IN THE UPPER TRIBUNAL Case No: UI-2023-000755
IMMIGRATION AND ASYLUM CHAMBER First-tier Tribunal No: HU/02605/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 September 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

Adewale Olusola Ilesanmi Respondent
(ANONYMITY ORDER NOT MADE)

Representation:

For the Appellant: Mr N Wain, Senior Presenting Officer.
For the Respondent: Mr A Corban, of Corban Solicitors.

Heard at Field House on 2 August 2023

DECISION AND REASONS

1. By a "Decision and Directions" (signed on 26 June 2023 and served on the parties on 4 July 2023) (the "EOL Decision"), I set aside the decision of Judge of the First-tier Tribunal Ripley (hereafter the "judge") who, in a decision promulgated on 3 January 2023 following a hearing on 16 December 2022, allowed the appeal of Mr Ilesanmi, a national of Nigeria born in 21 August 1975 (hereafter the "claimant") on human rights grounds against a decision of the Secretary of State of 16 March 2021 to refuse his human rights claim made in his application of 16 December 2019 for the revocation of a deportation order dated 7 October 2010 (served on 11 October 2010) that had been made against him.

2. The appeal was listed before me on 2 August 2023 for the decision on the claimant's appeal against the Secretary of State's decision to be re-made.

3. The claimant's human rights claim was based on his family life with his wife, Mrs. Oluwatoyin Olayinka Ogunmuko, born on 2 June 1978 (hereafter the "sponsor"), his son (born on 17 November 2004) (hereafter "E.I." or the son) and his daughter (born on 29 March 2007) (hereafter "L.I." or the daughter).

4. The claimant was issued with a 6-month visit visa valid from 23 January 2003 to 23 July 2003. His date of arrival is not clear. He was removed in 2011 (see para 9

below). The sponsor first arrived in the United Kingdom in 2003. She claimed asylum in 2011 (RB/35). She was subsequently granted derivative rights of residence in the United Kingdom in accordance with the decision in Ruiz Zambrano v Belgium [2011] EUECJ C-34/09 because she was the only primary carer for her children in the United Kingdom. On 22 April 2021, the claimant and his partner married in Nigeria.

5. As at the date of the resumed hearing before me, the claimant's children were aged 18 years 8 months and 16 years 4 months respectively. The claimant's wife and two children have dual nationality. They are British citizens and nationals of Nigeria.

6. The hearing on 2 August 2023 was a hybrid hearing. Mr Wain attended in person. Mr Corban attended remotely from his offices, with the permission of the Upper Tribunal. The claimant's wife and children joined remotely (via Microsoft Teams) from their home. They were sent the link by Mr Corban. He did not have the permission of the Upper Tribunal to do so. He told me that he had mistakenly thought that the permission granted to him to attend remotely extended to the sponsor and the claimant's children.

7. I decided to proceed with the hearing, after making it very clear to the sponsor and the claimant's children that, when one of them was giving evidence, it was necessary for the others to remain out of earshot. Oral evidence was given by each, in turn, from a room upstairs in their home. Those not giving evidence were told to wait downstairs in their property. Each confirmed, at the end of the oral evidence that they had not heard the oral evidence given by the others. I am satisfied that that was the case.

8. The offence that led to the deportation order was the claimant's conviction on 24 May 2010 at Northampton Crown Court of an offence of possession and/or use of a false instrument; specifically, obtaining leave to remain by deception (para 11 of the claimant's witness statement dated 14 January 2022), for which he was sentenced to a term of 3 years' imprisonment. He committed the offence whilst on bail on 1 January 2010. He attempted to obtain, through a sham marriage, the right to remain in the United Kingdom, according to the sentencing remarks of His Honour Judge Ross.

9. The claimant was removed from the United Kingdom on 12 January 2011 (according to the decision letter, RB/32 (E3)) or 7 December 2011 (according to para 2 of the judge's decision and para 9 of the claimant's witness statement dated 14 January 2022). It appears that he has not returned to the United Kingdom since then. The sponsor and the two children continued living in the United Kingdom.

(A) Section 117 and para 391 of the Immigration Rules

10. The provisions of s.117A-C of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") have to be considered whenever the Tribunal considers an appeal on human rights grounds. Given that I refer repeatedly to Exceptions 1 and 2 and the threshold of "very compelling circumstances over and above the Exceptions", it may be helpful for me to set out the provisions of s.117C. This provides:

> **"117C** *Article 8 additional considerations in cases involving foreign criminals.*
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

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

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

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

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

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

11. Para 391 of the Immigration Rules states:

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

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case-by-case basis to whether the deportation order should be maintained, or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors."

(B) The EOL Decision

12. Terms defined in the EOL Decision have the same meaning in this decision.

13. The issue before the Upper Tribunal at the EOL hearing was succinctly stated in the permission decision of Upper Tribunal Judge Rintoul, as follows:

> "Given that the judge concluded [26] that it would not be unduly harsh for the [claimant] to remain physically separated from his family, it is arguable that she found neither [Exception 1 nor Exception 2] was met, and that accordingly, she erred in allowing the appeal, there being no proper finding of very compelling circumstances".

14. Para 32 of the EOL Decision set out the ambit of the re-making of the decision on the claimant's appeal, as follows:

"32. I set aside the decision of the judge to allow the appeal. The judge's reasoning and findings at paras 20-26, which have not been challenged, shall stand. The issue at the resumed hearing is limited to the sole issue of whether there are very compelling

circumstances over and above the Exceptions. The parties must bear in mind that the duty under s.55 only applies to children i.e. those under the age of 18 years."

15. Although the sole issue before me in re-making the decision on the claimant's appeal is whether there are very compelling circumstances over and above the Exceptions, it is relevant to take into account the preserved findings and reasoning of the judge. The judge's findings at paras 20-26 were preserved.

16. The judge's findings at paras 20-26 were summarised at para 9 of the EOL decision which reads:

> 9. … [The judge] found (at para 20) that the claimant could not meet the private life exception in Exception 1. In relation to Exception 2, she made the following findings:
>
> (i) At para 22, the judge noted that it was accepted that the claimant enjoyed family life with the sponsor and his children, that it was accepted that the claimant speaks to his children regularly, that their son contacts him to tell him about his progress as a footballer, that their daughter calls him when she feels his absence and that, although the claimant was not supporting his children financially, it was accepted that he had a genuine and subsisting parental relationship with them, albeit that this was a long-distance relationship.
>
> (ii) At para 23, the judge noted that it was also accepted that it would be unduly harsh for the children to live in Nigeria. She noted that the children were aged 15 and 18 and had lived in the UK all their lives. The elder child, now an adult, had embarked on a football career and the younger child had her GCSEs the following year. The children had found it difficult to cope with the environment when they visited Nigeria and the daughter had said that she did not feel safe there. As the children were British nationals, their leaving the UK would involve giving up the benefits of citizenship. It would also have a significant adverse effect on the daughter's education. Taking all these factors together, the judge said that it would be unduly harsh for the children to leave the UK to relocate to Nigeria and that she was satisfied that that outcome could be correctly described as unjustifiably bleak or severe.
>
> (iii) At para 24, the judge rejected the sponsor's evidence that she met the claimant in Nigeria. At para 25, she found that it would be unduly harsh for the sponsor to relocate to Nigeria leaving the children behind without her. Her reasons were as follows:
>
> "25. … Unlike the children, the sponsor used to live in Nigeria. It is not clear from the available information exactly when she came to the UK. Despite her work, if it were not for the children, I would find that it would not be unduly harsh for her to relocate back to Nigeria. However, she is to all intents and purposes a single mother in terms of hands-on care, as the [claimant] is absent. There is a lack of evidence to suggest that the children could be cared for long-term by another adult. Although the [claimant's] daughter stays with the sponsor's friend when her mother is working, I am not satisfied that is a sufficient basis to find that she would be willing to be an alternative full-time carer for the [claimant's] children. I find it would be unduly harsh for the sponsor to relocate to Nigeria leaving the children here without her."
>
> (iv) The judge then considered whether it would be unduly harsh for the sponsor and/or the children to remain in the UK without the claimant at para 26 which reads:
>
> "26. **The final issue in both sub paragraphs of paragraph 399 is whether it will be unduly harsh for the children and/or the sponsor to remain in the UK without the [claimant].** The evidence of the sponsor is that she misses the [claimant], and she finds it difficult to fully support the children without him. She accepted that she could continue to visit him. Their son would like his father to be able to watch him play football in person and the

> [claimant's] daughter states that the house is quiet and she is lonely without him. She wants to introduce him to her friends and her mother will be less tired if he comes. I am mindful that their son was seven years old when his father left, and the [claimant's] daughter was four. They have managed without their father for a long time. Presumably, if the children's parents thought it would be in their best interest to be raised with their father, they would have travelled to Nigeria with him. As submitted by Mr Bassi, there is a lack of detail of how his absence has had a significant adverse effect. **I am not satisfied that the [claimant] has established that it would be unduly harsh for him to remain physically separated from his family."**
>
> (my emphasis)"

(C) The Resumed Hearing

(i) Oral evidence

17. The sponsor adopted the contents of her witness statement dated 28 March 2022 and her letter dated 17 July 2023 which she confirmed were true to the best of her knowledge. She lives with her two children.

18. The sponsor said that she met the claimant in Nigeria, at which point I reminded Mr Corban that the judge had rejected the sponsor's evidence that she and the claimant met in Nigeria before they first came to United Kingdom.

19. The sponsor last spoke to the claimant on the morning of the hearing.

20. In cross-examination, the sponsor said that the claimant is not currently working in Nigeria because his business collapsed during the pandemic. She is not financially supporting him. Asked how the claimant is managing his financial circumstances in Nigeria, she said that he is managing. She said that what he has now is a "*mere job*" and that, compared to before the pandemic: "*He is not making too much money anymore because the middle part of his business has collapsed*". Asked to explain, she said that, before the pandemic, he used to wash cars and he also had some other business. During the pandemic, everything collapsed. At present, he is only selling water. He is not sending the sponsor any money anymore but he used to send her money before the pandemic. She confirmed that it would be correct to say that the claimant is financially supporting himself.

21. The sponsor confirmed that the claimant had family in Nigeria. She intends to visit him this year. She always goes to see him. The last time that she visited the claimant, she went on her own because it cost too much for her to take her children. When she visits the claimant this year, she will take her children if she has the money. Her children do not want to go to Nigeria. They want the claimant to come to the United Kingdom.

22. The sponsor confirmed that the children visited the claimant in Nigeria in 2017 and 21019.

23. In re-examination, the sponsor said that a visit to Nigeria this year would cost £1,300 for one person.

24. In examination-in-chief, E.I. confirmed that the contents of his letter dated 23 January 2022 and his letter dated 17 July 2023 were true to the best of his knowledge. He adopted their contents as his evidence to the Tribunal.

25. E.I. said that he last spoke to his father on the day before the hearing. Their conversation lasted for about 5 or 10 minutes.

26. In cross-examination, E.I. said that he believes that his father is working at the moment. He is not really sure. When he talks to his father, he does not really talk about what his father does in Nigeria.

27. E.I. said that his father has family in Nigeria. He has brothers and sisters. He thinks that his father has contact with his siblings.

28. In examination-in-chief, L.I. confirmed that the contents of her letter dated 22 January 2022 and her letter dated 17 July 2023 were true.

29. L.I. said that she last spoke to her father the day before the hearing. Their conversation lasted 15 or 20 minutes. Asked to explain what their conversation was about, she said that her father asked how she was, what she was doing and what was going on and she asked him how Nigeria was and whether he was safe there.

30. In cross-examination, L.I. said that her father owns a car wash business in Nigeria. The relatives she has in Nigeria are her grandfather and her father's siblings. She does not have any plans to visit her father in Nigeria any time soon, or that she is aware of. She visited her father in Nigeria in 2017 and 2019.

31. I asked L.I. whether her father still owns a car wash. She confirmed that he did.

32. There were no questions in re-examination.

(ii) Submissions

33. Mr Wain relied upon the Secretary of State's decision letter and her review of her decision. The starting point was the judge's preserved findings. The judge found that it would not be unduly harsh for the claimant's children and wife to remain in United Kingdom without the claimant. It follows that, pursuant to s.117C(6) of the 2002 Act, the claimant would have to show that there were very compelling circumstances over and above Exceptions 1 and 2 in s.117C(4) and (5) respectively in order to succeed in his appeal. This was a very high threshold, in Mr Wain's submission.

34. In relation to the impact upon the claimant's family members of his continued exclusion, Mr Wain referred me to the factors set out at para 51 of HA (Iraq) [2022] UKSC 22. Mr Wain submitted that the claimant had not established that there were very compelling circumstances over and above the Exceptions.

35. In relation to the first factor set out at para 51 of HA (Iraq) "*the nature and seriousness of the offence committed*", Mr Wain asked me to take into account the sentencing remarks of the sentencing judge, at page 4 of the Home Office Bundle. The sentencing judge said that offences for possession of false passports, the offence for which claimant was sentenced, are very serious offences because they undermine border control and security of the United Kingdom. The fact that the claimant had committed the offence whilst on bail was an aggravating feature. He was sentenced to a custodial sentence of 3 years and the sentencing judge recommended that he be deported.

36. Mr Wain submitted that, apart from the passage of time, the claimant has not put forward any further evidence as to how he has addressed his offending behaviour

and what he has done in Nigeria in the form of rehabilitation or what other courses of action he has taken to address rehabilitation. All that is known is that he was deported in January 2011, that he has lived in Nigeria since then; and that he has remained in contact with his wife and children. In Mr Wain's submission, the only form of rehabilitation that the claimant could rely upon is the fact that he has not committed any further offences. However, it is clear from HA (Iraq) that this does not carry much weight.

37. In relation to the time that has elapsed since the offence was committed, Mr Wain accepted that the offence was committed in 2010 but, he submitted, this was only one factor in the overall balancing exercise.

38. In relation to the nationals of the persons concerned, the sponsor and the claimant's children were British nationals as well as Nigerian nationals. In relation to the claimant's family situation including the length of his marriage and factors relating to family life, Mr Wain submitted that the relationship between the claimant and the sponsor and his children with the claimant has been conducted since 2011 through various forms of contact, including travel to Nigeria. The relationships have been maintained since 2011. Mr Wain submitted that this was a clear indication that the deportation has not created very compelling circumstances, or disrupted family life.

39. In relation to the seriousness of the difficulties that the family are likely to encounter, Mr Wain submitted that the evidence in the witness statements relates to the fact that the sponsor has to work to support the children, the children are at school and the son has mentioned in his statement that he has contract work in football. All of those factors do not appear to have been affected by the claimant's deportation, in Mr Wain’s submission. They have maintained contact and visits to the claimant in Nigeria have been undertaken.

40. In relation to the best interests of the children, Mr Wain submitted that nothing has been put forward to indicate that there have been any particular serious difficulties that flowed from the claimant being deported.

41. In Mr Wain’s submission, there was a lack of evidence showing that the deportation/exclusion had had a negative impact on the family amounting to very compelling circumstances.

42. In relation to the claimant's own circumstances, Mr Wain submitted that there were slight discrepancies in the oral evidence. The sponsor initially stated that the claimant was not working but then corrected her evidence to say that he was working. It is clear that he was financially managing himself. The daughter confirmed in evidence that the claimant owned a car wash and that there were family members in Nigeria such as her grandfather and the claimant's siblings.

43. Mr Wain submitted that the claimant's cultural, social and family ties in Nigeria remained particularly strong. This was another factor that meant that the high public interest in continued exclusion was not outweighed.

44. Mr Corban submitted that the oral evidence given at the hearing before me was honest and clear. There was nothing to suggest that the truth had not been told. Mr Corban drew my attention to the fact that Mr Wain had not challenged the impact of the continued separation as described by the children and the sponsor.

45. Although the threshold in s.117C(6) was high, it was not impossible to overcome. Mr Corban then went through the factors that he submitted were relevant and asked me to consider them cumulatively.

46. The length of the claimant's exclusion from the United Kingdom is what distinguishes the claimant's case from many others where the appellants are still in the United Kingdom. The claimant has been outside the United Kingdom for more than 12 years which, in his submission, was a long time.

47. Mr Corban asked me to consider the length of the claimant's exclusion in relation to the ages of the children. They were aged 4 years and 7 years when claimant was separated from them. The son is now 19 years old, having been with his father for just 7 years and the daughter child was just 4 years old when the claimant was deported. In his submission, this was also a very strong factor.

48. Mr Corban asked me to take into account the negative emotional impact of the long separation on the children. The children have explained clearly how they have felt. The daughter said in her letter that, when she first met her father in Nigeria, she recognised him from afar and ran towards him and held him and cried. The negative impact of the separation is evident from the letters that the children have written to the court.

49. Mr Corban asked me to consider the best interests of the daughter who is still under the age of 18 years and to consider the impact of continued separation on her. It would not be in her best interests for the separation to continue.

50. This is not a case where the separation started when the children knew what was going on. They grew up during the period of separation. The daughter needs her father because she is at a very critical stage of her development, at the age of 16. The children were innocent parties. They were born before the claimant committed the offence. This was important.

51. The relationship between the sponsor and the claimant commenced before the conviction. The fact that the judge did not accept that the relationship started in Nigeria was not important, in Mr Corban's submission. What was important, in this submission, was the timing of the commencement of the relationship in relation to the conviction.

52. Mr Corban submitted that there were other factors that showed that this case was unique. The judge had found that it would be unduly harsh for the children and the sponsor to leave the United Kingdom and go and live in Nigeria with the claimant. In reaching my decision on whether there were very compelling circumstances over and above the Exceptions, Mr Corban asked me to factor in these findings by the judge.

53. Mr Corban submitted that, in relation to the "unduly harsh" requirement, the only aspect that the claimant did not satisfy was to show that the decision would be unduly harsh on him if he continued to stay in Nigeria away from the children.

54. It followed, in Mr Corban's submission, that the "unduly harsh" requirement was only not satisfied in part. The part not satisfied was the part for the claimant to show that the decision would be unduly harsh for him to continue to stay in Nigeria away from the children.

55. Mr Corban submitted that it was not relevant whether the claimant is working in Nigeria. Another factor in the claimant's favour was that he has not re-offended.

56. I reserved my decision.

(D) ASSESSMENT

57. I make it clear that, in reaching my decision on this appeal, I have considered all of the written and oral evidence, the parties' written and oral submissions and relevant case-law, whether or not mentioned specifically in my decision. I have reached my decision only after considering with anxious scrutiny all of the evidence before me, taking into account the judge's preserved findings and applying applicable principles.

58. The judge found that the sponsor and the claimant's children enjoy family life with him. These are preserved findings.

59. The claimant is outside the territory of the United Kingdom. It is the presence of his wife and children in the United Kingdom that gives rise to consideration of the claimant's right to family life with his family in the United Kingdom.

60. Mr Corban submitted (paras 53-54 above) that the claimant did not satisfy the "unduly harsh" requirement in part only. This submission is a variation of the submission he made before me at the "Error of law" hearing ("EOL hearing") (see para 24 of the EOL Decision). Furthermore, the submission ignores para 25 of the EOL Decision where I stated that, read as a whole, it was clear that the judge found at para 26 of her decision that it would not be unduly harsh for *the sponsor and her children* to remain in the United Kingdom without the claimant. The submission further ignores the fact that no Rule 24 response was submitted before the EOL hearing (see para 16 of the EOL Decision) and that I had decided that the sole issue in the resumed hearing was whether there were very compelling circumstances over and above the Exceptions. Finally, the submission ignores the fact that it is very clear from the judge's decision that she found that the claimant did not satisfy Exceptions 1 and 2.

61. Accordingly, Mr Corban's submission that the judge found that Exception 2 was not satisfied in part only is without merit and wholly untenable.

62. Many of the decided cases concern deportation or a refusal to revoke a deportation order in circumstances where the person concerned is still in the United Kingdom. Section 117C is worded so as to refer to deportation. It does not mention, in terms, revocation of a deportation order. However, s.117C also applies to decisions to refuse to revoke a deportation order, including cases in which the individual has been removed and is seeking revocation of the deportation order from abroad (head-note (7) of Binaku (s.11 TCEA; s.117C NIAA; para 399D) [2021] UKUT 00034 (IAC)).

63. It is for the claimant to establish that there are very compelling circumstances over and above the Exceptions in s.117C, to the standard of the balance of probabilities. If he establishes that there are very compelling circumstances over and above the Exceptions, this will mean that the decision to refuse to revoke the deportation order is disproportionate to the rights of the sponsor and the children to enjoy family life with the claimant and his right to enjoy family life with them.

64. Although the sole issue before me is whether there are very compelling circumstances over and above the Exceptions, it is relevant to remind myself of the

threshold for Exception 2 in S.117C(5). This is because the threshold in order to establish whether there are very compelling circumstances over and above the Exceptions is higher than the threshold in order to establish Exception 2.

65. In MI(Pakistan) v SSHD [2021] EWCA Civ 1711, Simley LJ said:

> "18. As already indicated, the meaning and application of the "unduly harsh" test in section 117C (5) of the 2002 Act was considered authoritatively by the Supreme Court in *KO (Nigeria)* and by this court in *HA (Iraq).* In *KO (Nigeria)* at [23], Lord Carnwath addressed the "unduly harsh" test in the context of considering whether the seriousness of the parent's offending should be weighed as part of the assessment, as follows:
>
> > "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor … can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."
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> 19. At [27] Lord Carnwath also endorsed guidance given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] INLR 563 as to the meaning of the words "unduly harsh", referring to their description of the "evaluative assessment" required of the tribunal in the following terms:
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> > "…. 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
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> 20. The "unduly harsh" test was considered again by this court in *HA (Iraq).* In relation to the Supreme Court's decision in *KO (Nigeria)* Underhill LJ made a number of important observations with which I respectfully agree.
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> 21. First, he said that Lord Carnwath's reference to "*a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*" could not be read entirely literally since it was difficult to see how one would define the level of harshness that would "*necessarily*" be suffered by "*any*" child: see [44]. I agree. The cohort of children encompassed by this provision will all have a genuine and subsisting relationship with the parent in question but there will inevitably be a spectrum of infinitely differing relationships within that cohort. For example, as Underhill LJ said, the deportee parent might be living separately from the children (while still retaining a genuine and subsisting relationship with them), the child might be on the verge of leaving (or have left) the family home, or there might be a baby who does not know the parent. It simply cannot be assumed that the majority have a close bond with the deportee parent or that there is some objectively identifiable standard of closeness (reflecting an "ordinary degree of closeness") against which comparison might be made. As Peter Jackson LJ put it in his supporting judgment in *HA (Iraq)* at [157]:

> "For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent whose face-to-face contact cannot continue may be akin to a bereavement."
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> 22. …
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> 23. …
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> 24. Secondly, …
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> 25. Thirdly, …
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> 26. Fourthly, as Peter Jackson LJ emphasised, in considering harm, "there is no hierarchy as between physical and non-physical harm" (see [159]) and there can be no justification for treating emotional harm as intrinsically less significant than physical or other harm. A failure to appreciate this is likely to result in a failure to focus on the effect of a parent's deportation on the particular child."

66. It is therefore clear that "unduly harsh" denotes a higher threshold than "reasonableness" and that "very compelling circumstances over and above the Exceptions" denotes a higher threshold than "unduly harsh". The high threshold of "very compelling circumstances over and above the Exceptions" takes account of the public interest in deportation cases.

67. Any assessment of whether an appellant's deportation would be unduly harsh for the individual's partner or children must be made without taking into account the public interest (KO (Nigeria) [2018] UKSC 53 at para 23). In contrast, it is necessary to take into account the strength of the public interest in deportation or in maintaining the deportation order when assessing whether there are very compelling circumstances over and above the Exceptions.

68. Both parties addressed me on the factors listed at para 51 of HA (Iraq). I now set out para 51, supplying the numbering to the bullet points for ease of reference later on in my decision:

> "51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in Hesham Ali at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In Unuane v United Kingdom (2021) 72 EHRR 24 the ECtHR, having referred to its earlier decisions in Boultif v Switzerland (2001) 33 EHRR 50 and Üner v The Netherlands (2006) 45 EHRR 14, summarised the relevant factors at paras 72-73 as comprising the following:
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> i. "• the nature and seriousness of the offence committed by the applicant;
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> ii. • the length of the applicant's stay in the country from which he or she is to be expelled;
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> iii. • the time elapsed since the offence was committed and the applicant's conduct during that period;
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> iv. • the nationalities of the various persons concerned;
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> v. • the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
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> vi. • whether the spouse knew about the offence at the time when he or she entered into a family relationship;

vii. • whether there are children of the marriage, and if so, their age; and

viii. • the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …

ix. • the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

x. • the solidity of social, cultural and family ties with the host country and with the country of destination." "

69. I will work my way through those factors, adopting the "*balance sheet*" approach, setting out factors in favour of the public interest in the claimant's continued exclusion and the factors in favour of the claimant. The factor numbers I use in my analysis below refer to the numbers I have ascribed to the factors listed at para 51 of HA (Iraq).

70. Finally, I make the following general points before turning to the evidence in the instant case:

71. Firstly, it has been said in many cases that the strength of the public interest is not a fixity and that it is necessary to evaluate the strength of the public interest in each case.

72. Secondly, whilst it may be counter-intuitive to think that an individual who has been unable to satisfy Exception 2 could go on to establish that there are very compelling circumstances over and above the Exceptions precisely because the threshold for the latter is higher than the threshold for the former, the instant case is unlike the usual cohort of deportation appeals that come before the Tribunal where the individual concerned is physically still in the United Kingdom and is resisting removal, often before the completion of the applicable minimum period.

Credibility and findings of fact

73. I had reason to doubt the credibility of the sponsor. She began her evidence by saying that she and the claimant met in Nigeria. I stopped Mr Corban asking her further questions about this because the judge had rejected the sponsor's evidence in this regard and noted that it was the claimant's evidence in his witness statement that they met in the United Kingdom.

74. When asked what the claimant was doing to support himself in Nigeria, the sponsor said that he used to wash cars before the pandemic but at present he is only selling water, whereas the son said that he believed that his father was working and the daughter said clearly that her father still owns a car wash. It is plain that the sponsor was attempting to mislead me about the claimant's circumstances in Nigeria.

75. I reject the sponsor's evidence that the claimant is only selling water in Nigeria. I find that he has a car wash business and that he earns sufficient to support himself in Nigeria.

76. For the reasons given above, the overall credibility of the sponsor's evidence is undermined. Nevertheless, I accept her written evidence about the emotional and practical impact upon her of being separated from the claimant since 2011, evidence which is supported by the evidence of the children. They were both entirely credible. I have no hesitation in accepting their written and oral evidence.

77. Although the judge rejected the claimant's and the sponsor's evidence that they met in Nigeria before they came to the United Kingdom, she did not make a clear finding as to when they entered into their family relationship. I note that there is no indication in her decision that the claimant and the sponsor were not a family unit when their children were born. Their children were born in 2004 and 2007. The claimant was convicted on 24 May 2010. From all of the documentary and oral evidence taken together with the judge's preserved findings, I draw a finding that the claimant and the sponsor had formed a family unit by the time their son was born.

78. It is clear from the oral evidence before me that the claimant does have family in Nigeria. His father is in Nigeria. He has siblings and also more distant relatives. There is little evidence about the solidity of his family ties in Nigeria. He must be well conversant with Nigerian culture, having been born and raised there and then returning to live in Nigeria from December 2011. He must have social ties in Nigeria. I find he has solid social and cultural ties in Nigeria.

79. However, I have the benefit of the claimant's witness statements and also the bundle of evidence of his communications with the sponsor. I also have the letters from the two children and I heard their oral evidence. On the whole of the evidence, I find that he has a very close bond with the sponsor and his children, a bond that they have managed to maintain notwithstanding the distance between them, and that the solidity of these bonds is greater than the solidity of his combined social, cultural and family ties in Nigeria.

80. Not only does the claimant have a very close bond with the sponsor and his children I find that the witness statements and letters show that there is a deep longing by each of them to be physically together. I find that they each find their physical separation a daily struggle. This was encapsulated most clearly by the daughter in her letter dated 17 July 2023 when she referred to the absence of the claimant in their lives as a daily struggle. She has been without the physical presence of her father in her life since the age of 4 years. She has plainly found that very difficult as has the son. I find that this is not a family that has been able to come to terms with the physical absence of the claimant in their daily lives. Their daily emotional struggle to carry on with their lives without him is the compelling aspect of this case notwithstanding that there is no medical evidence that the emotional impact has led to any health issues and no evidence that the separation has had an adverse impact on the children's schooling or their health or (in the case of the son) his football career. I find that it is in the best interests of the claimant's daughter that she enjoys family life with her father in person.

Factors in favour of maintaining the deportation order

81. In relation to factor i. of the factors listed in para 51 of HA (Iraq), the claimant attempted to obtain, through a sham marriage, the right to remain in the United Kingdom. I agree with Mr Wain that such offences undermine border control and the security of the United Kingdom. That is a serious matter.

82. The Court of Appeal held in OH (Serbia) v. SSHD [2008] EWCA Civ 694; [2009] I.N.L.R. 109, held that there are three important features of the public interest in deportation, as follows::

    i) The risk of re-offending by the person concerned.

    ii) The need to deter foreign criminals from committing serious crimes.

iii) The role of deportation as an expression of society's revulsion at serious crimes and in building public confidence in the criminal justice system's treatment of foreign citizens who have committed serious crimes.

83. I give weight to the fact that the offence was a serious one that undermined the system of immigration control as well as the public interest in deterrence and in building public confidence in the criminal justice system. It is also relevant to take into account the length of the claimant's sentence, i.e. 3 years. This was not a light sentence. Nor was it a very heavy sentence.

84. There was no dispute before me that the applicable minimum period for maintaining the deportation in the instant case is 10 years. Once the minimum period has been completed, there is no presumption either way. As David Richards LJ said in SU (Pakistan) v SSHD [2017] EWCA Civ 1069 at para 64, quoted at with approval para 23 of EYF (Turkey) v SSHD [2019] EWCA Civ 592, "*The effect of the expiry of 10 years is only that the previous presumption in favour of maintaining the [deportation] order falls away.*"

85. It must be the case that, once the minimum period has lapsed, the public interest in maintaining a deportation order will diminish over time. Indeed, Underhill LJ recognised that this was the case *"up to a point",* at para 25 of ZP (India)".

86. There is some lack of clarity about the date on which the claimant was removed from the United Kingdom (see para 9 above). It is more likely than not that the claimant's information is correct. Taking the date of removal as 7 December 2011, he has been outside the United Kingdom for a period of 11 years 8 months as at the date of the resumed hearing. This is a period in excess of the minimum period of 10 years, albeit only by 1 year 8 months. Nevertheless, the fact that he has been outside the United Kingdom for longer than the minimum period is relevant.

87. It is also relevant that the entire minimum period has passed with the claimant being outside the United Kingdom. He is not someone who has remained in the United Kingdom resisting removal whilst time passed so that all or a significant proportion of the minimum period was spent whilst he remained in the United Kingdom. The fact that he has been outside the United Kingdom for at least the minimum period contributes towards building public confidence in the system.

88. In relation to factor ii., the claimant lived in the United Kingdom for a period of nearly 9 years. His only lawful residence was as a visitor (preserved findings of the judge, at para 20 of her decision). However, the weight I give to the public interest in relation to this factor is reduced by reason of the fact that, following the making of the deportation order, he lived in the United Kingdom for a period of 1 year 3 months and that he has now lived outside the United Kingdom since December 2011. In all of the circumstances, I give this factor little weight insofar as it is a factor against him.

89. For all of the reasons given above, I do give weight to the public interest in maintaining the deportation order but the weight I give it is much reduced.

Factors in favour of the claimant

90. Factor iii. goes in the claimant's favour. Although I agree with Mr Wain that there is no evidence that the claimant has undertaken any courses in rehabilitation, the fact of the matter is that the best evidence of rehabilitation is an absence of offending over an extended period. In this case, there is no evidence that the claimant has

committed any offences during the period of 13 years 8 months since his conviction in May 2010, nor does the Secretary of State contend that he has. However, as Mr Wain submitted, this is a factor that carries little weight.

91. Aspects of factor iv. go in the claimant's favour as well as against him. The sponsor and the two children have British citizenship but they are also Nigerian nationals. The claimant is a Nigerian national. However, the judge's preserved findings include her findings that it would be unduly harsh for the sponsor and the children to live in Nigeria. Therefore, the United Kingdom is the only country in which they can enjoy their family life if they are to do so in person. On the other hand, the judge found that it would not be unduly harsh for the sponsor and the children to remain in the United Kingdom without the children (para 25 of the EOL Decision).

92. In relation to factor vi., I have drawn a finding that the claimant and the sponsor had formed a family unit by the time their son was born, at para 77 above. It follows that the claimant's offence was committed some years after the family unit was formed and therefore the sponsor could not have known of the claimant's offence when she entered into the relationship. This therefore also goes in the claimant's favour.

93. The judge's preserved finding that it would be unduly harsh for the sponsor and the children to live in Nigeria means that factors viii. and ix. go in the claimant's favour.

94. In relation to factor x., I have found at para 78 above that the claimant has solid social and cultural ties in Nigeria. However, I have also found at para 79 above that he has very close bonds with the sponsor and his children, bonds that they have managed to maintain notwithstanding the distance between them, and that the solidity of these bonds is greater than the solidity of his combined social, cultural and family ties in Nigeria. I have found at para 80 above that the daily emotional struggle on the part of the sponsor and the children, particularly the children, to carry on with their lives without him is the compelling aspect of this case notwithstanding that there is no medical evidence that the emotional impact has led to any health issues and no evidence that the separation has had an adverse impact on the children's schooling or their health or (in the case of the son) his football career. I have found that it is in the best interests of the claimant's daughter that she enjoys family life with her father in person. Her best interests are a primary consideration although not of paramount importance.

95. For the reasons given in paras 93-94 above, factor v. also goes in the claimant's favour. I place weight on the daily emotional impact on the sponsor and especially the claimant's son and daughter of being physically separated from the claimant.

96. The factors listed at para 51 of HA (Iraq) are plainly not exhaustive. The strongest factors in the instant case are the fact that the claimant has remained outside the United Kingdom for a period in excess of the minimum period, albeit that he has exceeded that minimum period by only 1 year 3 months; and the emotional impact on the sponsor and the children, particularly the children, of the physical absence of their father in daily lives.

97. Stepping back and considering everything in the round, giving due weight to the public interest and to the factors in the claimant's favour, I find that the claimant has established that there are very compelling circumstances over and above the Exceptions. Whilst this is a conclusion that may be counter-intuitive, given the judge's preserved finding that it would not be unduly harsh for the sponsor and the children

to remain in the United Kingdom without the claimant, it will be clear from my assessment above that the fact that I accorded less weight to the public interest is material to my conclusion that the high threshold in s.117C(6) is met, it being the case that the factors in the claimant's favour taken cumulatively are not otherwise sufficient to amount to very compelling circumstances over and above the Exceptions. This is so notwithstanding my finding that the emotional impact on the sponsor and the children, particularly the children, and their daily struggle is compelling.

98. I have therefore concluded that the Secretary of State's decision to refuse to revoke the deportation order breached the rights of the claimant and his family to their family life.

99. I therefore allow the claimant's appeal on human rights grounds.

Decision

The making of the decision of the First-tier Tribunal did involve the making of any error of law sufficient to require it to be set aside.

I re-make the decision on the appeal by allowing the claimant's appeal on human rights grounds against the decision of the Secretary of State to refuse to revoke the deportation order.

Signed
Upper Tribunal Judge Gill Date: 15 September 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**