



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/01376/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
On 26 September 2017**

**Decision & Reasons
Promulgated
On 19 December 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**DF
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khubber instructed by Turpin & Miller Solicitors
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Upper Tribunal found an error of law in the decision of the First-tier Tribunal and set that decision aside with directions in a document dated 8 June 2017, a copy of which appears at Annex A of this decision.

Background

2. A number of findings of the First-tier Tribunal are preserved which form the starting point for this decision.

3. In relation to the appellant's immigration history; it is not disputed the appellant is a national of Jamaica who was granted indefinite leave to remain in the United Kingdom on 14 July 2003. It is not disputed that the appellant is subject to an order for his deportation from the United Kingdom as a result of the sentence imposed on 31 October 2012 referred to below.
4. It is not disputed that the appellant has committed criminal offences in the United Kingdom as follows:
 - i. On 7 July 2007 the appellant was bound over for 12 months and fined following a conviction for breach of the peace.
 - ii. On 30 March 2010 the appellant was convicted of criminal damage, ordered to pay costs and compensation and made subject to a two-year restraining order - protection from harassment order.
 - iii. On 31 October 2012 the appellant was sentenced to 4 years imprisonment the being knowingly concerned in fraudulently evading prohibition/restriction on the importation of a controlled Class A drug. The appellant acted as a drugs mule carrying a case with 850g of cocaine to the UK from Jamaica.
5. In relation to procedural aspects; the Secretary of States certified the appellants asylum claim pursuant to section 72 of the 2002 Act, in relation to which the First-tier Judge made the following preserved findings:
 14. The first issue that I must deal with is whether this Appellant has rebutted the presumption that arises under Section 72. The Appellant was sentenced to 4 years imprisonment. The offence was that of drug smuggling and as noted by the sentencing judge the terrible harm caused by drugs is only too clear from the Appellant's own family experiences and the tragic consequences of [Ms N] addiction for her children. The gravity of his offence must not be underestimated. Although he accepted full responsibility for the offence when he was caught, he has in my view sought to make excuses for himself by stating variously that he was depressed, stressed due to relationship difficulties, having money problems, being threatened and that his family was being threatened. He had previously had the protection of the law and the Courts in the UK when his assailants in the stabbing incident were given a lengthy prison term. I do not find it credible that he would not seek the protection of the authorities in the UK if his family including [Ms N] the children, were being threatened as he claims.
 15. I have taken the reasons for the attaching of the certificate fully into account. Despite the assessment of risk of reoffending as being low the Respondent states that the risk could escalate if the Appellant is faced with financial problems. The Respondent points out that the Appellant travelled to Jamaica on a number of occasions. The Appellant has never explained how he managed to pay for those trips given that he was unemployed for long

periods of time and the household income largely consisted of disability benefits (for Ms N) and child benefits. It is also pointed out that the Appellant had family members in the UK and that their influence did not prevent him from offending. Nor did the fact that he had dependent children and a vulnerable partner.

16. I note that in his report dated 29 October 2016 Dr Basu does not mention financial pressure as a risk factor for the Appellant. He refers to lack of employment but apart from saying that the Appellant has the temperament to engage in employment and has training and work experience that will assist him in getting it, he merely concludes that "Allowing [DF] to engage in meaningful employment will help him in numerous ways.." I take this to be a reference to the fact that the Appellant is not currently allowed to work in the UK.
 17. Dr Basu assessed the risk of reoffending over the next two years as low. He does refer to social networks as a risk factor and notes that the Appellant is relatively socially isolated at the current time. He says that this "may" improve if the Appellant is allowed to work. Dr Basu says that the Appellant's history suggests that he has found himself around those who have exerted a negative influence on him either through drug misuse or violence and states "in future he should be mindful of this and ensure that it does not surround himself with potentially negative influences that might increase his chance of reoffending".
 18. The Appellant has allowed himself to lose control of his temper when his ex-partner stole his Criminal injuries compensation monies and he attended at her property and caused criminal damage, breaking a window there. He has been both the victim and the perpetrator of domestic violence.
 19. Having considered the evidence before me I am satisfied that despite the low risk of reoffending, the potential harm involved in future offending by this Appellant is not low because of the risk factors that have been identified above. I am not satisfied that the s72 presumption has been rebutted by the Appellant. But even if I am wrong on this I do not, having considered all of the evidence before me, find the Appellant credible in his claim that he is at real risk of persecution, being killed or subjected to inhuman or degrading treatment on his return to Jamaica from gang members.
6. Section 72 of the Nationality, Immigration and Asylum Act 2002 states that a person shall be presumed to have been convicted by final judgement of a particularly serious crime and constitute a danger to the community the UK if he is convicted in the UK of an offence and sentenced to a period of imprisonment of at least two years. It is not disputed the appellant received a four-year prison sentence for a particularly serious crime, drug

importation, and has been found to constitute a danger to the community of the UK.

7. In relation to family composition; The First-tier Tribunal found the appellant entered into a relationship with Ms N in 2008. Ms N has given birth to two children, the eldest of which it was found has ongoing contact with her natural father and does not have a father/child relationship with the Appellant. The second child C is described as a middle child born only weeks before the relationship between the appellant and Ms N started. The appellant is not the child's natural father but is said to have taken on the role of father from the time the child was only a few weeks old. The appellant and Ms N had a child of their own, B, born on 5 February 2011.
8. It is not disputed that as a result of issues that arose following the appellant's release from prison, when the couple resumed their relationship, Social Services had to intervene in the family in November 2013 as a result of which the children were placed with their maternal grandmother and have remained in her care since in a placement that is now permanent since. The First-tier Tribunal noted that the intervention was triggered by concerns about emotional neglect after it became apparent that Ms N was using Class A drugs. It is also recorded that she has no contact with the children at the present time and is not in contact with the Appellant or Social Services although the First-tier Tribunal were advised that Ms N was living with a relative.
9. It was found the appellant is not in a relationship with Ms N and is living with members of his extended family in the UK and that as a result of a contact application the appellant currently has contact on an unsupervised bases once a week with no concerns for the welfare of the children arising as a result of this contact.

The evidence and submissions

10. A supplementary bundle had been prepared for the purposes of the hearing before the Upper Tribunal. Clear directions had been made for the filing of such documents no later than 4 PM 16 June 2017 in relation to the bundle and 14 July 2017 in relation to the skeleton argument. The appellant's representative comprehensively failed to meet these deadlines although the evidence was admitted as Mrs Aboni raised no objection and was not prejudiced by the failure of Turpin Miller LLP to comply with a direction of the Tribunal.
11. The evidence in the statements was not contested enabling the matter to proceed by way of submissions only.
12. In his updating statement, the appellant confirmed that he sees the children B and C on at least a weekly basis and describes the contact sessions as being enjoyable for him and the children. The appellant also refers to seven cousins all of whom are living in Birmingham, whom he claims to be close to, and his hope that those family members will be able to get to know the children. The appellant claims that if deported the children will not only lose their contact with him but also the connection with their family as the family members are too busy with their own lives and a number of them have not had much contact with other family members. The appellant claims he is the only person who will be able to arrange contact between the children and the extended family.

13. The appellant claims that if he was able to secure permission to work he will work and that if he had more money he will be able to do different things with the children and also be able to obtain accommodation of his own and have the children stay with him.
14. The appellant speaks of the children's grandmother, M, who he states he can see how happy she is when she sees that he is happy because the children are with him. The appellant claims M needs his help to do more as she has the two young children and he claims to have been able to provide the help they need and to have helped with things around the house, and that it would be best for M and the children if he could have his children over at the weekend which would allow him to have quality time with his children and provide M with a rest.
15. The appellant also state that he speaks to B and C occasionally on the telephone but that that is limited.
16. A further statement by the grandmother, M, confirms the appellant has been increasingly involved with his children and she describes him as having proven that he is a capable and confident father. Any initial hesitation at not seeing their parents together is said to have been replaced by the children being relaxed and happy to see their father on his own. M states that the children's mother has her own flat in the West Midlands and tries to visit the children every weekend or when she can but remains on a methadone programme and has a support network both within the family and from practitioners. The opinion of M is that it would be "wonderful" if in the near future the children's mother will be in a position to spend time on her own with the two young children and to have them stay over although, at the moment, this appears unlikely.
17. M describes her family as being all white British and that the cultural heritage of the children is important to their identity and the question of having a positive identity can only be reinforced by their father and in turn by him being happy and settled. M describes the involvement of the appellant in the children's lives and the positive benefit to the children of such contact and states that she remains 100% supportive of the appeal; stating it will be devastating for the children to lose their father. It is stated the children have been through prolonged period of upheaval which has impacted on them both socially and emotionally and the continuation of the expansion of the status quo will continue to provide stability as the children grow up which, it is M's opinion, can only be achieved if the appellant is allowed to remain in the United Kingdom permanently.
18. A further witness statement has been provided by the appellant's uncle FF supporting the appellants appeal.
19. A letter dated 11 September 2017 written by a Social Worker employed by Walsall Council Children's Services addressed to the appellant's solicitors has been provided written in the following terms:

Thank you for contacting me regarding the forthcoming court hearing in respect of [DF]. As I'm sure you will be aware it was of significant concern to learn that DF's stay within the country has been appealed and I do need to stress my worries around the impact that this will have on his son B and stepdaughter C, who also identifies Mr F as a father figure.

From the perspective of Children's Services, over the last nine months Mr F's contact with children has developed significantly, with planned contact now taking place on a weekly basis, unsupervised, within the community. Mr F has been committed to this contact and has provided the children with significant memories of trips to the park and the cinema. Having gained the children's wishes and views I must say the children thoroughly enjoyed this contact and are happy to have their father as a regular feature in their lives! This view is also shared by the children's carer/Maternal Grandmother, who speaks openly of the positive relationship Mr F, B and C continue to share. As you will be aware, throughout their lived experiences the children have experience a lot of change and inconsistency. From the perspective of the family, they have now reached a stage where the children are settled into a routine and as an agency we are planning to withdraw our services within the coming weeks. If a decision is made to deport Mr F, I envisage that this will impact significantly on the emotional well-being of the children and direct work will have to be offered to the children around this. I should note that at this time we have not made the children aware of the tribunal, as on balance it was not felt to be in their best interests.

From my experience of working with Mr F, he has presented as an open and honest individual, who has a genuine motivation to maintain a positive relationship with his children. Through contact not only does he provide the children with a good sense of identity, he has also been able to provide the children with support around the cultural needs, as children of dual heritage.

If Mr F is deported I fear that the relationship that the children have been encouraged to build with their father over the last three years will be diminished, as realistically the children will not be able to maintain any meaningful contact with their father. Particularly as financially the family would not be in a position to support the children to visit his native country.

I do hope the views of the children will bear strongly on the tribunal's decision.

20. It is submitted on the appellant's behalf that apart from the family life the appellant has with his children there are a large number of extended family members in the UK which form an important aspect of his private life. It is also stated on the appellant's behalf that the appellant has not had any adverse criminal or immigration convictions his release on bail in 2014.
21. It was not disputed that the best interests of the children are to continue in their current environment with their grandmother, M, in light of the fact they are unable to live in the same household as their mother and father/father figure. It is suggested that the best interests of the children are being met by the current arrangements for contact between their mother and father/father figure being able to continue. Contact with the children's mother will continue as before and develop as and when further

progress can be made in light of her current situation and previous dependency issues.

22. The statement in relation to contact between the children and members of the appellant's extended family and the importance of the children's dual heritage and recognition of their cultural origins is noted, but it is not made out that this can only be established if the appellant remains in the United Kingdom. There appears to be a large extended family in Birmingham and it has not been made out that if members of that family unit wish to maintain contact with the children, to enable the children to know them and aspects of their cultural heritage, that this could not be arranged without the appellant.
23. On behalf the Secretary of State, it was submitted the appellant committed a serious offence for which he received a four-year custodial sentence. It was accepted the children are British nationals and cannot be removed as to do so would be unduly harsh and that all the children are to remain in the United Kingdom.
24. The respondent does not dispute the fact the appellant has a relationship with both B and C and that they welcome his presence in their lives; but it was submitted that is not sufficient to outweigh the public interest in the appellants deportation. It is also submitted that the fact the best interests of the children are for the appellant to remain with them was not sufficient to outweigh the public interest.
25. It was submitted on the Secretary of State's behalf that although the evidence indicates there will be some negative impact on the children it is not made out that it will have such a devastating effect upon them that the impact on their well-being and future development will be such as to make the decision disproportionate, especially as the children will remain in the current stable environment in which they reside.
26. It was submitted the assertion made on the appellant's behalf that the children would experience a chaotic lifestyle without their father had not been made out especially as the children were in a settled home environment and not in a chaotic lifestyle.
27. It was submitted it was not made out that contact could not continue on an indirect basis from Jamaica meaning the children would not be denied ongoing contact with their father.
28. It was submitted on the respondent's behalf that there was nothing so compelling on the facts to enable the appellant to avoid his deportation from the United Kingdom and that the public interest required his deportation.
29. On the appellant's behalf, it was submitted that he met the threshold of this being a truly compelling case. It was accepted the core issue in the case was the tension between the public interest requiring the deportation of a person sentenced to 4 years imprisonment and the public interest in his removal and the adverse impact on the best interests of the children.
30. Submissions were made in relation to domestic statutory provisions and the provisions of the Immigration Rules and the decision of the Court of Appeal in *MA (Pakistan)*. It was submitted on the appellant's behalf that matters had moved on since the appellant committed the offences and that all relevant factors had to be considered.
31. Submissions were made relating to Strasbourg jurisprudence. It was submitted it is accepted that face-to-face contact between the appellant

and the children is in their best interests and that the impact of removal was the issue and that fracturing that life which the children now have on a stable and settled basis with their grandmother, enjoying contact with their father, is in their best interests. It was submitted it is in the best interests of the children to have direct contact due to their unsettled past and that the children need stability which will be lost as a result of the impact of the removal of the appellant through deportation.

32. It was submitted, inter alia, that the appellant had stood in to meet the needs of the children when their mother was not able and has had protracted involvement with the children as recognised by social services.
33. It was submitted the fact the social worker had been decided not to tell the children about the ongoing proceedings as it may be damaging to their welfare was indicative of the concerns in relation to the children if the appellant was deported.
34. It was further submitted on the appellant's behalf that the lack of post offence conduct was relevant, that there was no need to remove the appellant as he had not reoffended, and that his positive conduct meant that the public interest was reduced. It was argued that there had been a long period from May 2014 when the appellant was granted bail without further offending.
35. It was submitted there is a need to look at the impact of all aspects of the case in this case with a complex history of events that led to suffering in the past which is the extra dimensional that makes the matter compelling.
36. It is argued that the law has moved on since the legislative framework when the decision was made in 2014 and that this is a decision made three years ago. It was argued that in 2017 the current situation means that there is no need for protection and that there are more involved issues relating to the adverse impact upon the children.

Discussion

37. No protection issues arise in relation to this appeal as the exception claimed on the basis of an entitlement to asylum and/or humanitarian protection was rejected by the First-tier Tribunal and it has not been shown that such findings are infected by arguable legal error or that the circumstances warrant a finding in the appellant's favour on this point.
38. The decision in *Hesham Ali (Iraq) v SSHD [2016] UKSC 60* was concerned with the law pre the Immigration Act 2014. In that case Lord Reed noted that "cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang [2007] 2 AC 167*, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule".
39. So far as post Immigration Act 2014 is concerned, in *NE-A (Nigeria) v SSHD [2017] EWCA Civ 239* it was held that there was no inconsistency between the analysis in *Rhuppiah* and what was said in *Hesham Ali*. The focus in *Hesham Ali* was on the rules and it had not been necessary to

consider the provisions of s117. Part 5A of the 2002 Act was primary legislation directed to tribunals and governing their decision making. Sections 117A to D were intended to provide for a structured approach to the application of Article 8 which produced in all cases a final result compatible with Article 8. Section 117B(6) was more than a statement of policy to which regard was to be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" was one to which the tribunal was bound by law to give effect. There was no room for any additional element in the proportionality balance under Article 8. Observations in *Akinyemi* were not to the contrary.

40. In taking a balanced approach, it is necessary to fully appreciate the purpose of a decision to deport the appellant from the United Kingdom pursuant to the automatic deportation provisions. In *Taylor [2015] EWCA Civ 845* it was held that although the tribunal recognised the need to attach significant weight to the public interest, it erred in failing to identify clearly the different purposes served by a deportation: namely, to reflect public revulsion of serious crime, to protect the public from further offending and to deter others from acting in a similar way. There was no discussion of the public interest of a kind that indicated that the tribunal was aware of the importance of the reasons underlying it.
41. A decision of the Court of Appeal that may appear to assist the appellant is that in *SSHD v RF (Jamaica) [2017] EWCA Civ 124*, in which the Court of Appeal found the First-tier Tribunal had correctly applied *Hesham Ali* and on the particular facts this was a rare case in which there were very compelling reasons. The appellant was 29 and of previous good character before the commission of the offence of possession of crack cocaine with intent to supply for which he received 4 years' imprisonment. He was in the UK with leave as a spouse (previously having leave as a visitor and then a student) and he was a committed family man with an 8 year old daughter who had worked in the past and was in a good position to obtain employment on release. He was found to be a low risk of re-offending and no or low risk of serious harm to the public. In those circumstances the First-tier Tribunal placed weight on the commitment of the family to each other; that it was not reasonable to expect the appellant's daughter to live in Jamaica and that there were insurmountable obstacles to the appellant's wife living in Jamaica and found that there were unjustifiably harsh consequences for the family so as to make the circumstances of the case exceptional in accordance with paragraph 399, although care needs to be taken in relation to this decision as the case turned on its particular facts and the decision was before s117C came into force.
42. The Immigration Act 2014 brought into force section 117 Nationality, Immigration and Asylum Act 2002. By virtue of section 117A, in considering the public interest question, the tribunal must (in particular) have regard (a) in all cases, to the considerations listed in section 117B, and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Subsection (2) provides that "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). Section 117A(2) is mandatory. As the public interest

provisions are contained in primary legislation they override existing case law. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise. In other words, the Tribunal cannot just rely on the listed public interest factors as a basis for rejecting a claim but must carry out a balancing exercise where a person's circumstances engage article 8(1) to decide whether the proposed interference is proportionate in all the circumstances. Section 117B sets out the public interest considerations applicable in all cases. Section 117C sets out additional considerations in cases involving foreign criminals. Section 117D is the interpretation section. Sections 117D(2), (3) and (4) reflect but are not identical to sections 33 and 38 of the UK Borders Act 2007.

43. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise. In other words, the Tribunal cannot just rely on the listed public interest factors as a basis for rejecting a claim but must carry out a balancing exercise where a person's circumstances engage article 8(1) to decide whether the proposed interference is proportionate in all the circumstances.
44. In relation to section 117C; In *NA (Pakistan); KJ (Angola), WM (Afghanistan) and MY (Kenya) [2016] EWCA Civ 662* it was held that the general scheme of Section 117C(2) to (7) was similar to that set out in the 2014 Immigration Rules which drew a distinction between those sentenced to less than or more than 4 years. Medium offenders under section 117C could escape deportation if they fell within the safety net of 'Exception 1' (long residence provisions) or 'Exception 2' (parent/partner provisions). Serious offenders could not make use of those safety nets, but section 117C(6) provided that they could resist deportation if there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". Although section 117C(3) did not make any provision for medium offenders who fell outside 'Exceptions 1 and 2', the Court was of the view that the lacuna in that section was an obvious drafting error and that Parliament must have intended medium offenders to have the same fall back protection as serious offenders. Although there was no 'exceptionality' requirement, it inexorably followed from the statutory scheme that the cases in which circumstances were sufficiently compelling to outweigh the high public interest in deportation would be rare. The Court of Appeal found that paragraphs 398 to 399A of the 2012 Rules constituted a complete code in MF (Nigeria). The same was true of sections 117A-117D of the 2002 Act, read in conjunction with paragraphs 398 to 399A of the 2014 Rules.
45. In *IT(Jamaica) [2016] EWCA Civ 932* it was held that section 117C(2) made it clear that the nature of the offending was also to be taken into account. Subsections (1) and (2) of section 117C made manifest the strength of the public interest. To displace that public interest, the harshness brought about by the continuation of the deportation order had to be undue. Inevitably, therefore, there would have to be very compelling reasons.
46. The framework in relation to which these issues have to be considered is therefore not in issue between the parties. Mrs Aboni referred to paragraph 398 of the Rules requiring the appellant to demonstrate compelling circumstances over and above those set out in 399 -399A but this is reflected in the statutory provisions which are applicable to this matter.

47. A case involving this appellant on his own would not have got this far as it would not have succeeded before the First-tier Tribunal, the appellant in isolation establishing nothing in relation to his own circumstances that would warrant a finding other than that he should be deported from the United Kingdom. The issue is, and has always been in this case, the impact upon the children.
48. Children are not able to choose who is to parent them and it is arguable that so far as B and C are concerned they have been unfortunate in having a mother previously addicted to Class A drugs and a father who thought it acceptable to import a substantial quantity of drugs into United Kingdom for personal financial gain which resulted in a lengthy prison sentence. The children's mother was removed from their lives as a result of her inability to properly care for the children and the appellant was absent as a result of sentence of imprisonment.
49. It is pleasing to note from the children's perspective that they were fortunate enough to have a maternal grandmother willing and able to put her own life and plans on hold to provide the type of care and stability the children need. All the evidence available to this Tribunal shows that the placement with the children's grandmother has been a great success and that, as a permanent placement, it is likely to continue irrespective of any decision made in relation to the appellant's future and whether he is deported from the United Kingdom.
50. There is reference to the children's mother making progress in her own life and being able to have contact with the children again which is an important element in terms of their own development and relationship although, as with anybody struggling with past drug addiction, the future may at this point in time be described as being 'hopeful' but otherwise uncertain.
51. It is also the case that the children appear to have had a very supportive social worker and that any concerns that originally arose that the appellant had himself been providing the drugs the children's mother was using having been dispelled by the current social worker which allowed the current contact to be developed.
52. Although social services indicate that if the status quo is to be preserved they anticipate withdrawing from their involvement, which is indicative more of the care provided by the children's grandmother and trust in her meeting the best interests of the children rather than a judgement on the appellant in isolation, it is recognised that this also takes into account the fact that children are happy and settled with the contact they enjoy with the appellant.
53. Social services have elected not to tell the children about these proceedings which is a judgement call made by the social workers and one which appears wholly appropriate in light of the fact that there is no need to cause the children any upset or uncertainty in relation to a decision that at that point was not yet known.
54. Social services however stated in a recent letter that if the appellant was to be removed it may be necessary for them to undertake direct work with the children indicating that professional support services are available and on hand if required.
55. It is accepted that if the appellant is deported the children will be distressed. Claims that they would regress into a chaotic lifestyle have

been shown to be a gross exaggeration by the appellant and one no doubt made to try and strengthen his position to prevent his removal from the United Kingdom. I accept that having suffered loss within the family which has been partially replaced by their grandmother these are children who would have to be supported if they perceived a further loss. I do not find it made out that such support would not be available or that the support that was available would not be effective. I accept that any immediate impact upon the children would be distressing and indeed harsh but whether it would be unduly harsh such as to establish very compelling as opposed to compelling reasons has not been arguably made out.

56. This is not a case in which the appellants deportation will mean there will be no ongoing contact with the children although it is accepted the nature of that contact will change. It is accepted the appellant will not be to take the children out as he will be in a different country and that although telephone conversation with young children may be difficult, face-to-face electronic communication by means such as Skype has not been shown not to be available. This is a means of communication enjoyed by many with relatives in other parts of the world or even within the United Kingdom allowing real-time visual and oral communication. I accept that through such a method it is impossible for the appellant to hug the children or for them to hug him but the loss of that element forms part of the proportionality assessment. The appellant's argument based upon a claim there will be no ongoing contact has no arguable merit. The only reason there will be no ongoing contact is he chose not to contact the children. It has not been made out the children's grandmother would obstruct any such indirect contact especially in light of the great care that she has taken to date in ensuring that the needs of the children are met.
57. If the appellant is removed from the United Kingdom it is arguable that the children's grandmother may have to assume an even greater role than she currently does in meeting the needs of the children, at least in the short term. It has not been made out that she is unable or unwilling to do so or to ensure that the children are able to re-establish a routine in their lives against which they can continue to attend school, be housed, fed and watered, and their emotional needs met as far as possible, on a personal level, with professional support being available as required.
58. It has long been recognised that the impact of deportation is that families are broken up. The lawfulness of the decision to deport is not disputed the question in relation to this matter being whether it is a proportionate decision. The scenario outlined in this case in relation to the family dynamics is unfortunately not as uncommon as some would like but the family dynamics only form one half, albeit one of considerable importance, of the balancing exercise.
59. Against this has to be weighed the case advanced by the Secretary of State.
60. In *LT (Kosovo) [2016] EWCA Civ 1246* it was held that when considering an appeal against a deportation order made on the basis that an individual's offending had caused "serious harm", tribunals should accord significant weight to the Secretary of State's view, while considering all the facts. Her view that supplying Class A drugs caused serious harm was reasonable.
61. There is in addition to this the finding of the First-tier Tribunal when considering section 72 of the 2002 Act that the appellant failed to rebut

the presumption that he constitutes a danger to the community of the United Kingdom for the reasons given in the earlier decision. Nothing that has arisen in relation to this appeal warrants making a different finding.

62. It is accepted the appellant has not offended since 2014 but he has during that time remained on licence following his release having completed half of this custodial sentence and remains the subject of a deportation order and appeal proceedings. It will be highly unlikely that a person who has fought so vehemently to avoid his removal from the United Kingdom would act in such a manner in the interim by committing further offences that would completely undermine the case he is advancing in support of his appeal.
63. In *Hesham Ali* Lord Reed, at paragraphs 47 to 50, endorsed the structured approach to proportionality and said "what has now become the established method of analysis can therefore continue to be followed in this context.....The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed".
64. All relevant legal authorities together with the submissions made by the advocates have been considered and even if there is no specific reference to case law, submissions, or legal provisions it does not mean they have not been taken into account in arriving at the conclusion below.
65. It is accepted the appellant has established both family and private life in the United Kingdom. The appellant was granted indefinite leave to remain although that has now lapsed as a result of the deportation order and so it is not a case of a person who has remained in the United Kingdom unlawfully for all the time he has been here.
66. It is accepted the appellant's private life includes extended family members in Birmingham and that his family life includes that with the children B and C.
67. It is accepted the respondent's decision will interfere with both his private and family life although the family life he currently enjoys will not be lost to him but will have to be exercised in a different, indirect, manner. The same is arguably applicable to private life based upon face-to-face contact with other members of his family.
68. It is not disputed that the interference will be of a sufficient degree to engage article 8 ECHR.
69. It is not argued that the respondent's decision is unlawful and the issue in the case has always been that of the proportionality of the decision.
70. It is clear that the appellant has advanced his case at its highest in seeking to rely upon the children to prevent his removal. It is accepted that the effect of deporting the appellant upon both children will be harsh and may result in a strong emotional reaction. It has not been shown the children will be without support or that the home environment that they currently have with their grandmother will be lost to them. It has not been made out the children's lives will become chaotic or that the security they currently have that underpins their current and future development with their grandmother will be irreparably harmed. It has not been made out that the professional intervention, assistance, and support given when combined with that of the children's grandmother will not be sufficient to

enable the children to understand what has occurred and to adapt to a new routine and continue with the progress they have made to date. The presence of the appellant although important has not been shown on the evidence to be the determinative factor or one that his absence will lead to a complete collapse in the physical, emotional, or psychological welfare of the two children. The impact has not been shown to be unduly harsh.

71. It has not been established the support the children currently enjoy will not be available to them meaning that the consequence of the appellants removal has not been shown to be as severe as the appellant invites this tribunal to find.
72. When weighing all the facts relied upon by the appellant with those relied upon by the Secretary of State, including the strong public interest in deporting a person who commits such serious drug-related offences and who has still been shown to represent a danger to the community of the United Kingdom, and in the absence of it being shown that very strong or very compelling circumstances are made out such as to outweigh the public interest in the appellants deportation, the finding of this tribunal is that the Secretary of State has discharged the burden of proof upon her to the required standard, when considering both requirements of the Immigration Rules and article 8 ECHR, to show that the decision is proportionate.
73. The appeal is therefore dismissed.

Decision

74. **The First-tier Tribunal has been found to have materially erred in law and that decision set aside. I remake the decision as follows. This appeal is dismissed.**

Anonymity

75. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 29 November 2017

Annex A



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/01376/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
on 2 May 2017**

**Decision
Promulgated**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DF

(ANONYMITY DIRECTION IN FORCE)

Respondent

Representation:

For the Appellant: Mrs Aboni Senior Home Office Presenting Officer

For the Respondent: Mr Khubber instructed by Turpin & Miller Solicitors (Oxford)

ERROR OF LAW FINDING

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Ford ('the Judge') promulgated on 14 December 2016 in which the Judge allowed DF's appeal on Article 8 family life grounds against the decision to deport him from the United Kingdom as a result of his criminality.
2. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal on the basis it was found the grounds asserting the Judge misdirected herself in her assessment that the

reason she identified outweighed the strong public interest in deportation, by reason of there being very compelling circumstances over and above those set out in the statutory exceptions, disclosed an arguable error of law.

3. Although this is an appeal by the Secretary State the parties shall be referred to by their status before the First-tier Tribunal meaning reference to the appellant is to DF.

Background

4. DF is a national of Jamaica. On 10 July 2014, the Secretary of State made an order for his deportation from the United Kingdom pursuant to section 32(5) UK Borders Act 2007. DF appealed the decision on grounds that (i) he will face a real risk of persecution for a Refugee Convention reason on return to Jamaica and (ii) of being killed or subjected to inhuman or degrading treatment by certain gang members. On human rights grounds DF contended that his removal would place the UK in breach of protected Article 8 private and family life rights.
5. In relation to DF's criminal offending the Judge noted:
 3. On 31 October 2012 the Appellant was sentenced to 4 years imprisonment for being knowingly concerned in fraudulently evading prohibition/restriction on the importation of a controlled class A drug. He had acted as a drugs mule carrying a case with 850g of cocaine into the UK from Jamaica.
 4. He had two previous convictions. On 7 July 2007 he was bound over for 12 months and fined following a conviction for breaching the peace.
 5. On 30 March 2010 the Appellant was convicted of Criminal damage, ordered to pay costs and compensation and made subject to a two-year restraining order - protection from harassment order.
6. In relation to the asylum claim, the Judge noted the first issue to be dealt with is whether the appellant had rebutted the presumption that pursuant to Section 72 Nationality, Immigration and Asylum Act 2002, which states that a person shall be presumed to have been convicted of a final judgment of a "particularly serious crime" and to constitute a danger to the community of the UK if he is convicted in the UK of an offence and sentenced to a period of imprisonment of at least two years. The Judge noted the offence was that of drug smuggling which, as noted by the sentencing judge, the terrible harm caused by drugs is only too clear from the appellants and family experiences and the tragic consequences of the appellant's former partner, MN's, addiction for her children.
7. Having considered the relevant factors at [14] to [18] the Judge sets out her conclusions in relation to the Section 72 issue at [19] in the following terms:

19. Having considered the evidence before me I am satisfied that despite the low risk of reoffending, the potential harm involved in future offending by this Appellant is not low because of the risk factors that have been identified above. I am not satisfied the s72 presumption has been rebutted by the Appellant. But even if I am wrong on this I do not, having considered all of the evidence before me, find the Appellant credible in his claim that he is at real risk of persecution, being killed or subjected to inhumane or degrading treatment on his return to Jamaica from gang members.
8. At [20] to [30] the Judge sets out her reasoning in support of her finding in the alternative. There has been no cross-appeal to the rejection of the appellants claim the section 72 presumption had been rebutted and therefore the alternative finding is academic although, on the face of it, sustainable.
9. The appellants claims, pursuant to Articles 2 and 3 ECHR, stand or fall with the finding of a lack of credibility in the asylum claim as does the claim for Humanitarian Protection.
10. The Judge went on to consider the Article 8 aspect of the appeal.
11. The Judge noted that DF entered into a relationship with MN in 2008. MN has two children; the eldest K has ongoing contact with her natural father and is not said to have a father/child relationship with DF. C, the middle child was born two weeks before the relationship between DF and MN started. Although DF is not the child's father it is said he took on the role of a father in her life from the time she was only a few weeks old. DF and MN have a child of their own, B, born in 2011.
12. The Judge noted that MN visited DF regularly with the children when he was in prison and that the couple hoped to continue their relationship when DF was released, although Social Services had to intervene in the family in November 2013 leading to the children being placed with their Maternal Grandmother, Mrs N, where they have remained since. The Judge noted the placement is now permanent. The concern in relation to the children was that of emotional neglect arising from MN's use of Class A drugs. The Judge noted MN has no contact with the children at present and is not in contact with DF or Social Services, although is believed to be living with a relative.
13. At [34 - 36] the Judge writes:
 34. Ultimately the real issues in this case are as follows. Is it in the best interests of C and B that the Appellant is permitted to continue his family live with them in the UK rather than outside the UK? If it is not, then the appeal will be dismissed as I do not accept that in those circumstances the Appellant can successfully argue that there are exceptional factors in this case outweighing the public interest in his deportation.
 35. If it is in the children's best interests or in the best interests of either of them then I have to look at whether there are any exceptional factors in this case that might potentially outweigh the public interest. If I get to this point I will finally conduct a balancing exercise giving

full recognition and weight to the will of Parliament and the considerable weight given by it to the deportation of foreign criminals as set out at paragraph 14 above.

36. On the evidence before me I am satisfied that it is in the best interests of the children C and B that the Appellant to be allowed to continue to enjoy family life with them in the UK. I say this for the following reasons.

14. The Judge then sets out a series of reasons which can be summarised in the following terms:

- The children have had to endure very difficult experiences in their lives. C has never had any meaningful contact with her own father. [37].
- MN is a vulnerable individual who has a history of being a victim of domestic violence, drug abuse and depression and whose lifestyle has been chaotic for most of the children's lives. There is no evidence the appellant has been involved in using drugs. [38].
- MN brought the children to see DF on a regular basis, usually once a month, when he was in prison when the family were living on disability benefits and child benefits. [40].
- MN's children were in a very dangerous situation when Social Services intervened and removed them from their mother's care placing them in the care of the maternal grandmother who now has a Special Guardianship Order for all three children. Their mother was openly using Class A drugs in their presence. [40]
- It was noted to be of concern that when released from prison DF and MN saw the children when they were with relatives without permission or supervision of Social Services. The Judge records "The Appellant knew that he should not have taken matters into his own hands. It was extremely selfish of him to see the children in this manner and it had harmful effects upon B in particularly because he had not been prepared in advance for this visit" [42]
- Following the issuing of a contact application by DF and a change of social worker the Court approved contact between DF and C and B initially supervised but moving on to regular unsupervised contact once a month which continues with no concerns for the children's welfare arising from such contact. [43].
- The children are in a stable permanent placement with their maternal grandmother (Mrs N) where they will remain until they are adults. They have no contact with their mother at present and there appears to be no likelihood of such contact in the foreseeable future. [44].
- DF is not in a relationship with MN at the present time. He lives with members of his extended family. [45]. DF has suffered from depression in the past but is not currently taking any medication and living with relatives has brought him stability, and courses

completed whilst in prison appear to have increased his confidence, improved his life skills and his ability to cope [46].

- C and B are of mixed ethnicity. Both children are British nationals [49]. The maternal grandmother referred in evidence to the children's mixed ethnicity and how important it was for their identity to have the family connection with the Appellants wider family. [50].
- At [52] *"These young children have had to endure the loss of their mother from their lives and separation from their father, the Applicant. He has always endeavoured to retain and build on their relationship. To lose him as well as their mother would be (as MN states in her witness statement) "devastating". She says that the children have been through some enormously difficult times and "finally we have some stability in their lives". I am satisfied that the maintenance of this stability is crucial to the well-being of C and of B."*
- DF has shown a commitment to the contact. It is crucial to the emotional development and well-being of the children not only to have an ongoing close relationship with their father but also maintain and strengthen their relationships with their fathers extended family members for some time to come. [53].
- At 54 *"These children need the reassurance and security are seeing their father regularly and believing that he is there to care for them and give them security and love. Contact by way of visits and phone calls and written communications would be most unsatisfactory for such young children, particularly given the loss and disruption they have already suffered within their family. Social Services are in favour of continuing the direct unsupervised contact but more than that wish to see a building on the relationship between the Appellant and the children. They see the contact is having a positive influence on the children. Mrs N sees the Appellant's presence in the children's lives is crucial to their well-being. She is trying to cope on her own with the full-time care of three young children and she needs the emotional support the Appellant can give and is giving to B and C."*
- At [55] *"I have no hesitation in concluding that it is in the best interests of children that the Appellant should be permitted to remain in the UK to enjoy family life with B and C here without disturbing their current stable care arrangements."* At [56] *"I am also satisfied that there are exceptional factors in this case that mean that despite the Appellants deportation being in the public interest the decision is disproportionate."*
- The Judge noted that when the children were removed from their mother's care and placed temporarily with their maternal grandmother Walsall Children's Services were opposed to direct contact with DF as it hoped that rehabilitation could take place and because it was believed that DF had not only been involved in attempting to smuggle Class A drugs into the UK but had exposed the children to those drugs and was possibly involved in

supplying drugs to their mother [62]. The Judge however found that it became clear that there was no evidence on which it could be found that (i) DF had exposed the children to drugs, (ii) supplied drugs to their mother, or, (iii) used drugs himself apart from one historic incident of cannabis use [63].

- DF has worked on his relationship with C and B through contact and is now seen as a positive influence in the children's lives. The Judge writes *"This is not to underestimate the damage done to these very young children by the behaviour of both of their parents. As a result of that behaviour and the chaos and disruption it caused to their emotional well-being, their need for security and stability is now high. The Appellant has become part of that stability."* [65].
- DF provides the children with an important sense of their mixed heritage and supports their sense of self-worth. The relationship between them is close and loving. Mrs N stated it would be devastating for the children to stop the regular direct face-to-face weekly contact and input from DF. The children's social worker agrees. [66].
- The best interests of the children are not a trump card. The Appellant's offending was particularly serious as reflected in a prison sentence imposed of four years imprisonment. Risk of reoffending has been assessed as low. Risk factors may trigger a temptation to reoffend. With support of extended family members and insight gained into his own behaviour and appreciation of the absolute need to put the children's needs above his own, the risk of DF reoffending is low. [67].
- The likelihood of the children maintaining and developing their relationship with the Appellants extended family members will be lower if he is not in the UK [69].
- At [72 - 74]:

72. But ultimately I am satisfied that it would be disproportionate not to allow the Appellant to continue his family life with C and B from within the UK. It is in the public interest that such vulnerable children are supported so that their own risks of falling into chaotic lifestyles and drug abuse is minimised.

73. I have taken fully into account the nature of the offence and its gravity. Drugs cause untold misery and unhappiness and this is tragically only too apparent in what has happened to MN. The Appellant was at fault for her being left to cope on her own with three young children when she was so vulnerable due to her history of addiction, depression and domestic violence.

74. As at the date of hearing I am satisfied that the need for the Appellant to be allowed to continue his family life in the UK and to support Mrs N, B and C is so great that it

outweighs the strong public interest in the Appellants deportation. The decision is not justified by the public interests stated given its impact on the lives of two young children whose young lives have been very difficult and who have lost their mother from their lives and endured periods of emotional neglect and the potential impact on their carer. Taking fully into account the public interest in the Appellant's removal, I am not satisfied that the decision is justified. It goes further than is necessary to protect and promote those interests. This increases the risk of the placement of the children with their maternal grandmother breaking down and leave her coping on her own with distressed young children who have already suffered the loss of one parent, and having been reunited with their father would see him disappear from their lives again save for limited contact and visits. The impact of the decision is disproportionate to the legitimate aim is being pursued and I am satisfied that it is in breach of Article 8 family life, the family in question being the two children C and B and the Appellant. There are exceptional factors in this case that also amount to very compelling circumstances justifying a departure from the norm of deportation from foreign criminals who have been sentenced to a period of four years imprisonment for drug crimes.

15. The Judge mentions the support of the Social Services and at [48] refers to a letter from the children's social worker from which the following quotes have been included in the decision under challenge:

"The children are clearly important to DF and he fears that a time may come when he will be separated from them. He has considered every scenario of what the future could hold but is certain that however he can and where ever he is he will always continue to be a consistent presence in the childrens' lives. DF has a supportive network and many family members who live in the UK some of whom have assured me that they will continue to support DF and have done so to date. They appear to be a close family which is something DF regards as being of importance. He wishes to remain in position to ensure that B has full access to his family, maintains a sense of identity and is exposed to his cultural heritage.

DF has to date been compliant; open and honest with the Local Authority and as a result we have every confidence in him continuing to live in a positive and well adjusted life given the opportunity. We are very much in support of him continuing to build a relationship with his son and at this point in B's life it is crucial that he is able to do so freely. DF has an extremely positive relationship with the childrens' maternal grandmother who has increased contact to a weekly activity based on her own observations of the loving relationships they share, how much they enjoy

spending time together and the positive influence this has over both B and C.”

Error of law

16. The Secretary of State does not dispute the factual basis identified by the Judge but maintains a number of legal errors were made in the decision under challenge.
17. It is asserted the Judge failed to correctly identify very compelling circumstances over and above those contained in the exceptions and in determination the circumstances failed to apply the “unduly harsh” test contained in paragraph 399 (a) of the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002.
18. The Immigration Rules relating to deportation provide:

Deportation and Article 8

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK’s obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very

compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –
- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
 - (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

19. Section 117C of the 2002 Act 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.
20. In this case the Judge found that DF was 'caught' by 398(a) as he has been sentenced to a period of imprisonment of at least four years. As a result DF does not fall within 399 or 399A, meaning that the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
21. In *NA (Pakistan); KJ (Angola), WM (Afghanistan) and MY (Kenya) [2016] EWCA Civ 662* it was held that a foreign criminal seeking to establish exceptional circumstances was entitled to rely on matters of the kind referred to in paragraphs 399 or 399A, but they would need to be features making his Article 8 claim especially strong.
22. It is not suggested DF has a qualifying relationship with a partner and the Judge found that the appeal turns upon his relationship with the children C and B. In that respect paragraph 399 requires a genuine subsisting parental relationship with a child under 18, which is not disputed, and as the children are to remain in the United Kingdom, a finding that it would be unduly harsh for the children to remain in the UK without DF. What the Judge was required to do, however, was identified very compelling circumstances over and above those described in these provisions. The best interests of the children are not determinative albeit that they form a very important/weighty part of the proportionality balancing exercise.
23. In *MM (Uganda) and [2016] EWCA Civ 450* it was held that the phrase 'unduly harsh' plainly meant the same in section 117C(5) of the 2002 Act as it did in paragraph 399 of the Immigration Rules. It was an ordinary English expression coloured by its context. The context invited emphasis on two factors: first, the public interest in the removal of foreign criminals and, secondly, the need for a proportionate assessment of any

interference with Article 8 rights. The public interest factor was expressly vouched by Parliament in section 117C(1). Section 117C(2) provided that the more serious the offence committed, the greater the public interest in deportation. That steered the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it would be to show that the effect on his child or partner would be unduly harsh. Any other approach would dislocate the 'unduly harsh' provisions from their context such that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation. In such a case 'unduly' would be mistaken for 'excessive', which imported a different idea. What was due or undue depended on all the circumstances, not merely the impact on the child or partner in the given case. The expression 'unduly harsh' in section 117C(5) and paragraph 399(a) and (b) required consideration of all the circumstances, including the criminal's immigration and criminal history.

24. The Judge sets out the factors that were considered relevant to the assessment so far as the children are concerned, which relate to the failings of their parents to provide adequate and suitable care, the transfer of responsibility for such care to the maternal grandmother, the reintroduction of DF into their lives following their being moved and his period of imprisonment, and what is said to be the traumatic impact upon the children of removing DF from their lives by his deportation to Jamaica.
25. The Judge does refer to the Secretary of State's position but also to DF's offending. As seen above, the Judge found at [67] that the risk of reoffending is low but also finds at [15] that notwithstanding the risk of reoffending being described as low the Secretary of State submitted that the risk could escalate if DF is faced with financial problems as DF travelled to Jamaica on a number of occasions, never explaining how he managed to pay for these trips given that he was unemployed for long periods of time and the household income largely consisted of disability benefits for MN and child benefit, and that the influence of family members in the UK did not prevent him from offending as nor did the fact he had dependent children and vulnerable partner.
26. The Judge at [17 - 19] found:
 17. Dr Basu assess the risk of reoffending over the next two years as low. He does refer to social networks as a risk factor and notes that the Appellant is relatively socially isolated at the current time. He states this "may" improve if the Appellant is allowed to work. Dr Basu says that the Appellant's history suggests that he has found himself around those who have exerted a negative influence on him either through drug misuse or violence and states "in the future he should be mindful of these and ensure that it is not to surround himself with potentially negative influences that might increase his chances of reoffending".
 18. The Appellant has allowed himself to lose control of his temper when his ex-partner stole his Criminal injuries compensation monies and he attended at her property and caused criminal damage, breaking a

window there. He has been both the victim and the perpetrator of domestic violence.

19. Having considered the evidence before me I am satisfied that despite the low risk of reoffending, the potential harm involved future offending by this Appellant is not low because of the risk factors that have been identified above. I am not satisfied that the s72 presumption has been rebutted by the Appellant.
27. The consequence of the Judge finding the s72 presumption has not been rebutted is that it is not only the case that the appellant has been found to have been convicted of a particularly serious crime, but also to constitute a danger to the community of the United Kingdom. The Judge does not seem to factor within the proportionality assessment her finding relating to the danger DF presents to society through his reoffending.
28. The Judge clearly found that the effect on the children would be unduly harsh but more than this is required. It is arguable that the Judge proceeded to identify relevant factors when finding that the chance of the children developing a relationship with their father's extended family members will be lower if he is not in the United Kingdom, [69], but no reasons have been given as to why this should be so. It is not suggested that there would be no ongoing contact between the children and their paternal family if DF was not in the UK, especially when the evidence is that both the maternal grandmother and DF's family are supportive of the children. It is not disputed that contact with extended family may be of importance in relation to the children's heritage and background but the Judge fails to refer to sufficient evidence to support a finding that this might be prejudiced or compromised, to the extent that it could amount to an unduly harsh impact, if DF is removed.
29. Similarly, at [72] the Judge finds it is disproportionate not to allow DF to continue his family life with C and B from within the UK and comments it is in the public interest that such vulnerable children are supported so that their own risk of falling into chaotic lifestyle and drug abuse is minimised. Whilst it is accepted that that is a statement supported by all working within the childcare field, there is no evidence that if DF were removed from the UK the children would be reasonably likely to fall into chaotic lifestyles and hence increase the risk that they themselves become problematic. The reason for this is the network of support that exist for the children, which was accepted by Social Services as meeting the children's needs, even when DF was in prison.
30. The special guardian, Mrs N, has parental responsibility for the children. Subject to any later order, the special guardian may exercise parental responsibility to the exclusion of all others with parental responsibility, apart from another special guardian. Local authorities are required to make arrangements for the provision of special guardianship support services. These include counselling, advice, information and such other services (including financial support) as are prescribed in the Special Guardianship Regulations 2005. The Regulations also provide for the assessment of needs for special guardianship support services, and the planning and the reviewing of those support services. This is stable,

settled, and supported structure of the family unit in which the children currently live.

31. Similarly, at [74], the Judge found that the decision to remove DF was not justified given its impact upon the lives of the children and the removal increases the risk of the placement of the children with the maternal mother breaking down, when there is insufficient reasoning or evidence to support the contention that a person as devoted to the children as their maternal grandmother would allow that to happen, or that leaving her on her own with “distressed young children who have already suffered the loss of one parent” would somehow undermine the placement. The first thing to note is it is not suggested that the maternal grandmother would have to suffer on her own, as clearly the children have a social worker and possibility of further Social Work intervention/assistance within the family unit.
32. The respondent’s proposal is that it is in the public interest for DF to be removed from the UK and that any contact he currently has with the children may continue thereafter by indirect means or eventually by face-to-face visits in Jamaica. It is not a case of family life being lost, but the quality of that family life and the way such family life is undertaken changing.
33. The Judge refers to the impact on the children of DF not being in their lives on a permanent basis but it does not appear there are any reports from Social Services of a sufficiently detailed nature dealing with the consequences of DF’s removal; with specific emphasis not only upon the likely effect upon the child generally but also what work can be undertaken to prepare the children for any actual removal, including ensuring they understand it is not as a result of anything they have done or anything for which they are responsible, and what support would be available for the children both before, during, and after the period of DF’s deportation from the United Kingdom. It is arguable that it is only when the results of such additional work are known that it can be assessed whether the effect on the children would not only be unduly harsh but that the consequences of DF’s removal will result in a situation such that it could not be proportionate when balancing the competing interests. Work of this nature is regularly undertaken by Social Workers in the field of adoption where a placement is contemplated which does not provide for ongoing contact with the child’s birth parents.
34. This is not to say that the requirements of the rules are determinative, for as found by the Supreme Court in *Hesham Ali (Iraq) v SSHD [2016] UKSC 60*, which was concerned with the law pre the Immigration Act 2014, Lord Reed noted that in *MF (Nigeria) [2014] 1 WLR 544* “the Court of Appeal described the new rules set out in para 23 above as “a complete code” for article 8 claims (para 44). Lord Reed noted that that expression reflected the view that the concluding words of rule 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the article 8 criteria and all other factors which were relevant to proportionality (para 39). On that basis, the court commented that the result should be the same whether the proportionality assessment was carried out within or outside the new rules: it was a sterile question whether it was required by the rules or by

the general law (para 45)". Lord Reed then went on to say that "The idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules, and the Rules alone, govern appellate decision-making. Dicta seemingly to that effect can be found, for example, in *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310; [2015] Imm AR 227, para 17, and *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636" albeit that Lord Reed reiterated the weight to be given to the public interest in deport cases. Lord Wilson, however, said that "Provided that the phrase (in the Rules) is not misunderstood, there is nothing wrong with an analysis in certain contexts that "exceptional circumstances" will be necessary for a claim under article 8 to prevail". Lord Wilson said that where the appellant's family life with another person was developed at a time when, to his knowledge, his immigration status rendered his ability to remain living in the UK precarious, " his claim to respect for his family life is inherently weak. It is therefore legitimate to describe it as likely to prevail only in exceptional circumstances. The court in Strasbourg has said so. Thus in *Rodrigues Da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 34, the Strasbourg court said: "39. ... where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8." Lord Wilson added: "In the *MF (Nigeria)* case, however, the Court of Appeal proceeded to make an insignificant but unfortunate error. It held at para 44 that the new rules were "a complete code" which fell to be applied not only by the Secretary of State's case-workers but on appeal by the First-tier Tribunal. It is one thing to suggest that the Secretary of State's rule 398 is relevant to the weight which the tribunal should give to the public interest. By doing so, the tribunal would do no more than, in the words of Lord Bingham in the *Huang* case, para 16, to accord "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice". But it is another thing altogether to suggest that the rules provide the legal framework within which the tribunal should determine the appeal.

35. In *Hesham Ali (Iraq)*, Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality and said "what has now become the established -critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed".
36. Whilst it is accepted that the Judge approached consideration of the Article 8 issue in a structured manner, the respondent's position which forms part of the balancing exercise when assessing the Secretary of State's states case is that set out in the Rules.
37. It is arguable at this stage that based upon the evidence made available to the Judge the finding that the situation for C and B, as a result of the consequences of DF's removal was such that the very high threshold had been crossed, does support the contention that the Judge has failed to substantiate the finding of very compelling circumstances in the case

where although face-to-face contact may be lost, other forms of contact will continue, and that there is no evidence that those extra factors required to displace the public interest in the face of a four-year prison sentence for drug-related offences, was made out on the evidence.

38. The determination shall be set aside. The Upper Tribunal was unable to proceed to remake the decision on the day and the following directions shall apply to the future conduct of this hearing:

- I. List for a resumed hearing before Upper Tribunal Judge Hanson sitting at Birmingham on the first available date after 14 July 2017, subject to the availability of Mr Khubber. Time estimate 3 hours.
- II The appellant shall file a consolidated, indexed, and paginated bundle containing all the documentary evidence he seeks to rely upon in support of his claim, to include witness statements which are to be signed, dated, and contain a declaration of truth. Expert reports from a child psychologist and/or the children's Social Worker dealing with the impact of DF's removal in specific terms and any work available to prepare the children for the same, referred to in the body of this decision, shall be included in the bundle. Such statements shall stand as the evidence in chief of the maker who shall be tendered for cross examination and re-examination only. The bundle to be filed no later than 4 PM 16 June 2017.
- III The respondent shall file a consolidated, indexed, paginated bundle containing all documents she seeks to rely upon in support of her case and/or in rebuttal of the points taken by the applicants no later than 4 PM 30 June 2017.
- IV Skeleton arguments shall be filed with the Upper Tribunal no later than 4 PM 14 July 2017.
- V Documents not submitted within the time periods provided by these directions shall not be admitted without specific permission of the Upper Tribunal. Such permission must be sought in a written application to be filed before the expiry of the period provided in these directions. The application shall explain why there has been a failure to comply with directions, who is responsible for such failure, which documents the application relates to, the relevance of those documents to the issues in the appeal, whether the opposing party consents to the documents being admitted late, the prejudice to either party of admitting or refusing to admit the documents, the time period by which it is envisaged such documents shall be available, and the impact of the granting of the application upon any hearing date that has been fixed.

- VI The findings of Judge Ford in relation to immigration and criminal history, family composition and contact between DF and the children and B shall be preserved.
- VII Liberty to apply to the parties in the event that sufficient time is not provided for the provision of expert or other related evidence in the directions provided herein.

Decision

39. The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. The case shall proceed to a Renewed Hearing in accordance with the directions set out above.

Anonymity

40. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.
I make such an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 8 June 2017