Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06937/2019

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 21st February 2020	**On 6th March 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs H Aboni; Home Office Presenting Officer
For the Respondent: Mr M Mohzam; Burton & Burton Solicitors

DECISION AND REASONS

1. An anonymity direction has been made by the First-tier Tribunal. For the avoidance of any doubt that direction continues. Unless and until a Tribunal or Court directs otherwise, JH is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies amongst others to all parties. Failure

to comply with this direction could lead to contempt of court proceedings.

2. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is JH. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to JH as the appellant, and the SSHD as the respondent.

3. The appellant is a national of Iraq. He is the subject of a deportation order that was signed on 3rd April 2019. On 4th April 2019, the respondent considered representations made on behalf of the appellant on 21st December 2018 and rejected the appellant's claim that his deportation to Iraq would be in breach of Article 8 of the European Convention on Human Rights. The appellant's appeal was allowed by First-tier Tribunal Judge Law for reasons set out in a decision promulgated on 7th November 2019.

4. The respondent claims the First-tier Tribunal judge failed to give clear reasons for the conclusion reached at paragraph [39], that the effect of the appellant's deportation on the appellant's three older children would be unduly harsh. The respondent claims that the report of the social worker relied upon by the appellant establishes that there will be obvious difficulties for the children but the report is based upon generic comments relating to single-parent families and does not establish that the effect of the appellant's deportation on his children would be unduly harsh. It is also said the judge failed to consider the extent to which any support or assistance required by the appellant's partner, might be available from social services who would perform their duties under the law.

5. Permission to appeal was granted by Designated First-tier Tribunal Judge Woodcraft and the matter comes before me to determine whether the

decision of the First-tier Tribunal is vitiated by a material error of law, and if so, to remake the decision.

The decision of First-tier Tribunal Judge Law

6. The background to the appeal is set out at paragraphs [2] to [8] of the decision. The judge noted the appellant has a British partner and children, and that in March 2014, he was granted discretionary leave on Article 8 grounds until 4th March 2017. In considering an application for an adjournment made by the appellant's representative to obtain a copy of an OASyS report, the judge noted at paragraph [11], the central issue in the appeal is whether it would be unduly harsh for the children to go to Iraq with the appellant or remain in the UK without him.

7. It is uncontroversial that the appellant has a genuine and subsisting relationship with his partner and children. His partner and children are British citizens. The appellant has four children, [RH] born on 24th November 2002, [ZH] born on 5th August 2007, [HH] born on 5th March 2010 and [NH] born on 19th September 2017.

8. The evidence given by the appellant is set out at paragraphs [12] and [13] of the decision. The appellant confirmed that he, his partner and his younger daughter visited his family in Dohuk in Iraq in 2015, when they went to visit the appellant's parents. The appellant said that he could not live in Iraq if he is deported because his brother has seven children and the appellant did not think there was room for him. He claimed it would also be very difficult for his family to live in Iraq as the education and healthcare system do not compare, and, his children would have no future there.

9. The evidence of the appellant's partner is set out at paragraph [14] of the decision. The appellant's older son adopted his witness statement, and his evidence is recorded at paragraph [15] of the decision.

10. The Judge noted that in assessing the claim by the appellant that his deportation would be contrary to the United Kingdom's obligations under Article 8 ECHR, he had to consider whether paragraph 399 or 399A of the immigration rules applies. The Judge found that paragraph 399A does not apply because he could not be satisfied that the appellant has been lawfully resident in the UK for most of his life or that there would be very significant obstacles to his integration in Iraq. The judge also found that paragraph 399(b) of the immigration rules does not apply because the appellant's relationship with his partner was formed at a time when the appellant was in the UK unlawfully and his immigration status was precarious. The issue was whether on a balance of probabilities, it would be unduly harsh for the appellant's children to live in Iraq, or unduly harsh for them to remain in the UK without the appellant.

11. At paragraphs [28] to [30] of the decision, the judge referred to the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53, noting that "unduly harsh" introduces a higher hurdle than that of "reasonableness" and the use of the word "unduly" denotes a level of "harshness" that may be acceptable or justifiable in the relevant context.

12. At paragraphs [32] to [33] of the decision, the judge refers to the report of the social worker. The judge found at paragraph [34] of the decision, that it would be unduly harsh for any of the children to live in Iraq. The judge noted, at paragraph [35], that none of the evidence suggests that the family would consider moving to Iraq as a whole, and found the appellant's partner would stay in the UK and try to bring up the children on her own, if the appellant were to be deported.

13. The Judge records at paragraph [36] of the decision that the appellant's representative was asked to identify the particular factors relied upon to establish that the effect of the appellant's deportation on the children would be "unduly harsh", and beyond what would necessarily be involved when a child is faced with the deportation of a parent. The judge states:

> "… he pointed to the prospect of psychological harm identified in the social workers report if the appellant was not in the family home providing love and support for his children, as well as to the increased prospect of financial hardship arising from the fact that his partner would not be able to go out work as long as she had to provide full time childcare…"

14. At paragraphs [38] and [39] of the decision, the judge concluded:

> "38. … I find that the appellant was a constant figure in the lives of his children, from 2002 when the oldest child was born until his incarceration at the end of 2018; his partner stresses in paragraph 5 of her statement that he has been *" the best father to my children I could have ever wanted."*. I also find that the catering business had to close when the appellant was arrested, adding to the family's financial problems, with the result that the respondent would not have been able to say that his partner was "coping" if the true position had been known.
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> 39. Having heard the appellant, his partner and the oldest child give evidence, I am satisfied that there is an extremely close bond between the appellant and each of his children. I find that the deportation of the appellant would inevitably fracture that relationship because it could not be adequately maintained by modern methods of communication. There are perhaps some children who would cope in that situation, even though it would be harsh for them. Other children would cope less well and for them the harshness of separation would be greater. Taking account of the evidence I have heard and of the expert opinion of the social worker, I am satisfied that the appellant's three older children are in the category of children who would cope less well. I find that they would face undue harshness if he were to be deported. That would arise from their particular vulnerabilities, on which the social worker commented above, as well as from the financial hardship created by the inability of their mother to go back to work.

15. Mr Mohzam submits the judge carefully considered all the evidence before him and found that there is an extremely close bond between the appellant and his children. He submits the judge was entitled to take into account the fact that the deportation of the appellant would mean that he would be unable to see his children, and understandably, the youngest of the children who is now aged 2, would want to see her father and would be deprived of the opportunity to develop her relationship with him.

16. Mr Mohzam relied upon the extracts from the report of the social worker that are referred to in paragraph [32] of the decision and also drew my attention to paragraphs 9.31 and 9.32 of the social worker's report in

which she expresses the opinion that the children's separation from the appellant is likely to have a negative impact on the attachment bond the children already have with their parents, thereby forming an additional route of fear and lack of safety for them and the children may interpret any separation as their being "abandoned" by their caregivers. Mr Mohzam refers to the opinion that the children may then develop a profound sense of wrongdoing resulting in the caregivers having to leave, igniting complex emotions and shame that may damage their lifelong relationships with themselves and others.

17. He submits the judge carefully considered the relevant authorities including the decision of the Supreme Court in KO (Nigeria) and following a proper assessment of the circumstances and relationships, reached a decision that was open to him. Mr Mohzam submits the respondent disagrees with the decision that was open to the Judge, but the decision is not tainted by a material error of law.

Discussion

18. It is uncontroversial that the deportation of criminals is in the public interest. Section 117C(2) of the 2002 Act confirms that the more serious the offence committed by the foreign criminal, the greater is the public interest in deportation of the criminal. Applying s117C(3) of the 2002 Act, the public interest required the appellant's deportation unless Exception 2 set out in s.117C(5) applies. That is, the appellant has a genuine and subsisting parental relationship with a qualifying child and the effect of his deportation on the child would be unduly harsh.

19. With specific reference to Exception 2 in S.117C(5) , Lord Carnwath in KO (Nigeria) observed, at paragraph 23:

> "The expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there

> is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.".

20. In SSHD v PG (Jamaica) [2019] EWCA Civ 1213, Holroyde LJ said, at paragraph 34:

> "It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or 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. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

21. At paragraph 38, Holroyde LJ further observed:

> "In the circumstances of this appeal, I do not think it necessary to refer to decisions predating KO (Nigeria), because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation.".

22. The respondent accepts the appellant has a genuine and subsisting parental relationship with his children who are all British citizens. The judge was satisfied that there is an extremely close bond between the appellant and each of his children. He found the deportation of the appellant would inevitably fracture the relationship because it could not

be adequately maintained by modern methods of communication. The judge was satisfied that the appellant's three older children would "cope less well", if the appellant is deported.

23. I acknowledge that if the Tribunal judge applied the correct test, and, that resulted in an arguably generous conclusion, it does not mean that it was erroneous in law. However, in my judgment the conclusion of the First-tier Tribunal judge, on the evidence, that the effect of his deportation on his children would be unduly harsh is unsustainable in the light of Lord Carnwath's analysis of the proper interpretation of Exception 2 in s.117C(5) , namely that:

> "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."

24. The social worker expressed the opinion that the deportation of the appellant would be emotionally damaging to the children, should the appellant be separated from them for the second time. The impact upon the children was addressed by the social worker by reference to the experiences of children raised by a single parent, or children brought up in single-parent households.

25. In my judgement, neither the social worker, the appellant's representative nor the First-tier Tribunal Judge identify factors that take the effect upon the appellant's children beyond the inevitable disadvantages resulting from the separation of a parent and child. It is inevitable that a separation will have a real and potentially damaging impact on children when a parent is deported and that a child will feel unhappiness in those circumstances.

26. Looking at the evidence before the First-tier Tribunal and the factors identified by the appellant's representative that are recorded in paragraph [36] of the decision, it is difficult to identify anything which distinguishes this case from other cases where a parent who is subject to

deportation as a foreign criminal, is separated from a child. The First-tier Tribunal judge found that the three older children “would cope less well”, and that would “arise from their particular vulnerabilities”, without identifying what the particular vulnerabilities the judge had in mind, are. 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. It is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.

27. 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."

28. In my judgment it was irrational for the First-tier Tribunal to conclude that it would be unduly harsh for the respondent's children to grow up in the UK without him without identifying the particular vulnerabilities that elevated the impact upon the children from being “harsh” to “unduly harsh”. The three older children may well “cope less well” but that is unfortunately, without more, an unfortunate consequence of the separation of a parent and child, when the parent is deported. It follows that in my judgement, the decision of the First-tier Tribunal judge is vitiated by a material error of law and must be set aside.

Remaking the decision

29. Mr Mohzam invited me to adjourn the hearing so that the appellant can submit further evidence. The application was opposed by Mrs Aboni who submitted that I should remake the decision upon the evidence that is before the Tribunal.

30. I refused the application to adjourn the hearing. The standard directions issued to the parties make it clear that there is a presumption that if the decision of the First-tier Tribunal is set aside, the Upper Tribunal will proceed to remake the decision at the hearing of the appeal. The Tribunal is empowered to permit new or further evidence to be admitted in the remaking of a decision, but no application has been made by the appellant in accordance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. No further witness statements have been made by the appellant and his partner. I have been provided with no explanation, let alone a satisfactory explanation, as to why any new evidence could, with reasonable diligence, not have been made available to the First-tier Tribunal on the initial appeal, and why no application to adduce evidence in accordance with the Tribunal Rules, has been made.

31. Mr Mohzam relied upon the report of the independent social worker report and submits that in this case, I should have particular regard to the close family ties and the relationship between the appellant and his children. I invited Mr Mohzam to outline and direct me to any evidence of any particular vulnerabilities that either his partner or any of the children have, to support the claim that the impact of the appellant's deportation upon his children, would be unduly harsh. Mr Mohzam referred to the age of the youngest child and the opinion expressed by the social worker that the children are close to their father. He submits the impact of separation, will be severe. Mr Mohzam submits that the children have grown up with their father, and his removal from the family will result in a sense of loss, a loss of security and the loss of the support that he has provided, including the financial support.

32. Mrs Abonhi submits the independent social worker does not identify any particular factors that are capable of satisfying the high threshold that must be met. She submits there is no evidence of any particular vulnerability and there is no evidence from the schools attended by the children or any medical professionals to demonstrate any particular detrimental effect upon the children when their father was in prison and separated from his family. She submits that here, there is nothing more than the normal impact upon children when a parent is deported.

33. In remaking the decision I adopt the unchallenged findings made by First-tier Tribunal Judge Law. First-tier Tribunal Judge Law found it would be unduly harsh for any of the children to live in Iraq. The respondent did not challenge that finding and Mrs Aboni has not sought to persuade me that I should revisit that finding. The issue is whether it would be unduly harsh for the children to remain in the UK without the appellant.

34. I have carefully considered the content of the independent social work report. First-tier Tribunal Law set out at paragraph [32] of his decision, the conclusions set out in the report of Lucy Mwape dated 15th July 2019. That report followed an assessment undertaken when the appellant was in prison. I note that although the report is that of Lucy Mwape, an independent social worker, the report is based upon a home visit on 21st July 2019, "undertaken by Mr Masimba Karemba and Mrs Beatrice Madzadzavara – independent social worker" when they saw and interviewed the appellant's partner and three eldest children. They observed the youngest child during that visit. The independent social worker met with the appellant on 30th July 2019 at Stoke Heath Prison. Lucy Mwape identifies in section 4 of her report, the documents that were made available to her.

35. In the course of the assessment, the appellant's partner reported that she does not have support from family networks and closing the family business had a huge negative impact on the family's financial situation

[7.1]. She explained that there are no major problems in school for these three school-age children [8.1], and the children's schooling was not being impacted upon by the absence of their father [8.3]. She claimed to be coping with the children to the best of her ability under the circumstances [8.5], although she did not consider that she was meeting the needs of the family financially, and did not have enough money to spare for regular visits to see the appellant in prison [8.8]. The appellant's partner believed that it is going to be a struggle with no money to open the business again, and she believed that she would struggle to manage the four children as a single parent [8.16]. The appellant's partner reported that she had not been to see the doctor since the appellant had been in prison and had tried to deal with the situation on her own [8.10]. The appellant's partner confirmed that the family has never had any involvement with social services [8.17]. The appellant's partner reported that RH has no health issues other than being asthmatic. She reported that ZH is reported by his teachers to be a "bright boy" but had been put on school detention 5-6 times during the time that the appellant had been in prison. She reported that if the appellant was in the family home, he would not tolerate that behaviour and such behaviour would stop. She said that most of the time she is busy with household chores, and ZH appeared to take advantage of the situation. That aside, the appellant's partner confirmed that ZH is in good health and has a good and clear daily routine in place. The appellant's partner reported that HH was doing well at school although she was behind with reading and writing. She was described as a "lovely girl", but the appellant's partner reported that her attitude had changed since the appellant's imprisonment and she was now always fighting with her sibling ZH. The appellant's partner confirmed that she has facilitated telephone contact between NH and the appellant and said that NH recognises the appellant's voice on the phone, and she laughs and giggles during telephone contact.

36. In her analysis, Lucy Mwape confirms that the family was missing the appellant and struggling to understand why the respondent proposed to deport him. The appellant's partner believed that her children are missing out, and the appellant was missing out on their development and life events. She states:

> "9.31 "The information provided by [the appellant's partner] suggests that there are secure attachments between the children and [the appellant]. It is the social workers' professional opinion that should the children be separated from either [the appellant's partner] or [the appellant], the situation is likely to have a negative impact on the attachment bond the children already have with the two thereby forming an additional route of fear and lack of security for them. This is likely to happen due to the fact that when parents are removed from children's lives suddenly and without adequate support, the attachment and relationship is affected.
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> 9.32 The assessors believe that, should [RH], [ZH], [HH] and [NH] be separated from either [the appellant] or [the appellant's partner], it is likely that they may interpreter *sic* that situation as "abandoned" by their caregivers. It is most likely that they may then develop a profound sense wrongdoing *sic* resulting in their caregivers having to leave, igniting complex emotions and shame that may damage their lifelong relationships with themselves and others."

37. In the final analysis, Lucy Mwape confirms that the appellant expresses love for his children and wife with passion [13.39], and that he appears genuinely concerned about their emotional welfare in his absence. She states there would be emotional and psychological implications on all the children should the separation continue, worse should the appellant be removed from his children altogether [13.40]. She notes that RH and ZH are in their adolescent years and a father figure is very crucial for them during this stage as they look out for him to reassure them that they are going through what he experienced [13.42]. She states that children at NH and HH's developmental age require secure stable and affectionate relationships with adults and responsiveness to their needs. At paragraph 13.50, she states:

> "… [The appellant] requires time to reflect on his character and be able to provide insightful parenting. His role as a loving father is crucial in establishing age-appropriate boundaries and rules to allow his children to experience both positive and negative natural consequences for their

> behaviour or provide logical consequences to help them learn from mistake."

38. Lucy Mwape concludes that during the home visit on 21st July 2019, it was observed from the way the children spoke about their father and mother that there is a close relationship with the appellant. They rely on him in terms of applying discipline in the house and providing the financial and practical support needed by the family. She notes that the appellant has been in the children's lives since they were born and had been separated from his children during the period when he was in prison. She records that all the older children considered visiting their father in prison was better than talking over the phone, as evidence of how significant it is for them to have physical contact with their father. Such physical contact is in their best interests. In her opinion, it would be emotionally damaging to the children should the appellant be separated from them for the second time if he is deported. She states that the children have already suffered his loss once, and twice may contribute further trauma. At paragraphs 14.8 to 14.13, she draws upon her experience and sets out the impact upon children that are raised by single parents.

39. Having carefully considered the evidence before me, I am satisfied that First-tier Tribunal Judge Laws correctly found that there is an extremely close bond between the appellant and each of his children. I am quite satisfied that apart from the period during which the appellant was incarcerated, he has lived with his partner and children, and that it is in the children's best interests to continue to live with both of their parents together in the UK. I acknowledge that the best interests of the children are a primary factor in my ultimate decision, however they are not a determinative factor.

40. I must take into account the public interest in deportation as expressed in the immigration rules and s117C of the 2002 Act. I have carefully considered whether there is anything within the evidence and in

particular, the report of the independent social worker, that establishes a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent reminding myself that it is an elevated threshold denoting something severe or bleak to be evaluated exclusively from the effect on the child. Having carefully considered the evidence, in my judgment there simply is not the evidence on which I can properly conclude that the deportation of the appellant would lead to his partner and children suffering a degree of harshness beyond what would necessarily be involved for any child of a foreign criminal facing deportation. I have no doubt that the children will initially feel a sense of loss because of their close relationship with their father, and that the consequences of the appellant's deportation will be harsh. The evidence establishes that the children are bright and resilient and that with the love and care that they received from their mother when their father was in prison, the impact upon them was kept to a minimum. The 'commonplace' distress caused by separation from a parent is insufficient to meet the test. The children will continue to receive the love, care and support that they need from their mother in the United Kingdom. It will undoubtedly be difficult for the children in the short term, but in my judgment the evidence simply does not provide a basis upon which the appellant can establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules.

41. In NA (Pakistan) -v- SSHD [2016] EWCA Civ 662, Lord Justice Jackson held that the fall back protection set out in s117C(6) also avails those who fall outside Exceptions 1 and 2 and that on a proper construction of section 117C(3), the public interest requires the person's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. As to the meaning of "very compelling circumstances" over and above those described in Exceptions 1 and 2, Lord Justice Jackson said:

> "28. … The new para. 398 uses the same language as section 117C(6) . It refers to "very compelling circumstances, over and above those described in

> paragraphs 399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.
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> 29. In our view, the reasoning of the Court of Appeal in JZ (Zambia) applies to those provisions. The phrase used in section 117C(6) , in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

42. Whether there are "very compelling circumstances" is a demanding test, but nonetheless requires a wide-ranging assessment, so as to ensure that Part 5A produces a result compatible with Article 8. It has not been suggested either before First-tier Tribunal Judge Law or before me that it would be unduly harsh for the appellant's partner to go to Iraq with him or remain in the UK without him. First-tier Tribunal Judge Law found that it would be unduly harsh for the children to live in Iraqi and for the reasons set out above, I have found that it would not be unduly harsh for the children to remain in the UK without the appellant.

43. I have noted the appellant's offending history. On 16th November 2018 he was convicted at Wolverhampton Crown Court of burglary and sentenced to 2 years imprisonment. In his sentencing remarks, His Honour Judge Watson noted that the appellant was found not guilty of possessing criminal property and the judge inferred from that that the jury found that although he was involved in the burglary he was not the leading light. The sentencing judge said:

> "…Notwithstanding that, this was a serious burglary and you have heard the consequences for the family who owned this business. It may not have been a dwelling burglary, but it must have felt like a dwelling burglary to those who had put time and effort into the business and kept items precious to them within the business, which items were stolen by you, either alone or with others…..In my judgement, given the extent of the loss to the victim, given the degree of vandalism in breaking into the property, this was, in my

> judgement, an offence with greater harm. There must have been, in my judgement, a degree of planning or organisation; the burglar alarm was disabled and in any event, there must have been equipment for burglary in order to go through the felt roof. It is therefore, in my judgement, an offence indicating higher culpability. What this means to you is that this is a category 1 offence. The starting point is imprisonment of two years with a range of between 1 to 5 years in custody. But it does not stop there. I must look at the factors indicating an increase in seriousness and indeed those factors reducing seriousness. Increasing seriousness is the fact that you have previous convictions, not just that fact alone, but you have previous convictions for a similar type of offence; two previous convictions for non-dwelling burglary, one going back to 2012, the other very shortly before this offence was committed. Following your first conviction, you were given a suspended sentence. That did not deter you. The second conviction, you received a financial penalty. I do not have the circumstances of that, but nonetheless this was a conviction very close in time to the one I must now sentence you for.
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> In addition there are further indicators indicating seriousness. This was an offence committed at night. Fortunately, no staff were present. There are no features within the guidelines which reduce seriousness, but I bear in mind your personal mitigation. You have four children, the oldest being 16, and you have been with your partner for some 20 years.
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> …, the starting point is two years. It is aggravated by your convictions, but I am prepared to reduce back to the starting point on account of your personal mitigation. That makes a sentence of two years. In my judgement, this offence is so serious that only a custodial sentence can be imposed, and that custodial sentence will be one of immediate imprisonment…"

44. I have carefully considered the matters referred to in the report of the independent social worker, particularly at section 13, in which the social worker records the information provided by the appellant during an interview on 30th July 2019. The appellant acknowledged that he let down his wife having come to the UK for better living prospects. He passionately described each one of the children. When speaking about the offence leading to his incarceration, the appellant did not wish to go into detail because each time he thinks about it, he cannot come to terms with the fact that he got himself involved in a criminal act that has affected his family. He acknowledged that he deserved to be punished and was very sad that the people being punished most are his children and wife. The independent social worker states that the appellant shows good insight into what his criminality has caused his family, and he expresses love for his wife and children.

45. I acknowledge that the public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly, recognising that there will be cases where the person's circumstances outweigh the strong public interest in removal. I have had regard *inter alia* to the appellant's length of residence in the UK, the close ties that he retains with his wife and children, his immigration and offending history, and the family circumstances described in the report of the independent social worker but there are in my judgment no very compelling circumstances which make his claim based on Article 8 especially strong. It follows that in my judgement, the deportation of the appellant is in the public interest and not disproportionate to the legitimate aim.

Decision:

46. The Decision of First-tier Tribunal Judge Law is set aside.

I remake the decision and dismiss the appeal.

Signed Date 21st February 2020

Upper Tribunal Judge Mandalia