Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22254/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 October 2017	**On 23 October 2017**

Before

The Hon. MRS JUSTICE LANG
UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUNIOR FOLKES

Respondent

Representation:
For the Appellant: Mr P. Duffy, Home Office Presenting Officer.
For the Respondent: Ms K. Joshi, Legal Representative, instructed by A. Bajwa & Co. Solicitors.

DETERMINATION AND REASONS

1. The Appellant (referred to as "the SSHD") appeals against the decision of the First-tier Tribunal (FTT), promulgated on 26 June 2017, in which FTT Judge Frankish allowed the appeal by the Respondent (Mr Folkes) under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") against the SSHD's

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decision to deport him and to refuse his human rights claim, dated 9 September 2016. FTT Judge Robertson granted the SSHD permission to appeal on 19 July 2017.

2. Mr Folkes is a Jamaican national who has been living in the UK since 2001. He has an adult daughter in Jamaica and he has fathered four children in the UK from three different relationships. On 6 July 2007, Mr Folkes was convicted of rape, and sentenced to 6 years imprisonment. This sentence triggered the automatic deportation provisions in the UK Borders Act 2007 ("UKBA 2007").

3. The main issues in the appeal were:

    i. the approach which the Tribunal should adopt to the SSHD's fresh decision to deport Mr Folkes given that, at an earlier appeal in 2010, the Upper Tribunal had held that the exception under section 33(2)(a) UKBA 2007 applied and it would be in breach of article 8 of the European Convention of Human Rights ("ECHR") to deport him; and

    ii. whether the FTT failed to apply correctly the test of "very compelling circumstances" which outweighed the public interest in deportation, as set out in paragraph 398(a) of the Immigration Rules and section 117C(6) NIAA 2002, when assessing Mr Folkes' changed family circumstances.

Facts

4. Mr Folkes, whose date of birth is 12 November 1975, is now aged 41. He was born and brought up in Jamaica, by his mother, who was a single parent. They were poor, and so he had to work part-time from a young age, and he had a limited education. He left home at age 16, and later worked as a miner. At the date of his application, his mother was still alive and living in Jamaica. He has a brother there too. He also fathered a daughter in Jamaica, and though he placed no weight on that relationship, the FTT found that "he clearly has a degree of relationship with his daughter in Jamaica as he knew that she is 24 and self-sufficient".

5. On 9 December 2001, he entered the UK as a visitor on a 6 month visa, when he was aged 26. He applied for leave to remain as a student on 20 May 2002, but the application was rejected on 13 June 2002, and he remained in the UK without leave.

6. Between about January 2002 and November 2002, he was in a relationship with [TB]. Their son, [TF], was born on [ ] 2003, and is now aged 14.

7. In July 2002, he met [LW], a British citizen. They became engaged in April 2003, and they married on 15 November 2003. [LW] had a daughter, [D], from a previous relationship who was born in September 1993, who became Mr Folkes' step-daughter. She is now aged 24.

8. On 11 March 2004, he applied for leave to remain as the spouse of a settled person. The application was refused, but on 16 November 2005 he was granted three years discretionary leave to remain, until 16 November 2008.

9. On [ ] 2005, [LW] gave birth to their son, [RF], who is now aged 12. He is a British citizen.

10. In August 2006, Mr Folkes had an affair with a woman which lasted for 4 to 5 weeks.

11. On 27 October 2006 he was arrested, after raping a woman whom he was visiting at her home. On 6 July 2007, he was convicted of rape at Harrow Crown Court and sentenced to 6 years imprisonment. His custodial term ended on 24 May 2010, but he was held in immigration detention until 10 October 2010.

12. On 10 May 2010, the SSHD notified him that automatic deportation would take effect, as the statutory exceptions did not apply to his case. A deportation order was served upon him.

13. On 11 May 2010, he appealed to the FTT. His appeal was dismissed on 10 June 2010, on the basis that the interference with family life caused by deportation would not be disproportionate to the legitimate aim of preventing disorder and crime.

14. On 2 July 2010, he was granted permission to appeal to the Upper Tribunal. In a decision promulgated on 24 September 2010, the Upper Tribunal allowed his appeal, holding that it would be disproportionate to deport him on the basis of the article 8 rights of his family, namely, his wife [LW], his stepdaughter [D], his son [R], and his son [T].

15. After his successful appeal, he was released from immigration detention, and went to live in a hostel. He did not return to live with his wife [LW]. He left her after discovering that she had been in a relationship with another man whilst he was in prison. He has had intermittent contact with her and the children since then. At one stage he maintained fortnightly contact with the children but by the date of the FTT hearing, he had not seen the children for 3½ months, because of a breakdown in his relationship with [LW], and he thought he would need to apply for a court order in order to see them. By the date of the appeal before us, some 4 months later, the position had not changed. He had not had contact with the children for many months and believed he would not be able to resume contact without a court order. At the date of the hearing before us, he had not applied for a court order.

16. In about March 2011, Mr Folkes began a relationship with [DF], whom he knew from Jamaica. She is a Jamaican national with indefinite leave to remain in the UK. On [ ] 2012, [DF] gave birth to their son, [L], who is now aged 5. He is a British citizen. [DF] has two children, aged 13 and 9, whose father sees them "when he feels like it" according to her evidence to the FTT. At the hearing before us, at which [DF] was

present, it was confirmed that the two older children had no regular contact with their father.

17. On [ ] 2012, his wife [LW] gave birth to their daughter [R], who is now aged 4. She is a British citizen. Despite the birth of their child, Mr Folkes insisted at the FTT hearing, and at the hearing before us, that his marriage had broken down in 2010.

18. Following the decision of the Upper Tribunal, the SSHD granted Mr Folkes discretionary leave to remain but only for periods of 6 months at a time. He was granted leave on 22 October 2010; 15 July 2011 and 25 November 2013. On 9 May 2014, Mr Folkes submitted an application for a further period of leave, without disclosing the changes in his family circumstances.

19. On 15 June 2015, he was served with a notice of intention to deport, based upon the conviction in July 2007. His solicitors submitted representations on 10 July 2015 setting out reasons why he should not be deported, relying upon the successful appeal to the Upper Tribunal in September 2010.

20. On 9 September 2016, the SSHD sent a decision letter refusing his human rights claim, on the grounds that the public interest in deporting a foreign criminal outweighed his right to private and family life, and it would not be unduly harsh for his wife [LW] and their children [R] and [R] to relocate to Jamaica with him, if they chose to do so. Mr Folkes would be able to maintain contact with [T] via Skype, email etc., and [T] could visit him. As to his private life, the SSHD noted that he was a self-employed builder who would be able to utilise his skills to obtain work in Jamaica, and that he would be able to maintain contact with friends in the UK via modern means of communication. The application for a further period of leave to remain, submitted on 9 May 2014, was refused in this letter.

21. The SSHD's notice of intention to deport and the decision letter of 9 September 2016 were based upon the false assumption that Mr Folkes' family circumstances had not changed, and his marriage with [LW] was subsisting. The SSHD was unaware of his relationship with [DF] and the birth of their son [L]. Mr Folkes' solicitors did not refer to the change of circumstances in their written representations to the SSHD; we do not know whether they were aware of them.

Legal framework

(1) Automatic deportation under the UKBA 2007

22. Under section 32(5) UKBA 2007, the SSHD must automatically deport, as a "foreign criminal", a person who is not a British citizen, following conviction for a criminal offence for which he has been sentenced to 12 months imprisonment or more, unless he falls within the exceptions in section 33.

23. By section 33(2)(a), automatic deportation does not apply where removal under a deportation order would breach a person's Convention rights.

24. Section 32(4) UKBA 2007 provides that, for the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good. By section 33(7), section 32(4) continues to apply, despite the application of section 33 exceptions.

(2) Article 8 ECHR

25. By virtue of section 6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

26. Mr Folkes claimed that his removal would be in breach of the "right to respect for private and family life" under article 8(1) ECHR. Article 8(2) provides:

> "There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(3) Best interests of children

27. By virtue of section 55 of the Borders, Citizenship and Immigration Act 2009, in making decisions on deportation, the SSHD must have regard to the need to safeguard and promote the welfare of children who are in the UK.

28. The House of Lords, in ZH (Tanzania) v Home Secretary [2011] 2 AC 166, held that, in the application of article 8(2), the children's best interests should be treated as "a primary consideration", to give effect to art. 3.1 of the UN Convention on the Rights of the Child. Nationality and the rights of citizenship are of particular importance in assessing the best interests of any child. Thus, the decision-maker must ask whether it is reasonable to expect the child to live in another country, and to be deprived of the opportunity to exercise the rights of a British citizen. However, even if it is found to be in the best interests of the child to remain in the UK, that factor can be outweighed by the strength of "countervailing considerations" in favour of removal (per Lady Hale at [29] – [33]).

29. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, Lord Hodge, delivering the judgment of the Court, summarised the principles to be applied, at [10]:

> "(1) The best interests of a child are an integral part of the

proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

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

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

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

(4) Sections 117A – D NIAA 2002

30. Since 28 July 2014, sections 117A-D NIAA 2002 have set out public interest considerations which a court or tribunal must take into account in an appeal based upon article 8:

"**117A Application of this Part**

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

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

(b) as a result would be unlawful under section 6 of the

Human Rights Act 1998.

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

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

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

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

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

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

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest

requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"*Article 8*" means Article 8 of the European Convention on Human Rights;

"*qualifying child*" means a person who is under the age of 18 and who-

(a) is a British citizen, or

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

"*qualifying partner*" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

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

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) ……
(4) ……
(5) …..."

(5) Immigration Rules

31. The considerations set out in section 117C NIAA 2002 are reflected in the Immigration Rules (last amended 10 August 2017) which provide, so far as is material:

> "**Deportation and Article 8**
>
> A398. These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) ….
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other

factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave.

399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave."

(6) Application of the legislation and the Immigration Rules

32. In Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60, the Supreme Court held that the Immigration Rules are not a complete code which exhaustively governs the decision-making process; to that extent MF (Nigeria) [2013] EWCA Civ 1192 (per Lord Dyson at [44]) was mistaken or misunderstood. They were a relevant and important consideration in the tribunal's article 8 proportionality assessment (per Lord Reed at [53]). However, Hesham Ali's case pre-dated the introduction of sections 117A-D NIAA 2002, and so these provisions were not considered by the Supreme Court.

33. In NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239, the Court of Appeal distinguished between the status and effect of the Immigration Rules and the legislative provisions in sections 117A-D NIAA 2002. Sir Stephen Richards said, at [14], that sections 117A-D NIAA 2002 were intended to provide for a structured approach to the application of article 8 which would produce in all cases a final result which was compatible with article 8, if properly applied. This was also the agreed starting point before the Court of Appeal in Ruppiah v Secretary of State for the Home Department [2016] EWCA Civ 803 (per Sales LJ at [45]).

34. The approach which tribunals should now adopt was helpfully described by Hickinbottom LJ giving the judgment of the Court of Appeal in Secretary of State for the Home Department v KE (Nigeria) [2017] EWCA Civ 1382, at [30] to [36]:

> "30. The statutory provisions in sections 117A-117D are law (cf the Immigration Rules: see Ali at [17]). However, both section 117C and the relevant Immigration Rules set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8(2) where there is a public interest in deporting a foreign criminal but countervailing article 8 factors. The force of the assessment in section 117C is, of course, the greater because it directly reflects the will of Parliament. The statutory provisions thus provide a "particularly strong statement of public policy" (NA (Pakistan) at [22]), such that "great weight" should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, "are likely to be a very small minority (particular in non-settled cases)" (Ali at [38]), i.e. will be rare (NA (Pakistan) at [33]).
>
> 31. But the required, heavily structured analysis does not eradicate all judgment on the part of the decision-maker and, in its turn, the court or tribunal on any challenge to that decision-maker's decision. It is well-established, and indeed self-evident, that relative human rights (such as the right to respect for family and private life under article 8) can only ultimately be considered on the facts of the particular case. The structured approach towards the article 8(2) proportionality balancing exercise required by the 2002 Act and the Immigration Rules does not determine the outcome of the assessment in an individual case.
>
> 32. Whether an exception in paragraph 399 or 399A applies is dependent upon questions that require case-specific evaluation, such as whether in all of the circumstances it would not be reasonable for a child to leave the United Kingdom or whether in all of the circumstances there are insurmountable obstacles to

family life outside the United Kingdom.

33. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, the decision-maker, court or tribunal entrusted with the task must still consider and assess whether there are "very compelling circumstances" that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not — indeed, cannot — be taken into account in any general assessment. As Lord Reed, giving the majority judgment, said in Ali :

> "49. … It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context, and, where a court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate. In that way, relevant differences between, for example, cases where lawfully settled migrants are facing deportation or expulsion, and cases where an alien is seeking admission to a host country, can be taken into account.
>
> 50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders…, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest on deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed — very compelling, as it was put in [MF (Nigeria)] — will succeed."

See also [53] to similar effect.

34. Therefore, as Lord Reed emphasises, whatever the seriousness of the offences or length of sentence, the ultimate question is the same — would deportation be in breach of article 8 — but the sentence imposed affects the approach to the exercise of assessing proportionality for article 8(2) purposes. If it is at least four years' imprisonment, any decision-maker must attach very considerable weight to the general assessment of the public interest in deporting foreign criminals, now directly adopted by Parliament in statute, under which such a sentence represents a level of offending in respect of which the public interest almost always outweighs countervailing considerations of private or family life, only being outweighed by countervailing factors which are very compelling (see Ali at [46]). Where there is a challenge to a decision involving the article 8(2) balancing exercise by a decision-maker on behalf of the Secretary of State in an individual case, as I have already described, the court or tribunal must give that general assessment substantial weight, because it is endorsed by Parliament; and it must also take into account — but no more than take into account — the application of that general assessment to the facts of the specific case by the original decision-maker (OH (Serbia) at [15(d)]). As independent judicial bodies, on hearing a challenge to an executive decision in an individual case, it is the duty of the court or tribunal to make its own findings of the relevant facts and then make its own assessment of the proportionality of the proposed deportation (Ali at [46]).

35. Since Ali, the 2014 Act has intervened, encapsulating the relevant Government policy in statute rather than merely Immigration Rules. However, in my view, the principles and approach expounded by Lord Reed still apply; although, in considering the appropriate weight to be given the assessment of the strength of the general public interest in the deportation of foreign offenders, any decision-maker, court or tribunal conducting the article 8(2) exercise has to bear in mind that that is now incorporated into statute, and so, even more starkly, reflects the will of Parliament.

36. In NA (Pakistan) at [37], Jackson LJ considered the correct approach to a case in which section 117C(6) ("very compelling circumstances") applies:

> "… [I]t will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so

> described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within the Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

I respectfully commend such an approach."

35. We have also borne in mind the guidance given by Jackson LJ in NA (Pakistan) [2016] EWCA Civ 662, at [38] – [39]:

> "38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *Űner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria*? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8.
>
> 39. Even then it must be borne in mind that assessments under Article 8 may not lead to identical results in every ECHR contracting state. To the degree allowed under the margin of

> appreciation and bearing in mind that the ECHR is intended to reflect a fair balance between individual rights and the interests of the general community, an individual state is entitled to assess the public interest which may be in issue when it comes to deportation of foreign criminals and to decide what weight to attach to it in the particular circumstances of its society. Different states may make different assessments of what weight should be attached to the public interest in deportation of foreign offenders. In England and Wales, the weight to be attached to the public interest in deportation of foreign offenders has been underlined by successive specific legislative interventions: first by enactment of the 2007 Act, then by promulgation of the code in the 2012 rules and now by the introduction of further primary legislation in the form of Part 5A of the 2002 Act and the new code in the 2014 rules. Statute requires that in carrying out Article 8 assessments in relation to foreign criminals the decision-maker must recognise that the deportation of foreign criminals is "conducive to the public good" (per section 32(4) of the 2007 Act) and "in the public interest" (per section 117C(1) of the 2014 Act)."

36. Thus, the case law of the ECtHR remains relevant to the issues to be considered by the tribunal under section 117C NIAA 2002 and the Immigration Rules. In Hesham Ali, Lord Reed reviewed the case law of the ECtHR on whether the deportation of a foreign offender would be incompatible with article 8 rights:

> "25. The question whether the deportation of a foreign offender would be incompatible with article 8 has been considered by the European court in numerous judgments. In cases concerning "settled migrants", that is to say persons who have been granted a right of residence in the host country, the court has accepted that the withdrawal of that right may constitute an interference with the right to respect for private and/or family life within the meaning of article 8. If there is an interference, it must be justified under article 8(2) as being "in accordance with the law", as pursuing one or more of the legitimate aims set out in that paragraph, and as being "necessary in a democratic society", that is to say justified by a pressing social need and proportionate to the legitimate aim pursued. The court has treated the legitimate aim pursued by deportation, on the basis of a person's conviction of a criminal offence, as the "prevention of disorder or crime" (although there are also a small number of cases in which public safety has been accepted to be an additional aim): see, for example, *AA v United Kingdom* [2012] Imm AR 107, paras 53-54. In practice, the critical issue is generally whether the "necessity" test is met. In that regard, the court has often said that the task of the court or tribunal applying article 8(2) consists in ascertaining whether the

decision struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

26. In a well-known series of judgments the court has set out the guiding principles which it applies when assessing the likelihood that the deportation of a settled migrant would interfere with family life and, if so, its proportionality to the legitimate aim pursued. In *Boultif v Switzerland* (2001) 33 EHRR 50, para 48, the court said that it would consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. Two further factors were mentioned in *Üner v Netherlands* (2006) 45 EHRR 14, para 58: the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of the social, cultural and family ties with the host country and with the country of destination. In *Maslov v Austria* [2009] INLR 47, paras 72-75, the court added that the age of the person concerned can play a role when applying some of these criteria. For instance, when assessing the nature and seriousness of the offences, it has to be taken into account whether the person committed them as a juvenile or as an adult. Equally, when assessing the length of the person's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive.

…

> 29 Where children are involved, their best interests are said by the court to be of paramount importance (by which it does not mean to say that they are determinative: see *Jeunesse*, para 109). Whilst alone they cannot be decisive, they must be afforded significant weight. Accordingly, national decision-making bodies should in principle advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (*Jeunesse*, paras 108-109)."

Issue 1: the effect of the Upper Tribunal's decision in 2010

37. Mr Folkes submitted that the SSHD was not entitled to make a fresh deportation order because she was bound by the determination of the Upper Tribunal in 2010 which held that deportation would breach the article 8 rights of his family members. He submitted that the issues were settled by the previous determination: see Devaseelan v. Secretary of State for the Home Department [2002] UKAIT 00702. The doctrine of *res judicata* applied.

38. The SSHD submitted that she was entitled to make a fresh decision because the law had changed since the Upper Tribunal made its determination in 2010. Further or in the alternative, Mr Folkes' personal circumstances had changed and so, applying the principles established in Devaseelan, the previous determination was merely the starting point, and the application of article 8 had to be assessed on the basis of the changed circumstances.

39. In our judgment, the FTT was correct to conclude that the SSHD was not entitled to disregard the 2010 decision and deport Mr Folkes merely because there had been a change in the law since 2010, but she was entitled to re-consider his case in the light of the change in his family circumstances.

40. We agree with the SSHD's submission that the principle of *res judicata* does not mean that a successful appeal against deportation renders an applicant immune from deportation at a later date. He remains a "foreign criminal" for the purposes of the UKBA 2007, as defined in section 32(1). Section 32(4) provides that, for the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good. By section 33(7), section 32(4) continues to apply, despite the application of section 33 exceptions.

41. The same principle underlies paragraph 399C of the Immigration Rules which provides that where a foreign criminal who has previously been granted a period of limited leave applies for further limited leave or indefinite leave to remain his

deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.

42. In Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60, Lord Reed (giving a majority judgment) explained at [12], that the likely explanation for the deportation of a foreign criminal continuing to be conducive to the public good, even where it has been held that removal would breach his Convention rights, was that the circumstances which may render deportation incompatible with the Convention may be temporary. He said:

> "For example, the risk of a breach of article 3 in the country to which the person would be deported may disappear …. Section 32(4) keeps open the possibility of automatic deportation under section 32(5) in the event of a material change of circumstances." (our emphasis)

43. In our view, such a material change of circumstances could also include a change in the family circumstances which previously led to a grant of leave under article 8.

44. The Upper Tribunal in 2010 made its determination pursuant to the UKBA 2007 (which provided in section 32(4) that deportation of a foreign criminal was conductive to the public good) and article 8. These provisions are still applicable. However, in 2010 the Upper Tribunal made its article 8 assessment based upon the case law, whereas now there is a structured decision-making framework, in which both Parliament and the SSHD have set out policy considerations which are to be applied to the article 8 assessment. There has not been any statement, whether in law or policy, to suggest that decisions made prior to these changes ought to be re-considered under the new framework, regardless of any material change of circumstances. In our view, this would be a significant departure from usual practice which we would expect to be clearly signalled if it was intended.

45. We do not consider that the change which has taken place – the codification of article 8 policy considerations - is sufficient to justify a departure from the well-established principles in Devaseelan which were approved by the Court of Appeal in Djebbar v Secretary of State for the Home Department [2004] EWCA Civ 804. These principles were affirmed by the Upper Tribunal in AS & AA (Effect of previous linked determination) Somalia [2006] UKAIT 00052, and approved by the Court of Appeal at [2007] EWCA Civ 1040. Applying those principles to this case, the 2010 determination stood unchallenged, as it was not successfully appealed by the SSHD (the representatives could not tell us whether the SSHD had sought to appeal or not). As an assessment of the matters that were before the Upper Tribunal in 2010, it should be regarded as unquestioned. The FTT was not hearing an appeal against the 2010 decision. The 2010 determination was the appropriate starting point. Thereafter, the FTT was entitled to take into account events which had occurred since the date of the 2010 determination. Because of the passing of time, and changes in circumstances, the outcome could legitimately be different.

Issue 2: whether the FTT failed to apply correctly the test of "very compelling circumstances" which outweighed the public interest in deportation

46. After examining the evidence, the FTT concluded that, although Mr Folkes had developed his private and family life whilst his position was arguably precarious, it was reasonable for him to think he was "home and dry after his successful determination" in 2010 (at [29]). The FTT Judge said:

> "29. … I find that the facts, subject to the shifting array of personnel, are essentially the same as in the successful determination. The appellant has avoided any further crime and gives some evidence of being a hard worker. Seven years on, with no real change to the legal (as opposed to actual) aspects of the appellant's personal circumstances (i.e. subsisting relationship, child and contact arising from previous relationships), the respondent seeks to pull the rug from under his feet by ceasing his sequential leaves to remain. That she is entitled to do under the law but subject to article 8 rights. Nonetheless, the last seven years since the successful determination demonstrate additional social and cultural integration. Above all, however, this is a case combining S117C very compelling circumstances and an unduly harsh effect on the partner and children. The appellant plays a role in the lives of three children by previous relationships. He plays a big role in the life of his child by his current relationship. It is a not inconsiderable factor in the equation that he has been a leading a lawful life as a family man during the seven years since the successful determination. To pull that particular rug from his feet by reason of changes in the law amounts, I conclude, to circumstances which invoke the saving provisions of very compelling circumstances and unduly harsh effect of partner and children under S117C."

47. The SSHD submitted that the FTT failed to apply the requisite test to the facts which he found, adopting too low a threshold, and failing to identify very compelling circumstances. The FTT's assessment that his circumstances were essentially the same as before, for the purposes of article 8, albeit "with a change of personnel", was "overly simplistic", as the changes were significant. Although the FTT recognised that the SSHD was entitled to re-consider the article 8 claim, it erred in characterising the SSHD's decision to refuse further leave as unfairly "moving the goalposts"(at [10] and [13]) and "pulling the rug out from under his feet" (at [29]).

48. Mr Folkes submitted that the FTT correctly applied the requisite test and was right to find that his deportation would have an unduly harsh effect on his children and current partner [DF], and that there were very compelling circumstances over and above this which outweighed the public interest in deportation. Ten years had

elapsed since his conviction in May 2007 during which time he had not re-offended and he had re-integrated into society. His private and family life in the UK had deepened, as he and his partners expected that he would be allowed to remain in the UK, following his successful appeal in 2010, and two further grants of discretionary leave to remain.

49. The Upper Tribunal in 2010 decided that it would be disproportionate to deport the Appellant on the basis of the article 8 rights of his family members – his wife [LW], his step-daughter [D], and his sons [R] and [T].

50. However, the Upper Tribunal in 2010 proceeded on the evidence before them that, upon release from prison/immigration detention, Mr Folkes would resume living as a family with [LW], [D], and [R]. In fact, as the FTT Judge found at [15], the Upper Tribunal was "hoodwinked in allowing the appeal on the basis of the interests of the Appellant's wife and children. What they were not told was that the marriage was, in practice, in severe jeopardy by the time they heard evidence from the parties. It came to an end in actuality and physical separation immediately afterwards".

51. We heard that, after his release from immigration detention in October 2010, Mr Folkes never returned to live at the family home. In 2011 he began a new relationship with [DF]. Although he initially maintained intermittent contact with [LW], even to the extent of fathering another child by her in 2012, by the date of the FTT hearing he and [LW] had fallen out, and she would no longer allow him to see their children. The FTT accepted his evidence that, although he had not seen the children for about 3½ months, he wished to restore contact and could do so if he made the effort, including taking court proceedings. This was over-optimistic since, by the date of the hearing before us, he had not repaired the rift with [LW], had not applied to a court for contact, and had not seen the children for about 7½ months. Thus, he no longer had any relationship with [LW], and his relationship with their children was fragile.

52. In 2010, the Upper Tribunal placed weight upon the position of [D], his step-daughter, who was then aged 17 and a child of the family (at [40] and [43]). She was aged 9 when Mr Folkes met [LW], he had been a part of her life since then, and had been a good step-father to her. If her mother had to move to Jamaica with Mr Folkes and [R], she would be placed in a difficult situation. Her life was in the UK, where she enjoyed contact with her natural father. But she was still dependent upon her mother and she was part of the family unit. By the time of the FTT hearing in 2017, [D] was a young adult, aged 24, and was no longer a consideration in the article 8 assessment.

53. In deciding that there would be a disproportionate effect on [LW]'s article 8 rights, the Upper Tribunal took into account that she was born and brought up in the UK and she remained close to her family and foster parents, whom she visited regularly. She had only been once to Jamaica for a two week holiday when she found that Mr Folkes' mother lived in a shanty house. She told the tribunal that she could not settle

in Jamaica. She had supported the family whilst Mr Folkes was in prison and continued to work.

54. In our view, the FTT erred in equating [DF]'s position with that of [LW], as they were quite different. Unlike [LW] who had no ties with Jamaica, [DF] was a Jamaican national, who came from the same area as Mr Folkes. Whereas [LW] gave evidence that she would not move to Jamaica, [DF] gave evidence to the FTT that if Mr Folkes was deported to Jamaica, she and her children would go with him. We consider that this was a crucial distinction between [DF] and [LW].

55. In our judgment, the FTT identified the correct legal test, but failed to apply it to the facts of this case. We agree with the SSHD that the FTT erred in treating the current circumstances as essentially the same as before. At [18], the FTT Judge said "the facts in the first determination have been reconstituted all over again with a change of personnel: [DP] as the current baby mother in a sequence of four: one in Jamaica, [TB], [LW] and [DP]". However, the changes in Mr Folkes' private and family life were significant, and the article 8 considerations needed to be re-assessed. In view of these changes, it was inapt to characterise the SSHD's decision as "pulling the rug from under his feet", and to treat that as a factor weighing against deportation. Moreover, Mr Folkes' position remained precarious, as he was only given periods of 6 months leave. In our view, the FTT's erroneous approach infected the entire decision-making process, and called into question whether the "very compelling circumstances" test had been applied with sufficient rigour.

56. In view of the FTT's failure to apply the correct legal test to the evidence, we set the decision aside and re-make it.

The article 8 assessment

57. It was common ground that Mr Folkes was a foreign criminal who had been sentenced to a period of imprisonment in excess of 4 years, and therefore he fell within section 117C(6) NIAA 2002 and paragraph 398(a) of the Immigration Rules. The public interest in deportation, for the legitimate aim under article 8 ECHR of preventing disorder or crime, would only be outweighed by other factors if there were very compelling circumstances over and above those described in sub-sections 117C(4) or (5) NIAA 2002. It was agreed that Mr Folkes' 4 children and 2 step-children were qualifying children for the purposes of section 117D NIAA 2002 and [DF] was a qualifying partner.

58. Mr Folkes relied upon the case of MN-T (Colombia) v Secretary of State for the Home Department [2013] EWCA Civ 893 in support of the proposition that the strengthening of family and private life during a period of delay in effecting removal ought to be taken into account in the evaluative exercise under article 8. In EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, [2009] 1 AC 1159, Lord Bingham said, at [14] – [16], that delay in the decision making process could be relevant to an article 8 claim if, for example, it has resulted in the applicant

developing closer personal and social ties and forming relationships in the expectation that he is not going to be removed. In both those cases it was alleged that the SSHD had delayed either in implementing deportation or in making a decision, neither of which applies here. However, we accept that, insofar as Mr Folkes' private and family life has strengthened during the time he has spent in the UK since 2010, this is a factor which should be taken into account.

(1) Criminality and rehabilitation

59. Rape is a very serious crime and there is a strong public interest in deporting a person convicted of such a serious offence. Mr Folkes pleaded not guilty but he was convicted after a trial. The sentencing judge increased the minimum 5 year sentence due to the aggravating factors, namely, that it occurred in the victim's home late at night; her young son was in the room next door; after she thought he had left the flat, he returned and continued to frighten her. The Upper Tribunal recorded that he was not assessed as "dangerous" for the purpose of the Criminal Justice Act 2003, and concluded that he did not present a danger to the public. He did not complete the Sex Offenders Treatment Programme in prison because he denied his guilt, but, according to the Upper Tribunal, he undertook to complete it in the community as a condition of his licence. The Upper Tribunal found that Mr Folkes had addressed his behaviour and acknowledged the seriousness of his offence.

60. In assessing his criminality, and the risk of re-offending, it is an important point in his favour that he has not been convicted of any other offences, before or since the offence of rape. Ten years have now elapsed since he was convicted, and he has been in the community for 7 years, without incident.

61. Mr Folkes submitted witness statements from a range of individuals who praised his integrity, hard work, community activities and commitment to friends and family.

(2) Mr Folkes'partner, [DF]

62. Mr Folkes has been in a relationship with [DF] since 2011, and they are now living together. [DF] is a Jamaican national with indefinite leave to remain in the UK. Mr Folkes and [DF] knew one another in Jamaica, as they both came from the same area. [DF] was working for Freezone where Mr Folkes' brother was the manager, and where Mr Folkes also worked for a time. [DF] gave evidence to the FTT that if Mr Folkes was deported to Jamaica, she and her children would go with him. The FTT discounted this evidence as "unrealistic" at [29], for reasons relating to her children, which we address below when considering the children's best interests. As far as [DF] alone is concerned, we consider that she could reasonably return to live in Jamaica with Mr Folkes, if she wished to do so. If she chose not to do so, she could visit him there and keep in contact via modern means of communication.

(3) Best interests of the children

63. We have set out above the principles to be applied when assessing the best interests of children. The Upper Tribunal in Azimi-Moayed and Others [2013] UKUT 00197 helpfully summarised the principles which have emerged from the case law of the Upper Tribunal to assist in determining appeals where children are affected:

> "(1) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependant children who form part of their household unless there are reasons to the contrary.
>
> (2) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> (3) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> (4) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
>
> …"

64. The witness statements submitted by Mr Folkes praised him as a good father to his children. The FTT said that he had been described as a model father (at [20]).

65. [T] is now aged 14. He is a British citizen and lives with his mother [TB]. Mr Folkes abandoned [TB] when she was pregnant, but he has maintained contact with his son. The Upper Tribunal found in 2010 that Mr Folkes saw [T] weekly, and that he visited Mr Folkes and his wife [LW] in their home, until Mr Folkes went to prison. Mr Folkes kept in touch with him from prison by telephone and by sending him cards. The Upper Tribunal concluded that deportation was not in [T]'s best interests, because contact would be limited to correspondence and occasional visits.

66. The FTT Judge recorded that Mr Folkes said little about [T] in evidence, other than that he still maintained contact with him. The FTT concluded that Mr Folkes "clearly

remains a figure of some degree of significance to [T]" (at [29]) and that if Mr Folkes was deported, the contact would cease save for correspondence. He considered that Skype would involve too much maternal cooperation to be realistic.

67. In our judgment, it is in [T]'s best interests for Mr Folkes to remain in the UK so that [T] can have regular direct contact with him. We accept that, as the SSHD said in her decision letter, [T] would be able to maintain a limited relationship with [T] from abroad via modern means of communication, such as telephone, email, Facebook, FaceTime, Skype etc. and that [T] would be able to visit him in Jamaica. We do not consider that [T] would need his mother's assistance to use Skype at age 14. However, a long distance relationship would be second-best for [T].

68. [R] is now aged 12. He is a British citizen and lives with his mother [LW]. The Upper Tribunal recorded in 2010 that he had behavioural difficulties and was seen in the Active Child Clinic, but rejected the suggestion that his condition was triggered or exacerbated by separation from his father. The Upper Tribunal accepted that Mr Folkes' wife [LW] had difficulty in providing for the family as well as caring for [R] whilst Mr Folkes was in prison. It also accepted that she did not wish to uproot her life in England to move to Jamaica, though it did not rule out the possibility that the family would move to Jamaica with Mr Folkes. The Upper Tribunal made several reference to [LW] standing by Mr Folkes and forgiving him, and plainly envisaged that they would resume family life if his appeal was allowed. It was on this basis that the Upper Tribunal concluded that deportation would be disproportionate because of the article 8 rights of [R] and the other members of the family. We now know that the marriage was already in jeopardy and that it ended shortly after the Upper Tribunal's determination.

69. Mr Folkes has not lived with [R] for some ten years, since he was sent to prison in 2007. [R] visited Mr Folkes in prison and Mr Folkes had fortnightly contact with him after his release from detention in 2010. There was evidence that he took [R] to school and to football training. However, he has not seen [R] at all for the last 7½ months, because of the breakdown in the relationship with his mother [LW]. He believes that contact will not resume unless ordered by a court, but he has not applied for a court order as yet. The FTT found that their relationship would be limited to correspondence if Mr Folkes was deported, as [LW] would not cooperate in setting up Skype calls. The FTT concluded that Mr Folkes "clearly remains a figure of some degree of significance" to [R] (at [29]) and it would be contrary to his best interests for Mr Folkes to be deported because of the limited opportunities for contact. We agree that it is in [R]'s best interests for Mr Folkes to remain in the UK so that [R] can have regular direct contact with him. We accept that they will be able to maintain limited contact through modern means of communication, but this would be inferior to face-to-face contact between father and child. That said, there is a real risk that Mr Folkes will not resume any meaningful contact with [R], even if he does remain in the UK.

70. [R] is now aged 4. She is a British citizen who lives with her mother [LW]. The relationship between her parents had ended before her birth and so she has never spent much time with Mr Folkes. As with [R], Mr Folkes had fortnightly contact with her until the breakdown in his relationship with [LW], but he has had no contact with her for the last 7½ months. He believes that contact will not resume unless ordered by a court, but he has not applied for a court order as yet. The FTT found that Mr Folkes "clearly remains a figure of some degree of significance" to [R] (at [29]) and it would be contrary to her best interests for Mr Folkes to be deported because of the reduction in contact. We agree with the FTT that it would be in [R]'s best interests to have face-to-face contact with Mr Folkes, particularly as she is so young, though even if he remains in the UK, there is a real risk that contact will not resume.

71. [L] is now aged 5. He is a British citizen who lives with his mother [DF] and Mr Folkes. The FTT found that Mr Folkes played a big part in [L]'s life (at [29]). Plainly, it is in [L]'s best interest for him to live in a family unit with both parents, if possible. If Mr Folkes was deported, and [L] remained in the UK, they would only have limited contact, which would not be in his best interests. Presumably this was one of the reasons why [DF] gave evidence that she wished to relocate to Jamaica with her children if Mr Folkes was deported.

72. The FTT found that it would not be in [L]'s best interests to live in Jamaica with his parents as he would be raised in a "crime-ridden ghetto". Both Mr Folkes and [DF] gave evidence to the FTT that the area from which they originated was impoverished and had a high crime rate. Whilst we recognise that the quality of life in Jamaica may in some respects be inferior to the UK, we cannot agree with the FTT's assessment that it is in the best interests of a child born to Jamaican parents not to live in Jamaica because of the economic and social conditions there. As Mr Folkes and [DF] would be returning to their home neighbourhood, they would know how to protect their children from the dangers there. They would also have the option of relocating within Jamaica.

73. [DF] has two children by her ex-husband, who are now aged 9 and 13. Mr Folkes has a good relationship with his step-children, described by the FTT as "useful". The FTT Judge said he accepted [DF]'s evidence that she valued her relationship with Mr Folkes and his paternal relationship with all three children (at [21]). In evidence to the FTT, [DF] expressed a low opinion of her ex-husband and said he sees their children "when he feels like it". At the hearing before us, we were told there was no regular contact between [DF]'s children and their father. Whilst we recognise the importance of the children maintaining contact with their father, they would be able to keep in touch via Skype, FaceTime etc, and on visits to the UK. No evidence was adduced to suggest that a move to Jamaica would be an unacceptable interference with their private lives (culture, school, friends etc.) in the UK. In our view, the question as to what is in their best interests is finely balanced as their relationship with their father appears to be minimal. Their mother is likely to be in the best position to decide whether they should re-locate to Jamaica as a family with their

mother and Mr Folkes, or remain in the UK in a single parent family with their mother.

(4) Immigration history, private and family life

74. Mr Folkes arrived in the UK as a young adult aged 26 and has been here for 16 years, which is a lengthy period. We accept that he has developed a strong private life in the UK, with friends and community ties, as well as employment. However, he was brought up in Jamaica and worked there before he came to the UK. Despite his concerns about finding work and accommodation, we consider that he will be able to re-integrate into life in Jamaica. He has relatives there and his skills as a builder ought to assist him in finding work.

75. Mr Folkes developed his private and family life in the UK when he knew that he was here unlawfully or that his stay was precarious. That is a factor which reduces the weight to be accorded to his private and family life. In Jeunesse v Netherlands (2015) 60 EHRR 17, the ECtHR said, at [108]:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. It is the Court's well-established case law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of art. 8."

This consideration is (in part) reflected in subsections (4) and (5) of section 117B NIAA 2002.

76. Mr Folkes remained in the UK without leave from the expiry of his visit visa in mid-2002 until he was granted leave to remain in November 2005. During that period when he was in the UK unlawfully, he entered into a relationship with Tricia and fathered his son [T]; and he married [LW] and fathered his son [R]. Thereafter his immigration status remained precarious throughout. He was refused leave to remain as a spouse, and only given discretionary leave to remain for 3 years in November 2005. After his successful deportation appeal, he was only given consecutive periods of leave of 6 months duration, and should have been aware that a change in circumstances could result in a re-consideration of his article 8 claim. During this time, he entered in a relationship with [DF] and her two children and fathered his son [L]. He also had a further child with [LW].

77. When he applied for a renewed grant of leave on 9 May 2014, he misled the SSHD by failing to disclose that he was no longer living with his wife [LW] and their children, and had a new partner, [DF], and a child [L]. He gave the family home as his address

though he was no longer living there. The SSHD did not discover the true position until Mr Folkes appealed to the FTT.

Conclusions

78. We are not satisfied that there are very compelling reasons, over and above those described in Exceptions 1 and 2 in section 117C which outweigh the public interest in deportation in this case. Mr Folkes does not meet the requirements of Exception 1 or 2. He does not meet the requirements of Exception 1 because he will not face very significant obstacles to integrating into Jamaica, for the reasons we have explained. As to Exception 2, we accept that it is not in the best interests of Mr Folkes' children for him to be deported, because face-to-face contact is more meaningful than long-distance contact. It is a realistic option for his partner [DF] to re-locate to Jamaica with her children. However, that would deprive [DF]'s two older children of face-to-face contact with their natural father. If [L] remains in the UK, the separation from his father and the lost opportunity to grow up in a home with both parents present would not be in his best interests. For these reasons, we conclude that the effect of Mr Folkes' deportation would be very harsh upon some or all of the children referred to above; had the offence of which he was convicted been less serious such that he had been imprisoned for below 4 years, we might just have been persuaded that the effect on his children was unduly harsh, such that the requirements of Exception 2 were met, because the public interest in his deportation would in those circumstances have been marginally lower. We acknowledge that deportation will be upsetting for [DF] if she decides to remain in the UK, but we do not consider that it would be harsh in all the circumstances.

79. However, the best interests of children do not override all other factors, for the purposes of section 117D(6) and article 8. Mr Folkes has been in the UK for many years, during which time he has developed a strong private life, and rehabilitated himself since his conviction over ten years ago. Nonetheless, we are satisfied that he will be able to re-integrate into life in Jamaica. We bear in mind that Mr Folkes has a chequered immigration history. Parliament has declared that the deportation of a foreign criminal is conducive to the public good and the public interest requires deportation for those sentenced to a term of imprisonment of 4 years or more. Having carefully considered all relevant factors, and weighed them in the balance, we have been unable to find very compelling circumstances against deportation, over and above those in Exception 2, as required by section 117C(6). Mr Folkes was convicted of a very serious crime and given a lengthy prison sentence. In our judgment, deportation is a proportionate response, and the interference with his article 8 rights, and the article 8 rights of his partner and children, is justified in this case.

DECISION

The First-tier Tribunal Judge made an error on a point of law and we re-make the decision in the following terms:

The appeal by the Secretary of State for the Home Department is allowed. Mr Folkes' appeal on human rights grounds against the Secretary of State for the Home Department's decision to deport him is dismissed.

MRS JUSTICE LANG
15 November 2017