



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16499/2019 (V)

THE IMMIGRATION ACTS

Heard by a remote hearing
On the 17th September 2021

Decision & Reasons Promulgated
On the 24th November 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SG
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Moksud, Counsel instructed on behalf of the appellant
For the Respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

Introduction:

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

Anonymity was granted at an earlier stage of the proceedings because the case involved the circumstances of minors. I find that it is appropriate to continue the order. 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 his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. On 4 May 2018 the respondent made a decision that the appellant is to be deported from the United Kingdom ('UK'), following his criminal convictions as it was considered that his presence in the UK was not conducive to the public good. The respondent refused the appellant's human rights claim in a decision letter dated 25 September 2019.
2. The appellant, a citizen of Jamaica appealed this decision to the First-tier Tribunal (Judge Handler) (hereinafter referred to as the "FtTJ"). In a decision sent on 18 March 2020, the FtTJ dismissed his appeal on human rights grounds, and the appellant has now appealed, with permission, to the Upper Tribunal.
3. The hearing took place on 17 September 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court with the parties' advocates attending remotely. The appellant also was present during the hearing so that he could hear and see the proceedings being conducted. No technical problems encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means.
4. I am grateful to Mr Moksud and Mr Bates for their clear oral submissions.

Background:

5. The appellant's immigration history is summarised in the decision of the FtTJ and the decision letter.
6. The appellant entered the United Kingdom on 22 August 2001 with six months leave as a visitor. On 26 very 2002 he submitted a student application and on 29 October 2002 was granted leave to remain until 28th of February 2003. This was followed by a 2nd application as a student which was granted until 31 March 2004.
7. On 21 March 2004 he submitted a marriage application as the spouse of a person present and settled in the UK which was voided stop however a 2nd application was submitted on 24 March 2004 on the basis of his marriage which was granted until 10 May 2006.
8. On 11 April 2006 the appellant submitted a marriage application as a spouse of a person present and settled in the UK, but it was refused on 28 July 2006. No appeal was lodged against this refusal.
9. On 4 October 2006 he was arrested by the police during a routine spot check and was found to be in overstayer. He was issued with an IS.151A notice and on 24 January 2007 was removed from the UK to Jamaica.

10. On 30 March 2008 he returned to the UK with the fiancé entry clearance visa valid from 11 March 2008 to 11 September 2008. The appellant married on 20 April 2008 to SM, a British citizen.
11. On 10 June 2008, his omitted an application of the spouse of a person present and settled in the UK but on 13 June 2008 the application was rejected as the fee was not paid. A further application was submitted and was granted on 10 July 2008 valid until 10 July 2010.
12. Later applications for leave as the spouse of a person present and settled in UK were submitted but were rejected as no fees were paid. Following the 3rd application made on 7 October 2010 he was granted indefinite leave to remain.
13. On 11 June 2011, the appellant was granted indefinite leave to remain.
14. Whilst present in the United Kingdom the appellant has amassed a number of convictions. They are scheduled in the decision letter and are summarised in the FtTJ's decision at paragraph [19]. The disclosure print shows that the appellant has 14 convictions the 23 offences between 15 September 2014 November 2018. Of those offences, there are 2 offences against the person, both in 2018, one offence against property in 2004, 5 theft and kindred offences between 2000 and 2018, to offences relating to police/courts/prisons between 2005 and 2018, 3 drugs offences between 2002 and 2013, 2 firearms/shotgun/offensive weapons offences between 2011 and 2017 and 8 miscellaneous offences between 2002 and 2016.
15. The FtTJ recorded in his decision at paragraph [19] the appellant did not dispute the information about his offending history set out in the respondent's decision letter.
16. On 12 March 2018 the appellant was convicted at the Crown Court of theft from a shop/store, common assault, going equipped for theft and breach of a suspended sentence of having a blade/article which was sharply pointed in a public place. On 3 April 2018 he was sentenced to 8 months and 14 days imprisonment.
17. In light of his convictions, the appellant was notified that the respondent decided to make a deportation order against him under section 5 (1) of the Immigration Act 1971. This was responded to by the appellant on 5 June 2018 and 19 June 2018. Further representations were submitted on 13 August 2018. Following this a decision was made on 25 September 2019 to refuse his human rights claim.

The decision of the Secretary of State dated 25 September 2019:

18. The decision letter is a lengthy document extending to 15 pages.

19. Having set out the appellant's immigration history, the respondent set out a schedule of the appellant's criminal offending. In respect of his article 8 claim the respondent set out the nature of his claim which related to his relationship with his partner and his children, who were British citizens. The appellant has 7 children in the United Kingdom (1 of whom is an adult) and he has a relationship with all of the 6 children except for one child who was the subject of 1 of his offences. The appellant was also in a long-term relationship with NW a British Citizen, since 2013 and they have 2 children together. It was submitted that it would be unduly harsh to deport him given their genuine and subsisting relationship and the impact upon family members.
20. It was accepted that his children were British citizens living in the UK residing with their respective mothers. It is not accepted that he had a genuine and subsisting parental relationship with the children because he had not provided details of his involvement in their lives other than what had been set out in his representations of 13 August 2018. There was no documentary evidence to show that prior to his custody he was conducting action for all of the children as claimed nor that during his period of custody that their main carers, their mothers would have conducted such tasks. It was also noted that he failed to demonstrate that he played an active role in each of the children's lives or contributed meaningfully to them. The respondent noted that he had not been a positive role model for them as he had acted violently against one of the children.
21. It was accepted that it would be unduly harsh for four of the children to live in Jamaica because the appellant had not shown that he had been a permanent father figure in any of their lives, had a family life or lived as family unit with any of them. However in relation to younger child, it was not considered it would be unduly harsh for her to live in Jamaica.
22. In summary it is not accepted that it would be unduly harsh for the children to remain in the UK even though he were to be deported. This was because the children could remain in the care of their mothers as they did during his absence whilst he was in prison, and he had not shown to have a relationship with the children other than being their father. Any current arrangements in place for their care would continue to apply.
23. In respect of his family life with his partner, it was accepted that his partner was a British citizen and that she was in the UK and expecting a 2nd child. Although it may be accepted that the appellant may have had a family life with his partner, they did not live together and therefore the relationship did not constitute a genuine and subsisting relationship.
24. It was not accepted that it would be unduly harsh for his partner to live in Jamaica if she chose to do so. The appellant had not provided any evidence to demonstrate that it would be unduly harsh for her to accompany him to Jamaica and whilst she may never have been there, Jamaica's 1st language is English and there would be no barriers to communication. It would be

cumbersome to adapt at first to a new country, but she would have the appellant's support. It was not accepted either that it would be unduly harsh for her to remain in the UK because she has continuously lived independently of the appellant even though they had been in a long-term relationship for the past 6 years. She had shown that she was not reliant on the appellant for her accommodation, day-to-day care or financial information support and thus deportation would not affect her status.

25. Consideration was given to paragraph 399A in the context of the appellant's private life. It was not accepted that he had been lawfully resident in the UK for most of his life; this was because he had arrived in the UK on 30 March 2008 with an entry clearance Visa as a fiancé until being granted leave to remain on 8 June 2011. He had therefore only resided legally in the UK for the past 11 years. The respondent noted that he 1st came to the UK in 2001 as a visitor aged 25, however he was removed to Jamaica on 24 January 2007 having lived in the UK for a period of 5 years and even if that period had been taken into account it would not demonstrate that he had lived in the UK for most of his life.
26. It was not accepted that he was socially and culturally integrated in the UK. It was also not accepted that there would be very significant obstacles to his integration into the country to which it was proposed to deport him. It was not accepted that he met the requirements of the private life Exceptions against deportation.
27. Under the heading "very compelling circumstances", the respondent noted that his deportation was conducive to the public good and there was a "significant public interest" because he had been convicted of an offence for which he had been sentenced to a period of 8 months and 14 days was a "prolific offender" having amassed 14 convictions for 20 offences. As to his family life, he failed to provide evidence of any genuine subsisting relationship with any of his children in the UK. As regards his current partner, they do not live together, and it was considered that it would be her choice if she decided to accompany him to Jamaica or remain in the UK and therefore to continue with family life with their daughter in Jamaica if she wished to do so. The appellant had not presented any insurmountable obstacles to demonstrate that he could not readapt establish a private life in Jamaica other than a preference to remain in the UK and there was no evidence to suggest that he was now estranged from his country of origin which would amount to undue hardship thus in order to outweigh the very significant public interest in deporting him, he would need to provide evidence of a very strong article 8 claim over and above the circumstances described in the Exceptions to deportation. The respondent considered that in his case no such circumstances had been presented.
28. In conclusion, the respondent considered that his deportation would not breach the UK's obligations under Article 8 of the ECHR and the public interest in deporting him outweighed his right to a private and family life.

The Decision of the First-tier Tribunal:

29. The appeal came before the FtTJ on 10 March 2020. The FtTJ heard oral evidence from the appellant, his partner NW and a witness MP. The FtTJ also had a bundle of documentation including witness statements from the family members and friends and his partner, a report from the probation service and OASys's report.
30. The FtTJ findings of fact and analysis of the issues are set out at paragraphs [19]-[64]. I shall set out a summary of the factual findings made, and the decision reached by the FtTJ.
31. The case advanced on behalf of the appellant was that he had committed minor offences, he had expressed remorse and had not offended since his last offence in November 2018. It was stated that he had a genuine and subsisting parental relationship with 5 of his 6 minor children in the UK who were British citizens and therefore qualifying children. He had a parental relationship with his 7th child in the UK who was over 18. It was also stated that he had a genuine subsisting relationship with his partner who was also a British citizen. It was stated that it would be unduly harsh for any of his children to move to Jamaica or his partner to move to Jamaica because they are all British citizens and have lived in the UK all of their lives. It was also claimed that it would be unduly harsh for the children to remain in the UK without the appellant because it was not fair for his children to be blamed for his actions (see paragraphs 13 and 14).
32. The case advanced on behalf of the respondent was set in the decision letter, and in summary the appellant was a persistent offender and his pattern of offending had shown an escalation in terms of the offences committed. The appellant was expressing remorse at the same time did not accept that he committed one of the offences of possession of a knife and did not accept that he committed the offence of battery against his daughter. The appellant does not have a genuine subsisting parental relationship with his children in the UK and it is in the best interests of the children of the appellant to be removed Jamaica because he is not a positive role model for the children. It was accepted that it would be unduly harsh with children other than A and S to move to Jamaica, but it was not considered it would be unduly harsh for A and S to move to Jamaica with their mother. The respondent does not accept that the appellant has a genuine and subsisting relationship with his partner (see paragraph 15).
33. The judge set out the legal framework at paragraph 18 and thereafter conducted an assessment of whether the appellant was a persistent offender or whether his offending had cause serious harm. It was noted at paragraph 19 that the appellant did not dispute the information about his offending history. At paragraphs 21 - 23, the FtTJ gave her reasons for reaching the conclusion that the appellant was a "persistent offender". The appellant had committed a large number of offences over a long period of time including a wide range of offences: multiple driving whilst uninsured, multiple shoplifting, multiple offences of possession of a knife blade/sharp pointed article in a public place,

multiple drug offences, breach of a restraining order, assault and separately battery. The judge found that the offences were escalating in severity and that there were “serious offences in early years”. The judge also found that the offences from 2011 onwards are of escalating severity in the most recent offence was battery against the appellant’s daughter.

34. Paragraph 24, the judge also found that the offences for which he was convicted on 12 March 2018 did cause serious harm and for this reason he was also a “foreign criminal” as defined in the 2002 Act.
35. For the reasons set out at paragraphs 25 – 28, the judge found that the appellant was in a genuine and subsisting relationship with his partner notwithstanding significant credibility issues. In relation to his children, the judge set out at paragraph 29 the circumstances of his 7 children 1 of whom was an adult. The judge set out that it was accepted that he did not have a genuine subsisting parental relationship with 1 of his children because there was a court order in place that prohibited him having any contact with her or her mother as a result of the appellant being convicted of battery and sentenced to a community order of 12 months unpaid work. There was a restraining order and protection of harassment order for 2 years. This was an offence committed against his daughter. Whilst the respondent did not accept that the appellant had a genuine and subsisting parental relationship with those children, the FtTJ found as a fact that he was in a genuine subsisting parental relationship with the children and at paragraph 38 set out the factual findings made concerning the role that the appellant played with the children, and that whilst he did not live with any of the children he saw them regularly and undertook a range of activities with them in a parental capacity. The judge found also that 1 of the children lived in a different geographical location and thus did not see the appellant as often as the other children and that the primary carers of the children with their respective mothers and that they were responsible for the bulk of the financial cost of bringing up children.
36. As to the best interests of the children, having conducted the “best interests assessment”, the judge found that it was in the best interests of each of the children to remain living in the UK with their respective mothers and also in their best interests to maintain and develop their relationship with the appellant and their other half siblings in the UK by having direct face-to-face contact with them.
37. At paragraphs 41 – 44 the judge set out her reasoning as to why the appellant could not meet the exceptions in section 117C relating to private life noting that it was accepted on behalf of the appellant that he had not been lawfully resident in the UK for most of his life having entered the UK as an adult aged 27. The judge found that he was not socially and culturally integrated in the UK, nor did she find that there were very significant obstacles to his integration to Jamaica having spent most of his life there and being a healthy male who could be expected to find employment. The Judge found that whilst the appellant had stated he had forgotten how life was in the Jamaican and would have no job/accommodation, that they were not “insurmountable obstacles” and that they

were difficulties that he could reasonably be expected to overcome without any particular hardship.

38. As to exception 2, the judge did not find that it the effect of the appellant's deportation on his partner or children would be unduly harsh. The judge gave her reasons at paragraphs 47 - 54. When addressing the children's circumstances, the judge found that each of the children were cared for in the main by their mothers and that the appellant did not live with any of the children. They had all coped when the appellant was in prison and that there would be support for the children from their wider family members in the UK alongside their other half sibling and each other. The judge accepted that if the appellant was separated from the children they would suffer significant distress and would have to adjust and not seeing the appellant on a regular basis face-to-face. However the judge found that they will be able to maintain contact using video and voice calls for the older children, messaging. Whilst the judge did not find that to be equivalent to face-to-face contact it would enable some contact. The judge found that in the event of his deportation the children would retain their current living arrangements with their mothers who would be their primary carers; they would continue at school and would have the support of their family members in the UK. The judge found that they were used to living with their respective mothers. In relation to the 2 younger children, the judge took into account their age and that they were very young children but found that they could reasonably be expected to adapt to not seeing the appellant on a daily basis.
39. The judge also found that the appellant had not provided any satisfactory evidence of his particular importance in the lives of any of the children or of the emotional dependence of the children on him or the emotional harm that would be likely to flow from separation. The judge found the evidence that was before the tribunal was not that there was any specific or unusual attachment or need.
40. As to the position of his partner, if she remained in the UK she would not have day-to-day contact with the appellant, but she could maintain contact via video and voice calls and messaging and would be able to visit the appellant in Jamaica. The judge did not find that that was "unduly harsh".
41. The judge made reference to the respondent accepting that it would be unduly harsh for J, S1 and S2 to move to Jamaica because the appellant was not in a relationship with either their mothers. However it would not be unduly harsh for his partner to move to Jamaica with their 2 children. In this respect, the judge noted the issue of whether it would be unduly harsh for his partner and their 2 children to move to Jamaica was not determinative because she had found that it was not unduly harsh for the appellant to move to Jamaica and for his partner and their 2 children to remain in the UK. However in the alternative the judge found that the appellant would be familiar with Jamaica having grown up there and lived there until he was 27 years of age and he returned there between 2007 and 2008. He had recently undertaken courses to improve his chances of employment and that he could reasonably be expected to find employment there. As to his partner, she was a healthy adult in employment

and it could be reasonably expected that she would find work. Whilst it would be in the best interests of their children to remain in the UK where they are British citizens, they could move to Jamaica with both their parents. In those circumstances the judge found that it would not be unduly harsh for his partner and their 2 young children to move to Jamaica.

42. As the appellant could not satisfy either of the exceptions in section 117C the FtTJ went on to consider whether there were very compelling circumstances over and above those described in the exceptions such that the public interest did not require his deportation. Having taken into account the relevant factors outlined in the earlier part of the assessment and also including the probation officer's report and the OASys report concerning risk of reoffending, the appellant's health, his relationship with his adult daughter, the considerations listed in section 117B, the appellant's general credibility and his non-acceptance of the convictions, the judge found that there were no very compelling circumstances and that the public interest in his deportation had not been outweighed. The FtTJ therefore dismissed the appeal.

The Appeal before the Upper Tribunal:

43. The appellant sought permission to appeal that decision and permission was refused by FtTJ Scott-Baker on 18 August 2020 but granted by UTJ Owens on 31 March 2021 for the following reasons:

"It is just arguable, having regard to the decision of the Court of Appeal in HA(Iraq) [2020] EWCA Civ 176 at the judge felt to have regard at [51] to relevant evidence in respect of the individual children's emotional dependence on him and the emotional harm which would flow from separation.

Although I have granted permission on this ground, there is a question of whether this arguable error has any material effect on the outcome of the appeal. This must be addressed by the appellant's representative at the hearing. Although the other grounds are weaker, all grounds arguable."

44. The appellant was represented by Mr Moksud who appeared on behalf of the appellant before the FtTJ and the respondent was represented by Mr Bates, Senior presenting officer.

The grounds and submissions:

45. Mr Moksud relied upon the written grounds. No further written submissions have been received on behalf of the appellant.
46. However, Mr Moksud made oral submissions to which I have given careful consideration.
47. The written grounds begin with introductory paragraphs concerning the history of the appellant. At paragraph 3 of the grounds, reference is made to paragraphs [57]-[58] and the contents of the probation report but does not set out any alleged error of law.

48. At paragraphs 4 – 6 the written grounds assert that as the appellant had not been sentenced to a custodial sentence of 12 months or more he was not liable to automatic deportation under section 32 of the UK Borders act 2007. It is said that he has committed minor offences, has expressed remorse and had not offended since his last offence in March 2018. Again it is asserted that the appellant does not qualify for automatic deportation.
49. The written grounds challenge the FtTJ's assessment of whether the deportation of the appellant would be "unduly harsh" for the appellant's partner and children. At paragraph 4, it is submitted that the judge had taken into account the decision of KO (Nigeria) v SSHD [2018] UKSC 53 but that the judge concluded that it would not be unduly harsh for his partner and their 2 children to move to Jamaica but there was no consideration by the FtTJ if his removal would be unduly harsh on his 3 older children under the age of 18. It is submitted that the FtTJ erred in law by failing to consider whether it would be unduly harsh for the appellant's 3 older children to move to Jamaica.
50. At paragraph 6 it is submitted that the judge failed to apply the legal principles correctly and failed to take into account paragraphs 399(a) and 399(b) of the Immigration Rules. The grounds state that the judge accepted that the appellant had a genuine and subsisting relationship with his current partner and children (paragraphs 25 and 39). The judge also accepted that will be unduly harsh for his 3 older children to leave the United Kingdom. However the judge failed to apply the provisions of paragraph 399 (a) and (b) and therefore materially erred in law. The appellant can meet the Immigration Rules under paragraph 399 (a) and 399 (b) as he has a genuine subsisting relationship with his British citizen partner and British citizen children.
51. At paragraph 7 of the grounds, paragraph 51 of the FtTJ's decision is challenged. The grounds submit that the appellant's bundle contained documents on the importance of his presence in the children's lives and his children's dependence on him. However the judge failed to take into account those documents including the following; he did not place any weight on the letter from the appellant's children's school; the appellant's children had provided letters regarding their father but the judge did not mention these let alone place any weight on them; the judge did not place any weight on the oral evidence of the witness MP(mother of the appellant's son J) and did not consider statements of other people which were enclosed in the bundle.
52. The last ground asserts that article 8 outside the rules has not been applied at all (see paragraph 8 of the written grounds). It is submitted that the appellant has been living in the UK for the last 18 years and with his current partner and children has established a strong family and private life and to remove him would be a breach of his article 8 rights. The judge did not even mention article 8 outside the rules let alone apply it in the judge failed to address the Razgar 5 stage test and as such erred in law.
53. In his oral submissions Mr Moksud summarised the appellant's background history making reference to his grant of indefinite leave to remain in June 2011.

He submitted that the appellant did not qualify for deportation as the sentence was of only 8 months imprisonment in 2018 and had not been 12 months or more.

54. Mr Moksud submitted that he relied upon the grant permission by UTJ Owens and in particular the reference made to HA (Iraq) and the issue of undue harshness. He submitted the judge did not explain the consequences for the children as a result of the appellant's separation from them. The appellant had 6 minor children in the UK who are British citizens.
55. Mr Moksud then submitted that the judge had placed little or no weight on the probation report which stated that during the supervision period he had complied with the programme of domestic abuse and had changed his behaviour. The appellant was referred to as being motivated and that his licence had been completed. Mr Moksud submitted that the judge did not place appropriate weight on the report and that the appellant was now no longer a risk to anyone.
56. Mr Moksud in his submissions returned to the legal framework again and submitted that the appellant did not qualify for automatic deportation. He submitted that the appellant had a genuine subsisting relationship with his children and also with his partner but that the FtTJ did not explain how the appellant's removal to Jamaica would be unduly harsh upon the appellant and the children. He referred to exception 2 but that the FtTJ did not mention paragraph 399(a) or 399(b) in the decision.
57. Mr Moksud submitted that the decision of the judge was lacking in regard to the consequences for the children of the appellant's removal and there was no reference to the loss to the children if the appellant would be removed to Jamaica and any emotional loss that there would be. There was no indication at all as to how the children would cope.
58. Mr Moksud submitted that the judge did not refer to the children's best interests or the Immigration Rules under paragraph 399(a) and 399 (b).
59. It was submitted that at paragraph 65 of the decision the FtTJ did not mention article 8 considerations outside of the rules and that no consideration was undertaken at all.
60. He reiterated that the decision was lacking a consideration of the children's best interests.
61. Mr Moksud submitted that the judge failed to take into account evidence relating to the children which he summarised as follows: letters from the children's school (p 29 and 30), letters from the children (page 15 - 16) letter from his wife (p14), letter from his ex-wife's mother p21, letter from the appellant's current partner (p22), letter from the appellant's mother-in-law page 27, letter from stepdaughter pages 24 - 26, relationship with current partner page 68.

62. Mr Moksud submitted that whilst the appellant had committed offences he had been a good father and there were letters from his partner and family relatives and the school which indicated that he had been contributing significantly for the children by taking them to school and thus he did not meet the criteria for deportation. The judge had not considered or given sufficient consideration to the documents and had not applied paragraph 399 (a) and therefore the decision should be set aside. In summary he said the appeal should be allowed because the circumstances for the children would be “unduly harsh”.
63. There was no Rule 24 response filed on behalf of the respondent. Mr Bates on behalf of the respondent made the following oral submissions.
64. He submitted that there were 2 points made by Mr Moksud, firstly that the judge failed to mention or consider paragraph 399 (a) and (b) and secondly that the judge had not considered article 8 outside of the rules.
65. By reference to the 1st issue, he submitted that the immigration rules mirrored section 117C and that the judge had referred to this at paragraph [18] of his decision and had also stated at paragraph 18 “I have also considered the rules which mirror those sections” therefore there was no error of law in his decision of any materiality and the appellant’s representative has not pointed out any differences between the rules or section 117C.
66. As to the 2nd issue and article 8 outside of the rules, the general legal authorities accept that the rules relating to deportation are a complete code for article 8 because built into the assessment is the appropriate threshold the public interest, undue harshness and exceptions are deportation and if the exceptions are not made out section 117C(6) and “very compelling circumstances” provide for the article 8 assessment and therefore the FtTJ was correct at paragraph [65] in her assessment of article 8 and considering whether there were “very compelling circumstances”. He therefore submitted the grounds were in error.
67. As to specific issues, the FtTJ assessed the appeal on the basis of it being a “conducive deportation” and not an “automatic deportation”. The FtTJ assessed the appellant as a “persistent offender” between paragraphs 19 - 23 and having considered the relevant case law at paragraph 21 the FtTJ went on to address the appellant’s offending history at paragraph 22 noting also that the offences included a wide range of offences and ones that were escalating in severity and the most recent offence was a battery against his daughter. Having undertaken an assessment of the appellant at [23] found him to be a “persistent offender” and thus a foreign criminal as defined in the 2002 Act.
68. As to the issue of the probation report, Mr Bates submitted that this had to be read in conjunction with the findings made that he was a “persistent offender” as to the issue of rehabilitation this aspect is dealt with in the decision of HA (Iraq) and would only be relevant to the “very compelling circumstances” assessment and would be irrelevant to the issue of “undue harshness”. The

issue of rehabilitation would carry some weight but would rarely be of great weight. Based on the factors here, the appellant had a long history of offending and the fact that the appellant had undertaken courses and had not offended, whilst being subject to deportation proceedings, it was understandable why the judge did not place great weight on the probation report.

69. At paragraph 24 the judge considered whether “serious harm” had been caused and gave reasons for this by reference to the conviction in 2018 and that that offence did cause serious harm and again he was therefore a “foreign criminal”. Consequently there was a public interest in his deportation because he was a persistent offender who had caused serious harm and therefore the judge was right to conclude that this was a “conducive deportation” as found by him between paragraphs 19 – 24 of the decision.
70. As to the approach to the “unduly harsh test”, at paragraph 54 the judge noted the respondent’s acceptance that it would be unduly harsh for the 3 older children to move to Jamaica and therefore this was not an issue before the tribunal. The respondent’s partner could travel to Jamaica without it being unduly harsh for the reasons set out at paragraph [54]. This was an alternative finding and the judge also found that it would not be unduly harsh upon the appellant’s partner or children if the appellant was deported. Therefore applying the “stay scenario” the judge looked at the facts and noted that he had previously had employment in the UK and had undertaken courses in which he could improve his chances of employment. His partner was a healthy adult in employment and took into account the best interests of both A and S which were to remain in the UK but notwithstanding their best interests, the judge found that it would not be unduly harsh for the appellant’s partner and A and S to move to Jamaica.
71. Mr Bates submitted that at paragraph [40] the judge undertook the best interests assessment and that it was in the best interest of all the children to remain in the UK with their father and mother. This was not a controversial statement, and it was not determinative but a primary consideration. The judge considered the assessment of undue harshness but found that it could not meet the high threshold necessary.
72. Mr Bates submitted that the grounds focused on paragraph 51 and where the judge had stated that the appellant had not provided “satisfactory evidence of his particular importance in the lives of any of the children or of the emotional dependence of the children on him or the emotional harm that would be likely to flow from separation”. The judge is not saying that there was no evidence that having considered the evidence that it was not “satisfactory”. Mr Bates submitted that it had been argued on behalf of the appellant that there were no findings on the emotional impact upon the children but that was set out in the opening sentence of paragraph 50 where the judge found “if the appellant had to go to Jamaica and the children stayed in the UK, the children would suffer significant distress. They would need to adjust not seeing the appellant face-to-face on a regular basis.” Therefore the judge had in mind the emotional impact

upon the children and therefore had regard to the evidence. At [38] the judge had regard to the evidence and set out at sub paragraphs (a) –(h) those findings of fact including that the children’s primary carer was their mother and that it was she who was making the significant decisions. At sub paragraph (h) the judge found that the appellant’s role was to “carry out particular activities of the children and to facilitate the children having contact with each other.”

73. Mr Bates submitted that the documents referred to by Mr Moksud were those which supported the appellant’s evidence that he was in a genuine and subsisting relationship. It was not disputed that the appellant took the children to school and the judge had not disregarded this evidence but reach the conclusion that it did not meet the threshold of “undue harshness”. He submitted that the appellant’s representative had not directed the tribunal’s attention to any information in those documents that would reach a threshold of undue harshness other than there being a separation.
74. Mr Bates submitted that the judge had looked at the Exceptions to deportation and found that there were no very significant obstacles to his reintegration, he looked at the potential impact on the children and accepted there would be a significant impact but not one that reached the level of undue harshness therefore there was no error of law in the judge’s approach.
75. He submitted that counsel’s submission was that the judge had not given sufficient weight to the documents, but weight is a matter for the judge. There was nothing irrational or perverse in the findings made by the judge and it was within the realms of the permitted outcome and adequate reasons had been given. At paragraph [64] the judge noted that all the evidence been taken into account. The judge also undertook a holistic assessment under the “very compelling circumstances” test under s117C(6) weighing up the matters both against and in favour of the appellant. On the side of the respondent, the appellant had been found to be a persistent offender who had caused serious harm and that there was a strong public interest in his deportation. At paragraph 64 the judge considered the issue of rehabilitation and consistent with the decision in HA (Iraq). The judge properly considered the factual circumstances and that the real issue was that the appellant did not agree with the decision but there was no material error of law identified in behalf of the appellant.
76. By way of reply, Mr Moksud submitted there was no explanation given by the judge for failing to take into account paragraph 399(a) or (b) and with reference to deportation of foreign criminals and the judge did not address those rules and that was a material error of law.
77. He submitted that in the decision at page 14 the respondent addressed article 8 outside the rules but the judge failed to do so.
78. Mr Moksud submitted that the judge had found him to be a “persistent offender”, but this does not apply because he had been convicted of offences of

cannabis which would be lawful in Jamaica. As to “serious harm” the probation report was in positive terms about the appellant.

79. As to paragraph 54 he submitted that the children would not move to Jamaica and therefore it meant the appellant would be successful in his appeal and he would meet the rules.
80. Mr Moksud returned to the documents which he described as “extensive” and that the decision should be set aside and that the appeal should be allowed out right.
81. At the conclusion of the hearing, I reserved my decision.

Discussion:

82. I have carefully considered the submissions made by each of the advocates and I am grateful for the clear submissions made by each of them as reflected above. I have set out in full the submissions made by each of the advocates.
83. It has been submitted on behalf of the appellant that by virtue of his sentence which was less than 12 months, he is not liable to automatic deportation under section 32 of the UK Borders Act 2007. At paragraph 6 of the grounds Mr Moksud refers to the FtTJ having erred in law by failing to take into account paragraph 399 (a) and (b). The reasoning set out at paragraph 6 is that the judge had not applied the law correctly and on the facts accepted by the judge that the appellant has a genuine and subsisting relationship with his current partner and children and that she accepted it would be unduly harsh for the 3 older children to leave the United Kingdom. However the judge had “failed to apply the provisions of paragraph 399 (a) and (b) of the Immigration Rules and thereby has materially erred in law. The appellant should meet the Immigration Rules 399 (a) and 399 (b) as he has genuine subsisting relationship with his British citizen partner and British citizen children”.
84. Whilst the grounds give the appearance of challenging the legal framework under which the assessment was undertaken, the FtTJ set out the relevant legal framework in her summary at paragraph [8]. Contrary to the submission made on behalf of the appellant, the FtTJ proceeded on the basis that he was not liable to automatic deportation under the UK Borders Act and expressly stated this at paragraph [8]. The position on behalf of the respondent was that a decision to deport the appellant was made under section 3(5) of the Immigration Act 1971 which identifies who is liable to deportation as follows :-

"(5) A person who is not a British citizen is liable to deportation from the United Kingdom if-

- (a) the Secretary of State deems his deportation to be conducive to the public good; or

/.....

85. At paragraph [7] of her decision the FtTJ set out that the appeal before her was a “a human rights appeal”. The decision under appeal was the refusal by the Secretary of State of a human rights claim; that is to say, the refusal of a claim, defined by section 113(1) of the Nationality, Immigration and Asylum Act 2002, that removal from the United Kingdom or a requirement to leave it would be unlawful under section 6 of the 1998 Act.
86. The First-tier Tribunal was not deciding an appeal against the decision to make a deportation order and/or the decision that removal of the individual is, in the Secretary of State's view, conducive to the public good but was concerned only with whether removal etc in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights.
87. By virtue of section 117A(1) of the 2002 Act a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8. In cases concerning the deportation of a foreign criminal (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights (see for example NE-A (Nigeria) [2017] EWCA Civ 239, at paragraph 14, and CI (Nigeria), at paragraph 20).
88. By contrast, the relevant Rules are not legislation, but a statement of the practice to be followed by the respondent's officials when assessing a claim by an individual seeking to resist deportation and a reflection of her view as to where the public interest lies. On this basis, Leggatt LJ (as he then was) concluded at paragraph 21 of CI (Nigeria) that:
- “In these circumstances it seems to me that it is generally unnecessary for a tribunal or court in a case in which a decision to deport a “foreign criminal” is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis.”
89. In the decision of Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 34 (IAC) the Upper Tribunal set out that this is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by a tribunal, not the provisions of the Rules.
90. Section 117A of the 2002 Act provides as follows:
- “117A Application of this Part
- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

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

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

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).”

91. Section 117C provides:

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

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

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

92. Section 117D defines the term "foreign criminal":

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

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender."

93. Thus a "foreign criminal" is defined in s. 117D(2) as a person who is not a British citizen who has been convicted in the United Kingdom of an offence and has either been sentenced to a period of imprisonment of at least 12 months or been convicted of an offence that has caused serious harm or is a persistent offender.

94. At paragraph 8 of her decision, the FtTJ set out the legal issues by reference to the submissions of the advocates. On behalf of the respondent it was confirmed that it was her position that the appellant was a "persistent offender" and was therefore a "foreign criminal" as defined in section 117D of the 2002 Act. The judge also noted that the respondent's position was that the appellant's offending had caused "serious harm". The judge also recorded the submission of Mr Moksud as follows "Mr Moksud confirms that it was accepted that exception 1 in S117C of the 2002 Act did not apply because the appellant has not been lawfully resident in the UK for most of his life. Mr Moksud submitted that exception 2 in section 117C applied".

95. It is against that background that I engage with the submissions advanced on behalf of the appellant. On any reading of the decision the judge did not purport to apply the automatic deportation provisions. The judge expressly stated so and recorded this at paragraph 8 of her decision. It was also properly recorded that the appellant fell within the definition of a "foreign criminal" as defined in section 117D because he was a "persistent offender". This was the basis upon which the respondent considered the appellant (but also that he been convicted of an offence which cause serious harm) and as a result the respondent and the decision letter applied the provisions in Rules 398, 399. 399A which mirrors the provisions in section 117C as set out above.

96. The grounds do not challenge the FtTJ's assessment of the appellant as a "persistent offender" and therefore there is no error established on the basis that the judge misapplied the legal framework.
97. As to the criticism mounted that the judge erred by not applying section 399(a) and (b) there is no merit in this submission. The judge was plainly aware of the correct legal framework having set out the respondent's position and as reflected in the decision letter and also in the oral submissions made at paragraphs 8 and at paragraph 18. As submitted by Mr Bates, the FtTJ expressly stated as follows" whilst I referred in the main to the relevant sections of the 2002 Act, I have also considered the rules which mirror those sections. Both section 117C of the 2002 Act and the relevant immigration rules, "set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8 (2) " (SSHD v PF (Nigeria) [2019]EWCA Civ 1139). The structured analysis must take place with reference to the particular facts of the appeal in question."
98. The reasoning set out in the written grounds provides no basis for stating that the judge was wrong to apply the provisions within paragraph 5A and in fact at paragraph 8 of the judge recorded Mr Moksud's submission that exception 2 of S117C applied. Consequently I reject the submission made that the judge applied the wrong legal framework as asserted in the written grounds and the oral submissions that have been made.
99. It has also been submitted in the written grounds and the oral submissions that the judge failed to apply article 8 outside of the rules. The basis for this submission is that the appellant had been living in the UK for the last 18 years and with his partner and children had established a strong family and private life in the UK and thus removing him would be a breach of his article 8 rights and those of his family members. It is submitted that the judge did not even mention article 8 outside the immigration rules nor apply it and failed to address the 5 stage test in Razgar and therefore erred in law.
100. There is no error of law in the approach taken by the FtTJ in this respect either. The FtTJ had regard to S117C (6) whether there were "very compelling circumstances" and took into account the factors relied upon by the appellant and those by the respondent. They included his length of residence in the UK, the judge having found that he entered the UK on 22 August 2001 aged 27 had been in the UK since then apart from the period between January 2007 March 2008 when he was in Jamaica (at [42]). The FtTJ had made factual findings as to the family life he had with his partner and children and took into account his relationship with them. Other findings made by the judge at [43] related to his lack of social and cultural integration in the light of his offending history, his failure to accept his convictions, his failure to provide evidence of employment and that there were no very significant obstacles to his integration to Jamaica having spent most of his life there and being a healthy male could be expected to find employment (at [44]). The judge took into account his health (at [59]) but found that the evidence was that he regularly took his children swimming and was consistent with him being "physically fit" and that his health condition

had no material impact. At paragraph [60] the judge considered his relationship with his adult daughter and at [61] the judge had regard to the considerations listed in section 117B. At paragraphs 56, 57, 58 the FtTJ address the issue of risk of reoffending and the probation officers report. Mr Moksud has not outlined any factor which the judge failed to consider or take into account as relevant under the article 8 assessment.

101. Furthermore, it was not necessary to set out the 5 stage approach in Razgar, as it was accepted that the appellant had established a private and family life in the UK and that there would be an interference with that which was in accordance with the law and that the only issue was that of the proportionality of the decision. Consequently the framework of the article 8 assessment undertaken by the FtTJ was not in error.
102. It is submitted on behalf of the appellant that the FtTJ failed to give sufficient weight to the probation report. The FtTJ addressed this at paragraphs 56 – 58 and also at paragraph 62. It is clear from those paragraphs that the FtTJ placed weight and reliance upon the probation report. Whilst the FtTJ did not accept the submission that the OASys’s report had any mistakes in it by reference to whether the appellant had children in Jamaica having made the finding “I do not accept that in 2 separate interviews, the interviewer recorded that the appellant had children in Jamaica erroneously. I find that the appellant has children in Jamaica who are over the age of 18 and the evidence given at the hearing in this respect is further undermining his credibility” the judge also recorded that “This issue does not undermine the probation report on which I place reliance”.
103. At paragraph 57, the judge took into account the probation report in the light of the earlier OASys report which had stated that the appellant had a low risk of serious harm to the public and staff when in the community and medium risk to children and known adults. The judge noted that the report was dated February 2018 and provided that factors likely to reduce risk included obtaining employment, skills training, completing programs, addressing beliefs which supported his current or previous behaviour and developing victim empathy. In this context the judge noted that the probation report was more recent than the OASys report having been written on 14 January 2020 with reference to the period between 3 April 2018 and 14 November 2019 and that it stated that the appellant appears motivated to change his behaviour. The FtTJ also recorded the probation officer saying that the appellant “obtained part-time work as a cleaner and later full-time work in a warehouse.”
104. At paragraph [58] the FtTJ undertook her assessment and took into account that the probation officer’s report “weighs in the appellant’s favour”. The judge expressly found that the appellant had engaged with the courses that had been offered to reduce the level of harm to children and adults known to him and concluded that it was “reasonable to expect that his risk in this respected reduced”. However the judge found that it was “significant that the appellant has not provided evidence of regular employment and I do not accept that the appellant has maintained a full-time job in a warehouse or elsewhere after

finishing his probation supervision and that is undermining of his general intentions to work legitimately on a long-term basis.”

105. At paragraph [62] the FtTJ returned to the issue of credibility and risk of reoffending setting out her finding on the appellant’s evidence regarding his treatment of one of his children who had been the subject of the last offence of battery. The judge recorded that he had not accepted that he had committed the offence. The judge noted the details of injuries sustained and that the appellant had given no reasonable explanation as to how they had been sustained. The judge found that the conviction was the last in a long line of convictions spanning a period of many years and that the problems of the credibility of the appellant “undermine his claims to be remorseful”. The judge properly observed that the evidence in the OASys report did not address specifically the risk of reoffending but dealt with the risk of harm although she found there to be an overlap. Whilst the risk of harm to known adults and children was medium, the judge found that she was satisfied that the appellant had reduced that risk by the completion of the courses referred to in the probation report and that that had “weighed in his favour”. However the judge concluded, taking into account the appellant’s history of offending together with the credibility issues, “that there remains a material risk that he will reoffend, in particular in offences which do not involve domestic violence.”
106. The Court of Appeal addressed rehabilitation in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176. After having surveyed the authorities (noting that he had ‘some difficulty’ with a suggestion by Hamblen LJ at [84] of Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551 that rehabilitation would ‘generally be of little or no material weight’), Underhill LJ held, at [141]:
- ‘...the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight...’
107. When the paragraphs of the FtTJ’s decision are read together, it is clear that the FtTJ did place weight and reliance upon the probation report and accepted that the appellant’s risk of reoffending was reduced by the completion of the courses referred to in the probation report which was a factor which weighed in his favour. However the judge gave adequate and sustainable reasons for reaching the conclusion that when taking account his history of offending, alongside the credibility issues that were outlined at paragraphs 56, 57, 58 and 62, that there remained a material risk of reoffending. The according of weight to evidence is a matter for the judge. It is not an arguable error of law for a judge to give too little or too much weight to a relevant factor unless the exercise is irrational. Thus the matter of weight attached to the report was a

matter for the judge and it is plain that she had full regard to that report in her assessment of the evidence.

108. Consequently there is no error of law in the weight attached to the probation officers report in the assessment of the evidence.
109. The grounds challenge the FtTJ's assessment at paragraph 51 of her decision on the basis that the FtTJ failed to consider the documentary evidence provided which is relevant to the issue of whether the children's separation from their father would be "unduly harsh". In particular Mr Moksud relies upon the submission that the FtTJ did not place any weight on the letters from the children's school/nursery and that the appellant's children provided letters and it is said that the FtTJ erred in failing to place weight on that material and the statements in the bundle from other family relatives and friends.
110. The grounds do not challenge the legal test applied by the FtTJ but the grant of permission at paragraph 3 states "it is just arguable, having regard to the decision of the Court of Appeal in HA(Iraq) [2020] EWCA Civ 1176 at the judge failed to have regard at (51) the relevant evidence in respect of the individual children's emotional dependence on him and the emotional harm which would flow from separation. Although I have granted permission of this ground, there is a question of whether this arguable error has any material effect on the outcome of the appeal. This must be addressed by the appellant's representative at the hearing."
111. I therefore turn to the decision of HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 (referred to as "HA (Iraq)"). A summary of the test which applies in that regard is to be found at [39] to [57] of the judgment informed also by the comments of the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)").
112. The relevant points made by the Court can be summarised in the following passages:
- "THE MEANING OF UNDULY HARSH"
39. Both Appellants contend that the effect of their deportation on their children would be 'unduly harsh', within the meaning of section 117C (5) - i.e. Exception 2 - and paragraph 399 (a) of the Rules. There is an issue before us about the height of the threshold which that phrase sets. The meaning of 'unduly harsh' was considered in *KO (Nigeria)* ...
40. ... It is important to bear in mind, and is perhaps rather unfortunate for our purposes, that the actual issue in *KO (Nigeria)* was a very specific one, namely whether the word "unduly" referred back to sub-section (2) of section 117C and thus required what Lord Carnwath described at para. 20 of his judgment as "balancing of the relative seriousness of the offence" - "the relative seriousness issue" ... Although in the course of his discussion of that issue he does also express a view as to the height of the threshold which the phrase "unduly harsh" connotes, that is not his primary focus.

...

42. ... Lord Carnwath considers the language of section 117C, and more particularly subsection (5), as regards the relative seriousness issue ... He continues, at para. 23:

'On the other hand, the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further 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 the 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 relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more.'

That is an important passage, and it is necessary to identify exactly what Lord Carnwath is and is not saying.

43. The starting point is that the question to which the reasoning is directed is whether the word 'unduly' imports a requirement to consider 'the severity of the parent's offence: that, as I have said, was the actual issue in the appeal. Lord Carnwath's conclusion is that it does not... it follows that it is irrelevant whether the sentence was at the top or the bottom of the range between one year and four: as Lord Carnwath says, the only relevance of the length of the sentence is to establish whether the foreign criminal is a medium offender or not.

44. In order to establish that the word 'unduly' was not directed to the relative seriousness issue it was necessary for Lord Carnwath to say to what it was in fact directed. That is what he does in the first part of the paragraph. The effect of what he says is that 'unduly' is directed to the *degree* of harshness required: some level of harshness is to be regarded as 'acceptable or justifiable' in the context of the public interest in the deportation of foreign criminals, and what 'unduly' does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not primarily on how to define the 'acceptable' level of harshness. It is true that he refers to a degree of harshness 'going beyond what would necessarily be involved for any child faced with the deportation of a parent', but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would 'necessarily' be suffered by 'any' child (indeed one can imagine unusual cases where the deportation of a parent would not be 'harsh' for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category.

45. Lord Carnwath then turns more particularly to the case of KO ... The only part that is relevant for our purposes is para. 27, where he says:

'Authoritative guidance as to the meaning of 'unduly harsh' in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563 ... They referred to the 'evaluative assessment' required of the tribunal:

'By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe,

or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.'

...

50. What light do those passages shed on the meaning of 'unduly harsh' (beyond the conclusion on the relative seriousness issue)?

51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value.

54. The Appellants of course accept that Lord Carnwath said what he said in the passages to which I have referred. But they contend that it is not a complete statement of the relevant law and/or that it is capable of being misunderstood. In their joint skeleton argument they refer to the statement in para. 23 of Lord Carnwath's judgment that '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' and continue:

'This statement, taken in isolation, creates the opportunity for a court or tribunal to reach a conclusion on undue harshness without due regard to the section 55 duty or the best interests of the child and without careful analysis of all relevant factors specific to the child in any particular case. Instead, such considerations risk being 'swept up' under the general conclusion that the emotional and psychological impact on the child would not be anything other than that which is ordinarily expected by the deportation of a parent ... that cannot have been the intention of the Supreme Court in *KO (Nigeria)*, which would otherwise create an unreasonably high threshold.'

...

55. ... it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55 ... The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test ...

56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond 'that which is ordinarily expected by the deportation of a parent' ... I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an

appellant to establish a degree of harshness going beyond a threshold 'acceptable' level. It is not necessarily wrong to describe that as an 'ordinary' level of harshness.... However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, 'ordinary' is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of 'undue' harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being 'is this level of harshness out of the ordinary?' they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.

57. ... Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50-53 above."

113. When considering the grounds, as Mr Bates submitted the FtTJ made a number of factual findings in relation to the circumstances of the family members including the children which are set out at paragraphs 36, 37 and particularly at paragraph 38. At paragraph 36, the judge identified the evidence that she had found to be inconsistent in material respects highlighting that which related to the financial contributions made by the appellant and also that which related to the level of contact between some of the children and the appellant.
114. At paragraph 38, the FtTJ set out the factual findings in relation to the each of the children's individual circumstances. The FtTJ concluded that the appellant regularly saw the children and made arrangements to ensure that all the children saw each other on a regular basis. The judge identified that in relation to J, he lived in a different geographical location therefore the appellant did not see him as often as he saw the other children. The judge set out the level of contact between S1 and S2 and also A and S (see paragraphs (b)-(e)) and found that the mothers of the children were their "primary carers and are responsible for the bulk of the financial cost of bringing up the children and all the significant decisions about the children. They are also responsible for the day-to-day parenting of the children including checking their health, dealing school matters and knowing when they need new clothes or other items." At (h) the FtTJ found that "the role of the appellant is to carry out particular activities with the children and to facilitate the children having contact with each other."
115. At paragraph 39, the judge concluded that from the evidence whilst the appellant did not live with any of the children he saw them regularly and undertook a range of activities with them in a parental capacity and was

considered by the children, their mothers and the school/nursery to be the father of the children. The judge concluded that there was a genuine subsisting parental relationship between the appellant in each of the individual children concerned.

116. At paragraph 40, the judge undertook the best interests assessment having considered each child individually. The judge found that their best interests were the same. Whilst reference was made to the history of domestic violence which included breaching a restraining order against an ex-partner and the offence against one of his children, the judge considered the OASys's report which stated that he posed a medium risk to known adults and children but concluded that having taken it into account that it did not lead to the conclusion that it was not in the best interests of the children to maintain their face-to-face contact with the appellant. The judge found "each of the children lives with his or her respective mother and is a British citizen. I find that it is in the best interests of each of the children to remain living in the UK with their respective mothers. It is also in each of their best interests to maintain and develop the relationship with the appellant and the other half siblings in the UK by having direct face-to-face contact with them."
117. The FtTJ then addressed exception 2 and S117C(5) at paragraphs 46 - 54 in the light of the decision of KO (Nigeria) and having taken into account the best interests of the children (see paragraphs 47 - 48). The FtTJ found that the evidence did not support a finding that the appellant's removal to Jamaica would be unduly harsh and set out her reasoning at paragraphs 49 - 54.
118. Whilst the FtTJ did not have the advantage of the decision HA(Iraq) the reasoning of the FtTJ is consistent with the approach set out in that decision. The FtTJ undertook a holistic assessment of each of the children's circumstances. Whilst the thrust of the grounds and submissions were that the FtTJ failed to have regard to the evidence, that is not made out when reading the decision of the FtTJ as a whole. The judge expressly stated at paragraph [38] that " I have taken into account that the evidence comes from a number of different sources including the children themselves, the appellant's adult child X, her sister X, the mothers of the children, the school of S1 and S2, the nursery of A and other family members. Based on the consistent evidence from those sources, I make the following findings ..." The FtTJ then went on to make a factual assessment from that evidence between paragraphs 38 (a) -(h) and at paragraph 39.
119. The factual findings made by the judge were directly taken from the evidence in the bundle and took account of the evidence from the children's respective mothers as to the role the appellant undertook with the family and the children themselves. By way of example, the FtTJ stated that in relation to the circumstances of J that he lived in a different geographical location and that the appellant did not see him as often as the other children that would see him each year on his birthday and would see him in the school holidays often staying with him for a number of weeks (see paragraphs 38 (b) and (c)). That evidence is consistent and is taken from the witness statement of J's mother at p13. As to

paragraph 38 (d) the factual findings made by the FtTJ as to the activities undertaken with S1 and S2 is directly taken from their letters (see page 15) and the evidence from their mother at page 11.

120. Mr Moksud also submits that the judge failed to have regard to the evidence of the school/nursery. That evidence is set out at pages 29 – 30 of the bundle. At page 30 in respect of the nursery and relevant to A, the letter gives little detail. It states that the appellant is known as “a parent at the nursery and was prevalent to events like graduation or the Nativity. We have fed back to the parent where his daughter is developmentally, and we saw him at least twice a week if not more on pick up from nursery. He was a quiet man let mum do most of the talking that he was also smiley and said hello.” At page 29 in relation to S1 and S2 it was also a brief letter and stated as follows “he continues to be involved in their education. He will pick up from school or collect them from the school bus. He has attended several school events to support his children; class assemblies and school plays for example.”
121. The FtTJ expressly referred to having considered this evidence at paragraph 38 and also at paragraph 39 which is consistent with her factual finding set out in subparagraph (d) that the appellant was known to the school that S1 and S2 attend and that he has attended school events that sometimes he goes to pick them up from school. It is plain that the FtTJ also had express regard to that evidence in her factual finding at paragraph [39] where the judge found that while the appellant “did not live with any of the children, he saw them regularly and undertook a range of activities with them in a parental capacity and is considered by the children, their mothers and the school/nursery to be the father of the children.”
122. When considering the FtTJ’s assessment of the evidence set out at paragraph 38 – 40 and 49 – 54, the FtTJ plainly took into account the written and oral evidence before reaching those findings of fact. The judge properly acknowledged the role played by the appellant and the lives of his children and had in mind all the relevant evidence including that from the respective mothers of children and the evidence from other relatives and friends. The assessment of the evidence took into account the factors identified in HA (Iraq) and the judge took into account the circumstances of each of the children and that all of the children remained living with their respective mothers and that there was no reason to believe that those circumstances could not continue. The judge found from the evidence that the mothers of the children were their “primary carers and responsible for the bulk of the financial contributions for the upbringing of their children” and that “all the significant decisions” about the children were made by their mothers and that they were also responsible for the day-to-day parenting of the children including checking their health, dealing with the school matters and knowing when they need new clothes or other items”. At paragraph 38, the judge set out the contact that the appellant had with each of the children taking account of the evidence (see paragraphs (a)- (e) and expressly took into account that the appellant had made arrangements to ensure that the children see each other on a regular basis (see (a)).

123. By way of comparison the judge found that the appellant's role in the family dynamics was to "carry out particular activities of the children and facilitate the children having contact with each other". At paragraph 38 (f) and (g) the FtTJ address the issue of financial contributions but found that each of the mothers of the children were responsible for the bulk of the financial contributions and that the financial confusions made by the appellant were on an "ad hoc basis".
124. It was those factual findings which underpinned the FtTJ's assessment of undue harshness set out at paragraph 47 – 54. Thus the FtTJ properly acknowledged his role in the family at paragraph [49] but concluded on the evidence that "the children are cared for in the main by their mothers". As to the issue of the emotional impact of separation, the judge took into account that the mothers of all the children coped when the appellant was in custody and that the evidence demonstrated that the children had the support of "wider family members in the UK" and also their half sibling he was an adult (at paragraph [49]).
125. Whilst Mr Moksud referred to the evidence from the school and the nursery, as recorded above the evidence is brief in its contents and provides no details as to the children's emotional needs or provides any factual information about them relevant to the issue of whether the children separation from their father would be "unduly harsh". At paragraph [50] the FtTJ acknowledged that if the children were separated from their father they would suffer "significant distress" and that they would have to adjust to not seeing their father face-to-face. However the judge considered the prospect of ongoing contact and although not face-to-face found that the relationship could continue and whilst it was not equivalent face-to-face contact it would enable some contact. The judge found that they would be able to retain their current living arrangements by living with their primary carers and continue to be at school and have the support of their family members. In respect of the children A and S, the FtTJ took into account their ages and that they were "both very young children" and that on her analysis "could reasonably expect it to adapt to not seeing the appellant on a daily basis". Thus the judge considered the prospects of contact so that the relationship would continue and considered the children's arrangements in the event of separation from the appellant and did so in the context of the ages of children and the family care arrangements.
126. At paragraph [51] the judge made reference to the failure of the appellant in providing satisfactory evidence of his particular importance in the lives of any of the children or the emotional dependence of the children on him. The judge noted that his claim was that it was particular important to his sons that they had a male role model and that the appellant facilitated the children all getting together a regular basis. The judge concluded that that evidence was not specific or demonstrated any unusual attachment or need.
127. In summary whilst paragraph 51 has been challenged on the basis that it failed to consider the evidence in the bundle, that is not made out as when the FtTJ's decision is read as a whole and in particular when regard is given to the factual findings made at paragraphs 38 – 39 which were made upon the evidence given to the tribunal and upon which the judge stated she had expressly had regard

to. I have not been directed to any evidence that undermines paragraph 51 or any of the factual findings made at paragraph 38 – 39. There was no evidence that the children’s school attendance, or their behaviour was affected by the appellant’s earlier absence nor was there any evidence identifying that any of the children had any health needs or any other specific needs. The assessment undertaken by the FtTJ was focused on the children and did not fall into the error for looking for something beyond the commonplace or unusual. It is plain that the judge accepted and acknowledged that there would be an impact on the children but having made a self-direction at paragraph [47] and applying KO(Nigeria), the judge did not reach the conclusion on the evidence that it reached the threshold of being “unduly harsh”.

128. I remind myself that an appeal to the tribunal may only lie where there is an error of law. Disagreement with a judge's factual conclusions, the appraisal of the evidence or assessment of credibility, or the evaluation of risk does not give rise to an error of law. It is trite law that many judges will approach the same set of facts very differently. In UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 Floyd LJ stated at paragraph 19:

“19. I start with two preliminary observations about the nature of, and approach to, and appeal to the UT. First, the right of appeal to the UT is “on any point of law arising from a decision made by the [FTT] other than an excluded decision”: Tribunal, Courts and Enforcement Act 2007 (“the 2007 Act”), section 11 (1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12 (1) and (2) of the 2007 Act. If there is no error of law in the FTT’s decision, the decision will stand. Secondly, although “error of law” is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v SSHD at [30]:

“Appellate courts should not rush to find such misdirection simply, because they might have reached a different conclusion on the facts or express themselves differently.”

129. It is now well established that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreement about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence as here. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole and she plainly did so, giving adequate reasons for her decision.
130. I note that following the hearing a further statement/letter was received by the tribunal in August 2021 from the appellant’s former partner setting out new evidence in relation to the children. That evidence did not form part of the evidence that had been before the FtTJ and therefore it cannot be said that the judge erred in failing to take into account evidence that was not put before the tribunal. However, if there is fresh evidence available, the correct course is for a

fresh application made to the respondent but that is a matter for the appellant (see Akter (appellate jurisdiction, E and R challenges) [2021] UKUT 272).

131. For the reasons set out, I am satisfied that the decision of the FtTJ did not involve the making of a material error on a point of law so that the Upper Tribunal should set aside the decision. I therefore dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtTJ shall stand.

Signed

Dated 17 November 2021

Upper Tribunal Judge Reeds

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.