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La Corte EDU su provvedimento di espulsione a carico di migrante condannato per frode (CEDU, sez. IV, sent. 27 settembre 2022, ric. n. 18339/19)

La Corte EDU ha deciso il ricorso presentato contro il Regno Unito da un cittadino nigeriano, il quale ha lamentato la violazione dell'art. 8 CEDU, in seguito ad un provvedimento di espulsione che – a dire del ricorrente - avrebbe interferito in modo sproporzionato con il diritto al rispetto della sua vita familiare e privata. Lo stesso Governo ha ammesso che l'espulsione del ricorrente avrebbe interferito con l'art. 8 della Convenzione, ma ha lo ha ritenuto comunque conforme alla legge perseguendo uno scopo legittimo (nella specie, la prevenzione del disordine e della criminalità). Per la Corte EDU, sebbene l'articolo 8 della Convenzione non contenga un diritto assoluto alla non espulsione di alcuna categoria di straniero ha ritenuto di dover effettuare lo scrutinio lasciandosi guidare da alcuni criteri da essa stessa stabiliti. Tra i quali: la natura e la gravità del reato commesso dal ricorrente; la durata del soggiorno del richiedente nel paese che procede all'espulsione; la situazione familiare del ricorrente come la durata del matrimonio; la gravità delle difficoltà che il coniuge rischia di incontrare nel paese in cui il richiedente deve essere espulso. Ed ancora l'interesse superiore e il benessere dei minori. Sulla base dei menzionati criteri, la Corte EDU ha ritenuto che l'espulsione del ricorrente è stata del tutto conforme all'articolo 8 della Convenzione, ritenendo peraltro grave il reato di frode commesso. E pur volendo considerare l'interesse superiore della famiglia e della prole, al quale va attribuito sempre e comunque un "peso significativo", in alcuni casi - come quello all'esame dei giudici di Strasburgo – esso va modulato in base alla gravità del reato commesso e ad altri fattori propri di ciascun caso di specie. Sicché il rimpatrio del ricorrente in Nigeria non ha un impatto così grave sulla solidità della sua vita familiare e privata e, pertanto, l'interesse pubblico alla sua espulsione è prevalente rispetto all'interesse di questi e non viola l'articolo 8 della Convenzione.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF XXX v. THE UNITED KINGDOM

(Application no. 18339/19)

JUDGMENT
STRASBOURG
27 September 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXX v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Gabriele Kucsko-Stadlmayer, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Pere Pastor Vilanova,
Ana Maria Guerra Martins, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*
Having regard to:
the application (no. 18339/19) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Mr XXX ("the applicant"), on 1 April 2019;
the decision to give notice to the United Kingdom Government ("the Government") of the complaint concerning Article 8 of the Convention;
the observations submitted by the respondent Government and the observations in reply submitted by the applicant;
the comments submitted by The Joint Council for the Welfare of Immigrants and The Aire Centre, who were granted leave to intervene by the President of the Section;
Having deliberated in private on 5 July 2022,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant complained that his expulsion would breach his right to respect for his private and family life as provided for by Article 8 of the Convention, and that the final domestic decision fell short of the Article 8 balancing exercised require by the case-law of the Court.

THE FACTS

2. The applicant, Mr XXX, is a XXX national, who was born in XXX and lives in XXX. He is represented before the Court by Mr D. Mariampillai, a lawyer practising in London with David Benson Solicitors.

3. The United Kingdom Government ("the Government") are represented by their Agent, Ms K. Hamilton of the Foreign, Commonwealth and Development Office.

4. The facts of the case may be summarised as follows.

I.BACKGROUND

5. The applicant, who was born in XXX, entered the United Kingdom in XXX, at the age of XXX, as the spouse of a settled person. His wife, who is also of XXX origin, was born in the XXX and is a XXXX citizen.

6. The applicant and his wife have three children, who were born in XXX. They are all British citizens. In 2016 his eldest daughter was diagnosed with type 1 insulin-dependent diabetes.

7. On 28 September 2004 the applicant was granted Indefinite Leave to Remain. On 16 July 2010 he was granted Indefinite Leave to Remain with no time limit (an administrative process which confirmed his existing Indefinite Leave to Remain status on a Biometric Residence Permit).

8. In addition to a number of driving convictions, in 2007 the applicant was convicted for tendering a false statement. He received a suspended sentence. On 21 May 2013 an application for naturalisation as a British citizen was refused on account of his criminal record.

9. On 24 November 2014 the applicant was convicted on two counts of conspiracy to make or supply articles for use in fraud. He was subsequently sentenced to a period of four years and eight months imprisonment. According to the judge's sentencing remarks, between January 2010 and January 2014 the applicant operated a document factory, producing extensively documents for use in fraud. An examination of his emails and computers had revealed lists of thousands of names and addresses of people considered to be potential victims of advanced fee frauds. While it was not easy to determine the full extent of the losses suffered by others as a result of the fraudulent documents, the judge was satisfied that it would be "well over £100,000 if not several hundred thousand pounds". One identified victim of an advanced fee fraud appeared to have lost EUR 140,000. As the applicant had performed a leading role in an activity conducted over a sustained period of time which had the potential to facilitate fraudulent acts involving large numbers of victims and involving significant sums, the judge considered that the offence fell into the categories of "high culpability" and "greater harm".

II.DEPORTATION PROCEEDINGS

10. Pursuant to section 32(5) of the United Kingdom Borders Act 2007 the Secretary of State for the Home Department was required to make a deportation order in respect of foreign criminals sentenced, *inter alia*, to a period of imprisonment of at least twelve months. The applicant was served with notice of his liability to deportation on 15 October 2015. Invoking Article 8 of the Convention, he made representations to the Home Office as to why he should not be deported on conclusion of the custodial element of his sentence.

11. On 10 May 2016 the Secretary of State refused his human rights claim. She noted that the Immigration Rules at paragraph A362 and paragraphs 398 to 399D were a complete code for considering Article 8 claims. Paragraphs 398 to 399A – which echoed section 117C of the Nationality, Immigration and Asylum Act 2002 (as inserted by section 19 of the Immigration Act 2014) – set out the situations in which a foreign criminal's private and/or family life would be deemed to outweigh the public interest in effecting his deportation. In the case of offenders sentenced to four or more years' imprisonment, the public interest in deportation would only be

outweighed where there were "very compelling circumstances" over and above the existence of a genuine and subsisting relationship with a partner and/or minor children who were settled in the United Kingdom and for whom the effect of the offender's deportation would be unduly harsh. According to the Secretary of State, there were no "very compelling circumstances which would outweigh the public interest in the applicant's deportation".

12. In this regard, the Secretary of State did not accept that it would be unduly harsh for the applicant's family to return to Nigeria with him. His wife was of XXX origin and he could help her to adjust to life in Nigeria. English was the official language there and children born outside Nigeria to a Nigerian parent were themselves Nigerian citizens. Alternatively, the Secretary of State did not consider that it would be unduly harsh for the applicant's children to remain in the United Kingdom with their mother, as she was their main carer and had cared for them while he was in prison. She acknowledged that the applicant's absence would likely result in some negative emotional impact on the children, but noted that the children had already spent a considerable time without the applicant's daily presence due to his incarceration. Although the Secretary of State took account of the best interests of the children, those interests had to be balanced against other relevant factors, including the public interest in deporting foreign criminals. The Secretary of State also considered that it would not be unduly harsh for the applicant's wife to remain in the United Kingdom if he were to be deported. She was British and had both family in the United Kingdom and ties to the community. Moreover, she had managed her life without him since his incarceration.

13. The applicant appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ("the FTT"). In support of his appeal he submitted a report by a consultant clinical psychologist. The report indicated that the applicant's absence had been very difficult for his wife and children and had precipitated significant emotional distress. It noted that his wife and two of his children were displaying signs of depression and concluded that his deportation would likely have a detrimental impact on all the children and would lead to a significant deterioration in his wife's mental state.

14. In a decision dated 27 February 2017, the FTT allowed the applicant's appeal. Having regard to the deteriorating mental health condition of the applicant's family, the fact that his eldest daughter had type 1 diabetes, and the significant impact of his absence on the children's social, emotional and educational development, the judge was satisfied, on the balance of probabilities, that the applicant's removal would likely cause significant harm to his wife and children. He therefore considered that the applicant's deportation would be unduly harsh and that there existed very compelling circumstances which would override the necessity of removing him.

15. The Secretary of State was granted permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber). On 30 July 2018 the Upper Tribunal set aside the decision of the FTT as it considered that the judge had materially erred in law in a number of important respects. It then substituted a determination dismissing the applicant's appeal.

16. The Upper Tribunal first considered the offence committed by the applicant. It accepted that in prison he had a number of "positive behaviour" case notes; that he had undertaken training and had been active in the chaplaincy. It had regard to a report by the Offender Assessment System ("OASys"), which indicated that the applicant had not recognised the impact and consequences of his offending on the victims, community and wider society. The report further noted that the risk

to the public would be increased if the applicant had access to computers and the Internet, and associated with his criminal peers. However, it accepted that the risk of serious harm to any group of individuals were the applicant to be released at the date of the report would be "low". The Upper Tribunal further noted that the report contained no summary assessment of the risk of further offences and understood this to mean that the writer of the report, having noted the nature of the claimant's offences, and that he was apparently unable or unwilling to recognise their impact on others, made an assessment indicating that, on release, there was a noticeable risk that the claimant would continue to behave in the way that he did before he was found out, even if the risk of serious harm was low. The Upper Tribunal further noted that this report had not been updated since June 2016 but concluded that there was no basis to conclude that the applicant's attitude to his offences, and his propensity to reoffend, was anything other than that set out in the OASys assessment.

17. The Upper Tribunal then considered the applicant's family. While the evidence suggested that the applicant had a close relationship with his family, he had not been with his family since his imprisonment began. Furthermore, his wife gave evidence to the FTT to the effect that he had not been in contact with his children since his incarceration and there was no record of the applicant's wife and children visiting him in prison. While letters from the children indicated that they missed their father, there was nothing "going beyond the norm for a nuclear family with children". In particular, there was nothing to suggest that the applicant's presence in the United Kingdom would be important for his eldest daughter's welfare. For the Upper Tribunal, the truth of the matter was that the applicant's input into the children's lives was nothing other than that which any other unemployed father might offer. The family income was derived from the applicant's wife; the applicant's activities in the family had been limited; and despite his absence for a considerable period of time, the mental difficulties of his wife and children had not required medical intervention.

18. The Upper Tribunal gave very little weight to the report of the consultant clinical psychologist (see paragraph 13 above) since it considered that the report as a whole showed a number of matters of considerable concern. First of all, it had not been read through: there were a number of errors and repetitions. Secondly, it adopted a wholly uncritical attitude to the information received. There were no signs of any investigation, or any attempt to place the information received in the context of other facts. In particular, it drew no real distinction between the applicant's absence owing to his imprisonment, and the prospective absence that might result from his deportation. Furthermore, there was no medical evidence of any sort, other than the diagnosis of the eldest daughter's diabetes, and, despite the diagnosis of clinical depression for the children, there was no suggestion that they might need to seek medical help. Claims that the children's academic progress had been affected were also unsupported by evidence. Finally, despite having been asked to attend, the consultant clinical psychologist did not make herself available to give oral evidence before the Upper Tribunal.

19. The Upper Tribunal did not consider the possibility of the family returning with the applicant to Nigeria since it had not seriously been suggested that they would do so.

20. The Upper Tribunal concluded that the applicant's family was an ordinary family which, like any other family, would be affected by the applicant's deportation. However, the evidence was

such that it would be extremely difficult to establish that his deportation would be "unduly harsh" on his wife or children, let alone that there existed additional "very compelling circumstances".

21. The applicant first applied to the Upper Tribunal for permission to appeal on the basis that its reading of the OASys assessment report had been "irrational". The Upper Tribunal rejected this argument and refused permission to appeal.

22. The applicant made a second application, this time to the Court of Appeal, for permission to appeal. Permission was refused on 21 February 2019.

23. The applicant appears to have been transferred to immigration detention on completion of his criminal sentence. According to the Government's observations of 3 December 2021, the applicant had "only recently been released into the community".

RELEVANT LEGAL FRAMEWORK AND PRACTICE

24. The applicable legal framework and practice is set out in *Unuane v. the United Kingdom*, no. 80343/17, §§ 23-51, 24 November 2020.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that his expulsion would breach his right to respect for his private and family life as provided for by Article 8 of the Convention, and that the decision of the Upper Tribunal fell short of the balancing exercise required by the case-law of the Court. Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life. ... .

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."

A. Admissibility

26. The Government submitted that the applicant's Article 8 complaint was manifestly ill-founded and should therefore be declared inadmissible. The Court is of the opinion that the complaint raises sufficiently complex issues of fact and law, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is further satisfied that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

27. The applicant submitted that his expulsion would interfere disproportionately with his right to respect for his family and private life. His spouse and children were British citizens; he had lived in the United Kingdom for nineteen years; and according to the OASys assessment report, his risk of reoffending was low.

28. The applicant further submitted that the decision of the Upper Tribunal fell short of the Article 8 balancing exercise required by the case-law of this Court. As in the case of *Unuane* (cited above),

the Upper Tribunal had directed itself solely and rigidly by reference to the "unduly harsh" and "very compelling circumstances" tests set out in paragraphs 398 to 399D of the Immigration Rules and in section 117C of the Nationality, Immigration and Asylum Act 2002 (as inserted by section 19 of the Immigration Act 2014). His appeal was dismissed as the Upper Tribunal concluded that the effect of his deportation on his partner and children would not be "unduly harsh", and that there were no "very compelling circumstances" over and above the "unduly harsh" exception.

(b) The Government

29. The Government submitted that the Immigration Rules facilitated, rather than prevented, the striking of a fair balance on the facts of individual cases. In this regard, the Immigration Rules provided the domestic decision-maker with a frame of reference for understanding what constituted serious offending, and ensured that he or she understood that in such cases family and private life considerations would need to hold a weight commensurate to the seriousness of the offending. The domestic courts had repeatedly held that the Immigration Rules had to be applied so as to produce a result compatible with Article 8 of the Convention.

30. The Government accepted that the applicant's deportation would interfere with his right to respect for his family and private life, but argued that it would nonetheless be in accordance with the law, in pursuance of a legitimate aim, and would strike a fair balance between the applicant's Convention rights and the community's interests. Moreover, the Upper Tribunal had considered the seriousness of the offence the applicant had committed, his "positive behaviour" in prison, and the OASys assessment report. In addition, it gave detailed consideration to the evidence relating to the applicant's wife and children. Having done so, it concluded that the public interest in the applicant's deportation outweighed the impact on the Article 8 rights of him and his family. This was a conclusion the Upper Tribunal was entitled to reach on the evidence, and it fell within the margin of appreciation recognised by the Court. The Upper Tribunal's process had complied with the proportionality assessment mandated by the Court, and there were no strong reasons for the Court to substitute its own assessment for that of the Upper Tribunal.

31. Alternatively, should the Court consider it necessary to undertake its own proportionality assessment, the Government argued that the circumstances as a whole were in favour of the applicant's deportation. His offence was a serious one; it was deliberate, and continued over a sustained period; it was not his first offence; the 2016 OASys report found that he had not recognised the impact of his offending on the victims and on the community; the applicant who was thirty-one years old when he came to the United Kingdom, had spent the majority of his life in Nigeria and would have significant social and cultural ties there; and although he has not been convicted of any further offences, he had spent much of the time between his conviction and the final domestic decision either incarcerated or in immigration detention. The Government accepted that he had a genuine family life with his wife and children, who were British nationals, and that his offence was committed following his marriage. However, in the Government's view, the separation of the applicant and his family would not cause any special difficulties and would not be disproportionate to the public interest in deportation. Although his oldest daughter suffered from diabetes, the situation was far removed from that considered in *Unuane* (cited above).

32. With regard to the third party intervention by the AIRE Centre (see paragraph 35 below), the Government contended that the manner in which the best interests of a child were most

appropriately addressed would vary depending on the child's age, ability to understand the situation, and to express his or her views. In the present case, the applicant's children's views were properly taken into account. The children were able to express their views in the form of letters to the FTT. No application was made on their behalf for them to give oral evidence.

(c) The third party interveners

(i) The Joint Council for the Welfare of Immigrants ("JCWI")

33. The JCWI submitted that the error of law identified in *Unuane* (cited above) was not an aberration but a natural consequence of the regime in section 117C of the Nationality, Immigration and Asylum Act 2002. While this regime in principle permitted a full proportionality assessment, in practice it provided a statutory straightjacket to decision-making by positioning the seriousness of the offending as the primary governing factor and affording insufficient protection to the private and family life of individuals subjected to deportation orders. It therefore resulted in systemic violation of Article 8 rights.

34. Moreover, according to JCWI if the best interests of the child were to be paramount, it would be necessary to take into account the fact that children's physical and educational needs could only fully be met within a functioning family and, as a consequence, depriving children of their families was altogether more serious than depriving adults of theirs. In addition, there was a strong public interest in ensuring that children were properly brought up. However, the "unduly harsh" test imposed an unrealistically high threshold and the impact on any children was not properly or routinely taken into account.

(ii) The AIRE Centre

35. The AIRE Centre contended that the Court was under an obligation to interpret the Convention compatibly with the other international agreements ratified by the Contracting States, including the United Nations Convention on the Rights of the Child ("UNCRC"). Consequently, the best interests of the child should be a primary consideration in all matters affecting children and should form the substance of Article 8 of the Convention. Children should have a right to express their views and have those views given due weight according to their age and maturity, in order to influence the determination of their best interests. Furthermore, it should be recognised that the family environment was important for the full and harmonious development of the child, and consequently the separation of parent and child should be considered as a measure of last resort.

2. The Court's assessment

(a) General principles

36. A statement of the general principles can be found in *Unuane* (cited above, §§ 70-76). In summary, even though Article 8 of the Convention does not contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of Article 8 of the Convention (see *Üner v. the Netherlands* [GC], no. 46410/99, § 57, ECHR 2006-XII and the references therein). In *Boultif v. Switzerland,* no. 54273/00, ECHR 2001-IX the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria are 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.

37. In *Üner,* the Court made explicit two further criteria implicit in those identified in *Boultif*:
– 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.

38. All the above factors should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction (see *Üner,* cited above, § 60).

39. In assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of appreciation (see *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X, and *Boultif*, cited above, § 47). However, as the State's margin of appreciation goes hand in hand with European supervision, the Court is empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 (see *Maslov v. Austria* [GC], no. 1638/03, § 76, ECHR 2008).

40. The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see *Ndidi v. the United Kingdom*, no. 41215/14, § 76, 14 September 2017; *Hamesevic v. Denmark* (dec.), no. 25748/15, § 43, 16 May 2017; and *Alam v. Denmark* (dec.), no. 33809/15, § 35, 6 June 2017).

(b) Application of the general principles to the facts of the case at hand

41. In the present case the Government have accepted that the applicant's deportation would constitute an interference with his rights under Article 8 § 1 of the Convention (see paragraph 30 above). Moreover, it does not appear to be in doubt that the deportation order was "in accordance

with the law" and "in pursuit of a legitimate aim" (the prevention of disorder and crime) for the purposes of Article 8 § 2 of the Convention. Consequently, the principal issue to be determined is whether the deportation order struck a fair balance between the applicant's Convention rights on the one hand and the community's interests on the other (see *Ndidi*, cited above, § 74, *Slivenko*, cited above, § 113, and *Boultif*, cited above, § 47).

42. In determining this issue, the Court will not – unless there are strong reasons for doing so – substitute its own assessment of the merits for that of an independent and impartial domestic court or tribunal which has examined the facts carefully, applied the relevant human rights standards consistently with the Convention and the Court's case-law, and balanced the interests of the applicant against those of the general public. However, where there has not been such an examination, the Court remains empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 of the Convention (see *Unuane*, cited above, §§ 76 and 79 see also *Ndidi*, cited above, § 76 and *Maslov*, cited above, § 76).

43. In the case at hand the applicant principally directed his complaints towards the Upper Tribunal's decision-making process, and in particular what he perceived to be its failure to conduct an Article 8 compliant proportionality assessment. The Government expressly asserted that the Immigration Rules did not prevent the striking of a fair balance on the facts of individual cases (see paragraph 29 above) and the Court has accepted this to be the case. In *Unuane* the Court did not consider that the requirements of paragraphs 398 and 399 of the Immigration Rules necessarily precluded the domestic courts and tribunals from employing the *Boultif and Üner* criteria (see paragraphs 36 and 37 above) for the purpose of assessing whether an expulsion measure was necessary and proportionate (see *Unuane*, cited above, § 83). It therefore falls to the Court to consider whether, on the facts of the case before it, the domestic courts and tribunals conducted a balancing exercise as required by the Court's case-law under Article 8 of the Convention (see *Unuane*, cited above, §§ 84-85).

44. In this context, the Upper Tribunal undoubtedly gave detailed consideration to the facts of the applicant's case, and it did balance the seriousness of his offence against the likely impact on his family and private life (see paragraphs 17-18 above). In doing so, it had regard to many of the criteria identified by the Court in *Boultif and Üner* (both cited above – see paragraphs 36 and 37 above), including the nature and seriousness of the offence committed by the applicant; his family situation, including whether his wife knew about the offence at the time when she entered into the relationship; and the impact his deportation would likely have on his wife and children. The Tribunal did not consider the difficulties the applicant's wife and children would face in Nigeria since it was not seriously suggested that they would return with him (see paragraph 19 above).

45. Nonetheless, the Upper Tribunal did not conduct this balancing exercise by reference to the case-law of the Court. Insofar as it considered those factors identified by the Court in its *Boultif and Üner* judgments at all (see paragraphs 36 and 37 above), it did so without explicit reference to those judgments and solely within the framework provided by the Immigration Rules, with a view to determining whether the impact of the applicant's deportation on his wife and children would be "unduly harsh" and whether there existed any additional "very compelling circumstances" required in order for his appeal to succeed. As the Upper Tribunal did not conduct the balancing exercise as required by Article 8 of the Convention, it therefore falls to the Court, in exercise of its

supervisory jurisdiction, to give the final ruling on whether the applicant's expulsion would be reconcilable with that Article 8 (see *Unuane*, cited above, § 85).

46. Having conducted the required balancing exercise itself, the Court considers that, on the basis of the information before the Upper Tribunal, the applicant's expulsion would, however, in any event be reconcilable with Article 8 of the Convention. After all, while the applicant asserted in his application form that his deportation would be a disproportionate interference with his right to respect for his family and private life, he did not further advance this argument in the application form itself or in his observations before this Court, nor did he provide any additional information to that which was before the Upper Tribunal.

47. The applicant first came to the United Kingdom in 2003, when he was thirty-one years old (see paragraph 5 above). Thereafter, he was convicted of a number of driving offences. In 2007 he was convicted for tendering a false statement and received a suspended sentence (see paragraph 8 above). The fraud offence, which gave rise to the deportation order, concerned the operation of a document factory (producing documents for use in fraud) between January 2010 and January 2014. The applicant was convicted in November 2014 and sentenced to a period of four years and eight months imprisonment (see paragraph 9 above). It is not clear from his submissions to the Court if he has since been released or if he remains in immigration detention, although in December 2021 the Government informed the Court that he had only recently been released from detention (see paragraph 23 above). Thus, on the basis of the information before the Court, the applicant has spent eleven years at liberty in the United Kingdom, for four of which he was engaged in criminal offending.

48. The applicant does not appear to have been economically integrated in the United Kingdom. According to the Upper Tribunal, his family's income had been derived from his wife (see paragraph 17 above). For the four years prior to his incarceration he was involved in a criminal enterprise. It would appear that he has only recently been released from detention (see paragraph 23 above), and he has submitted no evidence to suggest that he has found employment. Moreover, he has submitted no other information to substantiate his integration (see, for example, *Külekci v. Austria*, no. 30441/09, § 49, 1 June 2017).

49. The Court would agree with the Upper Tribunal that the fraud offence committed by the applicant was serious. 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 and their impact on society as a whole. While it has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum (see, for example, *Maslov*, cited above, § 85; *A.W. Khan v. the United Kingdom*, no. 47486/06, § 40, 12 January 2010; *Dalia v. France*, 19 February 1998, § 54, Reports of Judgments and Decisions 1998 I; and *Baghli v. France*, no. 34374/97, § 48, ECHR 1999 VIII), in *Lukic v Germany*, no, 25021/08, 20 September 2011 it accepted that multiple convictions for fraud were sufficient to outweigh the interests of a long-term resident alien who had been born in Germany and had spent his childhood and his youth there. Although the applicant in the present case does not have multiple convictions, the offence of which he was convicted was conducted over a four-year period and involved a large number of victims and significant sums of money (see paragraph 8 above).

Moreover, while the OASys report, which has not been updated since 2016, suggested that he posed a low risk of serious harm to any group of individuals, it also indicated that the applicant had not recognised the impact and consequences of his offending on the victims, community and wider society and that there was a noticeable risk that the applicant would continue to behave in the way that he did before he was found out (see paragraph 16 above). It did not, as the applicant now asserts (see paragraph 27 above), state that the risk of reoffending was low.

50. When viewed in the context of the seriousness of the offence, the Upper Tribunal did not consider that the impact of the applicant's deportation would be "unduly harsh" on his wife and children. Rather, it found that the applicant's family was an ordinary family which, like any other family, would be affected by the applicant's deportation, but that this fact alone could not establish the applicant's case. In reaching this conclusion, it gave very little weight to the report of the consultant clinical psychologist since it considered that the report as a whole showed a number of matters of considerable concern (see paragraph 18 above). The applicant has made no submissions about the impact his deportation would have on his family and he has not sought to persuade the Court that the Upper Tribunal had been wrong not to give weight to the conclusions of the clinical psychiatrist. Having considered the matter, for the reasons identified by the Upper Tribunal, the Court is therefore also not able to place any great weight on this report.

51. The third party intervenors suggest that in cases such as the present the bests interests of the children should be a primary consideration (see paragraphs 34-35 above). In this regard, the Court has indicated that in all decisions concerning children, their best interests, while not decisive, have to be afforded "significant weight" (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 109, 3 October 2014 and *Üner* (cited above)). However, it has made it clear that where an offender is being deported as a consequence of a criminal offence, the deportation decision first and foremost concerns him (see *Krasniqi v. Austria*, no. 41697/12, § 48, 25 April 2017). Therefore, while the Court does not apply an "unduly harsh" test, in the context of deportation as a consequence of a criminal offence it has nevertheless accepted that the family's interests may be outweighed by other factors, including the seriousness of the offence (see, for example, *Üner*, cited above, § 64; see also *Krasniqi*, cited above, § 48).

52. In the present case, while the applicant's deportation would undoubtedly be difficult for his wife and children, there is nothing to suggest that their need for his support is particularly acute. His children are now nineteen, seventeen and twelve years old. His eldest daughter has type 1 diabetes, but there is no evidence to suggest that the applicant's presence in the United Kingdom is important for her physical well-being. According to the evidence before the Upper Tribunal, the children did not have contact with him during the whole period while he was in prison (see paragraph 17 above). Following his custodial sentence he was detained in immigration detention (see paragraph 31 above). It is not known whether he returned to the family home following his release from detention.

53. Even if the applicant has returned to the family home, his wife has family in the United Kingdom and has established ties in the community (see paragraph 12 above). The family, which has already coped with his lengthy absence while in prison and immigration detention, would therefore have a support network in the event of his deportation. In addition, although the Upper Tribunal proceeded on the basis that the applicant's family would not return to Nigeria with him,

there is no evidence to suggest that they could not do so. The applicant himself lived in Nigeria for the first thirty-one years of his life (see paragraph 5 above). Although his wife and children are British citizens, his wife is of Nigerian origin and his children would be entitled to Nigerian citizenship through him (see paragraph 12 above). The case is therefore readily distinguishable from that of *Unuane,* in which the applicant's partner and children had to stay in the United Kingdom as the eldest child was awaiting heart surgery, and the Upper Tribunal had itself acknowledged that they needed the applicant to be there with them to provide support (see *Unuane*, cited above, § 89).

54. The applicant has not brought forward any arguments which would speak against the possibility of his family visiting him in Nigeria and staying in contact via telephone and the internet (see *Salem v. Denmark*, no. 77036/11, § 81, 1 December 2016; see also *Külekci*, cited above, §49). Furthermore, the applicant only left Nigeria when he was thirty-one years old (see paragraph 5 above), and there is no evidence to suggest that he no longer has family, social, cultural and linguistic ties there (see, for example, *Külekci*, cited above, § 50).

55. Finally, the applicant has not provided the Court with any information about his release, or about his conduct following his release.

56. The foregoing considerations are sufficient to enable the Court to conclude that the strength of the applicant's family and private life in the United Kingdom is not such as to outweigh the public interest in his deportation.

57. Accordingly, his deportation would not violate Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that the applicant's deportation would not violate Article 8 of the Convention.

Done in English, and notified in writing on 27 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar
Gabriele Kucsko-Stadlmayer President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Guerra Martins joined by Judge Motoc is annexed to this judgment.

G.K.S.
I.F.

DISSENTING OPINION OF JUDGE GUERRA MARTINS JOINED BY JUDGE MOTOC

With all due respect to my colleagues, I am unable to subscribe to their view that the deportation of the applicant would not violate Article 8 of the Convention.

1. As the judgment points out, the main legal issue to be assessed in this case is whether the expulsion of the applicant would interfere disproportionately with his right to respect for his private and family life as provided for by Article 8 of the Convention and thus amount to a breach of that Article.
2. As is noted in the judgment, the Court has well-established case-law in this context (which I will abstain from mentioning here as it is quoted and referred to in the judgment). According to this case-law, although Article 8 of the Convention does not contain an absolute right for any category of alien not to be expelled, there are circumstances where the expulsion of an alien will give rise to a violation of Article 8 of the Convention.
3. The Court has already clarified the relevant criteria for assessing whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued (see paragraph 36 of the judgment).
4. Furthermore, as the judgment underlines, the Court has also accepted that the Contracting States enjoy a certain margin of appreciation when the case concerns an expulsion matter, and at the same time the Court has highlighted that it is competent to give the final ruling on whether or not the State has acted within its margin of appreciation (see paragraph 39 of the judgment).
5. In the present case, whereas the First-tier Tribunal (Immigration and Asylum Chamber) considered that the applicant's deportation would be unduly harsh and that there existed very compelling circumstances which would override the necessity of removing him, the Upper Tribunal set aside that decision and dismissed the applicant's appeal.
6. In my view, in spite of the fact that the Upper Tribunal sought to base its reasoning on some of the criteria developed in the Court's case-law in this context (even without referring to it), it failed to strike a fair balance between the relevant interests and there are strong reasons for the Court to substitute its own assessment for that of the domestic court.
7. Contrary to the majority, I consider that the Upper Tribunal failed to strike an appropriate balance between the public and private interests by underestimating, without sufficient justification, one of the most relevant criteria established by the Court, namely the best interests and well-being of the children. In fact, when it assessed the nature of the relationship between the father and the children, although it accepted that there was contact between them, it clearly overestimated the fact that the children had not visited the father during his incarceration. This fact should not have been decisive because there are many reasons that could have justified it, including the protection of the children's well-being.
8. To sum up, in spite of the seriousness of the offence committed by the applicant, I consider that his deportation would violate Article 8 of the Convention.