



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10631/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 18 December 2020

Decision & Reasons Promulgated  
On 28 January 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR  
DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

ANTHONY EARL WEBB  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Mr R Sharma, Counsel, instructed by Gordon and Thompson  
Solicitors

For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

**REMAKE DECISION AND REASONS**

**Introduction**

1. This is the remaking component of the Upper Tribunal's decision in this appeal. Whilst it was the Secretary of State who successfully appealed against the decision of the First-tier Tribunal, as matters now stand it is appropriate to refer to the parties as they were at first instance: Mr Webb is therefore once more the appellant and the Secretary of State is the respondent.

2. The appellant is a citizen of Jamaica, born in March 1991. He arrived in the United Kingdom in December 1997 at the age of six. He was granted indefinite leave to remain on 24 August 2004. Following a conviction in February 2010 for conspiracy to commit robbery and a consequent sentence of three years' imprisonment in a Young Offender Institution, the respondent commenced deportation action. The appellant successfully resisted this on appeal in 2011. His current appeal is against the respondent's decision of 13 September 2017, refusing his human rights claim which had been made in response to a further decision to deport him, dated 31 July 2017. The deportation action was based a number of convictions acquired between 2012 and 2016, together with police intelligence that the appellant was a member of a London gang.

### **The error of law component of the decision in this appeal**

3. By a decision promulgated on 23 October 2019, the First-tier Tribunal allowed the appellant's appeal on Article 8 grounds. The judge concluded that the appellant was not a "persistent offender" and was not associated with a gang. Whilst describing the appellant as a "stranger to Jamaica", the judge allowed the appeal not on the basis of the private life limb of Article 8, but in relation to family life. He concluded that it would have been "unduly harsh" for the appellant's children to go to Jamaica and for them to be separated from him if he were to return there alone.
4. On appeal by the respondent, the panel (comprising Lord Uist, sitting as a Judge of the Upper Tribunal, and Upper Tribunal Judge Norton-Taylor) found that the judge had materially erred in law by failing to provide adequate reasons for his conclusions on the "unduly harsh" issue. The judge's decision was set aside. The full error of law component of the Upper Tribunal's decision in this appeal is appended, below.
5. Under the sub-heading "Disposal", it was concluded that in light of the factual issues in the case and the absence of any application from the appellant to adduce further evidence, a resumed hearing was unnecessary. With reference to section 117C of the Nationality, Immigration and Asylum Act 2002, as amended ("NIAA 2002"), the parties were directed to provide written submissions on the following matters:
  - (a) whether the appellant was a "persistent offender" or whether his offending had caused "serious harm";
  - (b) whether the appellant is "socially and culturally integrated" in the United Kingdom;
  - (c) whether there would be "very significant obstacles" to the appellant's integration into Jamaican society;
  - (d) whether it would be "unduly harsh" for the appellant's partner and three relevant children to leave the United Kingdom and reside in Jamaica;
  - (e) whether it would be "unduly harsh" for the appellant's partner and the three relevant children to remain in the United Kingdom were the appellant to be deported to Jamaica alone;

- (f) whether, notwithstanding an inability to satisfy either of the two exceptions under section 117C(4) and (5), it would be disproportionate to deport the appellant.
6. Four specific findings made by the judge were preserved:
- a) the appellant had a genuine and subsisting relationship with his current partner;
  - b) the appellant had a genuine and subsisting parental relationship with his two biological children with whom he lived, and with his step-daughter;
  - c) the appellant left Jamaica at the age of 6;
  - d) the appellant was not currently a member of a gang.

**Procedural history and issues arising from the Covid-19 pandemic**

7. In compliance with the directions referred to above, the appellant filed and served written submissions, dated 5 March 2020 and received by the Upper Tribunal the following day. Prior to the respondent being in a position to provide a response, the Covid-19 pandemic took hold. Directions were issued on 16 April 2020 (appended below). It transpired that the relevant Senior Presenting Officer with conduct of the case (Mr Kotas) had not received the appellant's written submissions. The Tribunal forwarded the submissions onto Mr Kotas. Further directions were sent out on 18 May 2020. On 28 May 2020, the respondent filed and served her written submissions in response to those from the appellant. There was no reply from the appellant within the stipulated timeframe. On 19 June 2020, directions were issued by email in the following terms:

“This appeal is awaiting a re-making decision in the Upper Tribunal. Pursuant to directions sent out on 18 May 2020, the respondent filed and served written submissions on 28 May 2020 (attached).

Any reply from the appellant was due to be filed and served by 4 June 2020. To date, there has been no such reply.

There is now a further and **final** opportunity for the appellant to file and serve any reply to the respondent written submissions. Any such reply must take note of what is said at [3]-[5] of those submissions. Any reply, should also, if appropriate, address the issue of whether a hearing should be conducted, notwithstanding the Tribunal's previously stated view that one is not necessary.

Any reply must be filed and served **no later than 5 days** from the date of this email direction.”

8. On 26 June 2020 the following response was received from the appellant:

“Re: Mr - Earl Anthony Webb 28 March 1991 Jamaica

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We write further to the Tribunal directions dated 19 June 2020.

Please note that the Secretary of State for the Home Office (SSHD) were served the appellant's bundle as this was an appeal from the SSHD. Although we are sympathetic that Mr Kotas did not have access to the papers when drafting the response, we cannot be held responsible for it in any sense. In any case Mr Kotas was familiar with the case since he represented the SSHD at the hearing before you on 15 January 2020.

The Tribunal is respectfully invited to dismiss the SSHD's appeal. In the alternative, we submit that this appeal requires a hearing given the issues involved and complexity of the evidence."

9. Having received these responses from the parties, the Tribunal considered whether a further hearing was required. Ultimately, Upper Tribunal Judge Norton-Taylor concluded that a further hearing was required (a Note and Directions Notice, dated 6 July 2020, to this effect is appended, below). In this respect, it should be observed that the appellant's representatives might have provided greater assistance to the Tribunal, particularly in respect of the reply dated 26 June 2020. Contrary to what is said therein, the stage at which these proceedings constituted the respondent's appeal to the Upper Tribunal has been and gone. In addition, simply stating that "the issues involved and complexity of the evidence" necessitated a further hearing did nothing to substantiate the assertion.
10. However, the remaking decision involves four minor children (three of whom play an important part in this case) whose particular circumstances have not been assessed since the decision of the First-tier Tribunal was written on 18 October 2019. Although there had been no application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce new evidence, in Judge Norton-Taylor's view it was important to be in a position to conduct an up-to-date assessment of the children's situation (whether by any new evidence and/or in light of more detailed oral submissions).
11. A further reason for holding a resumed hearing was the significance of the private life exception contained in section 117C(4) NIAA 2002. This was not dealt with by the First-tier Tribunal, a fact featured only very briefly in the written submissions of 5 March 2020. Again, there was value to be gained from receiving further evidence and/or oral submissions on this issue.

### **The resumed hearing**

12. The resumed hearing took place on a face-to-face basis at Field House.

### **The documentary evidence**

13. The appellant filed a consolidated bundle for the hearing running to a total of 182 pages, which we have read and taken into account. This included four witness statements for the appellant, two witness statements for the appellant's partner, Ms Micah Martson, and two witness statements for the appellant's uncle, Mr Ryan Powell. Those statements and supporting documents in the bundle evidence that the

appellant and Ms Martson have been together since 2014. Ms Martson is a British citizen. They have two children together: K, born in June 2016, and J, born in April 2019. Ms Martson also has a child from a previous relationship, T (now aged 8), who lives with Ms Martson and who has since the age of three regarded the appellant as a father. All three children are British citizens. The appellant also has another biological child from a previous relationship, JW (born in September 2008), who is a Ghanaian national. In his witness statements the appellant describes having limited contact with JW as a result of difficulties between him and his ex-partner's new partner.

14. In his statements, the appellant said that he had been granted bail to live with Mr Powell at his home address, which is not far from that of Ms Martson, but that since the pandemic started he had been living with Ms Martson and the children in her house. He said that if he were deported to Jamaica his family would be 'broken' and Ms Martson would not be able to cope with three children and working and studying at the same time. He said he wants to continue to be part of his children's upbringing and to give them the 'best chances in life as possible'. He apologised for his past actions and said that he had grown and changed as a person. He said that he also did not want to leave his uncle, Mr Powell, who is like a father to him. The appellant has a Construction Skills Certification Scheme Card (CSCS Card) as a Labourer and has been doing a course (City & Guilds Level 3 Diploma) that will enable him to become a qualified Gas Engineer. He is currently prohibited from working under the terms of his temporary admission.
15. Ms Martson in her statements says that she is a graduate of Kingston University, and that she is currently undertaking a PGCE with the aim of becoming a secondary school teacher. In her statement prepared in advance of a hearing in the First-tier Tribunal in February 2019, she confirms that she was then also working part-time in a Pupil Referral Unit. She describes the appellant as a doting and supportive father to the three children and says that she is very reliant on the appellant's support 'as it is the only support I have'.
16. Mr Powell in his statements says that the appellant has lived with him ever since he came to the United Kingdom when he was 6 years old. He says that the appellant has been a supportive father to the children and that every Sunday he brings the family round to Mr Powell's house for a family dinner. He confirms that T sees the appellant as her father.
17. A letter from the headteacher of T's school dated 11 September 2019 confirms that she had 100% attendance in the last academic year, that the appellant and Ms Martson are registered with the school as father and mother and that T's grandmother also regularly brings T to and from school.
18. In addition to the appellant's bundle, we had the previous respondent's bundle, but the only document to which we were referred in that bundle was the transcript of the sentencing remarks of the trial judge in relation to the conviction for conspiracy to rob on 8 February 2010, for which he was sentenced to three years in a Young Offender Institution, and which was the triggering offence for the making of the first deportation order against him on 13 September 2011. That offence was a "steaming

exercise”, robbing multiple passengers on tube trains and buses. Sentencing the appellant and his co-defendants for that offence, the trial judge noted that the offence was particularly serious because there was more than one offender, the defendants were part of a gang, the offence undermined the safety of travellers on the bus or underground, weapons were available for use (at least one knife and some bottles) and because of the “sheer number” of robberies that were committed (11 robberies). He described them as “horrific offences”.

19. We were also provided at the hearing (and accepted into evidence, without objection from Mr Sharma) an updated copy of the Police National Computer (PNC) record for the appellant. This shows that the appellant has recently been convicted of a further offence, specifically that on 16 October 2020 the appellant pleaded guilty to possession of a controlled drug, Class B, cannabis/cannabis resin on 20 August 2020 and was fined £80. The PNC record shows that the appellant has been convicted of a total of 12 offences in the eleven years since he was first convicted as a juvenile on 18 March 2009 for possession of a knife blade/sharp pointed article in a public place. Since the conviction for conspiracy to rob on 8 February 2010, he has received two further convictions for possession of a knife in a public place (on 13 April 2012 and 11 May 2015), for which he was sentenced, respectively, to 8 weeks and 12 weeks (suspended). In July 2015 he was convicted of three drugs possession offences (one Class B cannabis; two Class A heroin and crack cocaine) and sentenced to a 12 month conditional discharge and two community orders. In 2016 he was convicted for an offence of possessing a prohibited weapon (a CS gas cannister) committed during the operational period of his previous suspended sentence and sentenced to a total of six weeks’ imprisonment. In 2019 he was convicted of two driving offences and disqualified from driving for 6 months as a result of endorsements on his driving licence.
20. The OASys report for the appellant, completed in October 2017, which is in the appellant’s bundle, concludes that he was assessed at that time as a Low Risk to children, known adults and staff, but as a Medium Risk to the public. It is notable, in the light of his most recent conviction for cannabis possession, that in the OASys report it is recorded that he started smoking cannabis at the age of 14 years old, but ‘ended this activity some few months ago and has no temptation to begin again’.

### **The oral evidence**

21. At the hearing, the appellant adopted his four statements. In oral evidence, he said that he has had to retake part of the Gas Engineer course and is due to do this in January 2021. He said that he takes the children to and from school, takes his son to football on Saturdays and his daughter to acting school, or looks after J while Ms Martson takes them. He said that while Ms Martson is at university, he looks after J. He said that he did not think Ms Martson would be able to complete her PGCE without his help and that she did not have family who can assist. He said that one of Ms Martson’s sisters has her own two children and her other sister does not have children but works seven days a week, working at home. He said that his relationship with JW was getting better and that he had last seen him on his birthday in September 2020 and had started speaking to him two or three times per week.

Although he is on good terms with his ex-partner, her new partner is still very jealous and that is why he did not ask her to provide a statement in support of his appeal. When asked again by Mr Kotas whether there was anyone else around who helps out with the children, he said no and that T's dad was not around. The letter from the headteacher of T's school was then put to him, where the headteacher mentions that T's grandmother regularly takes her to and from school. He said that the letter was not incorrect, but that the grandmother has back problems and cannot help out all the time. He denied seeking to minimise the grandmother's involvement. He said that Mr Powell helps financially with the children, but not in other practical ways.

22. The appellant said that Ms Martson and the children had no connection with Jamaica and had never been to Jamaica. He himself had only been back to Jamaica once for a two week holiday in 2016. He stayed in a hotel with a family friend (who is also the headteacher of a secondary school in north London) and did not visit any relatives there. He said he knew no one in Jamaica and did not know the culture.
23. Regarding his driving convictions, he said that (contrary to what appears on the PNC record) he had not had his licence revoked on grounds of physical fitness, but because he was driving while uninsured. He accepted, however, that he knew he should not have been driving. When asked about his most recent conviction, and why he had offended again despite facing deportation, he said that he had turned to smoking cannabis because of the deportation action which he found stressful. He said that he did not want anything to do with cannabis anymore and could take a test to prove it.
24. Ms Martson adopted her two statements. In oral evidence she said that her mother (T's grandmother) helps with picking up and dropping off the children to school, but not as much as the appellant because of her back problems. She accepted the letter from the school was correct, but that recently the grandmother had not done as much. She denied seeking to minimise the involvement of the grandmother. She said that she had no one else who could assist and no family nearby. She did not, when first asked, even mention her sisters. When asked whether she had siblings she said one was a solicitor and lived with her mother, and her other sister worked full-time as a carer and also had two children of her own. She said that she had not mentioned her sisters when first asked because they have lives of their own and she does not see them often. She said that if the appellant was not around she would not be able to complete her PGCE or work. She said that the course was currently partly online and partly in person. She said that she had no ties to Jamaica and she could not afford to go to another country as she needs to pass her PGCE. She said her course is for one year and will finish in the summer of 2021. From April 2021 she would be applying to schools for jobs. She said that she receives maintenance through student finance, which helps pay the rent. She receives some financial assistance from her mother and Mr Powell, but nothing from the appellant as he is not permitted to work at present. She said there was nothing in Jamaica for her. She said her daughter was with an acting agency and her son is doing football with Tristar. They would lose that if they went to Jamaica. She said that if the appellant went to Jamaica without them she was afraid that her children would take the wrong paths because of being fatherless, and

that the children listen to the appellant more than they listen to her. She said that in her experience of working in the Pupil Referral Unit children without fathers get into trouble. She said she had not told the children that the appellant may be deported as she felt they were too young to understand. She said they did not have any significant health issues, although T has asthma.

25. Mr Powell adopted his two statements. In oral evidence he said that he sees the appellant's children every Sunday for a family dinner and also during the week sometimes. He said that they have a large family network who had really helped out financially with costs of representation for the appellant. He said that he was currently unemployed having lost his job due to the pandemic and was on Universal Credit. He said that Ms Martson's mother (T's grandmother) helps out a lot with the children, especially with J. He said that she comes to their house and they go to hers. He said that the last time he went to Jamaica was 2003 and that he had an 'old grand-aunty' there and 'her immediate offsprings'. He does not regard them as close family to the appellant and did not suggest that they meet when he paid for the appellant to have a holiday to Jamaica in 2016.
26. The appellant acknowledged in answer to questions from Mr Kotas that he had not sought a variation to his 'bail conditions' when moving in with Ms Martson at the start of the pandemic. The parties' representatives were not, however, clear what the position was in this respect. Following the hearing Mr Kotas notified the Tribunal that he had checked the position with the Criminal Casework Directorate (CCD) who confirmed that the appellant was on Temporary Admission from 4 August 2017 and the Notice of Restriction letter dated 31 July 2017 required him to reside at Mr Powell's address. The appellant had then been placed on immigration bail by the respondent from 22 September 2018. CCD could find no evidence from the CID database that the appellant has been granted permission to change his place of residence and they believe he is therefore in breach of his bail conditions. The appellant has not sought to dispute this.

### **The parties' submissions**

27. Mr Kotas for the respondent submitted that the appellant was clearly a persistent offender and that his original offence was plainly one that had caused serious harm. He referred us to the sentencing remarks of the trial judge. As to whether the appellant would face significant obstacles in relation to integration into Jamaica, Mr Kotas submitted that in the light of the legal authorities, whether or not the appellant has family in Jamaica is relevant but not determinative and it is for the Tribunal to make a broad evaluative judgement. The legal test is an elevated threshold. The appellant has a CSCS card, no mental health issues, he is confident and resourceful. Although he left Jamaica at age 6 and is effectively a stranger to the country, he is not someone with no memory of Jamaica. Although it may take the appellant time and effort to form a private life, his case does not meet the elevated threshold and there are not significant obstacles to his integration into Jamaica. As to whether relocation to Jamaica would be unduly harsh for the appellant's partner or the children, Mr Kotas did not press that point but relied on his skeleton argument. As to whether the appellant's deportation to Jamaica would be unduly harsh on the appellant's partner



or the children, Mr Kotas submitted that there had been an attempt by the appellant and his partner to minimise her mother's involvement with the family. He submitted that there was not anywhere near sufficient evidence before us, in terms of professional evidence, such as an independent social worker report or medical evidence, to demonstrate that the deportation of the appellant would be unduly harsh for his partner or the children. Although the children would be upset, and so would the appellant's partner, there is nothing in this case to show that there would be any consequences for the family going beyond the ordinary consequences of deportation. As to whether there are in the appellant's case exceptional circumstances going beyond the two statutory exceptions, Mr Kotas submitted that at this point the appellant's offending history should be brought into the equation. The appellant has continued to offend even while faced with deportation proceedings and has therefore shown a contempt for the criminal law of the United Kingdom. Although the appellant would if deported lose not only his close family but also his extended family in the United Kingdom, and although the appellant has been lawfully present in the United Kingdom for most of his life, there are not here very compelling circumstances to outweigh the public interest in the deportation of the appellant.

28. Mr Sharma for the appellant adopted his written submissions of 5 March 2020. He submitted that although the appellant's offences in the past have caused serious harm, and although he has continued to offend, he should not now be regarded as a 'persistent offender' or as someone who has caused serious harm applying the approach in Chege ("is a persistent offender") [2016] UKUT 187 (IAC) and Andell (foreign criminal - paragraph 398) [2018] UKUT 198 (IAC) (a decision we note was disapproved in SC (paras A398-399S: "foreign criminal": procedure) Albania [2020] UKUT 187 (IAC)). This is because his more recent offending (in particular the driving offences and most recent class B drug offence) was different in character to the block of offending in 2015-2017, was not so serious and was not linked to gang activity. He submitted these factors are relevant to proportionality, even if the appellant is in any event a foreign criminal as defined in s 117D of the NIAA 2002 by dint of having been sentenced to a period of imprisonment of more than 12 months. As to whether there would be significant obstacles to the appellant's integration into Jamaica, Mr Sharma submitted that the appellant is ignorant of the culture of Jamaica and has no lived experience of that, and that his uncle is also removed from the culture having not been to the country since 2003. He submitted that ignorance of the culture can place an individual at risk on return and forms a barrier to integration. He submitted that the fact that the appellant has a CSCS card does not mean that he can be employed in Jamaica, he has limited skills and may not be able to compete in the Jamaican employment market. He submitted that the fact that the appellant would likely be returning on his own would itself create a barrier to integration, while if he was returning with family that would impose additional stress which would also pose a barrier to integration. As to whether the appellant's deportation will be unduly harsh on his partner and children, he submitted that it would plainly be unduly harsh for the entire family unit to relocate to Jamaica where none of them had ever been and where the move would involve uprooting the children from their education and away from all their family and friends in the United Kingdom, in particular the grandmother and uncle. He further submitted that it would be unduly

harsh on the appellant's partner and the children if they remained in the United Kingdom while he was deported. His partner is in full-time education and has a career path that depends on completing that, but if the appellant went she would have to stop her course and would then be a single, unemployed mother of three children. He submitted that we could take judicial notice of the impact on children of losing a father, as well as of Ms Martson's own experience working with children in the Pupil Referral Unit. Taking into account all the circumstances, he submitted that deportation would constitute a disproportionate interference with the appellant's rights under Article 8.

### **Findings of fact**

29. There is little dispute on the evidence.
30. The appellant's criminal record is incontrovertible and is set out in the PNC record that we have summarised above.
31. The appellant was born in Jamaica and lived there for the first six years of his life before coming to the United Kingdom to live with his uncle, Mr Powell. He has now lived in the United Kingdom for 23 of the 29 years of his life, and was granted Indefinite Leave to Remain on 24 August 2004 (when he was 13). He has been educated in the United Kingdom and has worked in the United Kingdom. He has no friends in Jamaica and no family there with whom he has any real connection, although there are distant relatives on his uncle's side who he has never met. Apart from a two-week holiday in Jamaica in 2016, and his earliest years, he has no lived experience of Jamaica and is, as the First-Tier Tribunal judge found, effectively a stranger to Jamaica, although not a complete stranger.
32. The appellant has been in a committed family relationship with Ms Martson since 2014. She is a British Citizen. We accept that he is a supportive and loving father to J (now aged 20 months), K (now aged 4) and T (now aged 8) and participates daily in their care and upbringing, although he is not currently able to provide them with any financial support. All three children are British Citizens. The appellant also has a current parental relationship with his oldest son, JW (now aged 12), albeit that it is not particularly strong, given that there had previously been a fairly lengthy break in that relationship and even now they meet in person only very infrequently. Ms Martson is studying, and needs support with childcare to enable her to complete her PGCE and obtain employment. Ms Martson and the children have full and settled lives in the United Kingdom and we accept (though we have received limited evidence on this) that Ms Martson and the older children (JW and T) have their own social networks in the United Kingdom, as well as their immediate family connections, including Mr Powell, Ms Martson's mother and sisters and their families. The same will be true to a lesser extent for K who is younger, while J is too young to have any significant connections of his own apart from his immediate family.
33. We find that the family also has a support network. Ms Martson's mother, in particular, frequently assists with the children, taking K and T to and from school and assisting with J at home. In this respect, we find that the appellant and Ms

Martson sought to downplay her role and in the light of Mr Powell's evidence and the letter from the school, we find that Ms Martson's mother provides significant support to the family, notwithstanding her back troubles. Mr Powell also lives near the family and can help with the children, especially at present while he is unemployed. Mr Powell and members of the extended family have provided funding for the appellant's representation in these proceedings.

## Conclusions

34. Having set out our findings of fact, we now place these in the context of the relevant legal framework. That in turn involves the application of the mandatory considerations contained within section 117B-D NIAA 2002, which we shall address as they arise.

### **Is the appellant a "persistent offender" or has his offending "caused serious harm"?**

35. The terms "*persistent offender*" and "*caused serious harm*" appear in both section 117D(2) of the NIAA 2002 and paragraph 398 of the Immigration Rules. Mr Sharma has invited us to consider whether the appellant meets these definitions, and we have agreed to do so, having heard argument on the same. However, for the reasons that we set out below, whether he does meet those definitions or not is not determinative of the appeal and does not even affect the legal tests that we must apply when considering the appellant's appeal. Nonetheless, we accept that whether and to what extent the appellant is a "*persistent offender*" or has "*caused serious harm*" are matters that we can take into account when deciding, at the final stage, whether or not there are "*very compelling circumstances*" over and above those set out in the two statutory exceptions in section 117C(4) and (5) NIAA 2002, (and reflected in paragraphs 399 and 399A of the Immigration Rules) that might outweigh the public interest in deportation in the appellant's case.

36. In this appeal, the appellant contends that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the European Convention on Human Rights. As such, Part 5A of the NIAA 2002 applies (see s 117A(1)) and the Tribunal is required, by dint of section 117A(2)(b), to have regard in cases involving "*foreign criminals*" to the considerations in section 117C. "*Foreign criminal*" is defined in section 117D(2) NIAA 2002 as follows:

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

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who –
  - (i) has been sentenced to a period of imprisonment of at least 12 months,
  - (ii) has been convicted of an offence that has caused serious harm, or
  - (iii) is a persistent offender."

37. There is no dispute that the appellant fulfils that definition because he is not a British citizen, he has been convicted of an offence in the United Kingdom, and “*has been sentenced to a period of imprisonment of at least 12 months.*” That the 3-year sentence of imprisonment was imposed in 2010 and was the index offence in respect of the previous deportation action and appeal in 2011, is immaterial. At paragraph 43 of OH (Algeria) [2019] EWCA Civ 1763, Irwin LJ (with whom the other members of the Court agreed) concluded that:
- “... the natural meaning of the words in section 117D(2)(c)(i) is: “who has [in the past] been sentenced to a period of imprisonment of at least 12 months.”
38. Thus, the fact that the appellant had been sentenced to 3 years’ imprisonment in the past is sufficient to engage section 117D(2)(c)(i). In this regard, see also the decision of the Upper Tribunal in Rexha (S.117C - earlier offences) [2016] UKUT 335 (IAC), at paragraphs 14 and 15.
39. It follows that, whether or not the appellant is a “*persistent offender*” or has “*caused serious harm*” makes no difference to the fact that he is a “*foreign criminal*” to whose case we must apply the provisions of section 117C, including the two Exceptions in that section (Exception 1 and Exception 2) which we address below. Further, the Supreme Court in KO (Nigeria) [2018] UKSC 53 made clear that in considering those two Exceptions the offending history of the individual foreign criminal and his offending history are not relevant so that the question of whether the appellant is a “*persistent offender*” or has “*caused serious harm*” is not relevant to the application of those two Exceptions.
40. The Immigration Rules reflect sections 117C and 117D and provide for two equivalent exceptions (in paragraphs 399A and 399 respectively) to apply where paragraph 398(b) or paragraph 398(c) apply. Paragraphs 398(b) and 398(c) thus fulfil the same function to the definition of “*foreign criminal*” in section 117D, in that they provide a ‘gateway’ to the two exceptions. Set in context, those paragraphs are as follows:

**“Deportation and Article 8**

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

...

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they

have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

41. In his written submissions, Mr Sharma focused on paragraph 398(c). He argued that, on the facts, the appellant is not a "*persistent offender*" and does not show a "*particular disregard for the law*". As a consequence, it appeared to be the appellant's submission that he is not a "*foreign criminal*". However, as noted above, at the hearing, Mr Sharma accepted (as had, indeed, been conceded before the First-Tier Tribunal) that the appellant is a "*foreign criminal*". He was right to do so because paragraph 398(c) plainly does not replace the definition of "*foreign criminal*". It could not do so as far as the statute itself is concerned since it is trite law that the Rules cannot amend the statute and when deciding this appeal we must apply the primary legislation (cf paragraph 19 of SC (Zimbabwe) [2018] EWCA Civ 929). Nor does it do so as far as the Rules are concerned since: (i) the expression "*foreign criminal*" in A398 of the Rules must be construed by reference to the definition set out in section 117D NIAA 2002 (see SC (paras A398-339D: 'foreign criminal': procedure) Albania [2020] UKUT 187 (IAC)); and, (ii), the appellant's case falls within paragraph 398(b) in any event since he was sentenced to a period of imprisonment of less than 4 years but at least 12 months.
42. It follows that whether or not the appellant is a "*persistent offender*" or has "*caused serious*" harm does not change the legal tests that we must apply on this appeal, but we have nonetheless considered whether and to what extent the appellant meets these definitions so as to inform our overall assessment of the balancing exercise required by Article 8, as codified in section 117C(6) and the "*very compelling circumstances*" test which we deal with in the last substantive section of our judgment below.
43. The meaning of the phrase "*persistent offender*" was authoritatively considered by the Court of Appeal in SC (Zimbabwe). At paragraph 25, Coombe LJ (with whom the other members of the Court agreed) expressly approved the following passages of the guidance set out by the Upper Tribunal in Chege ("is a persistent offender") [2016] UKUT 187 (IAC):

"53. Put simply, a "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. Whilst we do not accept Mr Malik's primary submission that a "persistent offender" is a permanent status that can never be lost once it is acquired, we do accept his submission that an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though

he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.

54. Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time."

44. In essence, the assessment is fact-sensitive and must be carried out by the Tribunal with reference to the individual's offending history as a whole.
45. The appellant's criminal record shows that he has accrued 9 convictions for 12 offences within the period 2009 to 2020. The offences up to 2016 include, in addition to the index robbery offence, three offences involving possession of a knife, and one involving possession of a CS gas canister, as well as Class A and Class B drug offences. It is right that there was a gap in the offending behaviour between 2016 and November 2018, and that the more recent offences have been different in character to the earlier offences and less serious in nature than those previously committed (although driving when prohibited to do so whilst uninsured cannot properly be said to be trivial in any way). However, it is plain that the appellant knew that he should not be driving at all, and (given his previous conviction for the same) that he should not be in possession of cannabis. It is equally plain that he was aware of his own previous criminal history, the deportation action and the consequences that committing further offences might well have on his future. Notwithstanding this, he has committed further offences.
46. We have taken account of the fact that the appellant was a minor when he committed the first two offences on his record. In so far as the "*persistent offender*" assessment is concerned, case-law does not indicate that this fact should count against the attribution of the epithet, although in this case we do consider it to be a relevant matter weighing in favour of the appellant.
47. Nonetheless, having applied the guidance set out in the authorities and having regard to the facts of this case, we conclude that the appellant is a "*persistent offender*" within the meaning of section 117D(2)(c)(iii) NIAA 2002. He has, over the course of a relatively extended period, kept breaking the law. He has not accrued a very high number of convictions, but they are spread out over the period in question (even taking account of the gap between 2016 and 2018). Some of the offences have been similar in nature, others not: this does not provide any real assistance to the

appellant. Even after the successful appeal in 2011 and the gap in offending between 2016 and 2018, the appellant re-offended. It is clear to us that there has been persistence in his conduct. This is not a case in which it can be said that the appellant had been a persistent offender, but lost this status by virtue of cessation of offending between 2016 and 2018.

48. Mr Sharma's reliance on the additional words, "*who shows a particular disregard for the law*" in paragraph 398(c) of the Rules is misconceived in so far as the approach to be taken in an appeal is concerned. As stated previously, it is the definition within section 117D(2)(c)(iii) which is important.
49. Even if it had to be shown that the appellant did show "*a particular disregard for the law*", the facts of this case satisfy the test. With reference to what we have already said concerning the persistence of his offending, the appellant has repeatedly broken the law over the course of a number of years. It is of some significance that one of the offences for which he was convicted in September 2016 was that of committing an offence during the operational period of a suspended sentence. This is indicative of a complete disregard of a penalty previously imposed. The fact that the appellant continued to offend after having succeeded in his 2011 appeal and having been given a very clear warning as to his future conduct is also relevant. So too are the 2018 motoring offences and the 2020 drugs offence. They bring the appellant's disregard for the law up to date, as it were. They took place after the respondent had instigated the second set of deportation proceedings against him, and this must, in any view, constitute a relevant contextual factor. Finally, it cannot be the case that the test can only be met if the individual is, as at the date of hearing, displaying the "*particular disregard for the law*". That would be, to put it bluntly, absurd. As with the question of whether they are a "*persistent offender*", the assessment must be holistic, having regard to the entirety of the relevant conduct. We find that the appellant has shown "*a particular disregard for the law*".
50. As regards the question of whether the appellant's offences have caused "*serious harm*", the Upper Tribunal in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 350 (IAC) recently summarised the relevant case law as follows:

53. The current case law on "caused serious harm" for the purposes of the expression "foreign criminal" in Part 5A of the 2002 Act can be summarised as follows (drawing predominately from the judgment of Simon LJ in R (Mahmood and others):-

(1) Whether P's offence is "an offence that has caused serious harm" within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.

(2) Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.

(3) In determining what factors are relevant or irrelevant, the following should be borne in mind:

- (a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;
- (b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused "serious harm", as categorised in the Sentencing Council Guidelines;
- (c) A victim statement adduced in the criminal proceedings will be relevant;
- (d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;
- (e) The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;
- (f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;
- (g) The mere potential for harm is irrelevant;
- (h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

51. Applying that guidance to the facts of the present case, we take into account the view of the Secretary of State, and also the view of trial judge for the appellant's robbery conviction who regarded the eleven offences (and one attempt) committed as being 'horrific' with a number of aggravating factors as we have set out above. In our judgment, it is plain that this offence caused "*serious harm*" to its victims.

**Exception 1: the private life exception under section 117C(4) NIAA 2002**

52. Section 117C(4) provides as follows:

"(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 is proposed to be deported."

53. All three limbs of the exception must be satisfied in order for an individual to succeed.

54. The respondent accepts that the appellant has been lawfully resident in the United Kingdom for most of his life. That concession is plainly correct. Section 117C(4)(a) is satisfied.



55. As to the second limb under section 117C(4), the respondent has adopted what may be described as a neutral position on the question of social and cultural integration (see paragraph 15 of her latest written submissions).
56. In assessing this issue, we have considered CI (Nigeria) [2019] EWCA Civ 2027 and Binbuga [2019] EWCA Civ 551. In summary, those authorities show that all cases are fact-sensitive, the concept of an individual being a “home grown criminal” should not be applied to cases being considered under section 117C, and the individual needs to show that they have accepted and assumed the core values, ideas, customs and social behaviour of the culture of the United Kingdom.
57. The relevant factual matters in the present case in support of the existence of social and cultural integration are as follows:- the appellant arrived in this country at a young age and has lived here for 23 years. He was educated here, has worked, and has formed close relationships, not least with his uncle, Mr Powell, and his current partner. He is also the father of three children and the step-father of another. Whilst the relationship with JW had previously effectively ceased, it has been rekindled in the past year, although he has limited physical contact with him. He is a loving and supportive father to the other three children and participates fully in their daily lives. His immediate family in the United Kingdom are all British Citizens, his children are at school and undertaking extra-curricular activities such as football and acting and he supports them in those activities. His partner is working and studying for a PGCE, and he supports her in doing this. In other words, there is nothing to suggest that (on a day to day basis) the appellant has not accepted and assumed the core values, ideas, customs and social behaviour of the culture of the United Kingdom.
58. Against the appellant is his offending history. As regards convictions, we have discussed these when addressing the “*persistent offender*” issue, above. In and of themselves, we do not consider that they broke what had plainly been social and cultural integration prior to the start of the offending period. We have considered the admitted period of gang membership as part and parcel of my overall assessment. However, it is a preserved finding of fact from the decision of the First-tier Tribunal that the appellant has not been a member of the gang in question for some years. His membership was not for a prolonged period in any event. Given the obvious integration prior to that membership and its relatively short duration, we conclude that there was no break in the appellant’s social and cultural assimilation.
59. Alternatively, if such a break was created by the gang membership combined with the offences committed whilst he was associated with that group, we conclude that relevant social and cultural integration has been re-established over the fairly significant period of time since he ceased involvement with the gang.
60. In all the circumstances, section 117C(b) is satisfied.
61. We turn now to the question of whether the appellant would face “*very significant obstacles*” to “*integration*” into Jamaican society were he to be deported.

62. The term “*integration*” has been discussed in a number of cases, but the authoritative statement of its content can be found at paragraph 14 of Kamara [2016] EWCA Civ 813:

“14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

63. This well-known passage was the subject of further consideration in AS [2017] EWCA Civ 1284, in which at paragraphs 58 and 59, Moylan LJ (with whom the other members of the Court agreed) concluded:

“58. I do not consider that Mr Buley's categorisation of some factors as "generic" is helpful. Consideration of the issue of obstacles to integration requires consideration of all relevant factors some of which might be described as generic. What Mr Buley identified as "generic" factors, as referred to above, can clearly be relevant to the issue of whether there are very significant obstacles to integration. They can form part of the "broad evaluative judgment" as is specifically demonstrated by the reference in Kamara to "good health" and "capable of working".

59. I also reject Mr Buley's submission that, following Kamara, whether someone is "enough of an insider" is to be determined by reference to their ties or links to the other country. This is to turn what Sales LJ said in Kamara into just the sort of gloss which he expressly warned against. It is clear, to repeat, that generic factors can be of significance and can clearly support the conclusion that the person will not encounter very significant obstacles to integration.”

64. The practical approach to arriving at the answer to the question posed by section 117C(4)(c) was stated by the Court of Appeal at paragraph 9 of Parveen [2018] EWCA Civ 932 in the following terms:

“The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship difficulty or anything else, and to decide whether they regard them as “very significant”.”

65. In this case, the obstacles to integration that the appellant would face on return to Jamaica include the following:- he personally knows nobody there, he has no lived experience of Jamaican society and is effectively a stranger both to the country of Jamaica and its culture and society. Although he has a CSCS card as a labourer in the United Kingdom, there is no evidence before us as to whether that will be accepted in Jamaica. He has not yet completed his studies as a gas engineer and although it is

possible that he will have done before any deportation actually takes place, we must determine matters as they stand at the date of the hearing and we do not take that possibility into account. Although no country evidence has been presented to us of any difficulties that a new immigrant to Jamaica may face culturally, socially or in terms of finding employment, we are prepared to assume (in the appellant's favour) that, being a stranger to the country, with limited qualifications and work experience, it is likely to be difficult for him to integrate into Jamaica socially and culturally and to find employment in Jamaica. It may also be difficult for him to find accommodation, although we have again heard no evidence on that.

66. However, while the appellant is a stranger to Jamaica, he is not a complete stranger. His earliest childhood was spent there and he has returned for a holiday. His uncle has distant family there, and so the appellant may be able to draw on those connections. Even if that is not possible, he speaks the native language (English), he is of Jamaican ethnic origin, he is young and healthy and no evidence has been presented to us to suggest that someone with those characteristics will not be able to integrate into Jamaican society and culture, in time and with the usual effort that is required by anyone moving to a new place. Further, although his work experience and qualifications are limited, he does have that experience and qualifications in labouring work of a type that is universally required. There is no evidence before us that there is any particular problem with unemployment in Jamaica, or that new immigrants such as the appellant might have particular problems obtaining employment. Although, as noted, we are prepared to assume that it will be difficult for the appellant to obtain employment, we are not prepared to find that it will not in time be possible for the appellant to find employment. At least, we are satisfied that he is in as good a position as any immigrant to the country to obtain employment.
67. In those circumstances, we are satisfied that the obstacles to integration that the appellant would face if deported to Jamaica are not "*very significant*" obstacles and accordingly Exception 1 in section 117C(4) NIAA 2002 does not apply.

**Exception 2: the family life exception under section 117C(5) NIAA 2002**

68. Section 117C(5) NIAA 2002 provides as follows:

"(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."

69. By s 117D(1), "*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, and a "*qualifying partner*" means a partner who (a) is a British citizen or (b) is settled in the United Kingdom within the meaning of s 33(2A) of the Immigration Act 1971 (IA 1971). The appellant's current partner, Ms Martson and the three children who live with her are all British citizens and therefore "*qualifying*" for the purposes of the exception. The appellant's eldest child, JW, is also "*qualifying*" because although he is a Ghanaian citizen, he has lived in the United Kingdom for a continuous period of seven years or more.

70. It is a preserved finding from the decision of the First-tier Tribunal that the appellant has a genuine and subsisting relationship with Ms Martson, and that he also has a genuine and subsisting parental relationship with his two biological children and his stepdaughter. The evidence presented to us confirms this.
71. In respect of the appellant's eldest child, JW, the First-Tier Tribunal found (at paragraph 33) that the appellant did not play any significant role in his life. However, at this hearing new evidence has been presented on the basis of which we accept that the appellant does now have a genuine and subsisting parental relationship with JW, albeit that he sees him in person only very infrequently.
72. The authoritative statement of the law as regards the meaning of "*unduly harsh*" is contained in the judgment of Lord Carnwath JSC in KO (Nigeria) [2018] UKSC 53, at paragraph 23:

"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 Page 11 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."

73. However, Lord Carnwath's judgment was subjected to further scrutiny by the Court of Appeal in the recent case of HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176, in the course of which Underhill LJ (with whom the other members of the Court of Appeal agreed) gave further guidance on "*unduly harsh*" and as to how Lord Carnwath's judgment in KO (Nigeria) is to be interpreted. It is worth setting out a substantial part of Underhill LJ's judgment on this issue, beginning at paragraph 50 where, having set out various passages from Lord Carnwath's judgment, he discussed their effect as follows:

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

51. The essential point is that the criterion of undue harshness sets a bar which is "*elevated*" and carries a "*much stronger emphasis*" than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in MK (Sierra Leone), and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the

statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

52. However, while recognising the "elevated" nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in [section 117C \(6\)](#). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving [IT \(Jamaica\)](#), if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of "very compelling circumstances" to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to [section 117B \(6\)](#) at the start of para. 23) and the (very high) level applying to serious offenders.

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

74. Underhill LJ then went on to address the particular arguments of the parties in that case as follows:-

"54. The Appellants of course accept that Lord Carnwath said what he said in the passages to which I have referred. But they contend that it is not a complete statement of the relevant law and/or that it is capable of being misunderstood. In their joint skeleton argument they refer to the statement in para. 23 of Lord Carnwath's judgment that "one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent" and continue:

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

Mr de Mello and Mr Bazini developed that submission in their oral arguments. In fact it comprises two distinct, though possibly related, points. I take them in turn.

55. The first is that what Lord Carnwath says in the relevant parts of his judgment in [KO](#) makes no reference to the requirements of [section 55](#) of the 2009 Act [Borders Citizenship and Immigration Act 2009] and is likely to lead tribunals to fail to treat the best interests of any affected child as a primary consideration. As to that, it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55: see para. 15 of his judgment, quoted at para. 41 above. The reason why it was unnecessary for him to refer explicitly to [section 55](#) specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test. It was not necessary for Lord Carnwath to spell out that in the application of Exception 2 in any particular case there will need to be "a careful analysis of all relevant factors specific to the child"; but I am happy to confirm that that is so, as Lord Hodge makes clear in his sixth proposition in [Zoumbas](#).

56. The second point focuses on what are said to be the risks of treating [KO](#) as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under [section 117C\(5\)](#) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an "ordinary" level of harshness, and I note that Lord Carnwath did not jibe at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.

57. I make those points in response to the Appellants' submissions. But I am anxious to avoid setting off a further chain of exposition. Tribunals considering the

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

75. We have had regard to the whole of Underhill LJ's judgment, but we in particular take from his exposition as set out above that in considering whether the effects of deportation on Ms Martson or the children would be "*unduly harsh*", we have to consider whether, given the strong public interest in the deportation of foreign criminals in general, the effects would in the particular circumstances of this case be significantly more than undesirable, albeit that they need not be very compelling.
76. We add that although Underhill LJ was at pains in his analysis to explain why in his judgment Lord Carnwath's judgment in KO (Nigeria) was consistent with the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009) (reflecting article 3.1 of the United Nations Convention on the Rights of the Child), to give primary consider to the children's best interests, Peter Jackson LJ in his concurring judgment (with which Popplewell LJ also agreed) reaffirmed the well-established position that a decision that does not give primary consideration to the children's best interests will be liable to be set aside. He gave guidance as follows:-

"152. Parliament has enacted two important public interests in cases involving children. Section 117C of the Immigration Act 2014 enshrines the public interest in the deportation of foreign criminals. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to make arrangements to ensure that in her immigration functions she has regard to the need to safeguard and promote the welfare of children, which translates into a duty to make the best interests of the child a primary consideration. The decision-maker must bring both of these elements into play in accordance with the complete statutory code, applying (as may be appropriate in the individual case) the fulcrum of undue harshness, or of very compelling circumstances or of proportionality. A resulting decision to deport a parent may produce hugely detrimental consequences for a child but, provided his or her best interests have been adequately identified and weighed in the balance as a primary consideration, the decision will be lawful. But a decision that does not give primary consideration to the children's best interests will be liable to be set aside.

153. The practical effect of Section 55 has been summarised in *Zoumbas*. I draw particular attention to the final parts of Lord Hodge's summary, reproduced for convenience:

"(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

154. To these I would respectfully add that the Section 55 duty falls on the decision-maker. A child will not usually be in a position to urge his or her point of view and the decision-maker cannot treat the child as if he or she had some burden of proof.

155. The assessment that has to be carried out is therefore one that is adequately informed and specific to the individual child as a person distinct from the offending parent. It requires the decision-maker, as part of the overall assessment, to look at matters from the child's point of view – in the case of Exception 2, the question explicitly concerns undue harshness to the child.”

77. We now apply that guidance to the facts of this case. We begin with the question of whether it would be unduly harsh on the children and/or Ms Martson if they were to leave the United Kingdom and go to Jamaica with the appellant.
78. The best interests of the children are a primary consideration in our assessment of whether it would be “*unduly harsh*” for them to leave the United Kingdom and accompany the appellant to Jamaica.
79. In considering this question, we find that it is clearly in the best interests of all the children involved in this case that they remain living in the United Kingdom. Although the appellant’s two biological children with Ms Martson are both young (4 and 1 years of age), they are British, have lived in this country their entire lives, and would face obvious disruption were they to go to Jamaica. The appellant’s step-daughter is now aged 7 (she will be 8 in September of this year). She is in school and will have formed more significant ties outside of her immediate family unit. As with her two step-siblings, leaving her country of nationality will also entail real disruption. The same goes to an even greater extent for JW who is older again. He would likely also need to leave his mother in the United Kingdom if he were to follow the appellant to Jamaica and thus the effect on him would be even greater.
80. The fact of the children’s British nationality is, both in respect of the best interests assessment and separately, a relevant factor. However, the weight attributable to it in any given case is fact-sensitive (see Patel (British citizen child - deportation) [2020] UKUT 45 (IAC)). In the present case, no evidence has been adduced by the appellant to show that the children would be denied entry to Jamaica, or that they would be particularly disadvantaged there by virtue of their British nationality. There is no evidence to show that they would not, for example, be able to access healthcare and education in that country. There would be no linguistic barriers. The appellant’s own two children are very young, and his step-daughter is not at a stage of particularly significant educational development. There is no evidence that any of the children suffer from physical or emotional difficulties, such that a relocation to Jamaica would have a greater adverse impact upon them. However, we accept that T and K have developed their own social networks outside of their immediate family, which they would lose if they had to move. Their education would be disrupted. Both are pursuing hobbies (football and acting) which it may not be possible to pursue in the same way in Jamaica. Further, we accept that the opportunities for them in Jamaica in terms of education, extra-curricular activities and future prospects are likely to be more limited than those in the United Kingdom.



81. Before reaching a conclusion on the circumstances of the children, we must also consider the position of Ms Martson. She is a British Citizen who has lived all her life in the United Kingdom, has an extended network of family and friends in the United Kingdom and is studying with a view to building a career here. She would lose all this if she had to move to Jamaica. Although she is young and healthy and would encounter no language barrier in Jamaica, she would likely encounter difficulties obtaining employment there, even if she delayed her departure until she had completed her PGCE. She would also suffer the additional emotional impact of needing to care for and support her children in such a move without any support network or knowledge of the country and its culture. The significant impact of the move on her would likely contribute to the emotional impact of the move on her children.
82. Putting all the above together, we find that although this is a borderline case, it would be unduly harsh for Ms Martson, T and K to relocate to Jamaica. J is so young that if his case were considered in isolation we would not have considered it unduly harsh on him, but that is beside the point; he is part and parcel of the family unit. The position of JW is *a fortiori* since he would have to leave his mother in order to accompany the appellant to Jamaica and given that he has lived with her and not the appellant his entire life that would plainly be unduly harsh.
83. We then turn to address the second limb of the question under section 117C(5), namely whether it would be “*unduly harsh*” on the children and Ms Martson if they were to remain in the United Kingdom and the appellant be deported to Jamaica.
84. As with the first limb, we begin by assessing the children’s best interests. It is quite clear that for T, K and J these lie in the family unit remaining together. There is nothing to suggest that the appellant has been anything other than a good father/step-father to the three children. It is stating the obvious that all three children would miss him terribly if he were to be removed from their lives. As far as the two younger ones are concerned, the appellant has always been part of their lives. His step-daughter has essentially regarded him as her “dad” since the age of about 2 and thus in all likelihood for as long as she can remember. As for JW, although he has limited in-person contact with the appellant, we still accept that it is in his best interests to have that contact rather than not to have it.
85. Again, therefore, it is a primary consideration for us that the best interests of all the children lie in the appellant remaining in the United Kingdom. In the case of T, K and (to a lesser extent, because of his age) J, their separation from the appellant will undoubtedly be very distressing for all concerned: they love him and him them. The loss of a loving father-figure for any child will inevitably cause real distress and disruption, and the present case is no different. We take into account Ms Martson’s views, based on her experience of working in a Pupil Referral Unit, that the loss of a father figure can be a factor that leads to a child exhibiting poor, anti-social or criminal behaviour. However, Ms Martson is not an expert; she speaks only from her personal experience and we do not consider that we can, as Mr Sharma invited us to, take ‘judicial notice’ that the loss of a father’s physical presence as a result of deportation is likely in all cases (or even in a significant proportion of cases) to lead

to poor, anti-social or criminal behaviour. This is a matter that would need to be demonstrated by objective evidence, and we have received none.

86. On the evidence before us as a whole, we do not conclude that, having regard to their specific circumstances and characteristics, the impact of the appellant's departure on T, K and J would be "unduly harsh", as that term is properly to be understood (see in particular paragraphs 50-53 and 56 of HA (Iraq)). None of them have any relevant medical conditions, special educational needs, or other relevant vulnerabilities which would be likely to cause them particular emotional and/or developmental problems. The appellant is not currently contributing financially to their support, so his departure will not have a negative effect on the family's financial circumstances. The physical and emotional support that the appellant provides his family is very important, but there are other people around who would be able to help Ms Martson with the children if need be (in particular her mother and Mr Powell; but Ms Martson's sisters may also be able to assist from time to time). We take into account the fact that Ms Martson is a loving and capable mother to T, K and J, and, in light of what we say in the following paragraph, although she will undoubtedly be upset by the applicant's departure, we conclude that she would nonetheless continue to provide the children with strong parental care. The appellant will also not be completely lost to the family emotionally: he will be able to remain in contact with them by telephone and, no doubt, video and social media. In time, the family may be able to visit him in Jamaica.
87. The position in respect of JW is, on the evidence before us, necessarily weaker from that concerning T, K and J. The appellant has had little real involvement in his upbringing and direct contact has been fairly minimal in recent times. Whilst we accept that JW would be distressed by his father's departure, there is no evidence to suggest that he would not receive the love and care from his mother and step-father in order to come to terms with this event without suffering any significant detriment. It is also the case that JW has no medical or other needs which render him particularly vulnerable to the effects of the appellant leaving the United Kingdom.
88. As to Ms Martson, she will obviously miss the appellant greatly if he goes. They have been partners since 2014 and their relationship has survived difficult tests including the birth of two children, the appellant re-offending, being subject to deportation proceedings and required to live apart from the family at Mr Powell's address. It is clear to us that they have a strong relationship and are committed parents to their children. However, it is nonetheless a relationship that commenced at a time when the appellant was already liable to deportation as a result of his 2010 robbery offence and in the early years of which relationship he committed a number of further offences which both would have known rendered him vulnerable to further deportation action. There was thus a degree of precariousness to the appellant's circumstances, which (whether or not it falls squarely within the meaning of "*precarious*" in section 116B(5) NIAA 2002) nevertheless has some bearing as a matter of fact on the likely effect of breaking up that relationship by deporting the appellant since it is likely that Ms Martson and the appellant will always have known that, if he reoffended, he might face deportation again. Nonetheless, even if the relationship had not been commenced when the appellant's circumstances were precarious, it has

still been a relatively short relationship and both the appellant and Ms Martson have had relationships previously and have lived most of their lives without each other. While none of these factors mean that they will be any less upset at having to live in different countries, they do mean that there is nothing about the nature of the relationship, in and of itself, that would make the effects of deportation on Ms Martson unduly harsh.

89. It has been argued that if the appellant is deported Ms Martson will have to give up her PGCE and will not be able to obtain employment, but we do not accept that. Even now Ms Martson has only two terms remaining of her PGCE. She will be even closer to the end of the course by the time the appellant is deported (if he is deported). We consider it most likely that the family (in particular her mother and Mr Powell) will rally to provide her with the necessary support to enable her to finish her PGCE. She will then likely be successful in obtaining employment at which point she is likely to be able to pay for some additional childcare, as needed. In any event, even if her family are not able to provide her with the necessary support now, or she is not successful in completing her course or obtaining employment, we see no reason why Ms Martson should not be able to achieve these goals in a few years' time when J is a little older.
90. Putting all these factors together, and having regard to the guidance set out in the case-law, we are satisfied that the effect of the appellant's deportation on Ms Martson, T, K, J, and JW would not be "unduly harsh". Focusing on *these* children, there really is nothing which in our judgment raises this case beyond the elevated threshold imposed by the "unduly harsh" stipulation. The family will miss the appellant deeply, and his departure will cause a significant disruption to family life, but these are the inevitable and, using the term advisedly, ordinary consequences of deportation. The position of JW is *a fortiori* given the limited nature of the relationship between him the appellant.
91. It follows that we do not find that Exception 2 applies in this case.

**"Very compelling circumstances" under section 117C(6) NIAA 2002**

92. Section 117C(6) NIAA 2002 provides:

"(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."

93. The Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 at paragraph 27 held that the fall-back protection of section 117C(6) is available to those who have been sentenced to less than four years imprisonment, notwithstanding its apparent limitation on its face to those who have been sentenced to longer sentences. The Court further confirmed that this assessment takes the place of, and constitutes, the assessment of the balancing exercise required to ensure compliance with Article 8 of the ECHR; there is no room for a further balancing exercise outside the statute and the Rules: see paragraph 36. The Court

held (at paragraph 32) that in carrying out the balancing exercise all factors are relevant, including those that were already considered under Exceptions 1 and 2, although in most cases an individual who is a 'near miss' case for Exception 1 or Exception 2 will not be able to rely on the very same factors as constituting "*very compelling circumstances*, over and above those described in Exceptions 1 and 2". However, the Court added:

"32. ...But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

33. Although there is no "exceptionality" requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."

94. The Court further emphasised (at paragraph 34) that the best interests of children are again relevant to this assessment and carry great weight.
95. In assessing whether there are "*very compelling circumstances*", the extent and nature of the appellant's criminal record becomes relevant and, by virtue of section 117C(2), "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal".
96. The likelihood of reoffending (where it is possible to make an assessment) is also relevant. However, in HA (Iraq) Underhill LJ emphasised (at paragraph 142) that:

"Where a tribunal is able to make an assessment that the foreign criminal is unlikely to reoffend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as Moore-Bick LJ says in Danso, the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal question but also on wider policy considerations of deterrence and public concern."

97. In this case, the principles enunciated by the Grand Chamber of the Strasbourg Court in Maslov (1608/03) are also relevant, specifically the need to have regard to "the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there" (paragraph 74) and that "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion" (paragraph 75). However, we are also mindful that we must not slavishly apply these principles because, as the Court of Appeal explained in The Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ

1012, the Strasbourg case law “does not give the same significant weight to the need for deporting foreign criminals as the UK does”, and “it sees the public interest principally in terms of the potential damage caused by the particular individual re-offending, whereas that is merely an element – and by no means even the most important element – of the relevant public interest as perceived in the UK”.

98. We now apply those principles to the facts of this case. We begin by considering the public interest in his deportation by reference to his offending history and likelihood of re-offending. In this respect, we have already concluded for the reasons set out above, that his original offence of robbery caused serious harm. Although his more recent offending has been less serious, it has nonetheless been persistent in our judgment for the reasons we have already set out above. We also consider that the likelihood is that the appellant will re-offend since he has done so twice already even while facing these deportation proceedings and thus at a time when he must have known that any further offending would make it more likely he was to be deported. Although the appellant’s criminal record is by no means the most serious in the range of those crimes for which an individual may be deported, equally it is not at the lower end of the range. His original sentence of three years’ imprisonment was towards the upper end of the medium category of offenders (those sentenced to more than 12 months but less than four years’ imprisonment) who are liable to deportation under NIAA 2002 and the Rules. While his original sentence was for offending as a minor, and we give that factor some weight, he has persisted in his offending as an adult. In short, in our judgment, there is nothing about the appellant’s criminal record or the likelihood of his re-offending that significantly lessens the generally strong public interest in the deportation of foreign national criminals. Even if we assume that, because the appellant has lived most of his life in the UK, applying the Maslov principles (with the caveat we have set out above), there needs to be a greater public interest in his deportation than there would be in cases where the individual had come more recently to this country, that threshold is met in our view: the appellant’s offending and, importantly, the likelihood of re-offending is towards the upper end of the general scale.
99. Against the public interest in deportation, we then set the factors relevant to the Article 8 assessment for both the appellant and his family. In this respect, we take as our starting point the assessments that we have made under Exceptions 1 and 2 above, and the best interests of the children as we have found them to be in remaining in the United Kingdom and not breaking up the family unit. For the reasons we have set out, we did not find that there would be very significant obstacles to the appellant re-integrating into Jamaican society, and we did not find that the effects on his family of his deportation would be unduly harsh if they remained in the UK, as it appears likely will in fact be the case. The appellant’s case was not, in relation to either statutory exception, a “near miss” case in our judgment, and there were no factors that we have already considered above which become so strong in a general Article 8 assessment as to become “*very compelling*”. In this respect, we take into account the appellant’s very long residence in the UK and the fact that he is completely socially and culturally integrated (apart from his offending history), but this is not in our judgment sufficient to create a “*very compelling*” case. Nor are there any factors relevant to Article 8 that we have not already considered in

making our assessment for the purposes of the statutory exceptions that we could now bring into consideration in relation to whether “*very compelling*” circumstances exist.

100. It follows that in our judgment there are no “*very compelling circumstances*” in the appellant’s case that outweigh the public interest in deportation in his case. Therefore, he cannot satisfy section 117C(6) NIAA 2002.

**Notice of Decision**

**101. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and has been set aside.**

**102. We re-make the decision by dismissing the appeal on Article 8 ECHR grounds.**

Signed: *H Stout*

Date: 18 January 2021

Deputy Upper Tribunal Judge Stout

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

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

Signed: *H Stout*

Date: 18 January 2021

Deputy Upper Tribunal Judge Stout

**APPENDIX 1: ERROR OF LAW COMPONENT TO THE UPPER TRIBUNAL'S DECISION**



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

Appeal Number: HU/10631/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15 January 2020

Decision & Reasons Promulgated

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**Before**

**THE HON. LORD UIST  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**EARL ANTHONY WEBB  
(ANONYMITY DIRECTION NOT MADE)**

**Respondent**

**Representation:**

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Ms L Turnbull, Counsel, instructed by Bhattari and Co

**DECISION AND REASONS**

**Introduction**

1. For ease of reference, we shall refer to the Appellant in the proceedings before the Upper Tribunal as the Secretary of State and to the Respondent as the Claimant.

2. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Cassel (“the judge”), promulgated on 23 October 2019, in which he allowed the Claimant’s appeal against the Secretary of State’s decision of 13 September 2017, refusing his human rights claim. That claim was made in response to the Secretary of State’s decision to deport the Claimant from the United Kingdom following a series of convictions, together with alleged associations with a London-based gang.
3. The Claimant, a Jamaican national born in March 1991, arrived in the United Kingdom in December 1997 at the age of 6. He was granted Indefinite Leave to Remain on 24 August 2004. On 8 February 2010 the Claimant was convicted of conspiracy to commit robbery and sentenced to 3 years in a Young Offenders’ Institution. This prompted deportation action by the Secretary of State. The Claimant successfully resisted this on appeal in 2011 ([DA/00751/2011](#)). Notwithstanding this reprieve and the issuance of a letter from the Secretary of State warning him of his future conduct, the Claimant continued to commit offences between 2012 and 2016, resulting in renewed deportation action against him. The Claimant committed further offences in November 2018 relating to driving a vehicle without either a licence or insurance.
4. The Claimant has three biological children in the United Kingdom. Whilst he did not have regular contact with the eldest of these, he has resided with the other two, together with their mother and her daughter from a previous relationship. It is these relationships, together with his absence from Jamaica since the age of 6, which the Claimant relied upon when putting forward his human rights claim to the Secretary of State and when presenting his appeal to the First-tier Tribunal.
5. At that appeal, the central issues to be addressed were:
  - i. whether the Claimant can bring himself within either the family life or private life exceptions contained in sub-sections 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002, as amended (“NIAA 2002”) and paras 399 and 399A of the Immigration Rules (“the Rules”)?
  - ii. if not, whether the Claimant could nonetheless show “very compelling circumstances over and above” those described in the two exceptions, with reference to section 117C(6) NIAA 2002 (in other words, would his deportation be disproportionate when balanced against the very strong public interest)?

### **The judge’s decision**

6. At para 33 the judge finds that the Claimant did not play a significant role in the life of his eldest child and could not rely on this relationship. By contrast, the judge finds that the Claimant did play a very significant role in the lives of his two other children and his step-daughter. At paras 39 and 42 the judge considered the issue of whether the Claimant was a “persistent offender” within the meaning of section 117D(2)(c)(iii) NIAA 2002. On the basis that the motoring offences of November 2018 were of a different “nature” to the pattern of previous offending, the judge concluded that he



was not in fact a “persistent offender”. There is then a finding that, contrary to the evidence adduced by the Metropolitan Police, the Claimant was not currently associated with gang culture and had not been so for several years.

7. The judge agreed with the conclusion of the First-tier Tribunal from 2011 that the Claimant was, to all intents and purposes, “a stranger to Jamaica”. However, notwithstanding repeated references to “private life”, it is clear from para 42 that the judge did not allow the Claimant’s appeal on the basis of the private life exception under section 117C(4) NIAA 2002, but only in respect of the family life enjoyed with his partner, their two children, and the step-daughter. It is appropriate to quote at some length from para 42:

“Inevitably, deportation would have a substantial effect on private life and in all but exceptional cases the public interest requires such an outcome. However in this appeal the evidence has been quite consistent and convincing that the Appellant plays a very significant role in the lives of those who would be affected by his deportation, although in the past he has shown himself to have had considerable disregard for the law. He has reoffended and been involved with offensive weapons and the supply of drugs in the past. However he has appeared to have taken his family responsibilities seriously and continues to be a caring and constant father. The best interests of the children at an important stage in their development, in these circumstances, are not outweighed by those other factors raised in this appeal. I find that it would be unduly harsh on the children, given the circumstances that have been raised, for the Appellant to be removed to Jamaica. The children of the Appellant and his partner are British and in the circumstances there is no realistic likelihood, so I have been led to understand, for those remaining members of the family to leave the United Kingdom to live in Jamaica.”

8. The appeal was duly allowed on Article 8 grounds and, purportedly “under the immigration rules.” Of course, there is no longer any jurisdiction to allow an appeal with reference solely to the Rules.

### **The grounds of appeal and grant of permission**

9. The Secretary of State’s grounds of appeal are twofold: first, that the judge provided inadequate reasons for concluding that the Claimant was not a “persistent offender”; secondly, that the judge failed to direct himself correctly in law and/or failed to provide adequate reasons in relation to the “unduly harsh” test and the family life exception. On 18 November 2019, First-tier Tribunal Judge Grant-Hutchison granted permission.

### **The hearing**

10. Prior to the hearing, Mr Kotas had applied to vary the Secretary of State’s grounds of appeal. In the event, this application was withdrawn before us and we need say no more about it.
11. Mr Kotas relied on both grounds of appeal. In response to our observation that any error by the judge relating to the Claimant being a “persistent offender” was irrelevant, given that he was clearly a “foreign national criminal” within the meaning

of section 117D(2) NIAA 2002 by virtue of the 2010 conviction and sentence (a status that had seemingly been accepted by the Claimant and his representatives throughout these proceedings), Mr Kotas nonetheless asked us to reach a conclusion on the issue for the sake of completeness and to assist future consideration of this appeal should this become necessary.

12. As to the “unduly harsh” issue, Mr Kotas submitted that the judge’s references to KO (Nigeria) [2018] 1 WLR 5273 and MK (Sierra Leone) [2015] UKUT 223 (IAC) at para 41 were insufficient. In any event, the reasons provided for the conclusion that it would be “unduly harsh” on the relevant children were the Claimant to be deported were plainly inadequate.
13. Ms Turnbull relied on her skeleton argument and submitted that the judge had decided this case based upon all of the evidence before him. He was entitled to conclude as he did, both in respect of the “persistent offender” and “unduly harsh” issues.

### **Decision on error of law**

14. In our judgment the judge materially erred in law when allowing the Claimant’s appeal.
15. Before turning to the error that is material to the outcome, we agree with Mr Kotas that it is appropriate to consider the “persistent offender” issue. Although in our view the judge has erred in his approach, it is clear that the Claimant has always been a “foreign national criminal”. Thus, the error is on one view irrelevant. However, in light of our conclusion on the “unduly harsh” issue, this appeal is to be reconsidered in due course and it is important that any errors are identified and considered at this stage.
16. When addressing the “persistent offender” issue at para 39, the judge failed to cite any of the relevant case-law which provides binding guidance (see in particular, Chege [2016] UKUT 00187 (IAC) and SC (Zimbabwe) [2018] 1 WLR 4474). Paras 53 and 54 of Chege provide the crux of the guidance:

“53. Put simply, a "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. Whilst we do not accept Mr Malik's primary submission that a "persistent offender" is a permanent status that can never be lost once it is acquired, we do accept his submission that an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.

54. Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be

enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time.”

17. A failure to cite applicable case-law will not normally result in an error of law. However, it may be indicative of an error of approach. At the very least, quoting relevant passages will likely assist in addressing a judge’s mind to the right questions.
18. The guidance in Chege, which was specifically approved by the Court of Appeal in SC (Zimbabwe), shows that a careful assessment is required of the offending history. Whilst an individual with a very poor past can potentially lose the status of “persistent offender”, an absence of very recent offending will not necessarily be sufficient for this to occur. Further, and importantly, the epithet will not necessarily disappear simply because more recent offending is of a different nature from previous conduct.
19. Having regard to the above, the judge has clearly gone wrong in basing his conclusion that the Claimant was not a “persistent offender” purely on the basis that the most recent offences in November 2018 were of a different nature from those committed in the past. The error can be categorised either as a misdirection in law or a failure to provide adequate reasons.
20. There is a further error here. In refusing the Claimant’s human rights claim, the Secretary of State had clearly asserted that he was a “persistent offender” *and* a person whose offending had caused “serious harm”. These are alternatives. The judge has failed to address the second possibility.
21. We now turn to the material error itself. Whilst it is generally unhelpful to compare the facts of one case with those of another (as the higher courts have repeatedly reminded us), there is some value in referring to PG (Jamaica) [2019] EWCA Civ 1213. The appellant in that case was the father of three minor children, with whom he lived together with their mother. The children were all British citizens. Having committed a series of offences, the Secretary of State took deportation action. The First-tier Tribunal allowed PG’s appeal, essentially on the basis that deportation would be contrary to the best interests of the children and that in turn it would be “unduly harsh” on them if he were to leave. That decision was upheld by the Upper Tribunal. The Court of Appeal concluded that on the facts as found by the First-tier Tribunal, the conclusion that it would be “unduly harsh” on the children was one at which no rational decision-maker could have arrived. Thus, the Secretary of State’s appeal was allowed outright and the deportation order restored.

22. Although the Secretary of State's grounds of appeal in the present case have not been framed in terms of an out-and-out rationality challenge, PG (Jamaica) illustrates the need to provide clear and careful reasons, with specific regard to the applicable legal framework, when reaching conclusions on the "unduly harsh" issue. It is quite clear to us that at para 42 the judge has failed to provide adequate reasons for the conclusion that it would be "unduly harsh" on the children were the Claimant to be deported to Jamaica. His reliance on the Claimant playing a "very significant role" in the lives of the children, their best interests, and the apparent seriousness with which the Claimant was taking his family responsibilities, does not disclose sustainable reasons for the conclusion that this was a case with features going beyond the inevitable and expected consequences of deportation.
23. We therefore set the judge's decision aside.

### **Disposal**

24. This appeal shall be retained in the Upper Tribunal and the decision remade. There is a good deal of evidence on file relating to the hearing before the First-tier Tribunal in October 2019. There has been no application by the Claimant under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce new evidence, nor has there been any indication that there have been any material changes in the Claimant's circumstances.
25. As matters stand, we see no reason to set this matter down for a further hearing. Having said that, it is appropriate for us to receive further written submissions from both parties. This is in the main because in addition to re-deciding the "unduly harsh" issue, we will have to address the private life exception under section 117C(4) NIAA 2002 and para 399A of the Rules and, if appropriate, whether there are "very compelling circumstances over and above" either of the two exceptions. The judge did not engage with these issues. Finally, notwithstanding the undisputed fact that the Claimant is a "foreign national criminal", for the sake of completeness we may wish to reach a conclusion on whether the Claimant is a "persistent offender" or whether his offending has caused "serious harm".
26. When remaking the decision, the following findings of the First-tier Tribunal are preserved:
- i. the Claimant has a genuine and subsisting relationship with his current partner;
  - ii. the Claimant has a genuine and subsisting parental relationship with his two biological children with whom he lives, and with his step-daughter;
  - iii. the Claimant left Jamaica at the age of 6;
  - iv. the Claimant is not currently a member of a gang.

**Anonymity**

27. The First-tier Tribunal did not make an anonymity direction. We see no good reason for making one at this stage and do not do so.

**Notice of Decision**

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

We set aside the decision of the First-tier Tribunal.

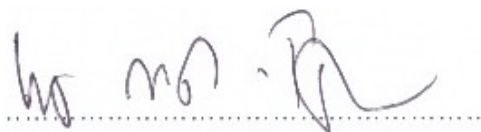
A remaking of the decision in this appeal shall be made following receipt of further written submissions from the parties.

**Directions to the parties**

1) No later than 9 days from the issuance of this decision, the Claimant shall file and serve written submissions on the following matters (with reference to the evidence before the Upper Tribunal):

- (a) Whether the Claimant is a “persistent offender” or whether his offending has caused “serious harm”;
- (b) Whether it would be “unduly harsh” for the Claimant’s partner and three relevant children to leave the United Kingdom and reside in Jamaica;
- (c) Whether it would be “unduly harsh” for the Claimant’s partner and the three relevant children to remain in United Kingdom were the Claimant to be deported to Jamaica alone;
- (d) Whether the Claimant is “socially and culturally integrated” in the United Kingdom;
- (e) Whether there would be “very significant obstacles” to the Claimant’s integration into Jamaican society;
- (f) Whether, notwithstanding an inability to satisfy either of the two exceptions, it would be disproportionate to deport the Claimant.

2) No later than 9 days from receipt of the Claimant’s written submissions, the Secretary of State is to file and serve a written response.



Signed

Date: 20 February 2020

Upper Tribunal Judge Norton-Taylor

## APPENDIX 2: DIRECTIONS ISSUED ON 16 APRIL 2020



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10631/2017

### THE IMMIGRATION ACTS

EARL ANTHONY WEBB

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

### DIRECTIONS NOTICE (T)

1. This appeal is awaiting a remaking decision by the Upper Tribunal following its decision, promulgated on 26 February 2020, to set aside the decision of the First-tier Tribunal. At the end of the error of law decision, both parties were directed to file and serve written submissions in respect of a number of issues. The decision in this appeal was to be remade in light of these written submissions and the preserved findings of fact set out at [26] of the error of law decision.
2. In the event, written submissions from the Appellant received by the Upper Tribunal on 6 March 2020. Having reviewed the file, I cannot see any response from the Respondent. It is possible that the intervening event of the Covid-19 pandemic may have affected the ability of the Respondent to file and serve her written submissions.
3. The Appellant's written submissions have now been provided to the Respondent by the Upper Tribunal.
4. **It remains the intention of the Upper Tribunal to remake the decision in this appeal based upon written submissions from the parties.**
5. In light of the above, I issue the following additional directions.

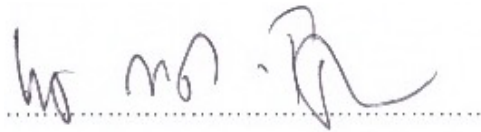
#### Directions to the parties

- 1) **No later than 14 days** after this notice is sent out (the date of sending out will be stated on the covering letter or covering email), the Respondent is to file

and serve written submissions, addressing the issues set out in the directions at the end of the error of law decision and in light of the Appellant's written submissions;

- 2) If so advised, the Appellant may then file and serve a reply, **no later than 21 days** after this notice is sent out;
- 3) With liberty to apply

Service on the Secretary of State may be to [email] **and** any address provided by a named Senior Presenting Officer. The Respondent should serve her submissions to any email address provided by the Appellant's solicitors.

A handwritten signature in black ink, appearing to read 'W. Norton-Taylor', written over a horizontal dotted line.

Signed

Upper Tribunal Judge Norton-Taylor

## APPENDIX 3: DIRECTIONS ISSUED ON 18 MAY 2020



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10631/2017 (T)

### THE IMMIGRATION ACTS

EARL ANTHONY WEBB

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

### FURTHER DIRECTIONS NOTICE (T)

1. The Tribunal last issued directions on 16 April 2020. The respondent was to respond within 14 days. There has been no response.
2. In previous correspondence the Senior Presenting Officer with conduct of the case indicated that he had been unable to see the relevant file and was seeking to obtain particular documents from the appellant's representatives. In light of the circumstances as a whole, I will not proceed to remake the decision in this appeal at this juncture. Instead, I make the following further directions. The respondent is on notice that a response to these directions within the time limit set out below is imperative, even if she is not in a position to file and serve final submissions due to the lack of relevant evidence.

#### Directions to the parties

- 1) **No later than 10 days** after this notice is sent out (the date of sending out will be stated on the covering letter or covering email), the respondent is to file and serve written submissions, addressing the issues set out in the directions at the end of the Tribunal's error of law decision and in light of the appellant's written submissions of 6 March 2020;
- 2) **No later than 10 days** after this notice is sent out, if the respondent is not in a position to file and serve submissions in accordance with direction 1), she must state this with reasons, and indicate her view as to an appropriate way to resolve any practical difficulties;



- 3) If so advised, and **no later than 17 days** after this notice is sent out the appellant may then file and serve a reply to any submissions or other response provided by the respondent in accordance with directions 1) or 2);
- 4) With liberty to apply

**Submissions should be filed and served using the email addresses previously used in correspondence.**

Signed: *H Norton-Taylor* Dated: 18 May 2020  
Upper Tribunal Judge Norton-Taylor

APPENDIX 4: NOTE AND DIRECTIONS OF 6 JULY 2020



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10631/2017

THE IMMIGRATION ACTS

EARL ANTHONY WEBB

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

NOTE AND DIRECTIONS NOTICE

1. Having considered the written submissions provided by the parties, the passage of time since the consideration of the evidence by the First-tier Tribunal and since the Upper Tribunal's error of law decision, and the nature of the issues to be addressed in remaking the decision in this appeal, I have reached the conclusion that a further hearing is now required.
2. In coming to this conclusion, I have not been assisted by the absence of any application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for new evidence to be adduced. It may be that there is no such evidence. However, the evidence that is on file and/or the written submissions from the appellant do not address in sufficient detail some of the core issues in the case; in particular (but not limited to), the question of whether there would be "very significant obstacles" to the appellant's integration into Jamaican society if he were to be deported.
3. The parties are reminded of the preserved findings of fact, set out in the error of law decision.

**Directions to the parties**

- 1) Any application by the appellant to induce new evidence under rule 15(2A) of the Procedure Rules must be made **within 14 days** of this Note and

Directions Notice being sent out. The appellant is reminded that updated witness statements constitute new evidence;

- 2) Whether an application is made or not, the appellant shall, **no later than 14 days** of this Note and Directions Notice being sent out, state his views as to whether the resumed hearing shall be conducted remotely or on a face-to-face basis;
- 3) **No later than 21 days** after this Note and Directions Notice is sent out, the respondent shall state her views as to the method of the resumed hearing;
- 4) With liberty to apply

Signed: *H Norton-Taylor*                      Date: 6 July 2020  
Upper Tribunal Judge Norton-Taylor