Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07974/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On the 25th September 2019	**On 2nd December 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

D J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adewoye, Solicitor Advocate
For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") promulgated on the 15th January 2019, in which the Tribunal dismissed the appeal of DJ against the decision of the Secretary of State to refuse his protection and his human rights claim and in the context of the respondent having made a deportation order against him.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as this appeal involves the interest of minor

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

The Background:

3. There is a long background history which it is necessary to summarise to consider the legal issues that are identified in this appeal.

4. The appellant is a citizen of Jamaica. He entered the United Kingdom on 19 March 2002 and was granted leave to enter as a student until 30 June 2003. That leave was further extended until 28 June 2004.

5. On 28 May 2004 he married a British citizen, KB, and on 16 June 2004, the appellant applied for leave to remain as a spouse and was granted leave until 22 June 2006.

6. In December 2004 he was convicted of having an article with a blade which was sharply pointed in a public place to plead guilty was given a conditional discharge for 12 months.

7. In May 2005 he was convicted of the Magistrate's Court for a number of offences relating to driving was insured for which he received a community punishment order. In November 2005 he was convicted at the Magistrate's Court of criminal damage and was conditionally discharged for six months.

8. On 31 May 2006, the appellant made an application for further leave to remain as a spouse but that was subsequently refused.

9. In September 2006 he was convicted of resisting or obstructing a constable for which he received a conditional discharge of 18 months.

10. On 6 October 2006 the appellant was convicted at the Magistrate's Court on six counts of supplying class A drugs and was committed for sentence at the Crown Court. On 13 November 2006 he was sentenced to a term of four years imprisonment concurrent on each of the eight counts.

11. On 21 November 2007, the Secretary of State made a decision to make a deportation order under section 5(1) of the immigration act 1971 on the basis of his deportation was conducive to the public good. It is also recorded that his application for indefinite leave as a spouse was refused on the 21 November 2007 in light of his conviction and paragraph 322 (5) of the Immigration Rules.

12. The appellant appealed that, and following a hearing on 23 January 2008, the Tribunal dismissed the appellant's appeal.

13. Following that, the appellant sought and was granted reconsideration of that decision which was set aside by Senior Immigration Judge Perkins on 5 June 2008 on the basis that the AIT had materially erred in law in reaching its decision.

14. In a decision promulgated on 19 November 2008, the AIT substituted its decision dismissing the appeal.

15. Further litigation followed and on the 21 July 2009, the Court of Appeal allowed the appeal by consent and remitted it for rehearing to the AIT.

16. The appeal then came before Senior Immigration Judge Grubb on 24 November 2010. In a decision promulgated on 30 December 2010, he allowed the appeal. During the appeal he heard evidence from the appellant, his sister and her husband. The judge recorded that the appellant relied exclusively upon Article 8 of the ECHR based on his family life with his wife K and the two children, K1 child of the family) and A. The appellant's wife suffered from mental illness and had been at times detained under the Mental Health Act. The judge's assessment of the evidence was set out at paragraphs [48]-[79]. The judge found that there was a close family life between the appellant, his stepson (age 9) and his daughter and that the appellant had taken full parental responsibility and care for both children when his wife had been hospitalised both prior to his imprisonment and since his release. Whilst there was a relationship between the appellant's cousins, it was not a relationship that engaged the aspect of "family life" but it was part of the children's private life.

17. As to the circumstances of the appellant, the judge found that the appellant had been in the UK since 2002. He had been married to British citizen since 2004 and had a stepson age 9 and a daughter almost 6. They are British citizens.

18. The judge set out the evidence relating to the appellant's wife and him mental health and at [70] recorded the evidence that she had been assisted with her condition with the support of her husband and that at the date of the hearing she had become hospitalised. The appellant had been caring for the children at the home of his sister. The judge reached the conclusion at [73] the effect of the offence deportation would be to split up the family and that it would not be realistic to suggest that he could maintain family relationships with the children in the UK.

19. As to the offences themselves, the judge made reference to the sentencing remarks in which the offences were described as "extremely serious" and acknowledging the appellant's explanation that he supplied the drugs in order to pay off debts to illegal money lenders, as the judge pointed out, the appellant continued to supply the drugs as a source of income for himself and his family even the debt had come to an end. It was noted that the offending was not a "one-off" but was "over a period of time" between March and June (at [55]). As to the risk of future reoffending, the risk of reconviction was "medium". Whilst in prison he had two disciplinary adjudications. The judge found that he remained a medium risk of reconviction at a low risk to the public (at [57]).

20. In his assessment of proportionality, the judge weighed in the balance the due weight given to the public interest in his deportation based on the appellants offending history and that he remained a "medium risk of offending and a low risk of causing harm" but found that it was not reasonable at present for the family to relocate to Jamaica and that the interests of the appellant's wife and children were that they should remain as a family. The appellant's presence in the UK was an integral part of the support required by his children and his wife to in respect of her mental health problems and did not find it was reasonable to expect the appellant's family to leave with the appellant and therefore he was satisfied that the appellant's deportation would not be a proportionate interference with his and his family rights to respect for "private and family life" under article 8.

21. The judge therefore allowed the appeal. The Secretary of State did not seek permission to appeal that decision.

22. Following this, on 7 September 2011, the appellant was granted discretionary leave in the UK for six months until 6 March 2012.

23. It is recorded that on the 16th February 2012 the appellant made an asylum claim in the UK following his visit to Jamaica in December 2005. It was asserted that he was in fear of return to Jamaica.

24. On 23 April 2012 he applied for extension of stay in the UK, but this was refused. The reasons given was that it was on the wrong form and no fee was received.

25. On 8 May 2012 the appellant applied for further discretionary leave to remain in the UK. He provided evidence of his family situation in support of the application filed with a covering letter of the 4 May 2012.

26. On 4 February 2013 at Crown Court, he was convicted of two counts of common assault and battery and was given a suspended sentence of four months imprisonment 24 months wholly suspended, a 12-month supervision order and a 140 hours unpaid work requirements.

27. On 30 May 2013, the appellant was granted discretionary leave in the UK until 30 November 2013.

28. On 21 January 2014, the appellant applied for further discretionary leave to remain in the UK. He provided evidence of his family situation in support of the application (covering letter dated 8 November 2013).

29. On 13 March 2014, the appellant was granted discretionary leave in the UK until 13th September 2014.

30. On 7 August 2014 the appellant submitted an application for further leave to remain via his representatives the IAC Ltd.

31. On 26 August 2016 the appellant's representatives submitted a pre-action protocol due to the length of time elapsed since the application was made. A holding letter was sent on the 26 September 2016 advising that the application was under consideration.

32. On 26 May 2017 further information was requested from the appellant's representatives including further evidence of his situation, given the time that had lapsed since the application was received. The response was received on 13 June 2017.

Deportation proceedings:

33. On 17 July 2017, the appellant was served with a decision to deport (ICD. 4936).

34. On 24 July 2017, the appellant's representatives responded to the decision letter with supporting evidence as to why he should not be deported from the UK on article 8 grounds.

35. On 3 October 2017 the representatives requested a decision for the application for further leave to remain that was made on the 7 August 2014. They also requested an update as to when a decision would be made on that application on 14 March 2018.

36. On 19 March 2018 the appellant was served with a fresh decision to deport (ICD;4936). It is recorded in the respondents material that "a new decision was required as the decision of 17 July 2017 was considered under the Immigration Act 1971, not under the UK Borders act 2007 and did not include a decision for the appellant's asylum claim from 16 February 2012."

37. Part one entitled "deportation decision" made reference to the appellant's offending history and that applying section 32 (4), deportation of foreign criminals was conducive to the public good and that the public interest in his deportation was "further strengthened because of your previous and subsequent convictions as follows" reference then being made to his offending history, including the offences in 2006 and 2013.

38. On 27 March 2018 the appellant's new representatives advised that they would submit further representations and on 16 April 2018 further representations were made on his behalf.

39. On 3 May 2008 a preliminary information form and a section 72 notice was sent to the representatives requesting further information relation to his asylum claim from 2012. His response was sent on 18 May 2018.

40. On 11 June 2018 that the appellant was served with the refusal of a protection human rights claim. The decision letter considered the protection claim advanced on behalf of the appellant at paragraphs 59 – 115. It is common ground that that protection claim was not pursued before the FtTJ. The decision letter considered article 8 in the light of the material provided and set out paragraph 119. At paragraph 121 -128, the

decision made reference to whether there were "very compelling circumstances", making reference to his offending history, the conviction in 2006 and the judges sentencing remarks, and reference to the change of circumstances at paragraph 127. The circumstances of the children were considered individually as was his relationship with his former partner and his relationships with his sister and niece. The decision went on to consider his private life at paragraphs 172 – 190 and concluded at paragraphs 191 – 193 that his conviction was considered to be one that was regarded as very serious and which compelled the respondent to give significant weight to the question of protecting society against crime and the health and morale of others. In order to outweigh the very significant public interest in deportation he would have to provide evidence of a very strong article 8 claim over about the circumstances described in the exceptions are deportation and that had not been demonstrated on the evidence provided.

41. On 20 August 2018 a case management review hearing was held by the First-tier Tribunal. There is a note written by the FtTJ in the Tribunal papers. It is recorded that Mr Adewoye was present at the hearing along with a presenting officer. The judge recorded that the appellant had appealed against the respondent's decision made under UK Borders Act 2007 and that he had raised the question of what matters would be at issue at the substantive appeal hearing. It is recorded that Mr Adewoye indicated that it would be article 8 (family and private life) and that consideration was given to not proceeding with the asylum appeal. The judge's note makes reference to the chronology and the reference to having been granted leave to remain on two occasions in May 2013 and March 2014 after his last conviction which was in February 2013 and that despite the chronology, a decision to deport him in July 2017, followed by a fresh decision to deport in March 2018 and been made. It is recorded that the presenting officer accepted that this required a clarification.

42. A further point noted by the FtTJ was that the decision letter made reference to the respondent deeming the deportation of the appellant as "conducive to the public good in accordance with the automatic deportation provisions" but he considered that the statutory "trigger" at s 32(2) of the 2007 Act, that a person concerned has been sentenced to a period of imprisonment of at least 12 months, would appear not to apply to the appellant given that his last. Imprisonment was a four-month suspended sentence imposed in February 2013. On the other hand, if relying on a conviction from 2006 of four years imprisonment, there had been a hearing which had allowed his appeal on article 8 grounds against the deportation order and the respondent had granted him leave to remain in September 2011.

43. The FtTJ therefore adjourned the hearing and made a number of directions which included for the appellant's solicitors to write to the IAC and the Home Office to confirm what issues would be argued at the substantive hearing but also that the respondent was directed to undertake a "comprehensive review of the decision that an automatic deportation order under section 32 (5) of the 2007 Act "should be made and the reason for making that decision in the light of the appellant's offending history, his immigration history and the judicial proceedings. The respondent was directed to write to the IAC and the appellant solicitors by 18 September 2018 to

confirm whether he still maintained that an automatic deportation order should be made and to provide full reasons for making that decision.

44. On 8 October 2018 a response was issued by the Secretary of State (see decision of the FtTJ at [34].

Decision of the FtTJ:

45. In a decision promulgated on 15 January 2019 the FtTJ dismissed the appellant's appeal. The FtTJ set out the immigration history of the appellant at paragraphs 1-11 and at paragraph 12 recorded the basis upon which the appellant advanced his appeal namely that he relied upon his family life with his youngest child C (born in 2012) who lived with his wife K and with whom he has contact and his recent contact with his eldest daughter A. He relied on evidence relating to his relationship with his wife K and the support he provided for her and also evidence provided by his sister and niece.

46. Under a heading entitled "the law", the judge made reference to the notice of deportation dated 13 July 2017 which had set out that the legal basis for removal of the appellant was under section 32(5) of the 2007 Act was "conducive to the public good for the purposes of section 3 (5) (a) of the Immigration Act 1971 and the decision relied on paragraph 399C of the immigration rules which states:

> "where a foreign criminal who has previously been granted a period of limited leave under this Part applies a further 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."

47. The judge made reference to the same decision acknowledging that "the appellant was not granted leave to remain under part 13 of the Immigration Rules but that it was stated there continued to be a public interest in the appellant's deportation". The judge also recorded the reference made to chapter 13 of the IDI's at section 7.4 which stated:

> "where a foreign criminal has previous to be granted limited leave on the basis of article 8, he will only be granted further leave if he qualifies under the article 8 provisions set out in paragraph 398 -399A, even if his first period of leave was granted before those provisions came into force or before the previous private and family life rules were introduced on 9 July 2012".

48. The judge then recorded at [14] that this decision was then stated to be incorrect and an amended notice of intention to deport with reference to the UK Borders Act 2007 was made on 19 March 2018 and that the respondent relied upon the "automatic deportation provisions" found at section 32 of the 2007 Act. The decision referred to the conviction of 2006 and relied on section 32(4) of the 2007 Act. The decision then referred to the appellant's previous and subsequent convictions as to the reason why public interest in the appellant was further strengthened. The judge also records that

"no reference is made to part 13 of the immigration rules. No reference is made to part 5A of the Nationality, Immigration and Asylum Act 2002".

49. At [16] the FtTJ made reference to the refusal of the appellant's protection of human rights claim which was made on 11 June 2018 which referred to the appellant's family life and made general reference to Part 13 of the Immigration Rules and part 5A of the 2002 Act. The judge noted that the appellant relied upon the exceptions regarding the Human Rights Act 1988 but was not relying on the Refugee Convention.

50. At paragraphs 17 – 18, the FTTJ set out Part 5A of the 2002 Act ("Article 8; the public interest considerations") and also Part 13 of the Immigration Rules "deportation and Article 8" paragraphs 398 and 399.

51. It is plain from reading the decision of the FtTJ that there was some discussion with the advocates concerning the decision made by the respondent on the basis that the Tribunal had allowed his deportation appeal in 2010 and that the decision to deport relied upon the same offence as a trigger for further deportation taken with the grant of two further periods of leave after he had committed a further offence in 2013 (see 23]).

52. The FtTJ's discussion of the and the issue which she described as the "so-called trigger" position was set out at paragraphs [31]-[42].

53. The FtTJ began her consideration by observing that the respondent had initially made a decision to deport the appellant which was agreed by the Secretary of State to have been defective which resulted in a second deportation decision being issued which highlighted the appellant's conviction in October 2006 and the prison sentence of four years as the basis of the deportation. The decision referred to his previous convictions and the subsequent conviction (for which he received a suspended sentence). The judge recorded at [32] that the respondent by the date of the final deportation decision had granted several periods of leave to remain on the basis of the appellant's family life and a grant of leave made after the 2013 conviction. The judge also made reference to the CMRH and that contrary to the directions made, no letter was sent to the IAC (undertaking a comprehensive review) but a letter was sent to the appellants representatives. The judge records that the letter of 8 October 2018 did not appear to be a comprehensive review as agreed and that the decision-maker referred to the directions of the FT TJ not being attached to the letter. The judge recorded "my enquiries at the hearing did not lead to a clear explanation".

54. At [34] the FtTJ set out the contents of the letter and at [35] the view of the appellant's representatives who had taken issue with the reference made to the application going to the criminal casework and referring to the applications for further leave to remain which included details of his previous convictions and relied on the fact that he been granted only six months leave otherwise he would have been granted "the normal 2 ½ or three years**".** It also was noted that there appeared to be no trigger for the deportation decision under the automatic provisions of the 2007 Act.

55. At [36] the judge recorded that the respondent had the "opportunity to fully expand/review the reasons the deportation decision of March 2018 with reference to the statutory provisions, this does not appear to have been done and the respondent are presented simply stated that the decision was relied upon."

56. As the judge observed at [37] she was not provided with any case law concerning the applicable legal framework from either of the parties nor any case law dealing with what she described as the "so-called trigger" and whether the "statutory presumption remains in perpetuity". The judge also observed the law had changed since the appeal had been allowed in 2010 and the current law is that set out in *YM (Uganda)* [2014] EWCA Civ 1292.

57. The judge then directed herself to the decision of *Johnson (deportation – four years imprisonment)* [2016] UKUT 00282., In which it was held that when a foreign offender has been convicted of an offence for which he has been sentenced to imprisonment of at least four years and has successfully appealed on human rights grounds, this does not prevent the Secretary of State from relying on the conviction for the purposes of paragraph 398 (a) of the immigration rules and section 117C of the 2002 Act if and when he reoffend is, even if the later offence results in less than four years imprisonment or, indeed, less than 12 months imprisonment. The judge then set out paragraphs 27 and 28 of that decision and stated, "I note here that there is a reference again to the issue of a later "trigger" offence which led to the decision to deport". The judge then made reference to the same decision where it was stated;

> "any individual imprisoned for such a significant period of time must have it in his mind that he is living on borrowed time, as it were, and that any further offending may have the consequence that the tribunal revisits an earlier appeal at which he successfully resisted deportation. Finally, the appellant contention that, for the purposes of paragraph 398 (a) the offence that triggers deportation can only be the most recent offending is nowhere to be found in the words of the paragraph and the expression "they have been sentence". Had it been the intention to limit the operation of the subparagraph in the manner suggested, it would require drastic rewriting."

58. At [39] the judge then stated:

> "again, there is a reference here to a later offence being a trigger. In the facts of the current case there was no link made to the later 2013 offence being a trigger which led to the deportation proceedings. The trigger appears to have been the change in the appellant's family circumstances which at the date of the deportation decision was still subject to consideration with reference to the appellant's application for further leave to remain. I note that the respondent made the decision after earlier deciding that the appellant should be given further leave because of his relationship with his daughter."

59. At [40] the judge observed the appellant had not sought to challenge the basis of the decision to deport him by way of judicial review and concluded that this would have been the "proper route to challenge a decision to deport him".

60. Having set out those issues, the judge considered that the appellant's appeal was "based on his claim that deportation would be contrary to the U.K.'s obligations under Article 8 of the ECHR notwithstanding that is a deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years." At [42] the judge made reference to Part 5A of the 2002 Act and section 117C. Although the judge did not expressly say so, it is plain from her decision that given his previous conviction which resulted in a period of imprisonment for 4 years, the public interest required his deportation unless there were "very compelling circumstances over and above those described in Exceptions 1 and 2."

61. The FtTJ's findings and conclusions were set out at paragraphs 44 –66. It is plain from reading those paragraphs that the evidence before the FtTJ was incomplete and there were a number of questions raised from the evidence. This included the change in circumstances since the decision was made in 2010 to allow his appeal and that there was no clear chronology outlining the events that occurred from 2013 until the present date (see [46]), that the appellant's wife had not attended court and her evidence was important and it was unclear why an adjournment had not been requested (see [47-48]), his contact with his younger daughter had not been explained properly (at [50-[51]).

62. The findings made can be summarised as follows:

    (1) Following the decision of the Tribunal in 2010, where it been decided that it was in the interests of the children and the appellant's wife for the family to remain together and that the appellant's presence in the UK was an integral part of the support required by his children and his wife in respect of her mental health problems, circumstances changed and the family were split. The eldest children were taken into care and in 2013 the appellant was convicted of a further offence.

    (2) The appellant was no longer living with his wife or his youngest child. His relationship with his wife has been long and on occasion very troubled but that the appellant stated he now had a stable relationship with his former wife. The appellant has had no contact with his stepson K since the children were taken into care by the social services ([49]).

    (3) The appellant has had indirect contact with his eldest daughter A since 2010 and she has requested direct contact and he has seen her on one occasion. The FtTJ referred to evidence from the social worker (correspondence in November 2018), which made reference to A being removed from the care of both of her parents for "various issues" but did not go into any detail on the judge noted that there was "no detailed information on what led to children being in care and the reasons for the level of contact allowed between them and the appellant". Therefore based on that information the judge found that the appellant did not have a subsisting parental relationship with A and that whilst the SW appeared to be suggesting that it was in her best interests to continue contact with

her father, the personal contact was in the very early stages. The judge recorded that while she recognised it was in A's best interests at present to continue her contact with the father, "I would not regard the evidence itself as being very compelling circumstances given the limitations of the relationship" (at [50]).

(4) As to his relationship with C, the judge set out the differing evidence at [51]-[59]. There was evidence in an email relied upon by the respondent setting out the mother's position and that the email referred to little contact between the appellant and C when the final assessment took place in June 2016 and that her mother had been assessed to meet her needs and to continue to care for her as a single parent. The judge referred to the appellant's evidence which did not refer to any breaks in contact between the appellant and C but that there was contact on Tuesdays and Saturdays and he helped his wife with childcare, provided financial support. The judge made reference to their being a gap in the information concerning the resumed contact with C when it began (at [54]). And evidence from the Head Teacher of C which made reference to him assisting with her reading and attending parents consultation (at [55]).

(5) The FtTJ made reference to the ISW report in relation to the appellant and C but noted that there was a difference in the evidence provided in the email from social services and the reference made to the Child Arrangements Order in January 2016 and the email was not referred to in the ISW's report (at 57]). The evidence of the ISW was that C and her father had formed a secure attachment.

(6) The FtTJ noted the gap in the chronology but accepted that the date of the appeal he had been having regular contact with C and a genuine and subsisting parental relationship albeit she lives with her mother. The judge accepted that it was in her best interests that he is present as an active and supportive parent (see [59]).

(7) The FtTJ made reference to the position of the appellant's wife and her vulnerability and the basis upon which the first appeal was allowed but given the conflicting information the judge did not appear to make any particular finding on this issue and whether C or his wife would benefit from any input from the appellant (at [60]).

(8) The FtTJ found that K had no intention to relocate to Jamaica, she was not in a relationship with A (save current arrangements to care for C and appellant's assistance with that childcare) and that there was no suggestion that C could live with her father in Jamaica (at [61]).

(9) The judge accepted that the appellant's sister and his niece had a close relationship and they see him in person about once or twice a year (at [63]). The judge made reference to the circumstances where the appellant's niece was the complainant in 2013 at paragraph 63 and 64 but it is not clear whether the judge made any particular finding other than stating "the evidence given by the appellant sister and niece in personal

supportive but did not contribute to a finding of compelling circumstances." It is unclear what finding was made or how or on what basis it was said to support a finding of "compelling circumstances".

(10) As to his private life, the judge recorded that he had been in the United Kingdom for appeared over 16 years and had close family a and friends. There were letters of support but none of those people had attended court. It was noted that the appellant had been financially independent and had worked to support his wife and was in employment. No other findings or assessment was made as to the strength of his private life (either in terms of length of residence, integration and any ties to Jamaica).

(11) The judge concluded her assessment at [66]. She stated that the appellant could not be said to be a persistent offender and not been convicted of any further offences since 2013. She further stated that the respondent appeared to regard his relationship with C as a reason to allow him further periods of leave to remain prior to the decision to deport. The judge also recorded that the circumstances in the email from the social services appear to be the trigger which had led to the deportation proceedings, but it appeared to be out of date as they had not had contact with the appellant's wife and child since 2016. The judge therefore considered that there had been an inadequate consideration of "family life" and were "factors which are weighed in his favour." The judge concluded, "however the requirement set by paragraph 117C (6) is that there must be very compelling circumstances over and above his genuine and subsisting relationship with his child who is a British citizen is a qualifying child. My overall conclusion is that the appellant cannot taking into account his current circumstances are whole and the factors I have referred to provide sufficient evidence of very compelling circumstances over and above the exception listed in S117C of Part 5A of the 2002 Act."

63. The appellant sought permission to appeal that decision, but permission was refused on the 7 February 2019 by the FtT. The grounds were renewed and on reconsideration permission was granted by UTJ Chalkley on the 13 March 2019.

<u>The appellant's grounds of challenge:</u>

64. Mr Adewoye has represented the appellant throughout his appeal and was the author of the grounds. He has at times helpfully represented the appellant on a pro-bono basis and has now secured funding for his representation.

65. Ground 1 states that the FtTJ erred in law to have proceeded with the case as a deportation appeal under the 2007 Act when there was no trigger for automatic deportation provisions under the UK Borders Act and that the trigger as stated in the decision to deport was the change in circumstances of the family composition since the last grant of leave which is now found to be incorrect and not his reoffending (see [66]). The judge therefore could not identify which aspect of the public interest the deportation of the appellant would seek to protect since there was no offence which

triggered the deportation proceedings following a successful appeal against deportation in 2010 and for granted further leave to remain two after another offence was committed.

66. It was asserted that the judge erred in law to have applied S117C of the 2002 act because it contravened the provisions of S117C(7) which provides that the considerations and subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted." It was therefore asserted that it was clear from the decision that the reason for the deportation was not solely because of the offences but because of the alleged change in family circumstances since the last grant of discretionary leave in 2014 therefore the provisions were not applicable.

67. In the alternative it was argued that the judge erred in her conclusion that the appellant's circumstances did not present "compelling circumstances" far above the ordinary relationship with his daughter. The judge gave inadequate reasons and failed to take into account relevant evidence which showed that the appellant had a strong Article 8 case to displace the public interest in deporting foreign criminals when one of the exceptions applied.

68. It was submitted that the appellant did not only rely on his relationship with his child but advanced other considerations, including the welfare of the child being affected in the event of the relapse of the wife's medical condition as set out in the medical evidence, that the wife and child could not relocate to Jamaica, the issue of delay in making a decision on his application, the fact that he is not a danger to the public, that he had supported his wife financially and the effect of his absence on the family, that deportation would prevent the continuous contact with A and that the FtTJ erred in an assessment of whether there was a subsisting parental relationship with A and that there had been grants of leave made in his favour since the last offence was committed and also made no findings on the evidence of the appellant's niece.

69. It was therefore submitted that the judge gave inadequate reasons why those factors, if taken into account) could not be compelling (taking into account *RF (Jamaica) v SSHD* [2017] EWCA Civ 124).

70. Finally it was submitted that the judge should have given adequate reasons for rejecting the relevant factors if she was to reject them as not compelling enough to be far above 399A or 399B and the judge had not highlighted any strong countervailing points to support the public interest in the deportation of the appellant. The judge was an error by failing to address the factors in detail when reaching a decision as to whether there were compelling circumstances.

71. There was no written Rule 24 response on behalf of the respondent. At the initial hearing before the Upper Tribunal the appellant was represented by Mr Adewoye and the respondent by the senior presenting officer Mr McVeety. Neither advocate

had provided a skeleton argument with reference to the relevant legal framework or case law or any pleading directed to the issues that the Tribunal had to consider beyond the appellant's grounds.

72. I heard submissions from each of the advocates. Mr Adewoye relied upon the written grounds and in particular he submitted the main ground was that set out at ground one that the judge had misdirected herself in law by treating this appeal as an automatic deportation appeal. He made reference to the appellant's immigration history and referred the Tribunal to the decision letter made on 11 June 2018. In particular, he submitted that the later offence committed in 2013 was not the "triggering offence" for the proceedings and no link had been made between that offence and the consequent deportation proceedings. Th respondent was put on notice by the appellant solicitors that the automatic deportation provisions did not apply because he had not been sentenced to a period of 12 months (reference being made to the response of the Secretary of State dated 8 August 2018 maintaining the decision).

73. Mr Adewoye made reference to the decision in *Johnson* (which had been cited by the judge) and that the present appeal could be distinguished from this is the appellant was not a persistent offender. This also had to be seen in the light of the finding made at [39] that the respondent had not linked the subsequent offending to any trigger offence but the change in the families circumstances. He submitted that the appellant was not a foreign criminal under the 2007 Act because of the nature of the offence committed in 2013 and therefore the decision to proceed without the appropriate "trigger" was fatal to the decision made by the FtTJ. He submitted that the judge should have said that there was no appeal before the Tribunal.

74. In his submissions he made to an application made a further leave to remain in August 2014 and that decision was subsumed in the decision letter made in June 2018 at paragraph 196 (p45) and the application was refused under paragraph 322(5) as a result of his criminality.

75. When asked by the Tribunal to outline his submissions as to what correct legal framework was applicable, Mr Adewoye submitted that this was a refusal of human rights claim and that the appellant would only need to satisfy S117B(6). As the subsequent events did not make him a persistent offender the automatic deportation provisions were therefore not triggered.

76. As to the substance of the decision, as set out in the written grounds, Mr Adewoye submitted that the FtTJ had made no findings of fact as to the impact of deportation upon the appellant's child C and whilst at [59] the FTT J made some reference to best interests there were no findings on the impact upon the child of the appellant deportation. Furthermore, in relation to the child A, the FTT J at [50] found that he did not have a subsisting parental relationship and her assessment here was also vitiated by legal error.

77. He submitted that the basis of the assessment made by the respondent was wrong as the appellant did have "family life" with C and relied upon out of date evidence in the circumstances presented in 2016 and they respondent did not consider evidence such as financial payments made by the applicant. The FtTJ did find that he was having regular contact with C, but the conclusion reached at [66] was an irrational one.

78. Additionally the FtTJ failed to take into account as a relevant factor the appellant's wife's medical condition and did not put into the balance and number of factors which could be considered "compelling" and the decision was not adequately reasoned and her conclusion that his circumstances did not form "compelling circumstances" under section 117C(6) was not correct in law.

79. In his submissions, he stated that a number of factors were not considered by the FtTJ which included the issue of relocation, the impact on the two children, when assessing risk after 2013 had been granted discretionary leave twice, the issue of delay between 2014 and 2018, and that all of the factors were "exceptional" but did not form part of the judges assessment.

80. Mr McVeety on behalf of the respondent made reference to the immigration history of the appellant and that he had previously been granted limited discretionary leave which had come to an end in September 2014 and he made an entire application. The respondent was also aware that he had made an asylum claim in 2012 although no formal proceedings had started and no interview taken place. Therefore in 2014 had been an application made a further leave to remain in Article 8 grounds and the respondent therefore reassessed the appellant circumstances from those that had formed the basis of the decision of UTJ Grubb in 2010. The respondent considered that the basis of the grant of leave had changed and the respondent reviewed the position following contact with the social services. Therefore he submitted the respondent had evidence to suggest that the reasons why have been granted discretionary leave were no longer applicable thus, even it was not necessary for the 2013 offence to be the "trigger".

81. As to the submissions made concerning lack of reasoning, he made reference to the decision letter at paragraphs 147 – 150 and that there was no evidence to show that the needs of C would not be met solely by her mother. However, whilst not making a formal concession, he recognised that the judge did not look at the unduly harsh test when reaching any decision, whether under the rules or when assessing whether there were any "compelling circumstances".

82. During their respective submissions it became plain that neither advocate agreed as to the applicable legal framework which should have been applied by the FtTJ. Mr Adewoye submitted that the automatic deportation provisions did not apply and if that was the case as a human rights claim S 117B(6) would apply. Therefore I made directions for the advocates to file skeleton arguments to set out any issues of law they wish to raise by reference to the legislation and any applicable case law. I also

made a direction that following the exchange of skeleton arguments, the parties should inform the Tribunal whether further hearing would be necessary.

83. The respondent did not file a skeleton argument but provided a letter to the Tribunal (dated 20 June 2019). The letter directed the Tribunal to the UK Borders Act (commencement No 3 and Transitional Provisions) Order 2008. The letter stated that whilst the respondent did not accept, in line with paragraph 3 (1) of the transitional provisions, that the fact that the appellant's index offence was committed prior to the introduction of the 2007 act prevented the respondent from seeking the deportation of DJ under section 32 of that Act. However it was accepted that he been served with a deportation order under section 5 (1) of the 1971 Act on 21 November 2007. As such in line with paragraph 3 (2) of the transitional provisions it is accepted that the decision to consider DJ under the automatic deportation provisions and the 2007 Act was not a lawful decision. The letter went on to state that the respondent sought permission of the Upper Tribunal, with the consent of the appellant to withdraw the decision dated 19 March 2018 to make a fresh decision in respect of his application for further leave to remain.

84. A skeleton argument was filed in behalf of the appellant and was sent 3 July 2019. As to the issue of withdrawal of the decision, it was submitted that the appellant opposed the request for withdrawal and that the matter could be dealt with notwithstanding the error in issuing deportation proceedings under the 2007 Act because the error did not affect the consideration of whether Para 399 of the rules applied whether it was a conducive deportation or an automatic deportation decision. The skeleton argument at paragraphs 31 – 39 set out the reasons why the appellant rejected the offer of the withdrawal of the decision. In summary, the respondent's delay from 2014 to the decision made in 2018 and had withdrawn a decision in 2017 to issue a further decision on 19 March 2018. The respondent did not engage at the CMR hearing and at the hearing before the FtTJ maintained their position as proceeding under the 2007 Act. There are children involved in the application and there is a likelihood that a fresh decision would take a while to make.

85. The skeleton argument made reference to the decision of *Terrelonge* (paragraph 399(b) UKUT 00653, but that it did not address the relevant questions in the present appeal as to what a statutory framework would be if the triggering offence attracts less than 12 months imprisonment. Further it did not address the point upon which concession of the respondent is now being made, if the notice of intention to deport was served before 1 August 2008 as it happened in the present case and upon which the respondent seemed to seek to withdraw the decision.

86. At paragraph 10 of the skeleton argument it was argued that the decision under the 2007 Act was unlawful and that if the error not been made he should not have been regarded as a foreign prisoner and that section 32 defined a foreign criminal is someone who is convicted of a crime and sentenced to 12 months imprisonment. The latest offence did not attract a sentence of imprisonment of at least 12 months and therefore section 32 did not apply. It was also inapplicable because of the date of the service of the notice of intention to deport which predated the commencement of the

Act. Furthermore, there was no power granted to the respondent under section 117 D to issue a deportation order and therefore it was not validly before the court.

87. At paragraph 15 of the skeleton argument the arguments advanced on behalf of the appellant were summarised; namely that the appellant was not a foreign criminal and the 2007 act did not apply to him because section 117 of the 2002 act only applied to cases involving the deportation of foreign criminals. In bold it was stated "The SSHD could not apply the 2002 Act definition to classify him as a foreign criminal because that is for the courts to have regards to not the SSHD". It was therefore submitted that the only appeal before the court was a "simple human rights appeal and not a deportation appeal" and therefore the correct approach was to apply S117B(6) .

88. He sought to distinguish the decision in *Johnson* (as cited) on the basis that the appellant was not a persistent offender which triggered the Home Office to issue liability to deport notice and also the notice under the 2007 Act was not unlawfully issued. On the facts of *Johnson*, the appellant had about 15 offences in a spate of one year following the successful appeal whilst the appellant in the present case had a suspended sentence of four months which was non-custodial.

89. In the alternative, it was argued that if the Tribunal rejected those submissions then the FtTJ erred in her assessment of what was compelling and that the judge failed to give adequate reasons for rejecting the factors which are found to be compelling and relied upon the written grounds as originally pleaded. In particular, the judge did not evaluate the additional factors in a rational or proportionate manner.

90. It was submitted that the human rights claim should be assessed on proportionality and not the presumptions in favour of deportation is contained in S117C and that the issues in the case when taken together irrespective of whether he is a foreign criminal or not, as it is a human rights appeal the issue relates to whether it would be disproportionate to refuse the application and should be decided on the evidence before it. The skeleton argument submitted that the Upper Tribunal should allow the appeal on human rights grounds on the basis that he qualifies for further leave to remain on the basis that he has a parental relationship with a British citizen, and it would be unreasonable for the qualifying child to leave the United Kingdom. Thus it was submitted that the public interest questions in section 117C would not apply and once the relationship with the qualifying child had been established, and the deportation notice is invalid, his appeal should be allowed (see *JG (s117B(6): "reasonable to leave UK")* [2019] UKUT 00072).

91. In the light of the issues raised by both written submissions and in the light of the appellant's representative indicating his agreement to an oral hearing the matter was set down before myself. Furthermore, there was also a relevant decision of the Court of Appeal in *MA (Pakistan) v SSHD* [2019] EWCA Civ 1252 handed down on 18 July 2019.

92. At that hearing the respondent was represented by Ms Petterson and not the previous presenting officer. That did not assist the Tribunal as she had not been privy to the previous submissions which I have set out above. The letter that had been sent to the respondent did not deal with all of the issues either. At the hearing Mr Adewoye confirmed that he maintained his position as set out in the written submissions that this was a human rights appeal only and that the appellant was not liable to deportation because the decision to deport was made under the 2007 Act. He submitted that the Tribunal had no power to give consent to withdraw and that the UT retained the jurisdiction to decide whether the determination should be set aside for the error of law. He made reference to the previous submissions which I have set out earlier in this decision and the reference made at the presenting officer accepted that there was a lack of reasoning.

93. Mr Adewoye made reference to the letter sent on behalf of the respondent and that the appellant was convicted before October 2007 and on this basis automatic deportation would not be applicable. He summarised the position that there was no lawful decision that brought the appellant within the ambit of deportation and that paragraph 398 or 399 did not give power to issue a deportation order. Neither did section 117 of 2002 Act. He therefore submitted that this was a human rights appeal only. Whilst the issue of lack of reasoning was accepted (or appear to be accepted on behalf the respondent) that related to the compelling circumstances however the reasoning in the decision was sufficient to satisfy the issue of S117B(6) as the only requirement was that the appellant was in a relationship with a qualifying child and it was unreasonable for the child to leave the UK. He submitted that considerations set out in S117C did not apply.

94. As to the decision in *MA (Pakistan)*, the proceedings were properly brought by the Secretary of State under the conducive deportation and the decision was not issued under the 2007 Act. On the facts of this appeal the respondent made an incorrect decision. He submitted that the Tribunal could make up its own mind as to the issue of proportionality on the facts and allow the appeal on Article 8 grounds.

95. Ms Petterson provided short written submissions on the 10 October 2019. As a preliminary issue, she submitted that the respondent had sought to withdraw the decision in the Upper Tribunal and the appellant has already had his appeal heard in the FTT and it was notable that prior to the hearing, the appellant argued that the decision now sought to be withdrawn was incorrect. Thus it was submitted that the respondent had the decision appealed against and that the matter ended there.

96. As to the substantive submissions, it was submitted that the written submissions and those relied upon orally went far beyond the issue of error of law now seeking to argue that the case should be decided by the Upper Tribunal itself. It was submitted that two errors were made arguing on one hand the detriment to the appellant having been "wrongly" categorised as a foreign criminal and secondly that the UT should become the primary decision-maker as to whether the appellant qualified for further leave to remain under the immigration rules. None of those arguments are legally sustainable.

Discussion:

97. I am grateful to the applicants for their submissions and I begin by addressing the issue of withdrawal of the decision and whether in fact the decision has been withdrawn. The submissions originally provided by Mr McVeety made reference to seeking the permission of the Upper Tribunal, with the consent of the appellant to withdraw the decision. Mr Adewoye on behalf of the appellant communicated that no consent would be given for the reasons he set out despite his submissions that the decision was an unlawful one and failed to address the issues. The submission made by Ms Petterson, who later appeared on behalf of the respondent, referred to the letter he wrote as "withdrawing the decision" although that is not what Mr McVeety's letter stated which referred to seeking permission to later withdraw the decision. The letter of 10 October 2019 at paragraph 3 refers to the decision "now sought to be withdrawn".

98. I have not been provided with any correspondence which states unequivocally that the decision has been withdrawn in any formal way. It has not been stated at the hearing that the decision had been withdrawn and I have not been told on behalf the appellant that he has received any formal communication to that effect. I therefore proceed on the basis that the decision has not been withdrawn. I do so on the basis bearing in mind that the request for a withdrawal was made in the light of the issues raised in the appellant's grounds in which it was asserted that the FtTJ had applied the wrong framework and the respondent subsequent reference to the transitional provisions. However, this was before the skeleton argument filed on behalf of the appellant setting out reasons why the appeal should proceed and also before the decision made by the Court of Appeal in *MA(Pakistan) v SSHD* [2019] EWCA Civ 1252.

99. Insofar as Mr Adewoye refers to the contents of that letter in terms of a "concession", in my judgement if the legal basis upon which that concession was made was erroneous it does not bind the Tribunal in reaching a different view on consideration of the applicable law.

100. With those preliminary matters in mind, I now turn to the issue of whether the FtTJ was in error in applying S117C(6) on the basis that the appellant was a "foreign criminal "who had been sentenced to a period of imprisonment at least four years and that the public interest required his deportation unless there were very compelling circumstances over and above that described in Exceptions 1 and 2.

101. As I have set out in the summary of the proceedings before the FtT, both before the hearing and at the time of the hearing, the issue of what legal framework applied in this appeal had been raised. Despite holding a Case Management review hearing, it did not appear that any real progress had been made in light of the non-compliance on the part of the respondent as reflected in the FtTJ's decision at paragraphs [31-38].

102. I therefore set out the relevant legal framework.

103. When a person who is not a British citizen is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months, section 32(5) of the UK Borders Act 2007 requires the Secretary of State to make a deportation order in respect of that person (referred to in the legislation as a "foreign criminal"), subject to section 33. Section 33 of the Act establishes certain exceptions, one of which is that "removal of the foreign criminal in pursuance of the deportation order would breach… a person's Convention rights": see section 33(2)(a). The appellant relies on this exception, arguing that his deportation would breach his right to respect for his private life guaranteed by article 8 of the Human Rights Convention.

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

105. The parties have referred to Part 5A which was inserted into the Nationality, Immigration and Asylum Act 2002 with effect from the 28th July 2014 (see *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 at [38]).

106. The material parts provide as follows:

> **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).
>
> …
>
> **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.

117D Interpretation of this Part

(1) ...

(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.

(3) …

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;"

107. **Immigration Rules A362-400**

A362: Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

363. The circumstances in which a person is liable to deportation include:

(i) where the Secretary of State deems the person's deportation to be conducive to the public good;

…

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;

...

(c) ... 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 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 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.

108. As the Court of Appeal pointed out in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239, para 14, although the Immigration Rules are relevant because they reflect the responsible minister's assessment, endorsed by Parliament, of the general public interest, they are not legislation; by contrast, Part 5A of the 2002 Act is primary legislation which directly governs decision-making by courts and tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on article 8 grounds.

109. The original written grounds advanced on behalf of the appellant argued that the FtTJ erred in law by proceeding with the case as a deportation appeal under the 2007 Act where there was "no trigger "for the automatic deportation provisions on the basis that the trigger in the decision letter was the change in the family circumstances and this had been incorrect. Thus it is argued the judge could not identify the facet of the public interest the deportation of the appellant would seek to protect and on the basis that there was no offending on his part which would trigger the deportation proceedings.

110. The original grounds were changed somewhat in the subsequent skeleton argument and the oral submissions made by Mr Adewoye which submitted that the appellant was not liable to deportation for those reasons and as this was a human rights application to which S117B(6) applied, the evidence satisfied this paragraph as the appellant had a genuine and subsisting relationship with a qualifying child and it would not be reasonable for that child to leave the United Kingdom. Therefore he submitted this was a human rights claim, and proportionality should be assessed on the basis of the factors set out in S117B and not S117C which only apply to foreign criminals and that the appellant did not fall within that category.

111. I have given careful consideration to the submissions made by the respective advocates. There is no dispute that the appellant was sentenced to a period of imprisonment of at least four years; this was the conviction in 2006 for the offences of supplying class A drugs. There is also no dispute that following that decision, the appellant had been granted periods of discretionary leave and such leave had been granted even after he had reoffended in 2013, which did not result in an immediate custodial sentence but a suspended sentence with conditions attached to that sentence. I could not find any findings of fact in the decision of the FtTJ as to the factual circumstances of the offending in 2013 or in the respondent's evidence.

112. The argument advanced on behalf of the appellant relies on a number of factors taking into account the chronology of the events including the grants of leave provided since the original conviction in 2006, and the appeal being allowed in 2010 and that there was no "trigger" for the deportation proceedings in 2017.

113. I have considered the arguments advanced but I have reached the conclusion that they are not correct in law. As set out in the decision of *MA (Pakistan)* (as cited) at [32], there are two material questions that arise. Firstly, whether the deportation of the offender is conducive to the public good? And if so, the offender is liable to deportation under section 3(5) (a) of the Immigration Act 1971? The second question

relates to the circumstances in which it is open to the respondent to make a deportation order. In this respect the decision refers to legal obstacles to the deportation of the offender, for example, because the decision would infringe Convention rights. But that the bar to deportation does not alter the fact that the offender is a person whose presence is not conducive to the public good. When reading the decision letter of 16 March 2018, in which the respondent set out the reasons for deportation, that decision made reference to section 32(4) that the deportation of a foreign criminal is conducive to the public good and goes on to state "the public interest in your deportation is further strengthened because of your previous and subsequent convictions". The respondent then sets out all of the appellant's offending history including those prior to the offence in 2006, the offence in 2006 and the later conviction in 2013. Thus the respondent expressly set out that in the case of this appellant his deportation was conducive to the public good and it was strengthened because of not only his previous convictions (that is, 2004 – 2006) but also his subsequent conviction (that in 2013). This was also set out in the decision to refuse protection and human rights claim issued on 11 June 2018 set out at part one and expressly within the decision letter at paragraph 57. Therefore the first question posed in *MA (Pakistan)* was addressed in the decision letter of 16 March 2018 and 11 June 2018.

114. As to the second question, this depended on whether a change in the law provide a proper foundation for the decisions made in March 2018 in June 2018 to deport the appellant.

115. The submissions made on behalf of the appellant, and some extent those on behalf of the respondent in the letter which made reference to the transitional provisions relating to the 2007 Act, fail to address the issue that the law in relation to deportation change in the period after the original decision to deport in the proceedings in 2010. The new part 5A of the 2002 Act was in force from 28 July 2014 (see *YM (Uganda) v SSHD* [2014] EWCA Civ 1292.

116. Whilst submitted on behalf of the appellant that there had been no change in the appellant's circumstances since the decision in 2010 and that the decision letter wrongly characterises the position of the appellant and his relationship with family members, in my judgement the respondent was entitled to review the appellant circumstances on the evidence provided. He was no longer living with his wife and children as a family unit. The respondent did make reference to his further offence committed in 2013 as part of the factual matrix and even if it was not the "trigger" as Mr Adewoye submits, the change in the law and the clarification made in that law of the public interest did justify the making of a fresh deportation decision.

117. The fact that the amendment to the law was made a number of years after his conviction on 2006 and after his appeal against the decision to deport him was allowed in 2010, does not preclude the respondent from issuing a fresh decision.

118. As to the argument the appellant is not a foreign criminal within the requisite definition on the basis that he has not been sentenced to a period of 12 months

imprisonment and on the finding of the FtTJ that he was not a "persistent offender", this fails to take into account the definition of a foreign criminal in section 117D 2 and the words used in that section taken in their ordinary meaning. The appellant is not a British citizen and he has been convicted of an offence in the UK and additionally has been sentenced to a period of imprisonment of at least 12 months. The fact that the most recent conviction 2013 was for a sentence of imprisonment which was suspended does not alter the fact that in 2006 he was sentenced to a period of imprisonment of 4 years. Looking at the wording of section 117D2 (C) (i) it refers to "has-been sentenced to a period of imprisonment of at least 12 months". The use of the word "has "is in the past tense and therefore the appellant does fall within the meaning of a "foreign criminal".

119. The FtTJ did make reference to the decision of *Johnson* at [38] where the Upper Tribunal reached the conclusion that the appellant in that appeal has been convicted of an offence for which he had been sentenced to at least four years imprisonment and that the Secretary of State was not precluded for relying on that. I can find no basis to distinguish *Johnson* from the present appeal as Mr Adewoye submits as the fact he was a persistent offender does not impact on the fact that the appellant has been I the past convicted of a qualifying offence. An issue referred to by the FtTJ was "the trigger" for the decision and that in *Johnson* there was a later "trigger offence" which had led to the decision to deport. At [39] the FtTJ found that on the facts of the appeal there was no link made to the later 2013 offences being a trigger which led to the deportation proceedings and that the "trigger" appeared to be the change in the family circumstances of the appellant. At [40] the FtTJ observed that the appellant did not seek to challenge the decision to deport him by way of an application for permission to apply for judicial review which the FtTJ considered to be the proper course to have taken.

120. Mr Adewoye submits that in view of the lack of the "trigger" as set out above the decision was not lawfully made. I cannot accept that submission and the answer lies in section 117C (7) which arguably makes reference to the consideration of the extent to which the reasons for the decision was the "offence or offences for which the criminal was convicted". When looking at the decision to deport made on 16 March 2018, I have already set out that the decision expressly referred to the convictions for which he was sentenced to 4 years imprisonment in 2006 and referred the public interest being further strengthened because of his previous and subsequent convictions which are then listed. The subsequent conviction of 2013 was also listed. Reference was also made to the position of the children and on the basis of the information that was currently available. The decision made it clear that the human rights claims outstanding and that in this respect the appellant could provide further evidence. This led to the decision on 11 June 2018 which was the appealable decision under section 82(1) of the 2002 Act. In this respect, whilst I find that the FtTJ was wrong to say that there was "no trigger", I conclude that the argument advanced on behalf of the appellant do not demonstrate that the FtTJ applied the wrong legal framework or that this was a simple human rights appeal to which section 117B applied rather than that section alongside S117C.

121. In my judgement the decision was lawfully made and therefore the consideration in Section 117C were applicable. I find no error in relation to ground one.

122. I now turn to ground 2. In this respect, whilst Mr McVeety on behalf of the respondent stated that he could make no formal concession, he recognised that there was inadequate reasoning in the conclusions reached by the FtTJ on the issue of whether there were "very compelling circumstances". Having considered the assessment made by the FtTJ and in the light of the grounds advanced, I have reached the conclusion that in this respect the submissions made on behalf of the appellant made out.

123. The statutory provisions at s.117A-C provide a "*particularly strong statement of public policy*" - see *NA (Pakistan) v SSHD* [2017] 1 WLR 207 at [22], such that "*great weight*" should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, "*are likely to be a very small minority"* (see *Hesham Ali v SSHD* [2016] UKSC 60 at [38], i.e. will be rare - *NA (Pakistan)* at [33].

124. As set out at paragraphs [21] and [22] of *KO (Nigeria)* that exception 1 is "*self-contained*" and "*leaves no room for further balancing*". In other words, a foreign criminal sentenced to less than four years who is able to meet the three requirements in exception 1, is entitled to have his Article 8 appeal allowed. There is no additional obligation to conduct a balancing exercise that attaches little weight to that appellant's private life in the UK or balances private life against the public interest, including the seriousness of the offending.

125. In the alternative, the position is different where an appellant cannot meet Exception 1 or 2. The wide-ranging evaluative exercise required by s. 117C(6) necessarily includes an application of the public interest considerations in s. 117B and a balancing of the public interest, including the seriousness of the offending – see the clarification provided by Lane J in MS.

126. In MS the President of the Upper Tribunal, Lane J (sitting in a panel with UTJs Gill and Coker) considered the correct approach to s. 117C(6) with the benefit of the guidance provided in *KO (Nigeria) v SSHD* [2018] UKSC 53 and *NA (Pakistan)* (supra), and said this:

> "16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
>
> 17. Viewed in this light, it can readily be seen that the ascertainment of what constitute "very compelling circumstances", such as to defeat the public interest, requires a case-specific analysis of the nature of the public interest. The strength of the public interest, in any particular case, determines the weight that must

then be found to lie on the foreign criminal's side of the balance in order for the circumstances to be properly categorised as very compelling. It would, frankly, be remarkable if a person sentenced to four years' imprisonment for fraud had to demonstrate the same circumstances as a person sentenced to life imprisonment for multiple murders.

18. To say this is not to seek to introduce a "balancing exercise" into Exceptions 1 and 2 and the test of "unduly harsh". The words "over and above", as interpreted by Jackson LJ in NA (Pakistan), underscore the difference in the tasks demanded by, on the one hand, section 117C(4) and (5) and, on the other, section 117C(6).

19. Furthermore, as Mr Pilgerstorfer pointed out, the effect of the judgment in NA (Pakistan), in bringing all foreign criminals within the ambit of section 117C(6), means that it is difficult to see how the test of very compelling circumstances can operate differently, depending upon whether the foreign criminal has, or has not, been sentenced to imprisonment of at least 4 years. In order for it to do so, yet further words would have to be assumed to be written into the section, over and above those mandated by the Court of Appeal's judgment.

20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion."

127. As *NA (Pakistan)* holds, the s. 117C(6) exercise is required to ensure compatibility with the UK's obligations under Article 8 of the ECHR. In addition, the judgment in *NA (Pakistan)*, given by Jackson LJ, reads:

"29. … The phrase used in section 117C (6), in para. 398 of the 2014 … does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. … [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very

> compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8."

128. The point made by Jackson LJ in *NA (Pakistan)* as above, was that he explained that circumstances over and above the exceptions do not necessarily mean that the test can only be satisfied where there are circumstances or considerations which are independent of the exceptions. There may be cases where the circumstances are compelling because the exception is not merely satisfied but is engaged in a particularly robust way so as to provide a very strong article 8 claim capable on its own of amounting to compelling circumstances and a wide -ranging evaluative exercise is required under section 117C(6).

129. This was not the test applied by the FtTJ in her analysis culminating in her conclusion at [66] and there were factors and evidence which was not either analysed or reasoned and were therefore not taken into account. Exception 1 refers to the matters relevant to private life of the person concerned and in particular social and cultural integration and whether there will be very significant obstacles to the appellant's reintegration to the country to which they would be deported. No findings were made concerning those issues relating to private life established in the UK and they would have relevance to the "pro" side of the balance sheet.

130. As to the issue of his relationships in the United Kingdom and his "family life", he relied upon his relationship with his children A and C.

131. In *KO (Nigeria)* at [23], the Supreme Court held that: '... the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level.

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

133. However I am satisfied that there was a lack of reasoning and analysis not only by reference to the law but also on the evidence. Mr Adewoye submitted that the appellant did not rely solely on the relationship with the children but other considerations including the welfare of the children being affected in the event of the mother's relapse. Other relevant factors related to the particular factual circumstances of this appellant and his immigration history. In the light of sections 117(1)- (6), the FTT J was required to consider carefully the offences committed by the appellant, which would include the later conviction and the appellant's

circumstances post-offending. The later conviction in 2013 was not properly explained and it is unclear at paragraphs [63]-[64] what finding the judge made about that conviction in the light of the oral given by the appellant's sister and niece. Mr Adewoye has also raised the consideration concerning A and whether he had a genuine and subsisting relationship with her. Consequently, there were a number of relevant factors that were not considered and a lack of reasoning in the overall conclusion reached and that the wide-ranging evaluative exercise required under s. 117C(6) had not been carried out. For those reasons, I accept that ground 2 is made out.

134. I have therefore had to consider how to proceed. I have rejected the appellant's submission that S117B (6) applies and therefore the appeal should be allowed based on his relationship with C. On the basis of the arguments advanced as to the error of law which included inadequate reasoning on material issues and failing to take into account relevant factors, I do not consider that the decision can be fairly remade in the Upper Tribunal on the evidence as it stands. There were a number of gaps in the evidence identified by the FtTJ and I note that the relationship with A was in its early stages. It is likely that matters have moved on and in fairness to the appellant who has to satisfy section 117C (6), he is entitled to rely on further evidence that he may wish to provide, both oral evidence documentary evidence. To that end, given that there is an ISW report it is not necessary for a further report but an addendum setting out the position which would provide a better understanding of any changes in the family dynamics, including the position of the appellant's wife if the case relating to her is being pursued. The provision of evidence is, of course, a matter for the appellant and his legal advisers. The FtTJ's finding that at the date of the hearing the appellant was having regular contact with C and had a genuine and subsisting relationship with her and that the appellant's wife and C should not be expected to relocate should be preserved findings (at[59] and [61] of FtTJ's decision).

135. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

136. In my observations set out in the earlier part of this decision, I set out the did not been clear that the decision had in fact been withdrawn as they had been no formal communication of that and as it stood it was on the basis of the respondent seeking permission to do so (although in my view it is not necessary for permission to be given to withdraw a decision), in the light of my assessment above that the decision was a valid and lawful one, it does not need to be withdrawn on the basis that it was originally thought. I proceed therefore on the basis that as the decision has not been withdrawn and Mr Adewoye has not stated that the decision has been formally withdrawn by way of service upon his client, there remains an appeal outstanding. Given that it will be necessary for the appellant to give evidence and his family members to deal with the evidential issues, further fact-finding will be necessary alongside the analysis identified and in my view the best course is for it to be remitted to the FtT for a further hearing.

Notice of Decision

137. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. I re-make the appeal as follows; the appeal is to be remitted to the First-tier Tribunal.

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

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

Signed

Date 26/11/2019

Upper Tribunal Judge Reeds