**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/01229/2020

**THE IMMIGRATION ACTS**

| **Heard by Skype for business** | **Decision & Reasons Promulgated** |
|---|---|
| **On the 30 October 2020** | **On 18 December 2020** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**OOL**
**(ANONYMITY DIRECTION MADE)**

Appellant

**AND**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr P. Lewis, Counsel instructed on behalf of the appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

**DECISION AND REASONS**

Introduction:

1. On 18 December 2019 the respondent made an order that the appellant is to be deported from the United Kingdom ('UK'), following his criminal convictions as it was considered that his presence in the UK was not conducive to the public good. The respondent refused the appellant's human rights claim in a decision letter dated 6 January 2020.

2. The appellant, a citizen of Jamaica, appealed this decision to the First-tier Tribunal (Judge Griffith) (hereinafter referred to as the "FtTJ"). In a decision sent on 5 May 2020, the FtTJ dismissed his appeal on human rights grounds, and the appellant has now appealed, with permission, to the Upper Tribunal.

3. The hearing took place on 30 October 2020, by means of *Skype for Business* which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court with the parties' advocates. No technical problems encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I am grateful to Mr Lewis and Mr Diwnycz for their oral submissions.

4. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of minor children. I have referred to the children as "SH1, SH2, SH3, SH4 and SH5, and the appellant's partner as "X". No disrespect is intended to them, but it is so that the Tribunal can maintain anonymity and that was how the FtTJ anonymised the 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.

Background:

5. There is a long litigation history in relation to this appellant. The appellant arrived in the UK on the 24 July 1997 aged 25 on a visitor's visa which had been granted for 6 months. On 10 December 1997 he married a British Citizen and submitted an application to remain in the UK based on his marriage, which was granted until 11 February 1999. That marriage was dissolved.

6. Between 1997 and 1998 the appellant committed a number of criminal convictions. He first came to the attention of the police in August 1997 only two months after his arrival in the UK and the following month he was given a conditional discharge of 12 months for theft.

7. In June 1998 he was sentenced to three months imprisonment for three counts of assault of a constable, one count of driving with no insurance.

8. Following his conviction on 30 November 1998 for five counts of supplying class A controlled drugs and one count of possessing a controlled drug with intent to supply drugs offences he was sentenced to 4 years imprisonment.

9. A deportation order was made against him. He appealed against that decision and on the 18 January 2001 submitted an asylum claim which was subsequently refused on the 18 April 2001.

10. On 20 July 2001, his appeal was dismissed and by 19 September 2001 he was appeal rights exhausted and was deported to Jamaica that day. He returned to the UK illegally and in breach of the deportation order in October 2001 using a false passport.

11. The appellant next came to the attention of the police in 2004 for drugs offences, when he was sentenced to 4 years imprisonment. The sentencing judge noted that the appellant had pleaded guilty to possession with intent to supply of 13 packs of crack cocaine and possession with intent to supply seven packs of heroin. The relevant offences took place on 7 May 2004. The judge took into account the fact that he pleaded guilty at an early stage, the remorse expressed through a letter handed to court, the fact that he was going to miss his family while in prison and accepted that he had returned from Jamaica not only to supply drugs but because he had connections in the UK. He had a partner, two children and his mother living in the UK.

12. On 17 July 2007, the appellant was sentenced to a further 11 months and 29 days imprisonment at the magistrate's court because he was in default of a payment outstanding when he was imprisoned.

13. As a result, the respondent revoked the deportation order to consider that conviction. The appellant appealed against the notice of intention to deport him and lodged an appeal against the decision.

14. On 16 February 2007, an Asylum, and Immigration Tribunal panel (Judge Lobo and Ms Endersby) dismissed his appeal against the decision to make a deportation order. The appellant had relied upon his article 8 claim.

15. The panel made the following findings:

- He had lied in his witness statement in his asylum appeal.
- He had also faked a urine sample during his first prison sentence when being tested for drugs.
- He admitted re-entering the UK after his deportation by using false documentation.
- The appellant's partner X also lied in the appellant's asylum appeal by describing herself as his cousin where she had been involved in a relationship with him since 1997/1998.
- The panel did not find either the appellant or his partner X to be credible witnesses.
- The panel did not accept that he was a different person to that which had been up until his second prison sentence for supplying drugs.

- They found his claim to be drug free and a practising Christian unconvincing.
- The evidence put forward of his domestic and compassionate circumstances was unreliable.
- He had demonstrated a propensity to commit serious crime by supplying class A drugs and he was a drug addict.
- There was little reliable evidence of family life.
- There was no evidence of the appellant and ex-ever living together prior to his going into prison for the second time. The appellant was still married to his former wife.
- The panel were not satisfied that the appellant enjoyed family life but that if they were wrong, removing the appellant to Jamaica would be proportionate.

16. It is recorded that the Tribunal had been told that the appellant had three children by three different mothers; a claim which was found not to be the position in the second appeal hearing heard in 2012 (see paragraph 27 of their decision).

17. Following the dismissal of his appeal, it appears that no attempts were made to remove him at this time.

18. On 18 June 2008 he submitted an application for leave to remain in the UK on the basis of his relationship with X. He also submitted representations under article 8 which was treated as an application to revoke the deportation order.

19. On 19 November 2009, a decision was issued refusing to revoke the deportation order. He was refused an in country right of appeal and brought proceedings for judicial review.

20. He was detained on 16 October 2009 until he was granted bail on 17 November 2009.

21. On 15 January 2010, a further decision was made refusing the application but with an in country right of appeal. The appellant did not appeal that decision and it was about this time that the appellant became an absconder and did not come to light for a further two years until he was encountered in July 2012 by the police after he had been made the victim of a stabbing.

22. On 21 September 2011, the appellant's third child (S3) was born.

23. A decision was made on 22 July 2012 to remove the appellant as an overstayer. The First-tier Tribunal hearing the appeal against that decision found that the appellant did not have an in country right of appeal because there had been no fresh claim which could be regarded as human rights claim.

24. On 21 August 2012, the appellant's solicitors submitted an application for revocation of the deportation order, which was refused, and he was served with the illegal entry papers. He sought to appeal a decision made in January 2010 in respect of his article 8 claim but was unsuccessful and became appeals rights exhausted.

25. On 14 September 2012 he lodged an appeal against a decision made by the respondent on 4 September 2012 (revocation of the deportation order) and his appeal was allowed on human rights grounds by a FtT panel in a decision promulgated on 7 November 2012.

26. There is a copy of that decision in the respondent's bundle at A1-A19.

27. The appellant was granted leave to remain from 14 June 2013 until 4 December 2015.

28. On 28 December 2015 he submitted an application for leave to remain on family and private life grounds (the application was considered in the course of the January 2020 decision letter).

29. On 9 June 2016, the appellant was sentenced to a conditional discharge for offences of possession of heroin, possession of cocaine and assault charges.

30. On 25 November 2016 he was sentenced to 2 years imprisonment for driving offences and steps were taken to deport him. The sentencing remarks are set out in the respondent's bundle at E1-E4. The judge noted that the appellant should not have been driving at all, he had never taken a driving test, he had no insurance for the car should not have been on the road. He received a sentence of 12 months imprisonment for dangerous driving having entered a guilty plea. The court also sentenced him for the breach of the conditional discharge which was made in June 2016. Those offences were for the possession of heroin, which the judge imposed a sentence of three months' imprisonment which would be consecutive to the 12 months. A further three months imprisonment was imposed for the possession of cocaine and a further sentence of three months' imprisonment on each of the two assault charges each to be consecutive to each other. Thus the appellant was sentenced to a total period of two years imprisonment.

31. On 23 February 2017 he made an article 8 claim. He was served with a deportation order on 19 September 2017 and human rights claim was refused. He appealed against that decision in October 2017.

32. However on 1 December 2017 he was sentenced for offences of possession with intent to supply class a drugs and was sentenced to terms of six years imprisonment to run concurrently.

33. There are no sentencing remarks but the pre-sentence report refers to the appellant being in possession of 5 wraps of cocaine and wraps of heroin which he claimed were for personal use but that the Crown Court rejected that during a trial of an issue and thus he was convicted of possession with intent to supply class A drugs. What aggravated the offences were that they were committed whilst on bail for the dangerous driving offences.

34. Following directions made at a Case Management review on 17 July 2018, the respondent was directed to make a fresh decision in light of the most recent conviction and sentence. Accordingly, the deportation order and deportation decision were revoked.

35. On 6 June 2019 the respondent informed the Tribunal that the decision of 19 September 2017 to refuse human rights claim had been withdrawn and the deportation order signed on the same day revoked; a fresh notice of decision to make a deportation order had been sent to the appellant and his representatives and the earlier decision was therefore treated as withdrawn.

36. In light of his conviction, a decision to deport him was issued on 7 June 2019. This was responded to by the appellant on 5 July 2019 and the appellant made a human rights claim. A decision was made on 6 January 2020 to refuse a protection and human rights claim.

The decision of the Secretary of State dated 6 January 2020

37. The decision letter is a lengthy document extending to 15 pages. It is not necessary to set out all that letter and it is summarised at paragraphs 14-32 of the FtTJ's decision.

38. Having set out the appellant's immigration history and his criminal convictions, including the most recent one for which he received a sentence of 6 years imprisonment, the respondent addressed the submissions made in respect of the article 8 claim.

39. In respect of his article 8 claim the respondent set out the nature of his claim which related to his relationship with his partner and five children in the United Kingdom and his private life having been resident since 2001.

40. The decision noted that his deportation was conducive to the public good and in the public interest because he had been convicted of an offence for which he had been sentenced to a period of at least four years (offences relating to the supply and importation of drugs )and thus in accordance with paragraph 398 of the Immigration Rules, the public interest required his deportation unless they were "very compelling circumstances, over and above those described in the exceptions of deportation" set out at paragraph 399 and 399A of the Immigration Rules.

41. In respect of his offence, there was significant public interest in his deportation because he had been convicted of a serious offences, namely possession with intent to supply class a drugs (crack cocaine and heroin) and was sentenced to terms of six years imprisonment to run concurrently . The respondent made reference to the trade in illicit drugs which had a severe negative impact on society and that drug addiction affected not only drug users but also their families.

42. When addressing his family life, it was noted that he had five children in the United Kingdom. The decision addressed the best interests of the children, and it was accepted that the children were all under the age of 18 and were British citizens. It was further acknowledged that the children resided with the appellant and his partner and that he had previously been granted leave to remain on the basis of family life in the United Kingdom. Thus it was accepted that he had a genuine and subsisting parental relationship with the children.

43. It was however noted that he had effectively removed himself from the family home as a result of his criminal behaviour and that the six- year sentence was a period of time which amounted to a significant part of the children's lives to date. Thus as a result of his imprisonment he had not been part of a functioning family unit the last three years or provided for the health and welfare needs on a day-to-day basis.

44. It was recorded that he had been imprisoned since 27 November 2016 which is a relatively large part of the children's lives and had provided no evidence that it had day-to-day contact with them during that time and there was no compelling evidence that he had provided financial or emotional support to them during his imprisonment or from any legitimate earnings before his imprisonment.

45. It was not accepted that it would be unduly harsh for the children to live in Jamaica and that the appellant had not provided any evidence to demonstrate that this would be so. Whilst it was except the children were British citizens, had not provided any evidence to demonstrate that they would not be entitled to apply for citizenship of Jamaica stop it was considered that there was nothing unduly harsh about them being raised within their own culture bearing in mind they would still be a relative young age when the appellant would be released from prison. It was also considered that the children could be educated in Jamaica.

46. It was not accepted either that it would be unduly harsh for the children to remain in the UK without the appellant. It was stated that the appellant had not provided evidence sufficient to demonstrate that it would be unduly harsh and it was noted that as British citizens, the children were not dependent upon the appellant for their right to remain in the United Kingdom or for the entitlement

to any relevant benefits and entitlements. It was noted that the appellant had not provided any evidence to show that his presence in the United Kingdom is needed to prevent children from being ill-treated, their health or development being impaired or their care being other than safe and effective. Whilst it was acknowledged that his absence may result in some negative emotional impact upon them as they become older, however their mother would be in a position to support them and assist them to access any relevant rights and entitlements. It was further considered that they would be to maintain contact with the appellant by modern means of communication or by visits to Jamaica.

47. When considering the best interests of the children, the respondent noted that there was no evidence to support the conclusion that his presence was needed in the United Kingdom and that their mother would be able to provide for them as she had been providing for their day-to-day health and welfare needs during the time that he had been serving his sentence. As the children were British citizens, their mother would be able to access benefits and provisions available from the government or the local authority to support the children's development.

48. The decision letter expressly considered the medical condition of S1 who had hyperthyroidism and depression. It was noted that by reference to the country materials that both medical conditions could be adequately treated in Jamaica. It was further noted that she would attain the age of 18 before he was released from prison and therefore would be an adult and would have sole responsibility for decisions concerning her life.

49. As to family life with his partner X, it was accepted that he was married to his partner but not accepted that they had a family life for the last three years as a result of his imprisonment. The decision letter noted that their relationship was formed when the appellant was in the UK unlawfully and his immigration status was precarious relying upon the decision in November 2012 in which the panel reached the conclusion "their relationship has been on and off and was clearly formed and continued in the knowledge that the appellant's immigration status was highly precarious."

50. It was not accepted that it would be unduly harsh for X to live in Jamaica and that would be a choice for her to make.

51. The decision letter made reference to the earlier decision made by the FtT panel in 2012 where it was found that his partner X had formed a support network with her brother to take care of their mother who suffered with paranoid schizophrenia which would prevent X from accompanying the appellant to Jamaica. However the respondent considered that there was no new evidence to show that X currently had care responsibilities for her mother or that a mother continued to need to her support.

52. It was further not accepted that it would be unduly harsh for X to remain United Kingdom in the event of the appellant's deportation. This was because he had not provided any compelling evidence that there would be a serious adverse impact on his partner such that the public interest in deportation was outweighed. There was no evidence that he provided financially for his partner or children in any significant way since his imprisonment.

53. The decision letter also addressed other considerations, which included the appellant's private life. It was noted that he had been present in the United Kingdom for 22 years although only four years of that period had been lawful residence and during that time he had committed criminal offences.

54. It was noted that he was previously deported to Jamaica in September 2001 and returned almost immediately in breach of the deportation order. He had previously faced deportation action and knew full well that if he offended again he would face further deportation action and since that time was offending increased in severity, culminating in a six-year sentence. The appellant could not claim that he was unaware of the repercussions in terms of deportation resulting from the criminal actions, yet he continued to offend. The appellant was fully aware that his criminality would result in a long prison sentence in deportation if he were caught, including depriving him and his family were settled family life. However he took that chance and embarked on a very serious criminal enterprise.

55. In conclusion, the respondent considered that his deportation would not breach the UK's obligations under Article 8 of the ECHR and the public interest in deporting him outweighed his right to a private and family life.

The Decision of the First-tier Tribunal:

56. The appeal came before the FtTJ on 18 March 2020. The FtTJ heard oral evidence from the appellant, and his partner which was summarised at paragraphs [37]-[77]. The FtTJ also had a bundle of documentation including a witness statements from the appellant and his partner, a psychological assessment of the family members, evidence relating to the children.

57. The FtTJ findings of fact and analysis of the issues are set out at paragraphs [92]-[124]. The FtTJ began her consideration by making reference to the earlier decision of the FTT panel in 2012 applying the principles in *Devaseelan* but taking into account that facts or circumstances since the first decision could always be taken into account. The judge recorded at [97] that the thrust of the appeal centred on his family life rather than private life. The nature of his family life identified at [98] was that he had a partner X and had five children (at the date of the hearing they were 17, 11, 8, 6 and 3 years of age). The youngest child born when the appellant was in custody. All the children and X were British citizens and in the UK.

58. At [101] the FtTJ reached the conclusion that in the light of the circumstances of children, their nationality and having no connection with Jamaica, she was satisfied that it would be unduly harsh for them to follow their father to Jamaica.

59. The FtTJ then addressed the issue of whether it would be unduly harsh for the children to remain in the UK without the appellant (see [102]-121]), focusing on the effects of the deportation on the children and on X (at [103].

60. At [104] the FtTJ found that the children were being well looked after by their mother and that her circumstances were relevant to the family's well-being generally she was the one who was currently bearing the practical emotional responsibilities bringing them up. The judge made reference to X's mental health issues and that she was her own mother's full-time carer. In the later paragraphs the FtTJ address the evidence relating to the individual children, taking into account SH1 had medical conditions it affected her both physically and mentally (at [104] and [115], SH2 displayed behavioural problems (at [104], [111],[112, [113] and SH4 at [114]. The FtTJ also considered the circumstances of all the children set out in the psychological assessment at [108]-[109] which is a report that she placed weight upon and accepted that the children had an attachment to their father and had a close bond with them ( see conclusions at [117]). During her assessment of the evidence relating to the children, the FtTJ identified where the evidence was inconsistent with other evidence that had been provided. For example, when considering SH2 in the school report set out at [111] the FtTJ found that the report of the psychologist made no reference to any behavioural difficulties and that he told the psychologist that he was in good general health and took no medication. At [112] the judge made reference to the report containing significant errors where SH2 was described as a young carer having responsibilities the caring for his siblings and mother when that was not the position. The judge also identified evidence relating to SH2 and his relationship with his maternal uncle (at [113]).

61. As to the circumstances of X the FtTJ took into account the medical evidence that she suffered from anxiety and depression but that she did not take medication and be referred to talking therapy. At [105] the FtTJ concluded that assistance in talking therapies could provide with assistance to help cope with day-to-day life. As to her position as her mother's carer that was considered at [106]-107] where the judge reached the conclusion that there was no evidence that her mother could not be cared for by the NHS and social services and thus reducing the daily burden on X.

62. In her conclusions the FtTJ found that there was no evidence that X had reach a stage where she would be unable to look after the children adequately took into account that there was the availability of therapy to treat anxiety and depression. Furthermore, there were alternative care packages to address her mother's needs and that she had support from her brother whom she described on her own evidence is having a close relationship thus concluding that X had

"avenues of support available to help cope in the appellant's absence". The judge also found that there was no evidence that the appellant was in any regular well-paid employment or making a significant contribution to the running of the house before he went to prison (at [118]).

63. After applying the elevated threshold, the FtTJ found that the circumstances of the family were not sufficient to meet the meaning of "unduly harsh" and that the exception was not met. In the alternative, the judge considered that even if exception to was met, the appellant needed to show very compelling circumstances over above those described in the exceptions. The FtTJ concluded that she could not find any such "very compelling circumstances". At [122] the judge addressed the matter is weighing on the appellant side of the balance which he relied upon which related to his rehabilitation (undergone drug and alcohol courses to address addiction and found to be drug-free when tested in prison). However the judge found that had been undertaken within a "secure and structured environment" and that had yet to show he would be able to put into practice what he learnt in prison. Reference is made to the medium risk of reoffending and risk of harm to the public as medium but that his behaviour demonstrated that "he is not learnt from experiences or give much thought to the consequences of his behaviour on his closest family members."

64. At [123]the FtTJ addressed the public interest and that the more serious the offence, the greater the public interest in the deportation of the criminal and reached the conclusion that in the light of the nature of his fences and the fact that he was a repeat offender, the public interest in his removal "is very high".

65. Returning to the issues at [124] and the decision of the panel in 2012 that the best interests of the children required him to be permitted to remain, the judge stated that "the situation is moved on since then in the light of his further offending in the public interest in his removal has increased". The judge took into account the best interests of the children that they were a "primary consideration", but they were not "paramount nor a trump card". The judge concluded that the appellant could not meet the rules nor could he show "any very compelling circumstances over and above the exceptions", and concluded that "the very high public interest in his deportation was not outweighed by the best interests of the children or any other matters relied upon".

66. The FtTJ therefore dismissed the appeal.

<u>The Appeal before the Upper Tribunal:</u>

67. The appellant sought permission to appeal that decision and permission was refused by the FtTJ but on reconsideration was granted by UTJ Smith on 24 August 2020 where he stated that

"it is at least arguable that the judge should have addressed in express terms why she was departing from the findings of the FtT in November 2012 decision at [52] that, if the appellant were deported "the family would face a crisis, probably leading to

significant harm to the children…" Arguably the judge should have addressed why she considered that starting point have been displaced. The materiality of any error on that basis will have to be explored in submissions, as there could be any number of reasons why different approach is now called for or permitted, such as the passage of time, age of the children, the appellant's absence in prison since December 2017. However, it is at least arguable that the judge should have addressed this point directly.

The remaining grounds of appeal are largely disagreements of fact. However, they all sit within the wider context of the "crisis" the FTT found the family would face in 2012, in the event the appellant were deported, and are arguably part of the same overall assessment. For that reason, I grant permission to appeal on all grounds"

68. The appellant was represented before the Upper Tribunal by Mr Lewis of Counsel and had drafted the grounds of appeal. The Secretary of State was represented by Mr Diwnycz, Senior Presenting Officer.

69. Mr Lewis relied upon the written grounds and the further written submissions he had sent to the Tribunal dated 15 September 2020.

70. Mr Diwnycz confirmed that there had been no Rule 24 response filed on behalf of the Secretary of State as directed by UTJ Smith on behalf of the respondent. He submitted that the FtTJ did not make any material error of law in his decision and that ground 2 was a "weight argument" characterised by the submission that the judge did not accord sufficient weight to the letter.

71. I intend to consider the submissions when setting out my assessment of the grounds and in the context of the FtTJ's decision. I am grateful to the advocates for their helpful and clear submissions.

The relevant legal framework:

72. There is no dispute as to the applicable legal framework. 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).

73. 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).

74. Section 117B lists certain public interest considerations to which the court or Tribunal must have regard in all such cases. These include the considerations that:
"(1) The maintenance of effective immigrations controls is in the public interest.
?
(4) Little weight should be given to -
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
?"

75. Section 117C lists additional considerations to which the court or Tribunal must have regard in cases involving "foreign criminals" (defined in a similar way to the 2007 Act). These considerations are:
"(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."

76. "Foreign criminals" who fall within section 117C(3) because they have been sentenced to a period of imprisonment of at least 12 months but less than four years have been referred to in the case law as "medium offenders" - in contrast

to those with a sentence of four years or more, who are described as "serious offenders". By reason of his sentence, the appellant fell into the latter category.

77. The focus of the FtTJ and that of the advocates was on the appellant's relationship with X and his five children. At the date of the hearing the children were aged 17,11,8,6 and 3. The youngest child was born whilst the appellant wad in custody where he was at the date of the hearing. In so far as the appellant sought to rely on the effect of his deportation on his children (who, being British citizens, were a 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 2, 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".

78. In the decision of *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 the Court of Appeal made reference to its earlier decision in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 stated :

"10. In relation to what is meant by "unduly harsh" in section 117C(5), the authoritative guidance is now that given by Lord Carnwath JSC in *KO (Nigeria)* and by this court in *HA (Iraq)*. The former addressed this issue notwithstanding that the main question in that case was not the meaning of "unduly harsh" but whether it involved consideration of the seriousness of the offence. At [23] he said:

> "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."

11. At paragraph [27] he said:

> "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home*

*Department* [2015] INLR 563 , para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

12. As explained in *HA (Iraq)* at [44] and [50] to [53], this does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness".

13. In relation to what is meant by "very compelling circumstances", in *Byndloss* Lord Wilson JSC said at [33]:

> "33. The deportation of a foreign criminal is conducive to the public good. So said Parliament in enacting section 32(4) of the 2007 Act: see para 11 above. Parliament's unusual statement of fact was expressed to be for the purpose of section 3(5)(a) of the 1971 Act so its consequence was that every foreign criminal became automatically liable to deportation. Parliament's statement exemplifies the "strong public interest in the deportation of foreign nationals who have committed serious offences": *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799, para 14, per Lord Reed JSC. In the *Ali* case the court was required to identify the criterion by reference to which the tribunal should determine an appeal of a foreign criminal on human rights grounds against a deportation order. The decision was that the public interest in his deportation was of such weight that only very compelling reasons would outweigh it: see paras 37 and 38, per Lord Reed JSC.
>
> ……..
>
> 55. The third [feature of the background] is that, particularly in the light of this court's decision in the *Ali* case, every foreign criminal who appeals against a deportation order by reference to his human rights must negotiate a formidable hurdle before his appeal will succeed: see para 33 above. He needs to be in a position to assemble and present powerful evidence. I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters: (a) the depth of the claimant's integration in United Kingdom society in terms of family,

> employment and otherwise; (b) the quality of his relationship with any child, partner or other family member in the United Kingdom; (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise; (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the United Kingdom; (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case; (f) any significant risk of his reoffending in the United Kingdom, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform."

14. The interrelationship between these principles and the Exceptions in Section 117C(3)-(5), both in relation to medium term offenders (with sentences of one to four years) and serious offenders (with sentences of four years or more), was authoritatively set out by Jackson LJ in *NA (Pakistan)* at paragraphs [28]-[39], of which the following are of particular relevance in this case:

> "29. In our view, the reasoning of the Court of Appeal in the *JZ (Zambia)* case [2016] Imm AR 781 applies to those provisions. The phrase used in section 117C(6) , in paragraph 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraphs 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.
>
> …..

33. Although there is no "exceptionality" requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr of Tonaghmore JSC in *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 338 , para 145. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *CT (Vietnam) v Secretary of State for the Home Department* [2016] EWCA Civ 488 at [38]: "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

…..

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *Üner v The Netherlands* (2006) 45 EHRR 14 and *Maslov v Austria* [2009] INLR 47? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our

> own rules and legislation) should heed the guidance contained in the Strasbourg authorities…….

Discussion:

79. The first ground advanced on behalf of the appellant relies upon the assessment made of the family by the FTT panel in 2012. Mr Lewis submits that the previous Tribunal made a "stark finding of fact" at [52] and that this finding should be the starting point as it was an authoritative assessment at the time it was made. Thus it is submitted that the FtTJ was in error by failing to treat it as such.

80. Paragraph 52 of the panel's decision was based on the evidence of a family GP set out in a letter dated 17/10/12 and summarised in their decision at [34]. The letter refers to X reporting increasing levels of stress amongst the children since the appellant was detained and X being treated for depression and that she was finding it increasingly difficult to handle the children due to their behaviour. The doctor concluded "I am reviewing X regularly, but I am concerned that if the appellant is deported that things will reach crisis point." At [52] the panel considered the evidence and that if the appellant were deported "we agree with Dr G that the family would face a crisis, probably leading to significant harm to the children."

81. It is further submitted that if the FtTJ had taken the previous finding as a starting point and asked herself whether the changes between 2012 and 2020 justified a departure from them, she could well have concluded that they did not.

82. In the written grounds and in the oral submissions made, Mr Lewis made reference to the evidence relating to the children and the appellant's partner X. His submission was that if the judge had approached the 2012 findings of fact in the correct way, the judge would have reached a different overall conclusion on proportionality.

83. I have given careful consideration to those submissions and have done so in the light of the previous decision, the decision of the FtTJ and the evidence that was before the Tribunal.

84. Having done so, I am satisfied that the FtTJ properly took into account the decision of the panel in 2012. At [92] the FtTJ began her consideration of the factual circumstances by expressly stating that the appellant was successful in his appeal in October 2012 and that she took that decision as her "starting point". The FtTJ went on to make reference to the guidance set out in the decision of *Devaseelan* correctly in my view, that the facts happening since the

previous decision can always be taken into account. At paragraphs [93 – 94] the judge recited parts of the decision of the previous panel in their assessment of the evidence that was before them. In particular, that the panel had concluded that the appellant's deportation would amount to a disproportionate interference with family life between the appellant and his children. The FtTJ recorded that the Tribunal had found "that it was plain that the children were currently suffering as a result of their father's absence" and also recorded the panel's consideration that they had set out at paragraph 53 of their decision. Further on in the FtTJ's decision the judge set out the panel's previous finding that family life could not be pursued in Jamaica and that the "best interests of the children require the appellant to be permitted to remain here. The best interest of the children in this case require the presence of two parents."

85. Whilst Mr Lewis submits that the judge made no reference to paragraph 52, in my judgement it is clear from reading the decision that the judge was well aware of the previous findings of the FTT panel and the assessment which had been made in 2012 and had made a summary of those points between paragraphs [92 – 94].

86. In my judgement it is not necessary for the judge to recite each and every paragraph of the previous decision and it is plain that the essential parts of that previous judgement and the findings made by the panel were properly understood by the FtTJ when undertaking her assessment based on the circumstances as they were in 2020. The judge expressly had regards to the previous finding relating to the best interests of the children and the effect upon them of the appellant's deportation.

87. In my judgement the FtTJ properly directed herself to the decision in *Devaseelan* and the previous decision of the panel as a starting point. It was open to the FtTJ to take into account in her assessment evidence of events that occurred since the decision (see her observation at [92]).

88. As Mr Lewis conceded at paragraph 6 of his written submissions the *Devaseelan* principles are not a "straitjacket" and there were a number of reasons why the circumstances in 2020 were different to those in 2012. The FtTJ properly recorded that the earlier hearing in 2012 was on a different basis as it was an appeal against the decision to revoke a deportation order. In the proceedings in 2020, the decision appealed against was a different decision and this involved the judge applying different principles of law in different statutory framework.

89. Furthermore, the earlier panel had made express findings relating to the appellant's conduct. At [54] they took into account that he had no convictions since July 2004 and that there were no reports of the appellant continuing to show a propensity towards offending. They found that the evidence pointed

towards the appellant being involved in the past in drug dealing to fund his own habit and at [55] when considering his family connections they were "much more firmly established and they were in 2004" and at [56] they stated "the evidence does not suggest to us that we must infer from the appellant's history that there is anything more than a fairly remote prospect that he will reoffend. There is no evidence that he continues to use drugs, and this was denied by the appellant and X. He appears also to have matured in his attitude towards his family responsibilities…".

90. However since the decision of the panel, the appellant, after he had been granted a period of leave to remain between 2003 – 2015, in November 2016 it received a sentence for two years imprisonment for dangerous driving and offences involving drugs and whilst he was served with a deportation order and having appealed it, he then went on to commit offences involving drugs for which he received a sentence of six years in imprisonment. His criminality rather than receding as the 2012 panel considered was likely, had in fact continued and had also increased in severity.

91. Furthermore their view that he had matured in his attitude towards the family responsibilities (set out at paragraph 56 of their decision) had been demonstrably undermined by his offending that had taken place.

92. In my judgement the passing of time since the 2012 decision, the appellant's reoffending, the circumstances the children in the light of their ages and individual circumstances, and A's absence from the family home for a further prolonged period of time were all matters which the FtTJ was entitled to consider in reaching an assessment upon the evidence before the Tribunal and as at the date of the hearing.

93. I do not consider that the FtTJ was in error in departing from the 2012 decision which required the evidence to be revisited.

94. The submissions on behalf the appellant refer to the changes since 2012. I observe that the written submissions make reference to 3 children that have been born since the decision in 2012. However that is factually incorrect. There were two further children born (SH4 in 2014 and SH5 in 2016). Mr Lewis identifies the circumstances of the children and X had not improved since 2012 but had worsened.

95. In my judgement, the real issue was whether the FtTJ properly considered the evidence which was before the Tribunal in 2020 concerning the circumstances of X, the children, and the appellant rather than whether the circumstances had changed since 2012.

96. The written grounds at paragraph 10 criticise the finding made by the FtTJ on the general basis that the points relied upon by the judge did not reflect new evidence which undermined the previous findings in 2012. In my judgement that submission fails to consider that the judge was entitled to consider the evidence as it stood at the date of the hearing and to assess the evidence, given the passage of time and the different circumstances of the children, the appellant, his offending history and the level of that offending in the different legal test that had to be applied. I can see no error in that approach, and it was one that was consistent with the decision in *Devaseelan*.

97. The submissions made by Mr Lewis seek to compare the circumstances in 2012 with those in 2020 without recognising those factors which in my judgement were of such relevance to entitle the judge to consider the evidence as it stood at the date of the hearing and to make a full and proper assessment of that evidence. That the judge reached a different conclusion from the earlier panel does not demonstrate any error of approach but reflected the evidence as it was before the judge on her analysis in 2020.

98. Even when considering those submissions made by Mr Lewis as set out at paragraph 10 of the written submissions, they do not support his primary submission. He submits that the reasons given by the judge to support the view that X could cope with caring for the children in the absence of the appellant did not reflect new evidence to undermine the 2012 panel. The identifies that the 2012 panel "can be taken to have been aware of the availability of "talking therapies" when it reached its conclusion.

99. However, in my view the submission fails to consider properly the evidence that was before the FtTJ. Whilst in 2012 the panel took into account the evidence of the family GP and the strain that X was under, no reference was made to any possible therapeutic input to help address any difficulties or alleviate the circumstances as regards the children. Against that evidential background, it cannot properly be said as Mr Lewis submits, that the 2012 panel could have been taken to be aware of "talking therapies" when it reached its conclusion.

100. However the judge in 2020 did have evidence upon which she could form a different view. At [105] the judge set out the medical evidence confirming that X was suffering from anxiety and depression. However the judge observed that X was not taking medication and that she had been referred to "talking therapies". At [105] onwards, the judge considered whether she could properly access that support and in doing so took into account X's evidence as to why she could not do so. Her evidence was to the effect that she did not have the time to get in touch with the providers. The FtTJ found, even taking into account and acknowledging that she was a single parent with a heavy burden

upon her, did not accept that she was too busy to refer herself to talking therapies which could have provided her with the assistance and support necessary to help cope with the children on a daily basis and without the support of the appellant.

101. Those findings are also the subject of ground 4. It is therefore convenient to deal with that ground at this point. It is submitted by Mr Lewis that those findings made little sense and did not explain how psychological assistance would assist X.

102. Having considered the evidence, the FtTJ made findings relating to support available for X. I am satisfied that those were findings properly open to the judge to make on the evidence. The FtTJ properly took into account the evidence that without the appellant X would have problems caring for the children and that during his absence (since 2016 due to his imprisonment and on previous occasions) that this had caused her anxiety and depression. The judge was entitled to place weight on the GPs letter that despite this, she was not taking any medication and that therapy to provide support for her mental health was available. Therefore it was open to the judge to reach the conclusion that the therapy would assist her in her day-to-day functioning and therefore the care of the children and that such therapy was beneficial and available. The judge demonstrably took into account X's explanation as to why she did not undertake therapy but gave adequate and sustainable reasons as to why she had rejected that evidence.

103. The FtTJ also had a psychological report which the judge had made reference to at paragraphs [108 – 109]. At [118] the judge made the overall assessment that there was "no evidence that X has reached a stage where she is unable to look after children adequately such that there is a risk that they might be taken into care. I refer to what I have said above about the availability of therapy to treat anxiety depression and the options – in the absence of any evidence that she alone can care for her mother, an alternative care package packages to address her mother's needs. She has a brother here and she described her relationship with him in a You turn report as a "close one". There are, therefore, avenues of support available to help her cope in the appellant's absence."

104. There is no error in that approach nor is it illogical to reach such a finding when the evidence is considered "in the round".

105. A further point made in support of ground 1 (which also involves ground 3) relates to the circumstances of X's mother. The written submissions and oral submissions made by Mr Lewis set out at paragraphs 10 – 11 refer to the findings made by the FtTJ that X's mother could be cared for by the NHS and social services and that this did not reflect new evidence to undermine the

findings of the 2012 panel. Mr Lewis submits that the 2012 Tribunal having considered the care X provided for her mother can be taken to have been aware of the possibility of NHS assistance and care.

106. Again, in my judgement those submissions fail to consider the different evidence before the panel in 2020 from that in 2012. The panel in 2012 referred to the evidence given by X that she and her brother had formed a support network for her mother (paragraph 35]. There was no specific finding as to the necessity for X to care for her mother but at [48] the panel considered that X's mother was part of the family jigsaw and did not consider that she could adapt to life in Jamaica.

107. The FtTJ in 2020 did address the position of X's mother at [106]-[107] of the decision and did so in the context of the evidence of X. The FtTJ accepted that there was evidence confirming that X was her mother's carer, but the judge stated "however, her claim that her mother did not interact with outside agencies is not corroborated. I refer to a letter from her mother's GP dated 19 December 2019 which states, "I have no record that [V] was unresponsive to external care in the past." The letter gave some background information about the medical history of X's mother. At one stage she was receiving four times a day package of care which was stopped as children decided to take care of her themselves." The letter went on to say that she is now fully dependent on assistance "for all ADLs and is at risk of self neglect without a family support." The judge found "whilst the letter states that it is "very likely" that her mental and physical health would deteriorate if X stopped providing support, what the letter does not address is whether and if so, why, only X can provide appropriate care. The GP reported a deterioration in her mental state of X mother in 2009, but at that stage it stopped taking her medication.

108. At [107] the judge concluded "there is therefore no evidence that X's mother cannot be cared for by the NHS and social services. In oral evidence, X was asked to elaborate on what she meant by her mother not interacting with the agencies. She said her mother feels more comfortable with her family taking care of her. That is not surprising, but it is not evidence of some significant reason why alternative NHS care cannot be provided, thus reducing the daily burden on X."

109. In his oral submissions Mr Lewis submitted that the judge gave no reasons for rejecting X's evidence as either being untruthful or not credible. However, in my judgement the FtTJ properly addressed the evidence and was entitled to consider whether that evidence was supported by an independent third party. It was not and thus the findings reached were ones open to the FtTJ in the context of the evidence. The judge was also aware that X had not been truthful

on previous occasions (see the observation made at [92] by reference to earlier findings made).

110. As to the burden of caring for her mother, the judge found that X could be assisted by the provisions of services from the NHS which would reduce the daily burden on her and thus mean that she would have greater availability for the children and their needs.

111. As to the assistance that X could receive from her brother, the grounds (ground 1) also referred to the position 2012. Mr Lewis submits that in 2012 the Tribunal were aware of her brother but that he was working full-time and "no doubt had his own life and preoccupations." It is submitted that this had remained the case in 2020 and that there was no evidence that X's brother was able or willing to provide a higher level of support in 2020 than he was in 2012.

112. Having considered the evidence and the assessment of the FtTJ, I am satisfied there is no error in her assessment of the circumstances of X's brother and that the judge was entitled consider the passing of time since 2012 when X's brother was 23 years of age in addition to the specific evidence given at the date of the hearing to reach a different view.

113. The evidence of X (set out in the witness statement) was that her brother lived with their mother but was busy with a business. Again, she referred to her mother being unresponsive to external services (a point which the judge addressed and rejected the reasons set out in referred to earlier in this decision are paragraphs 106 – 107). At pages 27 – 28 of the bundle X's brother had written a letter stating that he did the best he could for his mother and that X did most, if not all, of her care. Reference is made to both he and X accompanying their mother for the purposes of the scan.

114. It is correct that he did not attend the hearing to give evidence on behalf of the appellant or to support X's evidence. At [71] the judge recorded that the reason given for his non-attendance was that he was unable to come to the hearing. No further elucidation was given by X as to why he was not present given his part in the family dynamics.

115. The judge did not make any express finding relation to her brothers help for the purpose of caring for their mother. That may be because it was common ground that he had undertaken at least some of his mother's care as they lived in the same house but also because the FtTJ had reached the conclusion that X could call on greater assistance from the NHS.

116. However the FtTJ did make an express finding as to the help and assistance her brother could give to X in terms of support for the children and that this was different to the evidence in 2012 which demonstrates that he was able to provide some support for the children in the absence of the appellant.

117. This evidence was set out in the You turn report relating to SH2 where it was recorded that SH2 spoke about his uncle with fondness saying that his uncle taught him a lot about life and being confident with who he is. SH2 also identified his uncle as someone he would go to if he did not feel safe. Additionally the judge recorded at [117] that X stated that her brother was a "positive influence" on SH2. At [118] the FtTJ found that X had described her relationship with her brother as a "close one" and that alongside the assistance of therapy, and alternative care packages for her mother that she would be able to care for the children adequately. Consequently it was open to the FtTJ to conclude that there were other avenues of support that X could call upon in the absence of the appellant.

118. Therefore contrary to paragraph 11 of the written submissions and those made in his oral submissions, there was evidence upon which the judge could properly conclude that the position in respect of X's brother was different to that in 2012.

119. Similar submissions were made in respect of SH1. The written submissions relied upon by Mr Lewis in paragraph 9 refers to the circumstances of SH1 and provide page references to the evidence. The circumstances of SH1 were summarised at [115] of the decision and the FtTJ took into account her medical problems for hypothyroidism and enuresis. The medical evidence referred to in the written submissions consisted of general medical records stretching back to 2009. Her enuresis was identified as a long-standing problem from when she was little (at 115 and 121). Other medical evidence from 2013 – 2017 referred to her hypothyroidism and receiving medication for her thyroid problems. There was no up-to-date medical evidence for SH1, and the evidence given by her mother X was set out at [75] that her health was "moderate" and "being managed". SH 1 had provided a letter at pages 21 – 23 of the bundle setting out that she had experienced anxiety and depression as a result of a father's imprisonment. SH 1 was now 17 years of age (nearly 18) and the evidence in the bundle pointed to her having achieved academic achievements (page 169) and having received an outstanding achievement award (page 172) and had a conditional offer for university. The assessment made of the circumstances of SH1 are consistent with that material and do not demonstrate the point made in the grounds that the FtTJ was required to justify a departure from the decision of the panel in 2012.

120. I now turn to ground 2 which relates to the circumstances of SH4 who was born in 2014 and therefore the decision of the panel in 2012 did not consider circumstances.

121. Mr Lewis submits that the FtTJ was wrong to dismiss the evidence of Miss P on the basis that she was not a "qualified practitioner" and that the letter she provided was a mixture of opinion evidence and evidence of primary fact and therefore did not rely on the author's experience.

122. I have considered that submission in the light of the contents of the letter set out at page 88 of the bundle. Miss P is described as a master's student studying child psychology and that she was currently on a placement at the school. SH4 was referred to her for emotional support relating to his father's imprisonment. The letter set out that SH4 presented as an intelligent, gentle, and creative child. It is recorded that he often spoke of deep sadness in his tummy in connection with missing his father. She stated, "in my opinion with the right therapeutic support and the physical presence of his father SH4 has every chance of developing emotional and academic skills appropriate for his age." She later referred to difficulties in behaviour to self -regulate and gave her opinion that he was suffering from the absence of his father and that this is having an adverse effect on his emotional development.

123. The FtTJ did not take issue with the general evidence that any of the children with whom she was concerned did not miss their father and that this was adversely affecting them as set out in the second paragraph of Miss P's letter. Whilst Mr Lewis submits that the judge rejected that evidence that is not reflected in the decision. At [114] the FtTJ did not state that she gave the report no weight but that she gave the report "limited weight". Having considered the contents of the letter, I do not consider that the FtTJ was in error by stating that its author was not a "qualified practitioner". She was not. Miss P was a graduate student in a placement as part of a master's degree. While she was able to set out what she saw, any opinion as to the cause of any adverse behaviour would have to be seen and considered in the light of all of the evidence. By way of example, it is not been said whether Miss P had been given any of the background material in order to reach her opinion as to the physical presence of his father. Nothing is said about the period where SH4 was separated from his father due to period of imprisonment. Nor was any reference made to any particular care of SH4 beyond his "physical presence".

124. Conversely the judge did place weight on evidence relating to all of the children set out in the psychological assessment summarise at [108 – 109]. At [119] the judge concluded that this was the only report that she felt able to give weight. At [109] the judge as set out the conclusions that each of the children had an

attachment to their father, that that was in line with the close bond that they had with him and that they were worried about the prospect of losing their father. In the light of that evidence, the judge was entitled to prefer this evidence over that of Miss P as set out in the letter at page 88. Consequently I find no error on the basis of the submissions made and as set out in ground 2.

125. In summary, I conclude that the FtTJ did not err in her approach as set out in ground 1 ) even seen in the context of the evidence referred to in ground 2(relating to the circumstances of SH 4), or ground 3, relating to evidence of X, or ground 4 (by reference to "talking therapies"). The FtTJ properly had regard to the panel's findings in 2012 but was entitled to reach the conclusion that whilst they provided a starting point, that she was entitled consider the evidence as it was in 2020 relating to the children circumstances, those of the appellant, those of X, alongside the passage of time and in the context of a different legal test and framework. For those reasons I am not satisfied that there was any error in her approach on the basis of the submissions made by Mr Lewis.

126. I should deal with one point which is raised generally in the grounds at paragraph 14. In his written submissions Mr Lewis refers to the FtTJ having quoted the well-known aphorism in the decision of *Lee* and that Underhill LJ in the decision of *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 (4 September 2020) set out that it was not a substitute for consideration of the individual case. It is submitted in that paragraph that the analysis at paragraphs 119 – 121 gives the impression the judge was asking herself whether the harm to the children went beyond that which was ordinarily to be expected from the deportation of a parent, an approach which was disapproved of in *HA (Iraq).*

127. Beyond that, no further submissions either in the written submissions or in the oral submissions made any reference to the test applied by the FtTJ relating to the "unduly harsh" test, or by reference to the later decisions in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 (4 September 2020) or AA (Nigeria).

128. Having considered the overall assessment of the FtTJ, I do not consider that she erred in her consideration of that issue. At [95] the judge considered the circumstances of the appellant and that by reason of the length of the sentence he fell into the category of what is now described as a "serious offender" and therefore was required to show "very compelling circumstances". The FtTJ did not have the advantage of the later case law in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176 (4 September 2020) and *AA (Nigeria)* but those decisions identify that it is not necessary to refer to case law beyond that in *KO (Nigeria)* and *NA (Pakistan)* both of which the judge made reference to ( see the FtTJ's application of *NA (Pakistan)* at [96) and *KO Nigeria* at [102].

129. Whilst the judge made a reference to *MK (Sierra Leone)* [2015] UKUT, the FtTJ's reference to there being an "elevated threshold" still remains the position.

130. 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.

131. Importantly at [103] the judge focused her attention upon the effects of deportation upon the children and X and recognising the elevated threshold again.

132. At [101] the judge set out her reasons for reaching the conclusion that it would be unduly harsh for the children to relocate to Jamaica (the "go scenario"). No issue is taken with those findings.

133. It is recorded at [97] the Counsel relied upon Exception 2. No submissions have been made that the FtTJ failed to consider any factors under Exception 1. At paragraphs [102 – 121] the judge set out and addressed the evidence relevant to the consideration of undue harshness and expressly considered the points raised on behalf of the appellant which the judge summarised at [104]. In doing so, I am satisfied that the FtTJ carried out an assessment of the evidence that was before the FtTJ and did not fall into error in the way that grounds 1-4 asserts for the reasons that I have given earlier.

134. The FtTJ did not find that the appellant could meet the Exception 2 (S117C (5)) but in the alternative, even if it were met, that the appellant had not shown that there were "very compelling circumstances" over and above those Exceptions and addressed the other relevant factors identified including the appellant's claimed rehabilitation at [122] and the public interest at [123].

135. The judge property took into account in favour of the appellant that he had undergone drug and alcohol courses to addresses addiction and that when tested randomly for drugs was found to be drug-free. However, the judge was entitled to take into account that this had taken place within a secure and structured environment and that he had yet to show that once in the community he was able to "put into practice what he learnt in prison". There had been no OASY's report before the Tribunal only the presentence report which had assessed his risk of reoffending as medium and also risk to the public as medium. The judge properly found "he has been given chances in the past, but his behaviour shows he has not learnt from his experiences or given much thought to the consequences of his behaviour on his closest family members." The FtTJ's assessment of his conduct or steps towards rehabilitation was consistent with the guidance given in *HA (Iraq)* at [141] that '... tribunals

will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender …'

136. In addressing the public interest at [123] in light of the appellant's conviction, the nature of his offences, that he was a repeat offender, the conclusion reached that the "public interest in his removal is very high" was a finding demonstrably open to the FtTJ to reach. Consequently the omnibus conclusion set out at [124] properly considered the best interests of the children but that whilst they were a primary consideration, they were not "paramount" and that given the "very high public interest in deportation of the appellant" it was not "outweighed by the best interests of children or any other matter relied upon."

137. In my view the reference to the decision in *Lee* [2011] EWCA Civ 348 set out at the end of paragraph 124 was referred to only in the context of his offending outweighing the best interests of the children and did not fall into any legal error in the way disapproved in *HA (Iraq)* at [56].

138. In a S117C(6) case, as here, there was a requirement to consider the seriousness of the particular offence and to balance the strong public interest in support of deportation against the circumstances over and above Exceptions and 2. On the facts of this appeal the issue related to Exception 2. I am satisfied that this is precisely what the FtTJ did. Therefore the FtTJ having considered all factors weighing in the appellant's side of the balance cumulatively was entitled to conclude that the weight of the public interest in this particular case required deportation because it cannot be said that there are "*very compelling circumstances*" over and above those described in Exceptions 1 and 2 .

139. The question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing herself as to the relevant law and assessing the evidence on a rational and lawful basis.

140. The judge had the advantage of considering all the evidence in the case. As the Supreme Court stated in Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62]:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

141. In any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. Mr Lewis did not

seek to argue that the decision of the judge or her assessment of the evidence (including the expert evidence) was either irrational or perverse.

142. Consequently, it has not been demonstrated by the grounds as argued by the appellant that the decision of the FtTJ involved making of an error on a point of law. It follows that the decision of the FtTJ shall stand.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

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

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 his family members. 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

Dated 6/12/20

*Upper Tribunal Judge Reeds*

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email