Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13148/2019**

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 9th August 2022	**On the 11th January 2023**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR CARLTON ALEXANDER ATKINSON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Islam, instructed by UK Immigration Lawyers Ltd
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Jamaica and was born on 4th October 1963. On 15 December 2003 the appellant applied for entry clearance as the spouse of a British citizen, Mrs Janet Hurd-Atkinson. The appellant and Mrs Hurd-Atkinson had married in Jamaica on 5 December 2003. In February 2004 the appellant was granted entry clearance valid until 11 February

2006. He arrived in the UK on 18 February 2004. Following an application in February 2006, on 27 February 2006 the appellant was granted indefinite leave to remain as a spouse.

2. On 3 October 2018 the appellant was convicted at Birmingham Crown Court of causing death by careless or inconsiderate driving. On 23 November 2018 he was sentenced to a term of 16 months imprisonment.

3. The appellant was informed that in light of his conviction he is liable automatic deportation in accordance with s32(5) of the UK Borders Act 2007, unless one of the exceptions apply. The respondent deemed the appellant's deportation to be conducive to the public good. The respondent received representations from the appellant and his partner on 2 January 2019, 8 January 2019 and 2 July 2019. Following consideration of those representations, the appellant was served with a decision dated 24 July 2019 to refuse his human rights claim. The appellant's appeal against that decision was allowed on human rights grounds by First-tier Tribunal Judge Chamberlain for reasons set out in a decision promulgated on 29th November 2019.

4. The decision of First-tier Tribunal Judge Chamberlain was set aside by Upper Tribunal Judge Blundell for reasons set out in his error of law decision, decided on the papers under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules. He directed that the decision will be remade in the Upper Tribunal. The appeal was listed for hearing before me to remake the decision.

5. Because it is relevant to the scope of the issues to be determined by me, it is useful for me to set out in this decision, the background to the appeal and those areas identified by Upper Tribunal Judge Blundell in respect of which Judge Chamberlain had erred.

The background and error of law in the decision of the First-tier Tribunal

6. I adopt the background that was set out by Upper Tribunal Judge Blundell in paragraphs [10] to [13] of his decision. Having set out the appellant's immigration history, he said:

> "10. …The appellant was granted entry clearance and ILR as the spouse of a British citizen, Janet Hurd-Atkinson. Their marriage subsists. The appellant and his wife have one daughter together, CVA, who was born on 22 January 2005. The appellant also formally adopted one of his wife's daughters from a previous relationship. Her name is [SBA] and she is currently 22 years old.
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> 11. In the early hours of 29 August 2017, the appellant was driving along a residential road in Birmingham. A taxi driver named Mr Shezad was standing by his car, opening the driver's side door. As a result of his careless driving, the appellant did not see Mr Shezad and struck him with his car. Mr Shezad was not killed immediately but he died before the police officers who attended the scene could get him to hospital. The appellant did not stop at the scene of the accident He drove home and covered his seriously damaged vehicle with a tarpaulin. The appellant was traced by detailed police enquiries a week later, whereupon his car was also found.
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> 12. The appellant was prosecuted for causing death by careless or inconsiderate driving. He initially pleaded not guilty, but he accepted responsibility for his actions prior to trial. On 23 October 2018, he was sentenced by HHJ Parker to 16 months' imprisonment. I have taken the facts in the preceding paragraph from his sentencing remarks. In sentencing the appellant, Judge Parker weighed the details of the offence against the appellant's guilty plea, his otherwise clean record, his working history and the fact that he was a family man about whom people spoke highly. He noted that the sentence would seem derisory to Mr Shezad's family but he applied the sentencing guidelines andreached a sentence of sixteen months' imprisonment and disqualification from driving for two years. There was no appeal against sentence or conviction.
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> 13. Deportation proceedings were initiated whilst the appellant was imprisoned at HMP Featherstone. Having sought and received submissions from the appellant, the respondent decided on 24 July 2019 to make a deportation order against him and to refuse the human rights claim he had made. She was not satisfied that the appellant's deportation would be contrary to Article 8 ECHR. The appellant appealed."

7. Judge Blundell referred to the statutory exception to deportation that applies to those who receive a sentence of between 12 months and four years imprisonment as set out in s117C(5) of the Nationality, Immigration and Asylum Act 2002, and the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53 regarding the test of 'undue harshness'. Judge Blundell went on to identify three material errors in the decision of Judge Chamberlain:

“43. … I am unable to identify in the decision of the First-tier Tribunal any clear self-direction regarding the threshold presented by s117C(5) of the 2002 Act. The judge cited ZH (Tanzania) but there is no reference to KO (Nigeria) or to any other authority in which the meaning of 'unduly harsh' in this statutory context has been considered….

44. Notwithstanding that clear guidance from the Appellate Committee regarding the caution with which I should approach my task, I am unable to accept that the judge had in mind the correct approach to the second statutory exception. She made no reference to the elevated threshold inherent in the exception and she dedicated much of her analysis to the question of whether the appellant's deportation would be contrary to CVA's best interests. I do not lose sight of the fact that there are parts of the decision in which the judge made reference, for example, to the 'significant detrimental impact' and the 'severe and long lasting' effects on CVA but it is not clear, with respect, that the judge analysed those consequences against the statutory yardstick as construed in the authorities. As is clear from PG (Jamaica), KF (Nigeria) and Imran, a certain amount of emotional suffering and harm is the natural consequence where a parent is deported from the United Kingdom. In order for that suffering to cross the threshold into undue harshness, what is required is not merely severe, harsh or bleak consequences; the threshold is elevated even higher than that. So much is clear from the Supreme Court's approval of MK (Sierra Leone), as it is from the subsequent decisions set out above. Having considered the judge's decision as a whole, I am unable to conclude that she had that threshold in mind when she concluded that the consequences for CVA satisfied the second exception to deportation.

…

46. As contended by Mr Jarvis, the second error into which the judge fell was to reach a finding which was unsupported by the evidence at [46] of her decision. She concluded in that paragraph that CVA would 'inevitably' be required to take on 'some caring duties' in respect of her mother in the event that the appellant were deported. It is absolutely clear that the appellant's wife suffers from a range of health conditions, as documented at pp60-65 of the appellant's bundle in particular. I note that she was awarded Personal Independence Payment in 2017, at the standard rate for her daily living needs and at the enhanced rate for her mobility needs: p65 of the appellant's bundle refers. There is no breakdown of how that assessment was reached. Nor is there any indication that this continued to be awarded at the date of the hearing before the FtT. Nor is there any suggestion that the appellant received Carer's Allowance to look after his wife. It seems unlikely that he would have been eligible for the same, given that he was seemingly working full time until shortly before the hearing before the FtT: p71 of the bundle refers.

47. I can find nothing in the oral or documentary evidence to show that the appellant's wife requires assistance with getting out of bed, bathing, toileting and cooking, as the judge suggested at [46]. There is no reference to any such requirement in Diana Harris's lengthy report. The closest suggestion is at p14 of that report, which refers to the appellant helping her with 'personal care', which is described as washing her hair with appropriate care and giving her massages and herbal medication. I note that the report, and the letter from Dawn Hendricks (a family friend) which appears at p60 of the appellant's bundle, both refer to the maintenance of the garden as being the

appellant's wife principal difficulty whilst the appellant was in prison. Had there been a requirement for CVA or [SBA] to assist her with personal care at that time, it seems extremely likely that this would have been mentioned in the written evidence.

48. In considering the situation for CVA whilst the appellant was in prison, Diana Harris's report noted that CVA had been required to 'do more in the house like lunch, house work, fast easy meals, ironing etc', as the judge set out at [38]. There is no reference in the witness statements or in the judge's decision to suggest that CVA has ever helped her mother with bathing or toileting. The letter which was written by Shantelle in support of the appeal (at p47 of the bundle) makes no reference to her or CVA needing to assist their mother with these functions, whether during the time that the appellant was in prison or at all. There is no reason to think that matters have worsened since the appellant was in prison and that his wife now requires additional care. It is entirely unclear, with respect-to the judge, how she came to the conclusion that CVA would be required to carry out these caring duties, or indeed that such care was in fact required.

49. The third error into which the judge fell was that she failed to analyse the alternative support which would be available for the appellant's wife in the event of his deportation. There were two sources of alternative support. The first was the families of the appellant and his wife. A family tree appears at p41 of Ms Harris's report. It shows that the appellant and his wife have a total of six siblings in the United Kingdom. In addition to CVA and Shannette, the appellant's wife has two other adult daughters from her previous partner. One of those adult daughters, Cassena, wrote a letter which appears at p43 of the bundle. That letter shows that she lives in the same town as the appellant and his wife. The email from her other daughter, which appears at pp44-46 of the bundle, does not give her address but does refer to her having previously visited her mother's house regularly. Even if the judge was correct to find that the appellant's wife required regular personal care of the type suggested at [46] of her decision, she erred in failing to consider whether it could have been provided by these relatives before concluding that it would 'inevitably' fall to CVA to undertake such a role.

50. The judge also erred in dismissing the submission made by the Secretary of State about the role which could be played by the local authority in caring for the appellant's wife. I have reproduced [46] of her decision above. It is clear that she was particularly concerned by the prospect of CVA becoming a 'young carer'. In reaching that conclusion, however, the judge discounted entirely the prospect of assistance being provided by the local authority or the NHS without reference to the legal obligations owed by those bodies. Unhelpfully, those were not set out in the respondent's letter or in the Presenting Officer's submissions but I note, in particular, the statutory obligations imposed on a local authority by ss17ZA- 17ZC of the Children Act 1989, as inserted by the Children and Families Act 2014. As a result of those provisions, a local authority is required to assess whether a young carer has a need for support and to decide whether any need for support could be satisfied by services which the authority could provide under s17 (provision of services for children in need, their families and others). The Young Carers (Needs Assessments) Regulations 2015 were made under the power conferred by s1728(8) of the 1989 Act and make provision for the scope of the assessment and the manner in which it is carried out. The intention of the legislature, as Mr Jarvis submits, is clearly to provide a package of support to

> young carers so that their wellbeing and education may continue notwithstanding the needs of the adults with whom they live.

8. Judge Blundell came to be clear conclusion that Judge Chamberlain erred in three respects when she concluded that the appellant's deportation would have unduly harsh consequences on CVA. He concluded those aspects of her decision cannot stand and the decision is set aside. Judge Blundell explained, at paragraphs [54] to [59] of his decision why he rejected the submission made on behalf of the respondent that he could dispose of the appeal by remaking the decision dismissing the appeal because there is nothing on the facts of the case that even arguably, crosses the threshold of 'undue harshness'. Judge Blundell said:

> "57. The appellant cannot hope to succeed in relation to the first statutory exception because he has not spent more than half of his life lawfully present in the United Kingdom; he is currently 56 years old and he lawfully re-entered the UK in 2006, some fourteen years ago. It was positively contended in the skeleton argument before the FtT, however, that the appellant was socially and culturally integrated into the United Kingdom and that there would be very significant obstacles to his reintegration to Jamaica.
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> 58. Even though the appellant cannot satisfy the first exception as a whole, it is necessary to make findings on these latter two aspects of the exception for the reasons given by the Court of Appeal in JZ {Zambia) [2016) EWCA Civ 116; [20161 Imm AR 781. In summary, even if the appellant cannot satisfy the exceptions, any relevant findings made in relation to those exceptions may form part of an aggregation of matters which collectively constitute 'very compelling circumstances' under s117C(6) of the 2002 Act.
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> 59. For the same reason, I consider it necessary for there to be·findings·in relation to the 'partner' component in the second statutory exception. That is to say that it will be necessary for the Upper Tribunal to consider whether the appellant's deportation would bring about unduly harsh consequences for the appellant's wife. There has been no judicial conclusion on that issue and there must be reasoned findings upon it in order to approach s117C of the 2002 Act in the way required by NA (Pakistan) [2016] EWCA Civ 662; {2017) 1 WLR 207. In the event that the appellant cannot satisfy the second exception in relation to either his partner or his child, any relevant findings must nevertheless be factored into the holistic assessment required by s117C(6).
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> 60. In summary, the position is as follows. The finding that deportation would be unduly harsh on the appellant's child was tainted by legal error and will have to be redetermined by the Upper Tribunal. There were no findings on the first statutory exception, or on whether deportation would be unduly harsh on the appellant's wife and those findings must be made in the Upper Tribunal. And there was no consideration of whether there were very compelling circumstances over and above those in the statutory exceptions which sufficed to outweigh the public interest in deportation. In the event that the appellant cannot succeed under the exceptions, that issue will also fall to

be considered in the manner contemplated in the authorities. Ultimately, therefore, the decision on the appeal as a whole will be remade in the Upper Tribunal.

61. Although I have reached that conclusion, the appellant should be under no illusions about the difficulties which face him in this case. As I have explained at some length above, the threshold for 'undue harshness' is clearly a very demanding one. Equally, on the state of current authority, the appellant faces some difficulty in securing positive findings in relation to UK integration and obstacles to re-integration to his country of nationality. And the threshold presented by s117C(6) is a very high one, given the public interest in the deportation of those who fail to satisfy the statutory exceptions. Notwithstanding those difficulties, I feel unable to say that this is simply not a case which could succeed on any basis, and I order that the decision on the appeal as a whole will be remade in the Upper Tribunal."

The hearing before me

The conviction and sentence

9. Before I turn to the evidence in this appeal, it is useful for me to refer to the conviction and sentence that lie behind the respondent's decision. The appellant has been convicted at Birmingham Crown Court of causing death by careless or inconsiderate driving. On 23 November 2018 he was sentenced to a term of 16 months imprisonment. The details of the offence and the reasons for the sentence imposed are apparent from the sentencing remarks of His Honour Judge Parker that are to be found in the respondent's bundle.

> "You are 55 years of age. You have no previous convictions. In the early hours of 29 August 2017 you struck Mohammed Ryee Shezad in City Road in Birmingham as he stood in the road by the offside door of his vehicle, having just inserted the keys into the lock. The collision caused severe damage to your vehicle and, of course, it caused the death of Mr Shezad. You failed to stop. That is a very serious aggravating feature. You must have known or believed that you struck someone or something that required you to stop. It was beyond irresponsible that you did not. Of course, a feature of not stopping from the law's point of view is we have no opportunity to know what condition you were in. The evidence establishes that you had got into your car in Handsworth. It is questionable as to what state you were in. By the time you went to City Road you were driving slightly above the speed limit, 34 in a 30 miles per hour limit... The result was that Mr Shezad was found lying in the road by members of the public who alerted the police and then flagged down a passing police car three and a half minutes later. He was initially alive. Assistance was given to him but he died before reaching the safety of the hospital.

> It took the police a detailed investigation and trawl of CCTV to identify you through your car. On 4 September, a week later, your car was located outside your home address. It was now covered by a tarpaulin but underneath that the damage was clear to see. The photographs speak for themselves. There is damage to the nearside front lamp but there is significant damage to your windscreen on the nearside. So great is the damage that there is effectively a hole in the windscreen. You must have known, from the state of your vehicle and there is other material referred to in the opening on the car, you must have known then what you have done albeit, as you would say to the police, you did not know it was fatal. I must conclude that you took steps to hide your vehicle. You never surrendered yourself. I have little doubt that is because you simply could not face up to what you have done. That attitude continued by entering a not guilty plea when the case is really overwhelming. Fortunately you did eventually plead guilty ahead of trial and I will give you the credit you deserve for that.
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> So far as you are concerned, I make it plain; aside from this, you are a perfectly good man. You have embraced your stepchildren. You have a child of your own aged 13. You are a good father. You have been a working man. You have had the decency recently to leave a job because you knew what your predicament was and that a custodial sentence was almost certain to follow. Everybody speaks highly of you and to have reached the age 55 with barely troubling the law, as you have, is a tribute to you.
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> As you know, you have, through your bad driving, killed an absolutely blameless man…48 years of age, a model husband, a wonderful father of five children, the absolute glue within their family and the person they all looked up to, a religious man, from the sound of it a correctly proud man, deeply proud of his daughter's achievements in going to university….
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> The sentence that I am going to pass to the family will seem derisory. To them, his life was absolutely priceless and obviously no sentence I pass and never turned back the clock. They will never come to terms with the loss which they have suffered. I hope they understand that my powers are limited because I am dealing with a man who never wanted to hurt anyone that night and I am punishing you for bad driving, a fatal collision and I am bound to follow guidelines that are set down by the sentencing Council in respect of cases like this.
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> ….. I have taken into account your good character. I have taken into account the remorse that you obviously do feel although I regard that is tempered by the fact that you did not stop, you never surrendered yourself to the police and you would have never confessed to this crime had they not found you. Had this been a trial, I would have sentenced to 20 months imprisonment but as you have pleaded guilty the sentence is 16 months imprisonment…"

The evidence before me

10. The appellant attended the hearing before me and I was informed by Mr Islam that I would be hearing evidence from the appellant and his partner, Mrs Janet Hurd-Atkinson. The appellant's evidence is set out in a bundle comprising of sections A to E and a total of 172 pages. At the hearing I was

also provided with a ‘supplementary bundle’ that comprises of a letter from Bromsgrove Chiropractic Clinic Ltd and a ‘character reference’ from a retired social worker, Earl John.

11. The evidence before the Tribunal in the form of witness statements and reports is a matter of record. I do not propose to rehearse the written evidence relied upon by the appellant and his partner and will instead refer to it as far as it is necessary to do so to explain the conclusions I have reached.

12. The appellant adopted his witness statement dated 18 July 2022. He confirmed the contents of that statement is true and correct. Asked why his daughter CVA has not attended the hearing, the appellant said that he has two daughters. The eldest is pregnant and he did not ask the youngest to attend, because he did not wish to disrupt her preparation for university. She is hoping to attend Salford University, Manchester.

13. In cross-examination the appellant confirmed that CVA intends to move to Manchester in September 2022. The appellant said she is aware of the possibility that he may have to leave the UK, and he will tell her if he is left with no choice. He confirmed that his other daughter lives two to three miles away and is aware of the situation. The appellant confirmed that he is working as a ground worker doing building works. He said that he started working in the building trade in about 2007 and has been employed in his current job for just over a month. Asked about the care he provides for his wife, the appellant said that he provides body massages to ease the pain. He drives whenever they have to travel on a long journey over 50 miles and he cooks for her as well as dealing with all the household chores. The appellant claimed his wife did not have any assistance with those tasks when he was in prison. He said that his eldest daughter would try and come around to help when needed. The appellant said that his wife was assisted by friends and relatives when she travelled to visit him in prison but she did not have sciatica at that time.

14. The appellant said that prior to his arrival in the UK, he did not have a steady job in Jamaica. He lived on his own. He has a brother and a half-brother in Jamaica but he is not close to them. He said that he has not heard from them for the past five years. He does not know whether his wife and children are in contact with his brothers. Mr Carlton referred to the report of Diana Harris in which she records, at [7.9], Mrs Hurd-Atkinson keeps in touch with the appellant's brother in Jamaica. The appellant claimed that he knew she kept in contact with him previously, but since his conviction he has just been cut off. They maintained social contact previously. He said that no-one in his family knew about the offence until he was sentenced, and after he was released, he did not have contact with anyone. He said that he sometimes tries to call his younger brother, and sometimes his younger brother has tried to call him, but they have been unable to connect. The appellant confirmed he had visited Jamaica just before the accident and stayed in a hotel for two weeks. He had taken his youngest daughter with him. He saw his younger brother during that visit. He said that he had previously sent money to relatives in Jamaica when he could afford to. He did not think his younger brother would help him establish himself if he has to return to Jamaica. As far as his health is concerned the appellant said he suffered an injury to his leg in February that is healing. He has type II diabetes for which he is taking medication. He occasionally has symptoms of angina, but does not take medication for that.

15. The appellant's partner, Mrs Janet Hard-Atkinson adopted her witness statement dated 18 July 2022. In cross-examination she confirmed their youngest daughter does not know the appellant faces the possibility of deportation to Jamaica. She said that if the appellant is deported, their daughter will be devastated. She relies on the appellant to provide her with driving lessons, to play football, and to assist with homework when she is struggling. Mrs Hurd-Atkinson said the appellant assists her with cooking, housework and ironing. She relies upon him considerably. She said that when the appellant was in prison, she relied upon the help and support of

her daughters. She said that she would not live in Jamaica with the appellant because she has no knowledge about life in Jamaica and will not be able to get around. She has only visited Jamaica for a holiday and to attend a funeral. She said that it would be difficult for the appellant to find a job in Jamaica and support her. She said that when her youngest daughter goes to university she will have no one but the appellant to help her. She said that she had seen the way in which carers had looked after her own mother and she was poorly treated. She does not wish to rely on carers to support her. She said that she used to speak to the appellant's brother previously but has not really spoken to him for the past two years.

The respondent's submissions

16. Mr Williams relies upon the respondent's decision. He submits the issue here is whether Exception 2 set out in s117(5) of the Nationality, Immigration and Asylum Act 2002 applies. He submits the effect of the appellant's deportation on Mrs Hurd-Atkinson and their children would not be unduly harsh.

17. Mr Williams accepts Mrs Hurd-Atkinson has a number of health conditions that impact her wellbeing and mobility at times, as set out in the report of Diana Harris, an independent social worker. He accepts Mrs Hurd Atkinson is prescribed regular medication, but he submits, there is no reason to believe that any treatment that she requires would not be available to her in Jamaica. He submits there is no evidence to show the medication would not be available or is unaffordable. Mr Williams submits that the evidence shows this is a close family who have been able to maintain regular contact. The appellant and his partner own a home in the UK that could be sold or rented to provide an income if they decide to live in Jamaica. Mr Williams submits it would not be unduly harsh for Mrs Hurd-Atkinson to live in Jamaica with the appellant. Alternatively, he submits, the effect of the appellant's deportation on his partner and the children would not be unduly harsh.

18. Mr Williams submits there is nothing to show that the appellant's partner and children could not visit Jamaica. When the appellant was separated from the family because of his incarceration, there were no unmet personal care needs. In her report, Diana Harris refers to Mrs Hurd-Atkinson maintaining daily telephone contact with the appellant whilst he was in prison. She refers to Mrs Hurd-Atkinson's claim that she did not cope well, but there is no reference to her requiring assistance with her personal care and hygiene. There will undoubtedly be an emotional impact because of any separation, but Mr Williams submits, there is no evidence that would be unduly harsh. Mr Williams submits that if there are any unmet needs, Mrs Hurd-Atkinson would have assistance available to her from Social Services. The Tribunal should assume the local authority will discharge any of its obligations to provide any care, support and assistance that is required. In any event, if it came to it, the family would rally around to provide support.

19. Mr Williams accepts that it would be unduly harsh to expect CVA to leave the United Kingdom and live with her father in Jamaica, at a sensitive time in her life when she is just beginning University. He submits there is however an absence of evidence to establish that the effect of the appellant's deportation on CVA would be unduly harsh. The appellant's imprisonment clearly had an emotional impact upon CVA previously but she is now older and would be able to deal with matters better. She is doing well in her education. Her life is going to change when she attends University in any event. She will likely be separated from her parents and will have less of the hands-on support from her father that she may have previously enjoyed. It will be difficult for her, but there is no evidence that it would be unduly harsh.

20. Mr Williams submits when considering whether there are very compelling circumstances over and above the exceptions set out in s117C of the 2002 Act, the Tribunal should note that the appellant lived in Jamaica until he was in his early 40's. He is someone that will be perceived very much as an insider, in Jamaica. He has family connections and the appellant's evidence is that both he and his brother have been trying to contact each other, but

have missed each other. They have not fallen out. The appellant has previously provided some financial support when he was able to, and it is reasonable to assume his brother is likely to provide some short-term assistance to the appellant, even if that is only somewhere to sleep whilst he re-establishes his life in Jamaica. The appellant has experience of work in both Jamaica and the UK and he will be able to draw upon the skills that he has to work in construction. Even if there is an initial struggle, it is likely that the appellant's family will assist with remittances in the short term.

Submissions on behalf of the appellant

21. Mr Islam submits the appellant and Mrs Hurd-Atkinson are reliable and credible witnesses. He accepts Exception 1 set out in s117(4) of the 2002 Act does not apply. He refers to section C of the appellant's bundle and the report from the Worcestershire Acute Hospital NHS Trust, Imaging Department, confirming an examination of Mrs Hurd-Atkinson's pelvis following complaints of pain in the lower back and hips. Mr Islam accepts there is no evidence of a direct diagnosis beyond that set out in the report, but Mrs Hurd-Atkinson has provided evidence of the support and assistance she receives from the appellant. Mr Islam submits although there is no evidence before me regarding treatment that might be available to Mrs Hurd-Atkinson in Jamaica, the respondent has failed to provide evidence that the medication she requires, would be available to her. In any event, the evidence of Mrs Hurd-Atkinson is that she would not live in Jamaica.

22. Mr Islam submits there is evidence in the appellant's bundle regarding the health of Mrs Hurd-Atkinson, albeit most of the letters are historic. They do however paint a picture of an individual who has suffered ill-health over a number of years. Mr Islam drew my attention to the letter (*page C42)* from the Department for Work and Pensions that confirms that in May 2022, Mrs Hurd-Atkinson established an entitlement to a Personal Independence Payment ("PIP") for daily living that included activities such as the preparation of food, washing and bathing, dressing and managing toilet needs.

23. Mr Islam submits there is evidence before the Tribunal of the care and support that the appellant provides to Mrs Hurd-Atkinson. His deportation from the UK will have an impact on her day-to-day life, and it would be unduly harsh. There is support available from social services, but Mrs Hurd-Atkinson does not have faith in the ability of local authority carers to provide the support she requires. He submits the care provided by the appellant is irreplaceable. Mr Islam submits that although the report of Diana Harris was prepared in November 2019 when CVA was younger, on any view, this is a close family. In her summary of conclusions, Diana Harris confirms that if the appellant is removed, he would be unable to provide the physical, emotional and practical support to the children that he currently does, and being separated from an attachment figure would impact on their self-esteem, self-confidence and cause emotional suffering. Diana Harris expresses the clear view that the impact upon CVA's psychological well-being would cause her emotional suffering, and that it is in her best interests for her to remain in the UK with both of her parents. She refers to the huge impact on the entire family, that the incarceration of the appellant had previously.

24. Mr Islam submits that although the appellant spent a number of years in Jamaica prior to his arrival in the UK, he has now also lived in the UK since 2004 and has established a strong relationship with his partner and children, who are British citizens' that has endured the test of time. He arrived in the UK lawfully, speaks English and is not reliant on public funds. Mr Islam submits this is one of those cases in which the general public interest in the deportation of foreign criminals, is outweighed because of the very compelling circumstances the family finds itself in.

The Legal Framework

25. Section 32 of the UK Borders Act 2007 defines a foreign criminal, as a person not a British citizen who is convicted in the UK of an offence and, inter alia, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that

deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33. Insofar as is relevant that is:

> "(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
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> (a) a person's Convention rights, or
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> …
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> …
>
> (7) The application of an exception—
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> (a) does not prevent the making of a deportation order;
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> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
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> but section 32(4) applies despite the application of Exception 1 or 4.".

26. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Section 117C specifically deals with the weight to be attached to the public interest in deporting foreign criminals and provides a structure for conducting the necessary balancing exercise, dependent in part, on the length of sentence imposed.

27. The first question which arises is whether the appellant is a foreign criminal, as defined in s117D(2) of the 2002 Act. The appellant is not a British

citizen, and he has been convicted of an offence and sentenced to a period of imprisonment of at least 12 months. The appellant is a 'foreign criminal' as defined in s117D. Applying s117C(3) of the 2002 Act, the public interest requires the appellant's deportation unless Exceptions 1 or 2 set out in s.117C(4) and (5) apply. As far as 'Exception 1' is concerned, the appellant was born on 4 October 1963 in Jamaica. He has not been lawfully resident in the United Kingdom for most of his life and Mr Islam quite properly, accepts that Exception 1 cannot apply. The issue in this appeal is whether Exception 2 applies, and if not, whether there are very compelling circumstances over and above those described in Exceptions 1 and 2.

28. In reaching my decision I have had regard to all the evidence before me, whether or not it is referred to. I have had regard, in particular, to the evidence set out in the witness statements of the appellant and his partner, the medical evidence in section C of the appellant's bundle and the report of Diana Harris, an Independent Social Worker. I have had the opportunity of hearing oral evidence from the appellant and Mrs Hurd-Atkinson and of seeing some of the evidence tested in cross-examination.

29. In considering the oral evidence, I have borne in mind the fact that events that occurred some time ago can impact on an individual's ability to recall exact circumstances. I also recognise that there may be a tendency by a witness to embellish evidence because although the core of the claim may be true, he/she believes that by embellishing their evidence, the claim becomes stronger. I also remind myself that if a Court or Tribunal concludes that a witness has lied about one matter, it does not follow that he/she has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion, and emotional pressure. I have also been careful not to find any part of the account relied upon, to be inherently incredible, because of my own views on what is or is not plausible.

Findings and conclusions

Exception 1; s 117C(4) of the 2002 Act

30. It is accepted that on a purely arithmetical calculation, the appellant has not been resident in the UK for most of his life and therefore Exception 1 cannot apply. I have nevertheless considered whether the appellant is socially and culturally integrated in the United Kingdom and whether there would be very significant obstacles to his integration in Jamaica.

31. It is now well established that the question whether a foreign criminal is socially and culturally integrated in the United Kingdom is to be determined in accordance with common sense. I am prepared to accept the appellant's evidence that he has worked in the UK and forged strong relationships. The character reference provided by Earl John, a retired social worker speaks to the contribution made by the appellant to a local football team and within the Caribbean community where he has been instrumental in organising trips and activities for the elderly. He is described as an executive of the Afro-Caribbean Domino league which organises tournaments nationwide for its members. He is said to be one of the driving forces behind the maintenance of links and engagement amongst the Caribbean Diaspora. I accept the appellant has formed relationships in the UK and has continued to engage positively in community activities. The appellant has spent time in prison, but I accept he is socially and culturally integrated in the United Kingdom.

32. I do not however accept that the appellant would encounter very significant obstacles to re-integration in Jamaica. The assessment of 'integration' calls for a broad evaluative judgement. In SSHD -v- Kamara [2016] EWCA Civ 813, Sales LJ said, at [14]

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be

> enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

33. The appellant first arrived in the UK in December 2000 as a visitor with six months leave to enter. In May 2001 he applied for leave to remain as a student. That application was refused by the respondent in August 2001 and an appeal against the decision was dismissed by the Tribunal in June 2004. The appellant returned to Jamaica where he married Mrs Hurd-Atkinson before returning to the UK with entry clearance as a spouse. The appellant had on any view, maintained his connections with Jamaica during the time he spent in the UK previously.

34. The appellant was over the age of 40 when he last arrived in the UK and will have a very good understanding of how society operates in Jamaica. He has previously worked in Jamaica. I do not accept the appellant's evidence that he has no on-going relationship with his brothers in Jamaica. The appellant's evidence in this respect was vague, but when tested, it seems he has tried to contact his younger brother, and his younger brother has tried to contact him by telephone. The evidence of Mrs Hurd-Atkinson, which I accept, is that she was previously in contact with the appellant's brother in Jamaica. There is no evidence that the appellant has fallen out with his brothers. I find that the appellant has family in Jamaica, and that he would have the support of at least one of his brothers on return, even if that is short term support whist he re-establishes himself there. The appellant's evidence, which I accept, is that he has tried to contact his brother since his release from prison, and his brother has tried to contact him. They have not spoken simply because they keep missing each other's calls. Mrs Hurd-Atkinson confirmed to Diana Harris, and I find, that she keeps in touch with the appellant's brother in Jamaica.

35. The appellant's evidence is that he assisted his family in Jamaica financially when he was able to do so previously. There will inevitably be a

period of adjustment, but in my judgement the appellant could adjust to life in Jamaica within a reasonable timescale. The appellant is involved in community activities and has acquired transferable skills during the time he has lived in the UK. There will be every opportunity for that to continue in Jamaica. Mrs Hurd-Atkinson and the appellant's children are clearly very fond of him, and I find, would provide some short-term emotional support to the appellant. Life in Jamaica will not be easy initially, but I do not accept the appellant could not cope. Having considered the evidence as a whole, whilst I accept that he will naturally encounter some hardship in returning to Jamaica, he will not be entirely without support and I do not consider any hardship to approach the level of severity required by s117C(4)(iii).

Exception 2; s 117C(5) of the 2002 Act

36. As for the family life exception, there is no doubt the appellant has a genuine and subsisting relationship with Mrs Hurd-Atkinson and a subsisting parental relationship with CVA who is now 17 years old. The appellant also formally adopted Shantelle and she is now 26 years old.

37. The evidence before me regarding the health of Mrs Hurd-Atkinson is vague and many of the letters that are in section C of the appellant's bundle, are somewhat dated. I do however accept the evidence of Mrs Hurd-Atkinson that she suffers from fibromyalgia, sciatica osteoarthritis in both knees, the cervical spine and hips, and that she suffers from foot and ankle pain. I also accept her evidence that she has suffered tenosynovitis that has caused a pins and needles sensation in her hands and that she has hypertension. The most recent evidence before me regarding the pain she experiences in her lower back and hips is set out in the Imaging Department report prepared by Worcestershire Acute Hospitals NHS Trust. The report follows an examination on 16th May 2022 and notes a *"very slight reduction of the medial aspect right hip joint space indicative of early degenerative changes"*. The medication that Mrs Hurd-Atkinson is prescribed is set out in a letter from Crabbs Cross Surgery that is at page C31 of the appellant's bundle. I note that she has also been prescribed

other medication in the past such as Co-codamol, Naproxen and Diazepam. There is also evidence before me, which I accept, that Mrs Hurd-Atkinson is in receipt of Industrial Injuries Disablement Benefit and a Personal Independence Payment for daily living activities and mobility.

38. I have had regard to the report of Diana Harris, an Independent Social Worker, albeit that report is dated 4th November 2019 and follows an assessment completed at the family home on 12 October 2019. Diana Harris refers to the relationships the appellant and Mrs Hurd-Atkinson enjoy with friends and extended family (some of whom had provided letters of support) in paragraphs 7.3 to 7.9 of her report. The views of the appellant and Mrs Hurd-Atkinson are set out in paragraph 7.16 of the report. Diana Harris met with CVA and Shantelle during the course of the assessment. They were of course younger at that time, and CVA in particular, was at a different stage in her life where her focus was upon her schooling and GCSE exams. Diana Harris sets out a balance sheet in section 8.13 of her report that addresses, in particular, the benefits and impact on the children if the appellant has to return to Jamaica and the children remain in the UK with their mother. I have carefully considered the analysis that has been conducted by Diana Harris and her opinion that the burdens placed on the children far outweigh the benefits, and that it is in the best interests of CVA in particular for her to be able to remain in the UK with both of her parents.

39. In reaching my decision, I have throughout had regard to the best interests of CVA as a primary consideration. The leading authority on section 55 remains ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are “a primary consideration”, which, she emphasised, was not the same as “the primary consideration”, still less “the paramount consideration”. As a starting point, I readily accept that the best interests of a child such as CVA are usually best served by being with both or at least one of their parents.

40. The evidence regarding the appellant's relationship and the role that he plays in the lives of Mrs Hurd-Atkinson and CVA in particular, is set out in the witness statements before me and the report of Diana Harris. I accept that this is a close family and that Mrs Hurd-Atkinson and CVA would undoubtedly wish to continue living together in the same way that they are accustomed to.

41. I have considered the oral evidence of the appellant and Mrs Hurd-Atkinson regarding the support provided by the appellant to Mrs Hurd-Atkinson. I accept the appellant provides some support with household chores but I do not accept that Mrs Hurd-Atkinson would be unable to manage without the appellant's assistance. I have had regard to the evidence before me regarding the payments received by Mrs Hurd-Atkinson from the Department of Work and Pensions. Whilst I accept Mrs Hurd-Atkinson and CVA would prefer to receive the on-going assistance they receive from the appellant, I have no doubt that Mrs Hurd-Atkinson and CVA were adequately cared for when the appellant was incarcerated. They were able to rely upon emotional and practical support from friends of the appellant when Mrs Hurd-Atkinson was upset and stressed whilst the appellant was serving a period of imprisonment. The relationships and friendships have been established by the family over a significant period and having heard the evidence, I am quite satisfied that the extended family and friends rallied around to ensure that their needs were met. I am satisfied that they would do so again, in the future.

42. The period when the appellant was incarcerated will have been difficult for Mrs Hurd-Atkinson and CVA. I note that CVA told Diana Harris that during the appellant's previous absence, she could not focus at school, suffered headaches and lost weight. She told Diana Harris that when the appellant was in prison, she had to do more in the home including housework and preparing 'fast easy meals'.

43. On the evidence before me, and having regard to the opinions expressed by Diana Harris, I am prepared to accept that it is in the best interests of

CVA to be raised, where possible, with both of her parents being available to her. The appellant's removal to Jamaica will have some impact upon his ability to see CVA and Shantelle, regularly. The wishes and feeling of CVA are set out in the report of Dianna Harris and I accept she wants the appellant to remain in the family home. I accept the appellant is physically present to support the family with practical tasks and that provides a protective factor when Mrs Hurd-Atkinson does not feel well enough to support the children. The family has however demonstrated its ability to cope when CVA was younger during the time the appellant was incarcerated. I accept the appellant is a primary attachment figure and CVA in particular, would experience grief and loss being separated from the appellant.

44. Looking at the evidence before me in the round and attaching due weight to the opinions expressed by Dianna Harris I am prepared to accept that the consequences of the appellant's deportation on Mrs Hurd-Atkinson, CVA and Shantelle will be harsh. They will undoubtedly be upset, but they will continue to have the day-to-day support of each other and the extended family and friends that is referred to in the report of Diana Harris. Recently, in HA (Iraq) & Others v SSHD [2022] UKSC 22, the Supreme Court held that in determining whether the deportation of a foreign criminal would be unduly harsh on their partner or child for the purposes of s117C(5) of the 2002 Act, the court has to follow the direction given in MK (Section 55; Tribunal Options: Sierra Leone) [2015] UKUT 223 (IAC) and approved in KO (Nigeria) v SSHD [2018] UKSC 53, and has to recognise that the threshold for the level of harshness justifiable in the context of the public interest in the deportation of foreign criminals is highly elevated. Whilst I am prepared to accept that the appellant's removal to Jamaica will have some impact upon his ability to see Mrs Hurd-Atkinson, CVA and Shantelle regularly, and to provide the support he has previously, having had regard to all the evidence before me, I am not satisfied that the consequences which Mrs Hurd-Atkinson, CVA and Shantelle will face, in the event of the appellant's removal, would be unduly harsh. CVA will continue her education in the UK

with the support of her mother and Shantelle. CVA does not have any unmet health or educational needs. Even with the evidence before me regarding the health of Mrs Hurd-Atkinson, I find Mrs Hurd-Atkinson will provide CVA with stability when that is required.

S117C (6) of the 2002 Act

45. The appellant therefore fails to meet the statutory exceptions to deportation in every respect and what he must show, if he is to avoid deportation on Article 8 ECHR grounds, is that there are very compelling circumstances, over and above those in the exceptions to deportation, which suffice to outweigh the public interest in deportation: s117C(6) of the 2002 Act.

46. The test in s117C(6) is a proportionality test, balancing the rights of the appellant against the public interest in his deportation. The scales are nevertheless weighted heavily in favour of deportation. Although the appellant has not been sentenced to a period of imprisonment of four years or more, he does not fall beneath the statutory threshold for automatic deportation as a foreign criminal, and I consider that there is a cogent and strong public interest in his deportation.

47. Against the cogent public interest in deportation, the importance of which is underlined in primary legislation, I accept the appellant has a strong family and private life in this country. I have no doubt the appellant enjoys a strong relationship with Mrs Hurd-Atkinson, CVA and Shantelle in particular. The focus of the evidence before me is upon the impact of the appellant's deportation on the care and assistance he provides to Mrs Hurd-Atkinson and CVA in particular.

48. I have had regard to the length of time that the appellant has now spent in the UK, and the strength of his connections to the UK. The appellant has

supported Mrs Hurd-Atkinson and CVA in the past, and I accept that during the appellant's time in prison, the wider family managed the best they could in the situation, albeit they would have been unable to support Mrs Hurd-Atkinson in the same way that the appellant did. Mrs Hurd-Atkinson would however have access to outside agencies to meet any unmet need for physical support.

49. In reaching my decision I have also had regard to the fact that the appellant expresses remorse and there is no evidence before me of any prior of further offending.

50. In my final analysis, I find the appellant's protected rights, whether considered collectively with rights of others that he has formed associations with, or individually, are not such as to outweigh the public interest in the appellant's removal having regard to the policy of the respondent as expressed in the immigration rules and the 2002 Act. I am satisfied that on the facts here, the decision to remove the appellant is not disproportionate to the legitimate aim of immigration control and I am obliged therefore, to dismiss his appeal on Article 8 grounds.

Decision:

51. The appeal is dismissed on human rights grounds.

Signed **V. Mandalia** Date 22nd December 2022

Upper Tribunal Judge Mandalia