



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05736/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7 May 2019

Decision & Reasons Promulgated
On 17 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

K A B
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Ms H Foot, Counsel, instructed by Bajaria Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the Appellant's appeal against the Respondent's refusal, dated 6 April 2017, of his human rights claim, which in turn had been made on 12 January 2017.
2. In its barest form, the Respondent concluded that the Appellant, a Jamaican national, was, by virtue of convictions accrued, a "foreign criminal" and should be deported from the United Kingdom. The Appellant asserted that his particular circumstances, including primarily his relationship with his four British children but also that with their mother, meant that deportation would breach his rights under Article 8 ECHR ("Article 8").
3. The appeal had been heard and allowed by the First-tier Tribunal (Judge Gurung-Thapa) in a decision promulgated on 16 October 2017. On a challenge to this decision by the Respondent, Upper Tribunal Judge Finch concluded, in a decision promulgated on 4 February 2019, that the First-tier Tribunal materially erred in law. The full error of law decision is annexed to my remake decision.
4. In essence, Judge Finch found that the First-tier Tribunal had failed to direct itself to the applicable legal test when considering the core issue of whether it would be "unduly harsh" for the children to follow the Appellant to Jamaica, or for them to remain in the United Kingdom if he were to be deported (see para. 14-15 of Judge Finch's decision). That test consisted of two elements: first, that the nature of the parent's offending is not relevant to the substance of the assessment of undue harshness (paras. 22-23 of KO (Nigeria) [2018] UKSC 53, which had been handed down after the First-tier Tribunal hearing); second, that the appropriate threshold for the assessment of undue harshness was set out by the Upper Tribunal at para. 46 of MK (Sierra Leone) [2015] UKUT 223 (IAC) and approved by the Supreme Court at para. 27 of KO (Nigeria). In Judge's Finch's view, the evidence relied on by the First-tier Tribunal arguably fell short of showing unduly harsh consequences for the Appellant's children, particularly as regards the possibility of separation.
5. Judge Finch set the decision of the First-tier Tribunal aside and adjourned the appeal for a *de novo* resumed hearing before her in due course. No other specific directions were issued.
6. Judge Finch was, in the event, unable to rehear the appeal and a Transfer Order was made by the Principal Resident Judge at Field House. In this way, the matter came before me.

The issues in the appeal

7. There was some discussion at the outset of the hearing as to the precise nature of the rehearing of the appeal. Ms Isherwood submitted that the First-tier Tribunal's finding that the Appellant was not in a relationship with his children's mother (Ms

G) had never been challenged and should therefore be preserved. Ms Foot responded by reference to Judge Finch's decision that the rehearing would be on a *de novo* basis.

8. I made a ruling that the rehearing of this appeal was indeed on a *de novo* basis. It is true that the specific finding referred to by Ms Isherwood had not been challenged by way of cross-appeal. It is also the case that a judge determining the question of error of law may in certain circumstances expressly preserve findings/conclusions reached by the First-tier Tribunal, notwithstanding that its decision is set aside on other grounds. However, in the present case, Judge Finch was clear: under the subheading of "Decision" it is expressly stated that the appeal was to be heard *de novo*. No qualification was added, either in the decision itself or by way of additional directions. In my view there was no basis upon which to go behind the Judge Finch's decision on the nature of the rehearing of this appeal.
9. In respect of the material issues which fall to be assessed and decided on in this case, the following matters were canvassed at the outset of the hearing before me and neither representative disputed the relevance or accuracy of any of them:

Agreed matters

- i. the Appellant's immigration history;
- ii. the number and nature of the Appellant's convictions, including the conviction for drink driving in 2018 (to be set out in greater detail, below);
- iii. the Appellant is in fact the father of his four children;
- iv. the Appellant's four children and claimed partner are all British citizens;
- v. the Appellant has a genuine and subsisting parental relationship with all four of his children;
- vi. the Appellant has a fifth child in United Kingdom with whom he has no contact. The child plays no part in the Appellant's appeal;
- vii. the Appellant is a "foreign criminal" for the purposes of the Immigration Rules ("the Rules") and section 117C-D of the Nationality, Immigration and Asylum Act 2002, as amended ("NIAA 2002");
- viii. the Appellant cannot rely on para. 399A of the Rules or section 117C(4) NIAA 2002 because of his largely unlawful status in the United Kingdom.

Disputed matters

- i. the Respondent does not accept that the Appellant is in a genuine and subsisting relationship with Ms G;
- ii. the Respondent does not accept that it would be unduly harsh for Ms G and all of the children to go and live with the Appellant in Jamaica;
- iii. alternatively, the Respondent does not accept that it would be unduly harsh for Ms G and the children to be separated from the Appellant should he be deported to Jamaica alone;
- iv. the Respondent does not accept that there are any very compelling circumstances over and above those described in paras. 399(a)-399A of the Rules and section 117C(5) NIAA 2002.

The relevant legal framework

10. The relevant provisions of part 5 of NIAA 2002 read as follows:

“117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or 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.

(3) In subsection (2), *“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).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

...

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

...

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.

...

(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.

...

117D Interpretation of this Part

(1) In this Part –

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who –

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(2) In this Part, "*foreign criminal*" means a person –

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who –
 - (i) has been sentenced to a period of imprisonment of at least 12 months"

...

11. The relevant provisions of the Rules 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;

....

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

...

- (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

...

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.”

The Respondent's decisions

12. Following the Appellant's conviction in January 2014 and the imposition of a custodial sentence of 12 months' for actual bodily harm and 6 months' for perverting the course of justice, the Respondent issued a decision to deport the Appellant pursuant to section 32(5) of the UK Borders Act 2007. That decision was not of course appealable. A deportation order was signed on 6 April 2017.
13. Having subsequently made a human rights claim, the Respondent duly refused it and provided detailed reasons in support of this decision. I summarise those reasons here.
14. Having set out the Appellant's offending history and the nature of supporting evidence submitted with the human rights claim, the Respondent goes on to consider the issue of family life under Article 8. As previously mentioned, the Respondent accepts that Appellant is the father of four British children all of whom reside in the United Kingdom. It is accepted that although the Appellant was not living with the children and their mother, he nonetheless had regular contact with them and in light of all the evidence provided, it was also accepted that he had a genuine and subsisting parental relationship with them.

15. It is said that all of the children would be able to adapt to life in Jamaica, that they would be supported by both of their parents in undertaking this change, and that it was likely that they would have family already in Jamaica who could provide additional support. The children could take up hobbies and interests in Jamaica and could maintain contact with any friends in United Kingdom through modern methods of communication.
16. It is said that the children could be separated from the Appellant were he to be deported. It is noted that the children, as British citizens, could benefit from all entitlements afforded to them in this country. They would remain with their mother, who was their primary carer. The impact of being separated from the father would not be unduly harsh. The children could maintain contact with their father through modern methods of communication or even visits to Jamaica.
17. It is not accepted that the Appellant was in a genuine and subsisting relationship with Ms G. It is noted that in representations submitted by previous solicitors, it was said that the Appellant was "separated" from Ms G, although this position was subsequently altered when the human rights claim was made. It was noted that the Appellant did not live with Ms G and there was inconsistency in the evidence relating to when they allegedly formed their relationship. It is not accepted that the Appellant had been in the United Kingdom lawfully for most of his life, nor that there would be very significant obstacles to his reintegration into Jamaican society.
18. Finally, it was said that there were no very compelling circumstances in this case. There was insufficient evidence of rehabilitation, the Appellant's desire to re-establish his own business in this country was not a significant matter, and that any help he provided to Ms G's mother did not represent a compelling circumstance.

The evidence before me

19. Having worked through what initially amounted to a vast amount of paperwork on file, and with the agreement of both representatives, I am basing my decision on the following sources of evidence:
 - i. the Respondent's appeal bundle, under cover of letter dated 27 June 2017. Amongst numerous other items, this includes representations and evidence in support of the 2017 human rights claim, evidence relating to the Appellant's criminality (including a PNC report), and the Respondent's decision letter;
 - ii. the Appellant's appeal bundle from the First-tier Tribunal hearing (now marked AB1), indexed and paginated A1-F12;
 - iii. the Appellant's supplementary bundle prepared for the rehearing in the Upper Tribunal, indexed and paginated A1-D14 (AB2);
 - iv. a letter from Ms G's mother's GP, dated 30 April 2019, explaining that she was unable to attend the hearing before me;

- v. oral evidence from the Appellant, Ms G, and Ms J McN, the maternal aunt of Ms G.

20. A full note of the oral evidence is contained in the record of proceedings. I will refer to relevant aspects of this evidence when setting out my findings of fact, below.

Submissions of the parties

For the Respondent

- 21. Ms Isherwood relied on the Respondent's decision letter. Her overarching submission was that there was nothing in this case beyond what she described as the "ordinary" parent-child relationship. She submitted that there were certain credibility issues, including inconsistencies as to what family the Appellant has in Jamaica, whether he had indeed stopped smoking cannabis a significant period of time ago, and whether he was a good role model for the children in light of his most recent conviction. In addition, the evidence on the claimed relationship between the Appellant and Ms G was insubstantial. It was noted that the Appellant had not sought to vary his bail conditions so that he could live with Ms G.
- 22. Ms Isherwood acknowledged that if, as the Respondent asserts, the Appellant is not in a genuine and subsisting relationship with Ms G, it would be "difficult to argue" that she and the four children could be relocated to Jamaica along with the Appellant. However, if such a relationship did exist, it was submitted that the entire family unit could move. The Appellant had more family there and he had admitted to.
- 23. As regards separation of the Appellant from his children, Ms Isherwood submitted that there was no evidence to take the Appellant's case out of the "normal" category. The children's parents took it in turns to take one of the sons to football. There was no clear evidence of any neurological or behavioural problems with any of the children. There was very little evidence about Ms G's mother's situation. Neither of the two social workers' reports indicated any factors over and above a normal parental role exercised by the Appellant. It was said that some of the social workers' conclusions did not correspond to the school reports, which indicated that the two older boys were doing very well. The evidence from the school also showed that support would be provided to the younger son in that setting. Ms Isherwood wondered why the Appellant's presence in the United Kingdom was vital to the question of the children's identity. The psychiatric report from 2017 did not disclose any conditions on the Appellant's part. Finally, Ms Isherwood submitted that the evidence simply did not reach the threshold set out in KO (Nigeria).

For the Appellant

- 24. Ms Foot relied on her detailed skeleton argument. She asked me to take a cumulative view of all relevant factors, in particular the Appellant's role as a good father-figure to his children, his ability to draw on his own experiences to assist his two boys at a

very important stage in their lives, the credible evidence provided by the witnesses, and the behavioural difficulties of the younger son.

25. Ms Foot emphasised the Appellant's role in the children's lives, albeit that he did not live with them. There was medical evidence relating to Ms G's mother and the Appellant had been residing with her in part to assist her. It was submitted that the Appellant was in a genuine and subsisting relationship with Ms G notwithstanding what been said in previous representations in 2016.
26. It was submitted that the whole family unit could not go and live in Jamaica. What family the Appellant does have there live in an area that has been besotted by violent crime in recent times: I was referred to country evidence contained in section E of AB1. In addition, the four British children have spent their entire lives in this country and the two older boys in particular have set down firm roots in this country.
27. In terms of possible separation, Ms Foot submitted that the Appellant was a role model, particularly to his boys. His involvement in their lives amounted to more than assisting them with activities. The expert evidence of the two independent social workers should be afforded significant weight when undertaking the best interests assessment. Ms Foot suggested that there were the following special features in the Appellant's case: the fact that all four children were "mixed-race" living in a predominantly white environment; the behaviour and anxiety of the younger son went beyond "normal" teenage matters; and the impact that separation would have on the boys and the eldest daughter.
28. In respect of the relevant legal tests to be applied, Ms Foot urged me to treat the unduly harsh threshold with some caution, noting that it did not require the Appellant to show very compelling circumstances.
29. Finally, it was submitted that if the unduly harsh test were not met, they were in this case very compelling circumstances. In this regard I was referred to para. 37 of the skeleton argument.

Findings of fact on relevant matters

30. In reaching my findings of fact I have had full regard to all of the evidence before me, including that to which no specific reference is made. I have also taken into account the Respondent's stated position in respect of certain issues, together with the representatives' submissions before me.

Factual matters not in dispute: the Appellant's immigration history and offending

31. I find that the Appellant was born in December 1981 and arrived in the United Kingdom on 15 April 2002 with leave to enter until 29 January 2003. He subsequently overstayed. I find that at some unknown point he left the United Kingdom and returned here on 10 November 2012. It appears as though he was granted limited leave to remain until 10 May 2013. Following an in-time extension application, I find that the Appellant was then granted 30 months' limited leave to remain, running

until 16 June 2016. On the passport evidence before me I am satisfied that the Appellant made visits to Jamaica in November 2014 and March 2016.

32. The Appellant's uncontroversial offending history is as follows:

5 March 2007: convictions for possession of cannabis and driving offences committed on 13 February 2007. Fined £50 for driving without due care and attention; no separate penalty for the other matters, with driving licence endorsed.

2 August 2011: convicted of travelling on the railway without paying a fare and given a £65 fine.

9 December 2011: convicted of possession of cannabis and given a £65 fine.

12 July 2013: convicted of possession of cannabis and given a £200 fine.

3 October 2013: convicted of possession of cannabis and given a £75 fine.

17 December 2013: convicted of possession of cannabis and given a £110 fine.

24 January 2014: convicted of assault occasioning actual bodily harm and perverting the course of justice. Sentenced to 12 months' imprisonment for the assault and 6 months for the second count, both to run consecutively.

21 September 2018: convicted of driving a vehicle with excess alcohol. Fined and disqualified from driving for 14 months, subject to a reduction in the period once a specific course is undertaken.

33. In respect of the so-called "index" offence from 2014, and in light of the sentencing remarks of HHJ Hatton, dated 24 January 2014 (F1 Respondent's bundle), I make the following additional findings. The Appellant conducted what was described as a "sustained and serious" attack upon a woman with whom he had been having a sexual relationship. I find that the Appellant undertook a very nasty and what must have been an extremely frightening attack on the victim, including hitting her with objects as well as his fists, and making threats to kill.

34. I accept that the Appellant was assessed within the 2015 OASys report as constituting a "low" risk of reoffending and a "low" risk of serious harm to the public (C34 and C43 AB1). I note that the serious harm assessment stated that the risk to children was "high" as was that to a known adult (presumably the Appellant's victim). The unchallenged psychiatric report from Dr Malhotra, dated 30 June 2017, makes an assessment of a "low" risk of violent reoffending (B40-B41 AB1).

35. Whilst I do play significant weight on the OASys report and Dr Malhotra's assessment, the fact that the Appellant subsequently reoffended in the autumn of last year does, in my view, go to materially undermine the assessment of low risk. Notwithstanding what I accept was genuine contrition as regards the previous offending, in the knowledge not only that the Respondent was taking deportation action against him but also that he had an appeal hearing coming up, the Appellant chose to drive a car having consumed enough alcohol to be over the legal limit. In light of this, and in the absence of any subsequent risk assessment, I find as a fact that the Appellant represents a medium risk of reoffending.
36. I also find that he represents low to medium risk of serious harm to the public. Drink-driving is, by its nature, an act that creates the very real danger of extremely serious consequences for members of the public (in addition, of course, to the perpetrator themselves).
37. There is a question concerning the Appellant's use of cannabis over the course of time. He told me in oral evidence that he stopped doing this over two years ago. Ms Isherwood referred me to para. 43 of the psychiatric report at B20 AB1). The author reported that the Appellant had given up cannabis and was then only using it "occasionally... on a recreational basis". I find that this information could only have come from the Appellant himself. It does not sit well with his oral evidence, which was to the effect that he stop using it altogether prior to the assessment by the psychiatrist. Whilst not suggesting that the Appellant had necessarily committed any further offences relating to cannabis, I do find that he continued to use it on a recreational basis at the time of, and probably beyond, his interview with the psychiatrist on 2 June 2017. Having said that, I do accept that he has never smoked cannabis in front of the children or Ms G.

Factual matters not in dispute: the Appellant's children and his relationship with them

38. It is accepted by the Respondent that the Appellant is the biological father of four children, two older boys and two daughters: R (known as Sh), born in July 2005; J, born in September 2006; S, born in August 2012; and A, born in June 2014. All of the children of British, and all have lived in this country for the entirety of their lives.
39. I find that Sh is currently in Year 9 of secondary school, and will be beginning the GCSE course as of September 2019. I find that J is currently in Year 7, S is in Year 1, and A is in Reception class.
40. I find that Sh is very well-settled in his educational and social environment. The evidence from his school indicates that he is a very able student (C14 AB2). There is no suggestion that he has any developmental or behavioural problems, and I find that he does not.
41. I find that J is a talented footballer and a good deal of his focus in life is directed at that particular pastime. It appears from the school report at C13 AB2 that J also a good student.

42. From the evidence before me, I accept that J has had some difficulties in respect of his behaviour. It appears as though at one stage there was a referral for an ADHD assessment, but this was later withdrawn (para. 26 at B18 AB1). I do, however, accept the evidence of Ms G that J has been "stressed" at school and this has led to some behavioural issues. Her evidence to me was that involvement by the school's Special Educational Needs Coordinator is either in place or will be forthcoming, is supported by what she told the independent social worker recently (B11 AB2). I also accept the oral evidence that J has exhibited examples of distressed behaviour, including being tearful at school and undressing at a sports event. There is no specific report on J in respect of any difficulties, but in my view that is probably unsurprising given that assessment appears to be at a very early stage. I was told that J might be in line to receive counselling from an outside organisation, but in fairness to MsG, she was quite open in admitting that nothing was yet in place.
43. I find that S and A are both settled in school and the evidence from that institution indicates that they are both doing well there. There is no evidence to suggest that either of them have any additional challenges, and I find that they do not.
44. Based on Ms G's reliable evidence, I find that the children have visited Jamaica in the past: she took the two boys there on one occasion and all four children went on the second.
45. I turn now to the nature of the Appellant's relationship with his children. The Respondent accepts, as do I, that there is a genuine and subsisting parental relationship between the father and his children. To place this in a rather more detailed context, I make the following findings.
46. It is difficult to discern whether or not the Appellant has ever actually lived in the same property as the children. Having looked through the evidence before me with care, I cannot see specific evidence (whether direct or by way of representations/submissions made on the Appellant's behalf) to indicate that he has. If there had been any material periods of cohabitation, I would have expected to see evidence of this in one form or another.
47. On balance, I find that the Appellant has not lived with his children for any appreciable period of time during the course of their lives, although this fact has not of course prevented the Respondent and me accepting that he nonetheless has a genuine and subsisting relationship with them.
48. I find, as did the Respondent, that the Appellant has had a significant input into the lives of his children during the course of their lives. It is clear from the evidence before me that he has seen them on something fairly close to a daily basis. I accept that he has been heavily involved in practical matters such as: the school runs, at least in the past; sharing the task of taking J to football activities, including those involving fairly long-distance travel; assisting with homework, were able to do so; cooking; and general assistance with the children's everyday practical needs.

49. I find that Ms G works at S and A's school. From the timings of her hours provided in evidence, I find that she works at the school's breakfast and after-school clubs and as a midday supervisor or lunchtime assistant. On her oral evidence, the Appellant is no longer involved in the morning school run as the two girls go with her and the boys take themselves to school. It is unlikely that the Appellant is required to bring any of the children back from school, although I accept that he may do so on occasion.
50. I turn now to the equally important matter of the Appellant's emotional relationships with his children. I play significant weight on the essentially unchallenged expert evidence from the two social workers and the psychiatrist. In many respects, this supports what the Appellant, Ms G, and Ms McN have said on this issue.
51. The expert evidence from the two social workers (in particular that from Ms Prempeh) makes the following points, all of which I attach significant weight to:
- i. Ms G believes that the Appellant's absence from the children's lives would be very detrimental to their well-being;
 - ii. in the latest social worker's report, Sh reported that "everything went downhill" when the Appellant was last "away" (when he was in prison);
 - iii. Sh and J are aware of the possibility of the Appellant being deported and displayed noticeable adverse emotion when discussing this issue with the social worker;
 - iv. the Appellant's removal would represent a "significant change of circumstances" for all four children and that this event would be perceived by the two boys as a "significant loss";
 - v. Sh's age and current educational circumstances leads to the "possibility" that the Appellant's removal would have an adverse impact on the child's academic attainment;
 - vi. investigations surrounding J's behavioural issues makes him "vulnerable";
 - vii. the Appellant's removal would cause Ms G additional stress, and this "might" have impact on her parenting capacity;
 - viii. being of dual-heritage and residing in a predominantly white British community, the absence of the Appellant "may" have negative effects of regarding children's cultural identity and self-esteem;

- ix. separation of children from their father "may" have "far-reaching negative consequences" for them all;
- x. finally, that separation "is likely to have a negative impact upon [the children's] education, identity, emotional and behavioural development."

52. There is a reference in the latest report to the effect that young black boys need a male role model more than other demographic categories. I place less weight on this particular point than in respect of those set out above. The assertion is not specifically sourced and a degree of caution should be applied to relatively wide-ranging generalisations. For example, the author does not provide a comparator with, say, young white working class boys or those from disadvantaged Bangladeshi communities.
53. The combined effect of this evidence is that I find that all four children have a strong bond with their father notwithstanding the fact that he has not lived under the same roof as them. That in itself says something about the nature of both parents' commitment to the children. In addition, I find that it is more likely than not that the children would, purely from their own perspective, experience relatively significant negative effects on their wellbeing (both in practical and emotional terms), at least in the short term, if the Appellant were to be removed from their lives. This is likely to be most keenly felt by the two boys for reasons set out in the expert evidence.
54. Having said that, and whilst placing significant weight on the expert evidence, it is the case that both social workers couched many of their opinions in equivocal terms: "may", "might", "possibly" and suchlike. That is not a criticism of the authors, but rather a comment on the fact that the expert evidence is only one aspect, albeit an important one, of the whole picture.

Disputed factual matters: the Appellant relationship with Ms G

55. I find that the Appellant is not in a genuine and subsisting relationship with this Ms G. My finding is based upon the following matters.
56. I fully appreciate that both the Appellant and Ms G themselves have asserted that they are in a genuine and subsisting relationship. I have of course considered this assertion of a relationship in the context of the evidence as a whole. The fact that I have rejected this particular aspect of their evidence does not have a material bearing on what they have said about the children and other matters. Similarly, the fact that I have accepted other aspects of their evidence does not require me to find that the evidence of the relationship is reliable.
57. I do accept that the Appellant has in the past been a genuine relationship with Ms G. I find that this relationship was certainly something more than simply a "casual arrangement".

58. However, aside from the very brief assertions by the Appellant and Ms G in their respective witness statements contained in AB1 that they were partners, there is really virtually nothing by way of detail or other materially supportive evidence to underpin the claim that a relationship is subsisting. The 2016 social worker's report does not, as far as I can see, refer to them as being in a relationship. It is highly unlikely that such an omission was made in error. There is nothing in the latest social worker's report to indicate with any clarity that there was a subsisting relationship. Whilst I appreciate that this report was focused mainly on the children, the absence of clear references to the existence of a relationship is significant.
59. I note that in their latest witness statements, and despite the fact that the issue has clearly been a "live" one in these proceedings, neither the Appellant nor Ms G provide any detail about proclaimed relationship. Indeed, the Appellant says nothing at all, whilst Ms G simply states that "I am the Appellant's partner", without more.
60. There appears to be a brief reference in the psychiatric report to Ms G being the Appellant's "partner". However, once again this is really just a passing comment, without there being any further detail on the issue.
61. I find that the Appellant's living arrangements are relevant to the issue of the claimed relationship. I accept that he has in fact been residing with Ms G's mother for some time. I also accept that he is on immigration bail. There has been no satisfactory explanation as to why he was not bailed to Ms G's address in the first instance. Even putting that to one side, when asked why he had not sought to vary any residence condition so that he could live with Ms G and the children, the Appellant told me that "things had been going on" and he had not asked about this possibility. Ms G seemed unaware of the possibility of changing address.
62. I have noted the written explanation that the Appellant was residing with Ms G's mother in order to help care for her. However, this does not sit particularly well with the oral evidence referred to in the previous paragraph and in any event the evidence does not indicate that she requires 24-hour care.
63. Taking the evidence as a whole and with due respect to the Appellant and Ms G, there is a distinct lack of any sound explanation for the separate living arrangements.
64. In light of the foregoing and on the evidence as a whole, it is likely that the intimate relationship between the Appellant and Ms G ended at the time of, or shortly after, the Appellant's conviction in 2014.
65. Notwithstanding my finding on the intimate relationship, it is quite clear that the Appellant and Ms G have maintained very good links for the benefit of their children.

Disputed factual matters: the Appellant's family in Jamaica, Ms G's mother, and relevant family members in the United Kingdom

66. I find that the Appellant has provided unreliable evidence about his familial circumstances in Jamaica.
67. In oral evidence he told me that he only had his mother, stepfather, and a sister in that country, and that they live in a small property in the Montego Bay area. In her evidence, Ms G (whom I found to be a more impressive witness in several respects) quite candidly and, I find, truthfully, stated that the Appellant's mother has two daughters living with her, in addition to two nieces and her husband. They all reside in an appropriately-sized property. I prefer this evidence to that of the Appellant. I find that the Appellant has deliberately sought to minimise the extent of his family in Jamaica.
68. I find that Ms G' mother, D, does suffer from various medical conditions. Although there is something of a dearth of medical evidence, I have seen GP printouts which confirm that she has rheumatoid arthritis, osteoporosis, and a below-knee amputation on her left leg (D40 AB1). It is likely that she does require assistance with certain activities and I accept that the Appellant's presence at her home does have a benefit for her. It is likely that she needs to be driven to places and I accept that Ms G undertakes this task when required.
69. I accept the evidence that D divorced Ms G' father many years ago. Having said that, it appears as though he is still available to assist the family when required, something confirmed by the Appellant in oral evidence. I was told that he would be looking after the children on the day of the hearing. I infer that he lives relatively close to Ms G.
70. I find that Ms G has a sister, N, with whom there is regular contact. I accept that she does suffer from depression and is currently off work. Although this condition can potentially be very debilitating, I find that N was looking after her mother on the day of the hearing and this indicates that, at least to an extent, she is able to offer some assistance.
71. I find that Ms G has a brother living in Chester. I accept that he has a young family of his own and that he does not have a particularly significant role in either caring for D or assisting Ms G herself.
72. Ms McN is clearly a very committed aunt to Ms G and great aunt to the children. Her evidence shows that she maintains communications with the children, sees them on a fairly regular basis, and has a good insight into difficulties faced by children in general.

Conclusions

The “unduly harsh” assessment

73. I have found that the Appellant’s children are all “qualified” in that they are British, and that he has a “genuine and subsisting parental relationship” with them.
74. In light of para. 399(a) of the Rules and section 117C(5) NIAA 2002, two questions arise: would it be “unduly harsh” on the children to follow the Appellant to Jamaica; would it be “unduly harsh” for the children to be separated from their father.
75. In order for the Appellant to succeed in showing that his Article 8 claim outweighs the very powerful public interest in his deportation, both questions must be answered in the affirmative.

Self-directions

76. I follow the guidance set out in KO (Nigeria), MK (Sierra Leone), and RA (s.117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT00123 (IAC) and direct myself as follows:
- (a) the “unduly harsh” test is the same under the Rules as it is under section 117C(5) NIAA 2002;
 - (b) I do not take the relative seriousness of the parent’s offending into account when undertaking my assessment;
 - (c) the assessment requires an evaluation of the children’s “best interests”;
 - (d) the threshold for undue harshness is clearly beyond “reasonableness”;
 - (e) there must be shown a degree of harshness going beyond that necessarily involved for children facing the deportation of a parent;
 - (f) “Harsh” denotes something “severe” or “bleak”, and the addition of the adverb “undue” to the test raises the bar yet further;
 - (g) the relevant threshold is clearly high, but it does not require “very compelling circumstances” to be identified;
 - (h) the application of the test will always be highly fact-sensitive.

Question 1: would it be “unduly harsh” for the children to go and live in Jamaica?

77. In the Respondent’s favour, the test is a high one to satisfy. The Appellant is of course a national of Jamaica and English is the common language. All of the children

have at least visited the country in the past. On my findings, the Appellant does have family there and there is no reason to suppose that at least some form of support would not be forthcoming. The Appellant could be expected to find work of one sort or another. Jamaica is not a country in such a dire state as many others around the world.

78. Having said all of that, there are significant factors in the Appellant's favour.
79. It is quite apparent to me that the best interests of all four children lie strongly in remaining in the United Kingdom. I say this in light of: their respective ages (particularly those of the boys); their nationality and all that brings with it; the settled educational environment and Sh's imminent progression into his GCSE course; the social and cultural integration that they all clearly have here.
80. I have found that the Appellant is not in a genuine and subsisting relationship with Ms G. As Ms Isherwood candidly, and in my view appropriately, acknowledged during her submissions, the absence of such a relationship would make it difficult for the Respondent to argue that Ms G (and of course, by extension, the children) could relocate to Jamaica without it being unduly harsh. Whilst Ms G has, to her credit, ensured that she has a very good relationship with the Appellant for the good of the children in this country, it is something altogether different to expect her to emigrate to a country with which she effectively has no ties and without a committed partner. I appreciate that this factor attaches primarily to Ms G, but it would be artificial to consider it of no relevance to the position of the children: they would go to live in Jamaica with their mother and her wellbeing and overall circumstances is bound up with theirs.
81. Although Jamaica is not as dangerous or poverty-stricken as other countries, it nonetheless suffers from very serious problems connected to crime. The FCO Travel Advice at E1 AB1 and the Respondent's Country Policy and Information Note at E2-E16 AB1 paints a bleak picture of widespread organised and random criminal activity. The evidence indicates that tourists can be a particular target for robbery. I note that a major crime hotspot is Montego Bay, the Appellant's home area. I take judicial notice of the fact that there continues to be a state of emergency in that area (as confirmed by current FCO Travel Advice).
82. On the specific facts of this case and with full appreciation of the applicable high threshold, I conclude that the cumulative effect of the factors in the Appellant's favour go to show that it would be "unduly harsh" for the children to go and live in Jamaica.

Question 1: would it be "unduly harsh" for the children to be separated from the Appellant?

83. As with almost all deportation cases involving children, the question of separation is a very difficult one to answer.

84. The first factor I take into account are the children's best interests. I assess these as lying strongly in maintaining the current situation, namely the close relationship between the Appellant and all four children, with what is effectively daily direct contact. It is clear that they love him very much and see him as a very important part of their lives. These best interests are a primary consideration and I attach considerable weight to them in my overall assessment.
85. Having their father taken away from them would undoubtedly cause very considerable upset. On a *general* level, however, and without seeking to sound unnecessarily hard-hearted, such a sense of loss would constitute an inevitable consequence of deportation: it would not amount to an unduly harsh impact.
86. Dealing with the children in more detail, I turn first to Sh. I have found that he does not have any specific challenges in terms of behaviour or developmental issues. He has expressed the view that things went "downhill" when the Appellant was in prison and there is a real chance that the upset caused by his father's departure would have a negative impact on his studies, at least in the short-term.
87. I balance these matters against the following. Sh is clearly a very able student. With support, in my view there is a strong likelihood that he would be in a position to progress well in his studies as he moves into the GCSE course. There is no reason to suggest that the school and his extremely capable and loving mother would be unable to offer meaningful support.
88. On my findings, J is in a more vulnerable position than his older brother (although the evidence does not support the contention at para. 12(xiv) of Ms Foot's skeleton argument that he is "highly" vulnerable). He has displayed some behavioural problems and this must clearly be a concern for both him and his parents. I take into account the likely fact that the Appellant's removal would have an additional impact on him.
89. It is the case that the school appears to be putting in place support for J and in my judgment this is a strong indication that ongoing relevant help will be forthcoming from that quarter (or from outside organisations). In addition, Ms G would continue to be a very supportive and involved mother.
90. It is clear that football is an important part of J's life. The Appellant's absence might have an impact on his ability to travel around as much as he has done. Yet I cannot see that he would be prevented from playing any football at all. Whilst being difficult, and possibly involving changes to what might be his ideal circumstances, arrangements could be made by way of Ms G transporting him and/or liaising with other parents.
91. Whilst there has been a less detailed picture of S and A, I have found that neither have any specific educational and/or social difficulties.
92. I have considered the position of the Appellant as a role model to his children. From the perspective of a disinterested bystander, there are in my view significant questions

marks about the consistency of his assertion that he is an excellent example on the one hand, with his offending behaviour on the other (all of his offences were committed after at least one of the children had been born, and the seriousness has actually escalated over time).

93. However, the more important point is that the children see him as a role model and it is their perspective with which I am primarily concerned. As with the issue of the understandable upset caused by a separation, the loss of a parental role model (of whichever gender) is in reality an expected consequence of the deportation process.
94. There is an additional layer to the role model point in this appeal. The children are what is sometimes described as “mixed-race” (with respect, I would prefer to use the term “dual-heritage”). It does appear as though they live in a predominantly white locality in Wirral. In this context, the potential concern raised by the Appellant and the social workers on the issue of identity is valid to the extent that losing the day-to-day direct contact with one half of a child’s cultural heritage might cause potential difficulties.
95. This concern must be seen in the context of the evidence as a whole and what has and has not been said. I cannot detect a sense that the children are unaware of their heritage, or that they currently hold conflicting ideas about their cultural identities. There is no evidence to suggest that they have faced specific problems on account of their mixed parentage and I would give Ms G the credit of being willing and able to impart and encourage knowledge and understanding of the Appellant's (and the children’s) Jamaican background.
96. The current nature of Ms G’ work would in my view allow her to continue if the Appellant were deported. She takes the two girls with her to work in the mornings and the boys look after themselves. The midday supervisor role would also be unaffected. In respect of after school, it could be that the girls stay on at the club and the boys arrive home alone. Alternatively, the work pattern might have to change. Although I fully recognise that recourse to benefits would never be ideal, this would not in my view represent a material contribution to undue harshness.
97. I have found that the Appellant assists Ms G’s mother. In his absence, an additional burden would potentially fall on Ms G herself. A mitigation of this could realistically come from one or both of two sources: Ms G’ sister and the local authority. I fully appreciate that N suffers from depression, but she is capable of offering some assistance, as indicated by the fact that she was with her mother on the day of the hearing. Perhaps more importantly, if D’s needs required it, an assessment would in all likelihood be undertaken by the local authority.
98. D’s situation effectively precludes her from providing support to Ms G. Similarly, N’s input would be limited, at least in light of her current state of health. I have found that Ms G’s father is able to help out “when required” (as the Appellant put in evidence) and it is likely that friends would be willing to assist to some extent.

Although she lives in London, Ms McN represents both a source of solid emotional support and, when able, practical assistance as well.

99. It is, however, fairly clear that extensive support, perhaps on something approaching a daily basis, would not be present for Ms G and the children. This is a factor that I attach weight to as favouring the Appellant's case. The weight is somewhat reduced by the reality that many single parents will not have particularly strong support networks. Whilst I am not imposing any exceptionality test, difficulties, even fairly significant difficulties, arising from limited outside help would not, of themselves constitute harsh, and certainly not unduly harsh, consequences.
100. The above-mentioned matters will no doubt be very testing for M G's parenting capabilities. I take into account that fact that she has four children. But this is another aspect of the deportation process which is inevitable. On the facts of this case, I conclude that she would not be effectively prevented from continuing to provide love and strong parental support to all of the children.
101. In terms of contact post-deportation, it is clear that the use of social media and internet-based video messaging would not be a proper substitute for the day-to-day direct contact that the children currently have with the Appellant. The existence of such methods is not entirely irrelevant, though. In addition, the children have visited Jamaica twice in the past. I am of course aware that flights to that country can be expensive, depending in particular on the time of year, but the history of visits is indicative of a probability that this could occur in the future.
102. Drawing all of the above considerations together, I conclude that whilst a separation of the children from the Appellant would be hard, indeed harsh, it would not be unduly harsh. In so concluding I make three additional points.
103. First, I am acutely aware of the gravity of my decision. Although it will probably come as little comfort, this has been a very difficult case to determine.
104. Second, although I have worked through a number of separate factors when assessing the unduly harsh test, I have not simply asked myself whether any one of them would be enough to meet the high threshold. Whilst it is clear to me that no single factor is sufficiently strong, my predominant approach has been to consider all matters on a cumulative basis. This involves taking all the factors together and keeping well in mind the existence of the four children and their mother and the collective impact that the Appellant's deportation would have on them as a unit.
105. Third, I am very conscious that I have reached opposite conclusions on the two limbs of the unduly harsh assessment: in the Appellant's favour as regards a relocation to Jamaica; against him on the separation issue.
106. In my view, however, there is no inconsistency here. My decision on the relocation issue is based on questions of the children's security and safety, educational provision, the rights and benefits accruing from being in the country of their nationality, the maintenance of established friendships, and their mother not having

to move to a new country with someone she is not in a subsisting relationship with. Even then, my conclusion that a relocation would be unduly harsh was not reached by a particularly significant margin.

107. My decision on the separation issue has been based on the children remaining in what is, fundamentally, a safe, secure, and familiar environment, together with what I believe to be a careful analysis of additional general and specific factors relating to the children and their surrounding circumstances.
108. With reference to the exceptions set out in the Rules and section 117C NIAA 2002, the Appellant's appeal fails.

“Very compelling circumstances”

109. Finally, I turn to what may be described as the Appellant’s “fall-back” argument, namely that there are in this case “very compelling circumstances over and above” those described in the two exceptions contained in paras. 399(a)-399A of the Rules and section 117C(4) and (5) NIAA 2002.

Self-directions

110. I direct myself to the approach set out in Hesham Ali [2016] UKSC 60 and other relevant authorities including NA (Pakistan) [2016] EWCA Civ 662 and MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC). The essential principles to be applied are:
- (a) the test is “extremely demanding”;
 - (b) matters covered by the exceptions can also be relevant to the assessment of the test;
 - (c) the public interest is very strong indeed;
 - (d) that interest retains the facets of deterrence, the risk of reoffending, and the public’s concern on the issue of foreign nationals offending in the United Kingdom;
 - (e) the particulars of the individual’s offending are relevant;
 - (f) the policy of the Respondent as expressed in the Rules is deserving of “considerable weight”;
 - (g) the best interests of relevant children remains a primary consideration;
 - (h) cases are fact-sensitive.

111. The overall approach was summarised in Hesham Ali thus:

“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.”

Factors for the Appellant

112. The best interests of the four children lie very firmly in the Appellant remaining with them. As I have concluded that it would be unduly harsh for them to go to Jamaica, the only means by which this scenario can occur is if their father is permitted to stay in the United Kingdom. I give significant weight to these best interests as a primary consideration.
113. As part and parcel of the first factor, the Appellant has a strong family life with his children. Further, although I have found that he is not in a subsisting relationship with Ms G, the two have a strong link as parents to their children.
114. The Appellant is a good parent, at least from the perspective of his interactions with the children and putting his offending to one side.
115. I place weight on the fact that the Appellant will feel significant upset from being separated from his children.
116. The Appellant has been in the United Kingdom for a considerable period of time now. It follows that he has been away from Jamaica for many years and re-establishment in that country will not be easy.
117. Leaving aside the 2018 conviction for the moment, the Appellant has been assessed by relevant professionals as representing a low risk of reoffending and a low risk of serious harm to the public. I place material weight on this, subject to what I say, below.
118. There is a decent chance that the Appellant would be able to obtain employment if permitted to remain in the United Kingdom.
119. The Appellant has, at least in respect of the pre-2018 convictions, shown genuine remorse for his offending. He had a very good prison record and complied with all aspects of his licence and supervision by the Probation Service. This clearly counts in his favour.

Factors against the Appellant

120. The public interest, as expressed in primary legislation and the Rules, is very powerful. In that sense, the scales are weighted against the Appellant from the outset.

121. I have mentioned the issue of reoffending risk as a point counting, at least to an extent, in the Appellant's favour. In the other direction, though, is the simple fact that the Appellant went on to commit a further offence in 2018 at a time when the appellate proceedings were well under way. That rather belies the "low" risk categorisation made previously. In my view the subsequent offending reduces the weight attributable to this otherwise favourable factor.
122. I place due weight on the deterrence factor as being a matter of general application. On a more specific level, it is not without significance that the Appellant himself was not deterred from committing a further offence in 2018, notwithstanding the remorse expressed previously and the appreciation of the threat of deportation.
123. The same applies to the issue of the public's concern as to offending by foreign nationals. This point is enhanced by the Appellant's further conviction in 2018: a fair-minded member of the public would be fully justified in holding serious concerns about an individual who committed a potentially serious offence even though he (the Appellant) knew that deportation action was pending.
124. As set out in my findings of fact at para. 33, above, the "index" offence was nasty and in my view, serious. The Appellant undertook a sustained attack on a woman with whom he had a relationship. Quite clearly, the experience for the victim must have been very traumatic. The primary offence was then compounded by the Appellant's attempt to coerce the victim after he was charged. Whilst bearing in mind the actual length of the two consecutive sentences, I conclude that the public interest is rendered stronger by the nature of the "index" offence.
125. I have concluded that the Appellant cannot satisfy any of the exceptions contained in the Rules or section 117C NIAA 2002. This inability carries considerable weight against him.
126. There are no material health-related issues in this case.
127. The Appellant's immigration history is relevant to an extent. Although he had limited leave to remain from 2013, prior to that he had been overstayed in the United Kingdom for many years.

Evaluative judgment on the question of "very compelling circumstances"

128. Having weighed up all the factors counting for and against the Appellant, and, in respect of the former, having done so on a cumulative basis, I conclude that he has not shown "very compelling circumstances over and above" those set out in the exceptions contained in the Rules and section 117C NIAA 2002, or on any other basis.
129. There is clearly no single factor in his favour that can in any way properly be described as sufficiently powerful to meet the very high threshold.
130. On a cumulative view, and taking account of factors considered within the scope of the exceptions in addition to all others, the margin of failure is certainly narrower: I

would say that his Article 8 claim is strong. However, it is in my judgment insufficiently so to outweigh the numerous significant factors weighing against him on the balance sheet.

131. On a wider Article 8 assessment, the Appellant's appeal fails.

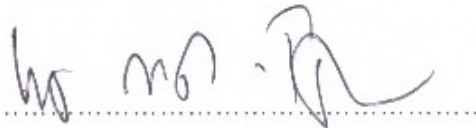
Anonymity

132. I make an anonymity order in this case because of the existence of the four children and the need to protect their identities.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

I re-make the decision by dismissing the Appellant's appeal.

A handwritten signature in blue ink, appearing to read 'H B Norton-Taylor', written over a horizontal dotted line.

Signed
H B Norton-Taylor
Deputy Judge of the Upper Tribunal

Date: 15 May 2019

ANNEX: ERROR OF LAW DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05736/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 31 January 2019**

Decision & Reasons Promulgated

.....

Before

UPPER TRIBUNAL JUDGE FINCH

Between

K A B

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Ms H. Foot of counsel, instructed by Solicitors

For the Respondent:

Mr. M. Kotas, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Jamaica. He arrived in the United Kingdom on 15 April 2002 and was granted temporary admission until 29 January 2003. On 21 January 2003 his application for leave to enter was refused but he failed to report, as required on 30 January 2003 as was listed as an absconder. On 20 September 2011 the Appellant applied for leave to remain on human rights grounds but then returned to Jamaica.
2. The Appellant re-entered the United Kingdom on 10 November 2012 and was granted leave to remain until 10 May 2013. He applied for further leave to remain on 30 April 2013 and on 16 December 2013 he was granted leave to remain until 16 June 2016. On 24 January 2014 he was convicted of one count of assault occasioning actual bodily harm and one count of doing an act intended to pervert the course of public justice at Liverpool Crown Court and sentenced to a total of 18 months imprisonment. As a consequence, he was served with notice of decision to deport him from the United Kingdom on 22 November 2016. He responded to this notice asserting that his deportation would breach his family and private life rights.
3. The Respondent refused his human rights claim on 24 March 2017 and signed his deportation order on 6 April 2017. The Appellant appealed and his appeal was allowed by First-tier Tribunal Judge Gurung-Thapa in a decision promulgated on 16 October 2017. The Respondent applied for permission to appeal and his application was refused by First-tier Tribunal Judge Easterman on 3 November 2017. The Respondent renewed his application and Upper Tribunal Judge Kekic granted him permission to appeal on 2 August 2018. Counsel for the Appellant filed a Rule 24 Response, which is dated 20 September 2018. The error of law hearing was adjourned on 4 January 2019 as it had been listed before Upper Tribunal Judge Kekic and counsel for Appellant successfully submitted that it was inappropriate for the appeal to be heard by the same judge as had granted permission to appeal to the

Respondent. The Appellant was informed that he did not need to attend this error of law hearing.

ERROR OF LAW HEARING

4. For the purpose of consistency, I have referred to the Secretary of State was the Respondent in my decision but he is actually the Appellant for the purposes of this error or law hearing. Both counsel for the Appellant and the Home Office Presenting Officer made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

5. Section 117C of the Nationality, Immigration and Asylum Act 2002 sets out “additional considerations in cases involving foreign criminals” who have submitted that it would amount to a breach of Article 8 of the European Convention on Human Rights to deport them from the United Kingdom. Its sub-sections state:

“(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.

...

(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. The Respondent accepts that the Appellant has a genuine and subsisting parental relationship with his four British children.
7. Upper Tribunal Judge Kekic granted the Respondent permission to appeal on two basis. The first was that First-tier Tribunal Judge Gurung-Thapa did not apply the correct test particularly where there is a strong public interest in deporting foreign criminals. The second was that the Judge had not given reasons for why she found that it would be unduly harsh to separate the Appellant from his children.
8. The basis upon which First-tier Tribunal Judge Gurung-Thapa reached her decision is no longer lawful in the light of the decision in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. The fundamental test for assessing whether the ‘unduly harsh’ test has been met has not changed but the emphasis on the role of criminality in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617 meant that when First-tier Tribunal Judge Gurung-Thapa reached her decision, she was distracted from the fundamental test by the need to give due weight to the Appellant’s criminality. Therefore, she said:

“I am aware that the issue of undue hardship had been considered by the Court of Appeal in **MM (Uganda) v SSHD** [2016] EWCA Civ 617. It was held that the phrase “unduly harsh” means the same as in section 117(5) as in rule 399. In considering this issue one must consider two factors namely (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. It also held that the more pressing the public interest in a foreign criminal’s removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. It also held that in the present context relevant circumstances certainly include the criminal’s immigration and criminal history”.

9. However, in paragraph 22 of *KO & others v Secretary of State for the Home Department* [2018] UKSC 53, Lord Carnwath found that:

“Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C’s deportation be “unduly harsh”? Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word “unduly” is intended as a reference back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and the like the test of “reasonableness” under section 117B, exception 2 appears self-contained”.

10. Therefore, the first basis upon which permission to appeal was given by Upper Tribunal Judge Kekic cannot stand in the light of the more recent Supreme Court decision.
11. However, Upper Tribunal Judge Kekic also gave permission in response to the second ground of appeal which was that the First-tier Tribunal Judge had failed to identify the unduly harsh consequences on the children if the Appellant was deported since it is well-recognised that in a deportation context the splitting of families may well be proportionate, however contrary to the best interests of the children that may be. When granting permission Upper Tribunal Judge Kekic summarised the error as not giving reasons for why she found that it would be unduly harsh to separate the appellant from his children.
12. The Home Office Presenting Officer separated the two issues out and submitted that the First-tier Tribunal Judge had both not appreciated the high threshold imposed by the ‘unduly harsh’ test and also given insufficient reasons for showing that this high threshold had been met. This was a useful approach as the reasons given by the Judge could only be adequate if she had directed herself to the correct test.
13. However, he also sought to rely upon the case of *Secretary of State for the Home Department v AJ (Zimbabwe)* [2016] EWCA Civ 1012. This was not appropriate as, although the Applicant in that case had been sentenced to between 12 months and 4

years imprisonment, he could not benefit from exceptions arising from genuine relationships with a partner or child and therefore the 'unduly harsh' test did not apply and he had to bring himself within the "very compelling circumstances" category.

14. Counsel for the Appellant submitted that the First-tier Tribunal Judge had identified the very harsh consequences that the children would suffer in paragraphs 47 to 71 of her decision. I accept that she did rehearse the facts on which the Appellant relied in these paragraphs. However, the Supreme Court has now confirmed in paragraph 27 of its decision that the Upper Tribunal gave authoritative guidance as to the meaning of the phrase "unduly harsh" in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC) where it stated in paragraph 46 that:

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

15. The First-tier Tribunal Judge did not direct herself to this test and it is arguable that the evidence she referred to could not meet this high threshold. The closest she came to the test was to note, in paragraph 62 of her decision, that case law indicates "there must be relatively few cases in which there is a meaningful relationship between a parent and children where deportation of the parent, with consequent physical separation, will not have an adverse impact on the children".
16. In her oral submissions, counsel for the Appellant took me to some of the evidence in the bundle but this could not undermine the fact that the reasons given by First-tier Tribunal Judge Gurung-Thapa did not indicate that the accepted test for showing that it would be 'unduly harsh' had been met.

17. Counsel of the Appellant also sought to rely on the case of *VV (grounds of appeal) Lithuania* [2016] UKUT 00053 (IAC) but this was not of direct relevance as the question in this case was one where the reasons given had to be considered in the context of the test approved by the Supreme Court.
18. As a consequence, I find that the decision by First-tier Tribunal Gurung-Thapa contained arguable and material errors of law.

DECISION

- (1) The Secretary of State's appeal is allowed.
- (2) The appeal will be heard *de novo* in the Upper Tribunal and reserved to myself.

Nadine Finch

Signed
Upper Tribunal Judge Finch

Date 1 February 2019