



Neutral Citation Number: [2022] EWCA Civ 1512

Case No: CA-2021-000130

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL (IAC)**  
**Upper Tribunal Judge Keith**  
**HU/22145/2018**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18 November 2022

**Before:**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LADY JUSTICE NICOLA DAVIES**  
and  
**LORD JUSTICE STUART-SMITH**

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**Between:**

**AEB**

**Appellant**

**- and -**

**SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

**Respondent**

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**David Chirico and Eleri Griffiths** (instructed by Duncan Lewis Solicitors) for the **Appellant**  
**Andrew Byass** (instructed by Government Legal Department) for the **Respondent**

Hearing date: 2 November 2022  
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**Approved Judgment**

This judgment was handed down remotely at 10.00am on 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Stuart-Smith:****Introduction**

1. The Appellant (“AEB”) appeals by way of a second appeal against the decision of the Upper Tribunal (“UT”) promulgated on 16 February 2021. By that decision, the UT dismissed his appeal against the decision of the Respondent Secretary of State, dated 17 October 2018, refusing his human rights claim and making a deportation order. Elisabeth Laing LJ gave permission to appeal on two grounds but refused permission on others on the basis that they did not satisfy the second appeal test set out in *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.
2. The Secretary of State made her decision because AEB had on 6 April 2017 been convicted on his own pleas of guilty of offences of dishonesty for which he had been sentenced to four years’ imprisonment. That conviction meant that he faced automatic deportation pursuant to section 32 of the UK Borders Act 2007. AEB brought an Article 8 human rights claim, relying on his private and family life, which brought sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) into play. The First-tier Tribunal (“FtT”) dismissed AEB’s appeal against the Secretary of State’s October 2018 decision, but its decision was set aside by the UT without any preservation of findings of fact, on the grounds that there were errors of law including an error which deprived AEB of a fair hearing. The UT decided to remake the FtT’s decision itself rather than remitting it to the FtT and later dismissed AEB’s appeal. The present appeal is against that decision.
3. Ground 1 is that the UT misdirected itself as to the applicable principles when deciding to retain AEB’s appeal rather than remitting it to the FtT. Ground 2 is that the UT erred in its approach to the question of whether there were “very compelling circumstances” within the meaning of section 117C(6) of the 2002 Act.

**The basic legal framework**

4. The powers of the UT on an appeal from the FtT derive from section 12 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). Section 12 gives the UT an unfettered discretion:

**“12 Proceedings on appeal to Upper Tribunal**

(1) Subsection (2) applies if the Upper Tribunal, ..., finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) ...

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.”

5. The UT’s discretion pursuant to section 12 is the subject of Practice Directions and Practice Statements of the Immigration and Asylum Chambers of the FtT and the UT, which explain how the UT will normally exercise the discretion conferred by section 12.2: see *JD (Congo) v SSHD* [2012] EWCA Civ 327, [2012] 1 WLR 3273 at [35]. The basic distinction between the Practice Directions and the Practice Statements is that the Practice Directions tend to set out steps to be taken by the parties while the Practice Statements tend to refer to what the FtT and the UT themselves will do.

6. Part 3 of the current Practice Directions deals with the procedure to be followed on an appeal to the UT. Paragraph 3.1 provides:

Where permission to appeal to the Upper Tribunal has been granted, then, unless and to the extent that they are directed otherwise, for the purposes of preparing for a hearing in the Upper Tribunal the parties should assume that:

(a) the Upper Tribunal will decide whether the making of the decision of the First-tier Tribunal involved the making of an error on a point of law, such that the decision should be set aside under section 12(2)(a) of the 2007 Act;

(b) except as specified in Practice Statement 7.2 (disposal of appeals by Upper Tribunal), the Upper Tribunal will proceed to re-make the decision under section 12(2)(b)(ii), if satisfied that the original decision should be set aside; and

(c) in that event, the Upper Tribunal will consider whether to re-make the decision by reference to the First-tier Tribunal’s findings of fact and any new documentary evidence submitted under UT rule 15(2A) which it is reasonably practicable to adduce for consideration at that hearing.

7. Paragraph 7 of the current Practice Statements provides:

### **Disposal of appeals in Upper Tribunal**

7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of

an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

8. Reading paragraph 3.1 of the Practice Directions and paragraph 7.2 of the Practice Statements together is not altogether straightforward. Paragraph 3.1(b) of the Practice Directions means that, except as provided by paragraph 7.2 of the Practice Statements, the parties to an appeal should assume that, if satisfied that the decision of the FtT should be set aside for an error of law, the UT will remake the decision. That assumption is also reflected in the first words of paragraph 7.2 of the Practice Statements, though it is expressed differently – the UT is “likely” to proceed to remake the decision unless an exception under paragraph 7.2 applies. Where an exception applies, the general assumption (or likelihood) that the UT will remake the decision is inapplicable. As a matter of language, where the exception applies, the UT is not likely to proceed to remake the decision.
9. Paragraph 7.3 of the Practice Statements provides a qualification of paragraph 7.2(b), tempering any suggestion that the UT should be quick to remit simply on the grounds that some further fact finding is required. The test under paragraph 7.2(b) is relatively stringent: the UT is required to have regard to the overriding objective before reaching a conclusion that the nature or extent of any necessary judicial fact finding is such that it is appropriate to remit the case to the FtT.

#### *The status and effect of the Practice Statements*

10. Submissions were made about the status (or lack of it) of the Practice Directions and Practice Statements in this case. In the light of the concessions made by the Respondent on Ground 1, to which I refer in more detail at [28] below, it is not necessary to

determine their precise status in order to decide this appeal. I therefore outline the position relatively briefly.

11. The 2007 Act makes provision for the making of Practice Directions. Section 23(1) empowers the Senior President of Tribunals (“the SPT”) to give directions as to the practice and procedure of the FtT and the UT. The SPT’s power is subject to section 23(4), which provides that such directions may not be given without the approval of the Lord Chancellor. However, that requirement is itself subject to qualification by section 24(6), which relevantly provides that section 23(4) does not apply to “directions” to the extent that they consist of guidance on the making of decisions by members of the FtT or UT. In summary, the power of the SPT to give Practice Directions is conferred by statute; and the effect of section 23(4) where it applies is that Practice Directions are given with the direct authority of the SPT and the Lord Chancellor.
12. Practice Statements for the FtT and UT are not mandated or given particular status by statute, rule or regulation. They are issued by or on behalf of the SPT. Before us, the authority to issue Practice Statements was identified as arising under powers that are inherent in the SPT by virtue of the holder of that office presiding over the UT and the FtT. This relies upon section 3(4) of the 2007 Act, which states that “the [SPT] is to preside over both of the [FtT and the UT]”. Reference was also made to section 2(3) of the 2007 Act which requires the SPT, in carrying out the functions of that office, to have regard to the need for proceedings before tribunals to be fair and to be handled quickly and efficiently. On the information that is available to us, this explanation appears to be correct and to reflect common understanding: see *DT v SSWP* [2015] UKUT 0509 (AAC) at [39] and Jacobs on *Tribunal Practice and Procedure* at [3.96].
13. In *Brook v Reed* [2011] EWCA Civ 331, [2012] I WLR 419, David Richards J (as he then was) considered the status of a Practice Statement that had been given by the Chief Bankruptcy Registrar of the High Court dealing with the remuneration of insolvency practitioners. We have not heard discrete submissions on the authority of a Practice Statement in that jurisdiction but it appears to be broadly analogous to the Practice Statements in the present case. David Richards J said, at [44]-[45]:

“44. The practice statement of itself cannot make law on substantive issues or require courts to apply the guiding principles stated in it. But the practice statement is not an attempt to create a new set of principles, but a convenient means of gathering together in one place the principles to be derived from the Insolvency Rules and authority, ... .

45. The practice statement acquires authority as a statement of guiding principles if it is expressly approved and applied as such in judgments at an appropriate level. ...”
14. In *JA (Ghana) v SSHD* [2015] EWCA Civ 1031 the then SPT (Sir Ernest Ryder, with whom Arden and Briggs LJ agreed) considered paragraph 7 of the Practice Statements and said at [31]:

“31. I am troubled by the submission that the UT judge was required to consider the criteria in [7.2] of the Practice Statement and that by failing to do so he was guilty of a procedural

irregularity sufficient to amount to an error of law ie the process amounted to an unfair hearing. That is a bold submission when shorn of its substantive context. Where a tribunal is given a procedural discretion then one expects there to be a reasoned decision about the use of that discretion, whether that is in response to an application made to the tribunal or as respects a choice that has to be made between, say, two available procedural approaches, one of which may be more adverse than the other to one or other of the parties. That was not the circumstance here. The UT judge was following a Practice Statement that set out the normal approach of the tribunal. As a specialist judge he can be taken to know what that approach is. The need for overt reference to the Practice Statement and his reasons for taking the normal approach can usually be taken as read. Further reference to the Practice Statement would ordinarily only arise where the judge chooses to take a procedural approach that is not the normal approach: that is a circumstance that would need to be reasoned.”

15. I respectfully endorse the observations of Richards J in *Brook v Reed* and of the Court of Appeal in *JA (Ghana)*. The purpose of a Practice Statement such as those with which we are concerned is to provide guidance, both to Tribunal Judges and to Tribunal users, so as to encourage consistency of approach and understanding. The terms of paragraph 7.2 do not seek to lay down immutable rules; still less do they seek to establish propositions of law or to fetter the broad discretion afforded to the UT by section 12 of the 2007 Act. But they do seek to reflect what is “likely” to happen in some circumstances and not in others. And, as the SPT observed in *JA (Ghana)*, the general obligation upon a Judge exercising a discretion to give adequate reasons for the course they decide to adopt is all the more important when they are proposing to adopt a course that departs from the “normal” approach.
16. As I have identified, where a decision has to be taken to remake or remit in circumstances where the effect of the error of law below has been to deprive a party before the FtT of a fair hearing, the “normal” assumption that the UT will remake the decision is negated. The reason for this is not hard to find. As was said by the UT in *MM (unfairness) Sudan v SSHD* [2014] UKUT 00105 (IAC) at [26]:

“We consider that, as a fairly strong general rule, where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant’s right to a fair hearing, the appropriate course will be to remit to a newly constituted [FtT] for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant’s statutory right of appeal to the [UT] should be triggered only where the former right has been fully enjoyed.”
17. I do not understand the reference to “a fairly strong general rule” to be suggesting the existence of a rule of law or procedure rather than an observation on what will be the usual outcome. For similar reasons, I would only use the word “presumption” with extreme care, and would avoid qualitative expressions such as “strong presumption”

wherever possible. Subject to that minor gloss, I agree with and respectfully endorse this passage. It provides compelling and principled support for the conclusion, amply reflected in paragraph 7.2(a) of the Practice Statements that, where an error of law has deprived a party of a fair hearing below, the normal procedure is and should be to remit. Echoing the observation of Sir Ernest Ryder, if a different course is to be adopted, it needs cogent reasons and, as a separate requirement, those reasons should be adequately expressed.

18. Although submissions during the hearing canvassed the question whether the fact that paragraph 7.2 of the Practice Statements is referred to (and to that extent may be said to be incorporated in) paragraph 3.1 of the Practice Directions affected its legal status or importance, I think that any difference is limited to its effect on the working assumption specified in paragraph 3.1 of the Practice Directions. The reference makes clear that, where paragraph 7.2 of the Practice Statements is engaged, the working assumption identified in paragraph 3.1 of the Practice Directions is negated. Given the generality of the terms of both provisions, referring to paragraph 7.2 of the Practice Statements in paragraph 3 of the Practice Directions does not elevate paragraph 7.2 so as to give it a legal status or effect that it would not otherwise have.

*Sections 117A-117D of the 2002 Act: “very compelling circumstances”*

19. AEB’s Article 8 claim brought into play Part 5A of the 2002 Act. Though extremely well known, it is convenient to set out the most relevant provisions of sections 117A-117D, as they are central to the resolution of this appeal. They provide as follows:

**“117A Application of this Part**

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

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

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

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

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

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

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

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

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

....

**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.

**117D Interpretation of this Part**

- (1) In this Part—



...

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

(a) is a British citizen, or

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

...

(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) ...”

20. I will return to these provisions when addressing Ground 2.

### **The factual and procedural background**

21. AEB is a Nigerian national who first came to the United Kingdom at the age of 29, in 1992. The UT found that he had been here continuously since 2005. For present purposes it may be accepted that his first entry into the United Kingdom was lawful; but for many years he has had no lawful basis for remaining here. An application made in 2005 was not determined and in all real senses appears to have lapsed: the Secretary of State did not determine the application before the issues that underlie the present case arose, and AEB did not at any stage press for a determination or refer to it after it had been submitted, though there were ample opportunities for him to do so if he had wished. By way of illustration, one such opportunity arose when he was served with a notice of liability to deportation on 19 July 2006. He did not respond by reference to his outstanding application; nor did he leave the United Kingdom. The UT found at [39] that the application “was not resolved for over a decade and that it is most likely that it was overlooked, by both the respondent and the appellant’s representatives, until 2018.”

22. In 2005 AEB met his future partner, MD. They now have three children. O was born in 2003 and is MD’s child and AEB’s stepchild. A, who was born in 2006, and C, who was born in 2008 are AEB’s biological children with MD. Each of the children has significant disabilities and special needs. O is now 19 but has significantly delayed development in speaking and understanding and presents as much younger than his chronological age. He remains highly vulnerable and needs supervision in many daily tasks. He is unable to leave the family home alone. A is diagnosed with autism and

has severely delayed use and understanding of language. He is in a special day school rather than mainstream schooling. The UT found that he “needs stability, security, and a clear structure in the family home”. He was observed to be clingy when around AEB. C also has a diagnosis of autism with significantly delayed understanding and use of language and requires adults to support her with timetables, routine and structure. As with the other children, she was observed to be clingy around AEB.

23. AEB has four separate convictions for eleven offences:
  - i) On 15 February 2005, for an offence committed on 13 December 2004 of using a false instrument to obtain a medical prescription, he was fined;
  - ii) On 28 June 2007, for offences committed on 4 December 2006 of obtaining employment using a false British birth certificate, he was made subject to community orders;
  - iii) On 12 June 2008, for offences of a similar nature, committed between 1 December 2001 and 22 January 2002 and on 27 May 2008, he was sentenced to 6 months in prison; and
  - iv) On 6 April 2017, for offences including an offence of conspiracy to defraud between 1 January 2012 and 28 April 2015, he was sentenced to 4 years imprisonment. The Judge’s sentencing remarks make plain that AEB was regarded as the ringleader of a relatively sophisticated fraud involving the making of 350 false claims on his ex-employers, Southern Rail, which had an aggregate claimed value in the region of £100,000. 171 of the fraudulent claims were paid by Southern Rail, amounting to an aggregate loss just short of £55,000. The sentence of 4 years was after a 25% reduction from a notional sentence of 64 months on account of AEB’s pleas of guilty.
24. In the light of the 2017 conviction, AEB was served with the decision to deport him on 29 August 2017. No response was provided to the section 120 notice contained in that decision.
25. AEB made his Article 8 human rights claim on 6 March 2018, which was refused by the Secretary of State on 17 October 2018. He then appealed to the FtT which dismissed his appeal. At the start of the FtT hearing, counsel for AEB requested an adjournment on the grounds that he required expert evidence of an independent social worker in respect of the current impact on his children of his separation from them, the impact of his removal and their best interests. The FtT was told that funding was in place, an expert had agreed to accept instructions, and that a report would be produced by the end of October 2018. The application to adjourn was refused because the FtT took the view that the appeal could be fairly heard without an expert’s report.
26. It was this decision not to adjourn that led the UT to hold that the hearing below had been procedurally unfair. In the Error of Law judgment, the UT Judge identified two errors that led to unfairness. First, “bearing in mind that this is a case which focuses centrally on the consequences of the separation of the appellant from his children and whether those circumstances would amount to very compelling circumstances over and above those outlined in exceptions 1 and 2 of section 117C(6) of the 2002 Act; and the evidence was readily available in a short period after the date of hearing, I regarded the

FtT's decision to proceed in the absence of that evidence as depriving [AEB] of a fair hearing." Second, "[the decision of the FtT] also presupposed the correctness of the respondent's assertion that because the appellant had not seen his children since 2017, it followed that the appellant was not in a genuine and subsisting parental relationship with them. This went to the heart of the appeal and went beyond whether there should be an adjournment. The FtT referred to the children being looked after by their mother and whilst there was not an express conclusion about the absence of a paternal parental relationship, the FtT's conclusion that she could consider the best interests of the children without the report implied that nothing of relevance would be in a report because of the absence of such a subsisting relationship. The expert's report was relevant not only to the children's views and their best interests, but also to the other issue that a social worker might be able to shed light on, ie. whether there was in fact such a parental relationship."

27. At [5] of his subsequent judgment remaking the decision, the UT Judge said:
- "Suffice it to say that the FtT's decision was set aside, without preservation of any finding of fact. I concluded that it was appropriate to retain remaking in the [UT], given the narrowness of the scope of the issues as they had developed since the respondent's initial refusal."
28. By the time of the remaking decision, the Secretary of State's case in relation to AEB's private life was that Exception 1 was not satisfied, and the UT ultimately so held. There is no appeal against that finding before us. In relation to the children, the Secretary of State accepted that AEB had a genuine and subsisting parental relationship with all three of the children, albeit he was in a "non-resident relationship" with them. The Secretary of State also accepted that it would be unduly harsh for the children, all British citizens, to live in Nigeria, noting their specific needs and vulnerabilities and the fact that their mother, MD, had indefinite leave to remain in the UK and was no longer in a relationship with AEB. However, it remained the Secretary of State's case that the option of the children staying in the UK with MD but without the appellant was not unduly harsh and therefore Exception 2 was not satisfied.
29. The core questions in relation to the children were therefore identified at [8] of the UT Judge's judgment as being whether (a) the effects of the children staying in the United Kingdom without AEB would be unduly harsh for the children; (b) "whether there were very compelling circumstances, by virtue of the individual complexity and seriousness of the children's needs, and the fact that all three children had such needs"; and (c) whether the question whether it would be unduly harsh for the children if AEB were deported should be decided "without reference to the nature of the appellant's offending, when coming on to consider very compelling circumstances, the length of sentence beyond four years and the nature of the offences (which were not violent or drug-related) needed to be considered, as did the impact on MD to be able, alone, or with professional help, to look after the children; [AEB's] claimed rehabilitation and lack of further offending; and the lessened weight of the public interest in immigration control in light of the respondent's failure to deal with an earlier application in 2007 for leave to remain, for over a decade."
30. The Judge held that, following his release on 11 December 2019, "the appellant has ongoing regular contact, albeit as a non-resident father, with his children and although

the relationship between [him] and MD has ended, they maintain a supportive relationship and he helps her to care for the children.” After reviewing the evidence (including that of the now-admitted independent expert) and competing submissions, the Judge held that “whilst MD was able to cope (just) with the appellant’s absence while he was imprisoned, a permanent separation would mean that one person, namely MD, would not be able to cope on their own.” The Judge held that deportation would result in a permanent physical separation and that remote communication would not suffice for the kind of support and care that was required for each of the three children “separately and also in combination”: see [60]-[61].

31. The Judge then laid the ground for his findings on the crucial issues at [62]-[63]:

“62. That being said and notwithstanding the appellant’s important role, in the event of the appellant’s deportation, Dr Farooqi does not go so far as to say that a replacement domiciliary care provision could not provide adequate care, supplementing the support of MD who would not be able to cope on her own (paragraph [48] refers to it being very difficult for one person to manage on their own). Rather, O and his siblings might find domiciliary arrangements, in combination with respite care, difficult to tolerate, because they prefer people they are familiar with and do not like change; and *“it is not worth taking the risk as they have their father to assist their mother to care for them.”* While I in no way criticise the quality of Dr Farooqi’s assessment, read literally, whether it is *“not worth taking the risk”* to arrange domiciliary care is not for Dr Farooqi for to comment on; rather, I infer from that any domiciliary care arrangements, to help MD cope, may prove challenging for the children and is not without risk, in terms of whether the arrangements would prove successful or not.

63. The appellant’s removal, given the children’s emotional dependency on him and the stability of the setting in which he plays a central role, would mean a real loss to the children in terms of their emotional development, although I do not go so far as to find that it would result in a drop in their educational attainment or welfare, absent any domiciliary care arrangements failing. ...”

32. When considering the principles to be applied, the Judge said at [71]-[72]:

“71. Noting the authorities to which I have been referred of HA (Iraq) v SSHD [2020] EWCA Civ 1176; AA (Nigeria) v SSHD [2020] EWCA Civ 1296; and KB (Jamaica) v SSHD [2020] EWCA Civ 1385, when considering “unduly harsh”, it is important to move away from notions of exceptionality or an objectively measurable baseline of the “ordinary” effects of deportation on “any” child. Every assessment of “unduly harsh” must have as its focus the effects on the specific relevant children, taking into account their best interests. The wording “unduly harsh” reflects Section 117C(1), that the deportation of foreign criminals is in the public interest, so it does not start off

as a neutral evaluation, but in the context of that public interest, the focus remains on the effects on the children. Unduly harsh effects may be common place and are highly fact-specific, particularly as they centre on the effects on individual children, including (but only as examples and not as a ‘tick-list’) their ages; educational and emotional needs; and the role played by the potential deportee parent.

72. In the assessment of “very compelling circumstances”, which reflects the strong public interest in deportation, such a public interest still has a moveable quality, i.e. the public interest may not have the same weight for all serious foreign criminals; “public revulsion” is too emotive a concept to be weighed in the assessment of such public interest, but the public interest in deterrence remains a relevant factor; and at its heart, it is helpful to assess very compelling circumstances through the “balance-sheet” approach, weighing on the one hand, the factors in the appellant’s favour, holistically, against the strong (but not immovable) public interest in deportation. Factors which can be relevant (although of varying weights and which again are examples, and not an exhaustive list) include: the nature of the offence (for example, whether it includes an element of violence), its seriousness and the appellant’s role in the offence, as often reflected in the sentencing Judge’s remarks; the extent of rehabilitation and likelihood of reoffending; the delay, as in this case, in resolution of an earlier application for leave to remain (relating to the public interest in the maintenance of effective immigration controls); the depth of the appellant’s integration in the UK and quality of his relations with his children; whether his relationship could be sustained after his removal; the need to promote the children’s welfare; and the obstacles to the appellant’s integration in Nigeria (noting that this is a broad evaluative assessment, with the concept of being “insider” meaning the appellant having enough of an understanding of how Nigeria works to be able to participate in it, be accepted within it, operate day-to-day and build up a network of relationships there). ... .”

33. He went on to consider the provision of alternative permanent domiciliary or temporary respite care and the risk that such arrangements might not be successful. At [78] the Judge said:

“Even if that risk is minimal, I accept Ms Griffiths’ powerful submission that to replace the appellant as a key person in the children’s lives, will have a material impact beyond a question of safety, childcare and education, to the childrens’ emotional development, at important stages of their lives. Even if the risk of any replacement arrangement failing is low, I accept that, while finely balanced, that the effect of the replacement of the appellant in these circumstances with a professional carer or

carers, and never seeing the appellant in person again, (albeit maintaining a relationship via the internet) would have an unduly harsh effect on O, A and C, given their particular attachment to him; their need for stability and security; their lack of confidence with strangers; and their complex needs. In summary, the appellant, just about, satisfies Exception 2.”

34. At [81]-[86] the Judge reviewed the various factors that he brought into the balance-sheet, explaining the weight (or lack of it) that he attributed to each. No criticism of his assessment is made: nor could it be as it fell within the range of assessments and evaluative judgments that it was open to the Judge to make. He then returned to the children, continuing at [87]:

“I also take into account that while there are risks (albeit unquantified by Dr Farooqi) of an alternative professional care arrangement for O, A and C not succeeding, as Ms Griffiths accepted, the extent to which alternative domiciliary care arrangements would mitigate the effects on the children of the appellant’s deportation remains a relevant factor, even if the effect is “unduly harsh.” I do not accept Ms Griffiths’ submission that the totality of the children’s needs or their needs individually, coupled with the wider role that the appellant plays beyond merely that of a carer, in nurturing their emotional development, tips the effect of deportation (as she submitted) beyond “unduly harsh” to become very compelling. Indeed, I regard the proper focus as being on the totality of the circumstances, and not an incremental approach. On the totality of the circumstances, there is a viable option, albeit not without risk, of appropriate domiciliary care arrangements being put into place to assist MD successfully to meet the children’s welfare and educational needs both individually and collectively, which while undoubtedly not in the best interests of those children; and unduly harsh, (in the context of likely permanent separation from their father who plays a key role in their lives) nevertheless remains a viable option. I do not underestimate the loss to the children of the appellant in their emotional development, beyond basic caring and educational needs, which remote communications will never replace, but I also take into account the lack of evidence of a worsening of the children’s welfare and educational development, when the appellant was previously absent between April 2017 and December 2019, without any social services support at all and the fact that some form of a relationship between the appellant and his children will continue. Taking into account all of the factors I have considered in this decision, these do not, in my view, outweigh the strong public interest in this appellant’s deportation as a serious foreign criminal.”

35. In the circumstances, he held that there are not “very compelling circumstances” in this case. The appeal was therefore dismissed.

**Ground 1: did the UT misdirect itself as to the applicable principles when deciding to retain AEB's appeal rather than remit it to the FTT?**

36. AEB's case on Ground 1 may be shortly stated and consists of three elements:
- i) The UT erred in its interpretation and application of paragraph 7.2 of the Practice Statements, primarily by failing to have regard to paragraph 7.2(a) and/or alternatively in treating "the limited scope of the issues" as making it appropriate for the UT to remake the decision;
  - ii) The UT should have remitted the decision to the FtT;
  - iii) By failing to remit the decision the UT deprived AEB of the standard two tier approach that should and would obtain if the decision was remitted to the FtT and the FtT retook the decision in a manner that was not procedurally unfair.
37. The Secretary of State accepts that the UT departed from the guidance set out in paragraph 7.2(a) of the Practice Statements and that it was therefore incumbent on the Judge to provide reasons for this approach. No sufficient reasons were given and those that were given concentrated upon the scope of the issues, in apparent reference to paragraph 7.2(b). The Secretary of State accepts that this reason cannot stand because paragraphs 7.2(a) and 7.2(b) should be read disjunctively. In other words, it was insufficient to refer solely to paragraph 7.2(b): the UT had also to consider whether paragraph 7.2(a) applied, which it failed to do.
38. The Secretary of State therefore concedes the first two limbs of AEB's submission; and those concessions are, in my judgment, rightly made. But she contests the third limb on the grounds that the loss of a "normal" two tier approach was not material and therefore neither was the error. It will be noted, however, that the Secretary of State's concessions on the first two limbs do not cover the whole range of AEB's attack. In my judgment, this case cannot be passed off simply as a case of a failure to give adequate reasons. Not only was there no consideration given to paragraph 7.2(a) of the Practice Statements at all, but also the UT's reference to paragraph 7.2(b) was itself misguided. The UT referred to "the limited scope of the issues" in its Error of Law decision (at [43]) and to "the narrowness of the scope of the issues as they had developed since the [Secretary of State's] initial refusal" in its substantive decision (at [5]). What paragraph 7.2(b) of the Practice Statements in fact refers to is "the nature or extent of any judicial fact finding which is necessary", which is different and which the UT did not address either in its Error of Law decision or in its substantive decision. It follows that the UT's reference to and interpretation of paragraph 7.2(b) was also wrong. As a matter of fact, though I would not base my decision solely upon this point, although it might be said that the scope of the issues had narrowed somewhat since the Secretary of State's initial refusal, *all* facts remained to be found and the nature and extent of AEB's relationship with the three children was and remained fully in contention until some concessions were made *after* the decision of the UT to remake rather than to remit.
39. Before us, Mr Byass wisely did not attempt to argue that, if a proper approach had been adopted by the UT, the decision to remake would have been the same. To the contrary, he expressly accepted that if the UT had given proper reasons, that would have involved proper consideration of both paragraphs 7.2(a) and 7.2(b) of the Practice Statements

which may have led the UT to a different decision. Once again, I would go further than the Secretary of State's concessions: no good reason has been shown for not following the normal course of remitting a decision where the error of law rendered the hearing below unfair; and a conclusion that all facts would have to be found only serves to support the need to remit.

40. There was no dispute between the parties that the 2007 Act has established what in normal cases will be a two tier system (FtT/UT) with the possibility of a second appeal thereafter if the more stringent requirements of the second appeal test are satisfied. Equally, it was common ground that there may be circumstances in which it is appropriate for the UT to remake a decision and that the effect of its doing so may be that a party only has the prospect of appealing a primary finding of fact (or law) by the UT if they can satisfy the second appeal test. I fully accept that this is recognised by the structure established by the 2007 Act and that such an outcome is not necessarily objectionable; but it does not follow that it is necessarily unobjectionable in all cases.
41. The Secretary of State placed heavy reliance on the decision of the Court of Appeal in *JD (Congo)*, a composite appeal dealing with four cases. One of the four cases (*MR (Bangladesh) v SSHD*) raised the question whether the UT, on finding errors of law in the original decision of the FtT, should have remitted the case rather than remaking it so that the second appeals test would not apply to the next onward appeal: see [6]. It is essential to bear in mind that there was no suggestion that the errors of law that had been identified in the FtT's original decision had rendered the hearing before the FtT unfair or had prevented the appellant from presenting his case.
42. The judgment of the Court was given by Sullivan LJ. At [23] the Court accepted that the second appeal test, though stringent, is sufficiently flexible to take account of "the particular circumstances of the case", which could include the fact that an applicant had succeeded before the FtT and failed before the UT, or the fact that the FtT's adverse decision had been set aside and the decision remade by the UT; and at [27] the Court referred to the potentially dire consequences of an erroneous decision as being a factor that could be taken into account as part of the flexible application of the second appeal test. That said, the Court did not suggest that the effect of such flexibility would be to render the second appeal test no more stringent than the test for a first appeal.
43. At that time, paragraph 7 of the Practice Statements lacked the current paragraphs 7.2(b) and 7.3. Paragraph 7.2 was in the following form:

"The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that—

  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - (b) there are highly compelling reasons why the decision should not be re-made by the Upper Tribunal. (Such reasons are likely to be rare.)"



This version provides the context for the Court’s observations and reasoning. In particular, the reference in the then paragraph 7.2(b) to “highly compelling reasons” meant that the bar for remitting was set higher by paragraph 7.2 as then in force than it is by the current version. I note in passing that, within a few months of giving the judgment of the Court in *JD (Congo)*, Sullivan LJ was appointed SPT and, in September 2012, gave the current (amended and somewhat softened) paragraph 7 of the Practice Directions. Though it is interesting, I do not rely upon this factual footnote in reaching my conclusions in the present case.

44. At [36]-[38] the Court said:

“36. The applicants did not contend that the Senior President had no power to issue practice statements and practice directions for the FtT and UT. It seems to us that the emphasis in paragraph 7.2 of the practice statement upon the desirability of the UT re-making the decision rather than remitting the case to the FTT for reconsideration, far from being unlawful, is an eminently sensible use of limited judicial resources within the UT and FTT, and is wholly in accord with the Senior President’s obligation under section 2(3)(b) of the 2007 Act to have regard to the need for proceedings before tribunals: (i) to be fair, and (ii) to be handled quickly and efficiently.

37. The sole basis for the applicants’ submission was the perceived need to avoid the adverse consequences of the application of the second-tier appeals test to a decision that was re-made by the UT. It was feared that the application of the test would effectively render the re-made decision “unappealable” in the absence of an important point of principle or practice. For the reasons set out above (paras 11–31), that fear is not well founded. While the mere fact that an applicant has succeeded before the FTT and failed in the UT, or has succeeded in having an adverse decision in the FTT set aside only to receive an adverse decision from the UT, is not sufficient to constitute a compelling reason so as to bring the ordinary test into play, the court when applying the second limb of the second-tier appeal test to the re-made decision by the UT will take account of the particular circumstances of each case.

38. The second-tier appeals test will still be more stringent than the ordinary test for granting permission, as illustrated by the two examples given by Lord Dyson JSC in the *Cart case* ... , but it is not so stringent as to render the re-made decision “unappealable”; and the fact that a more stringent test will be applied by the court when deciding whether to grant permission for an appeal against the re-made decision is not a justification for remitting the case rather than re-making the decision. Prompt decision-making in the tribunals system is in the best interests of all parties.”

45. I have already emphasised the need to read this passage in its proper context. Most importantly, that context includes (a) the terms of paragraph 7.2 as then in force; and (b) the absence of any suggestion that the relevant errors of law had rendered the proceedings before the FtT unfair. That context is to be distinguished from the present case because (a) the terms of paragraph 7.2 as now in force no longer include the need for “highly compelling reasons” before a case will be remitted under paragraph 7.2(b); and (b) the hearing before the FtT in the present case was held to be unfair. Unfairness is not just important because it is referred to in paragraph 7.2(a): it is of fundamental importance for the reasons set out by the UT in *MM (unfairness) Sudan*: see [16] above.
46. In *MR (Bangladesh)* the basis of the appellant’s appeal was that remaking the decision in the UT would render it unappealable: see [37] of the judgment in *JD (Congo)* set out above. That proposition was rejected although it was recognised that, even if the particular circumstances of the case could be taken into account in applying it, the second appeal test would be more stringent than that for a first appeal. It is, in my judgment, highly material that at [36] the President’s obligation was stated to be to have regard to the need for proceedings before the tribunals: (i) to be fair, and (ii) to be handled quickly and efficiently. The features that were weighed in the balance in that case were, on the one hand, the increased stringency of the second appeal test and, on the other, the need for prompt decision making. The need for proceedings before tribunals to be fair was not in issue and did not fall to be weighed in the balance.
47. It seems to me to be illogical and wrong to accept the rationale for the exception in paragraph 7.2(a) as expressed in *MM (unfairness) Sudan* and yet to assert that the loss of an uncontaminated two tier decision-making process (with the possibility of a second appeal thereafter) is not a material consequence of the UT’s failure to remit. If, which I do not accept, there is a tension between what was said in *JD (Congo)* and in *MM (unfairness) Sudan*, that tension should be resolved in favour of ensuring that parties in general, and AEB in particular, should have had and should now have a two tier process that is fair throughout. That, in my judgment, is the very purpose that lies behind paragraph 7.2(a). It does not mean that *all* cases where the hearing before the FtT have been unfair will necessarily fall to be remitted: but reasons for not doing so must be both cogent and expressed. Here there are none.
48. Put slightly differently, the admitted error by the UT has deprived AEB of (a) a fair hearing before the FtT; (b) the first appeal “standard” error of law test in respect of the range of factual findings and evaluative judgments which would have been made by the FtT; and (c) the opportunity to appeal against an adverse finding on a point of law which does not have to meet the second appeal test. Since the point of the paragraph 7.2(a) exception is to avoid those consequences, all of which flow from the unfairness of the original FtT hearing, these are losses that are substantial and which render the UT’s error material.
49. It is accepted by the Secretary of State that, if the UT had addressed the issues properly, it may have remitted the case to the FtT. In my judgment that is putting things at their lowest since no good reason has yet been advanced for not remitting. Be that as it may, if the UT had remitted the decision the outcome is unpredictable save that (a) if AEB were to have lost the remitted appeal before the FtT he would have had two possible tiers of appeal above him; and (b) if AEB had won before the FtT he would obviously have secured a real advantage which he has in fact lost. I say this not to encourage any suggestion that Judge-shopping is an acceptable pastime – it is not – but to build upon

the Secretary of State's acceptance that it cannot be said that the result would have been the same if the case had been remitted. That acceptance was, in my judgment, sound since the detailed and thorough evaluation of the case by the UT demonstrates that the decision was nuanced and difficult and that a different outcome could have fallen within the range of reasonable conclusions to which either the UT Judge or any other Judge could have come.

50. For these reasons the errors on the part of the UT were material. I would allow the appeal on Ground 1.

**Ground 2: did the UT err in its approach to the question whether there were “very compelling circumstances” within the meaning of section 117C(6) of the 2002 Act?**

51. There are two limbs to AEB's submissions on Ground 2. First, it is submitted that the sentence of 4 years was at the bottom of the range of sentences falling within section 117C(6) and that, therefore, it takes relatively little to amount to very compelling circumstances over and above those described in Exceptions 1 and 2.” It is submitted that the UT failed to adopt this approach. Second, it is submitted that, since Exception 2 could be satisfied if the effect of an appellant's deportation would be unduly harsh on one qualifying child, it follows that the weight to be attributed to the effect of deportation being unduly harsh on three children should be correspondingly greater. In their written submissions Mr Chirico and Ms Griffiths submitted that the effect on three children should be given three times the weight that would be given in the case of only one. In oral submissions Mr Chirico retreated from this strictly mathematical proposition but maintained that the presence of additional children should be treated “incrementally”. He submitted that the UT Judge failed to give incremental weight to the existence of the three children in this case and that this constituted a material error of law on the basis of which the UT's decision should be set aside.
52. I am unable to accept either limb of these submissions.
53. First, although a final sentence of less than 4 years does not trigger the operation of section 117C(6), it does not follow that AEB's sentence should be treated as demonstrating minimum or borderline seriousness. The seriousness of the offending is demonstrated by the fact that the notional sentence before reduction for plea was 65 months. The reduction of 25% to the final sentence of four years was on account of AEB's plea of guilty, which is a factor that is unrelated to the seriousness of the offence: see *HA (Iraq) v SSHD* [2022] UKSC 22, [2022] 1 WLR 3784 at [67] per Lord Hamblen, with whom the other Justices agreed.
54. The general principles to be adopted emerge clearly from the words of the statute, which, in a case to which section 117C(6) applies, requires there to be “very compelling circumstances, over and above those described in Exceptions 1 and 2” before the public interest in deporting the foreign criminal is outweighed. The correct approach has been authoritatively established on high and binding authority and does not require substantial restatement here. What follows is therefore intended only to be an outline summary without derogating from the statements of principle in the authorities to which I refer.
55. In *HA (Iraq)* at [46] ff Lord Hamblen set out the approach to be adopted. At [51]-[52] he said:

“51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed JSC in *Hesham Ali* at paras 24-35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment.”

And, after summarising relevant factors as identified by the ECtHR (which include the nature and seriousness of the offence committed by the applicant and the applicant’s family situation and the best interests of any children):

“52. The weight to be given to the relevant factors falls within the margin of appreciation of the national authorities.”

56. Where this balancing exercise has to be carried out, one way of structuring such a judgment is to follow what is known as the “balance sheet” approach, setting out each of the “pros” and “cons” before setting out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders: see *Hesham Ali v SSHD* [2016] UKSC 60, [2016] 1 WLR 4799 at [83] per Lord Thomas CJ. The public interest in deportation has a flexible or moveable quality – hence, for example, the relevance of the relative seriousness of the offence that has attracted a sentence of at least four years: see *Akinyemi v SSHD* [2019] EWCA Civ 2098, [2020] 1 WLR 1843 at [39] per Ryder LJ.
57. Further guidance on a structured approach to the exercise was given by the Court of Appeal in *HA (Iraq)* 2020 EWCA Civ 1176, [2021] 1 WLR 1327 at [29] per Underhill LJ (with whom Peter Jackson and Popplewell LJ agreed) and in *NA (Pakistan) v SSHD* 2016 EWCA Civ 662, [2017] 1 WLR 207 at [30]-[38]. Of particular relevance in the present case are [30] and [37] of *NA (Pakistan)*, where Jackson LJ (with whom the other members of the Court agreed) said:

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

...

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are “very compelling circumstances, over and above those described in Exceptions 1 and 2” as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).”
58. In the light of these authorities, I would accept that the effect on three children as opposed to one would be a material factor for the UT Judge to have considered in the present case. However, I am quite unable to accept that he did not do so, or that he applied the relevant principles in a manner that discloses a material error of law. At the outset, he identified that the core issues included “the impact of the individual complexity and seriousness of the children’s needs, *and the fact that all three children had such needs*”: see [29] above. His summary of the relevant principles at [71]-[72] is a suitable summary that discloses no error of law. Of most significance for Ground 2 is his acceptance in [71] that “every assessment of “unduly harsh” must have as its focus the effects on *the specific relevant children* taking into account their best interests”; and that, in the context of the public interest “the focus remains on the *effects on the children*” with his recognition that the effects will be “highly fact-specific, particularly as they centre on the effects *on individual children*.”: see [32] above. It is therefore clear beyond argument that, at least when identifying the principles that he intended to apply, the Judge had fully in mind the fact-sensitive nature of the enquiry into the effects on the individual children.
59. When he came to bring the effect on the children into the balance, his approach was consistent and correct. His finding at [78] had two aspects: first, that the effect of never seeing AEB again in person would have an unduly harsh effect on O, A and C; and, second, that in his estimation the effect upon them “just about” satisfies Exception 2: see [33] above. That second finding may, when viewed in isolation, be said to be ambiguous because it is unclear whether the effect on each child individually would just about satisfy Exception 2 or whether the effect of the three in aggregate would just about satisfy it. In my judgment, this ambiguity does not undermine the Judge’s conclusion because, when he came to carry out the balancing of the pros and cons he expressly considered and rejected the submission that “the totality of the children’s needs or their needs individually” coupled with other identified features “[tipped] the effect of deportation beyond “unduly harsh” to become very compelling”: see [34] above. He then made doubly clear what he was doing by saying that he regarded the proper focus as being on the totality of the circumstances. That necessarily means that he took into account the totality of the effects upon the children and placed them in the balance, as he had just said.

60. AEB's case on Ground 2 rests on the proposition that the Judge failed to give proper weight to the fact that there were three children, not one. Since the Judge expressly said that he had considered the totality of the children's needs as well as their needs individually, that proposition must fail.
61. For these reasons I would dismiss the appeal on Ground 2.

**Disposition of the appeal**

62. For the reasons I have set out above, I would allow the appeal on Ground 1, set aside the judgment of the UT and remit the case to the FtT to reconsider the appeal de novo.

**Nicola Davies LJ:**

63. I agree.

**Underhill LJ:**

64. I also agree