



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/16542/2013

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 2nd April 2019

Decision and Reasons Promulgated
On Friday 26th April 2019

Before

**MRS JUSTICE JEFFORD
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH**

Between

OR

**[Anonymity direction made]
(A protected party: by his litigation friend KWS)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Harrison QC and Mr A Vaughan, Counsel instructed by Bindmans LLP

For the Respondent: Mr J Anderson, Counsel instructed by Government Legal Department

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

This appeal involves a protected person and also concerns the welfare of a child. An anonymity direction has been made by the Upper Tribunal previously and it is

appropriate to continue that anonymity direction. We make clear that our reasons for that direction do not include the impact on the Appellant's own reputation of the crimes which he has committed. Until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

INTRODUCTION

1. This appeal comes before us for re-making of the decision in relation to Article 8 ECHR, an error of law having been found by this Tribunal (Mrs Justice Elisabeth Laing DBE and Upper Tribunal Judge Jordan) by a decision dated as long ago as 5 December 2014 ("the Decision"). It comes before us by a slightly unusual route. By the Decision, the Tribunal accepted that there was an error of law in the decision of the First-tier Tribunal Judge, promulgated on 9 July 2014, allowing the Appellant's appeal. The First-tier Tribunal's decision was therefore set aside although the factual findings therein were not disturbed by the grounds of challenge. The Tribunal went on to re-make the decision in relation to Article 3 ECHR, dismissing the Appellant's appeal in that regard but reserving to a resumed hearing the appeal on Article 8 grounds.
2. The Appellant has since appealed the Decision on the Article 3 grounds to the Court of Appeal. Permission to appeal was granted on that application by Lord Justice Hickinbottom on 26 November 2018. He gave directions on that occasion to permit the Appellant to amend his grounds to deal with an issue relating to the applicability of the case of Paposhvili v Belgium [2017] Imm AR 867 to the facts of this case. Following that amendment and a hearing on 28 February 2019, Lord Justice Hickinbottom stayed the Respondent's application to set aside the grant of permission and indicated that this Tribunal would hear and determine the outstanding Article 8 grounds by a resumed hearing, prior to the substantive hearing in the Court of Appeal on 24-25 June 2019. The Court of Appeal has also indicated that, in the event that either party is dissatisfied with our decision which follows, an application for permission to appeal will be considered by the Court on a rolled-up basis during that hearing.
3. As we understand the position, therefore, we are to determine only the Article 8 ground of appeal. We do so on the basis that the Decision which is under appeal remains intact and we gratefully adopt such parts of the Decision which are relevant to our consideration below.

PROCEDURAL MATTERS

LITIGATION FRIEND

4. An application has been made on behalf of the Appellant for the appointment of a litigation friend in this appeal. The proposed litigation friend is his sister who is a British citizen living in the UK. We have anonymised her identity here, and in the heading, in order to preserve the Appellant's anonymity.
5. A Presidential panel of this Tribunal has recently provided guidance in relation to the appointment of litigation friends (R oao JS and Others) v Secretary of State for the Home Department (litigation friend – child) 2019 UKUT 00064 (IAC). Although that guidance is in the context of the capacity of minor children in judicial review proceedings, the decision makes clear that it applies equally to the statutory appeal context ([72]) although the costs and procedural regimes are different. It is also of assistance for what it has to say about the assistance to be derived from the Civil Procedure Rules although those do not strictly apply to the Tribunal ([77]). For that reason, we adopted a similar approach when determining the application in this case. In particular, CPR 21.4(3)(a) and (b) provides that the litigation friend must be able to fairly and competently conduct proceedings and have no interest adverse to the Appellant.
6. We heard oral evidence from the Appellant's sister, KWS. She has been appointed by the Court of Protection since June 2015 to handle the Appellant's financial affairs in the UK. She confirmed that she remains willing to act on his behalf in relation to these proceedings. She confirmed that she understands her responsibility in relation to the making of decisions in relation to conduct of the proceedings and that she is content to assume responsibility. We also confirmed that she has no interest adverse to that of the Appellant. We were also satisfied on the medical evidence provided by Dr Sewell (to which we refer below) that the Appellant lacks the capacity to conduct these proceedings himself and that the appointment of a litigation friend is necessary.
7. The Respondent did not object to the appointment. We therefore appointed KWS as the Appellant's litigation friend in this appeal. We note that as this is a statutory appeal and the Appellant is in any event a publicly funded party (in which regard KWS is also his litigation friend), no costs consequences arise.

APPLICATION TO ADDUCE FURTHER EVIDENCE

8. The Appellant applied to adduce updated witness and medical evidence to which we will refer below. The Respondent did not object to that application. The Respondent also made an application to adduce further evidence. The basis of the application is set out at [3] to [5] of the Respondent's skeleton argument. Those paragraphs read as follows:

“3. The Defendant applies to rely on further evidence. First the Defendant applies to rely on evidence from Tascor as to the circumstances of the Claimant's removal. As explained below, it is denied that the Claimant was mistreated during the process of his removal. The evidence is plainly material in demonstrating that. For the avoidance of doubt, the

Defendant does not consider that the alleged mistreatment is relevant to the determination of this appeal in any event.

4. Second, the Defendant applies to rely on excerpts from the GCID records which also relate to the circumstances of removal, and for the same reasons as above.

5 Third, the Defendant applies to rely on a response to a country information request dated 21 March 2009 in respect of the Open Arms Centre.”

9. Ms Harrison objected to the adducing of the evidence, save for the third item referred to. She submitted that the other material was not relevant as indeed appeared to be the Respondent’s position. As Mr Anderson pointed out, however, the material went to an argument made at [11] of the Appellant’s skeleton argument concerning procedural fairness obligations under Article 8. It was to that argument that the material was directed even though the Respondent’s primary position was that it was not relevant.
10. Ms Harrison also pointed out that the material went further. In particular, the GCID notes appeared to be the entirety of those notes relating to the Appellant. That objection appears to be founded on the inclusion of details of other offences in which the Appellant has been suspected of involvement but have led to no convictions. We observe that the Respondent’s decision letters do include reference to the generality of those matters, but we were not provided with any evidence about them and Mr Anderson made clear that this was not the reason for seeking to adduce the further evidence. Accordingly, we disregard that evidence entirely when considering the appeal. We indicated that we would consider the other material going to the apparent issue of procedural fairness should a need arise to do so. As it was, for reasons which follow, we did not need to do so.

THE LEGAL FRAMEWORK

ARTICLE 8 ECHR: PROCEDURAL OBLIGATIONS

11. In light of our above observations on the Respondent’s application to adduce evidence, it is convenient at this point to deal with the nature and impact of the Article 8 procedural obligation as referred to at [11] of the Appellant’s skeleton argument. This is an out of country right of appeal against a decision of the Respondent which was certified under section 94 Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). That certification is on the basis that the appeal is one which is clearly unfounded, in other words could not succeed on any legitimate view and taking the evidence at its highest. There has been no successful challenge to that certification. As such, we agree with Mr Anderson that the Supreme Court’s judgment of Kiarie and Byndloss v Secretary of State for the Home Department [2017] UKSC 42 is not directly on point (see in particular at [35] the distinction drawn between section 94 certification and certificates issued pursuant to section 94B of the 2002 Act). Equally, however,

that judgment does not limit the extent to which the procedural obligations in Article 8 apply in a particular case. Moreover, even if Article 8 did not itself apply, there is a domestic common law duty of fairness which applies. Whether a hearing is or can be fair is a matter which is highly fact sensitive.

12. We do not need to say anything more about this for two reasons. First, Mr Anderson submitted, and we understood Ms Harrison to accept, that if an appellant considers that his out of country appeal cannot be fairly conducted, then the appropriate course is to seek a stay of the appeal and directions for steps to render the appeal fair. That is consistent with the guidance provided by the Presidential panel's decision in AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC). An appeal ought not to be allowed substantively on Article 8 grounds due to some procedural unfairness which is capable of being remedied.
13. Second, and in any event, the approach adopted by the Respondent in this case has been not to challenge the substance of the witness and medical evidence. Accordingly, there is no dispute as to the facts which requires resolution by the presence of the Appellant in the UK. We have of course already determined that the Appellant is not capable of providing instructions and we doubt could give evidence orally. No application was made for him to do so. Medical and other reports have been provided as to his condition since his return to Jamaica in 2013. There was therefore no submission made on his behalf that the appeal has been unfair and cannot fairly be determined.

TEMPORAL APPROACH

14. Both parties are agreed that, in determining whether deportation breaches the Appellant's Article 8 rights, we must proceed on the hypothesis that the Appellant has not been deported already. Both parties are also agreed that we must determine the position as at the date of the hearing before us. However, Ms Harrison argued that section 94(9) of the 2002 Act means that we have to proceed on the basis of a hypothetical removal as at the date of the actual removal. In this case, that was in July 2013. She says that this must be the position because, otherwise, if the position had improved for an appellant he would not be able to vindicate his rights. She used as an example a Libyan deported to Libya who was tortured or ill-treated on return contrary to Article 3 ECHR but who had been released by the time that the appeal came on for hearing. Ms Harrison argued that her submission was supported by the Decision.
15. The Respondent's position is that whether the deportation breaches the Appellant's rights is to be determined based on a hypothetical removal as at the date of the hearing. Mr Anderson submitted that this is consistent with both the wording of section 94(9) and what the Tribunal said in the Decision in the passages relied upon by Ms Harrison.

16. Section 94(9) provides as follows:

“Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal under section 82(1) while outside the United Kingdom, the appeal shall be considered as if he had not been removed from the United Kingdom.”

17. The purpose of that sub-section is in our view clear, particularly as it forms part of section 94 which gives rise to out of country appeals. It permits an appellant to pursue an argument that removal in consequence of the decision to remove him will breach his human rights (or in an appropriate case his rights under the Refugee Convention) even though the decision to remove has already taken effect. It is not to permit an appellant to put forward an argument based on historic breaches of Convention rights. That is consistent with the position under the Refugee Convention where the issue whether a risk arises is to be determined as at date of hearing and, if the risk no longer exists by that date, a person would no longer be entitled to succeed in his appeal against removal.
18. We are also concerned that, if Ms Harrison were right in her submission we would, in effect, be conducting a review of whether the Respondent’s decision to deport in 2013 was a lawful one; indeed, Ms Harrison came close to suggesting as much. That is not our function. Our function is to decide for ourselves whether deportation is in breach of the Appellant’s human rights as at the date of the hearing and unconstrained by the Respondent’s views (save as to the significance and weight of the public interest which applies).
19. The position as we set it out is moreover consistent with what was said by the Tribunal in the Decision at [23] that “the FTT was required to consider whether a hypothetical removal (which had in fact happened) would breach the Appellant’s rights under the HRA. The questions for the FTT accordingly were whether as at the date of the hearing, that hypothetical removal either created a real risk of ill treatment crossing the article 3 threshold or breached the Appellant’s article 8 rights.” That point is reiterated at [49] where the Tribunal dealt with this issue as follows:

“We do not criticise its reliance on evidence of the Appellant’s experiences in Jamaica after his removal as evidence that there was a real risk of a breach of article 3 when he was removed. Ms Harrison effectively accepted that this is what the FTT did in paragraph 7 of her skeleton argument for this hearing. It is true that at the stage when the Appellant was removed, the FTT, which had considered this issue in the determination dated 21 December 2011, had held that the Appellant would have access to appropriate medical facilities in Jamaica (determination paragraph 8). That was highly relevant to the question whether there was a real risk, at the point of removal, that the Appellant’s article 3 rights would be breached. But the question for the FTT was whether there was such a risk from a hypothetical removal at the date of the hearing. We consider that it would be counterintuitive and artificial if the FTT’s assessment of that risk could

not be informed by evidence of the actual consequences of the removal which had in fact occurred by the time of the hearing.”

[our emphasis]

Far from supporting the Appellant’s position, we consider that this paragraph reinforces the view we express above. We accept, however, that evidence post-dating the actual removal must be relevant to our assessment of the consequences of deportation. In fact, such evidence makes our task somewhat easier since we are not required to speculate.

20. Ultimately, as Ms Harrison accepted, little turns on this legal argument because, as a matter of fact, in this case, the Appellant’s position has, if anything, worsened in the period following the actual removal.

ARTICLE 8 ECHR: SUBSTANTIVE CONSIDERATIONS

21. We can deal very shortly with this aspect of the law. The parties argued the case by reference to section 117C of the 2002 Act (“Section 117C”) which reads as follows:

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

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C’s life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C’s integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”

22. It is accepted that, although the Respondent’s decision under appeal in this case pre-dates the changes to the 2002 Act brought about by the Immigration Act 2014 (which include the introduction of Section 117C), we are nonetheless required to have regard to that section in appeals heard after the date when it was introduced (YM (Uganda v Secretary of State for the Home Department [2014] EWCA Civ 1292). Both parties also accept that the Appellant is not subject to automatic deportation under section 32 UK Borders Act 2007 (because the Appellant was under eighteen at the date of conviction for the index offence and therefore an exception under section 33 applies). However, as Mr Anderson submitted, and we accept, Section 117C continues to apply (as do the other sections of Section 117A-D). We do not set out the relevant sections of the Immigration Rules. There is no suggestion that those operate differently on the facts of this case.
23. The Appellant was sentenced to a period of thirty months in a Young Offenders Institution for his crime. Accordingly, the issues for us are whether either of the two exceptions in Sections 117C (4) and (5) apply and, if they do not, whether there are other very compelling circumstances over and above those exceptions which outweigh the public interest in deportation. Although Section 117C (6) applies that test only to cases where the criminal sentence is four years and over, the Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 held that it applies also by analogy to cases where the sentence is over twelve months but under four years (see [23] to [26] of the judgment). The Supreme Court’s judgment in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 to which our attention is also drawn did not involve the application of Section 117 and therefore the focus of what is there said depends in part on the Immigration Rules being intended to be compliant with Article 8 more generally. We did not though discern any dissent on the part of the Respondent to the test being one of proportionality nor that a “balance sheet approach” should be applied when looking at the case overall.
24. Our attention was drawn to a number of other legal authorities to which we refer as necessary when we come to the discussion section below.

THE EVIDENCE

OUR STARTING POINT

25. There are two other decisions which form part of the framework in which we determine this appeal. First, the Appellant has exercised a previous right of appeal which culminated in a First-tier Tribunal decision promulgated on 21 December 2011 (appeal number: IA/26228/2011) (“the FtT Decision”). As such,

the principles enunciated in Devaseelan (Second Appeals – ECHR – Extra-territorial effect) Sri Lanka [2002] UKIAT 00702 apply. In short summary, the findings made in that decision are the starting point to our determination. Facts happening since that decision can be taken into account as can facts happening before that decision but not relevant to it.

26. Second, as we observe at [3] above, although the Appellant has permission to appeal the Decision, that has not been overturned. As such, what that has to say about the approach we are to take to this appeal is relevant. The Decision is of course relevant for what it has to say about the error of law made by the First-tier Tribunal decision allowing the appeal on Article 8 grounds (decision of First-tier Tribunal Judge Abebrese dated 9 July 2014: “the Second FtT Decision”). Nonetheless, we accept that the factual findings made in the Second FtT Decision are still of relevance. As we have already indicated, the Respondent has not challenged the facts of the case or the evidence put forward by the Appellant.
27. Before we move on to look at what those decisions show about the facts of the case and evidence, it is helpful to summarise the main facts of the case. Those are set out in detail at [6] to [22] of the Decision. In broad summary, the Appellant is a national of Jamaica born in May 1989. He came to the UK on 14 December 1998 aged nine years with his sister KR. Their mother, DH, was already in the UK. She did not have leave to remain here. OR and KR had leave to remain as visitors but then overstayed. DH and KR now have limited leave to remain. That is a development since the Decision in 2014. KWS is married to a British citizen and had indefinite leave to remain on that basis. She is now a British citizen herself.
28. In April 2005, the Appellant was convicted, on a guilty plea, of an offence of oral rape of a twelve-year old girl. He was just under sixteen years old at the date of conviction. He was sentenced to thirty months’ custody and placed on the Sex Offenders’ Register for life. His appeal against that conviction was dismissed in 2011. The Appellant has other convictions dating back to October 2008 of resisting or obstructing a constable in the execution of his duty, of taking a vehicle without consent, of driving without a licence and without insurance. He was given a twelve months’ community order.
29. The first decision to deport the Appellant was in 2009. However, in January 2008, the Appellant’s partner, MB, gave birth to a son, D. When the Respondent was provided with evidence in that regard, the decision to deport was withdrawn and replaced with a further decision which was the subject of the appeal leading to the FtT Decision. The Appellant’s appeal was dismissed on that occasion.
30. The Appellant thereafter applied for leave to remain. The Respondent at that point accepted that the deportation order had been incorrectly made and a fresh decision was made maintaining deportation. An asylum claim made following

the threat of removal in March 2013 was refused and certified under section 96 of the 2002 Act. The Appellant was deported on 12 July 2013 and remains in Jamaica. We will need to say a little more about the circumstances of the deportation below. However, we are not concerned with what occurred during the deportation. The Appellant claims to have been ill-treated. There is a civil claim in that regard. We were told that those proceedings have been stayed pending this appeal, but we need say no more about that issue. It is not relevant.

31. The central issue for our purposes is the effect of deportation on the Appellant's mental health. We will need to deal with that in more detail below both as to the circumstances which existed at the time of the earlier decisions and as they have now developed.

THE FtT DECISION

32. The salient findings as they appear in the FtT Decision and the Tribunal's observations on relevant evidence are as follows:

- (a) The Appellant had established a private life in the UK and had undergone schooling since his arrival. He was severely bullied at primary school and had been expelled in year 10 following an incident involving another pupil. He had however succeeded "in a number of educational endeavours" and had certificates to record his achievements.

- (b) The private life established was, however, "shallow and was certainly limited". He is said to have been involved with church activities.

- (c) The Tribunal heard evidence from MB and expressed concern about her ability to give evidence and recorded that it was "not particularly detailed and satisfactory". It was said that she and the Appellant had been in a relationship prior to 2008 but had split up during that year for about twelve months. MB had another relationship during that time and gave birth to a daughter. The Tribunal made the following findings about that relationship:

"[58] We concluded that it was not to be expected and that the bond between the appellant and [MB] was so strong that she would go to Jamaica with the appellant. We accept that she would be left in the UK as would the appellant's son. However we considered that there would remain the opportunities for contact to be maintained through modern means of communication and it was not wholly outside the range of possibilities for visits to take place by members of his family to the appellant in Jamaica."

- (d) The Appellant is the father of D who was born in January 2008.
- (e) At the time of the appeal (in 2011), the Appellant and MB were not living together. She had recently moved in with her parents and the two children. The Appellant visited D and MB and would help with D by taking him to the park and to school. He provided some money to MB for D when he was able. The Tribunal found:

"[45] The evidence of the witnesses was not wholly reliable so far as we were concerned but we were prepared to find that there is a reasonably strong bond between the appellant and [D]. We find that the appellant is a father figure in his life and the appellant himself takes responsibility and there is a bond between him and his son. We however considered that the relationship between the appellant and his son existed as a result of mostly weekend visiting which from time to time would extend to an extra couple of days both before and after the weekend. We were prepared to find applying the civil standard that these visits took place probably as frequently as every fortnight."

The Tribunal concluded though that "there was no question" that MB or D would consider or be expected to return to Jamaica with the Appellant. In so doing, they took into account "the rather loose relationship" between the Appellant and MB. The Tribunal found that D's future was with his mother in the UK.

(f) The Appellant's mother had no right to remain in the UK. He had various other members of family in the UK including an aunt, uncle and sister. The Tribunal viewed the evidence of the Appellant and his witnesses about the lack of any family members in Jamaica "with a degree of caution". It also concluded that the Appellant's mother could return to Jamaica with the Appellant if she chose to do so.

(g) By the time of this appeal, the Appellant's mental health problems were already manifesting themselves. We set out what was said about the evidence from the Appellant's doctor, Dr Garwood, and the Appellant's sister in full:

"[51] We noted particularly the letter from Dr Garwood dated 31 May 2011. He said that the appellant had a history of mental illness which he had been treating for over a year. The report was unsatisfactory in the sense that it was brief and did not explain in detail what specific investigations he had undertaken to enable him to reach a firm conclusion. He said that he had treated him with anti psychotic drugs which improved his condition. He said that he had suffered with a tendency to psychotic symptoms since he had first been referred to Dr Garwood. He was profoundly depressed. We noted that he suffers stress which seemed to increase and exacerbate his mental illness rapidly such that he descended into severe symptoms relatively quickly. We noted that the appellant's condition was progressive with periods of illness, with periods of remission. The exacerbations were likely to be related to life stresses. Without prompt and appropriate treatment he was likely to become chronically mentally ill with high dependency needs.

[52] We heard evidence from the appellant's sister [KWS] who said that she had assisted the appellant on a number of occasions when he had had serious conditions and breakdowns. There was no reference to breakdowns in any of the other documents which we had had particularly from Dr Garwood we noted that Dr Garwood prescribed strong anti psychotic medication which had the effect of causing potent sedation and suppression of psychotic symptoms. We noted that this letter was dated July 2008 and gave the opinion that he was "unfit to plead". The letter

concluded by saying that he required a further and full mental health assessment and a review of his medication. The letter produced for the proceedings before us and dated 31 May 2011 made no similar comment.”

(h) As to what might occur if the Appellant were removed to Jamaica, having noted the Respondent’s evidence about the availability of medication in Jamaica, the Tribunal went on to record the evidence of Dr Garwood as follows:

“[54] ... We balanced those comments with the comments contained within Dr Garwood’s letter that the psychiatric services in Jamaica are rudimentary. There is one psychiatric hospital and community mental health service. They do not offer the standard of care which was fit for purpose and does not reach the standard. He commented that it was unlikely that [OR] would obtain appropriate psychiatric care and thus his psychiatric condition would deteriorate rapidly and this would cause permanent deterioration of his mental health. [OR] had a close relationship and is well supported by his family. We noted that he was prescribed with medication and Risperdal tablets had been prescribed. We had no evidence to say that these drugs would not be available for the appellant in Jamaica.”

(i) The Tribunal accepted that the Appellant’s last offences were in 2008. The Tribunal noted, however, that the opinion of the probation service in relation to the second offence was that the Appellant was at medium risk of committing further offences.

33. The Tribunal therefore concluded that “the appellant’s claims and those of his son under article 8 are not sufficient to outweigh the need for the maintenance of immigration control”

THE SECOND FtT DECISION

34. By the time of the hearing in May 2014 leading to the Second FtT Decision, the Appellant had already been removed. He did not give evidence. However, the Appellant’s sisters KER¹ (now KWS) and KR gave evidence. KR also has mental health problems of her own and a very close relationship with the Appellant. She gave evidence that the Appellant had suffered a decline in his mental condition and had suffered a “shut down” in that he would not communicate. KR was concerned that the Appellant “may not survive in Jamaica in his present condition”. KWS also said that the Appellant’s condition had deteriorated and that he was not communicating with the family. KWS told the Tribunal that, when the Appellant was in the UK, she was responsible for ensuring that the Appellant “washed and functioned” and she also sent money to the Appellant but was concerned that this was being taken away by others in the community.
35. So far as we can see, MB did not give evidence to Judge Abebrese. There is no record of any oral evidence she gave at that time nor any finding made save that the Appellant “has a partner and child in this country and the Tribunal

¹ Although at [19] of the Second FtT Decision, Judge Abebrese says it was OR’s “brother” who gave evidence, the reference there is clearly to OR’s elder sister (now known as KWS). OR does not have a brother.

accept as credible the evidence in respect of the impact on the appellant in being removed from them. The evidence before the Tribunal is that the appellant [and that he] provided support for his child and partner, [MB]". The only evidence recorded about the impact of separation from MB and D appears to be that from one of the doctors who records that separation from his son and girlfriend was exacerbating the Appellant's mental health condition. Judge Abebrese made findings about the medical evidence at that time. As we set out further below, the evidence was that of Dr Labinjo who had examined OR while he was awaiting deportation and that of Dr Bailey-Davidson who had seen him following his arrival in Jamaica. Judge Abebrese's findings at [20] to [22] of the Second FtT Decision were as follows:

"[20] The tribunal after careful consideration of all the evidence makes the following findings. The Tribunal finds that the evidence of Dr Labinjo is credible for the following reasons. Dr Labinjo in his letter dated 9 July 2013 to Dr Thomas at the Sussex Partnership:

'I reviewed this gentleman following my initial report of 11 June 2013 at which I made a diagnosis of depression with psychotic features which were particularly exacerbated by his incarceration and particularly the separation from his young son and girlfriend. I also mentioned that [OR] had a depressive illness before [to] detention, I was also able to corroborate this from his GP records'

'I shall state that at this time I do not consider this man fit for detention, neither is he fit for travel. His depressive illness has been relatively refractory to treatment and he is at risk of fatality.'

[21] The appellant was assessed further when he arrived in Jamaica by Dr Bailey-Davidson who is a Consultant Psychiatrist and she made the following conclusions which the Tribunal finds credible in respect of the appellant's physical and mental condition

'He was admitted to Bellevue Hospital because he had become withdrawn and was isolating himself. At this time his diagnosis remains as depression with psychotic features...[OR] has no known relatives in Jamaica and so is limited in his adjustment to life in Jamaica.'

[22] It was submitted by the respondents representative Mr Briant that no medical reports had been prepared since the appellant was removed from the United Kingdom. The Tribunal finds that the reports which had been prepared on the appellant since his arrival in Jamaica were supportive of the report which had been prepared by Dr Labinjo and formed part of a consistent history of [the] a person who had been diagnosed as defective in several respects mentally and physically. ... The Tribunal accepts as credible the submissions of Ms Harrison that the appellant was suffering from a pre-existing condition before he was removed from this country. The condition as described by Dr Labinjo was severe and that the psychotic features remained in place. The evidence of Ms Sobers suggest that the evidence not only deterioration but also neglect and degrading. The photographs provided by the appellant indicate that the conditions which the appellant resides in is degrading. The Tribunal also finds it credible

that the appellant sleeps outside of the residence. Dr Labinjo in his report at Paragraph 32 states that the appellant whilst he was in this country was already signs of not being able to respond to questions about his son or his mum. Dr Labinjo at Paragraph 34 of the report states:

‘I have read the report of Ms Eva Forde and my clinical opinion is that [OR] has definitely not improved and is now psychotic as well, and this maybe the reason why he is now on the anti-psychotic drug haloperidol’

Furthermore, Dr Labinjo states at Paragraph 36 of his report and he states:

‘I have seen the report by the Independent Social Worker Ms Eva Forde who visited [OR] and have gained collateral information from it. She had spoken to [OR] Staff at the Shelter. He was self neglecting including his personal hygiene. This is a feature of clinical depression ... the report also indicates that [OR] had attempted suicide and that due to this, and their inability to locate any shards of glass from a broken mirror that is believed to have been broken by [OR], he was removed from this area of the centre for his own safety and protection and to enable him to receive more supervision and support.’

The Tribunal noted that Dr Labinjo at the hearing of the appeal was still of the view that based on the information from other sources in Jamaica he was of the view that the appellant was at present a significant high risk in respect of suicide. The Tribunal finds on the evidence provided on balance a credible conclusion of the appellant’s current mental state.”

36. We note Mr Anderson’s objection to the use of the word “degrading” in submissions which, quite obviously in the technical sense relates to the application of Article 3 ECHR (which the First-tier Tribunal found to be breached). In having regard to the passage cited above, we take the description into account only in the wider sense of conditions which are undignified and of very low standard. We do not intend by reference to that passage to indicate any agreement with the First-tier Tribunal’s view that Article 3 ECHR is breached by reason of the conditions in which the Appellant finds himself.

THE DECISION

37. We turn then to the evidence recorded in the Decision and what the Tribunal had to say about it.
38. We begin with the evidence about the Appellant’s mental health condition. This begins with the Appellant’s referral to a psychiatrist, Dr Labinjo, whilst the Appellant was detained pending deportation. The Appellant had tried to commit suicide on 3 July 2013 by hanging himself from railings. Dr Labinjo’s conclusion was that the Appellant was not fit to fly or be detained. He should either be assessed under section 2 Mental Health Act or transferred to hospital under section 48 of that Act. However, the Respondent was then given advice

by two other doctors (Dr Geraint Thomas, doctor at Brook House Healthcare, and Dr Raj) that the Appellant could be detained and was fit to fly.

39. An application for judicial review challenging removal was refused permission on the papers with a direction that renewal of the application should not act as a barrier to removal. The Appellant was refused an injunction by Mitting J preventing removal on 11 July 2013 and was removed on 12 July 2013. Permission was refused at an oral hearing on 14 August 2013. Although the Respondent accepted that the original decision to deport leading to the application for judicial review failed to provide the appropriate information about appeal rights and did not therefore conform with the Immigration (Notices) Regulations 2003, a new decision was served on 28 August 2013 which is the decision under appeal. Accordingly, we agree with Mr Anderson's submission that this is of no relevance to the issues we have to consider.
40. We set out in full the Tribunal's summary of the evidence before it in the Decision as to the Appellant's mental state and conditions in Jamaica as at November 2014:

"[18] The Appellant has been living in Jamaica ever since, in undoubtedly poor conditions. He lodged an appeal out of country on 19 September 2013. He has been staying in hostel for homeless men called the Open Arms Centre. He was accommodated at first in a relatively clean and modern part of the hostel, but moved to a dormitory after a suicide attempt so that he could be better monitored. The manager of the hostel, Mrs Grant, was given no information about his illness when he arrived. He was admitted to Bellevue Hospital for psychiatric treatment as an in-patient, but only after the intervention of Dr Labinjo. We have seen photographs of the interior of the hostel. Its condition is poor. The Appellant sleeps outside on the ground because his bed is infested and because the other residents have threatened him. The evidence about whether, and if so how effectively, he has been given medication for his illness is unclear, but it seems that he has at times been prescribed medication for his illness, and has refused to take it, and at times not been given any medication.

[19] A social worker who prepared a report after visiting the Appellant in January 2014 explained that he had been moved from much better physical accommodation with single rooms because of fears that he was a suicide risk and a feeling that this could be better monitored if he stayed in the dormitory. That accommodation is cleaner and more modern than the dormitory. His assigned sleeping quarters are next to those of the resident supervisor. Various activities are available for the residents, but the Appellant takes no interest in them. Cooked food is provided for the residents, but the Appellant does not eat it. Dennis Beckford, one of the workers in the hostel, buys him dried food. No-one is abusing him, but no-one is looking after him. The social worker noted that Mrs Grant is "very helpful, open and accommodating".

[20] A family friend who visited him on 1 and 7 May 2014 found him unkempt and unwashed, with filthy hair and feet, long dirty fingernails, and wearing filthy clothes. He did not seem to be showering or bathing.

He was not bothering about his hygiene or his appearance. He was very withdrawn. The dormitory was disgusting and insanitary. Mr Beckford tries to help him.

[21] There was recently a robbery at the hostel. The Appellant was held at gunpoint, according to an undated and unsigned statement by his sister. He has also been stabbed in an altercation.

[22] We were shown a very recent psychiatric report by Dr Sewell. He interviewed and assessed the Appellant in Jamaica. His diagnosis is severe mental illness (major depression with psychotic features). He lacks capacity. He is at moderate to high risk of self harm. His prognosis is poor."

THE EVIDENCE BEFORE US

41. As the Tribunal said, it had before it the then recent report of Dr Sewell dated 11 November 2014, prepared following an examination on 3 October 2014. We will say a little more about that below not least to put in context Dr Sewell's subsequent opinion. We need to deal with all the evidence produced after the hearing leading to the Decision and all evidence which goes to the Article 8 ECHR issues which was not therefore considered in depth in the Decision. The Tribunal helpfully summarised at [57] and [58] of the Decision, the factors to which we need to have regard on either side of the balance when it comes to reaching our assessment. Before we do that, though, we need to set out the evidence which is before us relating to those factors.

The Medical Evidence

42. It is convenient to begin with the medical evidence as the starting point is the position which we have already set out from the previous decisions.
43. In addition to the evidence of Dr Garwood, Dr Labinjo and Dr Bailey-Davidson to which we have already referred, we now have two reports from Dr Clayton Sewell BSc (Hons), MBBS, DM (Psychiatry). Dr Sewell is a Consultant General and Forensic Psychiatrist who is a Lecturer/Consultant in Forensic Psychiatry at the University of the West Indies, Mona and a Sessional Psychiatrist employed by the Department of Correctional Services, Minister of National Security, Jamaica. He is the immediate past President of the Jamaica Psychiatric Association.
44. Dr Sewell has prepared two reports regarding OR, the first referred to above and dated 11 November 2014 and a further report dated 21 March 2019 following an examination on 7 March 2019. Dr Sewell has diagnosed OR with "a severe mental illness consisting of Major Depressive Disorder, recurrent episode, severe with Psychotic Features, based on the DSM 5". His second report notes a more impaired mental state than existed in 2014 with more negative symptoms of mental illness. He opines that the significant stressors for OR's illness are his detention in the UK, deportation and separation from his family. Dr Sewell states in the first report that OR is at a moderate to high risk

of self-harm. His second report states that this is now a moderate risk. Both reports place OR at a high risk of being a victim of harm or violence from others. That is in part based on the fact that OR has been attacked in the past (see extract from the Decision at [40] above).

45. As we have already observed, we have to consider the position as at the date of the hearing before us. We have read Dr Sewell's first report and take it into account. However, it is more convenient to cite the content of his second report.
46. We have regard to what Dr Sewell says about OR's history of treatment since being back in Jamaica. OR was residing at the Open Arms Centre. This is a Non-Governmental Organisation which is partnered with various governmental organisations in Jamaica and receives some funding from the British Government. The British High Commission in Jamaica is satisfied that it is regulated by the appropriate authorities in Jamaica (see Response to an Information Request – Jamaica: Homeless shelters dated 21 March 2019 adduced by the Respondent). OR was described as keeping to himself and talking to himself, not engaging with others or participating in any activities, hardly saying anything and talking nonsense, frequently asking about his son, refusing to sleep inside and therefore sleeping outside in the bushes, having to be forced to wash and change his clothes and having a decreased appetite. Dr Sewell mentions that OR received treatment on one occasion for a few weeks at Bellevue Mental Hospital. Dr Sewell notes that OR has been prescribed various medications at various times but does not specifically say whether any such medication has been prescribed since OR has been back in Jamaica. As we note below, in any event, even if he is prescribed medication, OR appears to lack ability to realise that he ought to take that medication.
47. Dr Sewell was only able to examine OR in March 2019 through the intervention of Mr Beckford, who had tried to help OR when he was at the Open Arms Centre. Under the heading "**Relevant Recent History**", Dr Sewell says:

"According to Mr Dennis Beckford, [OR] was attacked with a knife by another man, while at the Open Arms Centre, sustaining a laceration to his forearm. [OR] subsequently left Open Arms around 2015 and since then has seen a worsening of his symptoms. [OR] has received no further psychiatric care and it is unknown if he has had any recent physical altercations.

[OR] reportedly stayed at a home in Vineyard Town, Kingston, where Mr Beckford would bring things for him but on the last occasion that Mr Beckford visited he was told that [OR] no longer resided there. Dennis Beckford subsequently would see [OR] wandering on the streets of Downtown, Kingston. Whenever Mr Beckford tried to interact with [OR], he would push him away and ignore him. Mr Beckford would observe rashes to the feet of [OR] but no obvious injuries. [OR], according to Mr Beckford has been observed to be inappropriately dressed and dishevelled in appearance, as well as smelling of urine in the past.

Mr Beckford was unaware of [OR's] current address but says that he went looking for [OR] at St. William Grant Part in Downtown, Kingston as he has passed him there on multiple occasions in the past. Fortunately, he saw him there and had to hold on to him and bring him to be seen for the purposes of this report."

48. Dr Sewell describes OR's presentation in March 2019 thus:

"Appearance and Behaviour

At the time of the interview, [OR] appeared his chronological age and was dressed in a long black hooded winter coat, jean shorts, dirty socks and slippers. His hair was braided but had become dishevelled with bits of grass in it. Prior to being seen he was observed standing in a corner of the waiting area. He was malodorous and appeared to have lost weight when compared to his previous visit in 2014. He initially stood outside the office and was reluctant to enter. He had to be guided into the office though he did not actively resist entering. He was eventually encouraged to take a seat. He sat hesitantly and appeared to have no interest in interacting with me. He made no eye-contact throughout the interview and preferred to stare at the adjacent wall. He did not respond to his name being called or to physical contact.

Speech, Thought and Perception

He had no verbalisation and when asked a question he would provide no verbal or physical response. His observed emotional expressions were flat with no changes observed during the entire interview. He appeared unable to concentrate or focus on the questions being asked and was clearly preoccupied in thought. He displayed significant negative symptoms of his mental illness which appeared to be impacting significantly on his ability to appreciate the situation and respond appropriately. There was no behaviour during the interview to suggest possible current homicidal or suicidal ideas. He appeared distracted and likely to be experiencing hallucinations.

Cognition

He did not appear to be oriented in time or place and did not respond to his name being called. [OR's] insight, judgment and abstract thinking appeared to be severely impaired. He displayed obvious impairment in his ability to comprehend, follow instructions and to complete any tasks during the interview. His interpersonal skills were also very poor. At the end of the interview he went back to the waiting area and to lie down on the floor."

49. Having set out the diagnosis and stressors to which we have already referred, Dr Sewell provides the following detail about OR's current level of function:

"... He is currently having considerable difficulty controlling his emotions following stressful events in his life and appears to display regression

(reversion to an earlier stage of development in the face of unacceptable emotions) and repression (unconscious blocking of unacceptable thoughts, feelings and impulses). He is also clearly psychotic with disorganised behaviour and hallucinations.

OR has been observed to be displaying behaviour suggesting a depressed mood, including withdrawn behaviour (sleeping outside, not communicating) and tearfulness. He has markedly diminished interest or pleasure in almost all activities, including those of daily living (being forced to bathe). There is also significant psychomotor retardation (slowing of thought and physical movement), signs of a loss of energy with diminished ability to think or concentrate. These signs are as a direct result of his mental Major Depressive Disorder.

During the process of his deportation and following that, he has difficulty functioning physically and emotionally as he did prior to these experiences. The experience has also impacted negatively on his supportive relationships with his young son and other members of his family. He appears troubled from time to time by discomfiting memories or emotions, especially in response to reminders of the life he has left behind him in the United Kingdom. This severe distress and lack of social support has resulted in severe impairment in his social and occupational functioning. This stressor is continuous, and he continues to be severely impacted by his illness.

He displayed significant fear, anxiety and based on the history provided had displayed great distress at being separated from his son. He still appears to be suffering as a result of the loss of family support, the symptoms of his mental illness and the inadequate biological and psychosocial remedies being provided to him at present..."

50. Dr Sewell goes on to deal with the treatment which OR is receiving in Jamaica as follows:

"In my opinion, [OR] currently does not appear to have adequate resources or expertise being provided to him to effectively manage his mental health condition given his current severe level of impairment.

The Community Mental Health Services remain challenged in terms of their staff and medications. This has led to [OR] falling through the gaps in service delivery, especially as there is no one to provide the social support necessary to facilitate his recovery. Such necessary social support would include finding [OR] and physically bringing him to appointments (as Dennis Beckford had to do on March 7 2019) and to administer medications. This is not within the capacity of the CMHS in St Catherine, which results in greater reliance on family members to facilitate the housing and continued care of [OR] even if compulsory acute care was provided. In the absence of any such family support in Jamaica, [OR]

appears to have gone a number of years without any treatment and there is clear evidence of deterioration in his mental and physical health.”

51. As to prognosis, Dr Sewell has this to say:

“The prognosis for [OR] is poor given the present circumstances. Without medication, psychotherapy and social support his symptoms will continue to worsen resulting in further disorganised behaviour and poor self-care. Access to the state social support service is extremely limited in Jamaica, requiring families to play a greater role. [OR]’s presence in Jamaica without his family puts him at risk, even after acute involuntary treatment. With the limited care and as a result of his ill-health the following sequence of events are likely to occur:

- He is likely to be targeted by others in the community.
- He will spend more time on the streets of Kingston.
- There he is likely to experience further victimization and decline in his physical health.
- He is at risk of running afoul of the law or being accused of committing a crime (usually a minor offence) and ending up in a correctional facility that is currently not fit for the purpose for which it was designed. This is likely to be associated with re-traumatisation and poor outcomes as far as [OR]’s mental and physical health are concerned.
- The impact of these possible experiences may extend to worsening feelings of hopelessness and helplessness, increasing his risk of self-harm.
- The delays in the criminal justice system in Jamaica will likely result in him spending an inordinately long period of time before he is suitable for trial.
- During that time, he would be subjected to further inadequate care as there is no full-time psychiatrist in the prisons and limited medication availability.”

We should note that we were not informed that OR has committed any crimes since returning to Jamaica and what Dr Sewell says in this regard appears to be linked to the possibility that OR will have resort to crime because of the situation in which he finds himself rather than any observation based on continuing risk of offending on OR’s part. To that extent, Dr Sewell’s opinion appears to run contrary to the recounted history of his time at the Open Arms Centre where it is said that “[t]here were no reports of him being aggressive towards others and was said to be more inclined to walk away from them”. It is also there observed that OR had “made no clear attempts to harm himself.”

52. Based on Dr Sewell’s assessment, he provides the following recommendations:

- “... 1. [OR] should immediately resume psychiatric treatment to include the provision of the appropriate antidepressant and antipsychotic medications (he was referred to the Bellevue Hospital after being evaluated).
2. He should also receive Supportive Psychotherapy, which could then be expanded as his symptoms remit to include Cognitive-Behaviour Therapy.
3. He would also benefit from improved social support to include:
- a. Adequate financial assistance
 - b. An individual to appropriately manage his finances.
 - c. Appointment of an individual to manage his legal affairs.
 - d. Appropriate supportive living arrangements.
4. Greater family support to include regular physical contact with his family, particularly being able to interact with his son.
5. Given the lack of any family support in Jamaica and his inability to have direct contact with his family in the UK who would otherwise be providing that support, [OR] will not recover from his mental illness while in Jamaica, and his symptoms will not improve and may well continue to further deteriorate. Even if adequate psychiatric services were available which I am afraid they are not, in this case effective access and use of them requires the assistance and support of his family and a safe and secure environment. It is therefore vital, in my view that [OR] is permitted to return to the UK where he can resume physical contact with his son and receive the support of his family, in order to stand a chance of any sustainable recovery.”

The Appellant's Relationship with Family Members in the UK

53. As will be evident from the medical evidence, the support on which OR's treatment and improvement is said to depend is that of his family and not of his partner. As such, we begin with the evidence from his family members. We heard oral evidence from KWS who is also acting as OR's litigation friend and from KR, OR's sister with whom he has a close bond.

KWS

54. KWS has provided three statements in these proceedings. In those statements, she describes the family circumstances as follows. She is the eldest of the three children. OR and KR have a different father but the same mother, DH. DH had come to the UK before the children leaving them in Jamaica. KWS was separated from OR and KR and went to live with a family friend. She came to the UK before OR and KR. She notes that OR and KR are particularly close because KR had responsibility for looking after OR when DH left Jamaica. We

will come on to deal with what happened at that time when setting out KR's evidence.

55. KWS says that OR's mental health problems started after his imprisonment for the rape. She acted as his carer. She is also the registered carer for KR who has mental health problems of her own. KWS ensured that OR took his medication and attended appointments. She had been doing this since 2008. Regarding OR's situation in Jamaica, in her first statement, undated but made before May 2014, KWS says this:

"[13] [OR]'s removal has affected us all very badly. Jamaica is not his home. He is a foreigner there. He came to the UK when he was very young and has been here ever since. We have no contacts and no family left in Jamaica and we have no one to assist him. [OR] needs help with his daily life and he cannot manage on his own. We, as a family, are very grateful to the help from Dennis from the Open Arms Centre who has been willing to keep us informed and to try and assist us but there is a limit to what he can do. He has made it clear to us that he cannot meet [OR]'s needs, and that where he is at the moment is totally unsuitable. [OR] needs much more help than he is getting. Dennis is very worried about him, his mental state, he thinks he will harm himself and he is very upset that [OR] is now sleeping outside of the hostel. There is a limit on what Dennis can do: he has been in serious trouble with the manager of the hostel, Mrs Gant, who has told him that he should not be getting involved in responding to [OR]'s solicitors and that his job is on the line if he carries on giving help or information...."

56. KWS goes on to describe how, when OR is unwell he withdraws into himself and refuses to interact with people because he is scared that they wish him harm. At those times, he will not look after himself and stops eating properly. By contrast, when he is well she describes how he interacts and fully engages with the family and others, plays with his son and takes good care of himself. Although KWS accepts that OR had mental health problems whilst in the UK, she says that with family support, he was able to recover.
57. She describes her communications with OR since he has been back in Jamaica as "too upsetting" so has left it to DH and KR to speak with him. She says it has become "impossible" to have a conversation. In her second and third statements, she says that she has little direct contact. OR answers the phone but says nothing so they cannot have a conversation with him.
58. KWS says in her first statement that OR was taken for treatment at Bellevue Hospital in November 2013, following the intervention of Dr Labinjo. She describes OR's reliance on Mr Beckford for help with getting food etc but reiterates that he is not able to help much because of his manager's objection to him doing so. She provides some money each month when she is able. She is a teacher. She said that she sends about £50 per month and sometimes more.

59. KWS provides evidence in her third statement about an armed robbery at the Open Arms Centre in September 2014 when OR was attacked. She also describes how she was informed by Mrs Grant of the Open Arms Centre on 26 October 2014 that OR had been evicted because of an incident when OR was stabbed. As such, he lost access to those facilities.
60. As a person with indefinite leave to remain (and now a British Citizen), KWS accepts that in theory she could go to Jamaica to see OR. However, she says that she cannot afford to do so, and also finds flying extremely difficult as she has claustrophobia.

KR

61. KR has provided three witness statements in these proceedings for previous hearings and provided an updating statement dated 20 March 2019.
62. In her first statement, KR describes how DH left her and OR in Jamaica when KR was aged twelve and OR seven. They were left with their father. They forged a very close bond as a result of their experiences. Their father neglected them, and they became homeless. They were sent to live with one of DH's friends whose sons abused OR and KR. KR was sexually, physically and mentally abused. OR was beaten and bullied. The children at school laughed at OR and KR and bullied them.
63. Since coming to the UK, KR and OR had lived with DH. KWS lives nearby.
64. KR says that she was not aware of her and OR's immigration status until 2008 when OR was arrested. At that time, she and DH were also told to report.
65. Following deportation, KR says that it has been difficult to speak to OR because either he does not answer the phone or won't speak. At first, he used to just repeat things and did not seem to understand. Now he rarely talks at all. She speaks of him being in a "locked away state". In her second statement, she said that OR had been slightly more communicative following a visit from a relative to which we refer below but that was the first time for a long while (the second statement was made in May 2014).
66. KR also says that OR was frightened of being put in hospital as, when he is ill, he becomes distrustful of people.
67. KR confirms that there are no family members in Jamaica. OR has no friends or relatives there. She confirms that Dennis Beckford has helped OR but has got into trouble with the manager of the hostel for helping.
68. KR provides more information about the Open Arms Centre. She says that the first part is where people are placed when deported. She describes that part as being looked after and well resourced. She says that the part to which OR was moved following deportation is for homeless men and is in a "very shocking

state". She says that OR told her that he could not stay in the dormitory where he was put because other men threatened him as they considered him to be British.

69. KR does however say in her first statement that OR was receiving medication. She also confirms that OR was in Bellevue Hospital for most of December 2013. KR was concerned about the treatment which OR was receiving, particularly since a nurse who visited him there left KR a message expressing concerns about him and the treatment he was receiving. There is no further information in this regard. In her second statement, however, she says that it is her understanding that OR is not taking medication regularly.
70. KR had a breakdown in 2011 and was treated as an in-patient for seven weeks. She has been diagnosed with post-traumatic stress disorder, bulimia, bi-polar disorder and agoraphobia. KWS confirms that KR has ongoing mental health issues. KR has been seeing a psychologist every week since June 2013 and continues to receive medication. She has been particularly affected by OR's deportation and her concerns for his well-being now that he is alone in Jamaica. According to her second statement, she suffered a relapse when she had to be taken to Whipps Cross Hospital on an emergency basis. She describes further problems in her third statement made in November 2014. That was following the armed robbery at the Open Arms Centre.
71. In her most recent statement for the hearing before us, KR confirms that she and DH now have limited leave to remain granted following appeals in October 2015. They now have limited leave to remain to 2021. In relation to her own situation, she is unable to work because of her mental health problems. She has access to benefits. Between them, the family send OR about £50 per month.
72. KR no longer tries to have conversations with OR because he is "barely communicative" and because she also finds it too upsetting to speak to him. They communicate by the "occasional emoji message" via WhatsApp. She says that KWS and DH still have contact but OR just repeats things and does not engage in a conversation. She says that the family can do little if anything to help without direct face to face contact. She told us that, when OR was living in the UK and was suffering from illness, she would get him up and ensure he ate, washed and brushed his teeth and cleaned his room. KWS would take both of them to appointments. KR would then ensure that OR took his medication and KWS would remind her to do this if she were not there.
73. We also had limited evidence that OR has recently moved into a private house in Jamaica. KR described the circumstances leading up to the provision of this accommodation as follows:

"13. [OR] is currently living in a private house. This was arranged through our paternal aunt [N] who lives in the UK. [OR]'s and my father lives in the United States. I have had no contact with him until very recently when he contacted me as I am having problems obtaining a birth

certificate from the Jamaican authorities. Our father has never been to Jamaica to see [OR] but on [N]'s request he did provide details of an old friend of his who may be able to provide [OR] with a room. This lady did give him a room and [OR] has been living there since around October last year although we do not really know how much time he actually spends there. The house is in the Independence City area of St Catherine as I understand. I understand from conversations with my mother and [KWS] that sometimes it is difficult for him there as the woman often calls him stupid and other insulting terms, and she certainly does not support him in any sense, apart from allowing him to stay in the room in her house."

We observe that it is suggested in Dr Sewell's most recent report, based on what he was told by Mr Beckford, that OR may no longer be living in this accommodation and may, once again, be living on the streets.

DH

74. DH, OR's mother, came to the UK in 1996. Her own mother came to the UK when DH was aged one year but DH remained living with her grandmother in Jamaica. OR and KR lived with her in the UK from 1998 until OR was deported. She confirms that OR's mental health problems became evident after his release from imprisonment following the rape. She says that, when ill, OR would become withdrawn but his condition was stabilised by medication.
75. DH says that OR must have been very ill following deportation because he would not otherwise have been admitted to a mental hospital. She says however that mental hospitals in Jamaica are not good places. She confirms KR's evidence about the conditions at the Open Arms Centre and the treatment of OR by others who don't like him because he is English.
76. In her second statement, DH describes her own mental health problems with depression for which she receives medication. She also confirms that KR's mental health has deteriorated since OR's deportation.

[SAG]

77. The best direct evidence we have about OR's situation in Jamaica (beyond the medical reports) comes from Ms [G]. She is originally Jamaican but now a British citizen and a friend of OR's mother. She visited OR during a visit to Jamaica to see her family in May 2014. She visited him twice at the Open Arms Centre. She says this about him:

"5. As I have said, I have known [OR] for many years and I was very upset at the difference in him. It was like he was a different person from the one I had known in the UK. He was unkempt, his hair was filthy and uncombed, his feet were filthy and he was generally in a very poor state. His clothes were filthy. His fingernails were very long and very dirty. I do not think he has cut them since he had been there. I cut them for him.

I do not think that he is showering or bathing. He has to pay to have his clothes washed and I do not think he has done this very often. He did have some cleaner clothes which I made him put on – he appears just not to be bothering at all about his personal hygiene and appearance. He was just like a tramp or homeless person you can see on the streets.

6. He was also extremely withdrawn. He was very reluctant to talk to me at all at first. At first I was not even sure he recognised me as when Mrs Grant from the hostel asked him if he knew me he did not answer. She had already told me that he hardly spoke but even so I was shocked that he did not immediately answer me as I am hardly a stranger to him. I thought he would be glad to see me but he did not react. It was very upsetting.

...

9. ... I saw the dormitory section for myself. This is where [OR] is living. The conditions there are disgusting and unsanitary. The dormitory is over run by cockroaches and bugs and I can see that it would be a disgusting place to stay.

10. [OR] told me that he does not stay in the dormitory at nights but sleeps outside the dormitory in the garden. He also told me that the dormitory is locked in the day time so he has not option but to stay outside. [OR] told me that he used to sleep on the verandah which is just outside the dormitory but Mrs Grant has now put a lot of flower pots on the verandah so he can not sleep there. He also told me that he used to sit on a bench most of the day and then he started sleeping on the bench as well. But recently Mrs Grant has stopped this as well: she has had the bench sawn in half so he can not sleep there. He must now sleep on the bare concrete and he has no bedding.

11. I was very upset when I first saw [OR]. Mrs Grant and other staff there commented that I was the first person who had visited him from the UK and they asked where his Mum was and why no-one else had visited him. I said it was because he had no-one in Jamaica to turn to. I was so upset by all of this that I started to cry.

...

12. One of the other men there, another man from Britain, told me that [OR] was also picked on and laughed at by the others as he did not stand up for himself and never said anything to anyone. I got the sense that he was bullied there. Others would not want to be near him when he is in such a state.

...

18. I feel desperate for [DH] and her family. They are good people and I have known them for a very long time. It deeply upset and shocked me seeing [OR] in that situation and I can only imagine how awful it is for them to know about what is happening to him. He is in a terrible state

and I do not see how he can get out of it. He urgently needs to be back being looked after by his family and with proper medical care in the UK.”

[EB]

78. We were also particularly struck by the witness statement from OR’s solicitor, [EB] dated 20 March 2019. We infer from the content that it was intended to demonstrate that OR lacks capacity in relation to the conduct of these proceedings. However, it also goes to confirm the evidence about OR’s lack of communication and mental health condition currently.

79. Ms [B] is a solicitor with Bindmans LLP. She has acted for OR since 2014. She spoke to him on two occasions, on 7 and 8 February 2019. What she says about the first of those conversations gives a flavour of the difficulties encountered:

“4. I rang him but he did not answer so I sent him a WhatsApp message to ask when was a good time to ring him. I said in my WhatsApp message “This is Liz in London. When is a good time to ring?”. I did not receive a reply. A few moments later I rang again and this time the phone was answered. I asked if I was speaking to [OR] and the person I was speaking to did not respond. I introduced myself by saying I was [EB] and I said I am working on your case in London about whether you can come back. There was then a silence until the speaker, a man, said “Are you outside mam?”. He repeated this twice. I said that I was in London and I was ringing him from London. I asked him if he knew who I was. There was no response. He was making a strange noise and I could not tell whether he was laughing or crying. He then suddenly said, “Hello mam”. I said hello and asked if he was [OR]. He did not answer and did not speak. There was then silence.

5. The silence was suddenly broken by him saying, “Hello mam” which he repeated three times but said nothing more. I asked if that was [OR]. The answer was, “Hello mam”. I said that I am his solicitor in the UK working on his case. He made no immediate response but then said, “Are you outside mam?” I said no, I was in London. He made the same noise, a small laugh/cry and then he went quiet again.

6. I then said I want to talk to him about his case in the UK and about his appeal. His response was, “Hello mam”. I asked him if he understood that he still had a case in London about his removal and possibility of returning here. He did not respond other than to make the same sound. I asked him if he was upset or he was laughing. He did not reply. I said I would try and ring him the following day. There was no reply to begin with and then I heard a very small voice, very quietly say, “Yes.” I said I was going now and I would speak to him the next day.

7. As I rang off I thought I heard him say something so I immediately rang back. The phone was answered but again he said nothing at first. He was continuing to make the noises, either the small laugh or the small

crying noise. He then said, "Are you outside mam?" I said, "No I'm not outside". I said "I will ring you tomorrow." He then said "Hello mam". I said, "Do you know why I'm ringing you?" Again the same noise but no words. I said I would ring him the next day. Again there was no reply just the same sounds and words."

80. The report of that conversation is consistent with evidence from OR's family members about the inability to hold a conversation with him because he simply repeats something which bears no relation to the content of the question asked.

The Appellant's Relationship with MB and D

81. We turn then to the relationship between OR and MB, the mother of D, and between OR and D.

MB

82. We begin with MB's own evidence. MB has provided three statements in these proceedings, two for the previous hearing and an updating statement for the hearing before us.
83. At the time of her first statement signed on 27 November 2013, MB says that she and OR had known each other for some years and had a relationship for about a year. They broke up before D was born but had reconciled by the time OR was deported. MB confirms that she and OR did not live together. He lived with his mother and sisters; she lived with her mother. At the time he was deported she says that she "hoped that we had a future together. I am now not sure what the future holds for us."
84. MB confirms in her statement that she has learning difficulties. She can read and write but she cannot count money and so her mother controlled her money. She moved out in 2009 when she was in a relationship with another man who is the father of her daughter but moved back to her mother's house in 2011. MB also has bi-polar disorder for which she is prescribed medication. By the time of her second statement, she had moved from her mother's house and was living on her own with D and her daughter.
85. Most of MB's evidence concerns OR's relationship with D. She says that OR was a very good father and wanted to be part of D's life. He had always been an active parent even when she and OR were not together. She says that D "loves him very much". She says that D calls OR "his super Dad".
86. In terms of the impact on D of OR's deportation, MB says this in her first statement:

"19. Since [OR] was deported [D] has not been himself. He has shown aggressive behaviour which had never happened before. He is not as happy as he was: he misses his Dad a lot and he wants his Dad back. [D] had been referred to the child psychiatrist because of his reaction to his

Dad's deportation. I know he misses his Dad a lot and he needs him, just like he needs me, but I don't want him to have to see people unless it is necessary. I don't like the idea of him seeing a psychiatrist when he is only 5.

20. I am sure [OR] misses [D]. He loves him very much and although they speak regularly on the phone it is not the same. [OR] was used to looking after him every week, for four days each week and every other weekend so they spent a lot of time together. This is a huge change for both of them. I think the person who has lost most through [OR] being deported is [D].

21. [D] knows that his Dad was deported and can't understand why someone would have decided to do that. It has made him very angry with the police who he blames for his Dad being in Jamaica. I find it very hard to try to give him an explanation of what has happened. I don't want to tell him too much as he is too young.

22. I also need [OR] back. I don't want to be a single parent, I never did. I want [OR] to be help me bring [D] up and to share the responsibility for [D]. That can't happen if [OR] is in Jamaica."

87. That latter point is followed up in her second statement as follows:

"7. I said in my earlier statement that I need [OR] back as I do not want to be a single parent and I want help with bringing [D] up. That is right. I very much want to be able to have [OR] here for [D]'s sake. I do not know what the future holds for me and [OR] but I do know for certain that [D] needs his dad and [OR] should be here to take that active role."

She reiterates that point in her most recent statement by saying that she does not know what the future would be for her and OR if he returned but she does know that he was committed to being a father to D and if he was helped with his mental health, he would once again be the "super dad" for D that he once was.

88. In her second statement, MB describes how D has been writing to everyone, including the Prime Minister to ask for his father to be allowed to come home. She describes the communication which she and D have with OR in her statement. She says that OR is very quiet and very rarely speaks. He does say a few words to D to say that he is alright, but MB does not believe that he is.

89. MB's most recent statement for the purposes of the hearing before us provides more detail about the impact of OR's deportation on D as follows:

"2. On a day-to-day basis [D] seems to be managing okay, but I know he sorely misses his dad. [D] is increasingly closed in about his feelings and it is difficult to know what he is thinking or feeling. He will simply say things like he is 'okay', but I do not think that he is.

3. [D] has had problems at school and the school have been worried about his behaviour and attitudes towards his schooling. He has shown periods of anger, losing his temper, throwing things, eg on one occasion he threw the PE equipment about and then stormed off. There have been calls from the school and a number of meetings about him and my Mum has taken over dealing with the school for me as I have struggled to understand what the school are saying to me so it is best that my Mum does this for me and [D]. The school have put some extra rules around for [D] to help him with his behaviour such as limiting his play time.

4. He used to go to see [OR]'s family a lot but I know when he's there he really feels the absence of his dad and he misses him. He has stopped going as it was making him very unhappy. [D] is an emotional child although he won't talk about his feelings and says he is fine when he is not. He often cries when his feelings get on top of him because he does not know how to deal with them. I struggle to know how best to help [D] but I do know that if his Dad was here [D] would be much happier.

5. I don't think [D] ever talks about his Dad to his friends or at school. He has become closed about his feelings for his Dad. He spends a lot of time at home with me. He gets very upset when his sister [S] goes off to see her dad because he does not have his own dad here.

6. [D] and his father definitely continue to have a bond. I know [D] desperately wants his Dad back in the UK. They have contact by WhatsApp messages and occasional calls, but very little is said during these calls since [OR] barely speaks, and says only one or two words, and often repeats them. Every child needs their Dad, but these conversations usually do not make much sense so I feel it is confusing for [D] to actually speak to [OR], which is why telephone contact is so occasional. This lack of any contact with [D] is really very distressing for him, and for me."

90. MB also says that she does not think that D has any mental health problems. She considers that the problems he has would not be helped by counselling. She says that the only thing which can make D better is his father being returned to the UK.

Other Family Members

91. OR's mother and sisters have also provided evidence about the relationship between OR and his son. KWS in her first statement describes the bond between OR and D as "very close and loving". She says that she saw "a real change" in OR when D was born. She says that "[D] gives [OR] purpose. From [D]'s point of view his dad is everything. Now that [OR] is in Jamaica [D] is really suffering."
92. KR confirms in her statements that OR is a good father to D. Due to OR's own experiences, he was determined that D should not grow up without a father. She says that D has been "really affected" by OR's deportation. D talks about

OR all the time and does drawings for him and writes him letters. However, even at the time of the first statement, KR noted that OR was so ill he no longer spoke to D.

93. In terms of the impact on D of OR's deportation, KR says that he has become very angry about his father's deportation. He has said that he hates the police because they took his father away. KR also reports that D has said his friends laugh at him because he does not have his father. She says that the family were very worried about D's behaviour and took him to the GP who referred him to CAMHS. As we have already noted, however, that referral was not followed through as MB objected to it.
94. In her most recent statement, KR says that OR's family no longer see D because he finds it difficult to see them because his father is not there. He no longer visits them. They still have contact by phone or text and give him presents as if from his father. KR says that MB and D still have contact with OR via WhatsApp, but she thinks this is likely to be very limited because of OR's current state.
95. DH also describes OR as a "very, very good Dad" to D. She says that D "was the best thing that ever happened to [OR]" and describes things they used to do together. She says that D was a very positive factor in OR's life. She describes D as "very miserable" without OR and that D's behaviour has been impacted.

The Appellant's Private Life

96. We have no witness statement from OR himself. He gave evidence to the Tribunal in his earlier appeal, but we have not been provided with any witness statements from that appeal. We note what is said about the evidence at that time. The Tribunal had no details of any legitimate employment. There was an indication that OR proposed to enrol in further education. We have already mentioned the findings of that Tribunal in relation to private life.
97. In terms of the evidence about OR's upbringing in the UK, the only relevant evidence appears to be that of DH who says this:

"10. [OR] came to the UK in 1998 with [KR]. He was 9 years old when he came and was living here until he was deported in the summer of 2013. He has grown up here and is a Londoner. He has a London accent and is like any other young man from London. He has friends from a wide range of backgrounds. He never says anything about Jamaica and has no attachment to it. He has never wanted to go to Jamaica, not even on a holiday.

11. He went to school Sybourn Junior School, Waltham Forest and then to Mcintee Secondary School. He did not take his GCSEs because he was arrested and imprisoned before he took them. After he was released he went back to Walthamstow College and then Enfield College but he struggled at both because he said he could not concentrate."

There is in the bundle for the 2014 hearing, a report of Renee Cohen BA, CQSW, Psychotherapist/ Independent Social Worker dated 12 April 2008 which says that KR and OR “have adjusted to life in the UK and feel part of British society with which they identify.” She also says that both “are very identified with British culture.” However, there is no detail provided nor any reference to the evidence on which those conclusions are based. We note that Ms Cohen’s report was considered by a previous Tribunal when DH, KR and OR appealed against a decision to remove them to Jamaica, culminating in a decision promulgated on 8 August 2008 (“the 2008 FtT Decision”).

98. As to OR’s private life since returning to Jamaica, there is no evidence before us suggesting that he has any relatives in Jamaica. The medical evidence suggests that, if there are any, there are none with whom he has a practical or meaningful relationship. The only evidence we have of any personal relationship OR has in Jamaica is that with Mr Beckford who works or worked at the Open Arms Centre. Mr Beckford sought to assist OR when he was there and continued to do so up until the time when he left the address in Vineyard Town in 2015. According to Dr Sewell’s most recent report, there is no longer any functioning relationship, to the extent that Mr Beckford no longer knows where OR lives, and OR no longer engages with Mr Beckford. It is apparent, based on his endeavours to get OR to the medical examination, that Mr Beckford remains willing to assist if he can. However, as Dr Sewell reports, Mr Beckford had to hold on to OR and bring him to the appointment. That is consistent with the absence of any continuing, co-operative relationship between them.

DISCUSSION AND CONCLUSIONS

EXCEPTION 1

99. Ms Harrison accepted that OR cannot meet exception one in relation to his private life. That is because he had not lived in the UK lawfully save as regards the first six months of his time here. We also observe that we would not have found that he had lived for most of his life in the UK in any event. He was in the UK between 14 December 1998 and 12 July 2013. That is a period of about 14 ½ years. He lived in Jamaica until aged 9 ½. He has been back in Jamaica now for over 5 ½ years.
100. We also do not accept that OR was socially and culturally integrated in the UK. It is said by his mother that he grew up here and was like any other young man from London. However, there is a dearth of evidence about his time growing up here. He received some education but that was of course interrupted by his offending. The Tribunal in the earlier appeal noted that OR had said that he intended to enrol in further education following his release, but DH says he struggled to do so because he could not concentrate. There is no evidence of any “legitimate employment” according to the Tribunal in the earlier appeal.

101. There is also very limited evidence about any of OR's relationships in the UK, with the exception of those with his family who are also all Jamaican in origin and the relationship with MB about which we say more below. Suffice it to say for present purposes that we are unconvinced that this was ever a committed relationship.
102. The Tribunal in the earlier appeal noted that OR had some involvement in church activities. However, no evidence about that was produced to us. Even the evidence put forward to the earlier Tribunal appears to have been merely a letter from a Pastor who said that OR (or possibly D) attended Sunday School. The earlier Tribunal, in 2011, found that private life was "reasonably shallow and was certainly limited".
103. We accept there is evidence that other men at the hostel in Jamaica have treated OR differently because they consider him to be British (although we note from Ms Sobers' report that one of the other residents of Open Arms Centre told her that they only called him that because most residents did not see OR as a person and generally did not know his name). In any event, that name is probably given only because they are aware that OR has been deported from the UK. That is relevant to the obstacles which OR has faced in integrating in Jamaica but not to the question whether OR was socially and culturally integrated in the UK.
104. We are not satisfied that the material before us allows us to reach a conclusion that OR was socially and culturally integrated here.
105. We do however accept that the situation for OR since returning to Jamaica has been very difficult indeed. He has become almost entirely socially withdrawn and does not interact with others. He is said to have been sleeping rough. He has no family members or friends in Jamaica with the exception of Mr Beckford who has been trying to help him to deal with life there. However, the evidence is that OR has not adjusted at all to life in Jamaica.
106. The question of what amounts to very significant obstacles to integration was dealt with by the Court of Appeal in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 where Sales LJ (as he then was) analysed it in the following way:

"14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted

there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

107. Having regard to the evidence which we have already set out, we consider that it shows that the level of obstacles which OR faces have reached that very high threshold. That is the more so when one considers that OR has been back in Jamaica now for nearly six years and yet the evidence is that he is still not functioning in his everyday existence. As we have already observed, he has apparently formed no relationships with others; as KR put it in her evidence OR has effectively “shut down”. He appears to have no interaction with others at all and has from time to time and quite probably presently, been living on the streets with no job and no integration in Jamaican society. As we have found, OR is unable to meet the first exception in Section 117C because he does not satisfy all the criteria there set out. The impact on his private life and family life is though something to which we will need to return when considering whether there are very compelling circumstances which outweigh the public interest in this case.

EXCEPTION 2

108. We begin with OR’s relationship with MB. Based on MB’s own evidence, we doubt that it can be said that she and OR have or ever have had a genuine and subsisting relationship. Insofar as Ms Harrison seeks to argue that this is because deportation and the separation that entails has affected that relationship so much that it has broken down, we do not accept that submission. The Tribunal in the earlier appeal did not make a finding that, at that time, in 2011, there was not any relationship between OR and MB but equally they did not make any finding that there was. We accept that Judge Abebrese found that MB was OR’s partner and that the evidence about the impact of OR’s deportation on her was “credible”. However, that evidence is not set out in Judge Abebrese’s decision. We have set out MB’s evidence about her and OR’s relationship above. We are not satisfied that this shows any continuing relationship between her and OR. She herself says that she does not know what future they have. Her concern appears to be principally if not entirely a desire to have OR share the parental responsibility for D.
109. Even if we are wrong about whether the relationship can be categorised as genuine and subsisting, it follows from what we say that we do not accept that it is unduly harsh for MB to remain in the UK without OR as she has done since 2013. She has family in the UK who have been supporting and continue to support her. She has some mental health and other problems but there is no evidence that any of those are caused by or have even been exacerbated by OR’s deportation.
110. Turning then to the impact of OR’s deportation on D, we accept that, notwithstanding the limited ongoing communication between father and son, there is still a genuine and subsisting parental relationship. OR is accepted to

be D's biological father. There is some evidence of OR's continuing concern for his child and D is said to continue to be important to him. Similarly, D remains committed to his father and very concerned that OR should be returned to the UK.

111. Applying paragraph Section 117C (5), we are required to consider whether the effect of OR's deportation is unduly harsh. This entails consideration whether it is unduly harsh for D to go to Jamaica to be with his father or to remain in the UK without him. The meaning of "unduly harsh" in section 117C (5) was considered by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. The particular issue that arose was whether the relative seriousness of the offence was a matter to be taken into account. In his speech, Lord Carnwath (with whom the others agreed) dealt with the meaning of the expression "unduly harsh" as follows (at [23]):

"... the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of the relative levels of severity of the parent's offence other than is inherent in the distinction drawn by the section itself by reference to the length of sentence. ..."

112. In the section that follows, at [27], Lord Carnwath cited with approval the Tribunal's decision in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 as providing authoritative guidance as to the meaning of "unduly harsh":

"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, means 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."

113. With that test in mind, we accept that D cannot be expected to go to Jamaica to be with his father. We have already found that there is no continuing relationship between MB and OR. MB is a British citizen who has problems of her own and could not be expected to leave the support she has in the UK to go to join a man who she is no longer in a relationship with. Moreover, in light of OR's own severe difficulties in managing to look after himself in Jamaica, he could not look after MB or D.
114. However, we do not accept that the evidence shows that it is unduly harsh for D to remain in the UK without OR. There is evidence that D is very distressed by his separation from his father (although MB's evidence is that he does not

show that distress as much in recent times). We accept that there have been some behavioural difficulties. We also accept that there was concern about D's mental state at one point although MB says she does not think that D is mentally ill. The evidence though goes nowhere near to establishing the magnitude of difficulties which would be required to meet the threshold of undue harshness. That a child would be extremely upset by separation from a parent is an expected consequence of deportation. It might also be expected that a child may behave badly because of that upset or the lack of control of the absent parent.

115. For those reasons, we do not accept that OR meets the second exception in Section 117C.

VERY COMPELLING CIRCUMSTANCES

116. That OR cannot meet either of the two exceptions set out in Section 117C is not however the end of the matter. We have to consider whether there are very compelling circumstances over and above those two exceptions.
117. We have referred above to the Supreme Court's judgment in KO (Nigeria) and to the Court's interpretation of Section 117C (5) which excludes from our consideration the seriousness of the offending save insofar as that is inherent in the differentiation between sentences of four years or more and those under that term. However, that judgment has nothing to say about the way in which Section 117C (6) is to be interpreted.
118. We have referred at [23] above, to the case of NA (Pakistan). The guidance given in that case concerning the application of the test of very compelling circumstances remains fully authoritative. The Court of Appeal's explanation of the operation of that test is set out by Jackson LJ as follows:

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

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

outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

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

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

32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a “near miss” case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were “very compelling circumstances, over and above those described in Exceptions 1 and 2”. He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.”

119. Having regard to what is there said, we note the need to take into account our conclusions about the exceptions as those apply in OR's case. Although we have found that OR cannot meet either of those two exceptions, it remains appropriate for us to take into account those conclusions when looking at the wider impacts on OR's private and family life.
120. Before we carry out the balancing exercise which a wider consideration of Article 8 requires, however, we need to say something about the public interest in this case to which we are required to have regard, and which is obviously to be given significant weight in a criminal deportation context.

The Public Interest

121. Section 117C (1) provides that the deportation of foreign criminals is in the public interest. Section 117C (2) provides that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal. In this case, the Appellant was sentenced in 2005 to thirty months in youth custody by reason of his age at the time of offending. He was convicted of further offences in 2008 which were of a lesser magnitude and did not lead to any term of imprisonment. We have referred to the Respondent's decision letters which allude to possible further offending which has not led to any convictions. However, as we have already observed, the Respondent did not pursue a case based on those matters, we received no evidence about those possible offences and we leave them out of our consideration when it comes to considering the public interest.
122. We have regard to what is said in the FtT Decision concerning the Appellant's offending as follows:

"34. ... In the respondent's bundle we had the judge's sentencing remarks dated 15 April 2005. They were referred to in the reasons for refusal letter. We noted that the judge commented in relation to the offence he said "first of all [C] did not consent to giving you oral sex and secondly that you were in possession of a knife, that she knew it, and this constituted an implicit threat ... This behaviour will not be tolerated and youths and young men who behave in this way must know that it will not be tolerated". He went on "I accept however that you believed that [C] was older than she in fact was and indeed you believed that her age was similar to your own". He added that he took into account that the appellant was only 15 and would not be 16 until "May". He took into account the appellant had no previous convictions. He concluded "the least sentence that I can pass is one of thirteen months detention² under Section 91."

35. We had no reports presented to us from the agencies for example there was no probation report in respect of the proceedings. We had no report from the Young Offender Institution concerning his conduct there.

² Although we do not have the sentencing remarks before us, we understand from other documents that the sentence was one of thirty months and we assume this to be a typographical error.

36. We considered it relevant that the appellant was convicted of other offences on 20 October 2008. These were offences involving resisting or obstructing a police constable, taking a vehicle without consent and other motoring offences. He was sentenced to a twelve month community order and disqualified from driving. We had the pre-sentence report in respect of these proceedings of which we took careful note. We noted in particular that the appellant had been assessed as being of medium risk of re-offending."

123. We have no further reports as to the current risk which the Appellant poses or might pose if returned to the UK. However, as Mr Anderson points out, the public interest in deportation is not confined to protecting the public from the risk of further offending. In OH (Serbia) v Secretary of State for the Home Department [2009] INLR 109, Wilson LJ (as he then was) identified the following interests:

"15. From the above passages in *N (Kenya)* I collect the following propositions:

- (a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
- (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
- (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
- (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than "to weigh" this feature."

124. At [70] of his judgment in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 6, Lord Wilson considered his reference to "society's revulsion" as "too emotive a concept" but went on to say:

"... But I maintain that I was entitled to refer to the importance of public confidence in our determination of these issues. I believe that we should be sensitive to the public concern in the UK about the facility for a foreign criminal's rights under article 8 to preclude his deportation. Even though, for the purposes of the present appeal, we must ignore section 19 of the Immigration Act 2014, the depth of public concern had earlier been made manifest not only in section 32(4) of the 2007 Act but also in the

amendments to the immigration rules introduced on 9 July 2012 to which I will turn in the next paragraph. Laws serve society more effectively if they carry public support. Unless it lacks rational foundation (in which case the courts should not pander to it), the very fact of public concern about an area of the law, subjective though that is, can in my view add to a court's objective analysis of where the public interest lies: in this context it can strengthen the case for concluding that interference with a person's rights under article 8 by reason of his deportation is justified by a pressing social need."

125. We take into account that OR's index offence occurred about fourteen years ago at a time when he was still a child himself. However, even accepting that OR may have rehabilitated in the time since then (and we do take note of the further offences of which he was convicted in 2008 in this regard), we accept Mr Anderson's submission that rehabilitation may be a relevant factor but is not weighty. He relies in this regard on the observations of Moore-Bick LJ in Danso v Secretary of State for the Home Department [2015] EWCA Civ 596 and Taylor v Secretary of State for the Home Department [2015] EWCA Civ 845 which are to that effect.
126. For those reasons, in spite of the passage of time since OR's offending, his age at the time and that he may have rehabilitated since, we nonetheless give significant weight to the public interest in this case. The index offence was a serious one, one which undoubtedly caused trauma to his young victim, and one which involved the implicit threat of the use of a knife.
127. There is an additional facet to the public interest in this case and that is OR's status when he was in the UK prior to deportation. He did not have any right to remain here. He was here unlawfully, save for the first six months when he arrived with his sister as a visitor to live with his mother. We accept that he was a child at that time and did not apparently become aware of his lack of status until much later (following his offending) but that cannot detract from the public interest in the maintenance of effective immigration control to which we are bound to have regard by Section 117B(1), nor from the fact that, by reason of section 117B(4), his private life is to be given little weight due to his unlawful status. We note in particular from the 2008 FtT Decision that, when that appeal was heard and determined in 2008, notwithstanding OR's mental health problems which were by that time apparent, the Tribunal nonetheless concluded that it was proportionate to remove OR, KR and their mother.

Factors in the Appellant's Favour and Our Assessment

128. As stated at [83] of the Supreme Court's judgment in Hesham Ali, one way of structuring the balancing exercise is, having found the facts, to "set out the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

129. Having set out the public interest which applies in this case and one side of the balance sheet, we now turn to the factors favouring OR, that is to say the factors which demonstrate an interference with his private and family life which may, if strong enough, outweigh that public interest.
130. We have regard to what is said at [57] and [58] of the Decision regarding the factors which militate for and against OR. We have already had regard to OR's lack of right to remain in the UK and his offending. We accept that English is spoken in Jamaica which is relevant to OR's ability to integrate there. As we have already noted, KR and DH are no longer in the UK unlawfully. Both have limited leave to remain. That is therefore now a factor in OR's favour.
131. The following factors in OR's favour are relevant:
 - (a) OR has a close relationship with his family members in the UK, and particularly with KR who now has limited leave to remain in the UK. They have a very close bond. OR's other sister KWS is a British citizen.
 - (b) OR has a genuine and subsisting relationship with D, his son. Although we find, in common with the Judge in the FtT Decision, that D's best interests are to remain in the UK with MB, it remains appropriate to have regard to the impact of OR's deportation on D. We have found that this impact is not unduly harsh but it is clear that D misses his father and we accept that, notwithstanding the limited communication between father and son at present, D remains important to OR and vice versa.
 - (c) OR had no right to remain in the UK before he was deported. However, he was brought to the UK as a child aged nine years and cannot be held responsible for that fact.
 - (d) Similarly, OR's age when he committed the index offence is relevant to the weight to be given to the public interest although we accept that significant weight must still be given because of the other facets of the public interest.
 - (e) Although we give little weight to OR's private life in the UK, as we are directed to do by Section 117B, and although we have found that there is insufficient evidence that he was socially and culturally integrated here, it remains relevant that he came here as a young child and spent his formative years here, spending a total of 14 ½ years prior to deportation.
132. If the above were the only factors in OR's favour in this case, we would have no hesitation in dismissing the appeal. They are factors in OR's favour on the other side of the balance sheet, but they do not, individually or cumulatively, outweigh the public interest in deportation. However, in this case, we consider that there are additional particularly significant factors which, when added to the above factors, lead to the conclusion that deportation is disproportionate. In other words, we find that the following, coupled with the foregoing are the very compelling reasons, over and above the statutory exceptions, for finding that the appeal should be allowed.

133. First, OR's medical condition. We do not repeat the findings of the various doctors who have examined OR both prior to and since deportation. In finding this a relevant factor in OR's favour and one which is to be given significant weight, we recognise that the Tribunal has dismissed the appeal on Article 3 grounds. Nothing we say is intended to displace that finding. In particular, we have regard to what is said by Laws LJ about the interaction of Article 3 and Article 8 in medical cases in GS (India and others) v Secretary of State for the Home Department [2015] EWCA Civ 40 at [86] as follows:

"If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe)* [2012] EWCA Civ 279 at paragraph 23:

"The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

134. We remind ourselves of course that this is a deportation case (unlike the cases in GS (India)). As such, we accept that the weight to be given to the public interest is that much stronger than in those cases. However, what leads us to our conclusion in OR's favour rests on another passage of Laws LJ judgment in those cases when dealing with the potential application of Article 8 to medical cases at [44] and [45] as follows:

"Article 8

44. As I have said, Article 8 has two linked paradigms: the capacity to form and enjoy relationships, and the right to privacy. We are not concerned with the latter (as to which there is a substantial body of case-law). As for the former, I will first cite *Bensaid*, in which the court said at paragraph 47:

"'Private life' is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are

important elements of the personal sphere protected by Article 8... Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects *a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world...* The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life." (my emphasis)

Paragraph 61 in *Pretty v UK* (2002) 35 EHRR 1 is comparable:

"As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person... It can sometimes embrace aspects of an individual's physical and social identity... Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. *Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world ...* Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees." (my emphasis)

The diffuse nature of the Article 8 paradigm is further emphasised by paragraph 65 in *Pretty*:

"The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance."

45. These and other passages tell us that the core value protected by Article 8 is the quality of life, not its continuance. Life itself is protected by Article 2. And it requires no sophisticated philosophy to tell us that central to the quality of life is the capacity to form and enjoy relationships. Other elements referred to in these authorities, such as gender identification, name, sexual orientation, sexual life and mental health are self-evidently integral to that same capacity."

135. We have already referred when dealing with the first of the exceptions under Section 117C to the very significant obstacles which OR faces in Jamaica. We do not think it overstates the case to say, as did KR in her evidence, that OR has "shut down". He has no relationships with anyone there. He has even ceased to cooperate with Mr Beckford who was helping him. Although he has been found a room in a private house, he has formed no relationship with the householder and, as we said at paragraph [73] above, he may well, in fact, be sleeping on the streets. He is certainly not caring for himself. In short, he appears to have no quality of life at all.

136. Coupled with the above is the importance of OR's family support in the UK, to which Dr Sewell refers in his recommendations and the lack of any support from family or friends in Jamaica. We accept the evidence that when OR was in the UK, both KR and KWS were responsible for supporting OR. That involved ensuring he dealt with everyday activities, such as washing, dressing and eating, but also ensuring that he attended medical appointments and took his medication. There is no evidence whether OR is being prescribed medication in Jamaica. Certainly, there is no evidence that such medication as he needs is not available. However, in this case, without that family support, OR does not have the ability to know that he ought to be taking that medication for his own good and, on all the evidence that we have, is not, therefore, taking any medication that may have been prescribed. OR's level of dependency on family who are all in the UK is a weighty factor in OR's favour.
137. Although we accept that the medical evidence does not show that OR is currently suicidal or harming himself, we do accept that it shows that OR has lost all sense of being and has effectively given up. Without his family support which is, we find, all in the UK, we accept Dr Sewell's opinion that OR's mental health will not recover. Without a recovery in his mental health, we find that his private life will remain very significantly affected in the way we have described.
138. As we have noted, OR has not had leave to remain in the UK other than for the first few months of his time here. We have already recorded the requirement to take into account the need to maintain effective immigration control in the public interest and the requirement to give OR's private life in the UK little weight as a result. However, little weight does not mean no weight. Moreover, it is the combined effect of the impact on OR's private life since deportation in Jamaica and his high level of dependency on family support all of which is in the UK that is in our view the main factor here rather than the impact of deportation on OR's private life formed in the UK.
139. For those reasons, balancing the very compelling circumstances in OR's favour against the public interest which we accept is significant in this case, we conclude that deportation is disproportionate and a breach of Article 8 ECHR. We therefore allow the appeal on that ground.

DECISION

The Respondent's decision to deport the Appellant is disproportionate and therefore a breach of the Appellant's Article 8 ECHR rights. The appeal is allowed.

Signed
Upper Tribunal Judge Smith



Dated: 26 April 2019