



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000463

First-tier Tribunal No: HU/06926/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of December 2023

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

TTN
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Stuart-King instructed by Qore Legal.

For the Respondent: Mr C Bates, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 30 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Harris ('the Judge') promulgated on 24 September 2021, in which the Judge

dismissed the appellant's appeal against the refusal of his human right claim dated 19 December 2019.

2. The respondent treated the application as a request to revoke the deportation order made against the appellant (see below).
3. The appellant is a citizen of Vietnam born on 24 April 1983.
4. There has been a protracted history of this case in that following the promulgation of the determination by the Judge the appellant sought permission to appeal to the Upper Tribunal which was refused by another judge of the First-tier Tribunal in a decision dated 17 November 2021. The application for permission to appeal was renewed directly to the Upper Tribunal but refused by Upper Tribunal Judge Macleman on 9 May 2022.
5. The appellant then made a 'Cart' judicial review to the High Court challenging Judge Macleman's decision. Permission to bring judicial review was granted by a Deputy Judge of the High Court in an order sealed on 22 March 2023.
6. In a further order sealed on 12 May 2023 the decision of the Upper Tribunal refusing permission to appeal to the Upper Tribunal was quashed, by consent.
7. In an order sealed on 5 June 2023 Mr C M G Ockelton, Vice President of the Upper Tribunal, granted permission to appeal in light of the decision of the High Court, reminding the parties that the Upper Tribunal's task is that set out in section 12 of the Tribunals, Courts and Enforcement Act 2007.
8. The matter comes before us today for the purpose of ascertaining whether the Judge has erred in law in a manner material to the decision to dismiss the appeal and for the making of consequential orders if material legal error is found.
9. The Judge sets out the appellant's immigration and criminal offending history from [8] of the decision under challenge.
10. The appellant was convicted on 31 May 2013 at Harrow Crown Court of the production of Class B controlled drug - Cannabis and sentenced to 6 months imprisonment.
11. On 11 June 2013 the respondent wrote to the appellant seeking reasons why he should not be deported and on 12 June 2013 he was served with a notice of a decision to make a deportation order.
12. On 5 July 2013 the appellant was detained under immigration powers following the completion of his custodial sentence.
13. On 16 July 2013 the respondent considered the human rights of the appellant and decided his deportation would not be in breach of those rights. There was no appeal against that decision.
14. The deportation order was signed on 5 August 2013 and the appellant removed from the UK on 24 September 2013.
15. It is not disputed that in July 2015 the appellant re-entered the UK illegally without detection. He claims this was accomplished with the assistance of people to whom he still owed money for bringing him to the UK on the first occasion.
16. The appellant claimed he escaped from another cannabis farm to which he had been sent and, after starting a relationship in the UK with TLV, made an application for leave to remain as a partner on 9 October 2018, with further documentation being produced in support in May 2019. A renewed application for leave was made by the appellant under cover of a letter dated 16 December 2019.
17. The respondent treated the applications as being an application to revoke the deportation order and, after considering Article 8 ECHR, refused the application.
18. The Judge noted the issues at large in the appeal as being:
 - i) Does the appellant have a genuine and subsisting parental relationship with the child V?

- ii) Would it be unduly harsh within the meaning of section 117(3) and (5) Nationality, Immigration and Asylum Act 2002 for V to remain in the UK without the appellant?
 - iii) Are there very compelling circumstances over and above those described in Exceptions 1 a 2 under section 117 C of the 2002 Act such that the appellant should not be deported?
19. Those issues were agreed with the parties, and it is of note there is no reference to the Judge being required to consider whether the appellant had committed an offence that caused serious harm for the purposes of section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').
20. The Judge's findings are set out from [31] of the decision under challenge. We note in particular the following.
21. At [33] the Judge writes:
33. It is not disputed by the appellant that, for the purposes of section 117 A - D of the 2002 Act, he is a foreign criminal on the basis that he is a person who is not a British citizen, who has been convicted in the UK of an offence and who has been convicted of an offence that has caused serious harm.
22. The Judge records it was agreed before him that the appellant's case engages section 117C(3) of the 2002 Act because the sentence of imprisonment was not for four years or more [39].
23. The Judge also records that before him Mr Hodson for the appellant confirmed he relied only on Exception 2 on the basis the appellant has a genuine and subsisting parental relationship with V, and that he was not seeking to rely upon Exception 1 or Exception 2 as regards a relationship with a qualifying partner [40].
24. It was not disputed before the Judge that V is a qualifying child [41].
25. The Judge notes there is an ongoing relationship between V and her father according to Home Office records and that the appellant's role is that of a stepfather. The Judge also notes it is the claim of the appellant, supported by TLV, that V's father no longer has any involvement with the child [46].
26. At [50] the Judge writes:
50. On the oral and documentary evidence before me, I find the appellant and TLV to be credible about the family life circumstances which they describe and I am satisfied on the balance of probabilities that the appellant is in a genuine and subsisting parental relationship with V which engages Exception 2 of s. 117C(3) of the 2002 Act. I am also satisfied on the balance of probabilities that HNN currently has no involvement in the upbringing of V and V has no contact with his biological father.
27. The issue before the Judge was therefore whether the appellant's deportation will be unduly harsh upon V.
28. Having made reference to relevant authorities the Judge writes:
60. I accept the account of TL V in her oral evidence that at present V is unaware of having anyone as his father but the appellant. Thus I accept that the appellant is at present the only father that V knows and that is the context for assessing the impact upon V that separation would have. However, on this evidence, I also consider it does follow that what is not present in V is any awareness of having been abandoned in the past by his biological father. Thus, this is not a situation where separation from the appellant could add to any already existing feelings in V of rejection or vulnerability caused by the behaviour of the biological father, HNN.
61. I also accept that, even on the respondent's account, the appellant's criminal offending took place before he started his family life with TL V and the children.

Thus, it cannot be said that the appellant's past criminal behaviour has involved neglect of or the risk of damage to his any care he gives to V.

62. Having had the benefit of the appellant and TL V give oral evidence before me and be cross-examined, I have found them both to be credible in their accounts of the family circumstances of V and how he is cared for by the appellant. I accept that, while TL V works in her business, it is primarily the appellant who provides day to day care of V in the manner described at paragraphs 17 to 20 of the appellant's witness statement and paragraphs 12 and 13 of TL V' s witness statement.
 63. On the evidence in this appeal, I am further satisfied that it is in the best interests of V to remain in this country with both his parent and his brother. However, I am not persuaded that the best interests of V establishes of itself that separation from the appellant would be unduly harsh.
 64. I am not satisfied it is demonstrated that in the absence of the appellant V would be without parental care. The appellant has taken on the role of primary carer for V but he is not the only parent who can provide care to V as there is also TL V. TLV is at present committed to her business and works long hours to support her family. Mr Hodson in his skeleton argument helpfully draws my attention to financial evidence produced in the appellant's bundle: in the financial year ending 31 March 2020 TLV's business had an annual turnover of £57,485 and an annual income of £23,473. However, I am not satisfied on the evidence before me it is demonstrated that TL V is unable to make adjustments to her working hours to cover child care for V and W or make arrangements with paid care or friends to assist with care. Even if TL V has to give up her business to care for V, I am not satisfied it is demonstrated that this would make V destitute or would otherwise produce an unduly harsh effect on V.
 65. I am satisfied that V would notice the absence of the appellant from his every day life and that absence would cause him distress. However, I am not satisfied that under the scheme of s.117C of the 2002 Act this distress by itself renders the separation unduly harsh; the scheme takes into account that the public interest in removing foreign criminals will at times mean separating a parent from a child which will cause a level of distress to the child without it automatically being unduly harsh.
 66. Mr Hodson submits that removal of the appellant would leave V without an adult male figure in his life and emphasizes that V has begun to attend school. I can accept that this could have a negative effect on V but I consider there is insufficient evidence in this appeal to demonstrate that this would cause damage to or have any other effect on V that would be unduly harsh. Moreover, it is unclear what mitigating effect may arise from the ongoing love, care and support provided to V by TLV.
 67. Bearing in mind the guidance given in Imran, I consider there is a lack of evidence, either expert or otherwise, produced in this appeal to support that V has any distinct vulnerability, distinct health condition or any other distinct characteristic or condition in his circumstances that will be unduly affected by separation from the appellant because of a distinct importance of the appellant in V' s life, any distinct dependence V has on the appellant or any distinct emotional damage V would suffer. The case law emphasizes that the test of unduly harshness incorporates a recognition that a degree of harshness can arise in a deportation situation involving a parent and child without the heightened level of the test being met.
 68. Weighing up the matters before me, whether individually or accumulatively, and taking into account the best interests of V as a primary consideration, I accept that the effect of separation from the appellant would be harsh upon V but I am not satisfied it is demonstrated on the balance of probabilities that it would be unduly harsh.
 69. I am not satisfied it is demonstrated that Exception 2 applies to the appellant under s.117C of the 2002 Act.
29. The Judge then moves on to consider whether there are very compelling circumstances over and above those described in Exceptions 1 and 2. Within this the Judge considers the weight to be given to the public interest in deporting foreign criminals from [73].

30. The Judge accepts that weight should be given to the respondent's submission that there is a significant public interest in deporting the appellant because of his criminal conviction for the production of Cannabis against which there was no appeal. Also the fact the deportation order made on 6 August 2013 remains in force and that the appellant is illegally present in the UK. The Judge notes the respondent's submissions that the appellant was convicted of a serious offence involving the production of Class B drugs, and that drugs have severe and negative impact on society for the reasons set out at [75] of the decision under challenge.
31. The Judge notes the appellant pleaded guilty in the criminal court and the sentencing remarks of HHJ Donne QC, who noted that whilst being involved in the production of cannabis is a serious offence it was accepted that the appellant's role was a minor one and that he had not been in trouble previously in the UK.
32. The Judge found a minor role meant there were no further aggravating or seriousness issues because of any prominence in the criminal operation [78].
33. The Judge accepted the appellant had not committed any further criminal offences since his return to the UK and that the risk of reoffending appears to be limited [79].
34. The Judge notes the public interest in removing foreign criminals arises not just from the prevention of reoffending but also general deterrence of other would-be criminals as well as public revulsion of criminal behaviour, which limits the weight to be given to the lack of further offending by the appellant against the public interest and the removal of the foreign criminal [80].
35. The Judge finds the appellant was subject to a deportation order made in 2013 when he re-entered in 2015, that he has never had any leave to enter or remain in the UK, and that his presence is illegal, which is a factor to be taken into account when having regard to the statutory consideration under section 117B(1) of the 2002 Act that the maintaining of immigrant effective immigration controls is in the public interest [81].
36. The Judge attaches little weight to the appellant's private life pursuant to section 117B(4) of the 2002 Act, finds the appellant retains cultural family and linguistic ties to Vietnam, the country in which he was born and raised and had spent the majority of his life, and did not attach much weight to the appellant's claim he felt that his criminal convictions in the UK would prevent him finding work in Vietnam. It was found on his own evidence the conviction did not prevent the appellant finding work in Vietnam after his 2013 removal, after completion of his prison sentence, and he has qualifications as an electrician which he can use in Vietnam; leading to it being found he would be able to be reintegrate into his own country and support himself financially [82].
37. The Judge notes the appellant being silent in his evidence about whether he still owes money to the criminals who previously targeted him and whether he will be in danger of being further targeted in Vietnam, leading to a conclusion that was not a matter that added to the assessment in the appeal [83].
38. The Judge notes it is not disputed the appellant has established family life with TLV in the UK but noted it had been established at the same time that his presence was illegal, warranting little weight being attached to it [85].
39. The Judge was not satisfied it was demonstrated that TLV would be destitute or unable to care for V if the appellant is deported [86].
40. The Judge accepts that for TLV separation from the appellant will be harsh but was not satisfied on the evidence that it had been demonstrated it would be more than harsh and/or of a nature to amount to very compelling circumstances over and above those described in Exception 2 [87].

41. The Judge accepts that the evidence shows the effect of deportation upon V will be harsh but did not find it had been demonstrated that the impact would be more than that at [88].
42. The Judge goes on to consider the circumstances of another child, W. It was not disputed there is family life between the appellant and W who has limited leave to remain in the UK like TLV, and who is a citizen of Vietnam. W had lived in the UK all his life, over five years at the date of the hearing before the Judge, who accepts that if TLV has to remain in the UK to care for V, W also has to remain because of his dependence on his mother [89].
43. As with V, the Judge was not satisfied it had been demonstrated the appellant's absence would result in W facing a lack of parental care from his mother or destitution. It was found there was insufficient evidence to establish W has any distinct vulnerability, adverse health condition, or other distinct characteristic or condition that would make effective separation more than harsh. [91].
44. In relation to the balance sheet approach recommended by the Supreme Court and other authorities the Judge writes at [94 - 95]:

94. As regards the public interest relied upon by the respondent:

- The appellant is a foreign criminal. The deportation of foreign criminals is in the public interest: s.117C(1) of the 2002 Act. I give weight to this.
- In respect of the application of s.117(c)(2) of the 2002 Act, I note that the sentencing judge identified being involved in the production of cannabis to be a serious offence. While bearing in mind that the sentence given to the appellant was of 6 months imprisonment only and that the sentencing judge accepted that the role of the appellant was a minor one, I take into account that the appellant has nonetheless been convicted of an offence that has caused serious harm for the reasons identified by the respondent in the reasons for refusal. I consider this must be given weight by me.
- The appellant has been illegally present in the UK since 2015: accordingly I have regard and attach weight to the statutory consideration of s.117B of the 2002 Act that the maintenance of effective immigration controls is in the public interest.

95. As regards the matters relied upon by the appellant:

- The circumstances of the appellant's private life in this country attract little weight because the appellant has established that life while here illegally: s.117B(4) of the 2002 Act. The appellant retains cultural and family ties to Vietnam. I am satisfied he would be able to reintegrate into Vietnamese society and does not face destitution there.
- The appellant has established family life with TLV. Because this was established while the appellant was here illegally, s.117B(4) of the 2002 Act applies requiring that little weight should be given to his family life with TLV.
- As the respondent does not argue that TLV's son, V, should be expected to relocate to Vietnam, I have treated the real world situation as being that TLV would have to remain in the UK to care for V and his brother, W. The removal of the appellant to Vietnam would in the circumstances entail TLV being separated from the appellant I have found that the effect on TLV of separation from the appellant would be harsh. I accept that I should give weight to this. However, it is not demonstrated on the oral and documentary evidence produced in this appeal that the effect would be more than harsh. I have noted that under the scheme of s.117C of the 2002 Act the public interest in the removal of foreign criminals incorporates a recognition that a degree of harshness can arise in a situation where family life exists without there being a breach of Article 8. This limits the weight I attach from amounting to very compelling circumstances over and above those described in the Exceptions.

- I am not satisfied it is demonstrated in the absence of the appellant that TL V or the children would face destitution or that TL V would be unable to provide child care to her children. These are not matters adding weight to the appellant's claim.
- I have found demonstrated that there is family life between the appellant and V, that the appellant is like a father to V and that the appellant is currently V' s primary carer on a day to day basis. I have found it is in the appellant's best interests for the appellant to remain in the UK with him. I treat this a primary consideration to be given weight but in the particular circumstances of this case I am not satisfied that this, without more, is sufficient to establish the required very compelling circumstances. I am satisfied it is demonstrated that the effect on V of separation from the appellant would be harsh. This also attracts weight. However, it is not demonstrated on the oral and documentary evidence produced in this appeal that the effect would be more than harsh. This acts as a limit upon the weight I attach here from amounting to very compelling circumstances over and above those described in the Exceptions.
- For similar reasons, in respect of W, I treat as a primary consideration that it is in the best interests of W that the appellant remain with him in the UK and I find that the effect on W of separation from the appellant would be harsh. However, it is not demonstrated on the oral and documentary evidence produced in this appeal that the effect would be more than harsh. This acts as a limit upon the weight I attach here from amounting to very compelling circumstances over and above those described in the Exceptions.

45. At [96] the Judge finds that there were no factors or accumulation of factors that are of sufficient weight to establish that there are very compelling circumstances over and above those described in Exceptions 1 or 2 that outweigh the public interest in the appellant's deportation.
46. The Judge found the appellant did not succeed under section 117C of the 2002 Act and that it had not been demonstrated that the decision was unlawful on human rights grounds.

The appeals

47. As noted above, the appellant sought permission to appeal which was refused by another judge of the First-tier Tribunal. In the renewed grounds seeking permission to appeal the appellant relied upon the original grounds dated 7 October 2021 and asserted the Judge failed to consider whether the appellant was convicted of a "serious offence".
48. Three grounds of appeal were originally relied upon being:

Ground 1 asserting there was nothing in principle to prevent the withdrawal of a concession that had been made before the First-to Tribunal and that the question whether or not an appellant has been convicted of an offence which has caused serious harm is not simply a question of fact as it depends upon the legal principles identified in Ground 1 of the original grounds of appeal. This Ground asserts the First-tier Tribunal should be alert to whether the legal test is satisfied and whether the threshold for deportation is indeed met in light of those principles. The Ground argues that the threshold for deportation is not met and that it is in the interests of justice for the Tribunal to permit the appellant to withdraw his previous concession.

Ground 2 asserts in the balance sheet exercise set out by the Judge the issue of rehabilitation does not feature.

Ground 3 asserts a failure to consider the seriousness of offending in relation to the test of “unduly harsh”.

49. During the proceedings before the High Court a direction was given by Ritchie J for a witness statement to be provided by Mr Hodson, the advocate for the appellant who appeared before the Judge.
50. That statement records the Judge noting at the appeal hearing the appellant made a concession that the conviction “caused serious harm” and that he met the “foreign criminal” definition.
51. In his witness statement Mr Hodson confirmed that although he kept a Record of Proceedings it did not record any ancillary discussions between the representatives of the parties or the Judge and nor did it contain the content of oral submissions made at the conclusion of the hearing and that he did not have any post hearing notes of what occurred at the hearing to which he could refer.
52. The statement refers to a revised skeleton argument and particularly section 5 of the document headed ‘submissions’ and particularly paragraph 5.1 – 5.5.
53. Mr Hodson asserts the concession did not arise during the course of the hearing or a response to further evidence regarding the circumstances of the appellant’s offence. He states nor was the concession itself the subject of discussion between him, counsel for the respondent, or the Judge.
54. Mr Hodson asserts that neither during the course of discussions nor at any time during the hearing did the Judge indicate that among the issues in the appeal to be decided was whether the offence committed by the appellant caused serious harm and that no submissions were invited from either party on this point.
55. We turn at this point to the relevant section of the revised skeleton argument of Mr Hodson dated 19 August 2021. At section 5.5 it is written:
 - 5.5. As such, it can only be assumed that insofar as the appellant does come within the definition of a ‘foreign criminal’ under Section 117D(2)(a)-(c) he does so because he is not a British citizen (Section 117D(2)(a)), he has been convicted of an offence in the UK (Section 117D(2)(b)) and he is said to have been convicted of an offence “that has caused serious harm” (Section 117D(2)(c)(ii)). Certainly, the appellant cannot be said to be a persistent offender or otherwise meet the conditions of being a foreign criminal.
56. Mr Hodson contends that the skeleton argument did not contain any better, express assertion that the appellant’s offence did cause serious harm, but it is important to read Para 5.5 together with Para 5.6 and 5.7 in which reasons are put forward that would support a different conclusion altogether. In those paragraphs of the amended skeleton argument Mr Hodson wrote:
 - 5.6. Nevertheless, with reference to Section 117C(2) of the 2002 Act, it is submitted that the appellant’s offence was at very much the lower end of the spectrum in terms of seriousness which translates into proportionately less weight being afforded to the public interest in his deportation contrary to the respondent’s contention that there is “significant public interest in deporting you” (Notice of Decision, §31 at [RB Pt2 - L3]).
 - 5.7. The Tribunal is referred to the sentencing remarks of the trial judge at [RB Pt1 - B1-B2] wherein it was accepted that the appellant’s role in the matter was “a minor one”. It was also noted that this was the appellant’s first offence and it is relevant that he has not been convicted of any further offences whatever the respondent may say about his behaviour.
57. Mr Hodson claims in his statement that the submission contained at paragraph 5.5 of the amended skeleton argument went further than it should have done,

claiming this was despite it being equivocal and grudgingly made and that in consequence all the remaining submissions were advanced within the context of section 117 C of the Nationality, Immigration and Asylum act 2002 which implied that the appellant did meet the definition of a 'foreign criminal' for those provisions to apply.

58. Mr Hodson also accepted at [17] that he admits that at no point did he directly argue that the offence did not cause serious harm.
59. Mr Hodson also accepts when drafting the amended skeleton argument of not being aware of the decision of the Upper Tribunal in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 (IAC), the headnote of which reads:

(A) section 117D(2)(b)(ii): "caused serious harm"

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:

- (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.
- B. Deportation decisions and human rights appeals (1) In a human rights appeal, the decision under appeal is the refusal by the Secretary of State of a human rights claim; that is to say, the refusal of a claim, defined by section 113(1) of the Nationality, Immigration and Asylum Act 2002, that removal from the United Kingdom or a requirement to leave it would be unlawful under section 6 of the 1998 Act. The First-tier Tribunal is, therefore, not deciding an appeal against the decision to make a deportation order and/or the decision that removal of the individual is, in the Secretary of State's view, conducive to the public good. It is concerned only with whether removal etc in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights. (2) The Secretary of State's decisions under the Immigration Act 1971 that P's deportation would be conducive to the public good and that a deportation order should be made in respect of P

would have to be unlawful on public law grounds before that anterior aspect of the decision-making process could inform the conclusion to be reached by the First-tier Tribunal in a human rights appeal.

60. Mr Hodson further argues that he proceeded under the mistaken impression that the labelling of the crime by the respondent as having caused serious harm under the Immigration Rules para 398(c) was not open to legal challenge so as to change the context of the appeal [19].
61. At [23] of his witness statement Mr Hodson writes:

23. Unsurprisingly, I deeply regret not having challenged what had been assumed (as it is put in my Skeleton) regarding the crime committed by the appellant having caused serious harm (as had been asserted in very general terms by the respondent). My regret is all the greater if a failure to challenge this highly dubious assumption contributed materially to the way in which the FTTJ approached the appeal, both at the hearing and in making the determination, so as to adversely influence its outcome, as averred by Ritchie J.

62. Before the High Court the appellant pursued only Ground one of the three grounds of appeal in relation to which permission was sought from the Upper Tribunal, namely:

- i. FTTJ Harris was wrong to accept a concession made by the Appellant's legal representative at the hearing that the Appellant had been convicted of an offence that caused "serious harm" and therefore meets the definition of a "foreign criminal" under s.117D(2) of the Nationality Immigration and Asylum Act 2002. The circumstances of the offending and penalty for it cannot properly be said to meet the legal threshold of a "serious harm", or alternatively cannot safely be concluded to do so without examination of all the circumstances of the offence.
- ii. In any event and in the circumstances of the case, the Upper Tribunal should permit the Appellant to withdraw that concession when considering whether the determination of FTTJ Harris contained a material error.

63. The Secretary of State opposes the appeal in a Rule 24 response dated 15 June 2023 in which it is written:

2. In preparing this response, the Respondent has had sight of the grounds of appeal before the FtT, the grounds before the UT and the contents of the Appellant's bundles for his Judicial Review of the decision to refuse permission. As noted from the statement of facts and grounds for Judicial review, the Appellant only pursues ground 1 and does not pursue ground 2 and 3. This response only deals with ground 1.

Ground 1

3. Ground 1 is a complaint that the Judge should have determined whether the Appellant had committed an offence that caused serious harm for the purposes of section 117C despite that fact having been conceded by the Appellant before the FtT. The Appellant appears to make no challenge to the accuracy of the concession recorded at §33 of the determination.
4. Contrary to the assertion in the grounds, the Judge does find at §78 of the determination that the Appellant was convicted of an offence that caused serious harm and gives specific reasons for making that finding between §74 and §78. The fact that the Tribunal does make that finding is a complete answer to the Appellant's first ground. This is not a case in which the Tribunal can be criticised for passively accepting a concession without considering the merits of the issue.

5. At best, the Appellant could argue that, if the concession had not been made, he could have made specific arguments as to why the crime he committed did not cause serious harm. The fact that the Appellant seeks to argue their case on a different basis before the Upper Tribunal than it did before the FtT, does not amount to a material error of law. The hearing before the FtT is not a dress rehearsal for a further hearing on appeal (Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5).
6. Even if that is wrong, the Respondent does resist the Appellant's application to withdraw the concession. The Appellant's justification for seeking to withdraw the concession appears to principally be made on the basis that the issue was one that was properly arguable and so it is in the interests of justice to allow the concession to be withdrawn (see §5 of UT grounds). The Appellant further asserts that arguability is the correct test for deciding whether a concession should be withdrawn (§6).
7. The implication of that argument, if correct, is that a party may seek to withdraw on appeal any concession they made before the FtT so long as the issue is arguable. That cannot be correct for a number of reasons. Firstly, it would mean that any concession before the Tribunal that reached the low threshold of arguability would not be a concession in any real sense. Any party would be entitled to withdraw that concession on appeal. The only concessions with any legal effect would be on issues that were inarguable.
8. Secondly, there may be reasons why a party made a concession despite knowing that the issue was arguable. A party may think the particular issue is arguable but weak and wish to place the spotlight on another stronger aspect of their case. It would plainly not be in the interests of justice for the withdrawal of a concession in such circumstances.
9. Thirdly, there is nothing in the caselaw to support such an approach. The Court of Appeal most recently reviewed the caselaw on concessions in *AM (Iran) v Secretary of State for the Home Department* [2018] EWCA Civ 2706. As explained at §40, there is no all-embracing principles that will apply beyond those in CPR Part 1.1 (the overriding objective) when deciding whether to permit the withdrawal of a concession. Plainly, arguability cannot, in all cases, be a complete answer to the question of what is consistent with the overriding objective.
10. As the Appellant has identified no other basis for the withdrawal of the concession, the Appellant's application should be refused.
11. The Respondent opposes the appellant's appeal. In summary, the Respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.

Discussion and analysis

64. In relation to Ground one the starting point has to be for us to consider whether a concession was actually made. We announced during the course of Ms Stuart-King's submissions when she posed this question that it is our finding that a concession was made in the terms that the appellant's offence was one that did involve serious harm.
65. We make this finding for a number of reasons. Firstly Mr Hodson who represented the appellant before the Judge is known to this Tribunal and is a very able, competent, and experienced advocate, with considerable experience within the immigration and asylum jurisdiction. It is therefore highly unlikely that he would have conceded the point, and accordingly not argued it before the Judge if he had not made the concession.
66. Second, the agreed schedule of issues recorded by the Judge which we set out above does not contain any reference to a challenge to whether the appellant's offending caused serious harm. It is clearly a rational observation that the reason this issue is not recorded as an issue is that it was not raised before the Judge as such, as it had been conceded.

67. Third, the record of proceedings of the hearing before the Judge makes no reference to any evidence being called on this point, to any submissions being made in relation to this issue, or anything to indicate other than the point had been conceded.
68. Fourth, the ground specifically seeks permission to withdraw the concession. It is highly unlikely an application would have been made to withdraw a concession if no concession had been made.
69. Fifth, when one looks at the evidence before the Judge, including the appellant's witness statements, there is nothing to indicate this was an issue at large expressly, by implication, or a matter that required any further consideration.
70. As the argument the Judge erred in relying upon the concession was only raised after the hearing in the grounds seeking permission to appeal, we do not find the Judge erred in law in relying on the concession, on the basis of the lack of any submissions or challenge before him, in arriving at the finding the appellant had been convicted of an offence which caused serious harm.
71. We accept that in principle a concession made can be withdrawn. Guidance to the approach to be taken can be found from a number of judgements including NR (Jamaica) v Secretary of State the Home Department [2009] EWCA Civ 856.
72. In NR (Jamaica) there were two grounds of appeal. The first ground of appeal is recorded as being "the concession issue". At [11 - 18] of that judgement it is written:

11. In *Secretary of State for the Home Department v Akram Davoodipannah* [2004] EWCA Civ 106, Kennedy LJ, with whose judgment Clarke LJ and Jacob J (as they then were) agreed, set out the principle in the following way [22]:

"It is clear from the authorities that where a concession has been made before an adjudicator by either party the Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course... Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the Tribunal must do is to try to obtain a fair and just result. In the absence of prejudice, if a presenting officer has made a concession which appears in retrospect to be a concession which he should not have made, then justice will require that the Secretary of State be allowed to withdraw that concession before the Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits."

12. As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted. Bad faith will almost certainly be fatal to an application to withdraw a concession. In the final analysis, what is important is that as a result of the exercise of its discretion the Tribunal is enabled to decide the real areas of dispute on their merits so as to reach a result which is just both to the appellant and the Secretary of State.

13. I do not accept, as was submitted by Mr. Chelvan, that before the Tribunal can permit the Secretary of State to withdraw a concession, it must satisfy itself the decision to withdraw was rationally made in public law terms; that it is required both to analyse the nature of the concession and the justification for its withdrawal as though it were an administrative decision of a public body; that it is only if something new has arisen after the concession has been made that it may be permitted to be withdrawn; that otherwise the withdrawal is unfair. Mr. Chelvan is confusing the role of the Secretary of State in taking an administrative decision (for

example in respect of someone seeking asylum), and his role as a party to litigation deciding how that litigation should be conducted.

14. I reject too a submission by Mr. Chelvan that whenever an application to withdraw a concession is made by the Secretary of State without notice, he is obliged to seek an adjournment. That is a misreading of what Collins J said in paragraph 12(6) of *Carcabuk*.

73. A further decision of the Court of Appeal is that of *Koori v Secretary of State for the Home Department* [2016] EWCA Civ 552 at [10] in which the Court found:

10. In the course of argument, Underhill LJ raised the possibility that the Secretary of State might be agreeing to waive compliance with the seven year rule requirement on the grounds that if the two older children were to lodge a fresh application, they would satisfy it, and she may have thought that this would be a pointless exercise. However, there is no general policy for waiving the requirement in that way, and it would undermine the requirement in the rule that time should be assessed as at the date of application were such a policy to be applied as a matter of course. Moreover, if she were intending to make a particular concession at odds with the terms of the rule in this particular case, in circumstances where there was no obvious reason why she should pick out this particular family for special treatment, I would have expected her to state that she was intending to do this and why. In my view there can be no doubt that this was simply a mistake properly to apply the law to the facts of the case.

74. In *Rauf v Secretary State the Home Department* [2019] EWCA Civ 1276 at [28 – 29] in which that Court found:

28. Mr Rauf cannot now be heard to say that he has been denied an opportunity to make representations about the concession. He had that opportunity. The only other basis for the contention that the UT fell into error is that it did not consider the law relating to withdrawals of concession. Mr Turner did not pursue this with any particularity. He would have had difficulty doing so considering the general principles to which we were referred in *CD (Jamaica)* [2010] EWCA Civ 768. The facts of that case are very different from this and the ultimate decision that was appealed was a refusal to allow a concession to be withdrawn that was overturned in this court. The principle to be applied was extracted from a decision of Goldring LJ in *NR (Jamaica) v SSHD* [2009] EWCA Civ 856 which is summarised at [18] of *CD (Jamaica)* in the following terms:

"The real question that the tribunal had to determine was whether all the essential issues in the case could fairly be resolved by allowing the concession to be withdrawn or whether the prejudice was such, and the damage to the public interest such, that the Secretary of State should not be allowed to withdraw the concession."

29. Putting to one side any more sophisticated examination of the law, Mr Turner could not have got past first post in any complaint that a concession which was simply an erroneous reading of the Immigration Rules which is mandatory and a proper reflection of the legislation has any prospect of not being withdrawn in the circumstance where there was no prejudice. There was no prejudice on the facts of this case because, on his own case, the best Mr Rauf could have achieved was 60 days grace and he had already had 7 months of the same.

75. Although it was submitted by Ms Stuart-King that there was no prejudice to the Secretary of State in permitting the concession to be withdrawn, but substantial to prejudice to the appellant, we do not accept that argument.

76. The effect of the appellant's application and tactical considerations is to enable a challenge to be made to the lawfulness of the deportation order made in 2013 which has never been the subject of an appeal either at the time or subsequently. That order was clearly made on the basis that the appellant was convicted of an offence which caused serious harm.
77. The first question is whether the application to reconsider should be considered in principle. We accept that such an application can be made. The basis on which the application has been made, according to the pleadings and witness statement of Mr Hodgson is based on an ignorance of the law argument in relation to his alleged failure to appreciate the basis on which the appeal could be conducted and the handing down of a subsequent decision by the Upper Tribunal. It is settled law that ignorance of the law is no defence, and it must be remembered that what was at large before the Judge is a human rights appeal in which the issue is whether the decision to refuse the application for leave on human rights grounds was proportionate, in relation to the impact it would have upon a protected right recognised by Article 8 ECHR.
78. That application was treated by the respondent as an application to revoke the deportation order which was considered in light of all relevant circumstances including:
- the grounds on which the order was made
 - any representations made in support of revocation
 - the interests of the community, including the maintenance of effective immigration control
 - the interests of the applicant, including any compassionate circumstances.
79. The Secretary of State's guidance provides a deportation order will be revoked where maintenance of that deportation order will be contrary to the Human Rights Convention or the Refugee Convention.
80. Exceptions to deportation as set out in the Immigration Rules reflect the provisions of section 33 UK Borders Act 2007.
81. The deportation order dated 16 July 2013 set out the basis for the making of the deportation decision in the following terms:

The current stated policy in relation to the deportation of foreign national prisoners is that criminal behaviour which results in a custodial sentence of 12 months or more, or a total aggregate sentence of 12 months or more over a period of 5 years, is serious enough to initiate deportation action. However, in addition to this, in September 2007 at the Bournemouth Labour Party conference, the Prime Minister at the time made a commitment that those foreign nationals involved in gun crime or the production, importation and supply of drugs would not be allowed to remain in the United Kingdom (the Bournemouth Commitment). As you have received a conviction for producing cannabis, which resulted in a sentence of 6 months imprisonment, your deportation is being pursued on this basis.

By the very nature of your offence you have preyed upon the vulnerability of those who have an addiction of these drugs and you had no regard for the impact of these drugs have on the fundamental interests of society. The Prime Minister and the Secretary of State remain committed to reducing the levels of crime related to the use and sale of drugs which by their very nature have a disproportionate effect on society as a whole. You have been convicted of a crime which is believed to be sufficiently serious to warrant your deportation under this commitment even though the length of sentence awarded to you does not fall within the general policy guidelines for the deportation of foreign prisoners.

82. The Secretary of State clearly made the deportation order on the ground the appellant's deportation is conducive to the public good. Section 3(5) of the

Immigration Act 1971 provides for the Secretary of State to make a deportation order on the basis that person's deportation is conducive to the public good which gives the Secretary of State discretion to act in a way that reflects the public interest.

83. In relation to the decision in Wilson, the current appeal concerns an application to revoke the deportation order made against the appellant. The case of Wilson sets out the criteria to be considered when deciding if a conducive deportation order is lawful in an initial appeal and does not, in any event, undermine the conclusion of serious harm if the recommended stages are worked through, on the facts.
84. Although the Immigration Rules relating to revocation applications state consideration must be given to the grounds on which the order was made this is to ensure that decision-makers do not lose sight of why an individual was made subject to a deportation order in the first place. Most applications for revocation of a deportation order will be made on human rights grounds, claiming that it was no longer proportionate for the individual to be subject to deportation as a result of family or private life considerations. The framing of the required criteria is to ensure that rather than considering what may be the position at a much later date in isolation a decision-maker does not lose sight of the fact the deportation order has been made and reasons for the same. We were not referred to any authority to show this provision means an individual can, in effect, run a fresh or first appeal against the original decision per se.
85. If it was thought the original deportation order was unlawful there was a remedy open to the appellant to have appealed that decision. Section 82 Nationality, Immigration Asylum Act 2002 gave a general right of appeal against an immigration decision (prior to the 2014 amendments to the right of appeal). Section 82(2)(j) included within the definition of an immigration decision "a decision to make a deportation order under section 5(1). The appellant therefore had a right to directly challenge the deportation order but chose not to do so.
86. No point was raised before us, however, by Mr Bates that the application should not be entertained or considered in principle.
87. The issue therefore becomes one of discretion to be exercised in accordance with the overriding objective.
88. We find that there is arguable prejudice to the public interest. A decision was made in 2013 to deport the appellant from the United Kingdom as a result, it having been accepted he had committed an offence that caused serious harm, namely the production of cannabis. That litigation was thought to have been concluded and a deportation order made as a result of which the appellant was removed from the UK. There was no challenge by way of judicial review to the removal direction. There is nothing to show that it was an unlawful removal which it may have been had the underlying deportation decision been unlawful.
89. We do not find the appellant has established that there is a sufficiently compelling reason to justify allowing the concession to be withdrawn and to effectively permit the reconsideration of the underlying deportation decision. We do not find the appellant's arguments outweigh the importance of finality of litigation and justify the opening of a question which appears to have been finally answered.
90. The argument by Ms Stuart-King to the contrary on the basis that something had been missed or otherwise gone awry, on the basis the full facts of the case were not known and that a mistake or fundamental misapprehension, or a fundamental piece of evidence or a point of law had been overlooked, we do not find has been made out on the facts for the reasons set out below.
91. We do not find that the application to withdraw the concession identifies a sufficiently compelling reason to entertain an application to reconsider the 2013

deportation decision on the basis of any sustainable error of law. There has been no material change in circumstances nor has it been established that the Judge's decision in relation to the question of serious harm has been wrong as a matter of fact or law. We find on the facts that the position initially adopted by Mr Hodson in conceding to the point before the Judge is the correct position in law.

92. We do not consider the concessionary point to be material in any event. As noted in the Rule 24 response, and from a reading of the determination as a whole, the Judge does not find that acceptance of the appellant's offending causing serious harm is based solely upon the concession made by Mr Hodgson, but makes the decision for himself based upon the effect of his offending. At [74 - 78] the Judge writes:
74. The respondent submits that there is a significant public interest in deporting the appellant because of his criminal conviction for the production of cannabis. The respondent draws attention to the appellant and not appealing his conviction or sentence and that the Deportation order made on 6 August 2013 remains in force at a time when the appellant is illegally present in the UK.
75. The respondent submits that the appellant was convicted of a serious offence involving the production of Class B drugs. The trade in illicit drugs has a severe and negative impact on society. It is a process causing misery and sometimes death to the many thousands of people who are unfortunate enough to become addicted to them. Drug addiction affects not only the drug users themselves but also their families. Furthermore, since addicts are often driven to commit ancillary crimes in order to finance their habit, those involved in supplying drugs are involved in a process that has harmful consequences for society as a whole, destroying lives and creating havoc and insecurity in communities throughout the United Kingdom.
76. I accept these are matters to which I should give weight.
77. I note that, although not dwelt upon by Mr Hodson in his submissions, at one point in his witness statement the appellant does assert that he was not aware that his behaviour was criminal and points to being under the control of others. Nevertheless, I find it cannot be ignored that the appellant pleaded guilty to the offence with which he was charged. It is on that basis of him accepting criminal guilt that I consider he has to be assessed.
78. I take into account that in his sentencing remarks HHJ Donne QC, while saying that being involved in the production of cannabis is a serious offence, accepted that the appellant's role was a minor one and that the appellant had not been in trouble before in this country. That said, I consider it remains the case that the appellant was convicted of an offence that caused serious harm because of the link to cannabis production. I find that the minor role means that there is no further aggravating of the seriousness because of any prominence in the criminal operation.
93. The Court of Appeal considered the definition of "an offence that has caused serious harm" in R (Mahmood and Ors v Upper Tribunal and Ors) [2020] EWCA Civ 717. In that case the Court of Appeal was considering whether the appellants had committed 'an offence that has caused serious harm' within the meaning of section 117 D (2) (c) (ii) of the Nationality, Immigration and Asylum Act 2002. That provision, within the section defining a 'foreign criminal' includes (i) a person who has been sentenced to a period of imprisonment of at least 12 months, (ii) a person who has been convicted of an offence that has caused serious harm or, (iii) is a persistent offender.
94. In relation to the interpretation of section 117D(2) the Court of Appeal, Simon LJ with whom the other members of the Court agreed, wrote:

34. Various issues arise as to the interpretation of this provision; but a number of preliminary points can be made.
34. First, the three categories in subsection (2) (c) have a potential to overlap. Plainly an offender who has received a sentence of more than 12 months may have done so because he committed an offence which caused serious harm. Equally, an offender who persistently offends is likely to receive a longer sentence (and more than 12 months) because of a poor antecedent history.
36. Second, the provision must be given its ordinary meaning informed by its context. The three categories must be read together. This is more than simply a conventional approach to statutory interpretation. It is plain, for example, from the structure of the provision that an offender who has been sentenced to a term of less than 12 months for an offence may nevertheless be treated as a 'foreign criminal' if the offence caused serious harm; and that 'serious harm' will only be relevant when the sentence for an offence is less than 12 months. This throws light on what may be encompassed by an offence which causes serious harm. While it is possible to think of offences which, despite causing the most serious harm, would not typically attract an immediate prison sentence of at least 12 months (causing death by careless driving is an example), in general paragraph (c) (ii) is not concerned with the most serious kind of harm which comes before the Crown Court.
37. Third, Mr Biggs drew our attention to s.32(1)-(5) of the UK Borders Act 2007 ('UKBA 2007'). Section 32 (3) provides that, where an offender is sentenced to imprisonment for an offence specified by the Secretary of State by order, a deportation order may be made under s.5(1) of the IA 1971. His submission was that allowing the 'serious harm' test under s. 117D(2)(c)(ii) to be satisfied where a given type of offence has been committed, merely because of a perceived generalised harm caused by such offending, would 'trespass into territory' covered by s.32(3) of the UKBA. We are not persuaded that there is any merit in this argument. Section 32 (3) has not been brought into legislative effect and the Secretary of State has not made any order as envisaged; and part 5A of the NIAA 2002 was introduced so as to provide a structured approach to the issue of deporting foreign criminals by reference to rights under article 8 of the ECHR.
38. Although, Mr Biggs and his attractive submissions sought to confine the ambit of section 117 D(2)(c)(ii) by reference to the words 'caused' and 'harm', these are words in common usage and do not call for extensive commentary.
39. So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so. Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be set that such a thief caused serious harm himself, either to the owner or to society in general. Beyond this, we are doubtful that a more general analysis of how the law approaches causation in other fields is helpful.
40. As to 'harm', often it will be clear from the nature of the offence that harm has been caused. Assault Occasioning Actual Bodily Harm under s.47 of the Offences Against the Persons Act 1861 is an obvious example.
41. Mr Biggs argued on behalf of Mahmood that the harm must be physical or psychological harm to an identifiable individual that is identifiable and quantifiable. We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual. Some crimes, for example, supplying class A drugs, money-laundering, possession of firearms, cyber crimes, perjury and perverting the course of public justice may cause societal harm. In most cases the nature of the harm will be apparent from the nature of the offence itself, the sentencing remarks or from

victim statements. However, we agree with Mr Biggs, at least to this extent: harm in this context does not include the potential for harm or an intention to do harm. Where there is a conviction for a serious attempt offence, it is likely that the sentence will be more than 12 months.

42. The adjective 'serious' qualifies the extent of the harm; but provides no precise criteria. It is implicit that an evaluative judgement has to be made in the light of the facts and circumstances of the offending. There can be no general and all embracing test of seriousness. In some cases, it will be a straightforward evaluation and will not need specific evidence of the extent of the harm; it will be for the tribunal to evaluate the extent of the harm on the basis of the evidence that is available and drawing common sense conclusions.
43. In *LT (Kosovo) and DC (Jamaica) v Secretary State for the Home Department* [2016] EWCA Civ 1246, the Court considered the proper application of s.3(5)(a) and paragraph 398 (c) of the Immigration Rules (see above). The issue was whether an offence of supplying a class A drug fell to be treated as causing 'serious harm' within the meaning of paragraph 398 (c), regardless of the particular circumstances of the offending.
44. One of the arguments before the Court was that the seriousness of harm should be considered by reference to the sentencing of 'dangerous offenders' under the Criminal Justice Act 2003 and the definition of 'serious harm' in s.224(3) as meaning 'death or serious personal injury, whether physical or psychological.' Laws LJ, in giving a judgement with which Lewison and Tomlinson LJ agreed, rejected the argument.

17. I should say straightaway that I am afraid I do not consider that the references to the Criminal Justice Act or the sentencing guidelines are of any assistance to the adjudication of the questions before us on this appeal.

That may be putting the matter to high, since the characteristic of an offence as causing 'serious harm' within the Sentencing Council Definitive Guidelines may be referred to in the sentencing remarks which are likely to be of assistance. On the other hand, the fact that the offence is not characterised as one causing 'serious harm' for sentencing purposes is plainly not determinative of the issue that arises under s. 117D(2)(c)(ii).

45. Although in *LT (Kosovo)* at [24], the Court questioned the Secretary of State's view that 'all drug offences are by their nature serious'; it is accepted as 'perfectly reasonable' the Secretary of State's view that supplying class A drugs causes serious harm. In that case, LT had been convicted of an offence of possession with intent to supply a single deal of less than 1 gram of a class A drug, cocaine, to a friend, which she had been sentenced to a term of 10 months. We considered below the argument that it is not the Secretary of State's view of the matter that is material when considering the provisions of Part 5A of the NIAA 2002. However, we note the Courts view in *LT (Kosovo)* that it was a reasonable view that dealing in class A drugs, even on a personal basis caused serious harm, on the basis of societal harm caused by the distribution and consumption of drugs.
95. Ms Stuart-King submitted that the Judge failed to undertake the required detailed assessment as what was required was a detailed consideration of the role of the offender and problems in society and that the assessment in the determination was not sufficient.
96. The Judge clearly considered the evidence that had been provided with the required degree of anxious scrutiny. So far as this is a submission that the evidence provided to the Judge was not detailed enough and that a further opportunity should be provided to enable the appellant to make further submissions or file further evidence, we find no merit in the claim that this establishes material legal error.
97. Case management directions given by the First-tier Tribunal set out the requirement for the parties to file all the evidence upon which they were

intending to rely by specified dates. The appellant provided such evidence. The appellant is represented. Although Ms Stuart-King referred in detail to the type of thing she would have expected the Judge to make a finding upon, claiming that even without the evidence the Judge needed to make such an assessment, and it meant the one actually made is infected by legal error, we find such a submission is not sustainable. Ms Stuart-King was unable to point us to any evidence provided to the Judge in relation to such points or in support of her argument. The Judge was entitled to proceed on the basis that the appellant had provided all the material he was seeking to rely upon in the appeal.

98. The submission the Judge erred in failing to consider the appellant's role within the operation for the production of the cannabis is without merit. The submission by Ms Stuart-King that it was only a minor role involving watering the cannabis plants, and a suggestion of around possibly 15 plants, is not the type of detail that was included in the evidence before the Judge. An advocate cannot give evidence during the course of submissions. The Judge also acknowledges in the determination that the appellant had a minor role in the operation and refers to the different degrees of culpability applicable when considering sentencing options. The Sentencing Judge refers to the appellant's role and degree of culpability which is reflected in the sentence he received. The fact of the matter is, however, that the appellant had a role as part of an organisation whose purpose was the growing and selling of a Class B drug, cannabis, which is illegal in the UK.
99. The fact the appellant's role is minor does not mean the offence for which he was convicted did not cause serious harm. Ms Stuart-King referred in her submissions to the example of a shoplifter. That is a scenario specifically considered by Simon JL in R (Mahmood) where it was found:
39. So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so. Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be set that such a thief caused serious harm himself, either to the owner or to society in general. Beyond this, we are doubtful that a more general analysis of how the law approaches causation in other fields is helpful.
100. Whether an offence causes serious harm is a question of fact. As acknowledged by the Court of Appeal that even a minor offender could give rise to serious harm depending on the nature of the offence. The appellant's role in the production of cannabis meant there is a clear causative link to the offence for which he was convicted and serious harm arising.
101. We do not accept there is any merit in the submission the Judge failed to ask the right questions. Proceedings within the First-tier Tribunal are issue based. The Judge clearly identifies the issues he was required to consider. The Judge considered those issues but also makes clear findings in relation to the issue of serious harm.
102. When asked whether it was accepted that class B drugs cause serious harm Ms Stuart-King conceded that class B drugs have the potential to cause serious harm but that that was not the test. It was submitted that the test is whether the appellant had committed an offence that caused serious harm. The Judge found he had, and it did, which we find to be a sustainable finding.

103. We take no issue with the submission that the potential to cause serious harm is not the right test but it was found in this case that the appellant's actions actually caused serious harm based upon the impact of drugs, including cannabis, on society as a whole.
104. The submission that the fact the appellant was involved in the cultivation was not enough fails to give proper regard to the fact that it was his cultivation that enabled the plants to come to maturity and for the drugs to be produced. We find no merit in the argument that the appellant's role within the organisation, which was clearly material, can somehow be separated from the negative impact on society of the drugs he was cultivating. It is the equivalent of looking at a completed jigsaw which gives the whole picture, taking a piece out, and then trying to separate the importance of that piece from the completed picture.
105. When the submission the fact the appellant was only involved in cultivation was not enough was challenged, it was accepted before us that the Judge did not have information on this point. That is true. The points now be raised were not raised before the Judge.
106. Ms Stuart-King made a further submissions that the burden was upon the Secretary of State to produce evidence of harm which she classed as an evidential burden.
107. Whilst the burden may be upon the Secretary of State to establish serious harm in relation to a whether a conducive deportation decision made on this ground was lawful, that was not the issue before the Judge. The deportation order had already been made and executed. It was the appellant who was arguing that the deportation order should now be revoked. The burden of establishing that therefore lies upon he who is alleging, namely the appellant.
108. The later submission made by Ms Stuart-King that that may be so, but there was still an evidential burden on the Secretary of State is without merit. Within the legal system of the UK the legal burden of proof lies with the party making an assertion. The evidential burden of proof is the burden of bringing the issue into play and is distinct from adducing evidence sufficient to establish the relevant facts to the relevant standard. In the current case the burden lies upon the appellant to establish his case that it is appropriate for the deportation order to be discharged on the basis that it will contravene his human rights for it to continue. If the appellant had produced sufficient evidence to discharge that legal burden there would then arguably be an evidential burden upon the Secretary of State to show that notwithstanding the appellant's argument the maintaining of the deportation order remained the proportionate outcome.
109. In the appeal we find that the appellant has not even made out his case on the application of the legal burden of proof and that on the facts of this case there was no obligation upon the Secretary of State to prove his case for him, or to adduce evidence to counter his arguments. In particular we do not find it was necessary for the Secretary of State to adduce detailed evidence to establish what had already been established, namely that the conditions for the deportation of the appellant from the UK had arisen.
110. The submission by Ms Stuart-King that the Judge should not have approached the issues with a closed mind is a submission totally without merit and contrary to a proper reading of the evidence and determination. Indeed when challenged as to the evidence supporting such a contention she was unable to direct us to anything to support her argument.
111. The submission that the Judge when finding serious harm had been met failed to consider the proper threshold and look at the evidence is without merit. The Judge was clearly aware of the required threshold. It was pointed out during the course of the hearing that the Court of Appeal have made clear on a number of occasions that judges of the First-tier Tribunal are deemed to know and

understand the law. Indeed in *Volpi & Volpi* [2022] EWCA Civ 464 the Court of Appeal found:

2. The appeal is therefore an appeal on the question of fact. The approach of an appeal court to that kind of appeal is a well trodden path. It is unnecessary to referring detail to the many cases that have discussed it; but the following principles are well settled:

- i) an appeal court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
- ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial Judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable Judge could have reached.
- iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial Judge has taken the whole of the evidence into his consideration. The mere fact that a Judge does not mention a specific piece of evidence does not mean that he overlooked it.
- iv) The validity of the findings of fact made by a trial Judge is not actually tested by considering whether the judgement presents a balanced account of the evidence. The trial Judge must of course consider all the material evidence (although it need not all be addressed in his judgement). The weight which he gives to it is however pre-eminently a matter for him.
- v) An appeal court can therefore set aside the judgement on the basis that the Judge failed to give the evidence they balanced consideration only if the Judge's conclusion was rationally insupportable.
- vi) Reasons for judgement will always be capable of having been better expressed. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

112. The Judge's reasoning is adequate, has not been shown to be irrational, and it has not been made out it is outside the range of those reasonably open to the Judge on the evidence.

113. We find no merit in the submission by Ms Stuart-King that the Judge's failure to take into account relevant factors and failure to provide adequate reasoning and discussion renders the determination unsafe. Such a submission may be sustainable if this was what the Judge had done but it is not established on the evidence before us that the Judge failed to consider relevant factors or to provide adequate reasoning. Ms Stuart King's submissions are, in effect, that had different information been provided to the Judge he may have come to a different conclusion and therefore he materially erred on the evidence he had been given, but such a submission does not establish anything irrational in the conclusion actually made.

114. The negative impact of drugs is well known. Over the past few decades, the amount of Tetrahydrocannabinol (THC) in cannabis has steadily increased meaning today's cannabis has in the region of three times the concentration of THC compared to 25 years ago. The higher the THC amount, the stronger the effects on the brain—likely contributing to increased rates of cannabis related hospital visits. More THC is also likely to lead to higher rates of dependency and addiction. It was as a result of the detrimental effects upon society and harm caused to individuals that cannabis was reclassified from a class C to class B drug.

115. The NHS identifies risk factors that cannabis can make some existing mental health symptoms worse and has been linked to possible development of mental health issues. People using cannabis over a prolonged period may develop a

tolerance of the effects and increase their intake and commonly known symptoms include difficulty sleeping, vivid dreams or nightmares, low mood, difficulty concentrating, irritability, cravings, potential damage to lung tissue by inhaling the substance, can arise. Cannabis may also worsen anxiety and paranoia in some people, in addition to the harm caused to society in general and any costs resulting from involvement to the police, NHS services, and drug-related domestic issues.

116. In relation to the proportionality of the decision, this being a human rights appeal, the Judge clearly undertook the required balancing exercise having established that it had not been made out that the appellants deportation from the United Kingdom would have unduly harsh consequences for him or any other family member.
117. It is also important to note that the appellant remains subject to a deportation order and in 2015 entered the UK illegally in breach of that order.
118. In *Secretary of State for the Home Department v MR (Pakistan)* [2018] EWCA Civ 1598 and *IT (Jamaica) v Secretary of State the Home Department* [2016] EWCA Civ 932 at [57] the Court of Appeal confirm the public interest in maintaining such orders.
119. In *EYF (Turkey) v Secretary of State for the Home Department* [2019] EWCA Civ 592 it was found that if less than 10 years had elapsed since the order was made, there is a presumption that it will be maintained, but that there was no presumption to the contrary in existence. In this appeal the deportation order dated 16 July 2013 had only been in force for two years when the appellant re-entered the UK legally, and even though now 10 years has passed that does not automatically create a presumption in the appellant's favour.
120. Entering in breach of a deportation order is a criminal offence under section 24(1)(a) of the Immigration Act 1971, as it is entering the UK without leave. Although section 24 has been amended by the Nationality and Border Act 2022 there are transitional provisions for illegal entry offences commenced prior to the commencement of the Act and thus any illegal entry offence committed before 28 June 2002 resulted in a charge under the provisions of 1971 Act as they were before. It was not made out on the facts of this case at any of the statutory defences pursuant to section 31 of the Immigration Asylum Act 1999, section 2 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, section 45 of the Modern Slavery Act 2015, or section 25BA and 25BB of the Immigration Act 1971 are applicable on the facts of this appeal. Even though the appellant has not been charged with this offence it is still another factor relevant to the public interest.
121. The finding that the deportation continues to be justified has not being shown to be an irrational conclusion on the basis of the evidence and Judge's findings.
122. No legal error material to the decision to dismiss the appeal has been made out.

Notice of Decision

130. The First-tier Tribunal has not been shown to have materially erred in law. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 December 2023