THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondents who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondents or of any member of their families in connection with these proceedings.

Trinity Term
[2022] UKSC 22
On appeals from: [2020] EWCA Civ 1176
and [2020] EWCA Civ 1296

JUDGMENT

HA (Iraq) (Respondent) *v* Secretary of State for the Home Department (Appellant)
RA (Iraq) (Respondent) *v* Secretary of State for the Home Department (Appellant)
AA (Nigeria) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lord Reed (President)
Lord Hamblen
Lord Leggatt
Lord Stephens
Lord Lloyd-Jones

JUDGMENT GIVEN ON
20 July 2022

Heard on 17 and 18 May 2022

Appellant (Secretary of State for the Home Department)
Marcus Pilgerstorfer QC
Zane Malik QC
(Instructed by The Government Legal Department (Immigration))

Respondent (HA (Iraq))
Ramby de Mello
Edward Nicholson
Tony Muman
(Instructed by Fountain Solicitors (Walsall))

Respondent (RA (Iraq))
Danny Bazini
Jessica Smeaton
(Instructed by Duncan Lewis (City of London))

Respondent (AA (Nigeria))
David Lemer
Agata Patyna
(Instructed by Duncan Lewis (City of London))

LORD HAMBLEN (with whom Lord Reed, Lord Leggatt, Lord Stephens and Lord Lloyd-Jones agree):

1. Introduction

1. These three conjoined appeals concern the statutory regime governing the deportation of foreign criminals under section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). A "foreign criminal" for the purposes of these appeals is a person who is not a British citizen, is convicted in the UK of an offence, and who is sentenced to a period of imprisonment of at least 12 months - see section 32(1) of the UK Borders Act 2007 ("the 2007 Act").

2. Foreign criminals who have been sentenced to terms of imprisonment of at least 12 months but less than four years (described in the authorities as "medium offenders") can avoid deportation if they can establish that its effect on a qualifying child or partner would be "unduly harsh": see section 117C(5) of the 2002 Act ("the unduly harsh test"). This exception to deportation is known as Exception 2. The meaning of the unduly harsh test was considered by the Supreme Court in its decision in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273.

3. Foreign criminals who have been sentenced to terms of imprisonment of at least four years (described in the authorities as "serious offenders") can avoid deportation if they establish that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" - see section 117C(6) of the 2002 Act ("the very compelling circumstances test"). As the very compelling circumstances must be "over and above" the exceptions, whether deportation would produce unduly harsh effects for a qualifying partner/child is relevant here too.

4. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207, the Court of Appeal held that a medium offender who cannot satisfy the unduly harsh test can nevertheless seek to show that the very compelling circumstances test is met. This was common ground before us and I shall proceed on the basis that it is correct.

5. The very compelling circumstances test requires a full proportionality assessment to be carried out, weighing the interference with the rights of the potential deportee and his family to private and family life under article 8 of the European Convention on Human Rights ("ECHR") against the public interest in his deportation. It follows that a proportionality assessment will be carried out in all foreign criminal cases, unless the medium offender can show that Exception 1 (which relates to length of lawful residence and integration) or Exception 2 applies, in which case the public interest question is answered in favour of the foreign criminal, without the need for such an assessment.

6. The principal legal issue raised by these appeals in relation to the unduly harsh test is whether the Court of Appeal erred in its approach by failing to follow the guidance given by the Supreme Court in *KO (Nigeria)* and, in particular, by rejecting the approach of assessing the degree of harshness by reference to a comparison with that which would necessarily be involved for any child faced with the deportation of a parent.

7. The principal legal issues raised by these appeals in relation to the very compelling circumstances test are the relevance of and weight to be given to rehabilitation and the proper approach to assessing the seriousness of the offending.

8. The facts relevant to the appeals will be addressed when considering the individual appeals. HA and RA were medium offenders, whilst AA was a serious offender. In relation to each appeal the First-tier Tribunal allowed the appeal from the Secretary of State's deportation decision; the First-tier Tribunal's decision was set aside by the Upper Tribunal which then remade the decision and dismissed the appeal, and the Court of Appeal allowed the appeal from the Upper Tribunal's decision.

9. The appeals will be addressed under the following main headings:

   (i) The statutory framework.

   (ii) The unduly harsh test.

   (iii) The very compelling circumstances test.

   (iv) The individual appeals.

2. The statutory framework

The 2007 Act

10. Section 32 of the 2007 Act makes provision for the automatic deportation of foreign criminals. Section 32(4) and (5) provides:

> "(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c 77), the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

11. There are exceptions to the Secretary of State's obligation to make a deportation order under section 32(5). The exception which is relevant to the present appeals is section 33(2) which provides:

> "(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach -
>
> (a) a person's Convention rights ..."

Article 8 ECHR

12. A "person's Convention rights" for the purposes of section 33 of the 2007 Act includes rights under article 8 ECHR. That article provides:

> "**Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The 2002 Act

13. By section 117A(1), Part 5A of the 2002 Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts (such as a decision to deport a foreign criminal) would breach a person's right to respect for private and family life under article 8 ECHR. In such a case "the public interest question" is defined as being whether an interference with a person's right to respect for private and family life is justified under article 8(2) ECHR: see section 117A(3). When considering that question, a court or tribunal "must (in particular) have regard" in "all cases" to the considerations in section 117B, and in "cases concerning the deportation of foreign criminals" to the considerations in section 117C: section 117A(2).

14. Section 117B provides that the maintenance of effective immigration controls is in the public interest (117B(1)); that it is in the public interest and in particular in the interests of the economic well-being of the United Kingdom that persons seeking to enter or remain in the United Kingdom are "able to speak English" (117B(2)) and are "financially independent" (117B(3)); and that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the UK "unlawfully" (117B(4)) or to a private life established by a person when the person's immigration status is "precarious" (117B(5)). It has been held that a person is in the UK "unlawfully" if they are present there in breach of UK law - *Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236; [2017] 1 WLR 3118 at para 40. A person's immigration status is "precarious" if they do not have indefinite leave to remain - see *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536.

15. Given its importance to the appeal, section 117C will be set out in full. It 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."

16. Section 117D sets out various definitions. A "qualifying child" is a person under the age of 18 who is a British citizen or has lived in the UK for a continuous period of seven years or more. A "qualifying partner" is a partner who is a British citizen or who is settled in the UK. A "foreign criminal" is someone who falls within the definition set out in section 32(1) of the 2007 Act and also a person who has been convicted of an offence that has caused "serious harm" or who is a "persistent offender".

The Immigration Rules

17. When Part 5A of the 2002 Act was brought into force on 28 July 2014, corresponding changes were made to the Immigration Rules: see paragraphs A398-399A. Whilst these do not generally add to the analysis, para 399 states that the unduly harsh test is to be considered on the basis that the child or partner (1) goes to live in the country to which the person is to be deported (the "go" scenario) and (2) remains in the UK without the person who is to be deported (the "stay" scenario). Whilst section 117C(5) poses the single question of whether the effect of deportation on a qualifying child or partner would be "unduly harsh", as the Court of Appeal held, it should be interpreted in line with paragraph 399 so that both scenarios are addressed. This means that the unduly harsh test is only satisfied if the answer in relation to both scenarios is that the effect would be unduly harsh.

The general approach to the interpretation of the statutory scheme

18. In *KO (Nigeria)* Lord Carnwath (with whose judgment the other Justices agreed) set out the appropriate general approach to interpretation at paras 12 to 15. In summary, he stated as follows:

(i) Part 5A of the 2002 Act must be approached in the context of the history of attempts by Government, with the support of Parliament, to clarify the application of article 8 in immigration cases. The purpose of the changes was to

promote consistency, predictability and transparency in decision making and to reflect the Government's and Parliament's view of how as a matter of public policy, the balance should be struck - para 12.

(ii) The new Immigration Rules, introduced with similar objectives to Part 5A, were designed to change the previous position comprehensively by "reflecting an assessment of all the factors relevant to the application of article 8" - para 13.

(iii) Part 5A of the 2002 Act then took that a stage further by expressing the intended balance of the relevant factors in direct statutory form - para 14.

(iv) The purpose was "to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute" - para 15.

(v) It is appropriate to start from the presumption that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent - para 15, referring to *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, para 10, per Lord Hodge.

3. The unduly harsh test

KO (Nigeria)

19. The specific issue which arose for decision in *KO (Nigeria)* was whether, in determining if it would be unduly harsh on a qualifying child if a parent were deported as a foreign criminal, it was appropriate to consider the relative seriousness of the parent's offending, having regard to section 117C(2) of the 2002 Act. This was an issue upon which different views had been expressed in decisions of the Upper Tribunal and the Court of Appeal. The Supreme Court held that this was not appropriate and that the seriousness of the parent's offending was not a factor to be balanced against the interests of the child in applying the unduly harsh test.

20. The core of the reasoning of Lord Carnwath is set out in paras 22 and 23 of his judgment:

> "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 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 (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2017] 1 WLR 240, paras 55 and 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." (Emphasis added)

21. Lord Carnwath then considered the facts relating to the appeal in *KO (Nigeria)*. In this context he stated at para 27 as follows:

> "27. Authoritative guidance as to the meaning of 'unduly harsh' in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [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.'"

22. When addressing the decision of Upper Tribunal Judge Southern in *KO (Nigeria)* at paras 33 to 36 Lord Carnwath criticised that part of the decision which held that deportation of KO would be unduly harsh for his children if the relative seriousness of the offence was not to be taken into account. He held that this applied "too low a standard" and that it seemed to treat unduly harsh "as meaning no more than undesirable". He observed that this did not "give effect to the much stronger emphasis of the words 'unduly harsh' as approved and applied in both *MK* and [*MAB (USA) v Secretary of State for the Home Department* [2015] UKUT 435 (IAC)]". Conversely, he found the main reasoning of the Upper Tribunal judge which supported his conclusion that deportation would not be unduly harsh as "difficult to fault".

The case of the appellant Secretary of State

23. The argument of Mr Marcus Pilgerstorfer QC for the Secretary of State focused on the emphasised sentence in the passage cited above from para 23 of Lord Carnwath's judgment. He submitted that Lord Carnwath was there stating that the unduly harsh test requires a comparison to be made with "the degree of harshness which would necessarily be involved for any child faced with the deportation of a parent" and that undue harshness means a degree of harshness which goes beyond that. It is this "notional comparator" which provides the baseline against which undue harshness is to be evaluated.

24. In support of this case Mr Pilgerstorfer relied on the fact that this is how *KO (Nigeria)* has been interpreted and applied in subsequent cases in the Court of Appeal. For example, in *PG (Jamaica) v Secretary of State for the Home Department* [2019] EWCA Civ 1213, having considered *KO (Nigeria),* Holroyde LJ stated as follows at para 34:

> "It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. …"

25. A similar approach was taken in *PF (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 1139; [2019] Imm AR 1351, para 32; *OH (Algeria) v Secretary of State for the Home Department* [2019] EWCA Civ 1763; [2020] Imm AR 350, para 40, and *KF (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2051; [2020] Imm AR 538, paras 30 to 33. It is right, however, to observe that there does not appear to have been any issue as to the correct approach in those cases.

26. *KO (Nigeria)* was also interpreted and applied in this way by the Upper Tribunal in the appeals in the cases of *HA* and *RA.* In all the circumstances, Mr Pilgerstorfer submitted that a reasonably settled approach had developed which was wrongly departed from by the Court of Appeal's decision in those appeals.

27. The leading judgment of the Court of Appeal in the *HA/RA* appeals, reported at [2020] EWCA Civ 1176; [2021] 1 WLR 1327, was given by Underhill LJ. A concurring judgment was given by Peter Jackson LJ and Popplewell LJ agreed with both judgments. Underhill LJ rejected the argument that Lord Carnwath in para 23 of his judgment was seeking to define any baseline level of harshness or that he was doing so by reference to "the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation". He explained para 23 in the following terms:

> "44. In order to establish that the word 'unduly' was not directed to the relative seriousness issue it was necessary for Lord Carnwath to say to what it was in fact directed. That is

> what he does in the first part of the paragraph. The effect of what he says is that 'unduly' is directed to the *degree* of harshness required: some level of harshness is to be regarded as 'acceptable or justifiable' in the context of the public interest in the deportation of foreign criminals, and what 'unduly' does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not primarily on how to define the 'acceptable' level of harshness. It is true that he refers to a degree of harshness 'going beyond what would necessarily be involved for any child faced with the deportation of a parent', but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would 'necessarily' be suffered by 'any' child (indeed one can imagine unusual cases where the deportation of a parent would not be 'harsh' for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category."

28. In the appeal in *AA*, reported at [2020] EWCA Civ 1296; [2020] 4 WLR 145, the Court of Appeal followed this approach, as it has also done in *MI (Pakistan) v Secretary of State for the Home Department* [2021] EWCA Civ 1711 and *TD (Albania) v Secretary of State for the Home Department* [2021] EWCA Civ 619.

29. Mr Pilgerstorfer submitted that the Court of Appeal in *HA/RA* wrongly failed to follow the proper approach set out in *KO (Nigeria),* as confirmed in subsequent Court of Appeal cases such as *PG (Jamaica)*. By deciding that Lord Carnwath's test "cannot be read entirely literally" the court provided guidance which departed from it and amounted to a contradictory gloss. The court disapproved of comparing the degree of harshness that would be experienced by a qualifying child to that which would necessarily be involved for any child, and wrongly lowered the threshold approved in *KO (Nigeria).* Further, aspects of the court's reasoning reinstate the link (disapproved by this court in *KO (Nigeria)*) between the seriousness of the offending and the level of harshness required to meet the section 117C(5) test.

30. I reject these submissions on a number of grounds.

31. First, I consider that far too much emphasis has been placed on a single sentence in Lord Carnwath's judgment and that if his judgment is considered as a whole it is apparent that he was not intending to lay down a test involving the suggested notional comparator. It is correct that in para 23 of his judgment Lord Carnwath was recognising that the unduly harsh test involves a comparison, but the comparison made was between the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which is connoted by the requirement of "unduly" harsh. As Underhill LJ pointed out, Lord Carnwath was not seeking to define the level of harshness which is "acceptable" or "justifiable". Had this been his intention he would have addressed the matter in considerably more detail and explained what the relevant definition was and why. Similarly, if he had been intending to lay down a test to be applied in all cases by reference to the suggested notional comparator he would not only have so stated but he would have explained the nature of and justification for such a test. The reference to the harshness which would be involved for "any child" is to be understood as an illustrative consideration rather than a definition or test.

32. This is borne out by the self-direction in *MK* which Lord Carnwath endorsed as providing "authoritative guidance" at para 27 of his judgment. This does not involve any notional comparator. If that was intended to be the applicable test then the approved self-direction would have had to be expanded and explained.

33. It is correct, as Mr Pilgerstorfer pointed out, that the "main reasoning" of the Upper Tribunal Judge at paras 43 and 44 of the decision which Lord Carnwath found "difficult to fault" included references to "nothing out of the ordinary" being identified and to the disruption being no different "from any disruption of a genuine and subsisting parental relationship arising from deportation" which involve echoes of the notional comparator approach. These considerations were not, however, being put forward as a test or essential touchstone and the reasoning being approved related to the application of an appropriately elevated threshold.

34. Secondly, as Underhill LJ observed, a test based on what would necessarily be involved for "any child" cannot be read literally. "Any" child would encompass children for whom the deportation of a parent would be of no real significance, despite having a genuine and subsisting relationship with that parent. For such a child there would be little or no harshness involved, in which case the baseline level of "due" harshness would be very low. That is clearly contrary to the high standard which Lord Carnwath was envisaging, as illustrated by his criticism of the too low

standard applied by the Upper Tribunal Judge at para 35 of his judgment and the need to give “much stronger emphasis” to the words unduly harsh.

35. Thirdly, in recognition of this difficulty, Mr Pilgerstorfer suggested that the appropriate notional comparator should be not merely a qualifying child - ie one with a genuine and subsisting relationship with the deportee - but one of “similar age, living circumstances giving rise to a genuine and subsisting parental relationship, and nationality/time in the UK”. He described these as “sensible baseline characteristics” but no support for them is to be found either in Lord Carnwath’s judgment or in the statutory wording. Mr Pilgerstorfer submitted that these characteristics “readily arise from the statutory requirements” but living circumstances, age, nationality (beyond being British) and time in the UK (beyond seven years for non-British children) are alien to the statute. The suggested characteristics may be sensible but they are an invention.

36. In any event, there are too many variables in the suggested baseline characteristics for any comparison to be workable. How does one determine what are the material “living circumstances”? Age does not take into account a child’s maturity. Time in the UK does not take into account to what extent the child is integrated into the UK or whether the child has travelled in and out of the UK to the country in which it is proposed to remove the proposed deportee. In reality there is no satisfactory way to define what the relevant characteristics of a notional comparator child are to be or to make any such comparison workable.

37. Fourthly, a test involving a notional comparator child is potentially inconsistent with the duty to have regard to the “best interests” of the child in question as a primary consideration in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. This requires having “a clear idea of a child’s circumstances and of what is in a child's best interests” and carrying out “a careful examination of all relevant factors when the interests of a child are involved” - see *Zoumbas* at para 10. The focus needs to be on the individual child, but the discounting of what are said to be the “normal” or “ordinary” effects of deportation by reference to a notional comparator child risks the court or tribunal ignoring the actual impact of deportation on the particular child in a search for features which are outside the supposed norm. As Lord Carnwath stated at para 15 of his judgment in *KO (Nigeria)*, the presumption is that the statutory provisions are intended to be consistent with the general principles relating to the “best interests” of children.

38. Fifthly, the notional comparator approach gives rise to the risk that a court or tribunal will apply an exceptionality threshold. Searching for particular features which take the facts of an individual child’s case outside the ordinary run of cases is

likely to mean looking for exceptional or rare cases. As Underhill LJ stated at para 56:

> "… if tribunals treat the essential question as being 'is this level of harshness out of the ordinary?' they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

39. Sixthly, the Secretary of State's suggested approach is likely to lead to perverse results. The respondents give the example of a case involving the impact of parental deportation on an eight year old who cohabits and has a very close relationship with the parent. As the norm for "any child" in that qualifying child's position would be that the effect of separation would be considerable, it would allow the significant effect of that deportation to be treated as acceptably harsh and thereafter discounted from further consideration. This can be contrasted with the case of a 17 year old who lives separately from the parent and whose relationship is at the very lowest end of the genuine and subsisting relationship spectrum. As the norm for "any child" in that qualifying child's position would be that the effect of separation would be of much more limited significance, it is likely to be easier to satisfy the unduly harsh test because it will be more straightforward to identify particular features that take the case above the much lower baseline level than the higher bar set for the highly dependent eight year old.

40. Finally, all these highlighted difficulties reinforce the conclusion that Lord Carnwath cannot have been contemplating a notional comparator test. None of them are considered. Had it been intended to introduce such a test there is no doubt that

many of these issues would have needed to be and would have been addressed. There is no hint of that in the judgment of Lord Carnwath, or indeed in the arguments before the court.

41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:

> "… '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."

42. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - ie it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).

43. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.

44. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.

45. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State.

4. The very compelling circumstances test

46. Under section 117C(6) of the 2002 Act deportation may be avoided if it can be proved that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2".

47. The difference in approach called for under section 117C(6) as opposed to 117C(5) was conveniently summarised by Underhill LJ at para 29 of his judgment as follows:

> "(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
>
> (B) In cases where the two Exceptions do not apply - that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements - a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."

48. In *Rhuppiah v Secretary of State for the Home Department* [2016] 1 WLR 4203 at para 50 Sales LJ emphasised that the public interest "requires" deportation unless very compelling circumstances are established and stated that the test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them."

49. As explained by Lord Reed in his judgment in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 at para 38:

> "… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State."

50. How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in *NA (Pakistan)*. In relation to serious offenders he stated as follows:

> "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."

In relation to medium offenders he stated:

> "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."

He also emphasised the high threshold which must be satisfied:

> "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."

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:

> "• the nature and seriousness of the offence committed by the applicant;
>
> • the length of the applicant's stay in the country from which he or she is to be expelled;
>
> • the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> • the nationalities of the various persons concerned;
>
> • the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> • whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> • whether there are children of the marriage, and if so, their age; and
>
> • the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …
>
> • 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

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

52. The weight to be given to the relevant factors falls within the margin of appreciation of the national authorities. As Lord Reed explained in *Hesham Ali* at para 35:

> "35. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The Convention on Human Rights can thus accommodate, within limits, the judgments made by national legislatures and governments in this area."

Rehabilitation

53. Whilst it was common ground that rehabilitation is a relevant factor in the proportionality assessment there was some disagreement between the parties as to the reason for that and the weight that it is capable of bearing in the context of the very compelling circumstances test.

54. That it is a relevant factor is borne out by the Strasbourg jurisprudence. The time elapsed since the offence was committed and the applicant's conduct during that period is one of the factors listed in *Unuane*, drawing on the ECtHR's earlier decision in *Boultif*. This is also supported by domestic authority - see, for example, *Hesham Ali* (per Lord Reed at para 38); *NA (Pakistan)* at para 112 and, more generally, *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596.

55. In *RA* the Upper Tribunal stated as follows in relation to the significance of rehabilitation:

> "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 … 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 … Any judicial departure from the norm would, however, need to be fully reasoned." (para 33)

56. In *Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551; [2019] Imm AR 1026 at para 84 I cited and agreed with that passage. The Secretary of State submitted that this approach was correct and should be endorsed as, whilst it acknowledges that rehabilitation can be relevant, in terms of weight it will generally be of little or no material assistance to someone seeking to overcome the high hurdle of the very compelling circumstances test.

57. In the *RA* appeal, the Court of Appeal, while agreeing that rehabilitation will rarely be of great weight, did not agree with the statement that "rehabilitation will … normally do no more than show that the individual has returned to the place where society expects him … to be". They considered that it did not properly reflect the reason why rehabilitation is in principle relevant, namely that it goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance.

58. Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case. I do not, however, consider that there is any great difference between what was stated in *Binbuga* and by the Court of Appeal in this case. In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending. Subject to that clarification, I would agree with Underhill LJ's summary of the position at para 141 of his judgment:

> "What those authorities seem to me to establish is that the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as Moore-Bick LJ says in *Danso*, the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period."

59. The only caveat I would make is that the wider policy consideration of public concern may be open to question on the grounds that it is not relevant to the legitimate aim of the prevention of crime and disorder. In *Hesham Ali* it was the view of Lord Wilson that this was a relevant consideration (see paras 69 to 70) but that was not a view endorsed by the majority. That is not, however, an issue that falls for consideration on this appeal.

The seriousness of the offence

60. The seriousness of the offence is a matter which the court is required to take into account when carrying out a proportionality assessment for the purposes of the very compelling circumstances test.

61. This is made clear by section 117C(2) which states that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."

62. This is also consistent with the Strasbourg jurisprudence. The first of the factors listed in *Unuane*, drawing on the ECtHR's earlier decision in *Boultif,* is the nature and seriousness of the offence.

63. An issue which arises on the present appeals is how the seriousness of an offence is to be assessed. In particular, the Secretary of State criticises the Court of Appeal's judgment in *HA/RA* for placing undue emphasis on the sentence imposed as the criterion for establishing seriousness.

64. When addressing the *HA* appeal, Underhill LJ stated at para 94 that:

> "[the offence's] seriousness is reflected in the sentence which the Court imposed. Generally, for the purpose of the proportionality balance that falls to be struck in a deportation case the seriousness of the relevant offending is established by the level of sentence."

It was then said the Upper Tribunal in *HA* should only have had regard to the length of sentence imposed when assessing the seriousness of his offending: "HA should have been treated when striking the proportionality balance as having committed an offence of sufficient seriousness to attract a sentence of 16 months, no more and no less".

65. When addressing the *RA* appeal, Underhill LJ at para 148 criticised the Upper Tribunal for placing reliance on its understanding that the sentencing judge had described the offence as being serious and stated that:

> "… the authoritative measure of the degree of seriousness is the sentence imposed."

Further, at para 147 he held that the Upper Tribunal was wrong to regard the fact that the judge had given credit for a guilty plea as a countervailing factor which diminished the weight that RA could place on the shortness of his sentence.

66. A sentence imposed by a court may well reflect various considerations other than the seriousness of the offence. Sentencing is approached in a structured way. In accordance with the Sentencing Council guidelines, in England and Wales the first step is to make an assessment of the seriousness of the offence having regard to

culpability and harm. Often, there will be offence specific guidelines which assist in making that determination. Secondly, aggravating and mitigating factors will be considered and that may have the effect of either increasing or lowering the appropriate sentence. Some of those factors may relate to the seriousness of the offence but others may not. For example, an aggravating feature which will commonly impact on the level of sentence is a prior record of offending. Conversely, being of previous good character may well lead to a lower sentence. There may be aspects of personal mitigation, such as being sole carer for dependents, which will reduce sentence. These considerations relate to the offender rather than the seriousness of the offence itself. Thirdly, if there has been a guilty plea, then credit will be given against the provisional sentence arrived at. Where there is a plea at the first reasonable opportunity then a credit of one third will usually be given. That can have a significant impact on the sentence but it has nothing to do with the seriousness of the offence. As explained in the Court's recent judgment in *R v Maughan* [2022] UKSC 13; [2022] 1 WLR 2820, at para 15, the rationale of reducing a sentence because of a plea relates to the administration of justice in that it avoids the need for a trial, it shortens the gap between charge and sentence, it saves considerable costs and, in the case of an early plea, it saves victims and witnesses from concern about having to give evidence.

67. In practice, however, an immigration tribunal may have no information about an offence other than the sentence. If so, that will be the surest guide to the seriousness of the offence. Even if it has the remarks of the sentencing judge, in general it would only be appropriate to depart from the sentence as the touchstone of seriousness if the remarks clearly explained whether and how the sentence had been influenced by factors unrelated to the seriousness of the offence. In relation to credit for a guilty plea that will or should be clear. If so, then in principle I consider that that is a matter which can and should be taken into account in assessing the seriousness of the offence.

68. Underhill LJ appreciated "the logic" of this at para 147 of his judgment. He then, however, rejected it as involving an inappropriate "degree of refinement" and being inconsistent with the statutory provisions (relating to medium and serious offenders) which make no distinction between discounted and undiscounted sentences. I do not agree that this is simply a refinement. In relation to short sentences its impact may not be great, but in relation to longer sentences it may be considerable. Take, for example, a jointly committed robbery under which one offender receives a sentence of nine years and the other, after an early plea, receives a sentence of six years. The seriousness of the offence they jointly committed is the same, but if that is judged by the sentence imposed then there is a major disparity. Nor do I agree that much weight should be placed on the fact that no distinction for discount is drawn when distinguishing between medium and

serious offenders. One can well understand that for those purposes a bright line rule was required. But, it is different when what is required is an assessment of how serious the offence is in order to gauge the level of public interest, as section 117C(2) mandates. Any evidence that bears on seriousness is relevant to that statutorily required assessment, not just the sentence imposed.

69. Underhill LJ also made the point that the fact that someone has acted responsibly and acknowledged guilt should be allowed to be put into the proportionality balance. In appropriate cases I agree that it may be relevant to rehabilitation. It does not, however, impact on seriousness.

70. The other issue raised in relation to the seriousness of the offence is whether it is ever appropriate to place weight on the nature of the offending in addition to the sentence imposed. Whilst care must be taken to avoid double counting, as this may have been taken into account in arriving at sentence, in principle I consider that this can be a relevant consideration. This is supported by the Strasbourg jurisprudence which refers to the nature and seriousness of the offence as a relevant factor. As stated in *Unuane* at para 87:

> "… the Court has tended to consider the seriousness of a crime in the context of the balancing exercise under article 8 of the Convention not merely by reference to the length of the sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences committed by the applicant in question and their impact on society as a whole. In that context, the Court has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum."

71. This Court's recent decision in *Sanambar v Secretary of State for the Home Department* [2021] UKSC 30; [2021] 1 WLR 3847 involved approval of an Upper Tribunal decision which assessed the nature and seriousness of the offences by reference to the circumstances of the offending and not simply the sentence imposed - see, in particular, at paras 51-52.

5. The individual appeals

72. It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:

    (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.

    (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.

    (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

HA

The outline facts

73. HA is a citizen of Iraq and was born on 2 April 1980. He arrived in the United Kingdom clandestinely on 7 July 2000 and claimed asylum. The asylum claim was refused on 15 August 2003 and the appeal rights as to that refusal were exhausted on 5 February 2004. He, however, continued to reside here unlawfully.

74. HA entered into a relationship with a British citizen, NT, in 2006. NT already had a daughter from a previous relationship, born on 21 April 2004. HA and NT have since had three children together born respectively on 17 October 2011, 6 May 2014 and

8 November 2016. The children are British citizens. HA, NT and their three children live together but NT's daughter lives nearby with her maternal grandmother.

75. HA was convicted on 15 May 2010 of assisting unlawful immigration and possessing an unlawfully obtained immigration card and also of failing to surrender to custody at the appointed time. The circumstances of these offences were that he was trying to arrange the illegal entry of his mother and brother in the United Kingdom. He was sentenced to 16 months' imprisonment.

76. The Secretary of State made a deportation order in respect of HA on 31 May 2017 in the light of his criminal offending. HA made a human rights claim relying on article 8 of the ECHR on 23 January 2018. The Secretary of State refused that claim and declined to revoke the deportation order on 26 February 2018. The First-tier Tribunal (First-tier Tribunal Judge Gurung-Thapa) heard HA's appeal from the Secretary of State's decision on 13 August 2018 and allowed it by a decision promulgated on 1 October 2018. The First-tier Tribunal's decision was however set aside by the Upper Tribunal (Lane J, President, and Upper Tribunal Judge Coker) on 15 January 2019 as being materially wrong in law. The Upper Tribunal retained the appeal for the purpose of remaking the decision. The Upper Tribunal (Lane J, President, and Upper Tribunal Judge Gill) heard the underlying appeal on 15 February 2019 and dismissed it by a decision promulgated on 8 March 2019.

The Upper Tribunal's decision on the unduly harsh test

77. The Secretary of State accepted that HA has a genuine and subsisting relationship with his partner and his children. She also accepted that it would be unduly harsh for them to relocate with him to Iraq. The issue was therefore whether it would be unduly harsh for them to remain in the UK without him.

78. At paras 66 and 67 of its decision the Upper Tribunal directed itself by reference to paras 23 and 27 of Lord Carnwath's judgment in *KO (Nigeria).* It then stated:

> "68. The respondent accepted that the appellant has a genuine and subsisting relationship with his partner and his children. Indeed, based on the documentary evidence before us and the appellant's oral evidence, we have no difficulty in finding that he has a close and loving relationship with his partner and his children. It is clear that he is very much a

‘hands-on’ father who is involved in the lives of his children, dropping them off to school and nursery every day and picking them up. We accept that they share other everyday activities that are part of normal family life. At para 11 of his witness statement, he says he is engaged with the religious, educational and physical development of his children. He takes his daughters swimming, to their dance classes and to football. We accept his evidence in this regard.

69. We accept that, if the appellant is removed, his partner and children will be emotionally and psychologically affected. His partner says, at para 4 of her witness statement, that she is emotionally and physically dependent upon the appellant. We accept her evidence. She also says that the appellant attended counselling sessions with her when she suffered from depression following the still-birth of their child in 2010. She says that the children, including her daughter by another father, absolutely adore the appellant. We are prepared to accept that the appellant plays the role of a father in the life of his step-daughter, given that there is nothing to suggest that her biological father has any involvement in her life.

70. Plainly, it would be in the best interests of all the children if the appellant remained in the United Kingdom. They currently have a stable environment with the appellant and his partner playing their individual roles. If the appellant is removed, we accept that this would have a significant impact on the children as well as his partner.

71. However, there is no evidence before us to show that the emotional and psychological impact on the appellant’s partner and/or his children would be anything other than that which is ordinarily to be expected by the deportation of a partner/parent.

72. If the appellant is removed, his partner would be left to cope with looking after the children, attending to their many needs as they grow up and dropping them off at school and their various activities, without the appellant’s help.

> …
>
> 75. In our view, even if it were the case that it becomes difficult for the appellant's partner to continue working full-time or at all, this is no more than the difficulties faced by many single parents working part-time or full-time. It is simply not enough to reach the threshold of undue hardship.
>
> 76. It is very likely that the appellant's removal would result in his separation from his partner and his children for at least ten years, if not permanently. It is far from ideal that the appellant's family in the United Kingdom would only be able to maintain contact with him through Skype and by telephone. These means of communication are no substitute for the appellant's physical presence in the United Kingdom and his day-to-day involvement in the lives of his partner and children.
>
> 77. … we accept that, due to his subjective concerns and due to the financial constraints, the likelihood is that the appellant's removal will bring to an end the ability of his children and partner to be in his physical presence for the foreseeable future.
>
> 78. Having considered everything in the round and having taken into account the best interests of the appellant's children as a primary consideration, we find that it would not be unduly harsh for the appellant's children to remain in the United Kingdom without him, given the elevated threshold that applies as explained in MK (Sierra Leone). We further find that it would not be unduly harsh for the appellant's partner to remain in the United Kingdom without him, having given her circumstances separate consideration."

The Court of Appeal's decision

79. The Court of Appeal highlighted all the findings made by the Upper Tribunal which emphasised the closeness of the relationship between HA and his children, his child

rearing responsibilities and the complete separation which his deportation would involve. In all the circumstances, it held that the reason that the Upper Tribunal had reached the overall conclusion that deportation would not be unduly harsh was para 71 of its decision, where it said that there was no evidence that the effect of HA's deportation on NT and his children "would be anything other than that which is ordinarily to be expected by the deportation of a partner/parent" - ie a notional comparator test. The court held that this was an error of law in the light of which the case should be remitted to the Upper Tribunal for redetermination.

80. The Secretary of State's principal ground for challenging the Court of Appeal's decision was that the notional comparator test is the appropriate test, as established by *KO (Nigeria).* For reasons already given, I reject that case.

81. The Secretary of State's fallback case was that the Court of Appeal was in any event wrong to conclude that the Upper Tribunal had misdirected itself and applied the notional comparator test. The Upper Tribunal had referenced the *MK* self-direction in both para 67 and in its conclusion at para 78 and this was the test it was applying. If so, I would agree that there was no error of law. On balance, however, I agree with the Court of Appeal that the test which the Upper Tribunal was in fact applying was the notional comparator test. Virtually every finding made in the passages cited above supported a conclusion that deportation on the stay scenario would be unduly harsh on HA's partner and in particular his children. The only finding of substance going the other way was para 71 and its reliance on the impact which "is ordinarily to be expected" on deportation.

82. Notwithstanding the need for judicial restraint and caution, I therefore consider that the Court of Appeal was correct to conclude that the Upper Tribunal had erred in law in reaching its decision on whether the unduly harsh test was satisfied and that the case will therefore have to be remitted. In these circumstances it is not necessary to consider whether any error of law was made in relation to the Upper Tribunal's decision on the very compelling circumstances test, although I have already expressed reservations about the Court of Appeal's emphasis on sentence as the sole relevant criterion for assessing the seriousness of HA's offending.

RA

The outline facts

83. RA is an ethnic Kurd and a citizen of Iraq. He was born on 1 March 1993. He arrived in the United Kingdom clandestinely on 1 October 2007 aged 14, and claimed asylum. The asylum claim was refused on 14 April 2009 but he was granted discretionary leave to remain until 1 September 2010. He made an application for further leave to remain on 31 August 2010. It was refused on 23 December 2010 and the appeal rights as to that refusal were exhausted on 15 July 2011. He, however, continued to reside here unlawfully.

84. RA married a British citizen, KI, on 18 May 2012. They have a daughter, born on 16 September 2013, who is a British citizen. RA was granted leave to remain on the basis of his family life on 9 June 2016 until 6 December 2018.

85. RA was convicted (on a guilty plea) on 10 August 2016 of an offence of possessing/controlling a false/improperly obtained identity document. The circumstances of the offence were that he had been sent a false Iraqi passport by his mother so he could visit her in Iraq. This was then detected when he presented the passport to the authorities to enable him to travel. He was sentenced to 12 months' imprisonment. The judge's brief sentencing remarks acknowledge that RA was of good character but say that an immediate custodial sentence was necessary because of the nature of the offence.

86. The Secretary of State made a decision to deport RA from the United Kingdom on 22 November 2017 in the light of his criminal offending and rejected his human rights claim at the same time. The First-tier Tribunal (First-tier Tribunal Judge Mensah) heard RA's appeal from the Secretary of State's decision on 18 May 2018 and allowed it by a decision promulgated on 12 June 2018. The First-tier Tribunal's decision was however set aside by the Upper Tribunal (Lane J, President, and Upper Tribunal Judge Coker) on 18 January 2019 as being materially wrong in law. The Upper Tribunal retained the appeal for the purpose of remaking of the decision. The Upper Tribunal (Lane J, President, Upper Tribunal Judge Gill and Upper Tribunal Judge Coker) heard the underlying appeal on 13 February 2019 and dismissed it by a decision promulgated on 4 March 2019: [2019] UKUT 123 (IAC); [2019] Imm AR 780.

The Upper Tribunal's decision

87. In its application of the unduly harsh test the Upper Tribunal considered both the "go" and the "stay" scenarios and concluded that neither would be unduly harsh for RA's partner or child.

88. On the "go" scenario the Upper Tribunal stated as follows in relation to its effect on his daughter:

> "54. It would plainly not be in the best interests of the appellant's British daughter for her to be expected to live in northern 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 Kurdish Sorani, 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)*."

89. On the "stay" scenario it stated as follows:

> "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 that 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 northern 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."

90. In relation to the very compelling circumstances test the Upper Tribunal concluded that this had also not been satisfied, stating as follows:

> "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, counts 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 the appellant's history of employment in the United Kingdom is, in any event, exiguous.
>
> 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."

The Court of Appeal's decision

91. On the "go" scenario, the Court of Appeal held that the Upper Tribunal's conclusion was insufficiently reasoned (para 119) in that there was: (1) a failure to show clearly that it had given full weight to the very significant and weighty factor of RA's child losing, at least for the rest of her childhood, the advantages of British citizenship (para 114); and (2) a failure to deal adequately with the reality of the situation that RA and his family would face on return to Iraq, having regard to the

concerns raised in the country guidance about access to accommodation and employment for relocating Kurds who do not have family support which raised real questions about RA's ability to find decent accommodation and a job (para 118). There is no appeal against the Court of Appeal's decision on the "go" scenario.

92. On the "stay" scenario, the Court of Appeal also held that the Upper Tribunal's conclusion was insufficiently reasoned, with the consequence that it was unclear what factors had been taken into account in considering the issue of undue harshness and impossible to see whether the best interests of the child had been treated as a primary consideration. At para 122 Underhill LJ stated as follows (see also the judgment of Peter Jackson LJ at para 163):

> "… Paras 58-60 of the [UT's] decision do not in my view amount to the kind of particularised consideration that it is clear from *Zoumbas* … is necessary in a case of this kind. In contrast to what we saw in HA's case, there is simply no indication of the kind of role that RA played in the life of his daughter, from which it would be possible to make a considered assessment of the degree of harshness that separation from him would entail."

93. The Court of Appeal further held that the Upper Tribunal had erred in its application of the very compelling circumstances test in that: (1) it had not expressly put RA's rehabilitation into the proportionality balance as it should have done (para 143); and (2) it should have proceeded without qualification on the basis that RA's sentence was at the very bottom of the relevant range and not taken as countervailing factors (a) that the criminal judge gave credit for a guilty plea and (b) the sentencing judge's observation that the offence was a serious one (paras 146-148).

94. In the light of its conclusions the Court of Appeal allowed the appeal and remitted the case for re-determination by the Upper Tribunal.

95. The difficulty with the Court of Appeal's criticism of the Upper Tribunal's reasoning on the "stay" scenario as being insufficiently detailed is that evidence was not placed before the Upper Tribunal to support a particularised consideration. It is for the applicant to satisfy the unduly harsh test and to do so with evidence.

96. The case was advanced before the Upper Tribunal on the basis that findings made by the Upper Tribunal in *MK* as to the effect of deportation on the children in that case could be read across to RA's case as a "factual precedent". There is no such thing as a "factual precedent". As both the Upper Tribunal and the Court of Appeal held, findings made by a tribunal in one case have no authoritative status in a different case. As Underhill LJ observed at para 129, the tribunal has to make its own evaluation of the particular facts before it, it is often difficult to be sure that the facts of two cases are in truth substantially similar, and the assessment of undue harshness is an evaluative exercise on which tribunals may reasonably differ.

97. As the Secretary of State pointed out, RA had adduced very limited evidence before the Upper Tribunal. The Court of Appeal noted at para 125 that RA's witness statement evidence went "no further than claiming that he 'has always been a very involved father'". The Upper Tribunal rejected KI's evidence that she intended to commit suicide as "an attempt to increase the chances of the appeal succeeding", adding that this was not "even remotely likely" (para 57). The Upper Tribunal acknowledged that the effect of RA's deportation on KI and the child would be "hard", but in all the circumstances would be "far from unduly harsh". The Upper Tribunal noted that KI and the child "live in very close proximity to family members, who already provide assistance and who can be expected to help" (para 58). The Upper Tribunal considered the evidence that KI had worked part-time but "she stopped because of the forthcoming tribunal hearing" and "following [RA's] deportation, it can reasonably be expected that [KI] can work part-time [again]" (para 59).

98. It is clear that the Upper Tribunal did have close regard to the best interests of RA's daughter but, without evidence, it could not carry out the type of particularised consideration which the Court of Appeal called for. No doubt this would have been desirable, but a tribunal can only decide a case on the basis of the evidence before it. It cannot fairly be criticised for failing to embark on a consideration of impact which would necessarily have been based on speculation and conjecture rather than evidence. Its conclusions have to be judged on the basis of the evidence and argument placed before it.

99. In the circumstances I do not consider that the Court of Appeal was justified in finding an error of law in the Upper Tribunal's conclusion on the "stay" scenario. On the limited evidence that was before the Upper Tribunal, its conclusions were open to it and were sufficiently reasoned.

100. I would, however, uphold the Court of Appeal's conclusion that there was an error of law in relation to the very compelling circumstances test. Although I have

criticised the Court of Appeal's approach to the seriousness of the offence, it is correct that the Upper Tribunal wrongly stated that the sentencing judge had described the offence as "serious". It is also correct that rehabilitation is not addressed, although it is common ground that it is a relevant factor. Further, the overturning of the Upper Tribunal's decision on the "go" scenario means that this will have to be reconsidered and findings made in relation to it may impact on whether there are very compelling circumstances.

AA

The outline facts

101. AA is a citizen of Nigeria and was born on 2 January 1988. He arrived in the United Kingdom in 1999 (aged 11) along with his mother who abandoned him shortly thereafter, leaving him in the care of an aunt. On 7 February 2010 he made an application for a residence card on the basis of his marriage to an EEA national. He was issued with the residence card, on that basis, on 7 July 2010. The card was valid until 7 July 2015.

102. AA was convicted on 29 November 2013 of two counts of conspiracy to supply controlled drugs. He was sentenced to four and a half years imprisonment.

103. An application for a permanent residence card was made in AA's name on 1 September 2014. The Secretary of State refused that application on 9 November 2014. An appeal from that decision was allowed in part by the First-tier Tribunal on 12 June 2015 on the basis that AA had retained a right of residence. The Secretary of State refused to implement the decision as she did not believe the person who had given evidence at the hearing on 2 June 2015 was AA, since he was serving a sentence of imprisonment at the time. AA accepts, for the material purpose of this appeal, that at the relevant time he did not have a right of residence under EU law.

104. By the time of his sentence, AA had met his current partner, C, who is a British citizen. Before forming a relationship with C, AA had a daughter, K, born on 5 April 2006 with a previous partner. The daughter resides with AA's former partner. AA and C had a son, A, born on 13 February 2014. The son resides with AA and C. C was expecting another child at the time of the hearing before the First-tier Tribunal. The child, D, was born by the time of the hearing before the Upper Tribunal on 17 February 2019. The children are all British citizens.

105. AA was released from prison in August 2015. The Secretary of State first notified AA of the intention to make a deportation order on 21 April 2017. AA, through his representatives, responded, making a human rights claim. On 15 June 2017, the Secretary of State made a decision to deport AA from the United Kingdom in the light of his criminal offending and refused his human rights claim at the same time.

106. The First-tier Tribunal (First-tier Tribunal Judge Swaney) heard AA's appeal from the Secretary of State's decision on 4 October 2018 and allowed it by a decision promulgated on 15 October 2018. It was not in dispute that it would be unduly harsh to expect C or AA's children to accompany him to Nigeria.

107. In allowing the appeal, the First-tier Tribunal recorded and considered evidence from AA and C (who was not cross-examined) as well as documentary and expert evidence. It held that the effect of AA's deportation on C and their children would be unduly harsh. The First-tier Tribunal additionally held that there were very compelling circumstances that outweigh the public interest in AA's deportation.

108. The First-tier Tribunal's decision was however set aside by the Upper Tribunal (Lord Beckett, sitting as an Upper Tribunal Judge, and Upper Tribunal Judge Smith) on 12 February 2019 as being materially wrong in law ("the error of law decision"). The Upper Tribunal set aside the First-tier Tribunal's decision stating, among other things, that: (1) it was unable to identify a basis on which it could be said that the effect of AA's deportation on C and the children would be unduly harsh, and (2) without finding that the unduly harsh test in Exception 2 was met, it was not open to the First-tier Tribunal to find that there were, in this case, very compelling circumstances.

109. The Upper Tribunal retained the appeal for the purpose of remaking of the decision. The Upper Tribunal (Upper Tribunal Judge Smith) heard the underlying appeal on 25 April 2019 and dismissed it by a decision promulgated on 21 May 2019 ("the remade decision").

110. The Court of Appeal (Moylan LJ, Baker LJ and Popplewell LJ) heard AA's appeal on 21 July 2020. They gave judgment on 9 October 2020 allowing AA's appeal on the basis that the error of law decision was wrongly made. They held that the basis of the error of law decision was that the First-tier Tribunal's decision was perverse and that this could not be established. The Court of Appeal accordingly set aside the Upper Tribunal's decisions and restored the First-tier Tribunal's decision.

The First-tier Tribunal's decision on undue harshness

111. In reaching its conclusion that the deportation of AA would have an unduly harsh impact upon AA's children and his partner, the First-tier Tribunal relied in particular upon the following factors:

(i) AA's daughter, at the age of 12, being at a key stage of physical and educational development as she moves into adolescence (paras 68-70).

(ii) The accepted expert evidence as to the negative impact on sexual development and behaviour in girls growing up without a father (paras 68- 70).

(iii) The accepted negative impact on the daughter's behaviour and educational achievement, when AA was in prison (paras 68-70).

(iv) The accepted negative impact on the socio-emotional development of AA's son (para 71).

(v) The significant weight afforded to the impact that AA's deportation would have upon the relationship between his two children (from different mothers) (para 72).

(vi) The significant impact on AA's partner's ability to continue to work as a nurse (para 73).

(vii) The impact on AA's son's ability to continue to participate in a number of educational and non-educational extra-curricular activities, in light of his suspected special educational needs (para 74).

(viii) The medical condition of AA's partner, entailing debilitating physical symptoms, which prevented her from caring for their son, and necessitated an enhanced caring role for AA. Those difficulties being likely to be exacerbated on the birth of her (at the time) expected child (para 75).

(ix) AA's partner's limited ability to support her son's substantial emotional needs in light of her own emotional instability (para 76).

112. The Secretary of State submitted that the unduly harsh test involves a notional comparator, that no such comparator had been used and/or that had such a comparator been used the First-tier Tribunal could not have concluded that deportation would have been unduly harsh. I have rejected the Secretary of State's case on the notional comparator.

113. In those circumstances the only basis upon which the First-tier Tribunal's decision could be set aside for error of law is if it could be shown that its conclusion was perverse.

114. In its error of law decision, the Upper Tribunal summarised the findings made by the First-tier Tribunal "at their highest", at para 41, in the following terms:

> "Taking the circumstances at their highest, the situation was that the claimant has a daughter aged 12 by a former partner and he is involved in his daughter's life and makes a positive contribution. He lives with a partner who is a British citizen and they have a son aged four with a baby expected. His partner has IBS and adenoma[o]ysis and felt low when he was in prison as she could be expected to be on the claimant's deportation which would have implications for their son. However, she is able to work as a nurse, albeit the claimant facilitates her doing so by taking their son to and from school, and his absence could mean that she would have to give up work. We note, at paragraph 4.5 of Ms Meek's report, that C told the social worker that she could not go to Nigeria as her family is here. The claimant is involved in his son's life and supports him in his activities and education and the absence of the claimant would have a negative impact. Ms Meek found that both children have an attachment with their father. Should he be deported his absence could impact on his daughter emotionally, physically as well as on her development and education. It would have a detrimental emotional impact on his son and it would have a detrimental emotional impact on his daughter, and in her case a physical impact which Ms Meek does not justify. All of which led Ms Meek to conclude, as the FtTJ did, that it is in the best interests of the children for the claimant to remain."

115. The Secretary of State submitted that the Upper Tribunal was right to conclude that these circumstances were insufficient to meet the appropriately elevated

threshold imposed by the unduly harsh test and the First-tier Tribunal's decision to the contrary was perverse.

116. I agree with the Court of Appeal that perversity cannot be shown and that para 41 is not a proper foundation for any such conclusion as it is neither a complete nor an accurate summary of the First-tier Tribunal's findings. In particular, it failed to make reference to AA's role in facilitating the on-going relationship between his children, the debilitating effects of AA's partner's health conditions, with impact on AA's caring role and her own ability to care for her son, and AA's son's particular learning needs. As the Court of Appeal held at para 38:

> "When purporting to summarise the FtT Judge's factual findings which were relevant to her assessment of harshness, the UT Error of Law decision did not do so accurately or fairly. It did not include all of the FtT Judge's factors, omitting, for example, any reference to the adverse impact of the [appellant's] absence on the relationship between the two children, to which the FtT Judge attached significant weight. It mischaracterised others so as to diminish their significance, with the result that it was not a summary which took them at their highest, despite purporting to do so. The factors which the FtT Judge identified were capable of supporting the conclusion that the effect on C and the children of remaining in the UK without the [appellant] met the elevated unduly harsh test. That was an evaluative judgement for the FtT Judge on the basis of the full evidence before her, including cross-examined oral evidence and the report from Ms Meeks, the nuances of which will not be apparent to an appellate tribunal. Her findings of fact are such that a conclusion of undue harshness was open to her."

The First-tier Tribunal's decision on very compelling circumstances

117. The Upper Tribunal found no fault in the First-tier Tribunal's application of the very compelling circumstances test other than what was considered to be its erroneous conclusion on undue harshness. Notably, it placed no reliance on the First-tier Tribunal's approach to rehabilitation and accepted that it had been entitled to place weight on AA's lack of reoffending since his release (para 47) and had not erred in its assessment of reoffending risk (para 33).

118. In relation to rehabilitation the First-tier Tribunal found as follows:

> "78. I found the appellant's evidence about his childhood and early adulthood as set out in his witness statement dated 17 May 2017 and in his oral evidence was credible. He described the significant impact on his life of being abandoned by his mother and the treatment he received from his aunt's husband. The appellant's evidence about being sexually abused by his football coach was also credible and I accept that this had a huge impact on him and on his subsequent relationship with his wife.
>
> 79. The appellant describes in some detail how he came to commit the offences he did. I consider his experiences as a child and an adolescent made him vulnerable to the influence of Moses (for whom he acted as a runner selling drugs). The appellant of course had choices and as he accepts, he made the wrong ones. I find however at the time, he was vulnerable and [thus] his ability to make appropriate choices and to have the strength to walk away from someone he felt was stronger than him and whom he feared was limited.
>
> 80. The appellant's conduct in prison and since his release has been positive and the evidence demonstrates that he engaged with his sentence plan and took steps to address his offending behaviour and to obtain skills he could use in the community after release. He talks about learning how to make better decisions and to be more assertive, two key factors in his offending. He also described how a drug awareness course taught him about the wider impacts of drug dealing within the community. The appellant has not re-offended and his personal circumstances are now significantly different to what they were when he committed his offence. The appellant is now living with his partner and son and his partner is pregnant with their second child. His partner is employed as a nurse and he enjoys a stable family life. This contrasts significantly with the life he was leading at the time of his offending. I accept the appellant has taken positive steps to reduce his risk of re-offending and that it is unlikely he will re-offend in the future."

119. The Secretary of State submitted that the First-tier Tribunal erred in law in attaching material weight to the fact that there was no further offending and that AA had taken steps to rehabilitate. I reject that submission. It is accepted that rehabilitation is a relevant factor. The weight to be given to it is a matter for the fact finding tribunal. This was not a case where the only evidence of rehabilitation was the commission of no further offences. On the contrary there was positive evidence of rehabilitation and of changed circumstances and a finding that AA was unlikely to re-offend.

120. In summary, the First-tier Tribunal made no error of law and it was rationally entitled to come to its conclusions in relation to the unduly harsh test and the very compelling circumstances test. The Upper Tribunal therefore erred in setting the First-tier Tribunal's decision aside and the Court of Appeal was correct to restore it.

Conclusion

121. For the reasons set out above, I would dismiss all three appeals.