Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22903/2016

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 9 January 2020 **On 25 February 2020**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

[W P W]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S Naik QC and Mr A Bandegani instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr S Kovats QC, instructed by the Government Legal Department

DECISION AND REASONS

Direction under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008

The disclosure or publication of any matter likely to lead members of the public to identify RX, J or RN is prohibited. This order applies to the appellant, respondent and all other persons. Failure to comply with this order could lead to contempt of court proceedings.

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INTRODUCTION

1. This decision relates to an appeal against a decision of the First-tier Tribunal ("the FtT") promulgated on 14 November 2018, dismissing the appellant's appeal against the Secretary of State of the Home Department's ("the SSHD") decision of 30 August 2016 refusing the appellant's human rights claim. On the same occasion, the SSHD made a decision refusing to revoke a deportation order in the appellant's name, signed on 23 February 2015.

2. On the 1 April 2019, the Upper Tribunal set aside the FtT's decision ("the error of law decision") and directed that the re-making of the decision in the appeal should be undertaken by the Upper Tribunal

3. The respondent now submits that the Upper Tribunal should re-visit, and depart from, its error of law decision of 1 April 2019 and conclude that the FtT did not err in law, the consequence being that the FtT's decision of 14 November 2018 would stand. We consider this submission in Part 1 of this decision. In Part 2 of this decision we re-make the decision in the appeal.

FACTUAL BACKGROUND – AN OVERVIEW

4. The appellant was born on 3 August 1978 and is a national of Jamaica.

5. His eldest son, RX, was born in the United Kingdom on 1 September 1997 to SY.

6. On 13 May 2000, the appellant was refused leave to enter the United Kingdom as a visitor but was granted temporary admission until the following day. He failed to report as required and remained in the United Kingdom. On 16 December 2000, the appellant and SY married in the United Kingdom. They separated in 2003.

7. In 2004, the appellant began a relationship with JH. J was born of that relationship in May 2008. In 2006, the appellant made an application to the SSHD for indefinite leave to remain as the father of RX, but that application was refused by the SSHD in November 2009. An appeal against the decision was dismissed by the FtT on 27 April 2010 and, thereafter, by the Upper Tribunal on 28 September 2010.

8. On 4 July 2013, the SSHD granted the appellant limited leave to remain in the United Kingdom for 30 months, as a consequence of his relationship with J (it being concluded that he had a parental relationship with J and that it was not reasonable to expect J to leave the United Kingdom).

9. On 13 February 2014, the appellant was convicted of supplying Class A controlled drugs and was sentenced to forty months' imprisonment. As a consequence, on 24 May 2014 the SSHD served notice on the appellant of his liability to deportation. In response, on 19 June 2014 the appellant raised a human rights claim, relying upon his relationship with his children and JH. On 23 February 2015, the SSHD made a decision to deport the appellant and also refused his human rights claim. The decision notice concluded by certifying the appellant's human rights claim pursuant

to section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

10. Challenge was brought to the section 94B certification by way of judicial review proceedings issued on 24 March 2015 (JR/3490/2015). Within the confines of the judicial review proceedings further evidence was put forward in support of the appellant's Article 8 ECHR claim. The SSHD made a supplementary decision on 30 April 2015, refusing to treat the further evidence as a fresh claim pursuant to paragraph 353 of the Immigration Rules, refusing to revoke the deportation order and maintaining the section 94B certification. Permission to bring judicial review proceedings challenging the decisions of 23 February and 30 April 2015 was refused on the papers by Upper Tribunal Judge Perkins on 18 August 2015. Upon renewal, the application for judicial review was stayed to await the Court of Appeal's decision in Kiarie and Byndloss v SSHD [2015] EWCA Civ 1020. The matter thereafter came before Upper Tribunal Judge Blum on 22 June 2016, who also refused permission to bring judicial review proceedings.

11. In August 2016, the appellant made further submissions to the SSHD asserting, *inter alia*, that his relationship with JH had broken down and that Social Services had initiated a child protection case in relation to both J and the appellant's then unborn child (RN). On 30 August 2016, the SSHD made a decision refusing to revoke the appellant's deportation order, as well as refusing the appellant's human's human rights claim. The SSHD accepted, however, that the further submissions amounted to a fresh human rights claim pursuant to paragraph 353 of the Immigration Rules. Once again, the appellant's claim was certified pursuant to section 94B of the 2002 Act.

12. The SSHD gave notice of intention to remove the appellant to Jamaica on 7 September 2016. In response, the appellant lodged a second application for judicial review, this time challenging the decision to remove him (JR/9647/2016). By way of an order dated 5 September 2016, Upper Tribunal Judge McGeachy refused to stay the appellant's removal. The appellant was removed from the UK to Jamaica on 7 September 2016.

13. On 4 October 2016, the appellant submitted an appeal to the First-tier Tribunal with the assistance of a pro-bono organisation., challenging the decision of 30 August 2016 to refuse his human rights claim. He, subsequently, instructed solicitors in the UK and, on 22 February 2018, the Legal Aid Agency granted prior authority to instruct a forensic psychiatric expert, an independent social worker and an independent probation officer.

14. In the meantime, in November 2016 the appellant's son RN was born to JH.

15. On 29 January 2018, the appellant lodged a further application for judicial review (JR/666/2018), challenging the SSHD's decision to maintain the section 94B certification and the FtT's decision not to stay the appeal proceedings. The return of the appellant to the UK was sought by way of relief. In a decision of 31 March 2018 (reported as [2018] UKUT 165), the Upper Tribunal (constituted of the instant panel): (i) refused permission to bring judicial review proceedings challenging the FtT's

decision to refuse to stay the appeal proceedings; and, (ii) stayed the proceedings insofar as challenge was brought to maintenance of the section 94B certification and refusal by the SSHD to return the appellant to the United Kingdom prior to the disposal of his appeal.

16. The appeal before the FtT was heard substantively by the President of the FtT and Resident Judge Campbell on 25 and 26 June 2018 and dismissed in a decision promulgated on 14 November 2018 (the FtT's decision"). On 13 December 2018, permission to appeal to the Upper Tribunal against the decision of the 14 November 2018 was granted by the President of the FtT.

17. As identified above, in a decision promulgated on 1 April 2019, the Upper Tribunal set aside the decision of the FtT and directed that the re-making of the decision in the appeal should be undertaken by the Upper Tribunal. On 9 May 2019, the Upper Tribunal ordered that:

> "Pursuant to s. 25 of the Tribunals, Courts and Enforcement Act 2007, the Respondent shall revoke the s. 94B certificate and take all necessary steps to facilitate and fund the Appellant's return from Jamaica to the United Kingdom as soon as practicable for both parties (without prejudice to the Respondent's ability to issue a fresh certificate per s. 94B if so advised)."

18. The appellant entered the United Kingdom on 18 June 2019 having been *"granted immigration bail"*. The deportation order against the appellant remains in force.

PART 1: SSHD'S REQUEST THAT THE UPPER TRIBUNAL DEPART FROM THE ERROR OF LAW DECISION

19. As we have already identified, the SSHD now makes a request that the Upper Tribunal re-visit its decision of 1 April 2019 setting aside the FtT's decision and, contrary to its earlier finding, conclude that the FtT did not err in law – the consequence of this being that the FtT's decision would stand.

Issue of Jurisdiction

20. It is not in dispute that in circumstances where the Upper Tribunal has not finally disposed of an appeal, it has jurisdiction to depart from, or vary, its decision that the FtT made an error of law such the FtT's decision should be set aside pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007 ("TCEA 2007") - AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245.

21. Ms Naik submits that the Upper Tribunal should take a staged approach to the exercise of such jurisdiction, the burden at the first stage being on the SSHD - as the party requesting departure from the error of law decision - to demonstrate *"the existence of very exceptional circumstances necessary for the UT to exercise its jurisdiction"*; a burden which Ms Naik describes in her skeleton argument as being a *"very high threshold"*. Ms Naik further asserts that it is only in circumstances where the Upper Tribunal concludes that this initial threshold has been surpassed that it should go on to consider the merits of the SSHD's underlying assertion that the

error of law decision is wrong and should be departed from.

22. Insofar as Ms Naik avers that the Presidential Tribunal in AZ was seeking to erect a gateway threshold to the operation of the Upper Tribunal's jurisdiction to depart from, or vary, its error of law decision, we reject this submission. Having identified the following, at [52] of AZ, as being the operative issue *"…in what circumstances will a party be permitted by the Tribunal to raise a matter, at a re-making stage, which, if accepted, would lead to a change in the written error of law decision"*, the Tribunal concluded as follows:

> "53. The answer is precisely that given in Practice Direction 3.7. It will only be in a "very exceptional" case that this should occur.
>
> 54. The Upper Tribunal would be hobbled if its error of law decisions could be routinely re-visited in cases where, pursuant to Practice Direction 3, the Tribunal proceeds to re-make the decision in the appeal, rather than remitting the case to the First-tier Tribunal. Neither the Secretary of State nor those who were appellants before the First-tier Tribunal would gain anything of legitimate value from such a state of affairs. The overriding objective of dealing with cases fairly and justly would be imperilled. "

23. Practice Direction 3.7 of the Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, made on 10 February 2010 ("the Practice Direction") reads:

> "The written reasons [for finding that the First-tier Tribunal made an error of law, such that its decision fell to be set aside only] shall be incorporated in full in, and form part of the determination of the Upper Tribunal that re-makes the decision. ***Only in very exceptional cases can the decision contained in those written reasons be departed from or varied by the Upper Tribunal which re-makes the decision under section 12(2)(b)(ii) of the 2007 Act.***" [emphasis added]

24. The position, therefore, is as follows. Before it has re-made the decision in an appeal pursuant to section 12(2)(b)(ii) of the TCEA 2007, the Upper Tribunal has jurisdiction to depart from, or vary, its decision that the FtT made an error of law such that the FtT's decision should be set aside under section 12(2)(a) of the TCEA 2007. The exercise the Upper Tribunal's jurisdiction to depart from, or vary, an error of law decision prior to re-making the decision under section 12(2)(b)(ii) of the TCEA 2007 is intensely fact specific and will only be exercised in very exceptional cases. Whilst the use of the phrase *"very exceptional cases"* in AZ and the Practice Direction is not to be treated as importing a gateway threshold to the exercise of such jurisdiction, it is intended to make plain the expectation that the Upper Tribunal will exercise its jurisdiction to depart from an error of law decision in only a tiny minority of cases.

25. Those appearing before the Upper Tribunal should consider carefully whether to make of an application that the Upper Tribunal depart from an error of law decision. Advancing of an argument that cannot conceivably be an *"exceptional case"* is an abuse of the Tribunal's process. If the Tribunal henceforth concludes that its

process has been abused, it will not hesitate to recognise this by exercising relevant powers, including as to costs.

26. Whilst we are hesitant to give guidance as to the sort of circumstances that might, or might not, lead the Upper Tribunal to depart from, or vary, an error of law decision prior re-making the decision under section 12(2)(b)(ii) of the TCEA 2007, we do think it necessary to emphasise that the existence of such a jurisdiction is not an opportunity for a party to re-make submissions that have already been made, or to make submissions that ought to have been made at the time the Upper Tribunal were initially considering its error of law decision. Insofar as guidance can be given as to the sort of circumstances that might found a *"very exceptional case"*, the scenarios akin to the issues that rules 43, 45 and 46 of the Tribunal Procedure (Upper Tribunal) Rules 2008 are designed to address may offer some assistance. For example if, following an error of law decision but before the re-making stage, a binding authority emerges from the Supreme Court or Court of Appeal, which means the Upper Tribunal's decision to set aside the decision of the First-tier Tribunal was wrong, it would be desirable to revisit the former decision, rather than proceed to a re-making stage that would be otiose. One might also envisage a situation where the First-tier Tribunal's decision was set aside on the basis of apparent procedural unfairness, but where it subsequently emerges that there was no such unfairness.

Discussion and Decision

27. Returning to the instant case, it is prudent to set out the background to the SSHD's application.

28. The appellant remained outside of the United Kingdom for the duration of the FtT proceedings. A preliminary issue before the FtT was whether the appellant's appeal could be determined fairly and effectively without his presence in the United Kingdom, applying the principles set out in Kiarie and Byndloss [2017] UKSC and AJ (s94B: Kiarie and Byndloss Questions) Nigeria [2018] UKUT 115. The instant appeal was treated by the FtT as a lead *"section 94B"* appeal and was heard by a Presidential panel.

29. Before the FtT, the appellant relied upon a detailed witness statement and gave oral evidence via video link from the British High Commission in Kingston, Jamaica. Further evidence was provided to the FtT in the form of witness statements from the RX, RX's maternal grandmother, the appellant's brother and the appellant's friend. There was no evidence before the FtT from either JH, J or RN. The appellant's relationship with JH broke down prior to his deportation and JH did not wish to engage in the appeal process. The appellant also relied upon reports from four professional witnesses: Dr Basu - a medical practitioner and forensic psychiatrist; Ms Haque – an independent probation officer; Ms Brown – an independent social worker and Ms Kakonge - a barrister, specialising in private and public law children proceedings.

30. In concluding that the appeal proceedings were fair and effective, the FtT's primary

focus was on the second question posed in AJ (s.94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 i.e. *"whether the appellant's absence from the United Kingdom, as a result of deportation or other removal pursuant to the section 94B certificate, is likely to present "difficulties in obtaining the professional evidence which…can prove crucial in achieving its success""* .

31. The FtT summarised its conclusions as follows, at [10]:

> "[10] Secondly, has the appellant's absence materially impaired the production of expert and other professional evidence, upon which he would otherwise have relied? The answer here is clearly no. The appellant has been able to obtain and rely upon a psychiatric report, a report from an independent probation officer, a report from an independent social worker and a report described as an independent family law expert opinion, prepared by Counsel. The psychiatric report and the report from the probation officer were prepared following contact with the appellant via video link. Each expert expressed some reservations but each reached conclusions which we summarise below and have taken into account. So far as the report from the independent social worker is concerned, the expert felt unable to undertake an assessment of the strength of the appellant's relationship with his daughter J. She considered that a full assessment would be in the best interests of J and the appellant's infant son RN and that observation of the appellant and his children together would be required for this purpose. However, a salient feature of this aspect of the case is the decision of the appellant's former partner and the mother of the two children concerned, JH, not to cooperate with the independent social worker or permit contact between the social worker and the children for assessment. Similarly, JH, was not prepared herself to speak to the expert. Her stance has severely limited the scope of the report. We deal with this particular issue more fully below, when we assess the report in detail. We are clear, however, that it is the lack of cooperation on the part of the mother of the appellant's two youngest children that has caused the limitation and not the appellant's absence from the United Kingdom. As we discuss below, we consider that the appellant has had steps available to him to seek to deal with the impasse and to take formal steps to enable a full assessment to be made. The indirect contact he currently has with his daughter and son is reliant upon the cooperation of their mother and arrangements are fragile, but such fragility is far from uncommon and is a feature in many cases in the family court. Overall, although all four authors of the reports drew attention to difficulties caused by the appellant's absence, we find that there was no material impairment in relation to the production of expert and other professional evidence."

32. The FtT considered the second AJ question in more detail at [119] to [130], concluding:

(i) The appellant's presence in Jamaica did not provide a serious impediment to the preparation of either Dr Basu's evidence or that of Ms Haque. Dr Basu's conclusions were consistent with the findings made by Ms Haque and those found in the OASys report [120-122];

(ii) Ms Brown spoke to the appellant via Skype and directly to RX. She was not able to meet with JH, J or RN because of unwillingness on JH's part The appellant's removal to Jamaica was not the operative cause of the limitations in Ms Brown's

report. Ms Brown had access to written records including personal case notes showing that the children [123-125];

(iii) Since removal, contact by the appellant with the children has been limited and managed by JH. The appellant is anxious not to disrupt the relatively fragile contact arrangements. Nevertheless, since the breakdown in his relationship with JH, he has had opportunity to seek an order from the family court putting the contact arrangements on a more formal footing, which might have led to a fuller assessment if access were given to the two children [126-127];

(iv) The appellant is able to apply for a specific issue order under section 8 of the Children Act 1989 from Jamaica. Although the prospects of success are uncertain, an application to the Family Court might still be made. Exceptional case funding for such an application is available from the Legal Aid Agency and, although the appellant and his solicitors have been advised that an application for such funding is unlikely to succeed it is, nevertheless, relevant that no such application has been made, nor has an application been made to the Family Court [127-128];

(v) There is no evidence to support the contention that JH's unwillingness to allow Ms Brown access to the children would be any different if the appellant were in the UK [128];

33. At [130], the FtT found in conclusion that although the appellant's removal to Jamaica had led to difficulties in relation to the expert evidence, *"those difficulties fall far short of showing there has been procedural unfairness"*.

34. In the error of law decision of 1 April 2019, we concluded as follows on the issue of whether the appellant's appeal before the FtT had been fair and effective:

> "[48] Moving on, the central feature of the second AJ question is the extent to which the appellant's ability to prosecute his appeal by the obtaining of professional evidence has been hampered by him being outside of the UK. The importance of obtaining professional evidence should not be underestimated. As Lord Wilson identified at [55] of Kiarie: *"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: … He needs to be in a position to assemble and present powerful evidence."*
>
> [49] A superficial analysis of the evidence would suggest that far from being hampered by being outside the UK, the appellant has benefited from this fact in combination with the FtT's decision to treat his appeal as a test case. Unusually, in our experience, he has secured public funding on an exceptional basis to allow for the instruction of four professional witnesses and has assembled a legal team of considerable repute. In our view, however, a more considered analysis of the evidence ineluctably leads to the contrary conclusion.
>
> [50] Whilst we concur with the FtT in its consideration of the evidence from Dr Basu and Ms Haque, we depart from its analysis of the evidence from Ms Brown, an independent social worker, and Ms Kakonge, a barrister specialising in children's

proceedings.

[51] One of the central pillars advanced by the appellant in support of his claim to the FtT that deportation would lead to a breach of Article 8 ECHR, was the significant impediment that deportation would cause to the continuation of his family life with J and RN, his British citizen children born to JH. It was conceded by the SSHD that deportation would impede the development of such family life, and the FtT found that it would be unduly harsh for J and RN to live in Jamaica [139].

[52] Within the confines of a consideration of the Immigration Rules (paragraph 399(a)(i)(b)) and the 2002 Act (section 117C(5)) the FtT was required to determine whether it would be unduly harsh to require either J or RN to remain in the UK without the appellant. At [139], the FtT identifies this consideration as being "the critical question" in the appeal. It is also of significance that when considering the aforementioned provisions, the Supreme Court, in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53, observed that they "raise a factual issue seen from the point of view of the child" [22].

[53] The consequence of JH's stance, submits Ms Naik, was that the appellant was denied the opportunity to provide the best evidence on "the critical issue". Indeed, the only substantive evidence that he could provide on this issue was his own testimony, based on the limited interaction he has with his children via Facetime, which itself has been controlled by JH.

[54] How then could this appellant seek to demonstrate, other than by way of his own personal testimony, that it would be unduly harsh for his children (one or both) to remain in the UK without him? The most obvious source of evidence on this issue would be from JH, the person undertaking the day to day care of the children and in an ideal position to observe the real-world effects of the appellant's deportation on them. This evidence could be supported by others who share in such knowledge, such as other family members. Whilst the children are of an age at which they could not be expected to provide evidence of their own accord, the appellant could also seek to rely on evidence from professional witnesses such as counsellors or independent social workers, who have had interaction with the children and JH.

[55] However, as the FtT observed, JH refused to engage in the appeal proceedings and did not provide the necessary consent to allow Ms Brown (the independent social worker) access to the children. Ms Brown indicated that she was not able to comment directly upon JH's parenting capacity and considered that it was not possible to coherently assess the impact and effect upon the children of the appellant's absence without being able to assess them directly. Ms Brown's report also identifies that JH has had mental health difficulties in the past, leading to the appellant becoming J's primary carer for a time, and that subsequent to the relationship between the appellant and JH breaking down Southwark Social Services Children's Department initiated safeguarding measures due to concerns over's JH's ability to care for J.

[56] That the appellant has been hampered in his attempts to adduce the best evidence in support of his appeal is clear. This, though, is far from being determinative of the question that we must answer. Neither Article 8 ECHR nor the

common law doctrine of procedural fairness requires access to the best possible procedure on the appeal, but access to a procedure that meets the essential requirements of effectiveness and fairness. What is effective and fair must always be viewed in context and will depend upon the facts and circumstances of a particular case.

[57] At [127] and [128], the FtT found that the appellant had not been denied the opportunity to provide evidence relevant to the assessment of the consequences of his deportation on the children (i.e. on the critical question) because he could have put the arrangements with the children on a more formal footing prior to his deportation and, in any event, he could have applied from Jamaica for a specific issue order under section 8 of the Children Act 1989. The existence of such opportunities, when taken in conjunction with (a) the fact that it was JH's stance that directly led to the limitations of Ms Brown's report and (b) that there was no evidence that JH's stance would be any different if the appellant were present in the UK, led the FtT to conclude that difficulties in relation to the expert evidence fell "…far short … of showing that there has been procedural unfairness".

[58] We have considered for ourselves the weight to be attached to the existence of such opportunities in our overarching assessment of whether [there] has been a fair and effective appeal.

[59] As identified above, the appellant's relationship with JH broke down in the summer of 2016. He approached solicitors in June 2016 in relation to the possibility of obtaining a child arrangements order; however, he did not pursue this avenue because JH was not hindering his contact with J at that time. This approach is entirely in accord with the opinion provided by Ms Kakonge in which he identifies that there "must be a genuine dispute about contact between parents for the court to grant an application for a child arrangements order". As to the opportunity for the appellant to apply for a specific issue order from Jamaica so as to obtain permission for the children to be assessed by the professional witnesses, this is a topic which is also the subject of Ms Kakonge's opinion. To summarise, on this issue Ms Kakonge opines that such an "application has an unrealistic prospect of success" which is to be directly contrasted with the position if the appellant were to be present in the UK, whereby the assessment of the children could be undertaken, absent JH successfully applying for a prohibited steps order to prevent it. Ms Kakonge also identifies an additional hurdle to the obtaining of such an order from Jamaica, that being the likely absence of the availability of public funding for the making of such an application.

[60] We remind ourselves that the respondent has not sought to provide evidence contradicting the opinion of Ms Kakonge and, in such circumstances, it falls to be accepted, given the absence of any reason to reject it. We conclude that the whilst the appellant did have an opportunity to put the arrangements with his children on a 'more formal footing' prior to his deportation, and that there was an avenue open to him via the UK Family Court to obtain an order requiring JH to allow the assessment of his children by Ms Brown, in the real world there were significant, if not insuperable, obstacles to the obtaining of a positive outcome in relation to such applications.

Conclusion

> [61] We now return, as we must, to the overarching assessment of whether the appellant has had a fair and effective hearing before the FtT. We take in to account all those matters identified above including, but not limited to, the circumstances which led to the appellant's deportation including the apparent lawfulness of the deportation order set in the proper context of the ongoing Kiarie litigation and the eventual outcome of such litigation. We take full account of the fact that the appellant has had access to high quality legal representation throughout, as well as the availability of public funding for the duration of the legal proceedings, that he was able to assemble a significant amount of evidence in support of his claim and that he was able to provide oral evidence to the FtT via video link.
>
> [62] Nevertheless, the very particular features of this case lead us to conclude that the proceedings before the FtT breached the procedural safeguards protected by Article 8 ECHR and the common law duty of procedural fairness.
>
> [63] At the heart of the appeal before the FtT - the critical issue - was the determination of whether it would be unduly harsh to require either J or RN to remain in the UK without the appellant. This raises "a factual issue seen from the point of view of the child". The threshold that the appellant was required surpass in order to make out his case in this regard is high and his prospects of doing so were seriously hampered by JH's refusal to engage in the proceedings or to allow Ms Brown to undertake an assessment of the children. This denied the appellant the opportunity to obtain the best evidence on the critical issue in his appeal. Had the appellant been in the UK, the opportunity for Ms Brown to directly assess J and RN would have been available to him, even if JH had taken the same stance in refusing to engage in the proceedings. The appellant has no remedies available to him in the Family Court that could materially improve his prospects of obtaining such evidence on the critical issue.
>
> [64] On the information before us there is no mechanism for the appellant to improve his position on the evidence relating to the critical issue in the appeal whilst he remains outside the United Kingdom. Given what we have said above, this inevitably leads us to the conclusion that the appellant's appeal cannot be 'effective' unless he is in the United Kingdom.
>
> [65] For these reasons, we conclude that the decision of the First-tier Tribunal contains an error of law. Given the nature of the error we exercise our discretion to set the FtT's decision aside. "

35. In support of the contention that we should now depart from the error of law decision and conclude that the FtT's decision should stand, Mr Kovats submits that there was no basis in law for the Upper Tribunal to speculate on the appellant's prospects of success in an application, made to the Family Court from Jamaica, for permission allowing a professional witness access to the children. He asserts that Ms Kakonge's opinion, which formed the foundation of the Upper Tribunal's rationale for setting aside the FtT's decision: (a) cannot lawfully be treated as evidence because it is no more than a submission on domestic law; (b) even if it is evidence, it is not admissible because the opinion therein is irrelevant; and/or, (c) the opinion must be treated as being of no weight. Mr Kovats sought to emphasise

the FtT's finding that it was JH's refusal to cooperate with Ms Brown that led to Ms Brown's inability to assess the children, not the appellant's absence from the UK.

36. Relying on the Supreme Court's decision in Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] 1 WLR, Ms Naik asserts that if Ms Kakonge's Opinion is found to contain 'submissions' on matters of law it should nevertheless *"be taken into account by an experienced judge, who can readily treat the statements as the opinions of a skilled witness as to practice, and make up his own mind on the legal question."* She submits that Ms Kakonge's Opinion was admissible as evidence both before the FtT and the Upper Tribunal and that it is of sufficient evidential value to permit the Upper Tribunal to conclude that the proceedings before the FtT were not fair or effective.

37. Replying, in written post-hearing submissions, Mr Kovats urged caution on placing reliance on the decision in Kennedy, observing that the Supreme Court were there considering a *"Scottish case"* and did not indicate that *"Scots law on the admissibility of skilled witnesses is identical to English law"*. It was further submitted that, in any event, the decision in Kennedy provided an illustration as to why the FtT did not fall into error in the instant case; the Upper Tribunal having lost sight of the FtT's finding that it was JH's lack of cooperation that led to Ms Brown's inability to assess the children, not the appellant's absence from the UK.

38. Taking Mr Kovats' primary submission first i.e. that the Upper Tribunal unlawfully treated Ms Kakonge's written Opinion as if it were evidence, we accept that some passages in Ms Kakonge's written Opinion do stray into the realm of legal submission. However, neither the FtT nor the Upper Tribunal attached any evidential weight to such passages. Even a superficial analysis of Ms Kakonge's Opinion discloses large tracts of evidence bearing on core issues that the FtT and the Upper Tribunal had to consider. In particular, we find that Ms Kakonge's opinion as to the practical impediments facing the appellant in any attempt to access and obtain suitable relief from the Family Court whilst living in Jamaica, is evidence as to legal practice and not, as Mr Kovats sought to suggest, submission on matters of domestic law.

39. Before we leave this ground of challenge, we think it helpful to make some observations about the Supreme Court's decision in Kennedy, given the reliance placed on it by Ms Naik. As a consequence of the operation of section 41(2) of the Constitutional Reform Act 2005, the decision is not binding on us in the instant appeal. Kennedy concerned an appeal to the Supreme Court from the Inner House of the Court of Session. A decision of the Supreme Court on appeal from a Court of any part of the United Kingdom, other than a decision on a devolution matter (which this case is not), is to be regarded as the decision of a Court of that part of the United Kingdom. The Upper Tribunal (IAC) sitting in England & Wales is not bound by a decision of a Court sitting in the Scottish judicial system and, consequently, we are not bound by any aspect of the decision in Kennedy.

40. In any event, we have some difficulty in envisaging how the legal principles

underpinning the *ratio* in Kennedy can be readily applied in the instant jurisdiction. In Kennedy, the Court gave consideration to the issue of whether the skilled witness evidence of a chartered member of the Institute of Safety and Health was admissible in relation to an employer's potential liability for an employee, a home carer, who had slipped on snow and ice when on her way to visit her client. In reaching its conclusion, the Supreme Court undertook a detailed analysis of Scots law of evidence in civil and criminal cases. There was, though, no discussion of the corresponding rules of evidence covered by the jurisdiction of the courts in England and Wales, let alone how such rules apply in the context of the Immigration and Asylum Chamber of the FtT or the Upper Tribunal.

41. Moving on, as will be obvious from we have said above, we also reject Mr Kovats' alternative submission that Ms Kakonge's evidence was irrelevant and, as a consequence, inadmissible. Putting this submission in its correct procedural and legal context, the FtT has the power to admit expert evidence (rule 14(1)(c) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604)) and it can admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom (rule 12(2)(a) of the 2014 Rules).

42. The central consideration for the FtT when determining the admissibility of evidence is the relevance of that evidence to the issues before it. There is a presumption that all relevant evidence should be admitted unless there is a compelling reason to the contrary (Ryder LJ in Atlantic Electronics Ltd v R & C Commissioners [2013] EWCA Civ 651 at [31]). Evidence is relevant to the determination of an appeal if it is capable of bearing on an issue to be determined therein. Evidence of the likelihood of an event occurring, such as that given by Ms Kakonge, is necessarily speculative, but that does not make it irrelevant. Furthermore, the fact that alternative, and Mr Kovats would say, determinative, evidence could have been provided by the appellant in the form of a response to an application made to the Family Court rather than placing reliance on Ms Kakonge's evidence on the issue, does not render Ms Kakonge's evidence irrelevant. It is a matter going to the weight to be attached to Ms Kakonge's evidence, not the admissibility of it.

43. As to the assertion by Mr Kovats that the Upper Tribunal was not entitled to attach weight to Ms Brown's report, given the FtT's finding that it was JH's refusal to cooperate that led to Ms Brown's inability to directly assess J and RN as opposed to the appellant's absence from the UK, we remind ourselves that the question for the Upper Tribunal on appeal against a decision of the FtT brought on procedural fairness grounds, is not whether the FtT acted reasonably or came to a rational conclusion, but whether there has been a deprivation of the right to a fair hearing (SH (Afghanistan) v SSHD [2011] EWCA Civ 1284). This is a question which admits of only one correct answer. Whether there has been procedural fairness is an objective question (R (Citizens UK) v SSHD [2018] EWCA Civ 1812). If the FtT concludes that the appeal process has been fair and effective but on appeal the Upper Tribunal concludes to the contrary, it follows that the Upper Tribunal must find that the FtT erred in law. This is the approach we took in our error of law

decision and we can find no justification for departing from the conclusion we previously reached, having taken such an approach.

44. For the reasons given above, we conclude there is no merit in Mr Kovats' application that we should depart from our error of law decision. Furthermore, one only has to read what is set out above to appreciate that the submissions Mr Kovats now seeks to make were available to him at the time the error of law decision was initially being considered. Although the terms of the error of law decision crystallised the Upper Tribunal's rationale for setting aside the FtT's decision, particularly when compared to much broader challenge taken by the appellant in the grounds of appeal, that is not an invitation for the losing party, in this case the SSHD, to reload the barrels and take a more focused aim at the target.

45. For all these reasons, we refuse the Secretary of State's request to depart from the error of law decision of 1 April 2019 and move on to consider whether the appellant's deportation would lead to a breach of Article 8 ECHR.

PART 2: RE-MAKING OF THE DECISION IN THE APPEAL

Legal framework

46. The statutory provisions and Rules relating to the deportation of foreign criminals are now familiar to all who practise in this field and have attracted a large amount of judicial consideration. The present case is of a less usual kind, in that it is concerned with an application for revocation of a deportation order made by an appellant who has been deported pursuant to section 94B of the 2002 Act and then returned to the UK pursuant to an order of this Tribunal. The deportation order remains in force despite the appellant's return to the United Kingdom.

47. The Secretary of State's power to deport non-UK nationals derives from section 3(5) of the Immigration Act 1971 ("1971 Act"), which reads:

> "A person who is not a British Citizen is liable to deportation from the United Kingdom if –
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) …"

48. Section 5(2) of the 1971 Act gives the Secretary of State power to revoke a deportation order *"at any time"*. The exercise of the deportation powers in the case of non-nationals who commit serious offences is governed by sections 32 and 33 of the UK Borders Act 2007. Pursuant to section 32(5): *"The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."* The appellant falls within the definition of a foreign criminal. By section 32(6) of the UK Borders Act 2007, the Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless, *inter alia*, one of the exceptions set out section 33 of the Act applies. Exception 1 precludes the removal of a foreign criminal in pursuance of a deportation order where such removal would breach a person's

ECHR rights. In the instant case it is the rights afforded by Article 8 ECHR which are in issue.

49. The proper approach to the Article 8 ECHR balancing exercise in a case such as this, where there has been an application to revoke a deportation order, is to be found in paragraphs 390-392 and 398-399A of the Immigration Rules, as well as Part 5A (sections 117A-D) of the Nationality, Immigration and Asylum Act 2002. The deportation and Article 8 regime of paragraphs 398-399A and section 117C of the 2002 Act apply not only to the initial decision to make a deportation order but also to a decision as to whether to revoke such an order once made (MR (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1598).

50. We adopt and apply the reasoning of Leggatt LJ (with whom the Senior President of Tribunals and Hickinbottom LJ agreed) in CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027 at [20] and [21], that it is in general unnecessary for a tribunal to refer to the Immigration Rules in a case such as this, where there is no dispute that the relevant provisions are reflected within Part 5A.

51. We, therefore, turn to Part 5A of the 2002 Act. Section 117A of the Act explains when Part 5A applies and identifies that, when considering the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2), the Tribunal must have regard to those considerations listed in section 117B and, in cases concerning the deportation of foreign criminals as defined in section 117D, those considerations set out in section 117C.

52. Section 117B provides that the maintenance of immigration control is in the public interest and provides for a list of matters that the Tribunal must consider as well as, in part, the weight that should be attached thereto.

53. Section 117C provides:

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…"

54. The provisions in Part 5A, taken together, are intended to provide a structured approach to the application of Article 8 ECHR (KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [14]) and produce a final result compatible with Article 8 (KE (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 1382 at [25] and Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 at [36]).

55. In NA (Pakistan) & Another v Secretary of State for the Home Department [2016] EWCA Civ 662, Jackson LJ provided guidance both on how to approach section 117C and on the relationship between section 117C and the jurisprudence of the European Court of Human Rights: -

"36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in MF (Nigeria)), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.

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 Űner v Netherlands (2007) 45 EHRR 14 and Maslov v Austria? 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. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8."

Discussion and Decision

56. We make our findings applying the legal framework set out above and having considered all of the evidence before us even if not referred to, including documents served by the appellant in support of the application for judicial review, the bundles prepared by the parties for the hearing before the First-tier Tribunal (including, but not limited to, witness statements made by the appellant, RX, other relatives and supporters, reports from four professional witnesses, assessments made by the National Offender Management Service and photographic evidence), as well as the additional appeal bundles provided by the parties for the purposes of the hearing of 9 January 2020 (including, but not limited to, witness statements drawn up by the appellant, RX, RX's grandmother and the appellant's brother, and a supplementary report of 19 December 2019 authored by the Independent Social Worker, Ms Brown). In addition, we heard oral evidence from the appellant and RX.

57. Returning to Part 5A of the 2002 Act, it is not in dispute that as a consequence of the appellant's conviction in February 2014 for supplying Class A controlled drugs and subsequent sentence of forty months imprisonment, he is a foreign criminal as defined within section 117D of the Act. The deportation of foreign criminals such as the appellant is in the public interest (section 117C(1)). The weight to be attached to the public interest in the instant case is more conveniently considered when we turn our minds to the application of section 117C(6) below.

Exception 1 - Section 117C(4)

58. Ms Naik rightly did not contend, either in the skeleton argument of 30 December 2019 or in oral submissions, that the appellant can meet the requirements of Exception 1. It is, nevertheless, prudent for us to set out why this is so.

59. Most obviously, the appellant has not been lawfully resident in the United Kingdom for most of his life i.e. "*more than half*" his life (SC (Jamaica) v Secretary of State for the Home Department [2017] EWCA Civ 2112 at [53]). The appellant was nearly 22 years old when he first arrived in the UK in May 2000, and he is now 41 years old. Even had he remained lawfully in the United Kingdom since his arrival in 2000 until todays date, he would still not meet the requirements of section 117C(4)(a). In any event, the appellant remained unlawfully in the United

Kingdom without leave to remain for approximately 13 years after his arrival, only being granted 30 months leave to remain on 4 July 2013. This leave to remain was brought to an end by the signing of the deportation order.

60. The second requirement in Exception 1 is that the foreign criminal (i.e. the appellant) must be "*socially and culturally integrated in the UK*". The Court of Appeal in CI (Nigeria) considered the scope of the phrase *"socially and culturally integrated"* in section 117C(4), stating:

> 57. In assessing whether a "foreign criminal" is "socially and culturally integrated in the UK", it is important to keep in mind that the rationale behind the test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under article 8. The test should therefore be interpreted and applied having regard to the interests protected by the concept of "private life". The nature and scope of the concept was explained by the Grand Chamber of the European Court of Human Rights in *Üner v The Netherlands* (2006) 45 EHRR 14, para 59, when it observed that:
>
> > "… not all [settled] migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of article 8. However, as article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of article 8." (citations omitted)
>
> 58. Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. …

61. Looking at the appellant's circumstances as a whole, we accept that he is *"socially and culturally integrated in the UK"*. Given our findings above regarding section 117C(4)(a) and those below made in relation to section 117C(4)(c), we do not propose to deal with this issue in any detail, save to say that we have considered the appellant's circumstances as a whole including, but not limited to, the length of time he has lived in the United Kingdom the relationships he has developed during that time, his immigration status including the grant of leave in 2013 founded on Article 8 grounds and the fact that he has engaged in criminal enterprise in the UK, been deported and lived outside the UK for over two years. Despite the deportation we, nevertheless, accept that the appellant's social and integrative links to the UK have been sufficiently rebuilt since June 2019, such that the requirements of section 117C(4)(b) have been met. In particular, we find that significant weight should be attached to the appellant's role in RX's, and his other children's, lives.

62. Finally, turning to section 117C(4)(c) in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813, the Court of Appeal said:

> "14. … The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

63. Having undertaken the broad evaluative judgment required of us, we conclude that there would not be very significant obstacles to the appellant's integration into Jamaica.

64. Unlike the position in many, if not most, deportation appeals we have had the considerable assistance in our consideration of this issue of evidence as to the circumstances that prevailed in Jamaica between his deportation in 2016 and his return to the UK in June 2109. During that time the appellant resided with his mother. Whilst the appellant's mother is currently in hospital in Jamaica, there is no evidence that the appellant could not return to live in the family house if deported. Although the appellant provides evidence that he was unable to find employment when in Jamaica, he does not state that this situation arose because he was not an 'insider' in the country or unable to operate on a day to day basis in the country, but rather because he was *"not in the right frame of mind"* as a consequence of being separated from his UK-based children. We, also, take account of the fact that the appellant has a number of family members living in Jamaica, including five siblings and two children (who are both aged in their very early twenties). Additionally, the appellant gave oral evidence that he had access to a car whilst living in Jamaica and referred to showing J around the country when she visited. In short, on the evidence before us, the appellant had a private and family life of real substance in Jamaica and there is nothing in the evidence that leads us to conclude that the same position would not arise if the appellant were now to be deported.

Exception 2 – Section 117C(5)

65. It is the requirements of sections 117C(5) and 117C(6) that form the primary focus of this appeal. We turn first to consider the respective requirements of the former of these provisions.

66. We conclude that the appellant does not have *"a genuine and subsisting relationship with a qualifying partner"*. The role performed by JH in the appellant's life is at present as the mother and primary carer of his children, J and RN, and as a facilitator of the relationship between J, RN and the appellant, including allowing the appellant to reside with her, J and RN when he visits the children in London. When looked at as a whole, the appellant's relationship with JH does not display the requisite qualities required to engage this limb of the section 117C(5), and no submission to the contrary was advanced.

67. Moving on, there is no dispute that J and RN are both *"qualifying children"*, within the meaning ascribed to that term by section 117D(1) of the 2002 Act. RX is not a qualifying child for the purposes of section 117C(5).

68. We also find that the appellant has a genuine and subsisting parental relationship with both J and RN. A genuine and subsisting relationship with a child does not require direct parental care or the parent having an active role in the child's upbringing. It is a fact sensitive exercise that requires looking at the circumstances of the relationship as a whole (Secretary of State for the Home Department v AB (Jamaica) [2019] EWCA Civ 661).

69. We have already touched on the circumstances that prevailed in the appellant's relationship with J prior to his deportation in 2016. He lived in the same household as J and JH between the time of J's birth in 2008 until January 2014, at which time he was arrested from the family home. There were occasions during the aforementioned six-year period that the appellant was the sole parental carer for J, JH having been admitted to hospital twice in 2008. Both JH and J visited the appellant whilst he was in prison and the appellant returned to the family home after release in November 2015, after which time he resumed normal parental and familial activities such as taking J to school, household 'chores' and generally engaging with J. However, after the appellant approached social services in 2016 asserting erratic behaviour by JH, he was *"kicked out"* of the family home. The appellant, nevertheless, maintained his relationship with J at that time, taking her school regularly until he was detained in preparation for his deportation.

70. Upon his return to Jamaica, the appellant kept in regular contact with J using FaceTime and telephone. He also engaged with RN via FaceTime. In July and August 2018, JH took J and RN to Jamaica to visit her mother. The appellant saw J and RN on numerous occasions during the month they were there, including over weekends when J would live with the appellant, in JH's absence. The appellant and J took trips around Jamaica and J met with her half-sisters.

71. J and RN met the appellant at the airport upon his return to the UK in June 2019. Although the appellant now resides in the Midlands, he visits the children regularly in London. There is some inconsistency in the evidence as to how often such visits are made, but we accept the appellant's oral evidence that he travels to London to visit them every other Friday and stays with the children and JH until the following Monday evening, at which time he travels back to the Midlands because he has to sign with immigration officials every Tuesday, in Birmingham. When in London, the appellant takes J out alone, for example taking her swimming, to the park, to church and to J's favourite ice cream parlour. The appellant also takes J to school on the Monday morning, and engages generally with J's school and her school life. The appellant also spends time with RN, although JH will not allow him to take RN out of the house in her absence because of the need for RN to be breastfed. The appellant does the housework at JH's property and helps with the cooking and cleaning when staying there. RN recognises the appellant, calls him "daddy" and is generally close to him physically when the appellant stays. RX has visited the

family in London twice since the appellant's return, including attending RN's third birthday party. He did not do so prior to the appellant's return in June 2019.

72. Considering the nature of the appellant's relationship with J and RN as a whole, with particular focus on more recent events but set in the context of the historical relations, we accept, for the purposes of section 117C(5), that the appellant has a genuine and subsisting parental relationship with both J and RN.

73. We now turn to consider whether the effects of the appellant's deportation on either J or RN *"would be unduly harsh"*.

74. In Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 Hickinbottom LJ reminded those tasked with considering section 117C(5) that:

> "46. … in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

75. The correct approach to the consideration of "*unduly harsh*" in section 117C(5) was recently considered by the Supreme Court in KO (Nigeria), Lord Carnwath (with whom the other Justices agreed) stating that on its face section 117C(5) raises a factual issue seen from the point of view of the partner or child. At [23] he went on to say:

> "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"."

76. Holroyde LJ further explained in PG (Jamaica) that:

> "34. It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or

> offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

77. Accordingly, when determining whether the appellant's deportation would be *"unduly harsh"* on J or RN, we have not had regard to the seriousness of the offence committed by the appellant, other than that which is inherent in the distinction drawn by section 117C itself by reference to length of sentence.

78. Moving on, Mr Kovats accepts that it would be *"unduly harsh"* to require J and RN to live in Jamaica, if the appellant were to be deported. We concur. Both children are British citizens. Whilst they each have a number of paternal and maternal relatives residing in Jamaica, they have only visited the country once for approximately one month. In our view, most significantly we remind ourselves that this is not a case in which the children's parents (i.e. the appellant and JH) are in a genuine and subsisting relationship. JH is the primary carer for both J and RN, and there is no evidence that she intends to move to Jamaica. In our view, it would undoubtedly be *"unduly harsh"* for J and RN to be required move to Jamaica, leaving their primary carer mother behind in the United Kingdom.

79. We now turn to consider the disputed issue in relation to section 117C(5): whether it would be *"unduly harsh"* for either J or RN to remain in the UK without the appellant.

80. The appellant was deported to Jamaica in September 2016 and resided there until June 2019. J and RN remained in the UK with JH at that time, save the short visit they made to Jamaica, referred to above. Whilst we can draw some assistance from the circumstances that prevailed during that period we remind ourselves that time has moved on and we must make our assessment on the current factual matrix.

81. Ms Naik submits that it is in the best interests of both children for the status quo to prevail i.e. for the appellant to remain in the UK and to have physical contact with the children. She further asserts, *inter alia*, that the appellant's removal from the UK would: (i) lead to safeguarding issues for both J and RN; (ii) have a detrimental psychological impact on J, as it did when the appellant was deported in 2016; (iii) deprive J and RN of contact with RX; and, (iv) lead to difficulties in RN developing any meaningful relationship with the appellant.

82. It is trite that the children's best interests are to be treated as a primary consideration. The SSHD *"does not dispute that it would be in [J's] best interests for the appellant to remain in the UK"* and, albeit the SSHD observes that the evidence in relation to RN is weaker, she takes the same position regarding RN's best interests. We also accept that it is in the best interests of both children for the appellant

remain living in the United Kingdom, allowing him to play a physical role in their lives. We have treated the children's best interests as a primary consideration in our assessment of whether it would be *"unduly harsh"* for either child to remain in the United Kingdom without the appellant.

83. Moving on, we reject Ms Naik's submission that the appellant's removal would lead to safeguarding issues for either J or RN. In support of her contention, Ms Naik relies upon what she submits are the consequences which flow from JH's *"mental health issues"*. She draws particular attention to information found in Ms Brown's reports and elsewhere relating to JH's *"explosive and quite volatile"* and *"erratic"* behaviour which, she avers, *"can be dangerous"*. Recent examples of JH leaving the *"stove or iron on"* are drawn from the appellant's evidence.

84. Delving deeper into this submission, we accept the evidence, in the form of a letter of 24 October 2008 from a health visitor employed by Southwark NHS, that JH was twice admitted to hospital for post-natal depression in 2008, the second of those admissions being between 31 August and 9 October 2008. We also accept that JH was the subject of a Mental Health Care Plan in 2009, which required her *"mental state and medication"* to be monitored on a *"2-3 weekly"* basis. We take full account of the fact that there were five separate social care assessments undertaken by the local authority in relation to the family between 2008 and 2016. In particular, in August 2016 both J and RN (RN being at that time unborn) were made the subject of a Child Protection Plan ("the Protection Plan") by Southwark Social Services Children's Department. The process leading to the Protection Plan was instigated by a referral from the Tower Team Midwives, whose concerns arose from a combination of JH's pregnancy and the team's knowledge of JH's postpartum psychosis after the birth of J. Whilst this referral was being processed, a referral was also made by J's school which raised concerns over JH's presentation, in particular observing that she became aggressive and angry at school staff – the individual incidents being set out in the evidence before us, all of which we have taken into account. In addition, the appellant raised concerns with Child Services at around the same time and, separately, a duty social worker raised concerns about the appellant's presentation. We observe, and take into account, that at the time of his immigration detention and subsequent removal in September 2016, Southwark Safeguarding and Community Services were seeking to work with the appellant to assess his parenting capacity and to enable him to address the domestic violence issues between himself and JH.

85. The date that the aforementioned Protection Plan ceased is not disclosed on the evidence before us, save that it can be deduced from an entry of 31 October 2017 in J's social services 'Person Case Notes' that as of that date neither J nor RN remained the subject of the Protection Plan. J was, though, at that time the subject of a 'Care in Need Plan' to address her emotional and social needs in school.

86. In our view, it is of significance that J and RN have lived with JH at all times since the appellant's deportation, save for a short period when JH was in hospital giving birth to RN, at which time J was looked after by relatives. The last entry in the copy

of J's Person Case Notes that has provided to the Tribunal, is dated 8 March 2018 and states *"…advising case closure. The outstanding concern is [J's] behaviour in school and the school have a plan in place for this and the Educational Psychologist is engaged with [J]"*.

87. We draw from all of the evidence before us, including but not limited to that summarised above, that Social Services (which includes child services) have had significant involvement with the family, putting in place both Protection and Care in Need plans when it was thought necessary to do so. The absence of the imposition of any further Protection Plan or other safeguarding involvement by Social Services since October 2017, and possibly prior to this date, strongly supports a conclusion that no safeguarding concerns arose during that time. This coincides with the period the appellant was living in Jamaica, and the period after his return during which he spends only a minority of his time in physical contact with J and RN.

88. Whilst the absence of any safeguarding interventions by Social Services between October 2017 and the present day does not inexorably lead to the conclusion that there will be no safeguarding issues in the future, particularly if the appellant is removed from the UK, in our view it points strongly in that direction. If safeguarding issues do arise, and we do not accept there is evidence to support the contention that they will, then Social Services are well equipped to deal with them, as they have in the past, even though JH remains *"suspicious"* of social services. Our conclusion is supported to some extent by the appellant's own evidence on this issue, the appellant stating in his witness statement of 13 December 2019: *"I will only ever say anything if I think the kids are at risk, which I do not think they currently are"*.

89. Turning to the issue of J's behaviour, with particular focus on her behaviour in the school environment. The appellant asserts that there was a decline in J's behaviour, which coincided with his deportation in 2016. He further asserts that since his return J's behaviour has improved. He has spoken to the teachers at J's school, who indicate that she is now doing well and is a pleasure to teach. He fears that there will be a decline in her behaviour if he is deported again.

90. J's Person Case Notes disclose that there were behavioural incidents involving J in 2013 at her first primary school, an entry in the Notes dated 14 October 2013 stating *"…there have been a large number of incidents involving [J] this term, where other children have been hurt or upset."* Broadly these incidents involved J pushing or kicking other children, including children much younger than herself.

91. J transferred to a second primary school on 20 June 2016, this not being as a consequence of behavioural incidents involving J. A document of 9 November 2016, authored by Lambeth Educational Psychology Service, identifies further significant behavioural incidents at school involving J kicking, hitting and calling other children names. The document also expresses concern over J's emotional well-being. A record of a Southwark Council Strategy meeting, dated 13 November 2016, states regarding J:

> "[J] has good attendance and appears to enjoy school. She is also well presented and it appears on the basis of the school's observations that [J's] mother is able to meet her basic care needs …School have no significant concerns regarding J's welfare when she is with them…she has an open relationship with staff and is able to approach them…School observes that J appears to be a resilient child. … School have witnessed altercations between the parents … It is clearly of concern that J is likely to be exposed to ongoing disputes at home. … [J] has positive interactions with her peers and teachers as a whole although there have been incidents of her behaving in a "spiteful" way or hitting other children."

92. As indicated above, a Protection Plan was in place at this time and the school developed strategies to assist J, including drama therapy. The referral form for drama therapy, identifies the *"Reason for Referral"* as follows: *"J found it difficult to settle; it has been suggested that J was bullied at her previous school and that may go some way towards explaining her actions here"*.

93. Although strategies were put in place by the second primary school, J's Person Case Notes describe behavioural incidents involving J continuing to occur, and a recommendation was made in June 2017 that an Educational Psychologist be put in place if the strategies then being deployed did not achieve the desired changes. The most recent Person Case Note before us, authored in March 2018, identifies that there were still concerns about J's behaviour at that time and that an Educational Psychologist had been engaged. There is no additional information relating to J's behaviour at school in the school year commencing September 2018 and J progressed into secondary education in September 2019. A letter from the college J attends, dated 19 November 2019, refers to J's successful transition into secondary education. There is no reference in the letter or elsewhere to any behavioural incidents involving J in her secondary education.

94. Having broadly recanted the circumstances referred to above, the Independent Social Worker, Ms Brown observes that J's behaviour deteriorated quite rapidly in the absence of her father's management, that he is a steadying and vital physical presence in J's life, that the appellant's physical presence in his children's lives allows him to be a direct observer into their ongoing welfare and that he has shown himself willing to approach the local authority, unlike JH who remains suspicious. She continues by stating that much of the emotional and practical support provided to J has been undertaken by the appellant rather than JH, and the appellant acts as the protector. It is said that the appellant's removal would have the same detrimental effect on J as occurred when the appellant was previously removed, which manifested itself at school in aggressive and confrontational behaviour. Ms Brown concludes that the appellant's removal would impact upon J's emotional and psychological wellbeing, and possibly her physical wellbeing if she began to self-harm or self-neglect. J would be devastated and her education and future career prospects may also be impacted upon by the appellant's removal.

95. Bringing all of this together, in light of the Supreme Court's decision in KO (Nigeria), when considering section 117C(5) we must assess whether the degree of harshness likely to be suffered by J in consequence of her father's deportation goes

beyond that faced by any child faced with deportation of a parent. In the instant matter, in our conclusion when the evidence is looked at as a whole it comes nowhere near surpassing this threshold.

96. The documents before us suggest that rather than it being the appellant's deportation that was solely responsible for J's behavioural issues, they are rooted in a much more complex web of intertwining events. The behavioural issues previously occurred in 2013 and resurfaced at a time when J had recently moved to a new primary school, there were significant disputes between her parents in the familial home and the appellant's deportation was proposed. Despite this accumulation of adverse circumstances, there is no evidence that J self-harmed or that there was self-neglect, and we do not accept that the evidence before us supports a contention that the appellant's deportation would lead to such occurrences in the future.

97. Whilst we accept that the appellant's deportation is likely to impact on J's emotional and psychological wellbeing and that this may lead to a decline her behaviour such as occurred in 2013, 2016 and 2017, in our view all children deprived of a parent's company during their formative years will find that experience traumatic and will be impacted upon emotionally and psychologically. If behavioural incidents involving J resurface at her secondary school then we have no doubt that the school, with the assistance of the local authority, will take the necessary steps to address this as they have done in the past.

98. In coming to our conclusion that the appellant's deportation would not be *"unduly harsh"* on J, we have also taken full account of the likelihood that J will be deprived of physical contact with her half-brother RX. We accept that there was no contact between them during the period that the appellant was living in Jamaica, and that it is the appellant who has acted as a facilitator for such contact since his return. We have also borne in mind, however, that even since the appellant's return there has only been minimal contact.

99. As for RN, he is just three years old. As we have found above, we do not accept that it is likely that there will be any safeguarding issues in the absence of the appellant. We do, however, accept Ms Brown's evidence that because RN's relationship with his father will be conducted exclusively by electronic means, he will have particular difficulty further developing a relationship with his father. Whilst undoubtedly it would be preferable for all children to be brought up by both parents in a close physical relationship, the matters identified above as the consequences for RN of the appellant's deportation are those that are likely to arise in every case where a young child is deprived of a parent. They are not consequences characterised by a degree of harshness over and beyond those any child would experience when faced with the deportation of a parent and they are not consequences which in our view are *"unduly harsh"*.

100. In summary, having considered the evidence as a whole we conclude that the requirements of section 117C(5) are not met.

Section 117C(6)

101. We finally proceed to consider section 117C(6), and examine whether there are *"very compelling circumstances"* over and above those described in Exceptions 1 and 2. If, in applying section 117C(6), the conclusion is reached that the public interest requires deportation, the Tribunal is bound in law to give effect to this and there is no further need for a proportionality assessment.

102. The public interest is movable and in certain cases must be approached flexibly for the reasons outlined in Akinyemi v Secretary of State for the Home Department [2019] EWCA Civ 2098 ('Akinyemi No. 2'), at [39] to [52]. A full assessment of the public interest must be balanced against an assessment of the Article 8 factors said, either on their own or cumulatively, to constitute *"very compelling circumstances"* for the purposes of section 117C(6).

103. Although section 117C(6) sets an "*extremely demanding*" test, it nonetheless requires "*a wide-ranging exercise*", so as to ensure that Part 5A produces a result compatible with Article 8 (NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662). The wide-ranging exercise required means that a foreign offender is permitted to rely on matters relevant to one or both Exceptions, as well as the ability to meet these in conjunction with other factors collectively (NA (Pakistan) at [32]). Although the Exceptions are self-contained and exclude further consideration of the public interest (see KO (Nigeria)), in order to determine whether the public interest is defeated by *"very compelling circumstances"*, a case-specific analysis of the public interest is necessary (MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 00122 at [17] - [20] and [28] – [30]).

104. In determining the weight to be attached to the public interest we have had regard to section 117C(2) i.e. the more serious the offence the greater the public interest in deportation. The appellant's sentence of forty months imprisonment, after a guilty plea for which credit was given by the sentencing judge, is towards the higher end of the range covered by section 117C(3). We give this due weight.

105. We accept that the appellant feels remorse for his actions and that whilst in prison he undertook courses in IT, business, English and mathematics. He has also engaged fully with the Probation Service. In his report of 20 June 2018, Dr Basu observed that the appellant was not deemed to present a serious enough risk to warrant either local multiagency risk management or a multiagency public protection panel. Dr Basu's own assessment of the risk of the appellant reoffending is that the risk is low. The risk that he could cause serious harm, should he reoffend, would, it is said, depend on the offence itself and the circumstances pertinent to the appellant. His financial circumstances were most associated with his risk of causing serious harm by selling drugs and his relationship circumstances were most related to his risk of causing serious harm by abuse, in the form of conduct towards a partner or children. Ms Haque, a qualified probation officer, also addressed the issue of the risk of the appellant reoffending and causing serious harm, in her report of the 21 June 2018. She concluded that the appellant posed a

low to medium risk of reoffending in a similar manner in the future, i.e. selling drugs within the community. Overall, he posed a low risk of reoffending in general, consistent with the OASys Assessment conducted in November 2016. She found that the appellant posed a low to medium risk of serious harm to the public, in respect of drug related matters, and a low to medium risk of harm to future intimate partners.

106. Over 18 months has passed since the above reports were prepared and, in that time, which includes a period of over 6 months when the appellant has lived in the UK, the appellant has not, on the evidence before us, been involved in any criminal activity. Looking at the evidence as a whole, we are prepared to accept that he has rehabilitated and now poses only a low risk of offending. Nevertheless, this a matter of only marginal weight in our assessment, there being no justification for departing from the ordinary position identified in SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256).

107. In such circumstances, we conclude that the public interest in deporting the appellant remains strong, despite his rehabilitation and the low risk of him reoffending.

108. When considering factors bearing on the appellant's side of the proportionality balance, we have had regard to all those matters referred to in our consideration of sections 117C(4) and 117C(5), but also remind ourselves that following Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, those persons with anything less than Indefinite Leave to Remain, have a "precarious" immigration status for the purposes of section 117B(5). In the instant case the appellant has not had Indefinite Leave to Remain in the UK at any point in time. There are no *"particularly strong features"* to his private life and, accordingly, we attach little weight such private life.

109. We do, however, accord significant weight to the appellant's relationships with J and RN and to the children's best interests. We take account of the adverse consequences the appellant's deportation would have on J and RN, which we have discussed above, and accept that the opportunities for physical contact between the children and the appellant will only occur if JH visits Jamaica and takes the children with her. Such visits, we accept, are likely to be non-existent or at best rare.

110. Although RX is an adult, we accept that he shares a family life with the appellant, and we attach significant weight to this relationship. RX and his best friend were attacked in January 2016. RX was stabbed and spent several days in hospital. The appellant visited RX in hospital regularly and every day after his release from hospital. RX was placed in a witness protection programme towards the end of February 2016. In August 2016, RX's friend, the other victim in the attack, was stabbed and killed in South London. After the appellant's deportation he and RX maintained contact by telephone, Messenger and Facebook. When RX's involvement in the witness protection program ended, he moved into independent accommodation, where he struggled. He subsequently moved to live with his

maternal grandmother in April 2019. He has also obtained employment, working nights. Since the appellant's return to the United Kingdom in June 2019 he has shared accommodation with RX and RX's maternal grandmother. RX no longer has a significant relationship with his mother.

111. In her report of December 2019, Ms Brown opines that as a consequence of his recent traumatic experiences, RX has reverted to a *"childlike state… with flawed decision making and uncertainty"*, that he *"requires his father's reassurance and physical protection"* and that he is a *"very vulnerable adult who is unlikely to stabilise himself without continuing family support"*. We accept that RX remains vulnerable and that the appellant is now providing him with support. We also accept, and take into account, that the appellant's deportation would have an adverse impact on RX's emotional wellbeing. RX would, nevertheless, remain living with his maternal grandmother and to that extent he would continue to receive at least some familial support. There is also no reason to believe that the appellant and RX would not maintain regular contact by telephone and social media if the appellant were living in Jamaica, as they previously did, although we accept that this is no substitute for the appellant's physical presence in the UK.

112. Drawing all of this together, having considered all factors weighing in the appellant's side of the balance cumulatively we, nevertheless, conclude that the weight of the public interest in this particular case requires deportation because it cannot be said that there are *"very compelling circumstances"* over and above those described in Exceptions 1 and 2.

DECISION

The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

We re-make the decision in the appeal by dismissing it.

Signed:
M O'Connor
Upper Tribunal Judge O'Connor
Date: 24 February 2020