Upper Tribunal
(Immigration and Asylum Chamber)

RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2019	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE GILL

UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RA

(ANONYMITY DIRECTION MADE)

Respondent

Representation :

For the Appellant: Mr M Pilgerstorfer, instructed by the Government Legal Department

For the Respondent: Mr D Bazini, instructed by D & A Solicitors

(1) In KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53, the approval by the Supreme Court of the test of "unduly harsh" in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, formulated by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), does not mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it.

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

(3) Section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of KO (Nigeria); namely, those who have not been sentenced to imprisonment of 4 years or more, and those who have. Determining the seriousness of the particular offence will normally be

by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation; but the ultimate decision is for the court or tribunal deciding the deportation case.

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

DECISION AND REASONS

A. SECTION 117C AFTER KO (NIGERIA)

1.
In this appeal and that of MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 00122 (IAC) , which was heard consecutively, we consider how section 117C (Article 8: Additional considerations in cases involving foreign criminals) should be construed , following the judgment of the Supreme Court in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53.

2.
For convenience, we shall refer to Mr RA as the appellant and the Secretary of State as the respondent. The facts of the appellant's case are set out, beginning at paragraph 3 4 below.

3.
Section 117C lies within Part 5A of the Nationality, Immigration and Asylum Act 2002. In brief, section 117A explains when Part 5A applies. In deciding whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR, courts and tribunals must have regard to the "general" considerations listed in section 117B and, in cases concerning the deportation of foreign criminals (as defined in section 117D), to the considerations listed in section 117C.

4.
Section 117B provides that the maintenance of effective immigration controls is in the public interest. Amongst other things, it also explains when little weight should be given to a private life or a relationship formed with a qualifying partner.

5.
As well as defining "foreign criminal", section 117D contains definitions of "qualifying child" and "qualifying partner".

6.
Section 117C provides as follows:-

" **117C Article 8: additional considerations in cases involving foreign criminals**

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

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

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

(4) Exception 1 applies where—

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

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

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

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

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

(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. ”

7.
In KO (Nigeria) , Lord Carnwath, giving the judgment of the Court, first considered the effect of section 117B(6), which identifies the circumstances in which the public interest does not require the removal of a person who is not liable to deportation. Lord Carnwath had this to say about section 117C:-

“20. Turning to section 117C the structure is not entirely easy to follow. It starts with the general rules (1) that deportation of foreign criminals is in the public interest, and (2) that the more serious the offence the greater that interest. There is however no express indication as to how or at what stage of the process those general rules are to be given effect. Instead, the remainder of the section enacts specific rules for two categories of foreign criminals, defined by reference to whether or not their sentences were of four years or more, and two precisely defined exceptions. For those sentenced to less than four years, the public interest requires deportation unless exception 1 or 2 applies. For those sentenced to four years or more, deportation is required “unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2”.

21. The difficult question is whether the specific rules allow any further room for balancing of the relative seriousness of the offence, beyond the difference between the two categories. The general rule stated in subsection (2) might lead one to expect some such provision, but it could equally be read as no more than a preamble to the more specific rules. Exception 1 seems to leave no room for further balancing. It is precisely defined by reference to three factual issues: lawful residence in the UK for most of C’s life, social and cultural integration into the UK, and “very significant obstacles” to integration into the country of proposed deportation. None of these turns on the seriousness of the offence; but, for a sentence of less than four years, they are enough, if they are met, to remove the public interest in deportation. For sentences of four years or more, however, it is not enough to fall within the exception, unless there are in addition “very compelling circumstances”.

22. Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C’s deportation be “unduly harsh”? Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word “unduly” is intended as a reference

back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and like the test of “reasonableness” under section 117B, exception 2 appears self-contained.

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 d eportation 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 t he next section) is a balancing of relative levels of severity of the parent’s offence, o ther than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) 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.

…

27. Authoritative guidance as to the meaning of “unduly harsh” in this context was 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] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the “evaluative assessment” required of the tribunal:

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

On the facts of that particular case, the Upper Tribunal held that the test was satisfied :

“Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that cruel.”

This view was based simply on the wording of the subsection, and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial. ”

8.
A s a result of KO (Nigeria) , the position is that, in determining whether E xception 2 (in section 117 C (5)) applies, a court or tribunal is not to have regard to the seriousness of the offence committed by the person who is liable to deportation. Importantly, however, the expression “unduly harsh” sets a high threshold.

B. THE ‘UNDULY HARSH’ TEST

9.

In seeking to articulate what is meant by “unduly harsh”, Lord Carnwath, as we have seen, approved the guidance given by the President of the Upper Tribunal in MK (Sierra Leone) . That guidance must, accordingly, be followed.

10.
Mr Bazini, however, drew attention to the second quotation from MK (Sierra Leone) contained within paragraph 27 of Lord Carnwath’s judgment. He submitted that it was not only the Upper Tribunal’s interpretation of “unduly harsh” in that case that received expressed approbation from the Supreme Court; it was also the Upper Tribunal’s application of that test to the facts of the case before it.

11.
Mr Bazini relied particularly upon paragraph 40(v) of MK (Sierra Leone) :-

“Section 117C(5): Unduly harsh – the two children

(v) We turn to consider the question of whether the Appellant’s deportation would have an unduly harsh effect on either of the two children concerned, namely his biological daughter and his step son, both aged seven years. Both children are at a critical stage of their development. The Appellant is a father figure in the life of his biological daughter. We readily infer that there is emotional dependency bilaterally. Furthermore, there is clear financial dependency to a not insubstantial degree. There is no evidence of any other father figure in this child’s life. The Appellant’s role has evidently been ever present, since her birth. Children do not have the resilience, maturity or fortitude of adults. We find that the abrupt removal of the Appellant from his biological daughter’s life would not merely damage this child. It would, rather, cause a gaping chasm in her life to her serious detriment. We consider that the impact on the Appellant’s step son would be at least as serious. Having regard to the evidence available and based on findings already made, we conclude that the effect of the Appellant’s deportation on both children would be unduly harsh. Accordingly, within the matrix of section 117C of the 2002 Act, “Exception 2” applies. ”

12.
The Tribunal in MK (Sierra Leone) had also to examine the position under the relevant Immigration Rules relating to the deportation of foreign criminals. It is in this p art of the Upper Tribunal’s decision that we find the quotations set out by Lord Carnwath in paragraph 27 of his judgment. It is therefore necessary to set out the entirety of th e relevant paragraphs :-

“ 45. We give effect to the new provisions of the Immigration Rules in the following way:

(a) The starting point is paragraph 398(a), the effect whereof is that the deportation of the Appellant from the United Kingdom is deemed to be conducive to the public good and in the public interest because the offence of which he was convicted in 2002 attracted a sentence of imprisonment exceeding four years.

(b) The next step is to consider whether paragraph 399 or 399A applies. If neither of these provisions applies, the public interest in deportation “ … will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. ”

(c) We consider that paragraph 399(a)(i) applies since, as appears from our findings above, we are satisfied that the Appellant has a genuine and subsisting parental relationship with two British citizen children who are aged under 18 years and are in the United Kingdom.

(d) In accordance with the remaining provisions of paragraph 399, we must decide two further questions. First, would it be unduly harsh for either child to go to live in the Appellant's country of origin? Second, would it be unduly harsh for either child to remain in the United Kingdom without the Appellant? In order for the Article 8 ECHR claim to succeed, both questions require an affirmative answer. The second of these tests replicates Section 117C(5) of the 2002 Act. The first belongs exclusively to the Rules.

(e) In giving effect to the new statutory regime we have already supplied an affirmative answer to the second question: see [44] above. In considering the first question, we find no reason to make any distinction between the two children concerned. Both are aged seven years. Inevitably, their age and current circumstances generally are factors of major significance. As we have observed, both children are at a critical stage of their development. They have spent the entirety of their lives in the United Kingdom. They are, in consequence, fully absorbed in the language, culture, norms, practices and lifestyle of United Kingdom society. The next factor of obvious significance is the foreign country concerned, Sierra Leone. A basic comparative exercise juxtaposing the two countries being considered will almost invariably be required in answering the question posed by paragraph 399(a)(i)(a) of the Rules. In conducting this exercise, it will normally be appropriate for the Court or Tribunal to make some basic assumptions relating to, and to take judicial notice of, elementary and general matters pertaining to United Kingdom society, subject of course to any evidence to the contrary. As regards Sierra Leone, we take judicial notice of the facts that this is a third world west African state whose recent history has featured a lengthy war and military coup. It has a severely depressed economy which is predominantly agricultural. Life expectancy, income and standard of living bear no comparison with their counterparts in the United Kingdom. While English is the official language, it is only nominally so. The effects of the ten year civil war were ruinous. Life expectancy remains at 40 years, one of the lowest globally. Much of the grave destruction of infrastructure during the civil war has not been restored and, most recently, the country has been afflicted by the terrible Ebola outbreak.

46. The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are mindful that " unduly harsh " does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb " unduly " raises an already elevated standard still higher. Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.

47. The final question is whether it would be unduly harsh for either child to remain in the United Kingdom without the Appellant. This is a different question from that considered in [46] above. We have identified a range of facts and considerations bearing on this issue. Once again, an evaluative judgment on the part of the Tribunal is required. In performing this exercise we view everything in the round. The Appellant plays an important role in the lives of both children concerned particularly that of his step son. He is the provider of stability, security, emotional support and financial support to both children. We have rehearsed above the various benefits and advantages which he brings to the lives of both children, coupled with his personal attributes and merits. We remind ourselves of section

55 of the 2009 Act. We acknowledge the distinction between harsh and unduly harsh. We remind ourselves again of the potency of the main public interest in play, emphasised most recently by the Court of Appeal in SSHD v MA (Somalia) [2015] EWCA Civ 1192. The outcome of our careful reflections in this difficult and borderline case and in an exercise bereft of bright luminous lines is as follows. Balancing all of the facts and factors, our conclusion is that the severity of the impact on the children's lives of the Appellant's abrupt exit with all that would flow therefrom would be of such proportions as to be unduly harsh. "

13.
Both in his written skeleton argument and his oral submissions, Mr Bazini submitted that we were obliged to adopt the same approach as in MK (Sierra Leone) to children aged at or around 7 and that we must likewise take " judicial notice " of the fact that children at this age are "at a critical stage of their development". It was , he submitted, unnecessary and, indeed, inappropriate for a tribunal to expect to see expert evidence on this matter, before making such a finding.

14.
We reject th ese submission s . Although the application of a legal test to a particular set of facts can sometimes shed light on the way in which the test falls to be applied, it is the test that matters. If this were not so, everything from the law of negligence to human rights would become irretrievably m i red in a search for factual preceden ts .

15.
W hat might a t first appear to be hard-edged findings of fact often turn out to be evaluative assessments . On analysing the above passages from MK (Sierra Leone) , that is the position here. The Upper Tribunal's conclusion that children aged 7 are at a "critical stage of their development" was such an assessment , based on the facts before it. It was not the laying bare of an obvious fact, of which any other court or tribunal must take "judicial notice". One could envisage an equally valid argument that a child of 2 or 3 is at a critical stage of its development; or a child at or approaching puberty, and so on. Childhood i s a developmental pr ogression towards becoming an adult.

16.
In any event, Mr Bazini's submissions founder when one reads paragraph 46 of MK (Sierra Leone) in context. As can be seen from the citation at our paragraph 1 2 above, t owards the end of paragraph 47, the Upper Tribunal in fact acknowledged that this was a "difficult and borderline case" and involved "an exercise bereft of bright luminous lines". That is, with respect, entirely right. The fact that the respondent may not have taken issue with the value judgment that the Tribunal reached in MK (Sierra Leone) does not mean that a differently constituted Tribunal, applying the test articulated in the first part of paragraph 46, could not lawfully have come to a different conclusion.

17.
As can be seen from paragraph 27 of KO (Nigeria) , the test of "unduly harsh" has a dual aspect. It is not enough for the outcome to be "severe" or "bleak". Proper effect must be given to the adverb "unduly". The position is, therefore, significantly far removed from the test of "reasonableness", as found in section 117B(6)(b).

C. THE APPLICATION OF SECTION 117C(6) TO ALL "FOREIGN CRIMINAL" CASES

18.
Interestingly, Lord Carnwath's analysis of section 117C does not touch upon a very significant matter that arose in NA (Pakistan) & Another v Secretary of State for the Home Department [2016] EWCA

Civ 662. On the face of the section, subsection (6) applies only in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years. As the Court of Appeal explained in NA (Pakistan) , the purpose of section 117C(6) is to ensure that , in every “foreign criminal” case, Part 5A of the 2002 Act does not operate in such a way as to cause a violation of Article 8. For this reason , section 117C(6) must be read as applying, not only to “four years or more” cases but also to those other foreign criminals sentenced to imprisonment for a period of less than four years (to which one must add the two categories referred to by Lord Carnwath: offence of serious harm/persistent offender) .

19.
This is what Jackson LJ had to say about the matter:-

“25. Something has obviously gone amiss with the drafting of section 117C(3). In Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586, HL, at 592 - 593, Lord Nicholls (with whom the other members of the Appellate Committee agreed) explained the circumstances in which the courts in interpreting statutes can correct obvious drafting errors. In our view the lacuna in section 117C(3)is an obvious drafting error. Parliament must have intended medium offenders to have the same fall back protection as serious offenders. Mr Tam invited us so to rule.

26. In reaching this conclusion it is important to bear in mind that the new Part 5A of the 2002 Act is framed in such a way as to provide a structured basis for application of and compliance with Article 8, rather than to disapply it: see the title of Part 5A, the general scheme of the provisions in that Part and, in particular, section 117A(1). If section 117C barred medium offenders from asserting any Article 8 claim other than provided for in subsections (4) and (5), that would plainly be incompatible with Article 8 rights (either their own or Convention rights of individuals in their family) in some cases. Equally plainly, it was not Parliament’s intention in enacting Part 5A to disapply or require violation of Article 8 in any case. We also place reliance on section 3(1) of the Human Rights Act 1998. That provision requires courts to construe legislation in a way which is compatible with Convention rights, if it is possible to do so. It is possible to do so here. In accordance with the guidance given by Lord Nicholls, the words which need to be read into section 117C(3) so as properly to reflect Parliament’s true meaning are clear, namely the same words as appear in sub-section (6) and in para. 398 of the 2014 rules, which came into effect at the same time as part of an integrated and coherent code in primary legislation and the Immigration Rules for dealing with deportation cases.

27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders “the public interest requires C’s deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.”

20.
Nothing in KO (Nigeria) casts doubt upon this important conclusion of the C ourt of Appeal in NA (Pakistan) . A s we have seen, Lord Carnwath had , in fact, nothing of substance to say about section 117C(6).

D. THE MEANING OF “VERY COMPELLING CIRCUMSTANCES”

21.

As a result, th e findings of Jackson LJ on the operation of the test involving “very compelling circumstances, over and above those described in Exceptions 1 and 2” remain fully authoritative:-

“ 28. The next question which arises concerns the meaning of “very compelling circumstances, over and above those described in Exceptions 1 and 2”. The new para. 398 uses the same language as section 117C(6). It refers to “very compelling circumstances, over and above those described in paragraphs 399 and 399A.” Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

29. In our view, the reasoning of the Court of Appeal in JZ (Zambia) applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that “there are very compelling circumstances, over and above those described in Exceptions 1 and 2”. As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute“ very compelling circumstances, over and above those described in Exceptions 1 and 2”, whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament’s intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in Maslov v Austria [2009] INLR 47, and hence highly relevant to whether there are “very compelling circumstances, over and above those described in Exceptions 1 and 2.”

32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a “near miss” case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were “very compelling circumstances, over and above those described in Exceptions 1 and 2”. He would need to have a far

stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation."

22.
It is important to keep in mind that the test in section 117C(6) is extremely demanding. The fact that, at this point, a tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest , does not in any sense permit the t ribunal to engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of section 117C. Not only must regard be had to the factors set out in section 117B, such as giving little weight to a relationship formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years.

23.
Jackson LJ put it as follows:-

"33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in HH v Deputy Prosecutor of the Italian Republic [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in Secretary of State for the Home Department v CT (Vietnam) [2016] EWCA Civ 488 at [38]:

"Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation." "

E. NAVIGATING SECTION 117C: NA (PAKISTAN)

24.
Jackson LJ then set out the following important guidance on how to approach matters:-

"36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As

was the case under the 2012 rules (as explained in MF (Nigeria)), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.

37. 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). "

25.
Finally, for our purposes, Jackson LJ addressed the relationship between section 117C and the jurisprudence of the European Court of Human Rights:-

"38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as Űner v Netherlands (2007) 45 EHRR 14 and Maslov v Austria? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8. "

26.
We make no apology for dwelling upon NA (Pakistan) . Although decided prior to the judgment of the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, which held that the Immigration Rules relating to deportation were not a "complete code", Jackson LJ's judgment remains authoritative as regards the matters set out above. Indeed, the finding at paragraph 38 of Hesham Ali that "very compelling circumstances" means "a very strong claim indeed" chimes with what Jackson LJ said about the nature of the test.

F. THE SCOPE OF THE SECTION 117C(6) EXERCISE

27.
In MS (Philippines) , we address in detail the submission advanced by Ms Patyna in that case ; namely, that on a proper reading of paragraphs 20 to 22 of Lord Carnwath's judgment in KO (Nigeria) , section 117C(2) has no part to play in the process required of a court or tribunal by section 117C(6) , other than as regards the distinction between the two categories identified by Lord Carnwath in paragraph 20 of KO (Nigeria) . We d o not accept that submission (which was not, in any event, advanced by Mr Bazini in the present case). The consequence, therefore, is that in the case of any

foreign criminal , a court or tribunal engaged in determining whether “there are very compelling circumstances, over and above those described in Exceptions 1 and 2” , will need to have regard to the seriousness of the offence.

28.
How should a judge approach that task? As Simon LJ held in Secretary of State for the Home Department v S u ckoo [2016] EWCA Civ 39:-

“In general, the facts of the conviction and sentence will be sufficient: matters of mitigation will be taken into account at the sentencing hearing.”

29.
On the other hand, given that the judge is not constrained to consider seriousness merely by reference to which of the two categories of “foreign criminal” the individual falls into , it will be necessary to determine the seriousness of the actual offence, within the category in question. This point emerges from the judgment of Singh LJ in Secretary of State for the Home Department v Barry [2018] EWCA Civ 790, in which the decision of the First-tier Tribunal to allow the appeal of a foreign criminal was upheld:

“56. Ms Patry's second submission under Ground 2 is that the FTT adopted an impermissible approach and/or gave weight to immaterial factors, namely the mitigation which it considered to be available to the Respondent and his expressions of remorse: see in particular paras. 102-122 of its determination; and the conclusions at paras. 154-155. Ms Patry submits that this involved an element of "double counting", since the mitigating factors had already been taken into account by the sentencing judge in arriving at the appropriate sentence for this case.

57. I do not regard the approach of the FTT in this regard to have been impermissible as a matter of law. I do not agree that questions of mitigation are totally irrelevant to the balancing exercise which the FTT had to perform. Ms Patry is right to say that questions of mitigation will already have played their part in arriving at the appropriate sentence for the underlying offence. However, it must be borne in mind that the three categories which are set out in the Immigration Rules are broad categories. In particular, the most serious category applies to any offender who has been sentenced to a sentence of imprisonment of at least 4 years. However, that can cover a wide range of cases. Although they are all serious, they can vary in degrees of seriousness. The criminal courts in this country come across some examples of the most heinous kind, which would be towards the top end of the range envisaged by Category 1. However, in an appropriate case, I can see no reason in principle why either aggravating factors or mitigating factors might not be taken into account by the FTT in assessing the seriousness of the offence in question and, accordingly, the strength of the public interest in deportation. Similarly, in a case such as the present, which falls into the intermediate category of seriousness, because the sentence passed was between 12 months and 4 years imprisonment, I can see no reason in principle why aggravating or mitigating factors may not be taken into account by the FTT”.

30.
The usual way in which the judge will assign the offence a place within the relevant category will be by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation. But, as Singh LJ makes clear, the ultimate decision is for the court or tribunal .

31.

Before us, there was debate as to the significance to be accorded to the particular issue of rehabilitation, as part of the section 117C(6) exercise.

32.
As the C ourt of Appeal pointed out in Danso v Secretary of State for the Home Department [2015] EWCA Civ 596, courses aimed at rehabilitation, undertaken whilst in prison, are often unlikely to bear material weight , for the simple reason that they are a commonplace; particularly in the case of sexual offenders .

33.
As a more general point , the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be . There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256, paragraphs 48 to 56) . Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will never be capable of playing a significant role (see LG (Colombia) v Secretary of State for the Home Department [2018] EWCA Civ 1225) . Any judicial departure from the norm would , however, need to be fully reasoned.

G. THE APPELLANT'S CASE

(a) Background and evidence

34.
The appellant and his brother arrived in the United Kingdom clandestinely in 2007, when the appellant was 14. The brother returned to Iraq under the A ssist ed V oluntary R eturn S cheme, having been refused asylum. Owing to his age, the appellant remained in the care of Social Services in the United Kingdom . The appellant's asylum claim of April 2009 was refused in October 2009 but he received discretionary leave until 1 September 2010. An application to extend that leave was refused and, since July 2011, the appellant has remained in the United Kingdom without leave.

35.
He underwent an Islamic marriage to a British citizen, of Kurdish Iraqi descent, in April 2012 and became legally married to her in May of that year. The appellant and his wife live in Yorkshire. They have one child, a daughter born in September 2013.

36.
In Ju n e 2016, the appellant was granted limited leave to remain, on the basis of his family life. On 10 August 2016, however, he was convicted on his guilty plea of the offence of possessing/controlling a false/improperly obtained identity document; namely, a false passport. He was sentenced to imprisonment for a period of twelve months, which reflected his guilty plea.

37.
The appellant had been sent the false passport by his mother in Iraq. He wanted to use it in order to visit her. The Sentencing Judge said:-

"You sought to present this passport to [the] authorities to enable you to travel and they discovered that it was forged. People like you who seek to travel on false documentation undermine the immigration and travel pillars upon which this country is, to a certain extent, built, and you must

understand that there will be an immediate custodial sentence as a result. Having taken everything into account that I have heard, the appropriate sentence in my view is one of twelve months' imprisonment."

38.
In September 2016, the appellant was served with a decision to deport. Notwithstanding representations on behalf of the appellant as to why he should not be deported , the respondent decided to make a deportation order. The appellant appealed against that decision and on 12 June 2018, the First-tier Tribunal allowed his appeal. The respondent obtained permission to appeal against that decision and in January 2019 we it set aside, following a concession by Counsel for the appellant who accepted (as was the case) that the First-tier Tribunal Judge had applied entirely the wrong test , asking herself whether there were insurmountable obstacles to family life continuing in Iraq, rather than the test required by section 117C and paragraph 399 of the Immigration Rules.

39.
In re-making the decision , we heard evidence from the appellant and his wife. Each adopted their respective witness statements.

40.
The appellant told us that he has a mother and sister in Erbil, n orthern Iraq. He had been educated in the United Kingdom and had trained as a barber. He had worked at that trade for a short period of time, prior to his arrest and imprisonment.

41.
In cross-examination, the appellant said that his daughter understood very little Kurdish and " ask s all her questions in English".

42.
The appellant said that his wife's family lived in the same road as he and his wife and daughter. They assisted with the childcare needs of him and his wife. The daughter's grandparents spoke to the daughter in a mixture of Kurdish and English.

43.
The appellant's wife said that she had made three trips to n orthern Iraq ; in 2010, 2014 and 2017. In 2010 she had gone to a family funeral. In 2014 she had taken her small daughter to Erbil to show the child to her mother-in-law. The daughter was then around 10 months old. The witness said she and her daughter had stayed in a hotel in Erbil since the mother was living in unsatisfactory conditions in that city. Their stay in Erbil had been prolonged owing to ISIS activity in the area.

44.
In 2017, the appellant's mother had become very ill and so the witness took her daughter to see the appellant's mother who was by then living in different accommodation, provided by a charity.

45.
The appellant's imprisonment had impacted badly upon the appellant's daughter , who would wake at night and ask for her father. When taken to visit the appellant in prison, the daughter had wanted to stay there.

46.
The witness said that her own life had been adversely affected by the imprisonment. She had completed the first year of her degree in biomedical science and had done two weeks of the second

year , when she had to suspend her course. Although she resumed the course in 2017, she had failed certain exams. This was because there was “too much going on”. She accordingly changed to a course in hum an biology but, in September 2018, she had changed again , in order to do health and social care.

47.
The witness said that these changes had been caused by the appellant’s imprisonment and the subsequent deportation proceedings. She said she had worked part-time in Superdrug until December 2018, when she had stopped as a result of the forthcoming tribunal hearing. She had received state benefits in the past.

48.
The witness was adamant that neither she nor her daughter could reside permanently in n orthern Iraq. She did not know what was involved in communicating with the appellant by Skype , should that be necessary. She could not afford to visit the appellant in a third country, should he be deported.

49.
The witness was confident that she would have passed her biomedical course, but for the difficulties she had described.

(b) Re-making the decision in the appeal

50.
In re-making the decision, we apply the legal principles which we have set out above. These include the finding that the actual decision of the Upper Tribunal in MK (Sierra Leone) do es not form part of any legal test.

51.
Mr Pilger s torfer conceded, and we find, that the appellant has a genuine and subsisting relationship with his wife, who is a “qualifying partner” by reason of her status as a British citizen. Mr Pilger s torfer also conceded (and we find) that the appellant has a subsisting parental relationship with a qualifying child; namely, his daughter, who is also a British citizen.

52.
In determining for the purposes of section 117C(5) whether the effect of the appellant’s deportation on the partner or child would be unduly harsh , we look at the position on the basis, either that the appellant’s wife and child would follow him to Iraq or, alternatively, that both would remain in the United Kingdom.

53.
So far as the wife alone is concerned, it would not be unduly harsh to expect her to live in n orthern Iraq with the appellant. The appellant’s wife speaks the local language and, although her situation there with the appellant would be much less pleasant than it is in the United Kingdom, it would not be unduly harsh, applying the test approved in KO (Nigeria) . The appellant’s wife is in good health, as is the appellant.

54.
It would plainly not be in the best interests of the appellant’s British daughter for her to be expected to live in n orthern Iraq. She would not only lose the opportunity of being educated in the United Kingdom but would also face a challenging physical environment. She would, in addition, have quickly

to master Kurd ish S o rani, although the evidence indicates that she has exposure to that language as a result of the presence of her parents, grandparents and other relatives in the United Kingdom.

55.
Looking at matters in the round, we conclude, albeit with some degree of hesitation, that it would not be unduly harsh for the daughter to live with both parents in northern Iraq. The child is still relatively young. The security position is considerably improved, compared with the position when her mother decided to take her there on a visit. She would be with both parents, in a loving relationship. There would be other family support to call on in the country, in the form of her aunt, even if the grandmother may not be able to offer much practical assistance. There is, in any event, no reason why the appellant cannot secure employment in Erbil. Overall, expecting the daughter to live in Iraq would not be unduly harsh, applying the test approved in KO (Nigeria).

56.
We turn to whether it would be unduly harsh on the appellant's wife and daughter for the appellant to be deported there, whilst the wife and daughter remain in the United Kingdom.

57.
The appellant's wife told us that, if that was to happen, she intended to commit suicide. We reject that assertion, which we find was made purely in an attempt to increase the chances of the appeal succeeding. There is no reason whatsoever to assume that, if the appellant were to be deported, his wife would bring upon their daughter the distress involved in taking her own life. Nothing in the remainder of the evidence begins to show that this is even remotely likely.

58.
If the appellant were deported, life for the appellant's wife and the daughter would, we find, be hard. It would, however, be far from being unduly harsh. The appellant's wife and daughter live in very close proximity to family members, who already provide assistance and who can be expected to help the appellant's wife with the consequences of the appellant's removal.

59.
The appellant's wife has, until recently, worked part-time. She told us that she stopped because of the forthcoming tribunal hearing. She did not explain, however, why she was expected to do so much in connection with th at hearing as to be unable to continue such work, particularly given the involvement of the appellant's solicitors. In any event, following the appellant's deportation, it can reasonably be expected that the appellant's wife can work part-time, as do very many mothers with children of her daughter's age. If, as has already occurred, the appellant's wife has to have recourse to benefits, that would not be a matter that would cause or contribute to undue harshness.

60.
We agree with Mr Bazini that reliance upon modern means of communication, such as Skype , is no substitute for physical presence and face-to-face contact. We do not, however, believe that, in the event of deportation, such face-to-face contact would not be possible. The appellant's wife has made several visits to n orthern Iraq in the past, including two with her (then very small) daughter. There is no suggestion that, at that time, the family's financial circumstances were markedly better than they are at present or would likely be in the future. Accordingly, it would be entirely possible for the appellant to see both his wife and daughter on a face-to-face basis in Iraq .

61.

For these reasons, we find that Exception 2 does not apply. We accordingly proceed, as described above, to examine whether there are any compelling circumstances, over and above those described in Exceptions 1 and 2.

62.
We have regard to the fact that the appellant's sentence of imprisonment is at the bottom of the range covered by section 117C(3). We give that due weight . We do, however, take account of the fact that credit was given for the appellant's guilty plea. We also take account of the fact that, as the Sentencing Judge pointed out, the offence was a serious one. Given that the appellant has never been found to have had any legitimate reason to come to the United Kingdom, the fact that he should decide to engage in criminal behaviour, having only just regularised his former unlawful presence, count s against him. The weight of the public interest, bearing in favour of deportation, therefore remains high.

63.
So far as concern factors bearing on the appellant's side of the proportionality balance, we have regard to the fact that, as mentioned in section 117B(4)(b) , the appellant's relationship with his wife was established in 2012, at a time when the appellant was in the United Kingdom unlawfully.

64.
At all material times, the appellant has not had indefinite leave to remain and, accordingly , section 117B(5) indicates that little weight should be given to the appellant's private life in the United Kingdom. In this regard, we observe that t he appellant's history of employment in the United Kingdom is , in any event, e xiguous .

65.
We accord , however, significant weight to the appellant's relationship with his daughter and to her own best interests, as a child. We accept, as we have already stated, that the appellant's deportation would have serious adverse effects upon his daughter and that, despite the opportunities to meet outside the United Kingdom, the appellant's daughter will clearly miss the appellant's daily presence in her life.

66.
Notwithstanding those factors in favour of the appellant, we conclude that the weight of the public interest is such that it cannot be said that there are very compelling circumstances, as required by section 117C(6), which would make deportation a disproportionate interference with the Article 8 rights of the appellant, his wife, or daughter. That is so , looking at each of their positions both individually and together.

67.
Each member of the panel has contributed to its decision and reasons .

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. We set aside that decision and re-make the decision in the appeal by dismissing it on human rights grounds.

Signed Date d: 4 March 2019

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

Anonymity

We have made a direction under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.