Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00310/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 August 2019	**On 02 September 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERROL [T]

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Ms S Najma, Legal representative, ASR Legal Solicitors Ltd

DECISION AND REASONS

1. The respondent (hereafter "the claimant") is a citizen of Jamaica aged 39. Having arrived in the UK in June 2014 as a visitor, he overstayed. In November 2014 he married a British citizen, LM, but his application to remain on that basis was unsuccessful. On 26 November 2015 he was convicted of three counts of supply of a Class A drug – crack cocaine – and on 9 June 2016 was sentenced to three concurrent terms of three years and recommended for automatic deportation. Having been served with a deportation decision the same month, he made a human right claim and then an asylum claim. On 21 December 2017 the appellant (hereafter "the Secretary of State" or "SSHD") refused his claims and confirmed the deportation decision, making a

subsequent deportation order on 9 March 2017. The decision also certified that he had been convicted of a particularly serious crime warranting the application of a Section 72 certificate under Section 72(9)(b) of the Nationality, Immigration and Asylum Act 2002. The claimant appealed. In a decision sent on 20 February 2018 Judge Burns of the First-tier Tribunal (FtT) dismissed the asylum grounds of appeal, but allowed his appeal on Article 8 grounds.

2. In a decision posted on 18 April 2019, Upper Tribunal Judge Rintoul and I set aside the decision. We identified several errors in the judge's assessment of the claimant's Article 8 circumstances.

3. At the end of our decision we stated (at para 24) that because the only live issue concerned paragraph 399A(ii) and the related s117C(5) issue of whether it would be unduly harsh for the children to live in the UK without the claimant, and because almost none of the facts were in dispute, we would retain the case in the Upper Tribunal. We then gave the following Directions:

> "**Directions**
>
> As will be evident from the terms of our error of law decision, we have particular concerns about the lack of evidence regarding the likely situation of the wife if she is left to bring up her four children on her own (we note that in addition to the issue of whether the effect of the claimant's deportation would be unduly harsh on the children, s117C(5) also requires an examination of the same issue in respect of the effect on the partner). To this end we direct that the claimant's representatives obtain and produce to the Upper Tribunal within eight weeks of the date this decision is sent (with copy to the SSHD Presenting Officer) an independent social welfare report addressing:
>
> (a) the likely circumstances of the wife and children if the claimant is deported;
>
> (b) the history and extent of contact between the two stepchildren and their biological fathers;
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> (c) the history of the family and how it managed during the period when the claimant was in prison; and
>
> (d) the number of family members on the wife's and claimant's side who live near to the claimant, with details of any help they have given to the wife in relation to caring for the children."

4. It can be seen from the text of the directions that we recognised that, as well as the issue of whether the effect of the claimant's deportation would be unduly harsh on the children, we had to consider whether it would be unduly harsh on his wife, LM. Subsequently the claimant's representatives produced a report from Diana Harris, an Independent Social Worker dated 14 May 2019. After discussions with the parties at a CMR hearing on 17 May 2017, I directed that the claimant's representatives produce an addendum report that (i) addressed the Upper Tribunal's error of law decision and directions; and (ii) obtained and then addressed the social services records held by Birmingham Social Services on the family, as this report failed to fully address all four questions identified in our Directions.

5. Within the specified time period the claimant's representatives produced an updated independent social work assessment of the claimant and family dated 4 June 2019 from Diana Harris.

6. The case is now before me in order that I re-make the decision on the appeal confined to the Article 8 issue. I should explain that in referring impersonally to the claimant's wife either as "his wife" and the children by capital letters, I have in mind the need to ensure that the children are not identified.

7. At the hearing I heard submissions. It is convenient to summarise these later, but I note here that in initial discussions it was agreed that this updated/addendum report still did not fully address points (c) and (d) of the Upper Tribunal's Directions. I considered whether it would be in the interests of justice to adjourn to obtain a further supplementary report that did, but decided to proceed for three reasons. First of all, as will be summarised below, Ms Harris did submit a 6-page addendum headed "Response to Directions from the Upper Tribunal", which dealt in turn with points)a)-(d) of the Upper Tribunal directions and identified some changes made in the text of the original report inserted in light of her further review. Second, even though it still did not deal fully with points (a)-(d), it contained sufficient information (including an email sent by Birmingham Children's Trust on 21 May 2019 in response to enquiries made by ASR legal), read together with the other documentary evidence, for me to assess the points of concern at (c) and (d). Third, the original and updated reports are both based on an assessment made only some three months ago and which is therefore relatively recent.

8. As noted above, the claimant's appeal against the above decisions was dismissed by the First tier Tribunal judge on asylum grounds but allowed on Article 8 grounds. The judge noted in respect of the Article 8 claim that it was not in dispute that the claimant enjoys family life with his wife and three children (the two oldest being step-daughters; the other being born in July 2004 [there has since been another child born to the couple in March 2019])). The judge noted that the SSHD in the refusal decision acknowledged that the best interests of the children would be to remain with both the claimant and his wife.

9. There was extensive evidence produced for the appeal before the First-tier Tribunal judge. The appellants' bundle alone runs to 513 pages. I do not intend to enumerate the contents, except to note that I have taken all of the evidence, including that which has been submitted more recently, into account. I note that the 513-page bundle includes school reports. The most important new evidence comprises the independent social worker report.

The independent social worker assessment of 4 June 2019

10. In this report Ms Harris, a qualified social worker trained in social work with children, describes her undertaking of an independent social work assessment lasting three and a half hours of the claimant's family in May 2019. Those present included the claimant's wife, her two daughters from previous

relationships, M1 (aged 15) and M2 (aged 10) and the couple's own two children (born in September 2015 and February 2018 respectively). She notes that the claimant's wife works 24 hours a week as an adult carer and the claimant takes the role of primary carer to the children. If forced to leave the UK she states that it would prevent the claimant from actualising the majority of his parental responsibilities and his wife would be forced into the position of being a single parent and would have no other childcare to enable her to continue working, reducing the family resources. The family would be able to improve their resources and better meet their needs if the claimant was enabled to work.

11. Ms Harris observes that the claimant's wife has been diagnosed with anxiety and depression, which increases her vulnerability to mental health issues. Removal of her partner would put increased pressures on her. She has stated that she would commit suicide if he was forced to leave, "which is a clear safeguarding concern". Ms Harris states that she has concerns about the claimant's wife's ability to continue parenting the children alone and there is a risk that they would require alternative carer arrangements. The impact of family breakdown would almost certainly affect the children's developmental and educational progress. She states that in the event that [the claimant] is forced to leave the UK she "would urge the Home Office to make an urgent safeguarding referral to Children's Services to assess the risks."

12. Turning to the children, she states that, using a balance sheet approach, she was unable to identify any benefits to the children from the claimant's forced departure from the UK and this action would be against M1 and M2's expressed wishes and feelings. As regards the couple's own two children, Ms Harris states that she was able to ascertain through observations that they were attached to both their parents and would not therefore wish their father to disappear from their lives and the family home. The impact on all the children of losing the physical day to day contact with the claimant was that it would make it more difficult for them to have their daily physical needs met. The children's routine and stability would be disrupted. She considered that it would be in their best interests to remain in their current circumstances with the claimant being enabled to work to support the family and improve the housing.

13. Ms Harris's report does not fully address point (d) in the Upper Tribunal's directions, but does provide a significant amount of information about the claimant's and wife's extended family. Ms Harris notes that the claimant's mother and younger sister reside in Birmingham. His wife has two half-sisters and one half-brother on her mother's side from a previous marriage (one sister died four years ago). Her biological parents had five children between them, although one died of cot death. Under a subhead 'Adult Social Support/Community Links', Ms Harris states that she established that the claimant's mother, aunt and uncle and his wife's parents "are their strongest support and provide them with emotional and practical help. They also have close historical friends and described their relationship with their neighbours as very close…" (she refers to a character reference from one of their neighbours).

14. In the 6-page "Response to Directions", Ms Harris first of all addressed point (a), the likely circumstances of the wife and children if the claimant is deported. It lists the wife's prescribed medication and repeats her concern about the impact of the claimant's deportation on the wife's mental health and the effect on her parenting and ability to meet the children's needs. She notes that she is "unable to state if [the wife] would be able to continue working but consideration needs to be given to childcare support and her heath". She then addresses point (b), the history and extent of contact between the two stepchildren and their biological fathers, drawing attention to her findings that the claimant's wife reported that the eldest stepdaughter (M1) has no contact with her biological father and that the second stepdaughter (M2) has consistent and regular contact with her biological father and visits him frequently and for special occasions (she also notes that M2 is diagnosed with ADHD and takes prescribed medication.). As regards point (c), the history of the family and how it managed during the period when the claimant was in prison, she notes that enquiries to Birmingham Children's Trust found no records of historical concerns or assessments of the family (email dated 21 May 2019) and that she believed it "worthy of note that the circumstances whilst [the claimant] was incarcerated were a temporary arrangement whereby the family were able to physically visit him. In the event that he is removed to Jamaica, it will be a permanent arrangement and they will not have the resources to visit him". Finally she addresses point (d), the number of family members on the wife's and claimant's side who live near to the claimant, with details of any help they have given to the wife in relation to caring for the children. She notes that on the claimant's side he has a mother, aunt and uncle and sister living in Birmingham and that the claimant's wife has several family members. She ends by stating that she bases her assessment on the family circumstances at the time she visited them (in May) and "in my opinion a permanent change is not comparable to a temporary change."

The parties' submissions

15. Mr Kotas in his submissions stated that even though in response to my case management directions of 17 May 2019 the claimant had been afforded the opportunity to provide a fuller report, the new one still failed to deal fully with points (c) and (d) ((c) being "the history of the family and how it managed during the period when the claimant was in prison"; and (d) being "the number of family members on the wife's and claimant's side who live near to the claimant, with details of any help they have given to the wife in relation to caring for the children."). It was significant in his view that even though the independent social worker had checked with the city social services, nothing to suggest any concerns had come back from them in the May 2019 email. In his submissions the updated report supported the SSHD's rather than the claimant's case, in that it showed that the oldest stepchild, M1, did not have a close relationship with the claimant and the second stepchild, M2, was in regular contact with her biological father, The diagrams filled out by the children mostly identified "mum" as doing the primary care functions within the family. The independent social worker said the family had a strong support network; hence his removal would not leave his wife adrift. The evidence was that whilst the claimant was in prison for some 18 months the family made do

and she coped. She was a single parent and would retain accommodation. There was no evidence that the children's schooling would be affected. There were no school reports indicating any particular concerns.

16. Ms Najma submitted that the new report does not favour the SSHD. It confirms that the claimant's deportation would have inordinate consequences for his wife and the children. Ms Harris in her report expressed a concern that his wife would commit suicide. The social worker had described the effects on the children as severe. Even though M1's relationship with the claimant was not very close, the evidence was that she was an introverted child who needed her own emotional space, and it was not disputed that the claimant was close with M2. Both publicly referred to the claimant as their 'dad'. The social worker assessed that the claimant's removal would have physical effects on the children in terms of daily needs. The absence of any school reports was not important, since the social worker was best-placed to assess their circumstances. The claimant was clearly playing an indispensable role as primary carer of the children.

My assessment

<u>The issues concerning whether the effect of the claimant's deportation on the claimant's wife and the children would be unduly harsh</u>

17. I am tasked with re-making the decision on the appeal relating to the Article 8 grounds. It is not in dispute that the claimant 's asylum grounds of appeal were properly dismissed by the First-tier Tribunal judge. There is a voluminous body of documents produced by both parties for this appeal. As noted earlier, I have had regard to all of it, including Ms Harris's first (May 2019) report.

18. As already noted, it is common ground in this case that it would be unduly harsh to expect the claimant's children to leave the UK and live in Jamaica. This also reflects the strong evidence that it would not be in the children's best interests to be faced with the prospect of relocating to Jamaica.

19. The respondent has not sought to argue before me that it would not be unduly harsh for the claimant's wife to accompany him to Jamaica. Given that his wife's support network is in the UK, that all four children are British citizens and that he has two children by a previous relationship, one of whom maintains contact with the biological father, this is an understandable point of agreement

20. As already noted, there are indeed only two issues that fall to be determined in this appeal: (1) the issue under s117C(5) of the NIAA 2002 as to whether it would unduly harsh for the claimant's wife to live in the UK without the claimant; and (2) the issue under paragraph 399A(ii) of the Rules and the corresponding provisions of 117C(5) of the 2002 Act as to whether it would be unduly harsh for the children to live in the UK without the claimant.

21. Section 117(C) (3) of the 2002 Act provides that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years

or more, the public interest requires his deportation unless one of two exceptions apply. The only relevant exception in this case is Exception 2:

> ("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 of the child would be unduly harsh."

22. It is not in dispute that the claimant has a genuine and subsisting relationship with his wife and with his children, including his two stepchildren, M1 and M2.

23. In assessing whether the effect of the claimant's deportation on his wife and children would be unduly harsh, I must have regard to the settled case law on this matter. In **KO (Nigeria)** [2018] UKSC 53 at [22], Lord Carnwath (with whom the other Justices agreed) stated at para 23:

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

24. Lord Carnwath also cited, without demur, the guidance given by the Upper Tribunal in **MK (Sierra Leone) [**2015] UKUT 233 that:

> "… 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold …".

25. As analysed by Holroyde LJ in **Secretary of State for the Home Department v PG (Jamaica)** [2019] EWCA Civ 1213 at [34] (with the agreement of LJJ Hickinbottom and Floyd):

> "It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider

> both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

26. At [39] he concluded:

> "Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or child in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature."

27. Whilst **PG** concerned a different set of facts, I consider it instructive to have regard to the way in which their lordships set out in this case how the assessment of the unduly harsh issues must be framed, in terms of effects going beyond the harshness inevitably involved in the deportation of a foreign criminal parent.

28. In the instant case, I do not consider that the evidence relating to the claimant's relationship with his children demonstrates any likely consequences or impact beyond the norm for deportation cases involving family separation. I shall say more below about why I have come to the view that the impact of the claimant's deportation on the children would not be unduly harsh, but would observe here that I have taken into account the evident fact that the claimant enjoys a family life relationship with all four children and acts in relation to all

as a father figure. I also adjudge that it would be better for the children if they continued to have two primary carers, the claimant and their mother. However, that does mean that I consider that the resultant situation in which they will find themselves, of being brought up by a single parent, would be unduly harsh. In reaching this conclusion, it is appropriate to set out several of my reasons at this stage. There is a limit to the strength of his relationship with the two stepchildren, one of whom (M2) retains close ties with her biological father and the other (M1) who does not consider herself close to the claimant (albeit this may in part be because she is presently introverted). The claimant's own children are both under five and of an adaptable age. As with M2, they can be expected in time to find males in the extended family who will be able to some degree to act as father figures (I shall address the relevance to the children's circumstances of the support the claimant's wife receives from the extended family in a moment).

29. If the claimant's case discloses circumstances going beyond the norm, that largely depends, therefore, on the impact on his wife being shown to be unduly harsh. If it is likely to have an unduly harsh impact on her, then it is likely to have an unduly harsh impact on the children, since in that scenario she would not be able to cope with looking after her children as a single mother.

30. In this regard it is submitted that the claimant's wife suffers from anxiety and depression and that the effect of the claimant's deportation would be to increase his wife's mental health problems.

31. However, it is necessary to consider his wife's health circumstances in their entirety. First, whilst she has been recognised by social workers to suffer from depression and anxiety, on one occasion this being on referral [presumably form her GP], there is no medical report specifically diagnosing her or, more to the point, no medical evidence identifying any degree of severity to her condition. She is not said to be under any treatment although she has been prescribed anti-depressants. She has been able to work for a considerable period as a carer. There is no evidence, therefore, that her anxiety and depression are severe.

32. Second, it would appear that concerns about her anxiety and depression have arisen primarily in the context of her expressed anxiety about the claimant's pending deportation. Thus the letter from Maypole and Chinnbrooke Children's Centre dated 4 January 2016 noted that it received a referral in January 2016 stating that the claimant's wife "was depressed/anxious about her situation with her husband", being "visibly upset when discussing [him] being deported " and stating that she feels [it] is the route (sic) of her depression." This letter goes on to say that it was feared that if the claimant was deported his wife "would sink into a deeper depression", which would have a direct impact on the family. A letter from a teacher at M2's school notes that his wife had disclosed that she suffers from depression and anxiety which she believes is due to the threatened deportation of her husband. This letter mentions that she has also said that "if 'the claimant' were deported she would end her life.

33. If the claimant is deported, she will no longer have the anxiety of his impending deportation. The question will then be the nature and extent of her anxiety about her new circumstances, knowing he has been deported and that she can no longer rely on his presence and support as a husband and a father.

34. In terms of her likely new circumstances, it is the evidence of Ms Harris (echoing that of the aforementioned letter from the Children's Centre) that if the claimant is deported, her depression and anxiety will worsen. Ms Harris noted that she had talked about committing suicide. That is also something she said to a schoolteacher at M1's school. Notably, however, Ms Harris goes no further than indicating that if the claimant is deported she would recommend a referral to social services. That is obviously prudent, but falls well short of establishing that there would be a real risk of the claimant's wife becoming an active suicide risk. In terms of the claimant's wife's likely situation if the claimant is deported, the gravamen of Ms Harris's report is that in that scenario she would then have to manage as a single parent. Whilst she expresses a concern that the claimant's wife would not be able to cope in this role, it is not expressed as more than a possibility. At page 2 of her "Response to Directions from the Upper Tribunal", she states that "I am unable to state if [the claimant's wife] would be able to continue working but consideration needs to be given to childcare support and her health". Nor, considering the evidence as a whole, do I consider that it is more than a possibility. In deportation cases being a single parent (regrettable a situation though it is and despite it not being in the best interests of the children to be deprived of the physical presence of their other parent) is the norm. I am not persuaded by the evidence read as a whole that there would be a real possibility that his wife would be unable to cope and that the impact on her would be unduly harsh. And in consequence of her being in my judgement able to cope, I am not satisfied that it would be unduly harsh on the children either, since they will still have their mother as primary carer coupled with (as I come to below) support from the extended family network also.

35. In this regard, it is relevant to consider how the family managed during the period of approx. 18 months when the claimant was in prison (between 2016 and 20 April 2017). At the stage the case was before the First-tier Tribunal judge, there was some uncertainty as to whether during this period the family had been in need of social services support. It has now been clarified that this was not the case. It has not been submitted that during this period the claimant's wife ceased to work.

36. Of course, the fact that during this period his wife was able to manage does not necessarily mean she would be able to cope in the different situation where the claimant is not simply some distance away in a prison for a finite period of 18 months (and there is evidence that during his time in prison there were weekly family visits), but thousands of miles away in a different country with little or no immediate prospect of any visits from her or the children and none in the immediate or medium term of the claimant being permitted to return to the UK. That is a specific point made in the social work report and also by Ms Najma.

37. However, one of the matters on which the Upper Tribunal sought more evidence was the degree of family support and community support. Here Ms Harris's report indicates that the claimant's wife is much better-placed than many single mothers facing the removal through deportation of a partner and primary carer in respect of family support. Ms Harris's report was unequivocal that that there is family support, the "strongest support" being provided by his wife's mother, aunt and uncle and his wife's parents. Ms Najma confirmed that these family members live nearby. Ms Harris also notes that the family also enjoy particularly close ties with neighbours living in the same could-de-sac. I consider that in light of this network of support his wife will be able (contrary to Ms Harris's fears) to continue her employment as an adult career, since it is probable she will receive help during her absence for work from grandparents or other family members or close neighbours. It is probably in my judgement that once the reality of the claimant's deportation has set in, the family, with the help of the wider family network, will adjust.

38. I return to the fact that the claimant's wife's family circumstances have not been considered by Birmingham social services to raise any concerns. The e-mail from the Birmingham Children's Services dated 2 June 2017 confirmed that the family were known to Birmingham Social Care from February 2012 but stated that although there had been two referrals, there were no safeguarding or health or education concerns for the children. Ms Harris's report (with reference to an email of 21 May 2019) notes that enquiries made by ASR Legal to the Birmingham Children's Trust found that 'there has not been any review of the children's health or education and no mention in this area previously".

39. As regards the children, (as already noted) whilst the claimant has a genuine and subsisting relationship with M1 (and Mr Kotas does not dispute this), she herself stated to Ms Harris that her relationship with the claimant was "not very close", although to persons outside the family she describes him as her "dad". She stated that he was very important in the family and looks after the kids and prepares food etc when his wife was working. (It was seemingly overlooked by the representatives but there were school reports relating to M1 dated March 2017.) MsHarris's report identifies a number of negative effects the claimant's deportation will have on the children, but it is not suggested that the two stepdaughters would be unable to continue their schooling or that the couple's two young children would be unable to progress through the normal educational stages.

40. M2 has weekly telephone contact with her biological father and visits him frequently. Whilst she could not describe her relationship with the claimant, she said that he looked after the family when her mum was working and he had taken her to school in the past. To persons outside the family she refers to him as "dad". She felt that if the claimant could not stay with them then her mother would not be able to go to work and would be really sad. As regards the couple's own two children, both are under five, there is no evidence to indicate other than that they enjoy a parental relationship with the claimant much like any other for children of that age. The evidence taken as a whole certainly establishes that the deportation of the claimant will have negative effects on them and the stepdaughters and that their life will be adversely affected by

having to transform from a two-parent to a one-parent family, but bearing in mind that the “unduly harsh” threshold is an elevated one, I am not persuaded that these harsh effects will cross the threshold to be or become “unduly harsh”. There is nothing to indicate features (such as children’s ill-health) that take the circumstances of these four children outside the norm relating to families affected by deportation decisions taken against foreign criminals.

The claimant’s Article 8 circumstances outside the Rules

41. In **NA (Pakistan) v Secretary of State for the Home Department** [2016] EWCA Civ 662, Jackson LJ at [36] summarised the approach which Part 5A of the 2002 Act, and the Rules, require a tribunal or court to take when considering the position of a foreign criminal who has been sentenced to a term of imprisonment of at least 12 months but less than 4 years:

> "… first see whether he falls within Exception 1 or Exception 2. If he does, then the article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the article 8 claim succeeds. If there are not, then the article 8 claim fails. … there is no room for a general article 8 evaluation outside the 2014 Rules, read with sections 117A to 117D of the 2002 Act".

42. In considering whether there are sufficiently compelling circumstances outside the Rules, I apply the balance sheet approach set out by Lord Thomas at [83] of **Hesham Ali** [2016] UKSC 60.

43. In favour of the claimant are the fact that he has resided been in the UK for

44. He has a good command of the English language.

45. Prior to his convictions for Class A drug offences, he was of previous good character. Whilst identifying him as performing a Category 3 role, the judge accepted that the claimant had entered into criminal activity because of debt. In a letter dated 26 March 20127 the claimant’s offender supervisor has given him a positive character reference, noting that the claimant was exceptionally well behaved and had treated staff with a great deal of regard and respect deserving of a reference. It is also relevant that the claimant's bundle contained a number of letters of support from other family members, friends and neighbours, some specifically attesting to the claimant’s good conduct and devotion to his family.

46. The claimant has also obtained certificates whilst in prison and has worked in a voluntary organisation. He has acted as a mentor in maths classes and there is a letter from one of the class members expressing support for the claimant’s positive work in this capacity.

47. Then there are the claimant’s family circumstances which have been dealt with in detail in the earlier assessment of the issue of unduly harsh effect. In summary he has an established family life with his wife and with his two stepdaughters and their two children. He also has extended family ties with his

own mother and aunt and with his wife's mother. It is clearly in the best interests of the children to remain with the claimant and his wife as a family unit. It is also clear that his removal would have negative effects on the children's lives, in particular their daily home lives, where he has been playing the role of primary carer whilst his wife has been at work. All of the children are British citizens and it is not contended by the SSHD that either the claimant or them should be expected to live in Jamaica (I note that M1 is in secondary school and will soon be taking GCSE's).

48. Although he is currently unable to work, the claimant has been employed previously and on the balance of the evidence would become the family breadwinner if he was allowed to stay.

49. However, in my assessment the factors weighing in favour of the claimant are significantly outweighed by factors weighing against.

50. The claimant came to the UK as a visitor and then overstayed from 2014 to the present. One consequence is that his private life ties formed in the UK have been precarious throughout.

51. The claimant is a foreign criminal. In June 2016 he was sentenced to three years for three offences as a crack cocaine dealer, the second two running concurrent with the first count. According to the sentencing judge, he had a significant role in supplying crack cocaine to others and the incidents were not isolated. The judge also noted that in his dealing activities he "used your wife". Whilst it is to his credit that he was assessed by OASys to be a low risk generally (although medium to the public), rehabilitation is not an important facet of the public interest. It was stated in **Danso** [2015] EWCA Civ 596 that "rehabilitation … cannot … contribute greatly to the existence of very compelling circumstances required to outweigh the public interest in deportation".

52. Although the claimant enjoys a family life relationship with his wife, this was formed at a time when his immigration status was precarious (he met her a month before whilst he was in the UK as a visitor and they married on 8 November 2014. This is a relevant factor in assessing the proportionality of the decision. see **Rajendran (s117B – family life)** [2016] UKUT 00138 (IAC).

53. In terms of the claimant's role as primary carer, whilst it is clear he has been actively involved in looking after the children and managing the home whilst his wife is at work, she only works 24 hours a week and is said to receive strong support from other family members. A letter from his wife's mother states that the claimant's mother had taken the two stepchildren under her wing and treats them as her own grandchildren. It is clear that during the period when the claimant was in prison (around 18 months) she was able to manage with the help of her family support. There are other family members living nearby to the claimant's and wife's home and his mother had stated in the context of his bail proceedings that she could assist the family.

54. However, as already indicated when addressing the issue of whether the claimant's deportation would have unduly harsh effects, I am not persuaded that the disruption and harsh effects that the claimant's deportation will have on his wife and children rises to the level of being unduly harsh. To repeat, I am required to decide this case by applying the principles set out in the case law which make very clear that "unduly harsh" is an elevated threshold.

55. The claimant has no health issues; he is a fit and healthy and relatively young man.

56. Taking into account the evidence as a whole and having regard to the relevant factors going to the assessment of the proportionality of the decision, I am satisfied that the claimant has failed to show that there are very compelling circumstances warranting a grant of leave outside the Rules. The only thing I would note, in the context of public policy discussions about the proportionality of lengths of time that deportation orders should subsist once the subject has left the UK, is that given the significant evidence that the claimant has rehabilitated, I would express my own view (nothing more than that; such a view can have no binding effect on the SSHD /Entry Clearance Officer) that if in three years' following his deportation the claimant continues to show that he has remained free of criminal activity and is occupying himself positively and there is evidence that he remains committed to family life with his wife and children, that it might be appropriate, upon any such application from the claimant, for the SSHD to review his circumstances with a view to considering whether to revoke the deportation order.

Notice of Decision

57. For the above reasons:

- the decision of the First-tier Tribunal judge as regards Article 8 has already been set aside for material error of law;
- the decision I re-make is to dismiss the claimant's appeal against the decision of the SSHD to deport him.

58. Although I previously made an anonymity direction, so as to maintain the one made by the First-tier Tribunal judge, I see no proper basis for continuing it any further. It is sufficient in my judgement that I have anonymised the children's details and that of the claimant's wife.

Signed Date: 22 August 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal