



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/06397/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 14 June 2019

Decision & Reasons Promulgated  
On 24 September 2019

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

A A

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Ogunbusola, Counsel instructed by Winston Rose Solicitors  
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or children of his family. Breach of this order can be punished as a contempt of court. I make this order because this case concerns the welfare of the children and there is a risk that it would be harmed by publicity.
2. This is an appeal against a decision of the respondent on 4 May 2018 refusing the appellant's claim for protection and/or leave to remain on human rights grounds.
3. The appeal was allowed on human rights grounds with reference to Article 8 of the European Convention on Human Rights by the First-tier Tribunal which also dismissed the appeal on other grounds. The Secretary of State appealed the decision of the First-tier Tribunal and it came before the Upper Tribunal (the Honourable Lady Rae sitting as a Judge of the Upper Tribunal and Upper Tribunal Judge Perkins) and that division of the Tribunal found that the First-tier Tribunal had erred in law and set aside its decision

insofar as it related to the decision to allow the appeal on Article 8 grounds. A copy of the decision is appended hereto.

4. The appellant had not challenged the decision to dismiss his appeal on other grounds. In order to avoid any possible misunderstanding I make it clear that I am concerned solely with the appellant's case that removing him would interfere disproportionately with his or his family members rights under Article 8 of the European Convention on Human Rights.
5. When the Upper Tribunal found an error of law we directed that the appeal be heard finally in the Upper Tribunal. The appeal then came before me sitting on my own.
6. Put simply, for the purposes of introduction, the appellant is subject to deportation. Clearly refusing him leave to remain interferes with the private and family life of the appellant and those close to him. The contentious issue is whether that interference would be proportionate and that is a matter for me to decide after conducting a balancing exercise guided by part 5A of the Nationality, Immigration and Asylum Act 2002.
7. I begin by considering the Secretary of State's reasons. I have considered the entire letter but much of it is not presently relevant because it relates to protection claims and determines matters that are no longer in issue.
8. The appellant is a citizen of Bangladesh. He was born in 1985. He tried unsuccessfully to obtain leave to enter the United Kingdom but following an appeal on 27 September 2005 he was issued with a twelve month work visa.
9. In September 2009 he was arrested as an illegal entrant having been encountered during an enforcement visit at an "Indian restaurant". He gave a false account of his identity and entry to the United Kingdom.
10. On 30 November 2009 at the Crown Court sitting at Luton he was convicted of possessing a false passport with intent and was sentenced to twelve months' imprisonment. Notwithstanding his guilty plea to an offence of "having false identity documents with the intention of using them for establishing registerable facts about yourself" the Crown Court Judge commented disapprovingly of the appellant's dishonesty. The judge said, "The problem when you lie repeatedly is that the court finds it impossible to discern what is the truth."
11. On 8 January 2010 he received a "Notice of Liability to Deportation". On 27 January 2010 by solicitors he submitted an asylum and human rights claim. Further representations were made but on 5 August 2010 his asylum claim was refused and a deportation order was made and signed. He appealed against the deportation decision (as was then permissible) but his appeal was dismissed in October 2010 and his appeal rights exhausted in May 2011.
12. He did not report as required and was treated as an absconder.
13. In January 2014 his solicitors made an application for Further Leave to Remain. The application was refused in May 2014. He came to the attention of the authorities again in November 2017 when he was reported to the Thames Valley Police and he was detained under immigration powers.
14. On 14 December 2017 his representatives made further submissions based on Article 8 of the European Convention on Human Rights and also on an alleged fear of persecution.

The claim was amended and in that form came to the attention of the caseworker in January 2018. The letter dealt with the protection part of his claim.

15. At paragraph 61 it began to consider the claim under Article 8 of the European Convention on Human Rights.
16. It noted, correctly, that the appellant claimed to be in “a relationship” with JF who is a British national born in 1984. Additionally, he claimed to act as the father of the partner’s four children and to have lived in the United Kingdom for over twelve years.
17. The children are all boys. PD was born in April 2005 and so is now aged 14 years. CD was born in July 2008 and so is now aged 11 years. AD was born in March 2010 and so is now aged 9 years. FD was born in March 2012 and so is now aged 7 years. The respondent accepted that there is a “genuine and subsisting parental relationship” with the stepchildren. The evidence showed that the children have lived with their mother and the claimant and he took parental responsibility for them. The respondent accepted that it would be unduly harsh for the stepchildren to live in Bangladesh and I treated that as an agreed fact although it sits uneasily with the finding at paragraph 80 and that the children *could* remove with their mother to Bangladesh.
18. Importantly it was not accepted that it would be unduly harsh for the stepchildren to remain in the United Kingdom after the appellant’s deportation. I set out below paragraph 81 of the refusal letter. This states:

“It is noted from the evidence provided that your partner states that she has struggled with your detention and in the time that you have been detained she has lost her job. However, she was able to take [FD] to his medical appointment on 9 February 2018 and no evidence has been provided to show that she has been able to care for the children in your absence; it is noted that your relationship only began 2.5 years ago and she has therefore previously managed to care for her four children alone and without your support. Whilst it is accepted that your partner and stepchildren may prefer you to remain with them in the UK, it is not accepted that it would be unduly harsh for your stepchildren were they to remain in the UK without you. As British citizens, the children can continue to reside in the UK in your absence with their British mother, [JF], and will be able to continue to access benefits and privileges afforded to them, including education and any healthcare they require. The children will also have the continued support of any extended family members and so the current scope and nature of their daily family life would not be adversely affected by your deportation.”

19. The respondent then considered the appellant’s family life with his partner. The respondent concluded that there is a genuine and subsisting relationship between JF and the appellant but that the relationship was formed when the appellant was in the United Kingdom unlawfully so his status was precarious and therefore, applying paragraph 399(b) of HC 395, the appellant could not rely on an exception to deportation because of the terms of paragraph 399(b)(i) which shows that the exception operates only when:
 

“the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious.”
20. The respondent also looked at the appellant’s “private life” and found that he could not come within the scope of paragraph 399A of HC 395 because he had not been resident in the United Kingdom for half of his life and certainly not lawfully resident for most of his life.

21. The respondent then looked at “very compelling circumstances” but found none. The appellant is a foreign criminal who had stayed in the United Kingdom without permission. The child FD had some medical problems that needed referral to hospital but there was nothing before the Secretary of State to indicate that they were going to be especially demanding or something with which the child’s mother could not cope without the appellant’s presence. Similarly, his partner had problems with her physical health but nothing that was *particularly* concerning. The partner’s mental health issue was a different matter. She said that before she started her relationship with the appellant she had attempted suicide after a traumatic breakup with her ex-husband. The respondent said at paragraph 99:

“It is not disputed that your partner has experienced and continues to experience very unfortunate problems in her personal life. It is accepted that she would prefer for you to remain with her in the UK and that this may address some of her psychological and emotional needs and alleviate some of her problems, however, it is considered that there are other means of support available to her. It is clear that she is in the care of NHS doctors and receiving treatment for her mental and physical health problems. As a British citizen she is entitled to help from the state, for example in the form of benefits to assist her with childcare and with seeking new employment.”

22. The Secretary of State refused the application.

23. Before me the appellant relied on a bundle that had been available before the First-tier Tribunal paginated 1-94 and a supplementary bundle running to thirteen pages.

24. The appellant gave evidence.

25. Unsatisfactorily he relied on a witness statement prepared for the First-tier Tribunal because much of that related to parts of the claims that have proved unsuccessful. I accept that relying on this largely discredited evidence was a pragmatic approach but it was a little odd to hear a witness adopt evidence which he knew had been disbelieved and which to a large extent did not relate to the issues before me.

26. In his statement he confirmed that he was in a “loving and genuine relationship” with his partner JF and that there are four children of JF’s former marriage who lived with them. He said at paragraph 7:

“It has been a very difficult and distressing time for my partner and our stepchildren who have seen their partner and stepfather being held in detention recently. My partner has been suffering intolerably without my presence during that time. Due to the uncertainty of my immigration status and future, she is left constantly in a depressive state of mind which is evidenced in a letter she has written as well as letters provided by her family.”

27. He did not think it feasible for the partner to leave the United Kingdom. Apart from having her family there she had medical problems. He then referred to the children. FD has regular appointments because of eye problems. At paragraph 10 he said that the child CD aged 9

“... has been substantially affected by my ongoing appeal process and from not being able to communicate with me or be in my presence while I was detained. The submission documentary evidence dated 10 April 2018 shows that he is suffering behavioural problems and developing suicidal tendencies as a result.”

28. He also referred to his own health problems but there was nothing that I would regard as serious.

29. He was asked supplementary questions. He said that he had taken part in an Islamic marriage ceremony in September 2018 and intended to take part in a civil marriage ceremony binding in English law in August 2019. He was asked particularly about his son who was missing him. He said that the boy was trying to harm himself and that he was not a normal child.
30. He was not cross-examined.
31. The appellant's partner gave evidence. She adopted her statement made in the earlier proceedings. In that statement she confirmed that she was in a "genuine and subsisting relationship". The statement was dated June 2018 and she said they had met about three years before. She believed there was a close bond between her children and the appellant. He referred to having "a few medical matters persisting" and this required frequent visits to hospital. She also said that the son FD attended hospital frequently because of eye problems. She said that the appellant supported her and she discharged these responsibilities and duties. She said that there was "shared parental responsibility" and that the appellant "is a great role model for them, as a father figure".
32. She then went on to say how she had been dealing with depression and was on medication.
33. She said how the children were all adversely affected by the appellant being taken into detention. The child CD then aged 9 had been substantially affected by things. His behaviour had deteriorated. She said at paragraph 8 "He has attempted to hang himself on several occasions and has been suffering with depression."
34. She could not contemplate removing her family to Bangladesh.
35. She too adopted her statement and confirmed that she had taken part in an Islamic marriage. In response to a supplementary question she confirmed the appellant's role in helping run the family and also confirming that the children had no contact with their natural father and a close bond with the appellant. She described the bond as "strong and lovely to see".
36. She then talked a little about her personal circumstances. She had been reconciled with her father but he was in a care home. Her mother had cancer and was continuing to be treated.
37. She was cross-examined.
38. Her attention was drawn to a school report concerning the child CD. It is dated 10 April 2018. He had behaved badly. He had not co-operated with the taxi driver taking him to school. He had refused to wear his seatbelt saying that his mother did not require him to wear a seatbelt. However, according to the school report, he continued to say that he wanted to die, that he wanted to commit suicide, that he could strangle himself with a seatbelt, that he wanted to kill himself and he wanted to kill his family and let them drown in their own blood. He complained that his brother T beat him and his mother did nothing and that he said he had stabbed his brother and was going to kill him when he was asleep by cutting his throat and pushing a knife into his head. The mother was telephoned. She denied telling CD not to wear a seatbelt and asked to speak to him on the phone, according to the teacher's note: "CD then physically attacked staff, hitting, thumping and kicking them. He screamed at his mother down the phone." He then used extremely bad language directed at members of staff.

39. She was asked why it was not recorded there that he had attempted to hang himself. It is right the independent evidence has not confirmed the claim that he had tried to hang himself and she did not answer the question satisfactorily. However in a manuscript letter dated which does not seem to be dated (page 27 in the bundle) she said of CD:  
 "... my boy has tryed(sic) suicide and is also(sic) waiting to get more help, because of past problems that he's(sic) DAD caused him, he's looked at [the appellant] as he's(sic) DAD. he talks to Him and loves Him And trust's this MAN".
40. The appellant's partner may not be well educated but she knows to how to write to make her point.
41. The child had been helped by the Child and Adolescent Mental Health Services.
42. In answer to re-examination she said that the child got better because of her husband's support. He protected and cared for him.
43. I have read the papers including the supporting letters from family members. These are obviously written from the perspective of someone who writes as an advocate rather than an expert and can only give them limited weight but they all add to the picture of a man who is playing a valuable part in upholding a family that has been damaged.
44. The notes from the children are short but each refer to the importance of their relationship with the appellant and I give them some weight.
45. I have noted medical evidence confirming the need for hospital treatment by FD and the appellant's partner. They simply confirm the oral evidence.
46. I am concerned about character references from various public officials. I accept that the appellant has thrown himself into certain community projects and conducted himself well. That is to his credit. It is a relevant feature although not a particular weighty one in a case of this kind. However, it concerns me that, for example, I am provided with a letter from a Milton Keynes councillor describing the appellant as "a good person of integrity and honesty". He has been convicted of an offence of dishonesty and sent to prison for twelve months. Either the person writing the letter does not know him very well or is very careless in the way he expresses himself. This has not assisted the case.
47. I am most concerned with a letter dated 27 May 2019 from one Simon Phillips described as a senior practitioner in the Family Support South and West Team at Milton Keynes council. He had been the allocated social worker to the appellant's partner's family. I set out much of his letter below. He said:  
 "I have had the opportunity to meet [AA] a number of times while visiting the family. I must say, my observations are positive to date.  
 It has been a difficult time for the mother of the children and [AA] genuinely does appear to be a stable and positive influence in the home. He is clearly working hard to help and support his current partner [JF] to care safely and consistently for the children, and there are strong indicators of a genuinely warm and healthy relationships between him and the children., there have been practical improvements made to the home environment and I have seen [AA] actively engage with the children.  
 I have been impressed by his good grasp of the children's own unique needs and the thoughtful conversations I have observed with the mother and helped her in understanding the root causes of some of the children's challenges. On her part, she seems to have benefited from the relationship and the wider families on both sides seem very supportive of a couple."

48. In some ways this is the most important evidence before me. I accept that Mr Phillips is in a position to offer the opinions that he does and that he does so from an entirely objective position. I have no hesitation in concluding that for all the things that could be said to his detriment the appellant is playing a significant part in stabilising a family that has been disrupted by breakup.
49. I have a letter from CAMHS dated 31 January 2019. It is marked confidential and not to be copied or shared without the author's permission. As far as I am aware permission has not been sought. Nevertheless it is before me and it is not subject to appeal order of a court. The important thing is that it confirms that the child CD has been given support and has been discharged.
50. There is clear evidence that the appellant is a stabilising influence in the family and life is better with him than without him. I have no hesitation in saying the best interests of the children involved here are that the appellant remains in the United Kingdom. This is an important consideration indeed a primary consideration but it is not the only consideration. I have to apply Section Part 5A of the Nationality, Immigration and Asylum Act 2002. Section 117C tells me that the deportation of foreign criminals is in the public interest. It also says the more serious the offence committed the greater the public interest in deportation. The appellant has been sentenced to twelve months' imprisonment. That makes him a foreign offender but he is also a foreign criminal but lower end of the bracket. This does not mean that he should not be deported. The public interest in his deportation remains strong. It simply means that the appeal is without aggravating factors beyond the factors inherent in his being a foreign criminal. The requirement that the deportation of foreign criminals is in the public interest is mitigated by certain exceptions. I need only consider Exception 2 because that is the only one that is relevant. This applies
- "Where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting relationship with a qualifying child, and the effect of seeing his deportation on the partner or a child would be unduly harsh."
51. The appellant does have a qualifying partner but I do not give much weight to that relationship on its own. It was formed at a time when the appellant was in the United Kingdom unlawfully and I am required by Section 117B(4) to give little weight to that relationship. Indeed, if it were not for the children there is no good reason why the appellant's wife could not go with him to Bangladesh. She does not want to live in Bangladesh and she has family ties responsibilities and ties in the United Kingdom apart from those involving her children but that is a matter of choice. Children apart, nothing was raised that I would regard as "weighty" in an article 8 balancing exercise or a "compelling" circumstance. Her serious mental health issues are behind her in part because of her relationship with the appellant.
52. That said, writing as if her relationship with her children could be discounted is highly artificial. I accept that the children cannot be expected to go to Bangladesh. Their home is in the United Kingdom. They have no life nowhere else. To expect them as British citizens to establish themselves in a country where they are not nationals and which would involve adopting a life very different from the life they enjoy in the United Kingdom is unrealistic and it is has never been the Secretary of State's case.
53. What troubles me is whether I also say that the effect of deportation on the children would be unduly harsh.

54. With respect to Mr Bramble he went right to the root of the problem and said the case focuses around CD. He has clearly been a disturbed child but he has also clearly benefited from mental health treatment. Mr Bramble said that the evidence is that CD is getting home schooling and the issue is whether removing the father figure from the family unit would be unduly harsh.
55. He said that there is no independent evidence about that. That submission, whilst strictly correct, does rather push aside the observations of the social worker Mr Phillips. He did not speculate about what might happen on removal but it is clear that the appellant's presence is a considerable advantage to the stability of the family.
56. I remind myself that the relevant test is whether removal would be "unduly harsh". It is implicit in this that harshness is a likely consequence. It is established law (and obvious without the need to resort to authority) that deportation can have very severe consequences on family lives established in the United Kingdom. That is what deportation does and Tribunals must not shy away from upholding the deportation decision because deportation is in the public good. This is a case where the appellant's new family has suffered as a consequence a marital breakup. There is evidence from the appellant's partner that the appellant has helped them re-establish themselves. There is evidence that one of the children in particular has suffered badly and has been particularly disturbed and is now on a right footing.
57. I simply do not *know* how much that is to do with the presence of the appellant in the United Kingdom. It is very hard to think that he did not contribute significantly to that end. Little boys approaching the age of 10 could be expected to misbehave. Indeed there might be reason to worry if they never did. It is right that a child of that age tests boundaries and asserts himself and sometimes that could be expected to go further than is acceptable. I am not unduly concerned that he complains that his brother beat him. Brothers do things like that without it leading to lasting harm. The child has done more and talked about wanting to die, wanting to "do suicide", speculating how he could do it in a car and saying how he wanted to kill his family. His behaviour towards the staff was appalling, being both violent and expressed in foul language. These are extra elements here.
58. The fact that CD has been discharged from CAHMS does not mean that the appellant's involvement is no longer relevant. Rather, I find, his presence is part of the care package and is one of the reasons that treatment and new plans have been successful.
59. Doing the best I can I find it probable that the presence of the appellant is beneficial to each of the children because it helps their mother and it helps them. The relationship with CD is particularly beneficial to that child and his removal would add to the child's problems. This case, contrary to Mr Ogunbusola's submissions is quite finely balanced but I am persuaded that the effect of removal would be unduly harsh for the children and I therefore allow the appeal even though I have reminded myself very firmly that the deportation of foreign criminals is in the public interest.
60. It is very important that the appellant understands that this appeal had been allowed in the Upper Tribunal (as it was in the First-tier Tribunal although, for reasons we have explained, not with sufficient information) for the sake of the children. I do not know what leave will be granted as a result of this decision but the appellant needs to




understand very clearly that if he does not continue to be an important factor in the lives of those children his human right claim becomes considerably weakened.

61. I append hereto the judgment of the Tribunal chaired by Lady Rae finding an error of law
62. For the reasons given we set aside the decision of the First-tier Tribunal. I have remade the decision and I too allow the appeal.

**Notice of Decision**

63. The Secretary of State's appeal against the decision of the First-tier Tribunal is allowed and the decision of the First-tier Tribunal is set aside. The appeal of the claimant (described in this part of the decision of the "the appellant") against the decision of the Secretary of State is allowed.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal



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Dated 23 September 2019



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/06397/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 October 2018

Decision & Reasons Promulgated

Before

The Hon. LADY RAE  
Sitting as a Judge of the Upper Tribunal  
UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr J Sarker, Counsel instructed by M-R Solicitors

**REASONS FOR FINDING ERROR OF LAW**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal promulgated on 4 July 2018 whereby it allowed AA's appeal against the respondent's decision to make a deportation order on the basis of his human rights. The Appellant's application for asylum and humanitarian protection was dismissed by the First-tier Tribunal judge and not appealed further.
2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and AA as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

## **Background**

3. The appellant, whose date of birth is 20 January 1985, is a citizen of Bangladesh. On 29 June 2004 he applied for entry to the UK as a sector-based work permit holder. That was refused. The decision was appealed successfully. He was issued with a twelve-month work visa on 27 September 2005.
4. In September 2009 the appellant was arrested as an illegal entrant during an enforcement visit to an Indian restaurant. On 30 November 2009, at Luton Crown Court, the appellant was convicted of possessing false documents with intent. He was convicted in the name of "RK" with a date of birth of 16 July 1983. The offence is recorded as "with intent knowingly possess false/improperly obtained another's ID document." He was sentenced to 12 months imprisonment. The sentencing remarks disclose that the appellant was in possession of a false passport and national insurance card. The sentencing Judge stated, "I take the view that you have acquired this counterfeit passport at some point to gain entry to this country and certainly in order to remain here." He also recorded that the appellant lied repeatedly.
5. On 18 August 2010 a deportation order was signed against him. He appealed that decision but his appeal "under immigration law and on asylum, humanitarian protection and human rights grounds" was refused on 26 October 2010.
6. In January 2012 the appellant's name was placed on the police national computer as an absconder as a result of his failure to report.
7. In January 2014 the appellant submitted an application for leave to remain but this was refused in May 2014. In November 2017 the appellant was detained under immigration powers. On 4 May 2018 the respondent refused the appellant's second protection and human rights claim.
8. The matter comes before us to determine whether the First-tier tribunal erred in law in allowing the appellant's appeal against the deportation order of August 2010.

## **Relevant factual background**

9. The First-tier Tribunal judge appears to have accepted the evidence of the appellant and his partner. She records that the appellant met his partner three years prior to the date of the Tribunal hearing and established a relationship approximately six months after that meeting. His partner has 4 children from her previous marriage. They are aged between 6 and 13. The partner and her children are all UK citizens. The partner has ongoing medical problems and appears to have suffered some mental health difficulties subsequent to the breakup of her marriage. The children have experienced a "difficult few years" after their parents' separation and one of them, child C, has emotional and behavioural problems which commenced after the marriage ended. The youngest child F has eye problems. The natural father of the children has been convicted of offences against children, not his own, and is only permitted supervised access to them. The judge accepts that the appellant assists in their day to day care, "including taking

them to school, shopping, cooking and taking the younger boys to the park.” [paragraph 91] There is no finding that he plays a crucial role in their upbringing.

### **Submissions**

10. Mr Bramble for the respondent adopted the grounds of appeal. In short, it was submitted that the circumstances of the children, their relationship with the appellant and the role of the appellant do not meet the test of undue hardship. Secondly the First-tier Tribunal judge has failed to consider the public interest in deportation when assessing undue hardship. In particular she failed to consider the nature of the offence which triggered the deportation decision, namely one which “undermines the very foundations of an effective immigration control”. The appellant’s role as described in paragraph 91 of the decision does not equate to a crucial role and falls far short of the “unduly harsh consequences”.
11. Mr Sarker for the appellant submitted that it was apparent from the findings that the judge had had regard to public interest in the assessment made. It was “inbuilt” into the decision. In any event there were sufficient circumstances disclosed, particularly the difficulties the children experience, which would meet the undue harshness test.

### **The First-tier Tribunal decision**

12. In her determination the judge has referred to the relevant immigration rules and statutory provisions. We note however that, at paragraph 40, she appears to have misinterpreted rule 398 in stating that the test in the present case is one of “exceptional circumstances” as appear in 398(c) whereas the relevant provision is 398(b). As will become clear in our decision nothing turns on that. In any event later in the determination the judge correctly identifies that the test is whether it would be unduly harsh for the appellant’s partner’s children to be separated from the appellant by reason of his deportation. The judge acknowledges that the appellant cannot meet the exception to deportation on the ground of family life with a partner (rule 399 (b)).
13. Having summarised the law and the evidence the judge turns from paragraphs 76 onwards to make “findings and conclusions”. The nub of the judge’s decision is contained in paragraph 93 and the notice of decision. Paragraph 93 states: “I therefore find that having considered the particular circumstances of this case, the appellant does meet the requirements of the exception to deportation on the basis of family life with a child. “We are unclear whether the judge is referring to one child or all of the children. It is also not entirely clear precisely what those “particular circumstances” are. The preceding paragraph, 92, commences “In this case there are other factors which, in my opinion, takes this case out of the ordinary.” The judge then describes the difficulties experienced by the appellant’s partner and children after the divorce. There is no mention of the appellant’s relationship with the children in that paragraph. At paragraph 91 the judge refers to the case of AJ Zimbabwe [2016] EWCA Civ 1012 from which she concludes that “there has to be some additional feature or features affecting the nature and quality of the relationship”. It would appear that, having identified the

requirement to identify “additional features” she has failed to indicate what those additional features are. What are identified quoad the appellant’s relationship with the children is contained in paragraph 91. In our view, there are no particular features identified in the determination which would lead us to the conclusion that the relationship between the appellant and his partner’s is anything more than a normal one. Accordingly the circumstances disclosed are insufficient to meet Exception 2 in terms of section 117C (5) of the Nationality, Immigration and Asylum Act 2002. In our view the judge has erred in law.

14. Secondly, other than acknowledging the conviction of the appellant, his immigration history and the relevant provisions applying to the case we have difficulty in identifying where in the decision, the First-tier Tribunal judge had considered the public interest in deportation. In our view therefore, in coming to the conclusion that deportation would be unduly harsh on a child or children the judge has failed to have regard to the public interest in deportation. The judge has thus erred in law.

15. As is almost always the case in appeals involving deportation the evidence that might make deportation disproportionate concerns the consequences of removal on other people other than the appellant. The appellant has relied on evidence concerning children whose best interests are a prime consideration. In these circumstances we have decided that the appeal should be heard again but in the Upper Tribunal.

### **Decision**

16. Having concluded that the First-tier Tribunal made material errors of law we shall allow the respondent’s appeal and set aside the decision.

17. We are of the view that the decision will require to be re-made but should be made before the Upper Tribunal at a date to be fixed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and 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 their 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. We make this order because the evidence necessarily discloses details about children whose privacy should be respected.

Signed

Date 20 May 2019

The Honourable Lady Rae sitting as a Judge of the Upper Tribunal.