Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04031/2019

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business
On the 22nd July 2020

Decision & Reasons Promulgated
On the 12th August 2020

Before

UPPER TRIBUNAL JUDGE REEDS

Between

NF
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Masood, Counsel instructed on behalf of the respondent
For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. On 12 February 2019 the respondent made an order that the appellant is to be deported from the United Kingdom ('UK'), following his criminal convictions as it was considered that his presence in the UK was not conducive to the public good. The respondent refused the appellant's human rights claim in a decision letter dated 5 February 2019.

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2. The appellant, a citizen of Jamaica, appealed this decision to the First-tier Tribunal (Judge Callow) (hereinafter referred to as the "FtTJ"). In a decision sent on 18 December 2019, the FtTJ dismissed his appeal on human rights grounds, and the appellant has now appealed, with permission, to the Upper Tribunal.

3. The hearing took place on 22nd July 2020, by means of *Skype for Business* which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC with the parties' advocates. No technical problems encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I am grateful to Ms Masood and Ms Petterson for their detailed and clear oral submissions.

4. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of minor children. I have referred to the children as "A1" And "A2"and the appellant's partner as "X". Unless and until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or members of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Background:

5. The appellant's immigration history is summarised in the decision of the FtTJ at paragraphs 3-7. The appellant arrived in the UK at the age of 23 as a visitor. He married a British citizen in 2002 but his application made in July for leave to remain as a spouse was refused on the basis that his relationship was no longer subsisting. By this time, he was in a relationship with X. X arrived in the UK in 1990 at the age of 24. There are two children born of their relationship, A1 in 2003 and A2 in 2005. X also had a son from a previous relationship. All the children are British citizens.

6. Three applications made in 2008 for leave to remain on article 8 grounds were rejected as invalid. In April 2009 the appellant made a further application relying on his relationship with X and his two elder children (hereinafter referred to as "A1" and "A2"), but this was refused. The decision was challenged by way of judicial review. In his statement, the appellant explained his involvement with the children's day-to-day activities (recorded at paragraph 5 of the FtT J's decision). The respondent agreed to reconsider the decision and in April 2020 granted the appellant discretionary leave to remain until 8 April 2013. This was extended in September 2013 until 3 September 2016.

7. A third child was born in 2015 from a relationship between the appellant and another woman. In 2012 the appellant was sentenced to a 12 -month community order for an offence of battery of his partner X. A restraining order was also put in place and as a result the appellant left the family home. Notwithstanding the restraining order, the evidence of the parties before the FtTJ was to the effect that they continued with their relationship, although he did not live in the family home, and continued to see and have contact with the children.

8. The appellant has a number of convictions for minor driving offences and cautions for the possession of cannabis. In April 2015, the appellant was arrested by the police for drug-related offences and then released on bail. In June 2017 he was convicted following pleas of guilty to offences of conspiracy to evade a prohibition on the importation of cannabis between January – April 2015, possessing cannabis with intent to supply on 22 April 2015. On 11 August 2017 he was sentenced to 4 years imprisonment on the first count with no separate penalty for the second count.

9. The circumstances of the offence are set out in the sentencing remarks of the Judge and summarised in the decision letter at paragraph 17 in detail.
The sentencing judge described the seriousness of the offence at the appellant had been convicted of in the following terms "… When they (the police) looked around what they found could only be described as a drug factory where you engaged in the preparation of cannabis for onward sale … At the premises was a range of paraphernalia … Hydraulic press … White disposable suits which no doubt were there so that you could seek to avoid DNA transmission and this detection and link with the drugs as they were past further down the chain … Police were able to trace via FedEx … Two packages which have been sent to this country which they were able to link to you and to drug dealing. Police investigations traced … WhatsApp messaging between you and a presumed supplier in the United States. It is clear to me that you are importing drugs … Processing them and packaging them for onward wholesale supply … Indication that this was a commercial enterprise which was operating on a very substantial scale … You played a leading role … In a substantial, commercial and sophisticated enterprise … I have considered the mitigation … You have children with whom you do not live with whom you are in contact.

10. No separate sentence was passed in relation to the second count and thus he was sentenced to a period of four years imprisonment in total. On 11 May 2018 a confiscation order in the sum of £16,394.26 was imposed.

11. In light of his conviction, a decision to deport him was issued on 14 November 2017. This was responded to by the appellant on 31 January 2018 and further evidence submitted on 21 March 2018. A decision was made on 5 February 2019 to refuse a protection and human rights claim.

The decision of the Secretary of State dated 5 February 2019

12. The decision letter is a lengthy document extending to 30 pages. It is not necessary to set out all that letter and it is summarised at paragraphs 8 (a) – (h) of the FtTJ's decision.

13. Having set out the appellant's immigration history and the sentencing remarks of the trial judge at paragraph 17 , the respondent addressed the submissions made in respect of the protection claim by reference to the objective material relating to sufficiency of protection and that of internal relocation. The respondent concluded that the appellant had not demonstrated that he would be at risk of harm or persecution on return or entitled to a grant of humanitarian protection in the alternative.

14. In respect of his article 8 claim the respondent set out the nature of his claim which related to his relationship with his partner and three children in the United Kingdom and his private life having been resident since 2002.

15. The decision noted that his deportation was conducive to the public good and in the public interest because he had been convicted of an offence for which he had been sentenced to a period of at least four years (offences relating to the supply and importation of cannabis)and thus in accordance with paragraph 398 of the Immigration Rules, the public interest required his deportation unless they were "very compelling circumstances, over and above those described in the exceptions of deportation" set out at paragraph 399 and 399A of the Immigration Rules.

16. In respect of his offence, there was significant public interest in his deportation because he had been convicted of a serious offence. The trade in illicit drugs had a severe negative impact on society and that drug addiction affected not only drug users but also their families. The appellant had been well-organised and played a significant role in the supply and importation of drugs as indicated by the sentence imposed. Despite the evidence of having undertaken courses in prison, it was considered reasonable to conclude that there remained a risk of reoffending in the absence of evidence that there had been any improvement in his personal circumstances since his conviction.

17. When addressing his family life, it was noted that his marriage in 2002 no longer subsisted and in respect of the claim made by his second partner Y, that she and the appellant had planned to live together it was noted that when released on bail between 2016 and 2017 he had not been allowed to contact directly or indirectly. As to his relationship with X, it was noted that his partner lived with the appellant's two children and they lived separately. Amid the background there were no compelling factors why the parties could not live together in Jamaica. The respondent did not accept that the appellant's relationship with his three children was genuine and subsisting. In the

alternative it was considered that they would be of an age where they might readily adapt to life in Jamaica with the support of the appellant and their respective mothers.

18. The decision addressed the best interests of the children, but account was taken of the lack of evidence to show that the appellant's presence was required to prevent the children's health or development being impaired. It was further taken into account that the appellant did not reside with either partner or the children and that any disruption to family life had been caused by the appellant's own conduct. The children would continue to live with their respective mothers and will be supported by them and thus would adapt to life without the appellant. The respondent considered that there were "no compelling factors" if the children remained in the UK without the appellant.

19. The decision letter also addressed other considerations, which included the appellant's private life and his friendships which was said could continue via modern means of communication and that they were no very significant obstacles to his reintegration. Consideration was also given to the medical evidence provided on behalf of his partner X.

20. In conclusion, the respondent considered that his deportation would not breach the UK's obligations under Article 8 of the ECHR and the public interest in deporting him outweighed his right to a private and family life.

The Decision of the First-tier Tribunal:

21. The appeal came before the FtTJ on 30 September 2019. The FtTJ heard oral evidence from the appellant, his partner and two elder children which was summarised at paragraphs [9]-[13]. The FtTJ also had a bundle of documentation including a witness statements from the family members, and the report of an independent social worker.

22. The FtTJ findings of fact and analysis of the issues are set out at paragraphs [15]-[40].

23. The FtTJ observed at [27] that in the absence of any meaningful evidence and submissions addressing Exception 1, the focus of his decision was that of Exception 2 and whether the effects of deportation on the appellant's children and partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation.

24. There was no dispute concerning the factual background. It was accepted that he had a genuine and subsisting relationship with his partner X, and with his three children. The eldest two children, A1 and A2, born in 2003 in 2005

respectively were the children of his relationship with X. They had met in or about 2002 and had lived together as a family with the appellant as an active father until 2012 when as a result of an altercation between the couple, the appellant was charged and convicted of an assault upon his partner X (of which no details have been given) but that a restraining order was made and the appellant moved out to a different geographical area (see 4.6 of the ISW report). However, notwithstanding his move from the family home, it was common ground that the appellant continued to have contact with the children at weekends and maintained his relationship with them. He and his partner X had reconciled but were not living together.

25. The FtTJ accepted that there was a genuine subsisting relationship between the appellant and his partner and importantly the children including his third child who was born from a relationship with Y with whom he had a short relationship. At the date of the hearing his third child was three years of age.

26. The FtTJ also accepted the evidence of the children which was also reflected in the ISW report that the appellant had exercised the role of a parent despite having lived apart from the family since 2012 (see paragraph 16).

27. At [27] the FtTJ found on the facts that there was no real prospect of X and the children joining the appellant in Jamaica and at [31] the FtTJ set out his reasoning in support of that. Namely, that the two elder children were at an age where it would be against their best interests and would be unduly harsh to uproot them and relocate to a country of which they had no first-hand knowledge. Such a move would disrupt their education and deprive them of the opportunity to be educated in the UK. The judge found that the eldest child was at a critical stage in his education. There was no family support to call on.

28. Dealing with the issue of whether it would be unduly harsh to expect them to remain in the UK without the appellant, he concluded from the evidence that undoubtedly X and the children would suffer great distress if the appellant were to be deported and their lives be made more difficult (at [27[), and that this was the likely consequences of the deportation of any foreign criminal who had a genuine and subsisting relationship with a partner and children in the UK. He concluded on the evidence that the effect upon X and the children would "not go beyond the degree of harshness which would necessarily be involved" and that the appellant's involvement in the light of the children and providing support and counselling did not of itself mean that the effects of deportation were unduly harsh for X and the children. He also considered that the difficulties which X herself would inevitably face, would not elevate the case above the commonplace so far as the effects of the appellant's deportation on her children were concerned. At [33] the FtTJ made reference to having "carefully considered" the effects of deportation and that they would be likely to have a "detrimental effect" and again referred to those effects at [34] as "undoubtedly detrimental".

29. At [27] he also considered that in the event of deportation face-to-face contact would be possible, noting that X, born in Jamaica had previously visited there and that she could take the children to visit the appellant.

30. Thus, the judge concluded that it had not been shown that the appellant's deportation would be unduly harsh for his children or on his partner.

31. Accordingly, the judge proceeded to consider whether there were any "very compelling circumstances" over and above those described in Exceptions 1 and 2.

32. At [29], the FtTJ addressed the submission advanced on behalf of the appellant that it would be unduly harsh for him alone to be deported based on the prevalence of violent crime in Jamaica. Having taken account of the objective material the judge concluded that the appellant was familiar with the social and cultural way of life in Jamaica where he had lived for the first 23 years of his life. He took into account that the authorities in Jamaica could offer a level of protection and that the appellant could reasonably relocate away from his home area and that it had not been shown that he would be at risk. The judge concluded that the evidence advanced on his behalf addressing the appellant's claim fear was "minimal" and that there were no details addressing the circumstances of the deaths of his family in Jamaica nor that he would be of any interest to any gang in that country which had a real intent to inflict serious harm. The judge also observed that the appellant raised such a fear some 17 years after his arrival.

33. Whilst the judge had not been addressed upon Exception 1, the emphasis being on Exception 2, the FtTJ considered those factors at [32], concluding that it had not been established that he had been lawfully resident in the United Kingdom for most of his life nor that they were very significant obstacles to his integration to Jamaica taking into account that he was a mature person in good health and capable of working. He retained social and cultural links with his home country through his association with his family and friends and was likely to be able to reintegrate and make use of employment skills that he had. The judge concluded that he had an understanding of life in Jamaica with an adequate capacity to participate in it.

34. At paragraphs [33] and [34] the FtTJ concluded that having taken account of all the relevant factors he was not satisfied that it had been demonstrated that they were "very compelling circumstances "in the appellant's case. The FtTJ took into account the circumstances of the appellant and his children. There was no dispute that the appellant had a genuine and subsisting relationship with X and the three children; the judge found that removal would be likely to have a detrimental effect upon them but was not unduly harsh. The judge took into account that throughout his relationship with X save for an interlude of about three years, the parties had been aware of the precarious nature of his immigration status. The judge also gave consideration again to the

circumstances of his offending and the seriousness of the offences committed at [34]. The judge considered the factors bearing on the appellant side of the balance but concluded that notwithstanding those factors and affording significant weight to the appellant's family relationships and the best interests of the children, the weight of the public interest on the facts of this appeal was such that it could not be said that they were "very compelling circumstances" as required by section 117 C (6).

35. The FtTJ therefore dismissed the appeal.

The Appeal before the Upper Tribunal:

36. The appellant sought permission to appeal that decision and permission was refused by the FtTJ but on reconsideration was granted by UTJ Keith on 26 February 2020 where he stated that "while the FTT carefully considered evidence from the appellant and his partner, and had referred to the social worker report at [12] , the FTT arguable (sic) erred in failing to analyse the report in the section findings of fact ([15] onwards) and engage with the contents, said to indicate a significant impact on the appellant's children. While the other grounds appear to be weaker, the grant of permission to appeal is not limited in its scope. "

37. The appellant was represented before the Upper Tribunal by Ms Masood of Counsel who had appeared on behalf of the appellant before the FtT and had drafted the grounds of appeal. The Secretary of State was represented by Ms Petterson, Senior Presenting Officer.

Preliminary Issue:

Jurisdiction:

38. The first issue that requires consideration relates to jurisdiction. The chronology of events demonstrates that following the decision of the FtTJ promulgated on the 18 December 2019, grounds of appeal were filed on the 31 December 2019. Permission to appeal was refused on the 15 January 2020. On 28 January 2020 an application was made to the Upper Tribunal for permission to appeal which was granted by UTJ Keith on the 26 February 2020. However, on the 11 February 2020 the appellant, having been detained at Brook House was removed to Jamaica.

39. Decision and directions were sent to the parties by UTJ Canavan in which she considered the chronology set out above and directed that subject to any representations made by the parties, the appeal would be treated as abandoned.

40. In compliance with those directions, the appellant's solicitors sent further submissions where it was argued that the appeal did not fall to be treated as abandoned by virtue of section 92 (8) of the 2002 act and that whilst he was removed to Jamaica on 11 February 2020, this was not a voluntary departure and that section 92 (8) covered only voluntary departures and did not apply to the circumstances where an appellant is removed against their will. The submissions cited the decision in SR (Algeria) v SSHD [2015] EWCA Civ 1375 at paragraph 15.

41. The respondent also provided short written submissions in which it was accepted that in view of the appellant having been removed rather than having voluntarily left the UK, the appeal did not fall to be treated as abandoned (see email from Mr A. Tan (Presenting Officer).

42. Consequently, the parties agree that the appeal is not abandoned. In making an assessment of the issue, the following provisions of the Nationality, Immigration and Asylum Act 2002 are relevant:

"**78. No removal while appeal pending**

(1) While a person's appeal under section 82(1) is pending he may not be—

(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section "pending" has the meaning given by section 104.

92. Place from which an appeal may be brought or continued

…

(8) Where an appellant brings an appeal from within the United Kingdom but leaves the United Kingdom before the appeal is finally determined, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified under section 94(1) or (7) or section 94B.

…

43. **104. Pending appeal**

(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while—

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.

44. In the decision of Niaz (NIAA 2002 s. 104: pending appeal) [2019] UKUT 399 (IAC) 25 the Upper Tribunal stated at [25].

"25. As a general matter, we agree with Mr Farhat that a person who does have a pending appeal, and who is removed by the Secretary of State pursuant to her immigration powers, does not thereby cause their appeal to be abandoned under section 92(8). The meaning of "leaves the United Kingdom" in this context has been authoritatively determined by Sales LJ, giving judgment in SR (Algeria) v Secretary of State for the Home Department [2015] EWCA Civ 1375:-

"15. The phrase "Where an appellant brings an appeal from within the United Kingdom but leaves the United Kingdom before the appeal is finally determined" defines the circumstances in which the appeal is to be treated as abandoned. In my view, the word "leaves" used in this context means "voluntarily leaves the United Kingdom". It does not cover a situation in which an appellant is removed against her will by the Secretary of State.

16. My reasons for construing the word "leaves" in this way are as follows:

(i) To my mind, as a matter of ordinary usage, the word "leaves" has a strong connotation of an action being taken by an agent on a voluntary basis (e.g. "The protester did not leave the building but was removed from it by a security guard");

(ii) In certain contexts it may be possible for the word to be used to refer to simple physical relocation of a person, however that relocation might be achieved, whether by deliberate action taken by the person as agent or by actions taken by others to relocate that person. However, there are no indications from the context here that such a wider meaning was intended. On the contrary, I think that both the linguistic context and the wider context and scheme of the legislation support the narrow meaning of "leaves" referred to above. As to the linguistic context, the word "leaves" appears in a composite opening phrase in which there is a single subject, the "appellant", who does two things: she "brings an appeal" and she "leaves the United Kingdom". The first clearly imports a notion of voluntary agency on the part of the appellant, since bringing an appeal is not something which is done to an appellant, and I see no reason to change the sense of the appellant being a voluntary agent doing something when

one comes to the second verb in the same phrase. The use of the word "but" supports this view: the appellant has acted voluntarily to commence an appeal, but then acts voluntarily in another way so that it should be treated as abandoned.

(iii) Rule of law considerations in this context support the same conclusion. In a state governed by the rule of law, where the state itself is the subject of ongoing litigation, it would breach rule of law principles for the state to be able to defeat the litigation not by defending it on the merits before a court or Tribunal, but by physically removing the opposing party so that she is prevented from bringing her claim before a court or Tribunal, as appropriate, for determination according to law. Parliament is taken to legislate for a state governed by the rule of law with rights of access to justice: see, for example, R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36; [2004] 1 AC 604, paragraphs [26]-[28]. Accordingly, Parliament must be taken to have intended to use the word "leaves" in the narrow sense referred to above, where it is the voluntary act of the appellant which has the stated effect of the appeal being abandoned.

(iv) The narrower interpretation of the word "leaves" also accords with what I think is the manifest object and purpose of the provision, namely to make it possible to strike out an appeal with a minimum of procedural fuss when an appellant has voluntarily left the United Kingdom, since such action is generally inconsistent with the serious pursuit of an appeal launched on an in-country basis. To give the word "leaves" a wider meaning would involve going beyond that object and purpose without any good reason to do so.

(v) It is also significant that in those cases in which predecessor provisions, including section 104(4)(b) of the 2002 Act, set out above, have been considered in this court, the judges expressing views as to their meaning have been careful to say that the word "leaves" refers to the appellant "by his voluntary action" physically leaving the United Kingdom: see MM (Ghana) v Secretary of State for the Home Department [2012] EWCA Civ 827 at paragraph [32] and Shirazi v Secretary of State for the Home Department [2003] EWCA Civ 1562; [2004] INLR 92 at paragraph [13]. These observations have not been critical to the points in issue in those cases, which in fact concerned voluntary departures by an appellant. However, they are in line with my own view that the natural interpretation of the word "leaves" in this context is that it connotes voluntary action on the part of the appellant in question."

45. Consequently, applying those provisions and as agreed by the advocates, the appeal does not fall to be treated as abandoned, and Section 92(8) does not apply. Therefore, the appellant still has a valid appeal.

46. I therefore deal with the submissions from the parties dealing with the grounds of appeal advanced on behalf of the appellant.

The grounds:

47. Ms Masood, who had appeared on behalf of the appellant before the FtT and drafted the grounds of appeal, relied upon her written grounds. No further written submissions have been received on behalf of the appellant. However, Ms Masood made oral submissions to which I have given careful consideration.

48. The written grounds submit that an important question in the appellant's appeal was whether the effect of deportation on the appellant's children would be "unduly harsh" (see "Exception 2" in section 117 C (5) of the NIAA 2002 and NA (Pakistan) v SSHD [2016] EWCA Civ 662, paragraph 37 per Jackson LJ. The grounds submit that the FtTJ's assessment was flawed.

49. Ground 2 submits that the FtTJ failed to properly address and take into account the evidence of the ISW's opinion about the effect of the appellant's deportation on the children particularly A1 at paragraphs 5.9.1, 5.10 and 17.6. Ms Masood submitted that this was her principal ground of appeal.

50. It was submitted there was no real consideration of the report in the decision. At paragraph 27 the FtTJ stated that "undoubtedly x and the children would suffer great distress if the appellant were to be deported and their lives will be made more difficult. But those were the likely consequences of the deportation of any foreign criminal who had genuine and subsisting relationship with a partner and children in the UK". The grounds submit that the ISW's opinion was that A1 would not simply suffer "distress" but "poor mental health impacting on his health and social development" if his father were to be deported.

51. At paragraph 9 of the grounds it was submitted that a careful approach to the professional evidence was more important for a meaningful appraisal of the children's best interests.

52. In her oral submissions Ms Masood set out the background to the claim identifying that there were three relevant children and that the appellant had been convicted of offences relating to drugs having received a sentence of four years. As to the evidence that was before the judge she highlighted that there were statements from the appellant and his partner and the two eldest children and also a report from an ISW (set out at page 47).

53. In her submissions she invited the Tribunal to consider particular parts of the ISW report.

54. Paragraphs 5.1-5.10 related to A1 and paragraph 5.5 – 5.7 set out the conversations the ISW had with A1 and at 5.9 the ISW made reference to a discussion that the ISW had with A1. It was recorded that he was aware of the prospect of his father being deported however when this was discussed the ISW recorded that "[A] appeared shocked at the suggestion became extremely distressed placing his head in his hands and sobbing." At paragraph 5.10 the

ISW stated "it is my professional view that [A's] response was extreme and indicates highly expressed distress which A is struggling to process and manage."

55. Paragraph 6.1 – 6.4 concerned A2. At 6.1 it was stated that A2 had no learning needs and was not being treated for any emotional or physical health needs. A2 was described as having an outgoing and lively personality, engaging easily in conversation and able to express the thoughts and feelings well. At 6.3 A2 told the ISW that she misses her dad and would prefer him to be at home with her. At 6.4 reference was made to maintaining closeness with her father by visiting and speaking to on the phone.

56. Section 9 concerned the circumstances of the appellant's partner and Ms Masood direct the Tribunal to paragraph 9.3 and the reference to the appellant's partner discussing the relationship between A1 and the appellant as "particularly strong and when they were both at home they would spend a large amount of time together."

57. Section 10 concerns the role the appellant played in the lives of his partner and children and section 11 concerns the closeness of the family unit and at section 12.1 it was recorded that both A1 and A2 discuss the close relationship with their father in which they were able to rely on him for emotional support.

58. Ms Masood drew my attention to section 14.1 where it was recorded that the children had found it "extremely difficult to cope with their father in prison although have managed this and the knowledge that there is an end date and he will be coming home. Should this not be the case, if x is deported to Jamaica, the negative impact on both mothers and the children will be significant. It is my professional opinion that this will have a devastating effect on A1 and A2 in particular".

59. She submitted that the "key paragraph" was that set out at 17.6 where the ISW stated "my professional views that should x not return to his previous role in the children's lives this will have a significant detrimental impact on them and for A1 in particular. It is my view that A1 will suffer poor mental health, impacting on his health and social development if his father is deported to Jamaica."

60. When looking at the determination she submitted that there was no reference to the ISW report at paragraph 16 when referring to the genuine and subsisting parental relationship and at paragraph 27, although reference is made to the issue of undue harshness, the ISW report went further than the matters set out in that paragraph.

61. In her oral submissions, Ms Masood sought to rely on a recent decision of the Upper Tribunal in Imran (Section 117C (5); children, unduly harsh) [2020] UAUT 83 (IAC) and the discussion in that case of two decisions of the Court of Appeal in PG (Jamaica) and KF (Nigeria). In her submissions, she highlighted

factors of those cases and in particular paragraph 27 of PG (Jamaica). As to the decision in Imran she relied upon paragraph 29 and submitted that there was evidence of a similar type in the present appeal.

62. She submitted that there was evidence in the ISW report that A1 would be distressed or traumatised and would suffer emotional harm if his father was deported and this was clearly referred to at paragraph 17.6 that he would suffer "poor mental health".

63. Ms Masood submitted that the error was material to the outcome and that if the FtTJ had properly considered the report the judge would have "inevitably have reached the conclusion that it would be "unduly harsh" for the appellant to be deported from Jamaica". However, in her submissions she accepted that that would not have been conclusive but that this was an important "steppingstone" (as referred to in NA (Pakistan).

64. Ms Petterson on behalf of the respondent submitted that the FtTJ did not make any material error of law in his decision and that ground 2 was a "weight argument" characterised by the submission that the judge did not accord sufficient weight to the ISW report. She submitted that the FtTJ was not required to recite every paragraph of the ISW report and that even when looking at the factors that Counsel had referred the Tribunal to , which related to distress and shock from two teenagers at the prospect of their father being deported may make it "harsh" but not necessarily "unduly harsh" and bearing in mind that the appellant would have to meet a higher and more demanding test than that required for Exception 2.

65. Ms Petterson submitted that whilst Ms Masood had pointed to issues in the ISW report, it was not an error of law to consider the report in the round and reach a conclusion on the evidence. She submitted that it may show harsh consequences for the children, but it did not go beyond that which any child would experience when being separated from a parent.

66. As to the decision in Imran (as cited) and relied upon by Ms Masood, she submitted that in relation to the decisions of PG (Jamaica) and KF (Nigeria) the varying levels of distress and potential level of harm did not meet the unduly harsh test. She sought to distinguish the case of Imran itself on the basis of him falling into the category as a "medium offender" having been sentenced to 18 months imprisonment and therefore S 117C(5) applied which was not the case for the present appeal.

67. Ms Petterson further submitted that even taking the evidence at its highest, the ISW's opinion of the impact on A1 set out at paragraph 17.6 was not supported by any other evidence beyond that opinion. A1 was not undergoing any assistance or therapy as a result of his father's imprisonment.

68. In essence she submitted this was a case where it was asserted that the FtTJ did not place sufficient weight on the ISW opinion. The judge was not required to

cite the entire contents of the report, and it could be taken that the judge was fully aware of the contents but that the ISW report was not determinative and given that the appellant fell into the highest category, on the evidence before the judge it was open for him to find that the appellant did not demonstrate "very compelling circumstances" over and above those in Exception 2.

69. By way of reply Ms Masood submitted that she did not accept that ground 2 was an argument about the weight of the ISW report but that the FtTJ gave no consideration to the report. In this respect she relied upon her skeleton argument before the FtTJ at paragraph 37 where it was stated "it would be unduly harsh on x and A1 and A2 to remain in the UA without the appellant. The likely impact on x of separation from their father as detailed in the ISW's report at paragraph 14.1 – 14.3 and 15.1 – 15.4. It is clear that the appellant's deportation would have serious adverse effects on his children." Thus, she submitted there was no appraisal of the report in the decision.

70. In her submissions Ms Masood submitted that this was a material error of law because the contents of the report were capable of meeting their higher test as set out in section 117C (6).

71. In respect of grounds 1 and 3, I intend to set out the submissions of the parties when addressing whether they demonstrate any error of law in the decision of the FtTJ.

The relevant legal framework:

72. When a person who is not a British citizen is convicted in the UA of an offence for which he is sentenced to a period of imprisonment of at least 12 months, section 32(5) of the UA Borders Act 2007 requires the Secretary of State to make a deportation order in respect of that person (referred to in the legislation as a "foreign criminal"), subject to section 33. Section 33 of the Act establishes certain exceptions, one of which is that "removal of the foreign criminal in pursuance of the deportation order would breach? a person's Convention rights": see section 33(2)(a).

73. The right protected by article 8 is a qualified right with which interference may be justified on the basis of various legitimate aims which include the prevention of disorder or crime. The way in which the question of justification should be approached where a court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 is governed by Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by amendment in 2014).

74. Section 117B lists certain public interest considerations to which the court or Tribunal must have regard in all such cases. These include the considerations that:
"(1) The maintenance of effective immigrations controls is in the public interest.
?
(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.
?"

75. Section 117C lists additional considerations to which the court or Tribunal must have regard in cases involving "foreign criminals" (defined in a similar way to the 2007 Act). These considerations are:
"(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."

76. "Foreign criminals" who fall within section 117C(3) because they have been sentenced to a period of imprisonment of at least 12 months but less than four years have been referred to in the case law as "medium offenders" - in contrast

to those with a sentence of four years or more, who are described as "serious offenders".

77. In CI (Nigeria) [2019] EWCA Civ 2027 at [20-21] stated:

"20. Paragraphs 398-399A of the Immigration Rules state the practice to be followed by Home Office officials in assessing a claim that the deportation of a foreign criminal would be contrary to article 8. Paragraphs 398-399A are in very similar terms to section 117C(3)-(6) of the 2002 Act. However, as the Court of Appeal pointed out in NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239, para 14, although the Immigration Rules are relevant because they reflect the responsible minister's assessment, endorsed by Parliament, of the general public interest, they are not legislation; by contrast, Part 5A of the 2002 Act is primary legislation which directly governs decision-making by courts and Tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on article 8 grounds. The provisions of Part 5A, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result compatible with article 8: see NE-A (Nigeria), para 14; Rhuppiah v Secretary of State for the Home Department [2018] UASC 58; [2018] 1 WLR 5536, para 36. Further, if in applying section 117C(3) or (6) the conclusion is reached that the public interest "requires" deportation, that conclusion is one to which the Tribunal is bound by law to give effect: see Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803; [2016] 1 WLR 4204, para 50; NE-A (Nigeria), para 14. In such a case there is no room for any further assessment of proportionality under article 8(2) because these statutory provisions determine the way in which the assessment is to be carried out in accordance with UA law.

21 In these circumstances it seems to me that it is generally unnecessary for a Tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis."

78. As the FtTJ observed at [27] in view of the lack of meaningful evidence addressing Exception 1, his focus and that of the advocates was on Exception 2 based on the appellant's relationship with his 3 children. If the appellant had been sentenced to a period of imprisonment of less than 4 years, he would need to show that the effect on his children of his deportation would be "unduly harsh": s117C(5) of the Nationality, Immigration and Asylum Act 2002. However, because the appellant was sentenced to more than 4 years imprisonment subsection (6) of s117C was applicable and he needed to show something "above and beyond" undue harshness (as was explained in *SSHD v JG (Jamaica)* [2019] EWCA Civ 982 at [16]).

79. In *AO (Nigeria)* at [23], the Supreme Court held that: '... the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that

is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level.

80. In so far as the appellant sought to rely on the effect of his deportation his children (who, being British citizens, were a qualifying children) it would not be enough to show that that effect would be "unduly harsh", in the sense explained in *AO*. That would satisfy Exception 1, but because his case fell within section 117C (6) he needed to show something over and above that, which meant showing that the circumstances in his case were, in Jackson LJ's phrase in *NA*, "especially compelling".

81. A further recent authority from the Court of Appeal, handed down on the 22 November 2019, is SSHD v AF (Nigeria) [2019] EWCA Civ 2051 which confirmed the current position at [31] in which Lord Justice Baker, when giving the lead judgement, stated:

> "31. For those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what Parliament has decided, and it is important to bear in mind the observations of Hickinbottom LJ in PG (Jamaica) at paragraph 46:
> "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with the other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of ECHR. It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

82. In PF (Nigeria) v SSHD EWCA Civ 1139, Hickinbottom LJ reiterated that this in the case of an offender of 4 years or more, there is a more stringent test than unduly harsh at [33] and he referred to Underhill LJ's description of the test in SSHD v JG (Jamaica) [2019 EWCA Civ 982 as " *extra* unduly harsh".

Decision on error of law:

83. I have carefully considered the submissions made by each of the advocates and I am grateful for the careful and clear submissions made by each of them.

84. I intend to deal with Grounds 3 and 1 before Ground 2 which Ms Masood submitted was her principal ground.

85. As to ground 3, it was submitted that at paragraph 27 of the decision the FtTJ stated that "in the event of deportation face-to-face contact would be possible. X the appellant's partner, born in Jamaica has previously visited Jamaica. She and

the children, like many tourists do, could visit Jamaica to see the appellant." However, the appellant's partners evidence and that of the mother of his youngest child was that they would not visit Jamaica with the children due to the prevalence of violent crime in Jamaica which the judge noted in paragraph 28. Consequently, the judge failed to take this evidence into account or make any clear findings on this evidence.

86. In her oral submissions, Ms Masood she referred the Tribunal to the ISW report at 15.2 where the appellant's partner said she would not want to take the children to Jamaica she feared for their safety. Therefore, she submitted there was no basis for the finding made at paragraph 27.

87. I find no error of law in the FtTJ's finding of fact at [27]. Whilst the appellant's partner had stated her opposition to visiting Jamaica in her conversations with the ISW as recorded at paragraph 15.2, it was open to the judge to place weight on her conduct in the past based on the evidence before the Tribunal from the appellant in cross-examination that his partner and the children had been on a visit to Jamaica (see paragraph 9) and the appellant's partners evidence recorded at paragraph 10 where she acknowledged that she had visited her mother in Jamaica. It is also relevant to observe that the ISW report at paragraph 15.2 stated "I am aware, from the paperwork provided to me for the purposes of this report that there is no valid reason why the children could not visit and that there is sufficient police protection in Jamaica to mitigate any potential risks to the children." Therefore, the assessment made by the FtTJ that the children would be able to safely visit their father was one that was open to him on the evidence before the Tribunal. In the alternative, there is no reason to believe that the children would not seek to maintain contact with their father by telephone or by other means as they did when he was in custody, although I would accept that it is not of a similar quality to face-to-face contact.

88. In respect of ground 1 reliance is placed on paragraph 33 where the FtTJ stated "Throughout his relationship with x save an interlude of about three years the parties have been aware of the precarious nature of the appellant's immigration status. Taking account of all factors, recognising that a child should not be held responsible for the conduct of the parent as was held in Zoumbas [2013] UASC 74, is not been shown that the effect of the appellant's deportation would be unduly harsh".

89. It is submitted on behalf of the appellant that the FtTJ wrongly took into account the appellant's immigration history and his precarious immigration status when assessing whether the effects of deportation would be "unduly harsh" on the children and that this was contrary to the decision in KO (Nigeria) v SSHD [2018] UASC 53 where it was held that the question of whether it would be "unduly harsh" on a child of the parent to be deported was to be determined without regard to the criminality of the parent or the severity of the relevant offence and that it must be determined, without regard to the immigration history of the parent. It is further submitted that the judge took

into account the appellant's precarious status and that was contrary to the decision in Zoumbas v SSHD [2013] 1 WLR 3690.

90. I find no error in law on the basis advanced on behalf of the appellant. The written grounds cite part of paragraph 33 but do not cite the whole of the paragraph or make reference to where that paragraph stood in the analysis of the FtTJ. In my judgement this ground entirely misreads the decision. The FtTJ set out the relevant legal framework at paragraphs [17 – 26] and properly identified on the facts of this particular appeal that the case fell within section 117C (6) as a result of his sentence of four years and that the public interest required his deportation unless there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" (see paragraph [22]).

91. At [24] and [25] the FtTJ directed himself in accordance with the decision of NA (Pakistan) at paragraph 37, that in relation to a "serious offender" (which this appellant was), it 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 describe set out particularly significant factors bearing upon respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment to be made whether they are "very compelling circumstances", over and above those described Exceptions 1 and 2 as is required under section 117(C) 6.

92. At [27] the FtTJ then carried out that assessment, and in doing so observed that he should "focus on the consideration of Exception 2 as to whether the effects of deportation on the appellant's children partner would go beyond the degree of harshness which would necessarily be involved any child or partner of a foreign criminal face of deportation, absent a consideration of the seriousness of the offence committed by the appellant facing deportation (applying KO (Nigeria)) and had expressly referred later on to Zoumbas at [33]but concluded that the evidence before the Tribunal had not provided a basis upon which the appellant could establish Exception 2 under section 117C(5). Accordingly, the judge then proceeded to consider whether they were any "very compelling circumstances over and above those described in the said Exceptions" (see [28]).

93. Following this at paragraphs 29 – 34 the judge then set out his assessment as to whether they were "very compelling circumstances" and it was in that assessment under section 117C(6) that the FtTJ weighed in the balance factors that were relevant to the public interest which included the precarious nature of the appellant's immigration status.

94. There is no error identified by the judge's self-direction to the relevant law nor in his approach to the applicable test. Whilst the judge considered the appellant's immigration status at paragraph 33 he was doing so in the context of whether they were "very compelling circumstances" which was entirely permissible as explained at paragraph 33 of PF (Nigeria) :

> "33. Turning to section 117C(6), for offenders who are sentenced to at least four years, or who fall outside the exceptions, the new statutory provisions reflect MF (Nigeria), by adopting the wording "very compelling circumstances" instead of the previous "exceptional circumstances". That is clearly a more stringent test than the "unduly harsh" test of section 117C(5). At [22] in AO, Lord Carnwath referred to section 117C(6) requiring, "in addition" to the section 117C(5) criteria, "very compelling circumstances". In Secretary of State for the Home Department v JG (Jamaica) [2019] EWCA Civ 982 at [16], having reviewed the relevant authorities, Underhill LJ referred to the need to show that the effect on the relevant child or partner would be "*extra* unduly harsh" (emphasis in the original). However, as Mr Dunlop submitted, that formulation risks masking a difference in approach required by section 117C(5) and (6) respectively: whilst AO held that the former requires an exclusive focus on the effects of deportation on the relevant child or partner, section 117C(6) requires those effects to be balanced against the section 117C(1) public interest in deporting foreign nationals. Under section 117C(6), the public interest is back in play."

95. I am therefore satisfied that ground 1 is not made out.

96. Dealing with ground 2 which Ms Masood submitted was the "principal ground", I am satisfied that the FtTJ did not make a material error of law which was capable of affecting the outcome of this appeal. I shall set out my reasons for reaching that conclusion in my analysis of the appeal and the evidence that was before the FtTJ.

97. The grounds centre upon the submission that the FtTJ gave no consideration to the ISW report in his assessment of whether the effect of deportation on the appellant's children would be "unduly harsh". In her submission Ms Masood relied upon paragraph 27 and submitted that the paragraph failed to properly reflect the harm identified in the ISW report.

98. When analysing this submission, it is important to consider the decision of the FtTJ when read as a whole. Before reaching his decision the FtTJ set out the salient parts of the evidence, much of which was unchallenged, which was relevant to the issues under consideration which included the nature of the relationship between the children and the appellant (and his partner) and the likely effect upon them of his deportation. This was set out at paragraph 10 where the judge recorded the evidence of the appellant's partner and made reference to the nature of family life; the appellant was an active parent in the lives of the children particularly A-1 and also the effect upon the children of separation from their father. A-1 described as regularly crying for his father and that both children were "emotionally upset" about their father being returned to Jamaica. At paragraph 11 the FtTJ summarised the evidence from the children. As regards A-1 the judge set out the evidence of the impact of his father being imprisoned and that as a teenager it was hard for him without his father; he had struggled at school and that he could not speak to anyone about this. I observe that this was also in the ISW report at paragraph 5.7. In respect of A2 she explained that her father being in prison affected her daily life.

99. At paragraph 12 the FtTJ provided a summary of the ISW in succinct terms. Whilst Ms Masood referred the Tribunal to certain parts of the ISW report, it is not necessary for a judge to set out large parts of the evidence which he had plainly read and had regard to. This is supported in this particular case at [14] where the judge expressly stated that he had had regard to the skeleton argument and the submissions made by Ms Masood which at paragraph 37 referred to the ISW report and that "her submissions are considered in arriving at my decision." He had referred to the report as "detailed" and in his overall assessment referred to having carefully considered all of the evidence.

100. In my judgement paragraph 27 should be read alongside those earlier paragraphs but also in the light of paragraphs 30, 33 and 34 which necessarily formed part of the overall assessment of the issue of undue harshness.

101. As I have set out earlier, I find no error of law identified in the approach taken by the judge to the applicable legal framework which is set out at paragraph 17 – 26. I observe that he correctly identified that on the particular facts of this appeal S 117C(6) applied and that he was required to consider whether there were "very compelling circumstances over and above those described in Exceptions 1 and 2")at [22] and properly directed himself to the applicable law at [23 – 27].

102. As to the applicable test as to whether deportation would be "unduly harsh" the judge directed himself to the relevant parts of KO(Nigeria) at [27] where he stated "I focus on the consideration of Exception 2 as to whether the effects of deportation on the appellant's children and partner would go beyond the degree of harshness which would necessarily be involve any child or partner of a foreign criminal faces deportation, absent a consideration of the seriousness of the offence committed by the appellant facing deportation." And further at [30] cited paragraph 23 of KO (Nigeria) and the relevant threshold.

103. Having summarised the relevant evidence and the correct legal framework, at paragraph[27] the judge stated as follows:

> "27. In the absence of any meaningful evidence and submissions addressing Exception 1, I focus on a consideration of Exception 2 as to whether the effects of deportation on the appellant's children and partner would go beyond the degree of harshness which would necessarily be involve any child or partner of a foreign criminal faces deportation, absent a consideration of the seriousness of the offence committed by the appellant facing deportation: KO (Nigeria) [2018] UKSC 53. In doing so I consider whether it would be unduly harsh for the children and/or x to live in Jamaica and whether it would be unduly harsh with them to remain in the UA without him. In the present case there is no real prospect of x and the children joining the appellant in Jamaica. According the issue is whether it would be unduly harsh to expect them to remain in the UA without the appellant. Undoubtedly x and the children would suffer great distress if the appellant were to be deported and their lives to be made more difficult. But those were the likely consequences of the deportation of

any foreign criminal who had a genuine and subsisting relationship with a partner and children in the UK. The effect on x and the children would not go beyond the degree of harshness which would necessarily be involved for the partner and children of a foreign criminal was deported. The appellant's involvement in the lives of the children in providing support and counselling did not of itself mean that the effects of deportation were unduly harsh for x and the children. Nor could the difficulties which x would inevitably face, be increased by her ongoing effort to further her education so as to improve her earning capacity and elevate the case above the commonplace so far as the effects of the appellant's deportation on her were concerned. In the event of deportation face-to-face contact will be possible, x born in Jamaica has previously visited Jamaica. She and the children, like many tourists do, could visit Jamaica to see the appellant. Neither the nature of the offence committed nor the passage of time could assist x now that KO (Nigeria) made it clear that the seriousness of the offending was not a relevant consideration when determining pursuant to section 117C (5) whether undue harshness would be suffered: PG (Jamaica) [2019] EWCA Civ 1213. It has not been shown that the appellant's deportation would be unduly harsh for his children and x . The evidence has not provided a basis on which he could establish Exception 2 under section 117C (5)."

104. At [33] the FtTJ made reference to having carefully considered the effect of deportation on the children and that "removal would be likely to have a detrimental effect". At [34] the FtTJ made reference to the effects of deportation for the children as "undoubtedly detrimental".

105. The consideration of the issue of undue harshness in those paragraphs and particularly at [27] is based on the evidence before the FtTJ including the ISW report. In general terms the ISW report did make reference to the likely outcome for the appellant's partner and the children that they would suffer great distress if the appellant were to be deported and that their lives would be more difficult. This is reflected in the description in A1 at paragraph 5.9 and the ISW's consideration at paragraph 5.10. I observe that the ISW proceeded on the basis that A1 was aware of the prospect of his father being deported to Jamaica and it was when the ISW broached that subject, A1 was described as being "extremely distressed". The description of his distress at 5.9 and 5.10 would necessarily have to be seen in the context of the nature of the conversation and of his reported lack of awareness of the issue of deportation. At paragraph 14.1 the report provided the opinion that the deportation of the appellant would have a "negative impact on both mothers and the children will be significant" and that it would have a "devastating effect on A1 and A2 in particular." At 17.1 the report made reference to the detrimental impact on them in the long term. Consequently, the FtTJ's assessment was based on the evidence before him which included the ISW report.

106. Ms Masood submitted that a key paragraph at 17.6 was not taken into account. This stated as follows: -

"17.6 The children are receiving good care by their mothers and their basic needs are being consistently met. X is able to provide A1 and A2 with care which is safe and effective and is able to ensure they are protected from maltreatment. However, my professional view is that should the appellant not return to his previous role within the children's lives this will have a significant detrimental impact on them and the A1 in particular. It is my view that A1 will suffer poor mental health, impacting on his health and social development if his father is deported to Jamaica."

107. However, the judge acknowledged in his assessment that the mothers of the children provided good care for the children and their needs were being met at paragraph 33 where the judge found that it was significant that the appellant's partner and three children would remain in the UK and that the youngest child, would continue to benefit from the care from her mother. Whilst the judge did not expressly refer to the opinion provided at 17.6 that A1 "will suffer poor mental health", the FtTJ did properly acknowledge that the evidence before him demonstrated that the effect of the appellant's deportation would be the likely to have a detrimental effect upon the children (see paragraph [33]) and also removal would be "undoubtedly detrimental" to them (see paragraph [34]).

108. I am therefore satisfied that when the decision is read as a whole and in the light of the material that was before the FtTJ that proper regard was given to the ISW report when addressing the relevant issues.

109. Even if it could be said that the FtTJ should have made further reference to the ISW report, I am not satisfied that any failure to do so was material to the outcome.

110. In her submissions Ms Masood submitted that such a failure would be material because the content of the report would meet the necessary test under section 117C (6).

111. During her submissions she had directed my attention to the decision in Imran (Section 117C (5); children, unduly harsh) [2020] UAUT 83 (IAC). The headnote of that decision reads as follows:

"To bring a case within Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002, the 'unduly harsh' test will not be satisfied, in a case where a child has two parents, by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and of the emotional harm that would be likely to flow from separation.

Consideration as to what constitutes 'without more' is a fact sensitive assessment."

112. As can be seen from that head note and the decision itself, the appellant was a "medium offender" whereas on the facts of the present appeal S 117C (6) applied as a result of his sentence of imprisonment of 4 years. Ms Masood also relied upon that decision due to the references made to the Court of Appeal decisions in PG (Jamaica) cited at paragraph 20 of Imran and also SSHD v KF

(Nigeria) [2019] EWCA Civ 2051 cited at paragraph 23. She submitted that the description of family life between the children and their fathers and the risk harm that would follow was similar in nature to that set out in those appeals.

113. I agree with the submissions made by Ms Petterson that the factual circumstances of those particular appeals do not assist in determining whether the circumstances of this appellant met the elevated test that was necessary in relation to this particular appellant. In PG (Jamaica) the Court of Appeal set aside the decision of the FTT and their determination of "undue harshness" for the reasons set out at paragraph 66 – 67 and 43 and 45. Similarly, on the facts of KF (Nigeria) the court set aside the decision of the FtTJ and at paragraph 18 the Court of Appeal set out the relevant parts of the First-tier Tribunal's decision which referred to the fact that a child being separated from a parent is something that a child be likely to find traumatic and would have potentially long lasting adverse consequences for the child. Which was what the ISW in the present appeal had concluded. However, at [30], Baker LJ said at [30], was not enough:

> 'Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.'

114. As set out above, if the appellant had been sentenced to a period of imprisonment of less than four years, he would need to show that the effect on his children of his deportation would be "unduly harsh (see section 117C (5) of the NIAA 2002). However, here, as the appellant was sentenced to four years imprisonment, s117C (6) applied and the appellant was required to show

something "above and beyond" undue harshness. As explained in SSHD v JG (Jamaica) [2019] EWCA Civ 982 at [16]:

> "..…in so far as the Respondent sought to rely on the effect of his deportation on his son (who, being a British citizen, was a qualifying child) it would not be enough to show that that effect would be "unduly harsh", in the sense explained in AO. That would satisfy Exception [2], but because his case fell within section 117C(6) he needed to show something over and above that, which meant showing that the circumstances in his case were, in Jackson LJ's phrase in NA, "especially compelling". In short, at the risk of sounding flippant, he needed to show that the impact on his son was "extra unduly harsh".

115. It is plain from reading the assessment made by the FtTJ that he accepted that there was a genuine and subsisting parental relationship between the appellant and his three qualifying children and that it was established on the evidence before him, that the appellant had exercised the role of the parent despite living apart from them since 2012 when he had left the family home following the imposition of the restraining order. The judge took into account that his role as a father had been particularly evident in the role of assisting A1 to participate in football and insofar as A2 was concerned, that he listened and provided her with help for her emotional concerns (at [16]). These were issues highlighted in the ISW report as well as in the evidence of the children. His involvement in their lives and providing support and counselling was also acknowledged in the ISW report at 12.1 and in the FtTJ's assessment at [27]. Consequently the role he played in their lives was not in issue as described by the ISW described section 10 of the report which included him playing a hands-on role in their upbringing, attending parents evenings, taking them out for meals to the park and the cinema when having regular contact with the children.

116. The potential impact of removal upon the children was referred to at paragraphs 14.1 –14.3 in relation to A1 and A2 where it was stated that children had found it extremely difficult to cope with their father in prison (14.1) and that A1 had found separation from his father particularly traumatic and presented a somewhat guarded and unwilling to talk about his emotions in relation to his father but that when he did talk about his views he was "deeply affected by separation from X who had been a significant and important person in his life." At 16.1 for the youngest child ,the impact of removal would have to be considered in the light of the child's age (age 3) and who therefore was not able to articulate her wishes and feelings but that removal of her father would remove any future attachment between them. At 17.6 in respect of A1 it was stated that if the appellant was deported and not return to his previous role with the children "this will have a significant detrimental impact on them and the A1 in particular. It is my view that A1 will suffer poor mental health, impacting on his health and social development if his father is deported to Jamaica."

117. I observe that the passage Ms Masood relied upon at 17.6 was based upon general research set out at 17.5 that a positive father and child relationship is important not just for childhood but on an ongoing basis and that the mental health benefits related to having an involved in positive father influence become more evident. No one could dispute this general proposition. However, there was no reference in the report to demonstrate that either of the children had any particular vulnerabilities or mental health problems as a result of their father having been separated from them for a significant period of time since August 2017. To the contrary, the evidence was to the effect that both children had no learning difficulties and were receiving no treatment or therapy for any emotional upset or distress as a result of separation from their father (see paragraph 5.2 and 6.1). Therefore, the opinion was based on generalised evidence and not specific to A1 and there was no explanation given as to why A1 or A2 would suffer detrimental effects more than any other typical child as a result of separation from his father.

118. The FtTJ accepted that the appellant's children if deprived of the appellant during their lives and ongoing formative years, may be at risk of suffering some form of emotional harm. This is plain from his reference to the detrimental effects of deportation shown from the evidence. However, for this to be properly characterised as "unduly harsh" it is necessary to look for consequences characterised by degree of harshness over and above what every child would experience in such circumstances. Being deprived of a parent with whom they had a close relationship is something a child is likely to find traumatic as the ISW sets out. Furthermore, I would accept that such a separation would potentially have adverse consequences. However, on the evidence that was before the FtTJ it failed to establish that the consequences for the appellant's children was "over and beyond" what every child would experience in such circumstances.

119. I am therefore satisfied that it was open to the judge, based on the evidence before him to conclude that the effect of deportation upon the children would not be "unduly harsh" and having given careful consideration to the evidence myself, and in the light of the "demanding test" under section 117C(6), the conclusion reached by the judge that the appellant had not demonstrated "very compelling circumstances" over and above those described Exceptions 1 and 2 was reasonably open to him.

120. The grounds only sought to challenge the assessment of "undue harshness" and Ms Masood did not seek to challenge any other aspects of the FtTJ's decision relating to any other factor. In a s. 117C(6) case, there is a requirement to consider the seriousness of the particular offence and to balance the strong public interest in support of deportation against the circumstances over and above Exceptions 1 and 2. I am satisfied that this is precisely what the FtTJ did. Therefore the FtTJ having considered all factors weighing in the appellant's side of the balance cumulatively was entitled to conclude that the weight of the

public interest in this particular case required deportation because it cannot be said that there are "*very compelling circumstances*" over and above those described in Exceptions 1 and 2 .

121. For those reasons, I am satisfied that the decision of the FtTJ did not involve the making of a material error on a point of law. I therefore dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated 6/08/20

Upper Tribunal Judge Reeds

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.