IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006564

First-tier Tribunal No: PA/11486/2017

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13th June 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE METZER KC

Between

ANDRE THOMPSON

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Scott, solicitor, of Pickup & Scott Solicitors
For the Respondent: Mr Melvin, Senior Presenting Officer

Heard at Field House on 31 May 2024

DECISION AND REASONS

1. Both members of the Tribunal have contributed to this decision.

2. The Upper Tribunal (UTJ Blundell and DUTJ Saini) issued its first decision in this appeal on 9 January 2024. A copy of that decision is appended to this one. The effect of that decision was that the decision of the First-tier Tribunal (Judge Brannan) was set aside in part and the decision on the appeal was to be remade in the Upper Tribunal. Two findings made by the First-tier Tribunal ("the FtT") were preserved. Firstly, that the appellant was not deserving of international protection and, secondly, that he was unable to meet the first statutory exception to deportation.

3. The resumed hearing was first listed to be heard on 7 March 2024 but it was adjourned because the appellant's solicitors had not complied with the direction for a composite electronic hearing bundle. So it was that the appeal came to be relisted before the panel as presently constituted.

4. We need not set out the background in any detail. It was comprehensively described by the FtT and there is a short synopsis of the salient matters at [3]-[7] of the Upper Tribunal's first decision. What matters for present purposes is that the appellant is a serious offender for the purposes of s117C of the Nationality, Immigration and Asylum Act 2002 and that he seeks to resist deportation by submitting that the private and family life which he has in the United Kingdom provides very compelling reasons which suffice to outweigh the public interest in deportation.

Documentary and Oral Evidence

5. We are grateful to Mr Scott for the composite hearing bundle which was filed and served well in advance of this hearing. A small amount of additional evidence was adduced a few days before the hearing. Mr Melvin filed and served a skeleton argument on 30 May, in response to which the appellant filed and served a skeleton to which was appended a further clip of additional evidence. We record that there was no objection to the late service of the skeleton arguments or the additional evidence, although it rendered our task in preparing for the appeal somewhat more difficult.

6. We heard oral evidence from the appellant. There were no additional witnesses. He answered questions from both advocates, after which we rose and decided that we needed to ask a certain number of clarificatory questions. Neither advocate had any questions arising from our questions. We will not rehearse the evidence at this stage in our decision but we will return to it in our findings.

Submissions

7. We then heard submissions from the parties which may be summarised in the following way.

8. For the respondent, Mr Melvin relied on the decisions under appeal and his skeleton argument. He submitted that it was for the appellant and Ms Campbell, the mother of his two younger children, to decide whether the children should stay in the UK or should return to Jamaica. The respondent could not remove the children, who are British, but it was for the parents to decide where they were raised. He was not aware of any Home Office policy which precluded him from making that submission.

9. Mr Melvin submitted that nothing turned on the delay between the appellant claiming asylum in 2017 and the refusal of that claim in 2022. The delay was attributable to the appellant, not the respondent.

10. It was clear that the appellant could not rely on the first statutory exception to deportation. It was also important to recall that he had fabricated an asylum claim. There was no protection or private life impediment to his deportation, and the real focus was on the family life between him and his children.

11. Mr Melvin accepted that the appellant lives with his two youngest children, J and D, who are aged four and five. The appellant had maintained that he was their primary carer but that was not accepted by the respondent. It seemed that the appellant had significant assistance from other people in any event. Such assistance was provided, in particular, by his older children, primarily his eldest

daughter, and by Ms Campbell. It remained the case that there was no evidence of Ms Campbell's circumstances. His evidence was rather vague. Whether they were in fact living as a family unit was a matter for the Tribunal. Either way, it was clear that she remained a significant part of the children's lives.

12. There was a paucity of evidence since the Upper Tribunal's first decision, although it had been clear from that point that the nature of these relationships was to be in issue. It was insufficient for the appellant to point to findings which had been made by the FtT in 2022; what was important was the current state of the relationships.

13. It was open to the appellant and Ms Campbell to decide that J and D should relocate to Jamaica with the appellant or both of them. Neither of them had any status in the UK and the best interests of the children were to be with their parents. Alternatively, the children might remain in the UK and Ms Campbell could attempt to regularise her status. It might be thought that she had a meritorious case for leave to remain, given that she has two children who are British. As indicated above, it was not accepted that the appellant was J and D's primary carer. Nor was it accepted that the appellant had decided not to involve his children in his case to avoid causing them stress.

14. Mr Melvin submitted that *Yalcin v SSHD* was of limited assistance to the appellant. Paragraph [57] of that judgment was to be read in context, and with [58] in particular. In this case, there was considerable offending, the most serious of which involved the supply of heroin and resulted in the imposition of a sentence of five years' imprisonment. There was evidently a heavy and cogent public interest in the appellant's deportation, and nothing which served to outweigh that public interest on the facts. Although the lack of offending for some years was to be taken into account – as was the fact that the appellant was a low risk of reoffending – the public interest remained so high that it comprehensively outweighed the matters on the appellant's side of the balance sheet.

15. For the appellant, Mr Scott submitted that the appellant was evidently the primary carer of J and D. The description he had given of his part time working arrangements had the ring of truth and should be accepted. The respondent accepted that J and D lived with the appellant in High Wycombe. There was no reason to doubt what was said about the limited role played by Ms Campbell in their care. Mr Scott invited us to accept that the appellant and J and D enjoyed a relationship with his other children also. There had been unchallenged evidence about his eldest daughter looking after J and D whilst he was out at work. If there was any doubt about the appellant's relationship with his teenage children, K and S, it was clear that he had been paying child support for his son K in the past. Mr Scott asked to accept that the appellant also had a disabled brother in Aylesbury, with whom he remained in regular contact.

16. Mr Scott submitted that it would be unduly harsh on the appellant's children for him to be deported. In the event that J and D were to accompany the appellant and Ms Campbell to Jamaica, they would lose contact with their half-siblings, which was also relevant. In the event that they were to stay in the UK with Ms Campbell, they would lose contact with the appellant, who has essentially raised them on his own, and would be placed with a woman who was subject to the hostile environment. Judge Metzer KC asked Mr Scott why Ms Campbell could not relocate to Jamaica. He had no real answer to that question, although he noted

that J and D would have no familiarity with the country, and could not be forced to go there because they are British citizens.

17. Mr Scott noted that the appellant has not offended for some years. He noted that the Probation Service assessment was that he represented a low risk of reoffending. His rehabilitation was a factor which needed to be taken into account. *Yalcin v SSHD* was relevant; even if he did not qualify under the exceptions, his family and his private life combined to outweigh the public interest in deportation.

18. We reserved our decision at the end of the hearing.

Findings of Fact

19. Having reflected carefully on the oral and documentary evidence adduced before us, we find that the appellant has given an essentially truthful and accurate account of his family circumstances in the United Kingdom. He is not currently in a relationship. He has fathered six children by five different women. Two of those children, Andrea and Darnell are adults. Two, S and K, are teenagers. Two, D and J, are young children, aged four and five. All of the children are British citizens.

20. There is very little documentary evidence of the appellant's relationship with his four older children but we think it more likely than not that what he said about them was true. He spoke about Andrea helping, on occasion, with the care of the youngest children. He made reference to the teenage children coming to visit on occasion. We accept Mr Scott's submission that there is some evidence that the appellant continued to support K by child maintenance payments and we note also that the appellant was involved in the safeguarding measures which were initiated after K's mother became romantically involved with a man who was involved in a violent incident at a nightclub in Aylesbury. We accept that appellant's evidence that he sometimes invites all of his children to his home so that they can have an evening together. The picture which emerged at the hearing was of the appellant and D and being the nucleus around which the other members of the family orbit. Contact between that nucleus and the remaining members of the family is not said to be particularly regular, nor do they appear to be particularly close. Given the role which the appellant continues to play in the lives of his teenage children, however, we do accept that he continues to have a genuine and subsisting parental relationship with those children as well as with D and J.

21. It was not clear to us at the end of the appellant's oral evidence how he managed to look after D and J whilst at the same time being able to work part time. We asked him to clarify this. We consider what followed to be the truth of the situation. He explained that he used to work for a company which moved cars around the country. It was a demanding full-time role which he had to stop when D and J were born. After their birth, he and Ms Campbell had separated and the care of the children had fallen to him. He had arranged to work at a company which makes and repairs pallets. He was able to do the work at any time, and he had taken to leaving the house in the evening, after the children had gone to bed, so that he could do a four hour shift. Andrea would come to his house to look after the children to enable to him to go to work. More recently, for the last year or so, the appellant has been able to take J to school and D to nursery, so that he can work during the day.

22. We were initially concerned by the evidence we received concerning D's attendance at nursery. That evidence showed four attendances at nursery but the bill for each session was zero. The appellant explained quite spontaneously, however, that he was permitted free childcare for D, as a result of which he attended for four days a week, at three hours per day. He went on to explain that things would become easier still when his son goes to 'big school' in the autumn. He named the school, and explained that he and Ms Campbell had chosen it together. He said that she had come to High Wycombe for that reason. We formed the clear view that this was the evidence of a full time parent, who had planned and lived the interplay between his family life and his professional life. He is clearly a man who is committed to providing for his children in any way that he can, and has managed to make arrangements which will enable him to do so. Having heard the appellant's evidence, Mr Melvin submitted that it was for the Tribunal to decide whether the appellant was the primary carer of his children. We have no hesitation in concluding that he is, and that Ms Campbell lives in Bognor Regis. We will now turn to her circumstances.

23. There is very little evidence about Ms Campbell's present circumstances. We know that she previously applied for leave to remain and that her appeal to the FtT against the refusal of leave to remain was successful. The respondent appealed against that decision, however, and Deputy Upper Tribunal Judge M A Hall set aside the decision of the FtT and remade the decision on the appeal by dismissing it. We are told (by both sides in this appeal) that she has taken no further steps to regularise her position, and we accept that she is present in the UK unlawfully.

24. The appellant gave evidence that Ms Campbell is now afraid of the immigration services to the extent that she is reluctant even to provide him with her address. We note that the letter she wrote recently gives no indication of where she is living and focuses exclusively on the appellant's relationship with J and D. Mr Melvin suggested in his skeleton argument that the appellant and Ms Campbell might still be in a relationship and that they may, in reality, cohabit in High Wycombe. He did not press that submission orally and we consider he was correct not to do so. We asked the appellant about Ms Campbell's situation in Bognor Regis. He was able to explain quite straightforwardly that she had moved there because she had relatives there. He said initially that her mother's sister lived there but he thought carefully and suggested that the relative was actually her mother's mother's sister; her great aunt. He said that this lady was called Ellie, adding that this was what Ms Campbell had told him.

25. We formed the clear impression that all of this was the appellant's genuine attempt to recollect what he had been told, rather than an attempt to create a story in response to the questions he was asked. It had the ring of truth, and we find it more likely than not that Ms Campbell does indeed live in Bognor Regis with her great aunt, and that she has sporadic contact with J and D, once or twice a month when she is able to afford it. The appellant stated, and we accept, that she used to be a teacher but that she is no longer permitted to work, and does not. We asked the appellant whether Ms Campbell is in a relationship and whether she has had any children after J and D. He did not know but he thought it unlikely that she was living with a partner or that she had any more children.

26. Given the limited role Ms Campbell plays in the life of the children, and given what we have said above, we consider that it is appropriate to refer to the

appellant's relationship with J and D as their primary carer. He has a more limited role in the lives of his other children but he continues to enjoy a family life with the teenagers and, as we have said, we consider that the relationship he enjoys with all four minor children to be a genuine and subsisting parental relationship.

27. As to the appellant's private life in the UK, we have comparatively little information. The judge in the FtT noted that there was very limited evidence of the appellant's social and cultural integration: [86]. We accept that he has lived in the UK for many years, having arrived at some point in the 1980s. We accept that he has lived and worked here for many years, although we note also that he has committed various offences including offences concerned with violence and the possession and supply of class A drugs. He says, and we accept, that he now has little connection with Jamaica, whether by way of family or friends, although we note that the FtT's assessment – which is preserved for the purpose of this remaking – is that the appellant will still be 'an insider', who would still be able to operate on a day to day basis: [88]. Had we been required to make a finding on that question, we would have reached the same finding on the evidence before us.

28. The judge in the First-tier Tribunal was concerned as to the lack of evidence that J and D could, as a matter of law, relocate to Jamaica with the appellant and/or Ms Campbell. The Upper Tribunal noted in its first decision that it was for the appellant to adduce evidence of any such difficulty. We record here that no such evidence has been adduced. We are aware from many previous cases that Jamaica and the UK are both countries which permit dual nationality and we see no reason why J and D would not be entitled to Jamaican nationality as a result of the fact that both of their parents have that nationality. There is certainly no evidence to suggest otherwise. Nor, for that matter, is there any evidence to suggest that they would not enjoy a right to admission to Jamaica as the children of two Jamaican nationals.

Conclusions

29. The appellant comes within the category of a serious offender as his longest sentence is five years' and therefore more than four years': *NA (Pakistan) v SSHD* [2016] EWCA Civ 662; [2017] 1 WLR 207, at [14]. He cannot benefit from the statutory exceptions to deportation. It is therefore necessary to proceed on the fall back protection stated in s117(6) applying the structured approach recommended by Jackson LJ in NA (Pakistan at paragraphs 23, 27-31, 33-35 and 37-39) which we prefer to use for analysis, although noting the possibility of the shortcut considered in *Yalcin v SSHD* [2024] EWCA Civ 74; [2024] 1 WLR 1626.

30. We find that the appellant cannot meet Exception 1. We refer and rely upon the FtT's preserved analysis at [83]-[89]. The appellant has not spent more than half his life in the UK and we have been provided with little evidence of the appellant's social and cultural integration beyond his family relationships and work. We find that there are no very serious obstacles to his re-integration to Jamaica.

31. In respect of Exception 2, that relies solely upon the appellant's relationship with his four younger children. The definition of unduly harsh is set out at paragraph 46 of *MK (Sierra Leone) v SSHD* [2015] UKUT 223 (IAC); [2015] INLR 563, as endorsed at [27] of *KO (Nigeria) v SSHD* [2018] UKSC 53; [2019] HRLR 1

and at paragraph 41 of *SSHD v HA (Iraq)* [2022] UKSC 22; [2022] 1 WLR 3784 : "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.". That is self-evidently a high threshold test. It is necessary to take into account the ages of the children and the 'stay' and 'go' scenarios for each child: *SSHD v HA (Iraq)* supra at paragraphs 39 and 87-100. We note that J and D are still very young and would be expected to stay with one or both of their parents but we consider that the appellant's other children would be able to travel for visits to visit him and them in Jamaica.

32. We accept that the best interests of each child is to maintain the status quo but that is not determinative: see paragraph 34 of *NA (Pakistan) v SSHD*. The question posed by the statute is a different one.

33. As set out above, we note that it is not suggested by the respondent that K and S should leave the UK. They are now British teenagers who live with their mothers. On the evidence, they have only sporadic contact with the appellant and with J and D. We find that only the stay scenario referred to in *SSHD v HA (Iraq)* is relevant here. There is nothing to suggest on the evidence that it would be unduly harsh for them to remain in the UK whilst the appellant returns to Jamaica. They would undoubtedly miss him and we recognise that there is a distinct likelihood that K would lose financial support from the appellant and that he would not be able to participate in decisions regarding the welfare of his older children face-to-face but he could seemingly do so from Jamaica by phone/Skype etc.

34. It is clear that the mainstay of argument as presented by Mr Scott concerns J and D. We have already accepted for the reasons set out above that the appellant is their primary carer. In respect of J and D, it is clear that both stay and go scenarios are in contemplation.

35. We consider that there is little evidence on which to decide whether it would be unduly harsh for J and D to remain in the UK without the appellant. On balance, we find that this test is not made out. These children are young and adaptable. Their mother, Ms Campbell, has seen them regularly and been a part of the decision-making in their lives: for example, in relation to the recent school choice for J. There is no evidence to suggest that J and D could not live with her and her great aunt in Bognor. We accept that the appellant is the breadwinner, and that Ms Campbell cannot work as she has no leave to remain. We repeat that these children are entitled to support as British citizens. We think it likely that Ms Campbell would secure leave to remain if she chose to seek it. We find that the most significant aspect to take into account is the loss of the current primary carer, the appellant, and J and D's settled existence in High Wycombe, but we find on the assumption that the children remain in the UK, that is insufficient to reach the high unduly harsh threshold.

36. The real focus of the argument was on whether the children could go with the appellant and Ms Campbell to Jamaica. Mr Scott was constrained to accept there was no reason why Ms Campbell could not go. She has no leave to remain and the presumption must therefore be that she leaves. The appellant is subject to a deportation order. Both parents of J and D are Jamaican. Whilst the children are

both British, we remind ourselves that this is not a trump card, but nonetheless is an important consideration in their best interests: [30] of *ZH (Tanzania) v SSHD* [2011] UKSC 4; [2011] 2 AC 166. Relocating would mean that J and D would leave the NHS and the school system behind, although as British citizens, they would be free to re-enter at any time.

37. The appellant has not been to Jamaica for some years, although he has been since arriving in the UK. The FtT found he would be an insider. He is undoubtedly a hardworking man. He has demonstrated impressively his ability to provide for his children and has made every effort to do so in the UK since his release. We noted to the appellant's great credit how he was able to fit his childcare responsibilities around his pallet work. We accept there would be an inevitable period of instability if they all relocated to Jamaica but the appellant would be able to work there, as he accepted in evidence. So we consider would Ms Campbell; we have been told that she is a qualified teacher. They have cooperated in the UK regarding the welfare of their children J and D and we consider they would be also able to do so in Jamaica. Whilst we are aware and repeat that their children cannot be removed from the UK, we accept Mr Melvin's submission that the appellant and Ms Campbell could decide, given that they are both faced with removal or deportation, that they should take their children with them to Jamaica although we stress that is not incumbent or forced upon them to do so.

38. We turn to the balancing exercise under s117C(6). We have undertaken the necessary proportionality assessment. We are grateful to the advocates for their submissions on the balance sheet of considerations. In the appellant's favour are a number of factors. He has been in the UK for many years and we therefore accept he would be in some difficulty in adjusting to life in Jamaica. As indicated above, there would be some initial instability in seeking to adjust the children's lives assuming they came with the appellant. We also give the appellant credit and count in his favour that he has not offended for some time. This has direct relevance to the balancing exercise for the reasons set out at [53]-[59] of *HA (Iraq).* We also note also that the author of the Pre-sentence Report assesses him to be at low risk of reoffending.

39. Against that, there can be no doubt that the appellant committed serious offences. Comprising a serious drugs offence plus an offence of violence shortly thereafter. We consider that Mr Melvin was correct to submit with reference to *Dalia v France* [1998] ECHR 5, at [54], that the nature of the offending is relevant. To attach weight to the nature of the drugs offence does not risk double counting contrary to [60]-71] of *HA*. The weight to be attached is diminished to some extent by the lack of further offending and the low risk of reoffending but we consider still amounts to there being a very significant public interest in the appellant's deportation as a result of his offending.

40. We balance against the strong public interest in deportation for a serious offence, the difficulties which will arise. The appellant's oldest children will no longer see him or J and D on a regular basis. His other teenage children will miss him as well as J and D. The appellant will be subject to a period of instability, as will J and D as we have recognised the children would be leaving the country of their nationality, albeit with (at least) their primary carer.

41. We find in carrying out the balancing exercise that the appellant is not able to reach the statutory exception threshold in any respect and also cannot show that there is ‘something more’, as required by s117C(6) as interpreted in *Yalcin*.

42. We therefore dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal having been set aside in part, we remake the decision on the appeal by dismissing it.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 June 2024

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006564

First-tier Tribunal No: PA/11486/2017

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDRE ANOTHONY THOMPSON

Respondent

Representation:
For the Appellant: Ms Ahmed, Senior Presenting Officer
For the Respondent: Mr Scott, Solicitor, of Pickup & Scott Solicitors

Heard at Field House on 16 November 2023

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge Jackson against the decision of First-tier Tribunal Judge Brannan ("the judge"). By his decision of 22 August 2022, the judge allowed Mr Thompson's appeal against the Secretary of State's decision to refuse his human rights claim. Mr Thompson is a serious offender who has been sentenced to three terms of imprisonment, the longest of which was a sentence of five years for possessing heroin with intent to supply. The judge found that there were very compelling circumstances over and above those in the statutory exceptions to deportation which outweighed the public interest in Mr Thompson's expulsion. He allowed the appeal on Article 8 ECHR grounds accordingly.

2. To avoid confusion, we will refer henceforth to the parties as they were before the FtT: Mr Thompson as the appellant and the Secretary of State as the respondent.

Background

3. The date of the appellant's entry to the United Kingdom is unclear but it is common ground that he enjoyed indefinite leave to remain ("ILR") from 16 July 1997. As the judge noted at [4] of his decision, the appellant has amassed various convictions since 1996. He received non-custodial disposals for offences concerned with drugs, violence, and dishonesty between 1996 and 2008. There was then a gap of six years, after which the appellant was convicted of possession of drugs of Class A and B for which he received a short sentence of imprisonment. That sentence was passed at Aylesbury Crown Court on 31 July 2014.

4. Also on 31 July 2014, at Aylesbury Crown Court, the appellant received a sentence of five years' imprisonment for possessing heroin with intent to supply. He returned to the same court in November 2015, when he was sentenced to 30 months' imprisonment for an offence of wounding.

5. Deportation proceedings were commenced in 2014. Representations were made on the appellant's behalf. A deportation order was made against the appellant on 19 October 2017.

6. On 20 October 2017, the appellant's representations were refused. Insofar as the appellant had relied on protection grounds, the respondent considered that section 72 of the Nationality, Immigration and Asylum Act 2002 applied and, in any event, that the appellant had failed to attend interviews in order to provide details of his claim.

7. In relation to the appellant's Article 8 ECHR claim, the Secretary of State noted that he had claimed to have four children but had only adduced evidence of two, both of whom were adults, then aged 23 and 20. It was not accepted that the appellant continued to enjoy a family life with them. It was not accepted that the appellant was in a genuine and subsisting relationship with his claimed partner, Ms Barton. The respondent was in any event not satisfied that it would be unduly harsh for the appellant and Ms Barton to live together in Jamaica, or that it would be unduly harsh for her remain in the UK without him. Although the appellant had resided lawfully in the United Kingdom for a number of years, it was not accepted that he was socially and culturally integrated or that there would be very significant obstacles to his reintegration to Jamaica. It was not accepted that there were very compelling circumstances which outweighed the public interest in deportation. There were no other human rights claims which entitled the appellant to remain in the United Kingdom.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal in November 2017. During the appeal, he asserted once more that he was entitled to international protection. The respondent decided to interview him in connection with that claim but did not do so until 2022. Having done so, she issued a supplementary refusal letter dated 8 April 2022. The appeal was finally able to proceed, and it was heard by the judge, sitting at Taylor House on 20 June 2022. The judge subsequently

directed that the parties should make further submissions, which he received in writing on 13 and 25 July 2022. The judge's reserved decision was then issued on 22 August 2022.

9. The judge's reserved decision is long, running to 33 pages of single-spaced type. It suffices for present purposes to set out the following summary of the conclusions he reached at [41]-[89].

10. The judge found that the appellant's crimes were particularly serious, but he accepted that the appellant had rebutted the presumption that he represented a danger to the community of the United Kingdom: [41]-[45]. He therefore discharged the certificate under section 72 of the 2002 Act.

11. The judge found the appellant's claims to have been targeted in Jamaica as a suspected gay man to be a complete fabrication. He did not accept that the appellant would be at risk on return for that reason: [49]-[62]. Whilst the judge accepted that the appellant's sister had been sexually abused by their uncle in Jamaica, he did not accept that he would be at risk on return for any reason connected to those events: [63]-[74].

12. The judge turned to Article 8 ECHR at [75]. Having directed himself on the law at [75]-[82], the judge turned to consider the first statutory exception to deportation at [83]-[89]. He found that the appellant was unable to satisfy any of the three requirements in s117C(4) of the 2002 Act.

13. The judge then considered the second statutory exception to deportation at [90]-[109]. Having set out the directions he gave to the parties and their responses to those directions, the judge directed himself that the question was whether the appellant's hypothetical removal would be unduly harsh on the children: [96]. He had detailed the appellant's six children and their mothers at [21]-[29] of his decision.

14. The judge focused at [97]-[109] on the current situation of the youngest two children, J and D, both of whom were accepted by the respondent to be British citizens. The judge noted that the relationship between the appellant and their mother, Ms Campbell, had broken down. She lives in Bognor Regis, whilst the appellant lives in High Wycombe. The judge accepted that the appellant was the children's primary carer, but they continued to see their mother. Ms Campbell has no immigration status in the UK and the judge observed that her work in the UK 'is likely to be illegal'. In the event that the appellant was deported, therefore, the children would 'have no parent with permission to remain in the UK' and their mother would not be able to provide for them legally. The judge noted that they would also face the upheaval of Ms Campbell becoming their sole carer. There was no assurance that her status would be regularised by the respondent. 'Surely', the judge suggested, 'those steps must be taken before removal of the appellant', so as to safeguard the best interests of the children. Leaving them in the care of their mother, who is subject to the 'hostile environment' would be 'bleak' and 'would surely be unduly harsh for them': [100].

15. At [101], the judge noted that it was seemingly agreed between the parties that J and D could not be removed with the appellant because they are British. At [102], having reminded himself of ZH (Tanzania) v SSHD [2011] UKSC 4; [2011] 2 AC 166, the judge directed himself that he should consider 'whether the factors

weighing against the children leaving the UK with the appellant are unduly harsh'. Given their young age, the judge felt that they could be expected to adapt to life in Jamaica, which was the country of both parents' nationality: [103]-[104]. That would separate them from the relationship they enjoyed with their half siblings, however: [105]. There was no evidence to suggest that J or D had Jamaican nationality and living standards were better in the United Kingdom when compared to Jamaica: [106]-[107]. The judge also noted that the appellant worked full time in the UK, whereas he would need to find work in Jamaica, which would no doubt take some time.

16. The judge considered that the best interests of the children were served by remaining in the UK with the appellant, but the question was whether their departure would be unduly harsh. He did not consider that it would be but at [109], the judge said this:

> However in saying this I do not suggest it can actually happen. I am looking at the hypothetical question of removal now, applying the authorities in paragraph 19.13 of McDonald's quoted above, the 'stay' and 'go' scenarios.

17. Having made those findings, the judge turned to analyse whether there were very compelling circumstances which satisfied s117C(6) of the 2002 Act. He reminded himself of that provision at [110] and he set out a section of SSHD v HA (Iraq) [2022] UKSC 22; [2022] 1 WLR 3784 at [111]. At [112]-[117], the judge considered the nature and seriousness of the appellant's offending. The seriousness of the first offence (as reflected in the sentence without a discount for the guilty plea) was 'approximately 70.5 months'. As for the second offence, for which 30 months was imposed, there was no additional information and it was to be judged 'only by the sentence imposed.'

18. At [117], the judge said this about the nature of the appellant's offending:

> The Appellant's most serious offences were for drug dealing and violence. However there is no suggestion that they involved particularly vulnerable victims, which was the issue in *Sanambar*. I also note that the sentences given for drug dealing offences are already long in England. In my view there is a high chance of double counting if drugs offences are treated more seriously by they [sic] nature again when considering deportation. In the circumstances I therefore give no extra weight to the nature of the offences.

19. The judge began [118] by stating that 'the two sentences are the principal factors weighing against the appellant'. He then gave reasons for finding that the appellant had rehabilitated but observed that 'this did not cancel out the public interest in his deportation'; it merely reduced it, but not 'down to the level of a medium offender'. At [119], the judge listed factors in the appellant's favour: the length of time he had lived in the UK; his recently re-established relationship with his two adult children; his relationship with the other two children, K and S; the effect on J and D who would have to leave the UK; and the appellant's relationship with his disabled brother. At [120], the judge made it clear that these factors did not outweigh the 'obvious statutory public interest' in the appellant's deportation.

20. At [121]-[129], the judge set out the reasons why he found there to be very compelling circumstances. In deference to the judge, it is appropriate to set out his reasons in full. Before doing so, I should note that there is reference throughout this section of the decision to a Ms Russell. There is no such person in this case, and it seems that the judge took at this stage of his decision to referring to Ms Campbell as Ms Russell. I do not know why that occurred.

> [121] However there is another factor which I am required to consider more thoroughly in the overall balance. That is the best interests of [J] and [D]. Their best interests would be served by remaining in the UK with both their parents. That is not compatible with the public interest in deporting the Appellant. As discussed above, it would be unduly harsh for them to remain in the UK without the Appellant. It would not be unduly harsh for them to go to Jamaica with the Appellant. One might call this course their "second best interest". It is the outcome that is compatible with the public interest in the deportation of the Appellant.
>
> [122] The real-world situation is that their second best interest cannot be achieved. The Appellant is currently undocumented and the whereabouts of his expired Jamaican passport are unknown (page 73 of Appellant's bundle). The children will, if the Jamaican authorities are anything like those in the UK, require visas in order to settle in Jamaica. I have no information at all about the ability of Ms Russell to travel. Sorting all this will take time and money. It is time and money the children will not have if the Appellant has been removed. Even if he were not removed immediately, as discussed above in relation to the British citizenship of the children, a deportation order has been and will take effect on conclusion of this appeal.
>
> [123] In normal circumstances, where British children are not also needing to leave the UK, the consequences of a loss of leave are helpful factors pushing a deportee to leave. At the same time, the Respondent can enforce removal without breaching any Article 8 rights.
>
> [124] However this is a very unusual case because it concerns British children for whom the least bad outcome is to leave the UK. In such circumstances it would be quite appropriate for the Respondent to seek the cooperation of the Appellant to do so to secure their second best interests. Indeed the Respondent says in her supplementary decision of 13 July 2022 moving to Jamaica with their parents would be in their best interests. The position of the Appellant in response to this was that she has not adequately addressed the specific situation of these children. I agree.
>
> [125] The reality is that even if I were to make some kind of forward looking assessment, as the Respondent invites in suggesting Ms Russell could regularise her status, the Respondent has already made a deportation order that becomes effective on conclusion of these proceedings. In doing so she is not helping to bring about the thing that she says ought to happen because she deprives the Appellant of the time and means to make the necessary arrangements.

> [126] In any case, the question I must ask [sic] the hypothetical question of what happens if the Appellant is removed today. That would be even harsher upon the British children because no opportunity is afforded to arrange for them to join the Appellant at all. That is despite the Respondent's own position being that these children should accompany the Appellant to Jamaica.
>
> [127] The question for me is how removal today and its consequences affect the balance in proportionality terms. I am conscious that ZH (Tanzania) was decided before the hostile environment was as hostile as it is today. The consequences for British children to a parent without leave were less severe as a result. I can equally accept that there are situations where the public interest in deportation can be strong enough to make immediate removal justifiable even where children should be joining the parent overseas but cannot do so immediately. For example there may be a threat due to risk of re-offending or the past offences are of such seriousness that immediate removal is justified. This is not such a case. The Appellant does not pose an imminent threat. He works full time and he has not offended since his release from prison. Although his crimes are serious, the longest sentence was five years which placed him only one year into the realms of being a serious rather than medium offender.
>
> [128] Looking at this situation in terms of proportionality, I find these factors together to outweigh the strong public interest in the removal of the Appellant at this time, bearing in mind the nature and seriousness of his offences, and the marginally reduced public interest due to the low risk of reoffending. It is an exceptionally strong claim within ambit though not fully satisfying Exception 2 when I look at the real-world consequences for the children.
>
> [129] This is a truly exceptional case. Removal of the Appellant with [J] and [D] would be compatible with Article 8. Equally removal with Ms Campbell not being subject the hostile environment would also be compatible with Article 8. But neither of these is the hypothetical removal I am considering, because:
>
> (a) in the real world there is no evidence that those children can actually relocate to Jamaica now, and the Respondent accepts she cannot make that happen; and
>
> (b) there is no commitment or attempt to regularise the immigration status of Ms Campbell, despite the Respondent being able to make that happen.

The Appeal to the Upper Tribunal

21. The Secretary of State's initial application for permission to appeal was refused by Resident First-tier Tribunal Judge Grant Hutchison on 7 November 2022. The Secretary of State renewed her application for permission in renewed grounds which were settled by Stefan Kotas. There are four grounds.

22. By the first ground, it was submitted that the judge had misdirected himself in law by failing to have adequate regard to the strong public interest in the

appellant's deportation. By the second ground, the respondent submitted that the judge had misdirected himself in law by having regard to the children's 'second best interest'; by failing to have regard to the real consequences of exposing them to the hostile environment; and by suggesting that the respondent should have taken steps to regularise Ms Campbell's status before proceeding with the appellant's deportation.

23. By the third ground, the respondent submitted that the judge had failed to undertake a lawful and complete balancing exercise under s117C(6). By the fourth ground, the respondent submits that the judge's conclusion as to proportionality was irrational.

24. In granting permission, Judge Jackson observed that:

> The grounds are all arguable. In particular it is arguable that the Appellant's offending has been somewhat minimised when considering the public interest and that the final balancing exercise was undertaken on the basis of a concept not known in relation to the assessment of best interests of children and ignoring the fact that neither exception to deportation applied.

Submissions

25. For the Secretary of State, Ms Ahmed noted that the grounds of appeal were full and detailed and she was content to rely upon them. She noted that the burden was on the appellant to establish that the children could not relocate to Jamaica and it was found by the judge that it would not be unduly harsh for them to do so.

26. For the appellant, Mr Scott submitted that the judge had given adequate reasons and had not erred in law. He submitted that there had been a proper calibration of the public interest by the judge and that what the judge had said about not 'double counting' offences relating to drugs was correct in law. The judge's reliance on the concept of the children's 'second best interests' was unobjectionable and the analysis was rigorous. It had been open to the judge to conclude that it would be unduly harsh for the children to stay in the UK without the appellant, although he acknowledged that the judge had not specifically grappled with the availability of support from social services, given that both children are British.

27. Mr Scott submitted that there was a proper balancing exercise undertaken by the judge and that he had not reached an irrational conclusion. We asked him whether the judge had correctly understood the burden of proof in respect of the matters he had detailed at [122] and [129]. Mr Scott was not sure about that.

28. In reply, Ms Ahmed submitted that the judge had failed to undertake any lawful assessment of the public interest in deportation. She submitted that he had downplayed the seriousness of the custodial sentences. The judge had entered the territory of an impermissibly proleptic assessment, and it was impermissible for the judge to criticise the Secretary of State for not regularising Ms Campbell's status. It was not clear on what basis the judge had made the finding he did at [122] about visas for and entry to Jamaica. Ms Ahmed was not aware of any policy which dealt with a case in which the deportation of a parent or parent rendered it necessary for British children to leave the United Kingdom.

29. We reserved our decision at the end of the submissions.

Analysis

30. Despite the length of the judge's decision and the apparent care with which it was produced, we have come to the clear conclusion that it is vitiated by a number of legal errors and that it cannot stand.

31. This was, as the judge noted, a case in which both the 'stay' and the 'go' scenario were in issue. As Lord Hamblen (with whom the other Justices agreed) explained at [17] of SSHD v HA (Iraq), the 'go' scenario involves considering what would occur if the child goes to live in the country to which the person is to be deported, whereas the 'stay' scenario involves considering the child remaining in the UK without the person who is to be deported. In our judgment, the judge erred in his consideration of both of those scenarios.

32. In relation to the go scenario, the judge erred in reaching conclusions for which there was no proper foundation in the evidence. We do not understand it to have been contended by the appellant that there would be difficulties in removing the appellant or Ms Campbell to Jamaica on account of a lack of valid travel documentation. Nor do we understand it to have been contended by the appellant that J and D would not, as British citizens, be entitled to enter Jamaica and to remain there with the appellant. There is no reference to any such submission in the appellant's response to the judge's directions, which the judge reproduced in full at [92] of his decision. Nor is there any reference to it in the skeleton argument which was settled by the appellant's solicitors on 19 May 2022. It seems that the point was taken by the judge of his own volition. The difficulty with his having done so, in our judgment, is that it was for the appellant to establish any such difficulties and the absence of evidence on the point was a difficulty for the appellant, and not the respondent. The judge seemingly proceeded, however, on the basis that the respondent had failed to show that Ms Campbell could be removed or that the children would be admitted to Jamaica.

33. In the absence of evidence on the point, and particularly where there was no positive submission put forward by the appellant on this point, we do not consider that there was any proper basis upon which the judge was entitled to conclude that Ms Campbell could not be removed, or more importantly, that the children would not be admitted to Jamaica. Certainly as far as the former point is concerned, it is well established that removal to Jamaica may be facilitated on an Emergency Travel Document. The ability to do so has been part of the factual matrix described in any number of cases: R (RS) v SSHD [2021] EWHC 54 (Admin) and R (Antonio) v SSHD [2014] EWHC 3894 (Admin), for example. We see no reason to conclude that Ms Campbell's removal (or that of the appellant) would be frustrated or even delayed by the absence of a valid national passport. Nor do we understand the basis on which the judge concluded that J and D would not be admitted to Jamaica and entitled to remain there as the children of two Jamaican nationals. If the judge was to reach that conclusion, the respondent was entitled to understand the evidential basis upon which he did so, whereas the decision is silent in that respect.

34. As for the stay scenario, the Secretary of State's grounds make two valid submissions. Firstly, the judge was evidently concerned about the children's exposure to the 'hostile environment' in the event that they were left with Ms

Campbell as a result of the appellant's deportation. He was, we think, entitled to assume on the evidence before him that she was not entitled to work and that the work which she was said to be undertaking was unlawful. We take judicial notice of the other facets of the hostile environment. Ms Campbell would not be allowed to buy or rent property, to have a bank account, or to draw on public funds. As the Secretary of State suggests in her grounds, however, the judge left wholly out of account of this aspect of his decision the fact that the children are British citizens who are entitled to support from the state. The first of the two safety nets considered at [109] of *Hysaj* [2020] UKUT 128 (IAC) is just as available to these children as it was in the rather different context under consideration in that case. Whilst the judge was correct that there would be some upheaval for the children if their mother replaced their father as their primary carer, his reliance on the hostile environment was incomplete, in that it left that safety net out of account. We note that Mr Scott frankly accepted in his submissions that he had no answer to this particular complaint.

35. Secondly, we consider that the judge erred in all that he said about the 'failure' of the Secretary of State to regularise Ms Campbell's position. There was no onus on her to do so. Ms Campbell has no right to remain in the UK. Her appeal against the refusal of her human rights claim was dismissed by the Upper Tribunal in 2014 and there is no suggestion of any further proceedings. The expectation is that she should leave the UK. The obvious course in this case is, as contended by the Secretary of State before the FtT, that she and the appellant agree to take the children to Jamaica. They can surrender to the Secretary of State for removal and there is no reason to think that they could not be removed together. The children obviously cannot be removed because they are British, but their parents may decide jointly that they should travel to Jamaica with them so as to ensure that they remain in contact. The judge did not consider that it would be unduly harsh for these British citizen children to do so and there was no proper basis, in our judgment, for concluding that to do so would give rise (individually or in combination with other factors) to very compelling circumstances.

36. The judge erred, therefore, in considering the situation of the children whether they stayed in the UK or were taken to Jamaica by the appellant. The judge's errors in relation to those matters corrupted his analysis of the matters which militated against the public interest in the appellant's deportation.

37. There are also manifest difficulties with the judge's consideration of matters which appear on the respondent's side of the 'balance sheet' analysis in this case.

38. We consider the judge to have erred in assessing the nature and seriousness of the appellant's offending. His analysis of the seriousness of the offending, the judge's approach at [114] and [115] was overly numerical. Whilst he was correct to focus on the view taken by the sentencing judge as to the length of the appropriate sentence, he attached no proper significance to the fact that the appellant's longest sentence placed him comfortably within the 'serious offender' bracket. As Lord Reed explained at [46] of Hesham Ali v SSHD [2016] UKSC 60; [2016] 1 WLR 4799, considerable weight was to be given to the Secretary of State's policy (now reflected in primary legislation) that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing Article 8 ECHR considerations. We do not see that principle squarely reflected in

the judges' assessment of the offending or, for that matter, in his wider balancing exercise. The effect is, as Judge Jackson suggested when granting permission, that the judge has somewhat minimised the appellant's offending in his analysis under s117C(6).

39. We do not consider that the judge's analysis of the nature of the appellant's offending was in accordance with the authorities he cited. He decided at [117] to give no 'extra weight' to the nature of the offences because he was concerned about the risk of 'double counting'. To do so was to overlook what was said by the ECtHR in *Unuane v The United Kingdom* (2021) 72 EHRR 24, however. At [87] of its decision in that case, the ECtHR recalled that it had 'consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum'. The appellant's most serious offences were of drug supply and violence and those were factors which were to be weighed in the balance. To do so would not involve 'double-counting'; it would be to recognise the special significance attached to such offending in long-established Strasbourg jurisprudence.

40. In summary, therefore, we find that the judge erred in fact and law. His assessment of the 'go scenario' was vitiated by his unfounded concern that the respondent would encounter difficulty in removing the appellant or Ms Campbell; that concern was not raised by the appellant and was in any event without any proper foundation in the evidence. His assessment of the 'stay scenario' was vitiated by his failure to take account of the support which is available to British children who are exposed to the 'hostile environment' as a result of their parent's lack of immigration status. Nor was it incumbent on the respondent to regularise Ms Campbell's status before proceeding with the appellant's deportation. The judge also erred in his assessment of the public interest in the appellant's deportation, in failing to assess the nature and seriousness of the appellant's offending in accordance with ECtHR authority and the statutory designation of the appellant as a serious offender. We set the judge's decision on Article 8 ECHR aside as a result of those errors.

41. There is no error in the judge's assessment of the appellant's claim for international protection. Nor is there any error in his conclusion that the appellant could not (were it available to him) meet the first statutory exception to deportation. We preserve those findings accordingly. The remainder of the decision on the appeal will be remade in the Upper Tribunal on a date to be notified.

42. To that end, we direct that the appellant's solicitors must file and serve a consolidated electronic bundle which complies with the Presidential Guidance on such bundles. That bundle is to be filed and served no later than seven days in advance of the hearing.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and is set aside to the extent described above. The decision on the appeal will be remade in the Upper Tribunal on a date to be notified.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 January 2024