



Neutral Citation Number: [2021] EWCA Civ 1158

Case No: C5/2020/2035

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM
CHAMBER)
Upper Tribunal Judge Lane

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2021

Before :

Lord Justice Bean
Lord Justice Newey
and
Lord Justice Edis

Between :

| | |
|---|--------------------------|
| LOGAN REID | <u>Appellant</u> |
| - and - | |
| THE SECRETARY OF STATE FOR THE HOME DEPARTMENT | <u>Respondent</u> |

Jonathan Holt (instructed by **TMC Solicitors**) for the **Appellant**
Jack Anderson (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 30 June 2021

Approved Judgment

Lord Justice Edis:

1. This is an appeal by Logan Reid from a decision of the Upper Tribunal (Immigration and Asylum Chamber), “**the UT**”. Mr. Reid was referred to by his initials only further to anonymity orders made in the Tribunals below, but Mr. Jonathan Holt, who appeared for him on this appeal, accepted that there was no good reason for this to continue and those orders are discharged.
2. The Secretary of State for the Home Department, “**the Home Secretary**”, decided on 20 February 2017 to deport Mr. Reid to Jamaica. On 12 October 2017 she refused his human rights claim. The First-tier Tribunal (Immigration and Asylum Chamber), “**FTT**”, allowed his appeal against that second decision of the Home Secretary. The UT allowed the Home Secretary’s appeal, set aside the FTT’s decision and remade the decision and dismissed Mr. Reid’s appeal from the refusal of his human rights claim. The result was that the deportation decision stood. The FTT’s decision was promulgated on 30 April 2018, and the UT’s decision was promulgated on 18 September 2019.
3. The decision to deport was made pursuant to section 3(5)(a) of the Immigration Act 1971 on the ground that Mr. Reid’s deportation was conducive to the public good because he was convicted on 5 January 2005 of seven offences including possession of a firearm and ammunition and was sentenced to 2½ years’ imprisonment. He had applied on 27 October 2015 to remain in the United Kingdom on the basis of his family life and responded to the deportation decision by relying on that claim. He said that it would breach his right under Article 8 of the European Convention on Human Rights to respect for his family and private life to deport him and it is the refusal of that claim which is the subject of these proceedings. His right of appeal arises under section 82(1) of the Nationality, Immigration and Asylum Act 2002. Judicial Review proceedings had been necessary to produce a decision from the Home Secretary which carried this right of appeal. It is unnecessary to set out the procedural history with any greater detail.

The Facts

4. Mr. Reid is a national of Jamaica, born on 2 January 1970. He claims to have entered the UK illegally in October 1994. He used a false British passport in the name of Cleton George Morrison. He was detained in March 1996, and removed from the UK on 5 April 1996. At that time, he was calling himself Derek Elvin Mogg. He re-entered the UK in May 1996, again using the Morrison passport. He was arrested in August 1997 and convicted on 2 February 1998 of two offences of possessing a controlled drug. A deportation order was made on 14 April 1998, but he left the UK voluntarily in June 1998, only to return, again using a false passport, later that month. He was deported again in October 1998, returning again in September 1999. After the 2005 conviction, he was apprehended in July 2010. From 2010 he was required to report but absconded and failed to report from November 2016. The 1998 deportation order has never been withdrawn.
5. The human rights claim was based on his established family life in the UK. There has never been any challenge to the proposition that he has such an established family life here. He has two sons, one born in September 1999 and one in October 2001. He has been separated from their mother since 2006. She had another child born in August

2009 with whom Mr. Reid has a close relationship. All three children are British citizens. The FTT heard evidence from members of this family, orally and in writing. There was also an Independent Social Worker Report from Stephanie Prempeh dated 1 August 2017.

The relevant Statutes, Rules and Convention

6. It is necessary to set out these materials in full, except that I shall not set out section 55 of the Borders, Citizenship and Immigration Act 2009. This requires the Home Secretary to carry out certain functions having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. It means that the best interests of a qualifying child are a primary consideration in carrying out those functions. The provisions in play in this appeal are designed to provide a framework to ensure that decisions are taken having regard to that fact. They are complex, and the relationship between the statutes and the Immigration Rules (“**the Rules**”) (made by the Home Secretary under the Immigration Act 1971) can only be appreciated by having the text of all provisions in mind. Their effect is to enshrine in law the importance in the public interest of the deportation of foreign criminals, and to require the FTT to uphold deportation orders except in defined classes of case. The definition of those classes has been problematic, but the statutory purpose and the Home Secretary’s purpose in making the relevant parts of the Rules is clear. In setting the provisions out, I have underlined the critical provisions which apply in this case. Mr. Reid is a foreign criminal, and it is not necessary to emphasise the definition provisions which give rise to that finding, which is not disputed. At the material time, the date of the FTT decision, he had a genuine and subsisting parental relationship with one qualifying child which was the basis of his human rights claim. This also is not disputed. He does not claim that he has ever spent any time in the UK lawfully.
7. Section 32 of the United Kingdom Borders Act 2007 (“**the 2007 Act**”) provides as follows:
 - (1) *In this section “foreign criminal” means a person—*
 - (a) *who is not a British citizen or an Irish citizen,*
 - (b) *who is convicted in the United Kingdom of an offence, and*
 - (c) *to whom Condition 1 or 2 applies.*
 - (2) *Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.*
 - (3) *Condition 2 is that—*
 - (a) *the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and*
 - (b) *the person is sentenced to a period of imprisonment.*
 - (4) *For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.*
 - (5) *The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).*

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—

- (a) he thinks that an exception under section 33 applies,*
- (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or*
- (c) section 34(4) applies.*

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

8. Section 33 of the 2007 Act provides, in relevant part, as follows:

(1) Section 32(4) and (5)—

- (a) do not apply where an exception in this section applies (subject to subsection (7) below), and*
- (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).*

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

- (a) a person's Convention rights, or*
- (b) the United Kingdom's obligations under the Refugee Convention.*

[...]

(7) The application of an exception—

- (a) does not prevent the making of a deportation order;*
 - (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;*
- but section 32(4) applies despite the application of Exception 1 or 4.*

9. Part 5A of the Nationality, Immigration and Asylum Act 2002 (the “**2002 Act**”) informs the approach to be taken when the question is whether Exception 1 under s. 33 of the 2007 Act applies, and, in particular, to the question whether a decision made under the Immigration Acts (such as a decision to deport a foreign criminal) breaches or would breach an individual’s rights under Article 8 of the European Convention on Human Rights (“**ECHR**”). Sections 117A-117D, which make up Part 5A, provide as follows:

Section 117A Application of this Part

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

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

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

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

- (a) in all cases, to the considerations listed in section 117B, and*
- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.*

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

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

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

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

- (a) are less of a burden on taxpayers, and*
- (b) are better able to integrate into society.*

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

- (a) are not a burden on taxpayers, and*
- (b) are better able to integrate into society.*

(4) Little weight should be given to—

- (a) a private life, or*
- (b) a relationship formed with a qualifying partner,*

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

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

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

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and*
- (b) it would not be reasonable to expect the child to leave the United Kingdom.*

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

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

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

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

(4) Exception 1 applies where—

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

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

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

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

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

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

Section 117D Interpretation of this Part

(1) In this Part—

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who—

(a) is a British citizen, or

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

“qualifying partner” means a partner who—

(a) is a British citizen, or

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

(2) In this Part, “foreign criminal” means a person—

- (a) who is not a British citizen,*
- (b) who has been convicted in the United Kingdom of an offence,*
- and*
- (c) who—*
 - (i) has been sentenced to a period of imprisonment of at least 12 months,*
 - (ii) has been convicted of an offence that has caused serious harm, or*
 - (iii) is a persistent offender.*

.....

10. Part 13 of the Rules deals with deportation. Paragraphs A398-399 provide as follows:

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;*
- (b) a foreign criminal applies for a deportation order made against him to be revoked.*

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;*
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or*
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,*

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*
 - (i) the child is a British Citizen; or*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.

11. Article 8 of the ECHR provides as follows:

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

These provisions applied to the facts of the case

12. Mr. Reid is a foreign criminal, whose deportation is conducive to the public good and a deportation order must be made unless section 33 of the 2007 Act provides otherwise. This is the effect of section 32(1), (4) and (5) of that Act. Section 33(2) means that there is no obligation to make a deportation order where the removal of the foreign criminal would breach a person's ECHR rights, although such an order is not prevented. That is why the focus now is on Article 8 of the ECHR.
13. Sections 117A-D of the 2002 Act provide a machinery for deciding whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the Convention. The statutory public interest considerations in favour of deportation in this case are (1) that the maintenance of effective controls is in the public interest; and (2) that the appellant's private life in the UK should be given little weight because it was established and maintained while he was in the UK unlawfully: section 117B. Mr. Reid is a person liable to deportation so the provision in section 117B(6) is not material. The public interest requires his deportation unless he has a genuine and subsisting parental relationship with a child under 18, and the effect of his deportation would be unduly harsh. This is the effect of section 117C in this case, and explains why the focus of attention was on Mr. Reid's relationship with his younger son, born 26 October 2001 and 16 years old at the date of the FTT hearing. The older boy had passed his 18th birthday by that date. The third child referred to extensively by the FTT is his former partner's daughter, who was 8 years old. She had never lived in the same household with Mr. Reid, who was not her father.
14. Rule 399(a) repeats the effect of section 117C (1) and (5) of the 2002 Act and says that a foreign criminal who has a genuine and subsisting parental relationship with a child

who is a British Citizen, as was the case here at the relevant time, may not be deported where:-

- a) It would be unduly harsh for the child to live in [Jamaica]; and
- b) It would be unduly harsh for the child to remain in the UK without Mr. Reid.

15. The Rules also provide by Rule 399D that the deportation order will be implemented unless there are very exceptional circumstances. It was decided by the FTT that this provision does apply to this case, and there is no appeal against that conclusion before us. Having decided it applied, the FTT then decided, as appears below, that it was immaterial.
16. It was plainly open to the FTT to find, as it did, that there was a genuine and subsisting parental relationship between Mr. Reid and his younger son who is a British Citizen and therefore, the issue concerned the “unduly harsh” test found in section 117C(5). The potential relevance of Rule 399(a) and the “very exceptional circumstances” test found in Rule 399D was dealt with in a rather opaque way by the FTT. The UT in due course held that this did not matter because the FTT had addressed the correct issue, namely the “unduly harsh” test.
17. There are, therefore, three differently worded tests to be applied:-
 - a) Would it be unduly harsh for JR to live in Jamaica, and would it be unduly harsh for the child to remain in the UK without Mr. Reid?
 - b) If the answer to (a) above is No, then are there very compelling circumstances outweighing the public interest in deportation beyond those considered at (a) above, see Rule 398?
 - c) Are there exceptional circumstances which mean that the deportation order signed on 14 April 1998 (which he breached when entering the UK on two occasions, including when last entering the UK in 2000) should not be enforced despite the terms of paragraph 399D applying?

The decision of the FTT

18. The judge in the FTT set out her decision in a careful reserved ruling running to 107 paragraphs. She referred at various points in her judgment to the three tests I have set out above, but said this (with no added explanation):-

“46. Having considered all the circumstances, I find that paragraph 399D applies to this appellant and on this basis there is no need for me to consider the exceptions under paragraph 399(a) and (b).”
19. She then directed herself that in considering proportionality she had to consider all relevant factors, which would include all those factors set out at paragraph 399(a) and (b) and added:-

“including whether the appellant’s family can relocate with him to Jamaica, the effect on his children if they are to remain in the UK after he has been deported, the level of his integration to the UK and the circumstances in which he would be living in Jamaica to evaluate if these amount to serious compelling circumstances.”

20. She also held that section 117C applied, and was not displaced by paragraph 399D. One effect of this approach was that she actually applied the “unduly harsh” test to the effect of deportation on an adult, and on a child who was not a child of Mr. Reid. The adult was not a “qualifying child” as defined in section 117D(1). There was no finding that his relationship with his ex-partner’s daughter was a “parental relationship” as required by section 117C(5).

The evidence

21. The FTT heard oral evidence from Mr. Reid, his ex-partner, and their two sons. One other witness also gave evidence, and there was a volume of written material showing Mr. Reid’s community ties in the UK. She applied *R. (oao Razgar) v. Secretary of State for the Home Department* [2004] UKHL 27 [17], and concluded that the deportation of Mr. Reid would engage Article 8, was in accordance with law and would pursue a legitimate aim. The issue was whether that interference was proportionate, the final step in the *Razgar* questions. This involved an application of the provisions set out above.
22. The FTT judge identified the seriousness of the 2005 offending and the aggravating features derived from Mr. Reid’s immigration history (later and accurately described by the UT judge as “appalling by any standard”). She found that there was a very low risk of re-offending because of the lack of any recent offending and Mr. Reid’s settled status.
23. She then analysed the family life, and the relationship he had with the children. She set out the oral evidence given by both his sons. Although the older son was then past his 18th birthday she said that his “best interests are still a relevant factor as a young adult”. This appears to have been because of her approach to the “exceptional circumstances” test in paragraph 399D of the Rules explained above. She considered that it was in his best interests not to be separated from his father.
24. In relation to the younger son, the FTT judge said that he was just about to take his GCSEs which would be disrupted if his father was deported. The evidence showed that since 2015 both boys have lived with their mother but they stayed with their father in his more spacious home at weekends. She found that it would be unduly harsh to expect the children (she was dealing with both sons and the 8-year-old daughter of Mr. Reid’s ex-partner) to relocate to live in Jamaica.
25. In considering whether it would be unduly harsh for the “children” to be left in the UK with their mother in the absence of their father, the judge accepted the oral evidence she had heard and found that there was a very close relationship between Mr. Reid and both his sons, and again referred to the “close bond” to the 8-year-old girl. In her findings of fact, she accepted that the relationship between Mr. Reid and his ex-partner’s daughter (aged 8) was part of his (and her) family life, although she did not

make a finding that the relationship was a “parental” one for the purposes of the application of the “unduly harsh” test. She assessed as relevant the adverse impact deportation would have on both sons, one of whom was an adult, and on the 8-year-old who was not Mr. Reid’s child. Of the 16-year-old son, she said that his prospects:-

“...do not just involve difficult or inconvenient circumstances but were having an excessively severe consequences in terms of his emotional, educational, and future development as well as his daily living circumstances.”

26. These findings were, she said, supported by an Independent Social Worker Report by Stephanie Prempeh dated 1 August 2017, whose conclusions she accepted in their entirety because they were consistent with all the other evidence. The Report said this:-

“I would also be concerned about the fact that [the 16-year-old son] is entering an important phase of his education. Any further disruption is unlikely to be conducive to his educational achievement and attainment. I am of the view that if Mr. Reid remains in the UK, it would help promote consistency, stability and emotional well being for [both sons and the 8-year-old daughter of Mr. Reid’s ex-partner].”

27. The FTT judge then made findings about the physical well-being and safety of the children, and here she did focus on the younger son rather more. The deportation would result in the loss of access to his father’s house, and he would continue to live in cramped conditions with his mother. She referred again to the effect of the loss of his father on this child’s emotional well-being and on his performance in his imminent GCSE exams. She added this, in a passage criticised by Mr. Anderson, for the Home Secretary, as unsupported by evidence and speculative:-

“At the age of 16 he is becoming an adult, and these are very significant years in any young person’s development. [He] has already experienced a racist attack recently in his mother’s area and his father assisted him to deal with this. As a matter of public record children from ethnic minorities have worse outcomes than those from white backgrounds and children from single parent families have additional problems. I find that [he] will be much more susceptible to peer pressure and potentially at risk because of his age. The absence of his father would leave a huge gap in his life, which cannot be filled by his mother. I find that the loss of the appellant could potentially lead to a loss of physical safety.”

28. The decision of the FTT judge is, on one view, inconsistent on the subject of Mr. Reid’s earning capacity. First, she says that he does not work now, and that he lives on the generosity of other people. One of those people was called as a witness to say that he pays Mr. Reid’s mortgage. He said he did not know Mr. Reid owned a property. Mr. Reid spends a lot of time at a garage working, but he said that this was a hobby. One of his sons said he worked there. Of the future, the FTT judge said:-

“I also find that if the appellant remains in the UK, he will obtain work to support his children. He has skills as a mechanic and has assisted his friend’s children with maths tuition.”

29. However, the FTT found that his earning capacity would desert him if he returned to Jamaica. She said:-

“I find that on his return he will have no accommodation and no income and that given his age and absence it will not be easy for him to find work. I find that in these circumstances it will be difficult for him to even have regular telephone or internet contact with his children in the UK....I find that the appellant’s deportation would represent a complete severing of family ties which would be a significant contrast to the present situation.”

30. The resolution of these apparently conflicting propositions is probably that Mr. Reid has actually been working for some time although he cannot admit this because he is not permitted to work in the UK. It is possible, therefore, to have great confidence that if his immigration status is resolved he will be able to support himself by work here. The skills which he has will be useful in Jamaica but it will obviously take him some time to settle and find work, during which time he probably will have the difficulties described.

31. The FTT judge then dealt with the delay by the Home Secretary in dealing with this case. Mr. Reid was sent to prison in 2005, and has been in the UK ever since. Between 2010 and November 2016 he was reporting as a condition of immigration bail. She pointed to a delay of seven years between 2010 and 2017 in making the deportation decision, and to a further delay in making the human rights decision. She concluded:-

“In these circumstances I find that the respondent did not view the deportation of the appellant as imperative and this reduces the public interest in deportation.”

The FTT’s application of the tests

32. Although she had directed herself that the “unduly harsh” test in 399(a) and (b) did not arise for consideration, except as part of the general assessment of proportionality and the assessment of “very compelling circumstances”, she did apply the identical “unduly harsh” test in section 117C(5) of the 2002 Act. She did so with reference to one adult, and one child who was not Mr. Reid’s child and in respect of whom there was no finding that he was in a “parental” relationship with her. Less controversially she also included the 16-year-old son of Mr. Reid who undoubtedly was a “qualifying child” as defined in section 117(D). She said this:-

“98. I take into account that the best interests of the children are not a determinative factor and can be outweighed by other serious considerations. Having weighed up all of the circumstances including the best interests of the children as a primary consideration, the effect on them of their father’s absence, the nature and the gravity of the offence, the appellant’s lack of immigration status when committing these offences, the

length of time he has remained in the UK unlawfully, the length of time that has elapsed since the offence as well as his low risk of re-offending, I find that it would be unduly harsh for the children to remain in the UK without the person who is being deported.

99. In these circumstances I find that the appellant can meet the exception at 177C(5).”

33. She then summarised other considerations which she found to be relevant and concluded:-

“106. In this appeal, I find that the compelling factors consist of the very serious consequences to the appellant’s second son if the appellant were to be deported as well as to the other children as a whole, as well as the very low risk of re-offending, the considerable time since the last offence and significantly the failure of the respondent to take any action to enforce the Deportation Order over a period of 7 years which I find considerably lessens the public interest and imperative in deportation. Having considered all of the factors I am persuaded that these factors amount to sufficiently compelling or exceptional circumstances which outweigh the public interest in his deportation.”

The UT decision

34. The Grounds of Appeal relied on by the Home Secretary were as follows, in summary:-
- i) The judge failed properly to apply the statutory tests which meant that she could only allow the appeal if she found that there were “very exceptional circumstances”, going beyond the “unduly harsh” exception, which outweighed the public interest in deportation. This ground was muddled in its presentation by a false reference to section 117C(6) of the 2002 Act, but was interpreted by the UT judge as a complaint that the judge failed to apply paragraph 399D properly.
 - ii) In any event, the finding of “undue harshness” was wrong.
 - iii) The immigration history of the appellant was given inadequate weight.
 - iv) The findings about Mr. Reid’s inability to reintegrate into Jamaican society, set out above, were wrong and unsupported by evidence.
35. The UT judge upheld the final ground of appeal. It was not clear why the appellant’s ability to reintegrate into Jamaican society was relevant because he certainly did not fall within Exception 1, never having been lawfully present in the UK and certainly not therefore for most of his life. The finding that he would not be able to support himself even to the extent of using the telephone or internet, apparently for ever, was not supported by any evidence.

36. In relation to the first ground, the UT judge cited *Secretary of State for the Home Department v SU (Pakistan)* [2017] EWCA Civ 1069 [44] and [45] as support for the proposition that the “very exceptional circumstances” test in paragraph 399D is a higher test than the “very compelling circumstances” test in paragraph 398 of the Rules. Reliance on the wrong paragraph will therefore constitute a material error of law.
37. The judge then considered the effect of *KO (Nigeria)* [2018] UKSC 53 and held that it would be difficult to see how the absence of “very exceptional circumstances” will defeat an appeal which meets the requirements of the “unduly harsh” test in section 117C(5) of the 2002 Act, called “Exception 2”. That is because the unduly harsh test focuses on the child, and not the previous misconduct of the parent. What is required by Exception 2 is a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. The judge considered the reasoning of the FTT which I have set out at [18]-[21] above. He found the first part, paragraph [18], puzzling but said that the FTT had ended up in the right place by focussing on the unduly harsh test in section 117C(5). He said:-
- “Whether or not there exist in this case “very exceptional circumstances” the judge was still obliged to apply section 117C and to consider, without reference to paragraph 399D, whether the effects of the appellant’s deportation upon the qualifying child would be unduly harsh. The grounds of appeal, therefore, fail to establish that the judge has erred in this part of her analysis.”
38. In relation to ground (ii) the UT judge found that there was no evidence to support the judge’s finding which I have set out at [25] above, and noted that the opinion of the social worker, [26] above, did not go as far as the judge. There was nothing in the report to show that the consequences she feared would be “unduly harsh” in the sense explained in *KO (Nigeria)*. The UT judge criticised the FTT judge for giving “excess weight to the fact that the hearing was taking place whilst [the child] was revising and preparing for his GCSEs”. He held that a proper application of the test involved looking further than the next 4 to 6 weeks after the hearing.
39. On this ground, the decisive passage in the judgment of the UT judge holds that the judge’s finding that the unduly harsh test was met was not properly open to her because the evidence showed nothing more than that the qualifying child would suffer the sort of harm which might be expected to follow any deportation of a parent. Indeed, that harm would be mitigated in this case by the fact that Mr. Reid had never been the primary carer of any of the children. The UT judge did not address Ground (iii) separately, but he applied the test in *KO (Nigeria)* summarised at [37] above which itself includes the statutory context of section 117C. The judge set out this passage in that decision from paragraph [23]:-

“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 present context. 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 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 the length of sentence."

This appeal

40. I would like to record my gratitude to both counsel for their succinct, careful and fair submissions.
41. Mr. Holt submits that UT made a finding of perversity. He said that it is central to this appeal that in doing so, it demonstrated the same approach as that identified in *Herrera v Secretary of State for the Home Department* [2018] EWCA Civ 412 at [18], which reads:-

"18. I do not believe that the decision of the FTT was perverse. As is made clear in *Ogundimu* [2013] UKUT 00060 (IAC) and *Akpan* [2015] EWCA Civ 1266, the exercise required by paragraph 276ADE (1) (vi) involves a rounded evaluation taking into account all the relevant circumstances. It is trite law that in performing an assessment of that kind different judges may reasonably reach different conclusions. Appellate tribunals must always guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if first tribunal had the advantage of hearing oral evidence. In my view that is what has happened here. The review carried out at paragraphs 20 to 24 of the UT's judgment reads more like a fresh assessment than a review of the reasoning of the FTT. Where Judge Farrelly differs, explicitly or implicitly, from the findings of Judge Hembrough it is essentially about matters of assessment: for example, at paragraph 21 he says of the Appellant's evidence, which the Judge Hembrough had accepted, that he would not be able to obtain work in Argentina that "the possibility of his obtaining some employment in his home country cannot be ruled out". I can understand that the FTT's assessment may have been at the more generous end of the spectrum, and that another judge might have found that the Appellant's evidence was insufficient to satisfy the test under the Rules. But in my view the conclusion reached by Judge Hembrough was one to which he was entitled to come."

42. In particular, Mr. Holt identifies what he says is a clear error in the reasoning of UT in the passage summarised at [38] above. He says it was a mistake to suggest that concentrating on the impact of the deportation on GCSEs was wrong in law because it only arose over the few weeks following the hearing. It was obviously relevant, and success or failure in exams of that kind may affect a person's earning power and achievements over a lifetime. He says that effectively this is a finding of perversity where there is none. The GCSEs were the pinnacle up to then of the child's education. The Tribunal must consider the

effect of deportation at the date of the appeal, and the date of the appeal may properly tip the balance.

43. Mr. Holt submits that the FTT decision on the unduly harsh test was made on the basis of oral evidence from the family, and the judgment is clear that it is based on all the evidence. A wealth of factors led to the conclusion. The finding was possibly towards the more generous end of possible findings, but to say no reasonable judge could reach that conclusion was not possible. The finding is set out at paragraph [92] of the FTT decision, which focusses on the qualifying child and is not based only on the Social Work report.
44. *HA(Iraq) v. Secretary of State for the Home Department* [2020] EWCA Civ 1176 provides some explanation of the decision of the Supreme Court in *KO (Nigeria)* as to the meaning of “unduly harsh” in the passage quoted above. At [56] Underhill LJ explains that the meaning articulated by Lord Carnwath JSC does not mean “rare” and says that “there is no reason in principle why cases of ‘undue’ harshness may not occur quite commonly”.
45. Mr. Holt then submits that there was nothing perverse in the FTT judge finding that Mr. Reid would struggle financially if deported and may not be able to maintain internet and telephone contact with his family in the UK.
46. Finally, he submitted that the FTT did actually make a finding that there were exceptional circumstances in this case which would satisfy the paragraph 339D. I have set out the passage from [106] at my [33] above. He points out that the UT did not address this finding and confined itself to a review of the application of the “unduly harsh” test.
47. Mr. Anderson on behalf of the Home Secretary says that there is “nothing between us on the law”. He submits that in the particular respects in which the UT judge criticised the FTT for making findings not supported by the evidence he was right. The FTT does not identify any evidence which would justify the conclusion that Mr. Reid would not be able to contact his family. He drew attention to the finding that Mr. Reid was being generously supported by others in the UK, and there was no reason to suppose that would stop.
48. He submits that the UT was required to properly scrutinise findings of the FTT on appeal to see what the basis of the findings is. The Social Work Report does not support the judge’s findings and the UT was right so to find. The same is true of the finding set out above about the physical danger to the younger son.
49. Mr. Anderson notes that the FTT’s approach to delay by the Home Secretary was identified as an error on her appeal to the UT, but he submits that delay as a matter of law cannot be relevant to the unduly harsh test, although the matter has to be assessed at the time of the hearing.
50. He accepts that the UT was in error if it disregarded the adverse effect on the qualifying child’s education of the deportation as legally irrelevant. But says that the evidence does not support the finding of the FTT.

Discussion

51. As has become clear, this appeal concerns the approach of the UT to the findings of fact of the FTT. There are no legal issues to be resolved. I have set out in some detail how those findings were arrived at by the judge at first instance and the way in which they were reviewed on appeal. This appeal is against the setting aside of the FTT decision. If it was properly set aside, there is no appeal against the subsequent decision of the UT judge to remake the decision and dismiss the appeal against the Home Secretary's decision of 12 October 2017.
52. In some respects the way in which the appeal was advanced before the UT did not tease out the most obvious problem with the FTT decision, which was the evaluation of the case in terms of the adverse impact of deportation on the "children". This word was used to include three young people, only one of whom was a "qualifying child" for the purposes of section 117C(5) of the 2002 Act and paragraph 398 of the Rules. One was an adult, and irrelevant to any consideration of those provisions. Another was a child, but not the child of Mr. Reid and although they had a close relationship as part of the family there was no finding that it was a "parental relationship" which would be necessary before she could become relevant for this purpose. That error appears to have arisen from the puzzling passage in paragraph [46] of the FTT judgment which I have set out at [18] above. It appears to have somehow liberated the FTT judge from consideration of what was relevant for the purposes of section 117C(5) of the 2002 Act and paragraph 398 of the Rules. This operated to such an extent that in the passage at [94] of her decision, the FTT judge considered "other factors which are relevant to the issue of whether it would be unduly harsh for the appellant to be separated from his children." The "unduly harsh" test has nothing to do with the impact of deportation on Mr Reid. There never was a close concentration on the harshness to the qualifying child of the deportation of Mr. Reid, and whether the degree of harshness which would be caused to him would be "undue". That, in my judgment, was a sufficient error of law to justify the UT setting the decision aside and re-making it.
53. That remains the position even though the UT rejected ground (i) of the appeal and decided that in the end the judge in the FTT had applied the right test. I think that she did not apply the right test, or at least that she did not apply it only to the material which was relevant to it. This is not as profound a criticism of the FTT judge as it would be now, because she did not have the benefit of the Supreme Court's decision in *KO (Nigeria)* which was not published until 24 October 2018, six months after the FTT decision was promulgated. That decision establishes the law authoritatively in an area where there had been widespread controversy and confusion.
54. I am not persuaded by some of the criticisms of the FTT made by the UT. I think she was entitled to take into account the adverse impact on the qualifying child's GCSEs if his father were to be deported. Indeed, the finding of the UT judge was that she "gave excess weight" to this factor which supports this conclusion, which is not controversial before this court. I also think that she was entitled to find that there probably would be a period of time after deportation when Mr. Reid would have difficulty maintaining substantial contact with his family in the UK, including the qualifying child. She went rather further than that, but I would not regard that as fatal to her decision on its

own. The separation of families is often a consequence of deportation, and there is no reason to suppose that the effect on this family will be any less. I have explained above how I understand the evidence about Mr. Reid's means, and his earning capacity. On that basis, I think it reasonable to conclude that he will take some time to get going in Jamaica and that he will be impecunious during that time. Further, I would not criticise the judge in the FTT from going further than the Social Worker in her assessment of the harshness of deportation to the qualifying child. The judge had heard oral evidence from, among others, that child and was entitled to make findings on the basis of it. I do not think that the UT on appeal should lightly interfere with such findings for the reasons explained in *Herrera* cited above.

55. However, the fundamental problem with the FTT decision, which the UT correctly identified, was the failure to articulate and apply the "unduly harsh" test as subsequently explained by the Supreme Court in *KO (Nigeria)*. In understanding that test, the observations of Underhill LJ in *HA (Iraq)* are illuminating. There is no reason why a situation of "undue" harshness should be uncommon. Otherwise "undue" harshness would become "due" harshness because it happened very often to very many children but otherwise remained as harsh as ever. However, the primacy of *KO (Nigeria)* is clear, and Underhill LJ was careful to base himself firmly on that decision and to add this to what he said about it:-

"57. I make these points in response to the appellants' submissions. But I am anxious to avoid setting off a further chain of exposition. Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paragraphs 50-53 above."

56. The UT decision was that there was nothing in the facts of this case which was properly capable of justifying a finding that Mr. Reid's deportation would be unduly harsh to the qualifying child, and that the FTT judge must have applied the wrong test or applied it wrongly in reaching the conclusion she did. I agree.
57. That is so even if her findings of fact with which UT did not accept are restored. Her conclusions at [27] above are no doubt correct, and there is a risk that separation from his father will destabilise the qualifying child. He was, however, 16 years old and he had not lived full time with his father for many years. His parents' relationship broke down in 2006. He lives with his mother and siblings in what appears to be a supportive and close family. The dynamics within that group were not closely examined in evidence, as opposed to the relationships its members have with Mr. Reid, but it appears clear from the social worker's report and the FTT findings that the qualifying child enjoys a close, loving, and supportive relationship with his mother. That is bound to alleviate the harshness of an enforced separation from his father.
58. In relation to the physical safety of the qualifying child, the FTT made the findings set out above in terms of a general risk, and referred to a recent racist attack and a threat in the area where the mother's accommodation was. The social worker's report gave more

detail of this and said that the mother was trying to obtain an emergency transfer out of the area as at August 2017. By the time of the FTT hearing (April 2018), the family had “just moved into new accommodation” in Smethwick. The findings that they lived in cramped and unsuitable accommodation relate back to the time when Mr. Reid was in detention. He was bailed on 30 August 2017, and there was no evidence, or none to which the FTT referred, that the new accommodation in Smethwick presented the same problems. At all events, the historic problems with the previous accommodation were by then irrelevant but appear to have played some part in the FTT reasoning. In any event, the contribution to the safety of the child made by the presence of his father was inevitably limited although no doubt his support was very much valued.

59. The only truly exceptional feature in the case was the delay in enforcing the 1998 deportation order after Mr. Reid’s release from prison. Nothing was done for something like a decade. However, this is not a factor tending to make his deportation now unduly harsh to the qualifying child. It is irrelevant to that question. The suggestion that it reduces the public interest in his deportation is well-founded to the limited extent that it means that he can now be regarded as unlikely to re-offend, but the way in which the public interest is to be weighed in these cases is regulated by statute and by the Rules, and delay is not a relevant factor. I do not mean that it is always irrelevant in deportation cases as a matter of law. I simply mean that where, as here, the question is whether deportation is unduly harsh to a qualifying child delay will usually be of little or no significance. To illustrate the point, one way of alleviating the harshness of deportation is to delay it until any qualifying child becomes an adult. This is very nearly what has happened here, no doubt through bureaucratic inefficiency rather than design.

Conclusion

60. Taken overall, the evidence accepted by the FTT judge was not capable of justifying a finding that the deportation of Mr. Reid would be unduly harsh to the one qualifying child. In so holding the UT judge was right, and I would dismiss this appeal.

Lord Justice Newey:

61. I agree.

Lord Justice Bean:

62. I also agree.