



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03033/2018

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2019

Decision & Reasons Promulgated
On 27 June 2019

Before

THE HONOURABLE MR JUSTICE FREEDMAN
UPPER TRIBUNAL JUDGE CANAVAN

Between

A D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

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

Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to make an order. We make clear that the order is not made to protect the appellant's reputation following his conviction for criminal offences. 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.

Representation:

For the appellant: In person
For the respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant entered the UK on 15 August 2002 and was granted leave to enter as a visitor until 13 September 2002. He was 16 years old on arrival in the UK. Subsequent applications for leave to remain as a student were refused. On 26 November 2003 he was granted leave to remain as a dependent of a person who was settled in the UK (his mother).
2. The appellant has a list of criminal convictions in the UK. In 2005 he was convicted of several different counts of possessing a blade or sharply pointed weapon in a public place and was given community punishment orders for those offences. In 2006 he was convicted of several driving offences including using a vehicle while uninsured and without a licence for which he received fines and endorsements. In 2007 he received a six-month conditional discharge for possession of cannabis. In 2008 he was given a 12-month conditional discharge for shoplifting. Further convictions followed in early 2009 for a breach of the conditional discharge and possession of cannabis for which he received small fines. By the time he was 23 years old the appellant was well known to the criminal courts, but none of his convictions were for offences serious enough to justify a custodial sentence. His history of relatively minor criminal convictions was not deemed sufficiently serious for the Secretary of State to consider deportation.
3. The picture changed in 2011. On 03 June 2011 the appellant was convicted of five counts of supply of Class A drugs including crack cocaine and heroin. On 08 September 2011 he was sentenced to 18 months' imprisonment for each offence to be served concurrently. A deportation order was signed on 21 August 2012. His appeal against the decision was dismissed on 13 March 2013. Further applications for permission to appeal were refused and his appeal rights became exhausted on 22 April 2013.
4. The appellant became liable to removal pursuant to the deportation order. It is unclear whether the Secretary of State took any steps to remove him the period immediately after the appeal. Even though he had been released from prison and was facing deportation, the appellant continued to commit offences. Several motoring and insurance related offences were recorded against him in April 2013. The sentences included a community order with a curfew requirement and an interim disqualification from driving. By July 2013 he was recorded as an immigration absconder because he failed to report when required. He was encountered on 05 November 2015 by the police when they arrested him pursuant to a warrant for failure to comply with a curfew order.
5. Further submissions were made to the Secretary of State on 08 December 2015, which were rejected with reference to paragraph 353 of the immigration rules in a decision

dated 07 January 2016. It is not necessary to set out the details of the subsequent litigation, save to note that the Secretary of State agreed to make a fresh decision.

6. While the Secretary of State was reconsidering the decision the appellant applied to the Family Court for a finding that he was a British citizen by descent. He claimed that his father was born in the UK. If the appellant was a British citizen the Secretary of State would have no power to deport him. On 09 February 2018 the Family Court dismissed the application in quite damning terms. The judge found that the issue of his paternity had already been considered in the first First-tier Tribunal decision, and that the application was “manifestly abusive”. There was no DNA evidence to establish paternity.
7. Despite his precarious position in the UK the appellant received a further conviction for possessing cannabis and received a small fine on 23 December 2016.
8. The Secretary of State made a fresh decision dated 14 February 2018 to refuse a protection and human rights claim made in the context of the original application to revoke the deportation order put forward in further representations on 24 December 2015. The Secretary of State considered the appellant’s claim to have a family life with four children in the UK. His son with his former partner was born on 02 May 2008 (“A”). His daughter with his current partner was born on 08 August 2015 (“B”). He also claimed to have a parental relationship with his current partner’s twin sons from a previous relationship (“C” and “D”). The Secretary of State accepted that he had a genuine and subsisting parental relationship with British children and that it would be unduly harsh to expect them to continue their family life with their father in the country to which he would be deported. However, the Secretary of State considered that it would not be unduly harsh to expect the children to remain in the UK without him because their mothers were their primary carers and could continue to provide the children with the necessary care.
9. First-tier Tribunal Judge Keane (“the judge”) allowed the appeal on human rights grounds in a decision promulgated on 06 March 2019. The appellant did not pursue the appeal on Refugee Convention grounds. The judge began his findings by acknowledging the seriousness of the appellant’s criminal history and emphasised that deportation is in the public interest. The appellant was sentenced to a period of imprisonment of at least 12 months but under four years. It was open to him to argue that he came within the exception to deportation contained in section 117C(5) of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”) (also reflected in paragraph 399(a) of the immigration rules). The judge made the following findings in relation to the children:

“15. I find that the [witnesses] each gave credible accounts of events. Of course, the respondent in his letter had made unequivocal concessions that [the children] are British citizens, the respondent made unequivocal concessions that the appellant has a genuine and subsisting relationship with each child and without amounting to an explicit concession the respondent tacitly conceded that the appellant is a party to a relationship with [his current partner]. In the light of those concessions scope for fact-finding in respect of evidence which necessarily and perhaps unavoidably amplified such contentions was limited. The evidence of the appellant and [his current

partner] was consistent with each other and with the available documentary evidence. Dr Halari, albeit as long ago as 23 December 2015, had assessed in detail the relevant family relationships. Dr Halari had not expressed doubts or concerns. Mr Bose notwithstanding close and probing cross-examinations of the appellant and [his current partner] did not submit that their evidence was not truthful. Mr Bose surely refrained from making such a submission for good, sound reasons. Documentary evidence comprises documents which are generated in the life of a family such as that to which the appellant is a party. There were testimonials, there were letters from schools and nurseries, and documentary evidence of cohabitation and maternity leave. All such evidence fell easily into the category of corroborative evidence of contentions plainly established by the evidence and subject, as I have already mentioned, to unequivocal concessions made by the respondent. I make findings of fact in line with the witness statement, oral and documentary evidence. if it be necessary for me to approbate the respondent's unequivocal concessions, referred to earlier in this decision, I do so.

16. The respondent had unequivocally conceded that it would be unduly harsh for [the children] to live in Jamaica. I have accordingly considered whether it would be unduly harsh to expect the children to remain in the United Kingdom without the appellant.
17. The reality, in the light of those findings of fact to which I have arrived, is that the appellant, [his current partner] and [the children] comprise a tight-knit family unit. The appellant, save during his incarceration, has remained in contact with [A]. At the date of the hearing the appellant was living with [his current partner], [B], [C] and [D]. Having considered all the evidence I find that the circumstances of the appellant's children mean that it is unduly harsh to expect them to remain in the United Kingdom without the appellant. In so finding, I rely on the findings of fact mentioned earlier but also on account of particular factors which I now recite concisely. The appellant is a caring and committed father to all of his children. Being unable to work ([his current partner] is employed as a teacher's assistant), the preponderance of the family's tasks and duties have fallen on his shoulders and he discharges them. There was no reason to doubt his protestation, expressed whenever he had the opportunity to do so, that all four children love him dearly and would be distraught if he was removed from the family unit.
18. I find accordingly that the appellant satisfied the exception to deportation in paragraph 399(a) of the Rules. The effect of this is that the appellant's circumstances outweigh the public interest in deportation of the appellant, notwithstanding his convictions ..."

10. The Secretary of State sought to appeal the First-tier Tribunal decision on the following grounds:
 - (i) The judge failed to give adequate reasons to explain why the separation of the family went over and above the usual negative effects of deportation. The judge failed to make clear findings to explain why he thought the consequence of deportation would be 'unduly harsh' on the children.

- (ii) The judge wrongly treated the children's best interests as the primary consideration rather than a primary consideration.
- (iii) The judge failed to take into account the fact that the appellant absconded as a matter that gave further weight to the public interest.
- (iv) The judge failed to determine the appeal with reference to the relevant immigration rules relating to applications to revoke a deportation order.

Decision and reasons

Error of law

11. Mr Tarlow made clear that the focus of the Secretary of State's challenge to the First-tier Tribunal decision was the first ground. In our assessment the second ground amounted to nothing more than a bare statement and is subsumed into the first ground challenging the adequacy of the judge's findings relating to the children. The third ground is immaterial to the assessment of whether it would be 'unduly harsh' for the children to remain in the UK without the appellant following the Supreme Court decision in *KO (Nigeria) v SSHD* [2018] WLR 5273. The fourth ground makes no material difference to the outcome of the appeal because the effect of paragraphs 390-390A of the immigration rules is to direct the assessment back to the 'unduly harsh' test contained in paragraph 399(a) in any event.
12. It is not disputed that the appellant has a genuine and subsisting relationship with qualifying children. The public interest in deportation is outweighed if the effect of deportation would be 'unduly harsh' on his children. Given the concession made in the decision letter that it would be 'unduly harsh' for the children to live in the country to which the appellant would be deported, the only issue before the judge was whether it would be 'unduly harsh' for the children to remain in the UK without him. In *KO (Nigeria) v SSHD* [2018] 1 WLR 5273 the Supreme Court confirmed that the assessment must be focussed on the position of the children but emphasised the elevated threshold in cases involving the deportation of foreign criminals.

"23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That

would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.”

13. The only findings made by the judge in relation to whether it would be ‘unduly harsh’ for the children to remain in the UK without their father are at [17] of the decision. It seems clear that the judge took into account the evidence of Dr Halari and heard evidence from several witnesses. However, he merely stated that he had “considered the evidence” without explaining what aspects of the evidence were sufficiently compelling to meet the elevated threshold of ‘unduly harsh’. The judge failed to explain what evidence persuaded him that the effect on the children in this case would be something more than the usual negative effect of deportation. Failure to give adequate reasons to explain findings on material issues is an error of law: see *MK (duty to give reasons) Pakistan* [2013] UKUT 00641. We set aside the decision and will remake it.

Remaking

14. The factual circumstances are not in dispute. The appellant’s immigration history and criminal history are set out above. The Secretary of State accepts that the appellant is in a genuine and subsisting parental relationship with British citizen children and that it would be ‘unduly harsh’ for those children to live in the country to which he is to be deported. The only issue for determination is whether it would be ‘unduly harsh’ for the children to remain in the UK without their father.

Best interests of the children

15. It is not possible to assess the exceptions to deportation contained in section 117C(5) and paragraph 399(a) of the immigration rules without an evaluation of the best interests of the children. An assessment must be conducted in every case where an immigration decision is likely to impact on the welfare of a child.
16. In assessing the best interests of the children in this case, we have considered the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration although they may be outweighed by the cumulative effect of other considerations.
17. The respondent must have regard to the need to safeguard the welfare of children who are “in the United Kingdom”. We take into account the statutory guidance “UKBA Every Child Matters: Change for Children” (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: “The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.” The UNCRC sets out rights including a child’s right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The

UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

18. The appellant produced a clinical psychology report of Dr Rozmin Halari as part of the body of evidence sent with further submissions made on 24 December 2015. Although the report is dated 23 December 2015 there is no evidence to suggest that the family circumstances have changed in any material way since Dr Halari prepared the report. It is not disputed that the appellant continues to have a genuine and subsisting parental relationship with all four children who would be affected by the deportation decision. The passage of time is only likely to have strengthened and deepened the family bonds she describes. For these reasons, we find that it is reasonable to assume that Dr Halari's opinion, as it then stood, is likely to continue to represent the position as it stands at the date of this hearing.
19. Dr Halari is a Chartered Consultant Clinical (Neuro) Psychologist. No submissions were made to challenge her expertise. We are satisfied that she is qualified to comment on the impact that the appellant's deportation might have on the children. The first half of the report outlines the outcomes of various assessment tools. The outcome of those assessments were generally within normal limits. Dr Halari explained that the appellant plays a significant role in the lives of the children and is involved in their day to day upbringing. He provides emotional and social support to A on a consistent basis. He plays a pivotal role in ensuring that A spends time with his sister and his step-brothers. A said that he would be very sad if his father had to leave the country. A spends time with his father after school and on weekends. A felt that his father played a positive role in his life. He was worried that he would not be able to see his sister and "brothers" if his father had to leave the country. Dr Halari said that the twins also view the appellant as a father figure although they have regular contact with their own father. Dr Halari commented:
 - "79. In my opinion, removing [the appellant] from the UK would have a significant detrimental impact on [A's] social, emotional, academic and behavioural wellbeing. It would also have a detrimental impact on the other children and the family unit as a whole.
 80. ... In my opinion if [the appellant] were to be deported, this would have significant negative impact on [A's] overall emotional and psychological wellbeing. [A] has formed a strong attachment with his father and disruption of this attachment can have quite serious consequences to a child's on-going, emotional, social and cognitive development. A significant negative change in [A's] life at such a delicate age can precipitate a traumatic experience and impact on his ability to relate with people at school and home.
 - ...
 83. It is important to note that [A] has witnessed the separation of [the appellant] with his mother. He has now formed a very close bond with his half-sibling and step-brothers whom he is in regular contact with. He has already endured a significant negative life event and for him to suffer yet another traumatic event (i.e if [the appellant] were to be removed), this

would have a significant negative impact on his overall psychological wellbeing. I believe that he would be extremely vulnerable, low in his mood, and would not be able to maintain his current level of social, emotional and education development.

...

101. [A] and the twins have a very close relationship and they consider themselves as brothers. The boys spend a significant amount of time together on the weekends participating in activities both together and with [the appellant].
102. In my opinion, a disruption of the attachment between [A] and the twins and [B] would have a significant negative emotional impact on both [A] and the other children. [A] would not be able to experience a sibling relationship with his sister and the twins and this is important to consider particularly in light of the fact that [A] has had to witness a previous separation (between his mother and father)."

20. A letter from [A's] mother dated 12 November 2015 outlined the history of her relationship with the appellant and the role he plays as a parent since their relationship came to an end. She described the appellant as "the strongest leg in my support system" in terms of the assistance he provided with child care. She went on to say:

"As the mother of [A] I feel that he would experience great distress in not having the ability to visit him and spend time with him which may affect him just as much as a death. [A] has never lost anyone close to him and I cannot imagine the loss of glimmer in his eyes with him knowing that he cannot see his father because he is not here. [A] although just a child has a very kind-hearted and caring personality which is expressed through everything he does, he holds those he cares about very near to him and doesn't go a day without remembering and mentioning to me everything that he cares about.

I have chosen not to tell [A] about the current situation that his father is in because I do not feel that he would understand, growing up believing that things can always change for the better and things will always be fine in the end or work out for the best. I also feel that when he does come to an understanding he will be very suppressive with his feelings and it will affect him not only now, but so heavily in his years to come. In the worst case that contact does become limited due to deportation I feel [A] will be resentful, disappointed and also lost, with so many children around him who will speak of their fathers and so many situations to come in which he will need a father figure where a mother cannot substitute, I fear that he will end up on a path which most young black boys without fathers end up on. I have therefore continued to allow [A] to visit his father in detention because I want him to continue his usual routine for as long as possible without disruption with hopes for the best outcome with also knowing that in the worst outcome [A] was able to spend all possible time with his father.

[A] has something which his father did not have, and that is a father that will be there for him no matter what the occasion is, he needs this stability and he needs to grow with something that I also did not have, a dependency and trust in that his parents are always going to be there for him. I grew up a very timid and reserved child because I did not know how to trust people when all they did was leave. The thought of [A] growing up without his father puts me in tears any time that I have to think about it.”

21. The appellant’s current partner provided a witness statement. She confirmed that they started living together in April 2014. The appellant developed an instant bond with her sons from a previous relationship. The appellant disclosed his convictions and the fact that he had problems with his immigration status. In her opinion “it was clear to me that he felt a deep sense of shame and remorse.” She described the level of involvement the appellant had with all the children. She went on to say:

“18. I am terrified of [the appellant] being deported because he is the life and soul of our family. I am really concerned that if he is deported..., the children will lose their strong bond with him, especially [B], because that is what extended absence does to families. I would not be able to afford trips to [the appellant’s country of origin] and there would be no physical family relationship. Our family life will be limited to telephone calls, which is far from ideal. In fact, it would not be a family life at all.

19. Such an arrangement cannot work for our family, as [the appellant’s] role in the family is the cement that binds it together. We are a close-knit family, and without him our family will not be complete. His absence will leave a vacuum in our family and adversely impact on our family life and the development of the children. The twins are adolescents who need a strong and positive father, [A], is approaching adolescence and also needs a positive role model, which [the appellant] is, having turned his back on crime, and [B] is a tiny person who loves her father deeply and would also be affected by her absence. I also rely on him, especially when I am ill [NB: his current partner suffers from sickle cell disease]. I could not cope with bringing up the children on my own. His help and assistance are indispensable to me.”

22. The appellant’s stepson C wrote a letter to the Tribunal:

“I am writing this letter in regards to my step father... [The appellant] and my mother has been together for over four years. Since being apart of our family [he] has also been loving and caring towards all of us.

He always helps me with my homework and gives me good advice about everything. He treats my brother and I like we are his own and he plays a good father role to my little sister [B] and his son [A] our step-brother.

[The appellant] has a huge impact on our family. He... cooks every day and he always makes sure we eat healthy. [He] always helps my mum with the shopping and cleaning.

If he was to leave our family wouldn't be complete as he plays a big role in it. We would all miss him especially [A] and my little sister [B]. [B] truly is a daddies girl, she always follows him around he house and without fail he is always there to comfort and calm her down when she's upset. So please take into account the harsh impact it would have on our whole family if he was to be taken out of our lives. (sic)"

23. D also wrote a letter to the Tribunal:

"I am writing to inform you of the very significant role [the appellant] plays in not only my life but the lives of my siblings also. [He] is the father of my younger sister [B] and is like a father to my brother and I.

[The appellant] and my mother have been together for around 4 years and ever since his arrival he has been a father figure to my brother and I and a good man to look up to. [He] does most of if not all the cooking in the house and goes out of his way to make sure we are all eating right, and if he weren't there we would most likely be eating unhealthy junk foods, so we are extremely lucky to have him. In addition as I enjoy sports and play football, [he] is very supportive and helpful, he's always giving advice on how I can improve and come to almost all of my football games, cheering me on and without [him] I wouldn't be the player I am now.

Another thing about [him] is that he is a great family man and a father to my younger sister. Ever since birth she has always been clinging to her dad and is truly daddy's little girl. [He] is the only one that can truly calm my little sister down and without him her life would be ruined before it's really begun. [He] is also a great father to his older son [A] who always comes to stay with his dad every holiday and almost every weekend, and [he] always does everything he can to make sure his son has the best childhood, by taking him out places and bringing him football.

To conclude [the appellant] is like a father to me and the man of our house and is a large piece in the puzzle of our family and without him our family is incomplete, so I hope you see how important he is to us."

24. In light of this evidence we have no hesitation in finding that it is in the children's best interests to be brought up by both parents and for the appellant to continue to be involved in the lives of his stepsons. The evidence shows that the appellant is likely to be a positive influence in their lives and takes an active role in their upbringing. The evidence shows that, aside from a fairly short period in prison, the appellant has been an involved and supportive father to his children. The family bonds between the appellant and the children are strong. The separation of the appellant from the children for a prolonged period would have a detrimental impact upon them. As British citizens the children have a right to remain in the UK and to all the benefits and advantages that this status brings. We conclude that the best interests of the children point strongly towards the status quo i.e. being brought up by both parents in the UK.

Findings in the context of the legal framework

25. Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that it incompatible with a Convention right. This duty is placed on the Secretary of State as well as courts and tribunals. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position on Article 8 of the European Convention. The complicated provisions relating to private and family life and the separate provisions relating to deportation bear little resemblance to the approach taken by the European Court of Human Rights when conducting a balancing exercise under Article 8. The Strasbourg court conducts a holistic assessment of all the relevant circumstances of a case weighing the individual's circumstances against the public interest considerations without separating different aspects of a claim. We are bound to assess the appeal with reference to the immigration rules and relevant statutory provisions, but it must always be remembered that those provisions are intended to give effect to, and are said to be compatible with, the underlying principles enshrined in Article 8 of the European Convention: see *NA (Pakistan) v SSHD* [2016] WLR(D) 662 [38-39].
26. Part 5A of the NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the 'public interest question' a court or tribunal must also have regard to the issues outlined in section 117C in cases concerning the deportation of foreign criminals. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention of Human Rights.
27. The statute makes clear that deportation of foreign criminals is in the public interest and that the more serious the offence committed the greater is the public interest in deportation. However, the statutory scheme also sets out circumstances in which the public interest in deportation is outweighed because a person meets one of the stated exceptions.
28. The appellant was sentenced to a period of imprisonment of 18 months and is eligible to argue that he comes within the exception to deportation outlined in section 117C(5) of the NIAA 2002. It is not disputed that the appellant has a genuine and subsisting relationship with qualifying children. The public interest in deportation is outweighed if the effect of deportation would be 'unduly harsh' on the appellant's children. The starting point for this assessment is our finding that it would be contrary to the best interests of the children to be separated from their father. However, the Court of Appeal in *NA (Pakistan)* noted that the inevitable consequence of deportation is for children to be separated from a parent even though it is contrary to their best interests. The Supreme Court in *KO (Nigeria)* made clear that something more than the usual harsh effect of deportation on a child is needed to reach the elevated threshold of 'unduly harsh' to meet the requirement of section 117C(5). However, the test is not so high that it can never be surmounted. Because the exceptions are said to represent the Secretary of State's view of where a fair balance is

struck between the level of offending and the interests of the children a decision to deport must still be proportionate to avoid a breach of Article 8.

29. The evidence shows that the appellant forms part of a close-knit family unit. It seems that he has maintained a good relationship with the mother of his first child. He is the conduit for A to know and spend time with his sister B and her half-brothers. The appellant has not been convicted of any serious offences attracting a custodial sentence since his release from prison. In his statement he says that he stopped using Class A drugs when he was in prison although we note he has a more recent conviction for possession of cannabis for which he received a small fine. He undertook rehabilitation courses and understands how drugs have a negative impact on society. Since his release from prison, it seems that he has concentrated on his family life with his current partner and the children. However, the reason why the appellant is facing separation from his family is because of his past actions. The appellant's family members give moving evidence of the effect that deportation would have on the cohesion of the family and the lives of the children involved. The Court of Appeal in *NA (Pakistan)* recognised that in most deportation cases involving the removal of a caring and supportive parent there will be negative effects upon the family.
30. In this case we find that there are additional compassionate elements over and above the usual harsh effects of deportation which elevate the effect to 'unduly harsh' in relation to A. Dr Halari's evidence is compelling. A is at a crucial age between childhood and adolescence. He has already suffered a traumatic event when his parents separated. With the assistance of his father he has been able to forge bonds with his half-sister B and his stepbrothers. The evidence indicates that the two families are melded by the presence of the appellant. A would suffer a further traumatic upheaval if he were to be separated from his father. His father's absence is likely to lead to fewer opportunities for A to continue and to develop the bonds he currently has with B and the twins. Dr Halari's opinion that such upheaval is likely to have a "significant negative impact on his overall psychological wellbeing" such that he would be "extremely vulnerable" outlines concerns about the child's wellbeing that, in our assessment, go beyond the usual harsh effects of deportation. In our assessment, the effect of further significant upheaval, at such a crucial stage in his young life, and having found some equilibrium following the separation of his parents, is likely to have severe and long-lasting consequences for A. This conclusion is supported by the compelling evidence given by A's mother outlining concern for her son's future welfare and development.
31. The evidence relating to the other children shows that the fracturing of the family would have harsh effects, but those effects would not appear to go beyond the usual negative impact of deportation. However, given our findings relating to the 'unduly harsh' effect that it would have on A given his past history, and the particular way in which the family dynamic currently works, we conclude that it is sufficient for the purpose of section 117C(5) NIAA 2002 and paragraph 399(a) of the immigration rules that deportation would have an 'unduly harsh' effect on at least one of the children. For these reasons we conclude that the appellant comes within one of the exceptions to deportation. His removal in consequence of the decision would amount to a

disproportionate interference with his right to family life under Article 8 of the European Convention.

32. At the hearing, the appellant raised the issue of his claimed British nationality by descent. This was not previously a live issue in the appeal. The appellant was represented at the hearing before the judge. The issue did not appear to be argued before the First-tier Tribunal and was not determined. The appellant did not cross-appeal the First-tier Tribunal's failure to determine the issue. The issue had already been considered and rejected by the First-tier Tribunal in 2013. In a more recent application to the Family Court the application was rejected in robust terms. The stumbling block appears to be the refusal of the appellant's father ("LD") to take a DNA test. The bundle includes a copy of LD's British passport and his birth certificate. The evidence includes a copy of the death certificate of LD's father ("SD"). The death certificate records his son as the informant ("AD"). The appellant's bundle contains a DNA test which confirms that he is related to an uncle ("ED"). However, the missing link is any evidence to show that the appellant's uncle, ED, has common parentage with LD. No copy of his uncle's birth certificate seems to have been produced. The death certificate does not establish a link between SD and ED because the death was reported by a different son.
33. For the reasons given above we conclude that removal of the appellant would be unlawful under section 6 of the Human Rights Act 1998.
34. On this occasion the appellant has succeeded in his appeal. Subject to any subsequent determination of his claimed British nationality, the applicant should be aware that if he commits any further offences, especially offences of a serious nature, it will be open to the respondent to review whether it is appropriate to take further deportation action. We trust that this will act as an incentive to the appellant not to commit any further offences if he wishes to continue his family life in the UK.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed  Date 26 June 2019
Upper Tribunal Judge Canavan