was also found to be low, with a risk of 7% in the first year and 12% in the second year. His OASys Violence Predictor score (OVP), predicting risk of reconviction for a violent offence, was low, with a one year score of 3% and a two year score of 5%. The Risk of Serious Recidivism (RSR) score was stated to be low, with the risk being 0.12%. He was assessed as posing a medium risk of serious harm to the public if he reoffended in the community but a low risk to children, known adults and staff. The forensic psychiatric report dated 23 September 2019 from Dr Iqbal also found the appellant presented a low risk of reoffending.

67. The professional risk assessments show the appellant poses a low, if not very low risk of reoffending. I accept also that he has been an exemplary prisoner. This is shown by his progress through the prison system, during which he was given a temporary licence to work in the community, volunteered as a "listener" in prison. was granted town leave and progressed to home visits. He has complied fully with the terms of his licence. The offence was committed 6 years ago but that does not indicate a meaningful period of non-offending as the appellant has been out of prison for less than a year since being convicted. It was not my view that any of these matters showed that the appellant's degree of rehabilitation was such that it could lead to a material reduction in the weight attracting to the public interest. As well as the risk of reoffending, the public interest reflects the wider factors of deterrence and public concern, both being very high here given the sentence of 9 years' imprisonment.

Factors against Deportation

68. I take the weight attracting to the difficulties for the appellant's family first. I found this to be a very strong aspect of the appellant's case. The appellant's family are innocent parties who have suffered greatly and experienced real setbacks in their lives as a result of the appellant's offending. There has been a palpable improvement in their well-being and progress since the appellant was released from prison and returned to the family home. I accept that the difficulties of the appellant's wife and children would be real and serious if the appellant is deported and that the detrimental effects on them all, especially the younger children, may well be lifelong. It is almost unnecessary to indicate that I accept that it is in the best interests of the two minor children that the appellant remain in the UK. That is manifestly and strongly the case.

69. This factor weighs heavily on the appellant's side of the balance. That is so because the evidence shows strongly that the appellant's deportation would be unduly harsh for his wife and minor children. Additional weight must be given to the appellant's side of the balance given that the older

children have also suffered and will be damaged by the appellant's deportation. The appellant's wife expressed clearly in her evidence how the suffering of the children has impacted on her. The statements of the older children all commented on the concern for YU. It appeared to me that the closeness of the family was such that their concern for each other was adding to their distress. The weight that attracts to the appellant's side of the balance is greater because of the cumulative impact of the difficulties the family will face.

70. I also took into account that the appellant's elderly mother, who has lived with him and his family for almost all of his life in the UK, was also deeply affected by his conviction and imprisonment and is now very distressed at the prospect of his deportation. Her worry that she may never see the appellant again if he is deported is very understandable. I accept that the appellant's deportation would be highly distressing for his mother. The evidence indicated that she was living with the appellant's family at the time that he was convicted but that the appellant's siblings have helped to look after her in their homes as well since then. BA confirmed this in her oral evidence. The situation of the appellant's mother adds some weight to his side of the balance but I did not find it to be a strong factor given that her other children and their families are all here to support her.

71. Turning to the circumstances of the appellant, as above, he does not meet Exception 1 as he has not shown very significant obstacles to reintegration in Bangladesh. I have found that he does meet s.117C (4)(a) very strongly, as he has lived in the UK lawfully for 45 years since the age of 7 years' old. This is an extremely long period of time and attracts a great deal of weight on the appellant's side of the balance, going significantly beyond the period of half the appellant's life specified in s.117C (4)(a).

72. I have also found that s.117C (4)(b) is strongly met. The appellant has lived almost all of his life and most of his formative childhood years in the UK and is strongly socially and culturally integrated notwithstanding his serious criminal offending. I weigh this factor strongly in his favour also.

Conclusion on "very compelling circumstances"

73. There are matters attracting significant weight on the appellant's side of the balance here. The circumstances of the appellant's wife and children if he is deported will be very serious. It is not just a question of the wife and two minor children being badly affected but all of the children. The serious damage that will be done to the appellant's family, individually and cumulatively, if he is deported is a weighty matter, one which is likely to alter the course of the rest of their lives. My concern for their future of the appellant's family if he is deported has led me to give serious consideration as to whether this factor is capable of outweighing the public interest. That concern was tempered to a degree by the comments of Dr Roberts on the resilience of BA and the evidence of support from the wider family and the community if the appellant is deported.

74. In addition, there is further weighty factor of the appellant's extremely long, lawful residence in the UK. That strong factor also led me to give careful consideration as to whether the factors on the appellant's side of the balance when taken together could outweigh the public interest. In that consideration I had to bear in mind that, as Maslov sets out at paragraph 74, even being born in the UK or coming here as a young child cannot be definitive of deportation being disproportionate but that spending a large part of childhood in the UK amounts to a "special situation", additionally so where the appellant has been here lawfully.

75. In many cases, I would find these factors on the appellant's side of the balance amounted to "a very strong claim indeed", as identified at [38] of Hesham Ali as being capable of outweighing the public interest. But, here, the offence is one that attracted more than double the 4 year sentence which itself "almost always outweighs countervailing considerations of private or family life"; Hesham Ali at [46]. Against the elevated weight on the side of the public interest where the appellant was sentenced to 9 years' imprisonment, I am unable to find that the situation of the appellant's children and the appellant's circumstances on return to Bangladesh after 45 years here even taken together are capable of outweighing the public interest.

Notice of Decision

The appeal is re-made as refused under Article 8 ECHR.

Signed: S Pitt Date: 24 February 2022
Upper Tribunal Judge Pitt