



IAC-FH-CK-V1

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

Appeal Number: PA/02412/2019

**THE IMMIGRATION ACTS**

**Heard at Field House Face-to-Face**

**On 8<sup>th</sup> November 2021**

**Decision & Reasons  
Promulgated**

**On 24 February 2022**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DJ**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Ms Z Ahmad, Home Office Presenting Officer

For the Respondent: Mr T Bahja, Counsel instructed by Bestway Solicitors

**DECISION AND REASONS**

**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 his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to

contempt of court proceedings. This direction is made because of the minor children and proceedings relating to them.

1. The appellant is a citizen of Jamaica born on 15<sup>th</sup> April 1981 and entered the UK as a visitor on 25<sup>th</sup> November 2001. He appeals against the decision of the Secretary of State dated 27<sup>th</sup> February 2019 refusing his human rights claim. At the same time a deportation order was made against him as a foreign criminal on the basis of being a persistent offender. He has been convicted of numerous criminal offences since 2006 and has also been diagnosed as paranoid schizophrenic. The appellant had six biological children born between 2007 and 2013 and a stepdaughter.
2. The appellant appealed the Secretary of State's refusal decision on the basis of Articles 2, 3, 8 and 14 of the European Convention on Human Rights. His appeal was heard by First-tier Tribunal Judge Ruddick on 21<sup>st</sup> February 2020 but the decision, promulgated on 10<sup>th</sup> March 2020, was set aside by Upper Tribunal Judge Plimmer in a decision dated 7<sup>th</sup> September 2020 on the basis that the judge had not applied the guidance in **Chege ("is a persistent offender") [2016] UKUT 187**. That decision was approved in **Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551**. In **Mahmood & Ors v Secretary of State for the Home Department [2020] EWCA Civ 717** Simon LJ at paragraph 71 recognised that there may be some cases where a person who was a persistent offender could show, through remorse or rehabilitation, that they were no longer properly categorised as such, but held that the cases were likely to be exceptional. Hamblen LJ in **Binbuga** at paragraph 46 confirmed that there should be an established period of rehabilitation and keeping out of trouble for "a significant period of time".
3. The judge did not consider that *lack* of offending may be of little significance "in deciding whether, looking at his history as a whole, he fits the description" of a persistent offender. The judge did not examine the factors giving the appellant a strong incentive not to commit further offences for example: "*after his last offence in June 2017: he was engaged in Family Court proceedings to gain access to his children and these have now been finalised*". He was also awaiting sentencing for the June 2017 offences and he was ultimately sentenced to a community order in January 2019 with ongoing oversight to January 2021 as identified at paragraph 21 of Upper Tribunal Judge Plimmer's error of law decision.
4. The second error of law related to the judge's conclusion that his most recent offending could be explained by his poor mental health as set out in particular in the Crown Prosecution Service ("CPS") report but the judge did not engage with the guidance in **SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929**; the question to be determined was that posed within the statute itself without any gloss: is the appellant a persistent offender? The medical evidence may indicate why he offended but did not expunge his convictions.

5. Those errors were material errors of law and whilst the judge found that family life “would undoubtedly suffer irreparable harm” and it was “very strongly” in five of the children’s best interests for them to have face-to-face contact with their father, there was no clear examination of the nature and extent of the harm that would be suffered and significantly whether the effect on the children reached the elevated threshold of undue harshness. It was noted that the Cafcass Reports used in the family proceedings were not disclosed to the First-tier Tribunal.
6. I note in particular that the family proceedings papers in respect of only of the children C3, C4 and C5 were given permission to be disclosed to the First-tier Tribunal because the appellant and his representatives had not complied with the Family Court Protocol with regards to the other children, so those Family Court documents were removed from the bundle by Judge Ruddick. By the date of the hearing there was no confirmation that permission had been granted to disclose those papers.
7. Upper Tribunal Judge Plimmer at paragraph 4 of her decision recorded as follows:

*“4. At the hearing before the FTT on 21 February 2020, it was confirmed on behalf of D that he only relied upon Article 8 and was no longer pursuing his appeal on international protection grounds. In a comprehensive (25 pages) and carefully drafted decision the FTT made detailed factual findings, which I merely summarise below.*

- (i) D suffers from paranoid schizophrenia and has presented with significant symptoms over time. He was assessed as unfit to plead or stand trial in a psychiatric report dated 17 April 2018, prepared by Dr Cumming, a Consultant Forensic Psychiatrist, on behalf of the CPS (‘the CPS report’).*
- (ii) D has a genuine and subsisting parental relationship with all six of his biological children and with his step-daughter. On 28 November 2019 the family court made a Child Arrangements Order in relation to three of the children requiring them to spend significant time with D on alternative weekends and for half the holidays. D has been a stable and loving influence in the lives of his children. The family life between them is strong and would suffer ‘irreparable harm’ if D is deported.*
- (iii) D has been convicted of 17 offences since 2006. No single sentence has been over six months. The majority of his more recent offending involves theft and kindred offences, in particular ‘pickpocketing’. The most recent offence (on 19 June 2017) involved ‘pickpocketing’ and he was given a*

*community order on 17 January 2019. This required him to have mental health treatment as a non-resident patient for two years”,*

and she stated at paragraph 30 the following:

*“30. The decision shall be remade in the UT, with the FTT’s findings of fact preserved (as summarised above). Mr Jarvis confirmed that the findings of fact are comprehensive and were not the subject of any appeal. However, those findings were made as at 21 February 2020 and in the light of the evidence before the FTT. The UT will need to make its decision based upon any updated evidence as at the date of the hearing.”*

8. For the purposes of this appeal I shall set out the appellant’s immigration history in brief, together with a record of the deportation orders made and withdrawn against him. He entered the UK lawfully as a visitor in 2001 and was granted further leave to remain as a student until 31<sup>st</sup> March 2003. He then made applications to remain under a false name of AM and one was successful such that he was granted leave to remain until 6<sup>th</sup> September 2003. Thereafter he had no leave. He applied on 20<sup>th</sup> August 2010 on the basis of his relationship with his then partner and their children C3, C4 and C5. That application was refused, but allowed on appeal and as a result he was granted discretionary leave until 17<sup>th</sup> November 2014.
9. On 11<sup>th</sup> November 2014 he applied in time for further leave to remain on the basis of his family life but on 18<sup>th</sup> November 2014 he was served with an undated decision to make a deportation order. That decision was withdrawn but on 24<sup>th</sup> October 2015 the respondent served a further decision to deport the appellant to which he responded.
10. On 11<sup>th</sup> February 2016 the respondent refused the appellant’s human rights application and made a deportation order against him under Section 32(5) of the UK Borders Act. This deportation order was subsequently expressly withdrawn on 12<sup>th</sup> May 2017 but in the meantime, the appellant had appealed the refusal of his human rights claim and also claimed asylum.
11. On appeal in relation to the human rights claim, First-tier Tribunal Judge Hodgkinson on 2<sup>nd</sup> June 2016, dismissed the appeal despite the outstanding asylum claim which remained pending. On 15<sup>th</sup> May 2017 the respondent acknowledged that Section 32 of the UK Borders Act 2007 did not apply, and the deportation order of 11<sup>th</sup> February 2016 had been withdrawn. However, on the same day the respondent issued a new decision to make a deportation order, this time under Section 5 of the Immigration Act 1971, on the grounds that the appellant’s deportation was conducive to the public good. The appellant submitted further representations and finally, on 27<sup>th</sup> February 2019 the respondent issued a new decision refusing the appellant’s protection and human rights claims.

The decision stated that it was considering all of the appellant's previous applications and submissions since 11<sup>th</sup> November 2014 which were described as outstanding and a new decision to deport the appellant was made.

12. The essence of the above is that the appellant has been repeatedly served with deportation orders which have then subsequently been withdrawn save for the final order. The decision currently under appeal is that issued by the Secretary of State on 27<sup>th</sup> February 2019 addressing the appellant's protection and human rights' claims.
13. As noted in the First-tier Tribunal decision, the appellant has brought two previous appeals before the First-tier Tribunal, the first allowed and the second dismissed and these are the assessments of the facts as they were made at the time and those decisions have been approached in accordance with **Devaseelan v SSHD** [2002] UKIAT 00702 . It was, however, acknowledged that the legal basis for Judge Hodgkinson's decision was that the appellant was a person to whom Section 32 of the 2007 Act applied and that, the respondent acknowledged, was incorrect. (The appellant in fact had been sentenced to two years' imprisonment in March 2015 but the sentence was not a single sentence but an aggregate of smaller sentences of imprisonment including an activation of a suspended sentence).
14. The skeleton argument presented on behalf of the appellant specifically stated that the author found it "difficult to understand" the scope of the First-tier Tribunal Judge's findings of fact that Upper Tribunal Judge Plimmer had said were preserved. I have, however, set out below and at length the facts as I understand them to be, preserved and effectively unchallenged by the Home Office Presenting Officer.

### **The Medical Evidence**

15. As the findings of fact by the First-tier Tribunal were preserved I have set out the judge's record (with the references from various sections of the reports) of the appellant's mental health condition as follows:

*"60. The medical reports in front of me indicate that the Appellant suffers from a serious mental illness. As I am required to take his mental health into account in assessing the credibility of his evidence before me, I set the medical evidence out first, as a preliminary matter.*

*61. There are three medical reports in the Appellant's bundle:*

- i) An assessment of his fitness to plead, prepared on 03 October 2017 by Dr Muhammad Butt, a Specialist Registrar in Forensic Psychiatry at the West London Mental Health NHS Trust, at the request of Westminster Magistrate Court Diversion services; this is supplemented by an updating letter from Dr Butt on 28 November 2017.*

- ii) *A psychiatric report prepared on 12 February 2018 by Dr David Baird, a Consultant Forensic Psychiatrist, at the request of Hodge Jones & Allen, acting on behalf of the Appellant in his criminal proceedings; and*
  - iii) *A psychiatric report prepared on 17 April 2018 Dr Ian Cumming, Consultant Forensic Psychiatrist, at the request of the Crown Prosecution Service.*
62. *The separate reports all come to similar conclusions:*
- i) *The Appellant suffers from paranoid schizophrenia [67, 72, 82, 101];*
  - ii) *He had reported hearing voices for the past 'few years' [68]; the CPS report states that he was hearing voices already in 2015, and that his medical records referred at that time to his having heard voices previously, in 2006. He was diagnosed with psychotic depression in 2016 [76]. In February and March 2017, the Appellant attended A&E twice, complaining of hearing voices; this was followed by regular attendances at his GP as his condition worsened over the next few months, until he was sectioned under the Mental Health Act in October 2017 and committed to Lewisham Hospital. [76-78] He was discharged in November 2017. [78, 99]*
  - iii) *There were two voices, a good one and a bad one [68, 71]; he described the bad one as 'red' and said it punished him and told him to do things, although he did not say what these things were, other than sometimes telling him to take his life. [68, 79, 82, 100]*
  - iv) *He believed he was from another galaxy, to which he would return [71, 74, 78, 80, 82, 83, 100];*
  - v) *He presented as paranoid, suspicious, and guarded [68];*
  - vi) *He expressed persecutory delusions [68, 100];*
  - vii) *He had an intellectual disability, described alternatively as 'possible' [68], 'at least mild' [72], and a 'cognitive impairment'. [77]*
  - viii) *His social judgment was immature for his age and he was at risk of being manipulated. [72];*
  - ix) *He had previously used illicit drugs but had stopped when he began taking psychotropic medication [67, 71, 80]. He had also stopped drinking alcohol. [80]*
  - x) *He was unfit to plead or to stand trial [67, 69, 83].*
63. *Although all three reports were prepared in connection with his prosecution for his pickpocketing offences in May and June 2017, it was only the CPS report that specifically*

*considered those offences. With regard to the commission of the offences, the report quoted a police sergeant who described the Appellant as 'a very good pickpocket ... calculated, experienced, patient and he certainly knows his business.' [81] In Dr Cumming's opinion, however, the Appellant seemed unaware of what offences he had committed, referring instead repeatedly to his fear that a judge would take his children away. [82-83]*

64. *The CPS report, finally, is the only report that considered the Appellant's previous medical history in detail and set out an overview of the likely progression of the Appellant's illness over time. It concluded:*

*'67. I noted on [sic] a background of a considerable history of offending, the last few years has seen a marked change in his mental health. Whilst detained in an immigration centre, concern was raised about his mental health with the emergence of auditory hallucinations and paranoid beliefs. Around 2 to 3 months before the offences, he was referred to mental health services with again reports of auditory hallucinations and persecutory delusions. ..*

*68. Paranoid schizophrenia is a major mental illness. .. Typically, individuals with schizophrenia see symptoms emerge between their late teens and mid-thirties; in men, the peak period for the illness to occur is un the mid-twenties. It can be acute or gradual in onset but typically progressive if undetected. ... 20% appear to have a favourable outcome with a small number recovering completely. The majority however either continue to suffer from the illness in a waxing and waning profile and require long term treatment, others remain chronically ill or show a progressive deterioration.*

*69. Aspects of [the Appellant's] presentation are in keeping with a more chronic manifestation of the illness or what is sometimes called, residual schizophrenia, where the more acute symptoms have tended to resolve and are replaced by negative symptoms.*

*70. I noted that since he first presented to mental health service, there has been a continual decline in his functioning with poor self-care, neglect and becoming more isolated. I found it somewhat incongruous and surprising that he had been involved in the offences and identified ... as a*

*known pickpocket, as the offences appeared quite sophisticated and organised. I noted that there is a suggestion that his current partner and carer had also been identified as being involved at one point.*

71. *However, his mental state in the interview with me is consistent not only with his presentation to Dr Baird but also the clinical records which predate and follow the offences. [82-83]’”.*

16. Within the further evidence provided, there was a report from Dr Natavan Babayeva, Locum Consultant Psychiatrist from the South London and Maudsley NHS Foundation Trust dated 26<sup>th</sup> October 2021, who confirmed that the appellant was known to mental health services in South London from 2017 and that he suffered from a

*“severe and enduring mental health disorder, namely paranoid schizophrenia (ICD10 F20.0), which might impact on his ability to function and look after his basic needs. His condition is treatment-resistant and he usually presents with mild/moderate residual psychotic symptoms. He is adherent with his antipsychotic treatment, oral risperidone 7mg once daily and antidepressant sertraline 200mg once daily.”*

17. It was concluded that in terms of his prognosis *“paranoid schizophrenia is chronic, severe relapsing and remitting mental disorder”* and that the appellant had a *“lifelong vulnerability to further relapses which can be precipitated by non-adherence with antipsychotic medication +/- psychosocial stressors”*.

### **The Children**

18. The First-tier Tribunal Judge made a record of undisputed facts as follows:

*“65. The Appellant has the following biological children:*

	<b>Anonymised reference</b>	<b>Month and year of birth</b>	<b>Mother</b>	<b>Child's nationality</b>
1.	A1	February 2007	A	British
2.	B2	February 2007	B	Jamaican
3.	C3	July 2009	C	British
4.	C4	October 2010	C	British
5.	C5	April 2014	C	British
6.	D6	July 2013	D	British

66. *In addition, child D6 has a half-sister, born in November 2010, whom the Appellant describes as a step-daughter.*



*She is also British, and currently in foster care with her half-brother [recorded as D7].*

**Previous findings with regard to the Appellant's children**

67. *In the 2011 determination, First-tier Tribunal Judge O'Garro made the following findings regarding the Appellant's children:*

- i) The Appellant had family life with the three children he lived with, C3, C4, and C5, and also with his children A1 and B2. A1 visited him regularly to spend time with him. [25]*
- ii) Child C3 had a history of 'respiratory symptoms' and required 'constant care and attention'. [38]*
- iii) The Appellant's children, in general, had been receiving 'care and nurturing' from the Appellant. [39]*

68. *In the 2016 determination, Judge Hodgkinson made the following findings with regard to the Appellant's children:*

- i) It would be unduly harsh for any of the children to relocate to Jamaica; this was accepted by the Respondent. [67]*
- ii) The Appellant was not at that time in contact with Child A1, as his mother had changed her telephone number. [62]*
- iii) There was no evidence that the Appellant had any ongoing relationship with any stepchildren. [63]*
- iv) The Appellant maintained regular telephone contact with his children while in detention, and I 'accept that he does not have the present indication to take an active involvement in all of his children's lives.' [68, 77]*
- v) The Appellant 'does have a bond with his children'. [69]*
- vi) The Appellant had never provided a stable home for his children, due to his 'history of moving from one relationship to another' and his criminal offending and resulting periods of imprisonment and immigration detention. [68, 70]*
- vii) There was no evidence that the Appellant's removal to Jamaica would have a 'particularly detrimental effect' on the children, bearing in mind in particular their young age and the fact that the Appellant had been incarcerated since 2014 and had not resided with the children for 'quite some time'. [69, 76]*

viii) *It was in the children's best interests to continue living with their mothers. [77]*

***The Appellant's new evidence with regard to his children***

69. *In March 2019, the Appellant applied for a Child Arrangements Order with regard to children C3, C4, and C5. He stated in his application that he had previously had a verbal agreement with their mother, allowing him to see the children 'when convenient', but that since January 2019, she had used the fact of his new romantic relationship as a reason to break the agreement.*

70. *In his application for a Child Arrangements Order, the Appellant did not express any concerns about the children's safety or welfare. The Appellant said in his oral evidence, however, that in the course of these proceedings, he found out that social services had previously been involved with the family, which he had never known. He then asked his children about this, and they made allegations against their mother, saying 'she does this and she does that'. He did not elaborate.*

71. *On 28 November 2019, the Family Court made the Child Arrangements Order with regard to children C3, C4, and C5, and on 06 February 2020, the court agreed to its disclosure in these proceedings. The court noted that it had heard 'from Cafcass there are no welfare concerns but the parties are making complaints about the other', in particular that the Appellant was sometime late to pick the children up from school.*

72. *The final order states:*

- i) The parents shall live with their mother;*
- ii) The mother 'must make sure that the children spend time or otherwise have contact with the children [sic; it appears what was meant was the father] as follows:*
  - (a) Alternative weekends from Friday after school (starting at 3:00 PM) until Sunday at 5:00 PM;*
  - (b) First half of the summer holidays;*
  - (c) First half of the Easter holidays;*
  - (d) Christmas to be agreed between the parties;*
  - (e) Half of each half term holiday;*
  - (f) 'Any other time as can be agreed between the parties.'"*

19. At the hearing before the First-tier Tribunal the appellant stated in oral evidence that children D6 and D7 were in foster care because their mother

left them in the home alone and there was a fire and that was also mentioned in Dr Cumming's report.

20. D6 and D7 are looked after children under Section 31 of the Children Act and that the plan for them was "long-term fostering".

*"77. A letter from Lambeth Council dated 20 February 2020 states that D6 and D7 are looked after under Section 31 of the Children Act, and that the plan for them is 'long term fostering with a view to them having ongoing contact with their birth family.' With regard to the Appellant, it states:*

*They have supervised face to face contact with [the Appellant] once every two months. The children enjoy the contact and look forward to seeing him. The future plan provided [the Appellant's] risk assessment is positive contact will eventually increase to possibly overnight stay at his home. It is the children's wish to continue to spend time with their father.*

*[The Appellant] for his part has engaged positively with the Local Authority and the children's Social Worker. It would therefore be in the Children's best interest that face to face contact with their father continues."*

There was a suggestion in the Cafcass letter of April 2019 concerning children C3, C4 and C5 that there were concerns of emotional and physical abuse and "concerns around older child suffering physical abuse from father" but the judge accepted, as maintained by the appellant, that the Family Court would not have recently made a contact order in his favour if these concerns had been discovered to be well-founded.

21. The judge also accepted that although there were acts of aggression by the appellant made against his previous partners, the convictions of which were recorded in his Police National Computer ("PNC") record, but the judge deferred to the Cafcass report, finding that there were no grounds for concern about the children's welfare now as these findings were made by qualified professionals with expertise in the field of child protection. The judge also accepted that the handwritten letters of support from six of his children had a "ring of authenticity" and the judge also found that C3, C4 and C5 signed a joint letter requesting that their father not be sent to Jamaica where they would not be able to "see him or hug him anymore".

22. The judge found the following:

*"82. I find that the Appellant has a genuine and subsisting parental relationship with all six of his biological children, and with his stepdaughter. I further find that he has put considerable effort into maintaining his relationships with them in spite of the breakdown of his relationships with their mother, and throughout his periods of incarceration. I note that he is now back in touch with the one child he had lost*

*touch with at the time of his previous appeal; he recently hosted a birthday party for him at his home, and the child has written a letter in support of this appeal. Although I found the Appellant's evidence about his relationship with his children credible, my decision in this regard does not rely primarily on his oral evidence. It relies on the findings of Judges O'Garro and Hodgkinson, the Family Court records, the letter from Lambeth Council, the children's letters, and numerous photographs.*

*83. I also accept the Appellant's evidence that he regularly brings his children together with their half-siblings; this is documented in the photographs, and was referred to in Judge O'Garro's findings. A letter from C4, moreover, says that they are trying to 'take our little sister and brother out of care.' This confirms that the half-siblings see themselves as part of the same family.*

*84. I further find that it is in the children's best interests to remain in contact with their father. I note that this is also the view of Lambeth Council with regard to D6 and D7."*

23. The judge also departed from Judge Hodgkinson's finding that the appellant was not a stable figure in his children's lives, finding that he had always fought to remain part of their lives and he regularly brought them together with their siblings in a loving extended family. The judge also found that Lambeth Council and the Chelmsford Family Court had found that it was in the best interests of C3, C4, C5, D6 and D7 to remain in regular face-to-face contact with the appellant. It should be noted that D6 and D7 were found to have been in foster care because they had been exposed to significant harm whilst in their mother's care. The judge placed considerable weight on the views of Lambeth Council and Chelmsford Family Court.
24. The judge found that the efforts to have the children D6 and D7 adopted had come to an end and they were likely now to remain in long-term foster care and the difficulties in the children's family lives with their mothers made the presence of the father all the more important. There were no welfare concerns about C3, C4 and C5 but they had come to the attention of Social Services out of concern about "emotional and physical abuse" previously and the judge accepted, the appellant's belief expressed in his oral evidence that his children were safer and happier now that he is back in their life and watching over them.
25. The judge found, "this means that it is also especially strongly in their best interests that he remains part of their lives". The judge did not accept that the children could be maintained from Jamaica. The judge accepted at paragraph 90 that the appellant clearly saw all of his children in person regularly and that C3, C4 and C5 now lived with him for a significant portion of their lives: half of every holiday period and every other weekend. Although A1 and B2 did not face, on the evidence the same

risks of abuse or neglect in the appellant's absence as the other siblings, they remained part of an extended family created by the appellant (paragraph 91) and it was in their best interests to retain continue to have face to face contact with their both parents.

26. At paragraph 132 Judge Ruddick concluded that the appellant had a strong family life with his children and 'considerable weight needed to be given to their family lives and that 'those family lives would suffer irreparable harm if the appellant were deported, and modern mean of communication would be no substitute for face to face contact.

### **The Appellant's Criminal Record**

27. At paragraph 93 the judge recorded that the appellant's criminal record was "long, complex and initially difficult to understand".
28. The First-tier Tribunal set out the offences as follows:

#### **Theft and kindred offences April 2010 to June 2017**

*"96. The Appellant has been convicted of 17 offences involving theft or stolen goods, over a period of six years and nine months. The last offence was committed on 19 June 2017. The maximum single sentence imposed was six months.*

*97. The considerable majority of the Appellant's offences are for pick-pocketing, and he was described by the Judge who sentenced him on 20 March 2015 as 'obviously very expert at taking people's property when they are on public transport.' He has been convicted of having attempted or committed 'theft from person' 13 times: on 23/09/2010; on seven separate occasions, plus once going equipped for theft, between 15/10/2011 and 11/02/2012; on 11/07/2014 and 09/10/2014; and on 10/06/2017 and 19/06/2017.*

*98. He was sentenced for the offences as follows: on 11 November 2010, to 16 weeks for the offence of 23/09/2010; on 23 July 2012, 12 weeks each, consecutive for four of the counts of theft and eight weeks each, concurrent, for a further four; on 20 March 2015, six months each, consecutive, for the thefts in July and October 2014; and, finally, on 17 January 2019, to a community order with requirements for mental health and drug/alcohol treatment, for **the June 2017 thefts**.*

*99. The Appellant also has three convictions for thefts committed in June and July 2013, for which he was initially sentenced on 21 January 2014 to four months' imprisonment (wholly suspended), and requirements for unpaid work and participation in drug treatment and 'building skills for recovery' programmes.*

100. In addition, the Appellant was convicted on 21 October 2010 for handling stolen goods on 27 April 2010, and sentenced to an unpaid work requirement of 100 hours.

Offences relating to police/courts/prison: six offences between December 2006 and July 2014

101. The Appellant has six convictions for breaching community orders, failure to comply with conditions of his suspended sentences, or committing further offences during the period of a suspended sentence: on 11/12/2006, 27/04/2010, 23/09/2010, 08/03/2014, and (on two separate counts) on 11/07/2014. As a result of these convictions, he was ordered to continue his unpaid work requirement for a further 25 hours, and previously suspended sentences were either extended or activated. The severest sanction imposed as a result of these convictions was the activation, on 20 March 2015, of the three consecutive four month sentences first imposed, but suspended, on 21 January 2014.

Drug offences: two offences, committed on 11/09/2008 and 15/07/2014

102. There are two drug-related convictions: for possession of cannabis (offence committed on 11/09/2008; sentenced on 24/12/2008 to pay a fine of £40.00, costs of £20 and forfeiture of drugs); and possession of class B amphetamine (committed on 15/07/2014; sentenced on 05 August 2014 to a 12 months unpaid work requirement, a victim surcharge of £60.00, costs of £100, and forfeiture and destruction of the drugs).

Offences against the person: two offences, committed on 22/07/2009 and 02/11/2012

103. The Appellant has two convictions for battery. For the first, he was sentenced to two months' imprisonment (wholly suspended), as well as a supervision order and a 24-month 'programme requirement' and to pay compensation of £250.00. For the second, he was sentenced to 12 weeks' imprisonment.

104. A Cafcass report of 24 April 2019 states that both of these offences were against women who were his partners at the time. In the second offence, the Appellant 'slapped and punched the face' of his partner while she was 'holding her two small children'.

Offences involving weapons: two offences, committed on 11 May 2006 and 16 May 2007

105. The Appellant has two convictions related to weapons. The first was for possession of a firearm with the intent to cause

*fear, for which he was sentenced to supervision and 200 hours of unpaid work. The second was one year later, for possession of a blade, for which he was sentenced to a community order, a supervision requirement, costs of £60,00, and forfeiture of a 'lock knife'.*

*Miscellaneous offences related to driving: 14/08/2007*

*106. Finally, the Appellant has two offences related to driving, both committed on 14/08/2007: for using a vehicle while uninsured and 'driving otherwise than in accordance with a license.' He was given a fine of £130 and six points on his license.*

***Previous findings with regard to the Appellant's criminal offending***

*107. In the 2011 determination, Judge O'Garro noted that the Appellant was not considered a danger to the community at that time, in spite of his criminal convictions. [31] This included both weapons offences.*

*108. In 2016, Judge Hodgkinson found that the Appellant was 'clearly a recidivist' and would 'probably reoffend,' given his number of criminal convictions and the fact that he had continued to offend after his previous human rights appeal and after receiving a warning letter from the Respondent in 2012.<sup>3</sup> [71] The bulk of his offences related to pickpocketing [17], and he was 'an experienced and able pickpocket.' [72] Although his May 2006 firearm offence was 'not as serious as might appear on the face of it,' [16, 21], his overall criminal record was 'appalling' [74].*

---

<sup>3</sup> *As noted above, this 'warning letter' is not before me, and the letter to the Governor of HMP Pentonville that is before me, although it contains the Appellant's name and date of birth, is inaccurate about the Appellant's sentence."*

29. The judge considered the appellant's current evidence regarding his criminal offending and although she found that the appellant was vague at times and denied a drugs offence until pointed out by Mr Archie, the Home Office Presenting Officer, the weight placed on his apparent evasiveness was lessened by the medical evidence in front of the judge.

*Resumed hearing in the Upper Tribunal*

30. At the hearing before me Mr Bahja relied on his written skeleton argument, submitting that there were two issues for me to consider, first, whether the appellant was a persistent offender, and secondly in relation to whether the effect of deportation on the children would be unduly harsh. It was submitted that the appellant was not a persistent offender and even if he were it would be unduly harsh for the children to remain in the UK without the appellant.

31. Mr Bahja referred to the preserved findings of fact made by the First-tier Tribunal, and he relied on **MZ (Hospital order: whether a 'foreign criminal') Pakistan [2020] UKUT 225 (IAC)** specifically in relation to the latest alleged "conviction" of 2019. It was asserted that the last offence was in fact committed in 2015.
32. It was noted in **SC (Zimbabwe)** that being a persistent offender was someone who kept breaking the law, but it was not a permanent status that could never be lost but it could apply to a person who had not offended for some time and was not currently offending, depending on the facts including the overall picture and pattern of offending.
33. As the Court of Appeal pointed out in **R (Mahmood)**, the test was whether someone "keeps on breaking the law" and at paragraph 71 held:

*"While we recognise that there may be some cases where a person who was a persistent offender can show, through remorse or rehabilitation, that they are no longer properly categorised as such, the cases are likely to be exceptional."*
34. As Hamblen LJ noted in **Binbuga** at paragraph 46, it would usually involve "keeping out of trouble for a 'significant period of time'".
35. Mr Bahja stated that several attempts were made to obtain the actual sentencing remarks of the judge, but Counsel's attendance note at the criminal hearing dated 17<sup>th</sup> January 2019 recorded in relation to the appellant: "... You were convicted of doing the act in respect of two counts of theft, the judge having found you unfit to plead." [my underlining]
36. It was submitted that the social worker in the witness statement dated 14<sup>th</sup> August 2019 had recorded that the appellant had a diagnosis of paranoid schizophrenia and had been known to mental health services since 2006. It was not disputed that the appellant was convicted of a number of offences from December 2006 to 20<sup>th</sup> March 2015 for which he received a number of custodial and non-custodial offences, but it was submitted that he did not fit the description of a persistent offender because he had not committed any further offences from March 2015 onwards and was undergoing medical treatment to control his condition. He was subjected to a hospital order for the offence committed in 2017 and that was not subject to Section 117C of the 2002 Act as per **MZ (Hospital order)**. He was thus excluded from the statutory provisions of Section 117D(3)(a) and from the Immigration Rules. The appellant was deemed unfit to plead and was sentenced to a hospital order. There had been a period of over five years where he had not committed any crime and he thus he would fit into the description of an exceptional case.
37. With regards to the second issue of whether it was unduly harsh for the children to remain in the UK without the appellant, Mr Bahja cited **HA (Iraq) v SSHD [2020] EWCA Civ 1176**. Although he referred to whether the children should be relocated to Jamaica, Ms Ahmad confirmed that in fact it would be unduly harsh for the children to be relocated to



Jamaica and therefore I take the issue of relocation on the part of the children no further forward.

38. In his written submissions Mr Bahja submitted that it would indeed be unduly harsh for the children to be separated from their parent should he be returned to Jamaica and that Section 117C(5) of the Act applied. The appellant had a genuine and subsisting parental relationship with a qualifying child and the effect of his removal would be unduly harsh. Similarly, paragraph 399 of the Immigration Rules also would apply. As per **KO (Nigeria) v Secretary of State for the Home Department [2018]**,

*“the judge had to look for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent” and that accordingly, to the extent that the judgments below had made reference to parental immigration history, misconduct or criminality as factors to be balanced against the interests of the child, such consideration was not part of the correct test (... paragraphs 16 to 42)”.*

39. It was important to identify the factors which were relied on as making the consequences of deportation unduly harsh as per **AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296**.

40. As **HA (Iraq)** explained, almost all cases were different, involving a multitude of individual factors. As Underhill LJ held at paragraph 56 “undue” harshness may occur quite commonly and that if Tribunals approached the question of harshness as to whether it was “out of the ordinary” they may find that it was not because it did not fit into a commonly encountered pattern

*“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”.*

41. The appellant suffered from paranoid schizophrenia and had been presented with significant symptoms over time. The Family Court made a Child Arrangements Order on 28<sup>th</sup> November 2019 in relation to three of the children requiring them to spend significant time with the appellant on

alternative weekends and for half a holiday. The appellant had been a stable and loving influence in the lives of his children. As the First-tier Tribunal Judge found, the children would suffer irreparable harm if the appellant was deported. The appellant relied on documentary evidence to verify that such as the school letters dated 17<sup>th</sup> January 2020, 18<sup>th</sup> December 2019 and 5<sup>th</sup> July 2019, together with the children's statements and various photographs.

42. At the hearing before me Mr Bahja submitted that the offence of 2017 did not result in a conviction and the appellant had been out of trouble since March 2015. The period 2015 to 2021 was significant, taking into account all issues and the appellant was a changed man. There would be no facilities for him should he return. If I was not with him on the persistent offender point, his relationship with the children was not in dispute and he was a stable figure in his children's lives.
43. Ms Ahmad submitted that the appellant had had a deportation order made against him but withdrawn in May 2017 and yet he still committed a further offence. She relied on **Chege** that the appellant was a persistent offender, and he may have stopped his offending, but he had a significant period during which he committed offending, and the gap of four years was not significant.
44. With regard to the children, **TD (Albania) [2021] EWCA Civ 619** at paragraph 22 confirmed that **HA (Iraq)** did no more than explain that what was required was a case-specific approach in which the decision-maker addressed the reality of the child's situation and warned of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness.
45. She noted that all three children C3, C4 and C5 lived with their mother but had regular contact with the appellant and that D6 and D7 were in foster care and met the appellant every six weeks in a contact centre. He did not live with any of the children and although there may be irreparable harm it could not be shown that it would be unduly harsh, given the elevated nature of the test and the nature of his relationship with his children. Considering "unduly harsh" with reference to **KO (Nigeria) [2018] UKSC 53** at paragraph 23 the test for unduly harsh meant going beyond the level facing any child whose parents were facing deportation. She referred me to **NA (Pakistan) [2016] EWCA Civ 662** at paragraphs 32 to 34 where it is held that circumstances which are sufficiently compelling to outweigh the high public interest in deportation will be rare. With regards to very compelling circumstances in relation to his children and mental health it could not be said that they were sufficient to meet the high threshold. Currently the appellant was relying on a relationship with a different partner from that which was considered in the decision of 2019. He had a lengthy criminal history, had used different aliases and had limited private life in this country save for his relationship with his children. The case was not put forward on the basis of being unduly harsh on the partner.

## **Analysis**

46. I have regard to the caselaw cited above insofar as material. Section 117D(2) of the Nationality, Immigration and Asylum Act 2002 defines a foreign criminal, as follows:

***“117D Interpretation of this Part***

*(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”*

47. If the appellant is found to be a foreign criminal, he needs to show that he can fall within the exception set out in Section 117C(5) or failing that, under Section 117C(6) “very compelling circumstances”.

***“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”.*

48. Paragraph 398, 399 and 399A of the Immigration Rules reflect Section 117C and must be interpreted in a consistent manner with that Section. Paragraph 398 requires that

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

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of the State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A."

49. The question here is whether the appellant is a persistent offender further to Section 117D(2)(c)(iii). As noted in paragraph 25 of **Chege**, most offenders show particular disregard for the law by persistent offending, and the headnote of **Chege** states as follows:

- "1. The question whether the appellant 'is a persistent offender' is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it.*
- 2. The phrase 'persistent offender' in s.117D(2)(c) of the 2002 Act must mean the same thing as 'persistent offender' in paragraph 398(c) of the Immigration Rules.*
- 3. A 'persistent offender' is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A*

*'persistent offender' is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a 'persistent offender' for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the **overall picture** and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts."*

50. Where the foreign offender does not fall within sub-paragraph (a) or (b) of Paragraph 398, as held in **Chege**, is a necessary precondition of the matter being considered by the Tribunal under s117C that the Secretary of State has formed a view that he falls within sub-paragraph (c), and that the appellant, taking a sensible and natural meaning of the words 'particular disregard', has shown a particular disregard for the law. The Secretary of State confirmed this in her decision of April 2019. It is unnecessary for the Secretary of State to spell this view out in her decision where, as in the present case, the nature and pattern of the offences committed by the offender over a very long period self-evidently demonstrates the requisite state of mind or attitude. That said, Section 117D makes no mention of the requirement of a particular disregard for the law. Further in view of the offending record it is undeniable that the appellant has a particular disregard for the law.
51. **Chege** at paragraph 53 confirmed that someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and that if there had been a history of repeated criminal conduct carried out over a sufficiently long period of time that may indicate that the person concerned is someone who keeps on re-offending even if there was no recent offending. However, when determining whether the offending is persistent was not just a mathematical exercise but the length of the period of offending and how many offences "will be enough" will depend "very much on the facts of the particular case and the nature and circumstances of the offending". Persistence may be shown by the fact that someone keeps committing the same type of offence but equally may be shown by the fact that he has committed a wide variety of different offences over a period of time. Nor is it necessary for the offences to be committed within "a reasonably short" space of time: the longer the period over which offending occurs and the greater the number of offences, the more likely it may be that persistence is established. Sporadic instances of isolated offending over a course of several years are unlikely to suffice. As stated at paragraph 55 of **Chege**, "the facts may demonstrate that although he has committed very few offences, the offender's experience of the criminal justice system has provided him with insufficient deterrence and that he is plainly someone who is going to keep on re-offending".

52. At paragraph 57 **Chege** confirmed that one must look at the “*history of the individual from the commission of the first offence up to the date of the decision*” and stated:

*“Factors to be taken into account will include the overall pattern of offending, the frequency of the offences, their nature, their number, the period or periods over which they are committed, and (where relevant) **any reasons** underlying the offending, such as an alcohol or drug dependency or association with other criminals.”*

Paragraph 58 stated:

*“If the person concerned has been out of trouble for a significant period or periods within the overall period under consideration, then the length of such periods and the reasons for his keeping out of trouble may be important considerations, though of course the decision-maker is entitled to bear in mind that the mere fact that someone has not been convicted for some time does not necessarily signify that he has seen the error of his ways. It may simply mean that he has paused in his offending. It is the overall picture of his behaviour that matters”*

and further, at paragraph 59 the court had this to say:

*“If during those periods of apparent good behaviour the person concerned was serving the custodial part of a short sentence, or was too unwell to go out and commit the kinds of offences he is generally prone to commit, there may be an explanation for the hiatus in offending which is not inconsistent with his being properly regarded as a persistent offender. Likewise, if he had a very strong incentive not to commit further offences, such as being subject to a community order, or a suspended sentence, or he is on bail, or he has been served with a notice of deportation, the fact that he has committed no further offences during that period may be of little significance in deciding whether, looking at his history as a whole, he fits the description.”*

53. **Binbuga (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 551** went on to consider the issue of whether a period of rehabilitation may lead to the conclusion that someone is no longer a persistent offender. As **Chege** makes clear at paragraph 60 there must be “*an established period of rehabilitation*” and keeping out of trouble “*for a significant period of time*”. **Binbuga** confirmed that as **Chege** and **SC (Zimbabwe)** “make clear, a persistent offender is someone who ‘keeps on breaking the law’” and “an individual may be so regarded even though ‘he may not have offended for some time’”. Paragraph 46(5) reaffirmed that pointed out in **Chege** that where there is a strong incentive not to commit further offences lack of offending may be of little significance “in deciding whether, looking at his history as a whole, he fits the description” and further, at paragraph 46(6):

*“In considering the overall picture the Ftj ought to have had regard to the fact that TB had resumed offending in 2013 to 2014, notwithstanding a significant gap since his prior offending in 2004 to 2009.”*

54. In **Mahmood v Secretary of State for the Home Department [2020] EWCA Civ 717** Simon LJ at paragraph 71 recognised that there may be some cases where a person who was a persistent offender may show, through remorse or rehabilitation, that they are no longer properly categorised as a persistent offender, but those cases are likely to be exceptional.

55. The real question for me is whether the appellant can now be classified as a persistent offender, and if he could once have been classified as a persistent offender, whether there has been an established period of rehabilitation for a significant period of time to establish he is not now a persistent offender.

56. Mr Bahja contended that the last conviction was in fact not a conviction because of **MZ**. He produced a certificate of conviction from Southwark Crown Court which showed that on 18<sup>th</sup> December 2018 the Crown Court found the appellant to be under a disability in relation to two counts of theft from another person and he was sentenced to the following “community sentence, the defendant must undergo mental health treatment by a fully registered medical practitioner at South London and Maudsley Hospital as a non-resident for two years”. Nowhere on that certificate did it specifically state that the appellant is sentenced under Section 5(1)(b) of the Criminal Procedure (Insanity) Act 1964, but **MZ** states as follows:

*“An individual sentenced to a hospital order following a finding under section 5 (1) (b) of the Criminal Procedure (Insanity) Act 1964 that he ‘is under a disability and that he did the act or made the omission charged against him’ is neither subject to section 117C of the 2002 Act (as amended) nor to paragraphs A398-399 of the Immigration Rules. He is excluded from the statutory provisions by section 117D(3)(a) and from the Immigration Rules concerning deportation.*

*[Note: The difference between OLO and Andell to which the judge refers at paras [10] to [13] is now resolved in SC (paras A398-339D: ‘foreign criminal’: procedure) Albania [2020] UKUT 187 (IAC).]*”

57. No sentencing remarks were available to me but Counsel’s attendance note indicated after some extensive liaison with the sentencing judge, HHJ Korner QC, that the appellant had indeed been sentenced under Section 5 of the Criminal Procedure (Insanity) Act 1964 and thus, although the appellant may technically have a conviction dating from 2017, on the basis of the evidence, I accept that he was sentenced under Section 5, and thus that Section 117C of the 2002 Act does not apply to him nor do

paragraphs 398 to 399 of the Immigration Rules for the purpose of the latest conviction. What that sentence does identify is that the appellant has been under a two-year supervision order from 17<sup>th</sup> January 2019.

58. The appellant has been convicted as detailed above of seventeen offences and, for the purposes of analysis under Section 117C, he was last convicted on 19<sup>th</sup> February 2015 at Blackfriars Crown Court and on 20<sup>th</sup> March 2015 for theft from a person. On that occasion he was sentenced for a breach of suspended sentence (three consecutive periods of imprisonment amounting to twelve months) and the judge had this to say when sentencing:

*"What I am going to say Mr J is that the sentence is rising each time. The sentence will have to be six months on each of those two matters 11<sup>th</sup> July and 9<sup>th</sup> October. They will therefore be consecutive to one another and to the suspended sentence. The sentence will be one of 24 months' imprisonment altogether."*

59. The judge added: *"I am also satisfied that there should be an antisocial behaviour order in all the terms. ... That is going to last **for five years.**"* The sentencing remarks also observe the expertise of the appellant is in being able to distract and steal from those boarding public transport was highlighted.
60. I highlight aspects of the appellant's criminal offending. His PNC records reveal that he was first convicted on 11<sup>th</sup> December 2006 for possession of a firearm with intent to cause fear or violence, convicted in 2007 of having an offensive weapon, again in 2007 for driving whilst uninsured and apparently without a licence. He was again convicted of breach of a community order. In 2008 he was convicted of a possession of cannabis and for battery for which he received a sentence of two months' imprisonment suspended for two years. In 2010 he was convicted of handling stolen goods for which he received a community order and in 2010 for theft from a person. In 2012 he was convicted of seven counts of theft from a person and sentenced to three months' imprisonment and again in 2013 convicted of battery for which he received three months' imprisonment. In June 2013 he was convicted of theft and sentenced to four months suspended for eighteen months and in July 2013 he was again convicted of theft for which he received a four-month sentence, again suspended for eighteen months, and he received a supervision order for eighteen months. In August 2014 the operational period of the suspended sentence was extended from eighteen months to two years. He was again convicted in July 2013 for which he received a four-month sentence, suspended for eighteen months, and a supervision order for eighteen months. That was varied and extended to two years in January 2014.
61. In August 2014 he was convicted of possessing a class B drug and given a community order for twelve months. He was recorded as having committed further offences during an operational period of the suspended



sentence order on 8<sup>th</sup> March 2014 and thus the suspended imprisonment was extended.

62. Finally, on 20<sup>th</sup> March 2015 he was convicted on two counts of theft from a person and given overall the two-year sentenced described above.

63. I have repeated the analysis of the offences above to show that the appellant has committed an extensive range of offences including offences against the person, theft, possession of offensive weapons and that the imposition of supervision orders appeared to have little effect, for example after the supervision order imposed in January 2014 the appellant continued to commit offences. The appellant has committed offences for which he has been convicted from 2006 to 2015 and that is for nearly a ten-year period. It is also significant to note that initially his sentences were suspended but finally, in 2015 he was indeed committed to prison. The fact of the criminal convictions must have entailed the element of 'mens rea' despite the history of psychiatric illness and are an objective fact. Although the medical reports necessarily review the history of the appellant's mental health, those reports all date from 2017 onwards and are making direct clinical observations from then on. In other words they do not or confirm the appellant's state of mind at the time of the pre-2015 convictions or indeed undermine those previous convictions.

64. The medical records show, and in particular the psychiatric court report dated 17<sup>th</sup> April 2018 compiled by Dr Ian Cumming, that the appellant first came into contact with mental health services in 2006. The psychiatrist found it

*"somewhat incongruous and surprising that he [the appellant] had been involved in the offences and identified by LB as a known pickpocket ... as the offences appeared quite sophisticated and organised. I noted that there is a suggestion that his current partner and carer had also been identified as being involved at one point."*

65. The psychiatrist went on to state:

*"However, his mental state in the interview with me is consistent not only with his presentation to Dr Baird but also the clinical records which predate and follow the offences [of 2017 for which the appellant received a community sentence]."*

66. The appellant has not only been under the sanction of an antisocial behaviour order for five years (he was no doubt on licence following his release from prison after the sentence in 2015 of two years' imprisonment) but has more recently had the deterrent effect of the wish to have contact with his children. The appellant has been engaged in Family Court proceedings since at least 20<sup>th</sup> February 2018. The issues cited in those proceedings included whether the father presented any risk to the children and whether he was in a position to care for both or either D6 alone. The local authority had filed evidence for both children D6 and D7 to be placed for adoption outside the family. That would have had a

significant deterrent effect on the appellant, and it was noted in the timetable for proceedings that they could not be completed within 26 weeks owing to delay in the assessment of the father due to his admission to hospital under the Mental Health Act 1983.

67. Even if the 2017 conviction is disregarded, the appellant has a lengthy criminal record of offending from 2006 to 2015. He suffers from mental health difficulties, and this has to be factored as a reason for his offending, but he has had access to mental health services and treatment prior to 2015 and seemingly since 2006. The appellant has through much of his offending career had access to post offending programmes for drug and alcohol treatment and 'building skills for recovery'. I note that as late as 2014 he was employed by Tesco. The appellant has been sentenced to various community orders and has six convictions for breach of the same. He has breached numerous court orders. The threat of deportation has loomed since 2014.
68. There has been restraint imposed on his offending for large periods of time via suspended sentences and since 2015 he has been subject to a five-year anti-social behaviour order and two-year supervision order from 17<sup>th</sup> January 2019. He has also been subject to the strictures of the Family Court in order to establish and maintain contact with his children.
69. I conclude that the appellant remains a persistent offender and the omission of offending in the last years since 2015 does not signify real rehabilitation because of the restraints imposed. He does not fall into the exceptional category where having been a persistent offender he has shown rehabilitation because of the nature of the restraints upon him. I find that he is still to be classified as being a persistent offender albeit that he has not been convicted of offending for some time.
70. I turn to the consideration of Section 117C(5) and paragraph 399(a) (the appellant has British citizen children in the UK) and 399A of the Immigration Rules. I have considered the Joint Presidential Guidance Note No 2 of 2010 and **SB (vulnerable adult: credibility) Ghana** [2019] UKUT 398 (IAC). That said the appellant did not give evidence before me and the facts remained largely undisputed by the Secretary of State. The real question was whether the deportation of the appellant would have an unduly harsh effect on his children.
71. At the hearing before me Ms Ahmad confirmed that the Home Office had no expectation that the children would remove to Jamaica. That would be unduly harsh. **KO (Nigeria) v Secretary of State for the Home Department** [2018] UKSC 53 at paragraph 23 set out that 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". **HA (Iraq)** [2020] EWCA Civ 1176 identified at paragraph 52 that "while recognising the 'elevated' nature of the statutory test, it is important not

to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in Section 117C(6)."

72. The underlying question for Tribunals is whether "the harshness which the deportation will cause for the partner and/or children is of a sufficiently elevated degree to outweigh that public interest". There should in each case be an informed evaluative assessment. At paragraph 56 Underhill LJ confirmed that "there is no reason in principle why cases of 'undue' harshness may not occur quite commonly" and the question was not "is this level of harshness out of the ordinary?"; undue harshness may indeed fit into some "commonly encountered pattern". That can still mean that it can be unduly harsh and there are an 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."*

73. **SM (Zimbabwe) [2021] EWCA Civ 1566** at paragraph 13 repeated this:

*"In MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), the Upper Tribunal directed itself as follows (at para. 46):*

*'... '[U]nduly 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.'*

*That self-direction was followed in the later case of MAB (USA) v Secretary of State for the Home Department [2015] UKUT 435 and was quoted with approval by Lord Carnwath in his judgment in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, [2018] 1 WLR 5273. However, it must be read subject to two passages from my judgment in HA (Iraq)."*

74. In accordance with **Devaseelan** the decisions of the First-tier Tribunal were the starting point for the findings of Judge Ruddick. The decision of Judge O'Garro dates back to July 2011 and albeit it identified that the appellant had family life with his children with whom he had regular

contact, that decision is now considerably dated for the purposes of an analysis of whether it would be unduly harsh for the children should the appellant be deported although it sets out the situation as it was then.

75. From the appellant's own evidence, as recorded in the decision of Judge Hodgkinson his relationship with the mother of A1 broke down in 2006 and he commenced a relationship with the mother of B2, who was born in 2007, a few days before A1. In 2008 the appellant started another relationship with the mother of C3, C4 and C5, C3 is a child who is partially deaf. In 2012 the appellant and their mother separated, and the appellant commenced a relationship with the mother of D6 but at the same time had an affair with the mother of C3, C4 and C5 as a result of which C5 was born in 2014. Judge Hodgkinson recorded that there was no challenge to the appellant's evidence that he did seek regularly to maintain telephone contact with all his biological children whilst in detention.
76. First-tier Tribunal Judge Hodgkinson recorded in June 2016 at paragraph 25, that the appellant had remained in custody from November 2014 until the present time, that being 18<sup>th</sup> May 2016. Judge Hodgkinson at paragraph 68 concluded that the appellant had never provided a stable home for any of the children and before him there was no evidence that his "removal to Jamaica would have a particularly detrimental effect on any of the children". Judge Hodgkinson also found [75] that the appellant had a grandmother in Jamaica who had raised him and that he was "old enough to support himself".
77. I turn to a consideration of whether it would be unduly harsh to remove the appellant and I am aware of the finding at paragraph 132 of First-tier Tribunal Judge Ruddick and in particular that she placed considerable weight on "*their family lives with the appellant and, through the appellant, with their half-siblings*", and that "*Those family lives would undoubtedly suffer irreparable harm if the appellant were deported*". As previously pointed out, irreparable harm does not necessarily equate with unduly harsh.
78. I have taken into consideration the photographs and written documents provided of the appellant and children. The appellant's statement dated from 2019 and added little although oral evidence was given at the hearing in February 2020. There was no up-to-date statement from them or information.
79. Two of the older children, A1 and B2, are now 15 years old and there was limited evidence as to the extent of contact with the appellant or evidence of their current circumstances.
80. Judge Ruddick, whose findings were preserved, specifically stated that in relation to D6 and D7 there was no confirmation from the Family Court that documentation may be released but it is recorded in the First-tier Tribunal decision that contact with the appellant takes place every eight weeks in a

contact centre. As recorded by Judge Ruddick, D6 and D7 are in foster care, the adoption order having been lifted. There was no evidence that the children had in fact been allowed to stay over at his home or that the contact had been increased. Indeed, the letter from Lambeth Council dated 20<sup>th</sup> February 2020 confirms that both were looked after children under Section 31 of the Children Act, and the plan was for long-term fostering with a view to having ongoing contact with the birth family. That letter dated February 2020 did not allude to the contact being developed, albeit it was the children's wish to continue to spend time with their father and that the appellant had engaged positively with the local authority. It was recorded that it would be in the children's best interests that face-to-face contact with their father continued. Nothing in that letter identified undue harshness for the children should the appellant not have contact.

81. I have no doubt that the best interests of these two children are to continue to have stability through their foster home, bearing in mind the upheaval they have already experienced through being parted from both their mother and father (the mother was found to have neglected the children), and also to have contact with the father. However, I am not persuaded that the inability to see their father once every eight weeks despite the plan for further contact would be unduly harsh for those two children. There was simply no evidence to that effect. Both appear to be at school and there was no evidence of significant health needs.
82. I turn to C3, C4 and C5, for whom the Family Court made a Child Arrangements Order on 28<sup>th</sup> November 2019 and agreed to the orders' disclosure in these proceedings. It was noted that the appellant was sometimes late to pick up his children from school. However, as identified by Judge Ruddick and recorded above, there was alternate weekend contact and half of the summer and Easter holidays to be spent with the father with Christmas to be agreed between the parties and half of each half-term holiday.
83. Again, there was no up-to-date statement from the children, but Judge Ruddick recorded that C3, C4 and C5 attended court on 21<sup>st</sup> February 2020 and that A1 and B2 had attended his home with these three children the previous week to celebrate their February birthdays together.
84. C3 was born extremely premature and had some degree of deafness in both ears and received speech and language therapy but the report to hand from Speech and Language Therapy Service was elderly dating from 2014. The finding of Judge Ruddick that the Cafcass order confirmed there were no concerns around the children's welfare now, albeit that the appellant had been convicted of battery towards his previous partners.
85. C3, C4 and C5 live with their mother for the majority of the time whilst the father has contact. The school reports of C3 dated June 2019 confirmed that she had made a good amount of progress across the curriculum this year, had become "far more confident with working independently" and "overall C3 has been a pleasure to teach this year" and "it has been lovely

watching her grow into a confident and independent member of the class". The 2019 report for C4 confirmed that he "is a confident and sociable member of the class. His attitude towards school has improved." He was "showing progression across the curriculum" and "has been a pleasure to teach". In relation to C5 in June 2019 the report stated she could "be proud of her achievements. She is very good friends with all the children in [the] class and well-liked by all her peers and the teaching staff".

86. These children appeared to be in mainstream school and appeared to be progressing well. The appellant had been absent, incarcerated or having intermittent contact with them until the court order made in November 2019 but despite that and hitherto that point, they appeared to be coping well. I appreciate that the appellant has a genuine parental relationship with C3, C4 and C5 and on his oral evidence has contact with A1 and B2 but he does not live with any of the children and the evidence before me did not persuade me, despite the contact, that the effect on the children should the appellant be deported would be unduly harsh.
87. I have considered the best interests of these children throughout this decision further to **ZH (Tanzania) [2011] UKSC 4**; 'best interests' is a primary consideration but not paramount consideration and is not a trump card. The best interests of C3, C4 and C5 as indeed for D6 and D7 would be to have stability with the people with whom they live and preferably contact with their father. The test however is whether there would be undue harshness on the separation.
88. I have no reason to find that the appellant's removal from the United Kingdom would be unduly harsh on any of his partners which would in turn affect the children. The appellant now resides with a new partner who was not named in the application and none of his previous relationships have survived. Indeed, his relationship with the mother of D6 and D7 is non-existent and the relationship with him and the mother of C3, C4 and C5 resulted in the requirement for a court order so that he might see the children and those orders reveal a disagreement between the parties.
89. I accept that the appellant has significant contact with C3, C4 and C5 but there are no significant issues with their health, no significant issues with their education and I am not persuaded, on the evidence before me that the effect on the children of the appellant's removal would be unduly harsh, or that it was out with the ability of the children to keep in contact with each other, particularly bearing in mind the two oldest children are 15 and the oldest of the second group of children is now 12. Separation will of course cause harm which may well be lasting because the children will no doubt have an attachment to the appellant. Nothing before me indicated undue harshness in terms of being 'severe' or 'bleak'
90. The Social Worker report dated 2018 on D7 referred to her having supervised contact with the appellant her stepfather every 8 weeks and that she looked forward to seeing him but did not identify any reasons why it would be unduly harsh if he were deported. This report confirmed the

long-term foster care placement of both D6 and D7 together which was the important factor.

91. Although Judge Ruddick relied on the Family Court order for contact between the appellant and his children C3,4 and 5 and found that the children's family lives with the appellant would suffer irreparable harm if the appellant were deported and modern means of communication would be no substitute for face-to-face contact, irreparable harm does not necessarily equate with being unduly harsh. . 'Harm' as referred to by FtT Judge Ruddick connotes a spectrum of damage from blemish to intense damage. There was no analysis of the nature of the harm which was said to be going to occur to the children although it can be surmised that it would be psychological. The severity of that psychological damage was not analysed and in my view severe damage was not demonstrated by the evidence despite taking into account the letter said to be written by six of the children and referred to above. The concept of 'irreparable' is somewhat speculative and although it denotes more serious damage it is simply not possible to know what is or is not 'irreparable' and there was simply no evidence as to what harm would be lasting.
92. The court order dated 28<sup>th</sup> November 2019, which is the last order before me is entitled 'a first hearing dispute resolution appointment' although as indicated it was seen fit following an updated Cafcass letter dated 22<sup>nd</sup> October 2019 (unproduced) to make a contact arrangements order. Most of the court documents on file were in relation to D6 and D7 for which permission was not given to release.
93. None of the reports within the bundle, some of which should not have been included in relation to D6 and D7, identified that it would be unduly harsh on the children if face to face contact would cease.
94. Turning to Section 117C(4), this exception applies where
95. C has been lawfully resident in the United Kingdom for most of C's life,
96. C is socially and culturally integrated in the United Kingdom, and
97. there would be very significant obstacles to the foreign criminal's integration into the country to which he is proposed to be deported.
98. The appellant was born in April 1981 and claims he came to the UK on 25<sup>th</sup> November 2001 when was 20 years and 7 months old. He is not yet 41 years old. Having entered the UK on 25<sup>th</sup> November 2001, he still has not spent the majority of his life in the UK and it is clear from his immigration history that he has not been *lawfully* resident in the UK for most of his life. From 2003 until 2010 he had not leave. Thus Section 117C(4)(a) does not apply to him. Nor, under Section 117C(b) could he be considered socially and culturally integrated owing to his offending.
99. Turning to any very significant problems to his integration into Jamaica, **The Secretary of State v Kamara [2016] EWCA Civ 813** held that

*"integration" calls for a broad evaluative judgment of whether the individual will be enough of an insider in terms of understanding how life in that other country is conducted and a capacity to participate in it, have a reasonable opportunity to be accepted, operate on a day-to-day basis and to build up within a reasonable time a variety of human relationships'.*

100. In a broad evaluative assessment of whether the appellant would be able to integrate into Jamaica there was no indication that his grandmother was no longer in Jamaica and even if that were not the case it is evident that the appellant lived in Jamaica for his formative years and prior to coming to the UK. He left Jamaica when he was 20 years old and therefore spent his formative years there and would retain an understanding of the culture.
101. His ACRO (police criminal records office) record disclosed following a subject access request, recorded that he had previously (as recorded in 2010) had a range of work including as a decorator, painter and mechanic. On the birth certificates of his children dated 2007 and 2009 the appellant's occupation was given as 'plumber'. In 2014, his occupation was recorded as a shop employee and there were payslips on file. He has had work experience.
102. I fully accept that the appellant has mental health needs and is on medication, but this matter was considered by the Secretary of State, who disclosed a Country of Origin Information Request regarding psychiatric provision in Jamaica, albeit dated 19<sup>th</sup> October 2015, which confirmed that there were psychiatric facilities in Kingston, Jamaica which were public facilities. Antipsychotic drugs were available, and it is the case that the appellant had not shown evidence that he would be unable to access these facilities or that he would be unable to approach the Jamaican authorities for medical assistance should this be required on his return. It is accepted that the medical facilities may not be of the same standard as in the UK but applying the test in **AM (Zimbabwe)** [2020] UKSC 17, I do not find that the appellant's health had reached the requisite threshold or that access to medical treatment would preclude the appellant's removal to Jamaica.
103. The appellant did not pursue his asylum claim and I consider that his previous assertions of being at risk from gangs in Jamaica no longer pertain. He pursued his claim on Article 8 grounds only. However, as the Secretary of State's refusal decision maintained, he had produced no credible evidence of persecution or difficulties. Even so, there is according to the background material including the CPIN on Jamaica, sufficiency of protection. I conclude that there are no very significant obstacles in that regard to his reintegration in Jamaica with reference to his Article 8 claim.
104. I thus turn to Section 117C(6), consideration of whether there are very compelling circumstances over and above those described in Exceptions 1



and 2 of Section 117C. The 'Exception' claimed in this case in connection with the children does not in my view fulfil the requirement in this instance and thus does not have such great force for Article 8 purposes that it constitutes very compelling circumstances, but nonetheless I have assessed it in conjunction with and cumulatively with other factors relevant to Article 8.

105. The appellant's witness statement submitted for the First-tier Tribunal hearing in April 2019 stated he had '*six children in the United Kingdom*'. The appellant, however, also had two adult children in the UK but little up to date evidence was provided thereto. KW born in 1999 was said to have ADHD and allergies but the report dated from 2014. Another child DS was born in 2001 but again no up to date evidence was provided.
106. The appellant's mental health condition has been set out by First-tier Tribunal Judge Ruddick, who confirmed that the reports were prepared by suitably qualified psychiatrists and none of the reports had been challenged by the respondent. The reports identify that the appellant suffers from chronic schizophrenia and that he also suffers from a possible intellectual disability, neither of which are likely to disappear. Indeed, the CPS Report stated that only a "small number" of those with chronic paranoid schizophrenia made a complete recovery. Although it was suggested that if he lost the support of his current partner there was a genuine possibility that he would re-offend it appeared that the appellant had subsequently changed his partner. There is a functioning public mental health service in Jamaica and the evidence the appellant retains his grandmother in Jamaica. He stated he was willing to comply with his medication regime in the UK and secure employment. There is no reason that he could not do the same in Jamaica. He is still a relatively young man at 40 years old, has experience of Jamaica and has had some work experience. Despite stated intellectual deficits he applied for a student nursing visa when he first came to the UK. He is able from 2019 to care for his minor children alone. Through the public health service and work he could secure treatments and medication as required. The Secretary of State referred to the CPIN albeit 2015 confirming that there is psychiatric treatment both inpatient and outpatient in Jamaica and that medication such as Risperidone is available.
107. In January 2020 he was discharged from the South London Maudsley St Giles Central Promoting Recovery Team owing to his difficulty in 'establishing motivation to attend regularly for psychological therapy'. He managed to secure a contact order in 2019 to take responsibility and care for young children. On 16<sup>th</sup> September 2020 Dr N Babayeva, Acting up Consultant from the South London Maudsley St Giles Team confirmed that he presented at that time with 'some residual psychotic symptoms of his Paranoid Schizophrenia and reactive depression because of difficulties in the relationship with his ex-partner (mother of his children) and childcare arrangements, ongoing immigration issues, and issues with benefits'. His medication was increased to sertraline 200mg once a day. This is the last medical report before me.

108. There was no further medical evidence or specific evidence in the form of reports in relation to the children's welfare after 2019. The photographs of the appellant and his children were undated.
109. In relation to his length of residence in the UK, I have had regard to the appellant's immigration history and factor in my findings above. Much of his time in the UK has been spent here illegally and during which he has persisted in committing criminal offences. He entered the United Kingdom as an adult not as a minor and I take this into account. His status has been essentially precarious throughout, having been granted leave as a student and then leave under a false name until 2003 and latterly discretionary leave in 2010 until 2014 on the basis of family life.
110. I undertake, when conducting the proportionality exercise, the "balance sheet" approach and find that the appellant has several British citizen children in the UK who have contact with him. Additionally he has mental health difficulties. On the evidence before me there were no unduly harsh consequences for the children. They have either very limited contact with him, are in foster care or if they do have contact the evidence in relation to the effect of his deportation on their lives was not fully explained. D6 and D7 are in foster care but the court documents and up to date reports are not available to me.
111. When considering Section 117B, the appellant has not been able to work latterly, primarily because of his immigration status (although it is acknowledged that there have been some errors on behalf of the Secretary of State in addressing his applications). The appellant speaks English fluently and acknowledges that he worked in the past. These however are neutral factors.
112. As set out at Section 117C(1), the deportation of foreign criminals is in the public interest. The appellant, although *not* being sentenced to a period of imprisonment such as to warrant automatic deportation, is subject to deportation nonetheless because he is a persistent offender and has a very extensive criminal record.
113. On the evidence I am simply not persuaded that there are any very compelling circumstances set out in this case once a detailed analysis of the factors is undertaken. In the light of my findings above I therefore dismiss the appeal.

### **Notice of Decision**

The appeal of DJ is dismissed .

Signed Helen Rimington

Date 8<sup>th</sup> February 2022

Upper Tribunal Judge Rimington

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed Helen Rimington  
Upper Tribunal Judge Rimington

Date 8<sup>th</sup> February 2022