Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14192/2018**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On the 20 October 2021	**On the 17 November 2021**

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE KEBEDE

Between

ZK
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person.
For the Respondent: Mr Tan, a Senior Home Office Presenting Office.

DECISION AND REASONS

1. This matter comes back before the Upper Tribunal to enable it to substitute a decision to either allow or dismiss the appeal following its remittal by the Court of Appeal.

Background

2. The facts do not appear to be in dispute. They show the appellant was born in 1994 in Pakistan, the country of which he remains a citizen. He arrived in the United Kingdom in 2001 with his mother when he was 7 years of age. The appellant was granted Indefinite Leave to Remain (ILR) in 2008 in line with his mother's grant under the legacy programme.
3. The appellant married MI, a British citizen in 2013. She was born in Pakistan in 1994 and came to the UK with her father and siblings in 2009 when she was about 15 years of age. The appellant and MI met at college and were friends before getting married.
4. The appellant and MI have three daughters who are British citizens, ZO born on the 28 August 2014, ZI born on the 8 October 2016 and a baby girl born on 12 September 2021.
5. The appellant and his family live with his extended family which includes the appellant's mother, brother, sister and nephew in Manchester. Whilst it was previously accepted by the Secretary of State that he is a loving father and husband who has a genuine subsisting relationship with MI and their children, the appellant has been put to proof of this fact by the Secretary of State in her skeleton argument as noted below.
6. When Mr Tan was asked about this, he accepted there was no firm evidence of a change in the family situation, and we proceeded on the basis that the previously accepted position is that applicable at the date of the hearing before us.
7. The appellant is subject to an order for his deportation from the United Kingdom following his conviction and sentence to 12 months imprisonment having pleaded guilty to a charge of fraud by abuse of position and breach of a conditional discharge. The appellant was released in November 2018, after serving half of his sentence, and the evidence from the Probation Service indicates he presents a low risk of reoffending.
8. The Sentencing Judge in his sentencing remarks, illustrating the seriousness of the offence, stated:

> *"… MK you were born in 1994 and are now 23 years of age, 24 later this month. I have to sentence you for an offence of fraud by abuse of position from when you are a carer for Mr XX. You started working for him on the 11 September 2017 and you were providing 9 hours a week of assistance to him.*
>
> *As part of your work you helped with money, it is clear, and I have seen a capacity report in respect of him, that he is not able to deal with his own money at all, so part of your job as his carer was to take him to the bank on a Tuesday to help him take his weekly money out. He was utterly dependent on you as his carer to help him with this.*
>
> *When you were not taking him to the bank to deal with his money, his bank card was supposed to stay in the safe. In fact, it would seem you kept it with you and, certainly by 23 September 2017, so only 12 days after you began work with him, you stole the first amount of money from him using his bank card.*
>
> *By 5 February 2018 you had emptied his bank account, and that was a bank account that in August 2017, shortly before you started working with him, had contained about £14,000. Over a four-month period you stole from him and you stopped, really, when there was no money left.*

You except that you stole £13,590. There is a basis of plea on the digital case system where you accept stealing a lower figure, but I have been told that you have abandoned that basis of plea and I sentence you, therefore, on the basis that you stole £13,590 from Mr XX.

He, I have heard, is a very vulnerable individual indeed, 49 years of age. He has cerebral palsy, a learning difficulty, he is deaf, and he uses a wheelchair. He communicates via signing and a storyboard and, as I have already said, it is plain, he is not able to deal with his own money at all.

When his bank account was looked at, which it was once the money had gone, it was clear that the bank card had been used in shops, restaurants and cash withdrawals that were nothing to do with Mr XX.

When the police searched your house, I am told they found new designer clothes, a designer watch, receipts for gaming and other luxuries. It is clear from the contents of the pre–sentencing report that the money had been spent to purchase luxuries. At one point the card had been used to spend just over £900 in an Indian restaurant to buy dinner for 40 or 50 people.

Mr XX does not really comprehend what has happened, although what he knows has made him sad. His social worker has made a victim impact statement saying that this could not have happened to a more vulnerable individual who is trying very hardest to live independently. He could not be more dependent upon his carers.

The chronology to this offence is significant because in January 2017 you were working in an O2 shop and during the course of that employment you stole £20 in cash from nine different customers. You were arrested and interviewed in February 2017. In October 2017, 12 October 2017, you were given a conditional discharge in respect of that matter and for the majority of this offending you were subject to a conditional discharge.

You told your employer, who was employing you as a carer, that that conviction was as a result of a mistake that you had made, and they allowed you to continue working for them. That clearly is not right, and I have seen the details in relation to that offending and your admissions that you had taken £20 in cash, as I say, from nine different customers who had come into the shop and who thought they were paying towards an upgrade on their telephone.

In terms of mitigation, I have read with care a number of glowing character references, including one from the Iman at your mosque, and others from family members. You are nearly 24 years of age; you are married and you have two young children.

You clearly do a lot of good in the community. You are intelligent. You have the benefit of a good education and a loving family. That makes it all the more puzzling and all the sadder that you would behave in the way that you have and find yourself in the position that you do. I do take account, of course, of the needs of your family and the impact of any sentence upon them, and I have read with care the letter from your wife, and a letter from your brother.

You are said to be remorseful; I hope that is correct. You have indicated a desire to pay £700 by way of compensation and you put the money to one side for that purpose and that is to your credit. You are said to have been overwhelmed at the access to such large amounts of money and, in effect, unable to help yourself. You told yourself at first that you would repay the money.

If that is right, it must have become quickly apparent to you that you are not going to be able to repay the money, and you then continue to steal for a period of, as I say, just over four months…

Procedural issues

9. The appellant has previously had the benefit of legal representation but appeared before us as a self-representing litigant. There is within the file copies

of a request made by the appellant to adjourn this hearing to enable him to obtain legal representation, all of which have been refused.

10. The appellant renewed the application before us claiming, as before, that he needed time to instruct a representative. The appellant tried to obtain legal aid about eight months ago but had been advised it was not available to him. He stated that he would need about £4000 to be able to pay a lawyer although he accepted he did not have such funds himself. His previous adjournment request indicated that he would need permission to work to enable him to earn sufficient funds to pay his legal representative. This clearly would create an unacceptable open-ended adjournment, as it is not known whether the appellant could secure employment and, if he did, how long it would take him to earn the required funds.

11. The application is now predicated on the basis that if he can get a legal representative to accept payment by instalments of the £4,000 he may be able to obtain help with payment of the same from his brother. It was accepted by the appellant his brother could not afford to pay the £4000 as a lump sum and there was nothing before us to indicate any representative would accept instructions on the basis they will be paid for the work they were required to undertake at some point in the future, especially if the solicitor engaged was to instruct a barrister to represent the appellant at which point the full fee due to the barrister will become the responsibility of the solicitor. In addition, there was nothing before us from the appellant's brother to indicate he is willing to assist the appellant in this or any other manner.

12. The appellant referred to a desire to obtain further evidence making specific reference to obtaining a report from an NHS psychologist in relation to his own presentation. We note there is a letter to this effect, following an earlier directions hearing before the Upper Tribunal indicating the report from an NHS psychologist will be available within a fairly limited stated period of time. What is not explained is why, when the appellant stated his representatives only withdrew their assistance to him two weeks ago, considerably after the time when that evidence was said to be available, such evidence was not filed before the Upper Tribunal.

13. There was some indication from the appellant that an NHS psychologist had been approached but that they had advised that the scope of the work they were willing to undertake was based upon assessment and treatment rather than writing a medico-legal report to assist him in these proceedings. Even if that was the case, there has been ample time to obtain all the evidence the appellant was seeking to rely upon before his representatives withdrew.

14. We gave the application careful consideration but refused the adjournment request. The appellant failed to establish that the interests of justice require such an adjournment being granted. It was still the case that the appellant was effectively seeking an adjournment on the basis of something that might happen in the future if certain people agreed to his proposal, when there was no evidence that anybody would. There is no evidence that his brother was willing to assist the appellant or could afford the £4000. There was clearly no evidence that the appellant will be able to afford to instruct and pay for legal

representation himself. There was no evidence of any solicitor or barrister being willing to take the appellant's case on a pro-bono basis.

15. Many people appear before the Courts and Tribunals without the benefit of legal representation. The cost of employing solicitors and barristers is expensive and cuts to the availability of legal aid are well documented in the national press. It was not established on the facts that this is a case in which the appellant needs to be legally represented. We note, in particular, three skeleton arguments having been filed by three different but experienced immigration practitioner members of the Bar setting out the appellant's claim as to why he should not be deported from the United Kingdom. They set out a common thread running through the appellant's case which we have considered in detail.
16. Considering all matters in the round, including the overriding objectives and the fundamental issue of the fairness of the proceedings, we concluded that it was not appropriate to adjourn the proceedings especially as we are likely to be in exactly the same position we are in today if the case is returned to the list without causing unacceptable delay.
17. This issue was reviewed again following the conclusion of the proceedings and we are happy that no procedural irregularity sufficient to amount to material error of law arises in relation to this matter. We are also satisfied as a result of taking great care to ensure the appellant understood the issues in the appeal, the procedure, and had sufficient time to enable him to say to the Upper Tribunal what he wanted us to hear from his side, that he had a fair hearing of his appeal.

The law

18. The correct approach to the deportation of foreign criminals is that set out in Part 5A of the Nationality Asylum and Immigration Act 2002 and more particularly by section 117C.
19. The statutory provisions are reflected in Part 13 of the Immigration Rules. The effect of section 117C and the equivalent Rules has now been 'officially sanctioned' in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, and HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176.
20. The legislative framework in relation to the power to deport is to be found in the UK Borders Act 2007. Section 32 provides:

> **32 Automatic deportation**
>
> (1) In this section "foreign criminal" means a person—
>
> (a) who is not a British citizen or an Irish citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that—

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

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

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies.

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

21. The expression 'foreign criminal' is to be construed by reference to the definition of that expression in section 117D of the Nationality, Immigration and Asylum Act 2002, which defines a "foreign criminal" as a person—

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

22. The appellant satisfies the definition of a 'foreign criminal'.

23. Section 32(5) of the UK Borders Act 2007 sets out that the Secretary of State must make a deportation order in respect of a foreign criminal where:

the criminal was convicted in the United Kingdom and sentenced to a period of imprisonment, and
the period of imprisonment is 12 months or more, and
the sentence is a single sentence for a single conviction, it must not be an aggregate sentence or consecutive sentences, and

the criminal was serving that sentence on or after 1 August 2008, and
the criminal had not been served with a notice of decision to deport before 1 August 2008, and
none of the exceptions set out in section 33 of the 2007 Act apply.

24. The appellant seeks to rely upon an exception set out in section 33 of the UK Borders Act 2007 claiming his deportation will be contrary to Article 8 ECHR. Where an exception applies then automatic deportation cannot continue although that does not necessarily preclude deportation action under the Immigration Act 1971, although that is not an issue before us today.

25. The Immigration Rules relating to deportation read:

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

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

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

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

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

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

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

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

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

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

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

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

26. The above provisions are reflected in the Nationality, Immigration and Asylum Act 2002, section 117 and specifically for a deportation case section 117C.

Section 117B

Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.
(2) It is in the public interest, and in particular in the interests of the economic well being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
  (a) are less of a burden on taxpayers, and
  (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  (a) are not a burden on taxpayers, and
  (b) are better able to integrate into society.

(4) Little weight should be given to—
  (a) a private life, or
  (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. …

Section 117CArticle 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
  (a) C has been lawfully resident in the United Kingdom for most of C's life,
  (b) C is socially and culturally integrated in the United Kingdom, and
  (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

The evidence

27. We record at this stage that only the appellant attended the hearing. Witness statements have been filed by the appellant, his wife MI, his brother in the UK, and his mother FN. The appellant was asked why none of his family members had attended today, especially as an interpreter had been booked to assist FN, but his explanation was not satisfactory. Whilst what appeared to be the absence of support from other family members who assisted the appellant in the past may give rise to the question of whether he did have ongoing support from his family now, the appellant was advised that we would take the written evidence into account from all sources as his evidence in chief to ensure that we are able to consider his case at its highest.

28. In his witness statement dated 18 August 2018 the appellant confirmed his immigration history and family composition within the United Kingdom as it was at that date before making the following observations:

> 9. I accept that I have made mistakes by committing these offences for which I am repenting. However, I believe Home Office is not trying to deport for the offences that I have committed but on the basis of the sentence that I have been given. If the court has sentenced me a day less the Home Office would have not even considered me for deportation and I would not be in this predicament.
>
> 10. I could have been released on licence on 9 August 2018. I would have been with my family after 3 months. It was because of the Secretary of State's action that I was not considered for early release. Now, I will be released on 9 November 2018. The total time that I would serve is six months (plus one day when I was arrested by police and then released on bail).

11. I believe that even OASys report has not been prepared in my case as the UMO officer told me that I would be released in six months therefore there is no need to prepare the report.

12. My behaviour in prison has been excellent. I have passed English Level 1 and now taking classes for Level 2.

13. I am extremely distressed by my current situation and possibility of being separated from my family. I cannot even imagine living without my family. My deportation will be a punishment for my family as well.

14. I am unable to explain my mental situation in words, the current circumstances are not only affecting me, but my entire family, all of whom played no role in my actions. It is unbearable for me to see that my whole family are suffering because of my mistakes.

15. The Secretary of State is accepted that I meet the requirements of having a relationship with a British child and British partner; the relationship was formed at time when I was in the UK lawfully, and our immigration status was not precarious, except the unduly harsh requirements.

16. The Secretary of State rejected my Human Rights claim against deportation on the basis that it would not be unduly harsh for my children to live in the Pakistan; and it would not be unduly harsh my children to remain in the UK without me. Similarly, the Secretary of State concluded that there are no insurmountable obstacles preventing my wife from returning to Pakistan with me; and it isn't unduly harsh for her to live in the UK without me. The Secretary of State also decided that there would not be any significant obstacles to my integration into Pakistani society.

17. The Secretary of State has failed to take into account our above-mentioned and following circumstances while considering our Human Rights Claim:

    (i) I was considered as low risk to the community.
    (ii) The Secretary of State has failed to consider my offence and just because I was sentenced to one year, he has issued the Deportation order. If my sentence was just one day, less than I would not have been considered for deportation.
    (iii) The Secretary of State has failed to take into account the best interests of my children.
    (iv) I came to the UK at the age of 7 and have lived most of my life in the UK. I have socially and culturally integrated in the UK.
    (v) The Secretary of State has failed to take my family life into account as a whole, i.e. my relationship with my wife, children, mother, brother, sister and nephew. All these family members are not in a position to leave the UK with me.
    (vi) I have been working in the UK and established private life with my work colleagues.
    (vii) My wife only works part-time. I was the primary source for maintaining the family before my sentence. My wife is already suffering and would be unable to cope with both employment and childcare without my help.
    (viii) My eldest daughter suffers with a medical condition in her eye , which is resulting "a convergent squint". My elder daughter has been diagnosed with (i) unilateral right high myopia; (ii) right amblyopia and (iii) intermittent right exotropia. She is having hospital appointments regularly (every 6 – 8 weeks). She is also starting her education in September 2018.
    (ix) Both my daughters of problems with their ears, and are being treated at hospital. It would be extremely harsh for me and my family to live in Pakistan with no immediate family to support us in Pakistan. All our immediate family members are in the UK.

(x) I came to the UK at a very young age, and have only visited Pakistan once since my arrival in the UK. It is almost impossible for me to adjust to life in Pakistan due to the different way of living.
(xi) My wife and children have a very close relationship with me and it would be unduly harsh to separate us.
(xii) My wife and children have maintained regular contact with me while I have been in prison by telephone (daily) and by weekly visits.
(xiii) I sincerely regret my actions and I am remorseful for the offences I have committed. I am now a reformed person.
(xiv) I have learned my lessons and I am aware that if I reoffend then I would most likely be deported from the UK.
(xv) I was assessed as low risk for serious harm.

18. I would request the Tribunal to consider this matter sympathetically and allow my appeal.

29. In his supplementary witness statement dated the 29 March 2019 the appellant writes:

1. I am living with my family after my release from prison on 7 November 2018.
2. I am enjoying my family life with my whole family and really appreciate the opportunity that has been provided to us in this country. I fully regret my actions where they are living in fear of my deportation and prospects of living apart.
3. I have been brought up by my mother and I never had father in my life and do not wish my daughter to grow up without me in their life and willing to make any sacrifice for them.
4. I confirm that English is my first language and I can just about speak Urdu language which is national language of Pakistan. I came at the age of seven and only visited Pakistan once.
5. I have always communicated in English, a language that I speak fluently, read and write. My children are being raised with same approach, as their mother tongue is English.
6. I have no family or friends in that foreign country. As my only family are in Manchester.
7. As I would struggle to find employment in that country with my limited language where unemployment is very high. I have experience of working here, in Manchester. I am able to get myself in employment here, like all my family and friends have.
8. I'm raised in the British culture with British values. The same values & the same culture as my daughters being British citizens deserve to be raised in. I cannot possibly fit in another culture, as that would mean losing my identity as a human being.
9. My family cannot be expected to leave home and migrate to a different country. As Manchester is their home and place of comfort and being with loved ones.
10. My deportation to a foreign country will mean living on streets, having no shelter, no food or a stable future.
11. I cannot be separated from my wife and kids as they depend on me for everything. I cannot possibly provide for them in another country or be there for them in the time of need. I fear for my daughters and wife's security as I will not be able to offer them that in another country.
12. My wife was not able to cope without me she suffered from psychological issues. She was not able to cope with her parenting responsibilities for our daughters. There is a letter in our documentary evidence from my daughters school confirming my daughter ZO was admitted as a pupil to start in September 2018 but she was deferred to start for one term. It is clear evidence that my family was not able to cope with day-to-day life without me and my deportation would be unduly harsh on them.
13. I would request the Tribunal to consider this matter sympathetically and allow me to remain with my family at our home in Manchester.

30. The appellant's wife's statement dated 20 August 2018 sets out her family history having been born and raised in Pakistan but coming to the United

Kingdom in 2009 and the composition of the family within the UK. The appellant's wife claims she first became aware of the appellant's offences when he was arrested from the family home and that the entire family were shocked at the news that the appellant had committed an offence, claiming that he had never been the type of person to do anything that would cause his family harm. The appellant's wife states that she had been working part-time as a customer assistant, leaving the children with the appellant while she was at work and that since the appellant's imprisonment the children needed a lot of her attention with not seeing their father around, due to which she was unable to go to work regularly which it is claimed was causing her a lot of financial issues.

31. The appellant's wife confirms that ZO suffers from very weak eyesight and hearing problems and has regular hospital appointments and that her father's imprisonment has had a significant impact on the behaviour, including feeling emotionally upset about having to attend doctors appointments without the appellant being around.

32. At [10] of the witness statement the appellant's wife states: *"If [ZK] gets deported. I would have to go to Pakistan with him as I always want to live as a family and I always want the father of my children to be living with them. Going to Pakistan will cause us a lot of problems financially, emotionally and psychologically. It is almost impossible for us to live in Pakistan as my dad's family and [ZK's] family all live here. We don't have anything left in Pakistan. We don't have a house in Pakistan and it will be impossible to find a job there. I will not have any family support neither will [ZK] or my kids and we are really not financially stable to move to Pakistan. Even the thought of living in Pakistan with my children is affecting me psychologically".*

33. The appellant's wife speaks of being referred for psychological therapy by her GP and we refer to the evidence concerning health issues further below.

34. The appellant's wife states that they have always lived as one family unit with ZK's mother, brother, sister and nephew and that it will be harsh on them and his family to live separately.

35. The appellant's wife confirms she has been visiting her husband weekly in prison together with her daughters and nephew, and that they have corresponded.

36. At [17] of her witness statement the appellant's wife states: *"my kids are born in this country and I want them to live here and educate here. I don't want to live as a single parent. I want my daughters to have their father and mother living with them together. My older daughter starts her school in September and I have been preparing her for that. I am very disappointed in [ZK] and I personally understand the gravity of this offence. However, knowing how regretful he is with his actions and seeing how withdrawn he is from everything, I assure you that he will not reoffend and will continue to be a valuable member of society."*

37. The sentiments expressed above are reflected in the statements of the appellant's brother, in both his original and supplementary statement, and the appellant's mother which we have fully taken into account.

38. In relation to the medical evidence; there are copy letters from the NHS Manchester University NHS Foundation Trust in the bundle confirming appointments for ZO at the eye clinic and a letter dated 23 July 2018, from Self

Help a part of the NHS Greater Manchester Mental Health NHS Foundation Trust addressed to the appellant's wife, confirming their receipt of a referral from her GP to access the psychological therapy service and asking her to contact them to confirm she wishes to access the service.

39. We have also read and taken into account letters from the school, hospitals, and a letter from the Lady Barn Group Practice, the appellant's wife's GP surgery, dated 1 February 2019 which is in the following terms:

"[MI] has contacted the GP surgery recently as she would like a letter from the doctor to explain some of the issues going on with her health recently. I understand that her husband is currently going through a court case and there is a possibility of the Home Office deporting him and [MI] would therefore like some written evidence from the doctor.

I can confirm that I first saw [MI] on 13 December 2018. At that time, she presented with a range of issues relating to stress, insomnia and mental well-being and prior to seeing me, she saw one of the other GPs at the surgery. She has also attended for self-help counselling.

She has required some time off work due to the stress and problems with sleeping and she has also taken some medication to help aid her sleeping pattern.

More recently, [MI] has found out that she is also pregnant and has been referred to St Mary's Hospital for ongoing pregnancy care.

An awful lot has happened recently and it has, understandably, had an impact on [MI's] well-being. She feels quite stressed. She has had difficulty sleeping and it has had an impact on her mood and her mental health.

[MI] is continuing to see Self Help counselling, and she can see the GP for ongoing support as and when needed.

40. In her supplementary statement dated 6 February 2019 MI speaks of the impact of the appellant's imprisonment and her situation generally, where she wrote:

5. Since [ZK's] release my children have been very happy. I am feeling good in myself by having [ZK] around as he helps me a lot with the children and everything else. I have been able to go back to work as normal and I am having less financial difficulties. I can balance my day-to-day jobs properly with having [ZK] around. I am very happy and I cannot bear the thought of not having my husband around.

6. The six months I have spent without my husband have been very difficult. Not only for me but my children found it very difficult to cope without him. We knew that [ZK] went for six months and would be with us soon this helped us to go through this difficult time. But his deportation can mean that we might have to live apart for ever.

7. My older daughter started her school in January 2019 and she is very settled in her school. We have established family life here in the UK that we can't have in Pakistan with [ZK].

8. I am pregnant with our third baby. [ZK] has supported me immensely during my first two pregnancies and he is supporting me a lot with this pregnancy. It will be extremely difficult for me to cope with three children without having [ZK] around.

9. I was seeking help from "Self Help" where I was seeing a counsellor on weekly basis to help me cope with stress whilst [ZK] was in prison. Since [ZK] came out I felt like I did not have the need to seek help from a counsellor so I stopped seeing the counsellor. However, I am once again very stressed because of [ZK's] ongoing deportation case due to which I have been seeing a doctor on a regular basis. A copy of my GPs letter confirming my physical and mental health issues is exhibit MI 6. I am very stressed thinking how I will deal with [ZK] deportation and how will I look after my children.

10. I request the Tribunal to consider this matter sympathetically as it involves the life of three British children and whole family.

Submissions

41. The appellant relied upon his earlier skeleton argument dated 17 August 2020 in which his previous representative invited the Upper Tribunal to allow the appeal for the following reasons: (dates referred to in the skeleton argument are based upon its date of publication although we have considered the relevant data as it would be at the date of the hearing before us)

Submission (1) - Public interest under section 117 C (1) and (2)

12. The Appellant relies on the Court of Appeal decision in *Akinyemi v Secretary of State for the Home Department* [2019] EWCA Civ 2098 (paragraph 44 – 51) in support of the proposition that the public interest has *"a flexible or movable"* quality. To this end, reliance is placed on the following factors:

12.1. The Appellant has been in the United Kingdom since 9 October 2001, he was just 7 years old when he came to the United Kingdom and has spent the best part of 19 years in this country. Lord Reed confirmed at paragraph 26 of *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 that it *"makes a difference"* whether a foreign criminal came to the United Kingdom as a child or an adult;

12.2. As to the seriousness of the crime, without the Appellant wishing to downplay the situation, this claim did not involve a sexual element, physical harm, narcotics or features of a similar level;

12.3. The Appellant has been assessed as being a low risk of reoffending and a low risk of harm;

12.4. He was imprisoned in a category C prison.

12.5. Subsequent to his arrest and at all other material times, his behaviour has been beyond reproach.

13. The Appellant submits that the above factors critically dilute the public interest in his deportation. The Tribunal is therefore invited to follow Sir Ernest Ryder's thinking in *Akinyemi* (paragraph 50) and attach a far lower weight to the public interest in the Appellant's determination.

Submission (2) – Exception 1, section 117 C (4)

14. It is undisputed that the Appellant has been in the United Kingdom lawfully for most of his life and that he is culturally integrated into the United Kingdom. In light of these realistic concessions, the sole issue is whether there will be very significant obstacles to the appellant's integration to Pakistan on deportation. The Appellant contends that such obstacles do indeed exist, and relies on the following:

    14.1. His absence from Pakistan since 9 October 2001, when he and his family arrived in the United Kingdom (but for a short trip to Pakistan for their honeymoon in 2013);

    14.2. He speaks Urdu but cannot read and write it;

    14.3. His entire nuclear family unit is in the United Kingdom;

    14.4. Being absent from his family will impede his integration. A conclusion he was able to survive six months in prison and, as such, would be able to survive in Pakistan without his family would, with respect, be fallacious: (1) Not only is 6 months, a far cry from long term/permanent deportation but (2), his family regularly visited him in prison in a fashion and to an extent that could not be maintained across borders.

Submission (3) - Exception 2 in relation to the Appellant's children, section 117 C (5)

15. The Appellant submits that his deportation will be unduly harsh on the children, all of who are British. Reliance is placed on the following factors:

    15.1. Each of the children were born in the United Kingdom;

    15.2. [ZO] his oldest daughter, will turn 6 within 7 days of drafting the skeleton and before the Tribunal hears this appeal.

    15.3. Much time has passed since the now overturned determination of UTJ Plimmer and all that is likely to have occurred from 3 April 2019, is that the Appellant's children's ties with this country and him will have further strengthened and solidified;

15.4. [ZO] suffered from anxiety attributed to the Appellant's absence from her life when he was imprisoned and this delayed the start of her education;

15.5. [ZO] is in education in the United Kingdom;

15.6. UTJ Plimmer previously found that the Appellant's deportation would be "*difficult and* ***shocking***" (emphasis added) for the Appellant's daughter. "Shocking" must, semantically and substantively, we considered as being unduly harsh in the context of the child facing separation from their father.

16. The Tribunal is invited to note the recorded concession at paragraph 36 of FTJ Parker's determination to the effect that the Secretary of State appears to have accepted that the children could not be expected to leave the United Kingdom and there does not appear to be any record of the withdrawal of that concession.

Submission (4) - Exception to in relation to the Appellant's wife, section 117 C (5)

17. The Appellant submits that his deportation would have an unduly harsh impact on his wife whether she chose to join him in Pakistan or remain in the United Kingdom for the following reasons:

17.1. His wife had to seek psychiatric help and counselling to deal with the Appellant's imprisonment, which lasted for just 6 months. This was despite his wife having extensive family support and her children being with her. During the relevant time, the Appellant's wife was diagnosed as suffering from a mixed anxiety and depressive disorder and was recommended. Antidepressants cognitive behavioural therapy;

17.2. She has a family life in the United Kingdom, which will be disputed (sic) if she were required to relocate Pakistan.

Submission (5) – Very compelling circumstances beyond Exception 1 and 2

18. The reasons set out above, when considered alongside the following factors, the Appellant submits that there are very compelling circumstances that outweigh any public interest in his deportation for the following reasons:

18.1. Much time has passed since his conviction and the index offence and the Appellant has maintained a clean sheet in line with the assessment that he poses a low risk of reoffending;

18.2. The Appellant lives with his mother, brother, sister, nephew and his immediate family;

18.3. He has previously been working in the United Kingdom and has established a private life;

18.4. He has not been reliant on public funds;

18.5. Deportation is capable of harming the public interest. Given the impact on the family and the potential impact on the public purse;

18.6. He shares a strong bond with his mother, who was the victim of domestic violence and raise the Appellant and his siblings as a single parent.

42. In his skeleton argument dated 13 October 2021 Mr Kotas on behalf of the Secretary of State writes:

Submission

Exception 1

1. For the avoidance of doubt, the respondent accepts the appellant has been lawfully resident in the UK for most of his life and is socially and culturally integrated in the UK. The issue for the Upper Tribunal is whether there would be very significant obstacles to the appellant's integration into Pakistan. The respondent submits applying a broad evaluative judgment per in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 (at [14]) the appellant would be able to re-establish a private life for himself upon return within a 'reasonable' time period. Mere prolonged absence alone is not sufficient to demonstrate that the appellant would not be able to integrate. Indeed, the test is not one of 'no ties' as was the position previously. AS v Secretary of State for the Home Department [2017] EWCA Civ 1284 has also clarified that generic factors such as health and the ability to work are relevant to this broad evaluation. In Parveen v The Secretary of State for the Home Department [2018] EWCA Civ 932, Lord Justice Underhill confirmed this was an 'elevated threshold' to reach (at [9]).

Exception 2

7. The respondent conceded in her decision letter that the appellant has a genuine and subsisting relationship with a qualifying partner and children, however, given the passage of time since the decision letter it will still be incumbent on the appellant to demonstrate these relationships still subsist at the date of hearing.
8. On the assumption that they do, the appellant will need to demonstrate that it would be unduly harsh for the partner/children to relocate and for them to remain in the United Kingdom without the appellant - See Patel (British citizen child - deportation) [2020] UKUT 45.
9. The definition of 'unduly harsh' has now been authoritatively settled by the Supreme Court in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 which affirmed the high threshold this connotes in expressly endorsing

the Upper Tribunal's dicta in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC).

10. Further general guidance on the application of this test has also been given by the Court of Appeal in HA (Iraq) v SSHD [2020] EWCA. The true import of the of HA Iraq can be seen at [56] of the judgment. First, Lord Justice Underhill was cautioning against an approach whereby a tribunal or decision maker finds that the effects of deportation would be 'ordinary' if they are not exceptional. It was his Lordship's view that 'undue harshness' could be manifested in children 'quite commonly'. Second, he cautions against blithely dismissing the effects of deportation as a 'commonly encountered pattern'. Rather he advocates an intensely fact-sensitive approach, looking at all material factors when assessing the effects on individual children.
11. The respondent submits that on the facts of this case the appellant falls short of demonstrating deportation will be unduly harsh on his family.

117C(6) Very Compelling Circumstances over and above Exceptions 1 and 2

12. The Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department & Ors [2016] EWCA Civ 662 at [27] clarified that the fall back protection of 117C(6) is available to those who have been sentenced to less than four years imprisonment (i.e. medium category offenders), and that all matters including those under the exceptions can be considered in this global assessment (see [32]).
13. The Upper Tribunal may decide it needs to consider the case of Maslov. The SSHD's primary position is that on the accepted chronology the appellant is not someone who has lawfully spent all or a major part of his childhood in the UK. He entered the UK when he was 7 years old in 2001 and at best had leave until December 2003 (approximately 2 years). He was then not granted leave until 2008 when he was 14 years old, which would equate to a further 4 years before he attained majority.
14. In any event, the SSHD would submit even on an unrefined application of the dicta in that case, there clearly are 'very serious reasons' that warrant the appellant's deportation. However, the Court of Appeal in The Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ 1012 has very much tempered the weight to be given to Strasbourg jurisprudence within the context of deportation proceedings (see [47]).
15. In assessing 'very compelling circumstances', the tribunal is now, unlike under the Exceptions, required to weigh in the competing public interest on the other side of the scales. The Court of Appeal in The Secretary of State for the Home Department v PF (Nigeria) [2019] EWCA Civ 1139 thus clarified:

    "[33]…However, as Mr Dunlop submitted, that formulation risks masking a difference in approach required by section 117C(5) and (6) respectively: whilst KO held that the former requires an exclusive focus on the effects of deportation on the 7 relevant child or partner, section 117C(6) requires those effects to be balanced against the section 117C(1) public interest in deporting foreign nationals. Under section 117C(6), the public interest is back in play."

16. In so doing the appellant must show a 'powerful' or 'irresistible' case (per Chege (section 117D Ð Article 8 Ð approach) [2015] UKUT 165 (IAC)).
17. The respondent submits that the appellant has not shown that there are such 'very compelling circumstances' that render his deportation disproportionate.

Stefan Kotas
On behalf of the SSHD
13.10.2021

Discussion

43. This appeal was remitted to the Upper Tribunal by the Court of Appeal by an order sealed on 6 January 2020. The Statement of Reasons annexed to the order is in the following terms:

Statement of Reasons

1. This is an appeal against the determination of the Upper Tribunal (UT) promulgated on 03 April 2019 to remake the First Tier Tribunal's (FTT) determination promulgated on 09 October 2018 to allow the Appellant's appeal against his deportation on human rights grounds.
2. The Appellant is a citizen of Pakistan who has been residing in the UK since 2001 when he arrived with his mother as a young child (seven years old). He was granted indefinite leave to remain in 2008 and has, therefore, been lawfully present in the UK for most of his life. He married his British citizen wife in 2013 and the couple have two British citizen children, and (sic) four and two. He has genuine subsisting relationship with his wife and two children.
3. The Appellant was sentenced to 12 months imprisonment, having pleaded guilty to fraud by abuse of position and breach of conditional discharge. He was served with a decision to make a deportation order in accordance with section 32(5) of the UK Borders Act 2007 on 22 May 2018. He then made a human rights claim on the basis of his family and private life in the UK, which was refused by the Respondent on 28 June 2018. That decision is the subject of this appeal.
4. The Appellant appeals the UT's determination of 3 April 2019 on three grounds. In short, these are as follows:

    (i) Paragraph 32 of the UT Judge's determination is flawed since it provides no reasoning in respect of the application of the principles confirmed in *Maslov v . Austria* [2009] INLR 47, given that the Appellant has been settled in the UK since the age of seven;

    (ii) UT Judge Plimmer's assessment of the unduly harsh test in respect of the oldest child was flawed, since the conclusion that the effect on the child would be "devastating" and "shocking" meets the requirements of the test; and

    (iii) The UT's determination was procedurally irregular since the Respondent took no point when appealing in relation to exception 1 in section 117C(4) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002), but the UT Judge later refused the appeal on that basis having failed to identify it as an issue at the first stage hearing.

5. The Respondent has given careful consideration to the particular facts of this case and review the Appellant's history and the latest case law, including the recent judgements in *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027 and *Akinyemi v SSHD* [2019] EWCA Civ 2098.
6. The Respondent accepts that the UT's determination may have confused the law in relation to subsections 117C(4) to (6) NIAA 2002, and their application to the facts in this case (whilst noting that the UT was bound to consider the "very compelling circumstances" test in section 117C(6), as confirmed by the Court of Appeal in *NA (Pakistan)* [2016] EWCA Civ 662.
7. Accordingly, the parties agree that this appeal should be allowed and remitted to the UT for a fresh determination.

44. In relation to the 'Maslov point' we have given due regard to guidance from the Court of Appeal in relation to the application of this principle and also the recent decision of the Supreme Court in Sanambar v Secretary of State for the Home Department [2021] UKSC 30.

45. It is surprising to see in the appellant's initial witness statement his complaining that he is the subject of an order for his deportation only because

of his length of sentence, attempting to argue that if he had been sentenced to one day less he may not have been the subject of a deportation decision. That statement in itself is misleading, as it does not qualify that if the appellant had been sentenced to less than 12 months whilst he may not have been subject to a decision under the UK Borders Act he may have been liable to a decision to deport him from the United Kingdom on the basis it is not conducive to the public good to allow him to remain in the United Kingdom pursuant to the Immigration Act 1971.

46. It is also the case that it was not the Secretary of State who sentenced the appellant to 12 months imprisonment but the Crown Court having taken into account all the relevant factors including the mitigation relied upon by the appellant, as noted in the Sentencing Remarks, and that it having been concluded that 12 months was the appropriate sentence the Secretary of State must deport the appellant unless an exception to the power to deport is made out.

47. In relation to the fact the appellant entered the United Kingdom as a child, European case law, particularly in Uner v The Netherlands (2006) 45 EHRR 14 found that in striking the balance between a settled migrant's rights under article 8 and the prevention of crime, the court should consider :

(i) the nature and seriousness of the offence committed by the applicant;
(ii) the length of the applicant's stay in the country from which he or she is to be expelled;
(iii) the time elapsed since the offence was committed and the applicant's conduct during that period; and
(iv) the solidity of social, cultural and family ties with the host country and with the country of destination

These are more commonly referred to as the 'Üner criteria'.

48. In Maslov the European Court of Human Rights held that where a settled migrant has lawfully spent all or the major part of his childhood and youth in the host country, very serious reasons are required to justify expulsion, particularly where the person committed the offences underlying the decision to deport as a juvenile.

49. The Supreme Court in Sanambar rejected the appellant's argument that in a case involving a settled migrant who has lawfully spent all or the major part of his childhood in the host country, the court must separately consider whether there were very serious reasons to justify expulsion, as a separate condition after the examination of the Üner criteria, repeating the need for a court or tribunal to carry out "a delicate and holistic assessment of all the criteria flowing from the ECtHR's caselaw in order to justify the expulsion of a settled migrant, such as the appellant, who has lived almost all of his life in the host country" and the need to demonstrate that the interference with his private and family life was supported by relevant and sufficient reasons.

50. The Rules and statutory provisions applicable to an appeal against a deportation decision have been drafted to be compliant with existing European

case law with the Uner criteria being reflected in sections 117C(4) and 117C(6) of the 2002 Act; which we have properly taken into account.

51. The Court of Appeal in Mwenozi v Secretary of State the Home Department [2018] EWCA Civ 1104 at [11] to [12] provided guidance on the correct application of the Maslov criteria where they write:

> 11. In its judgment in *Maslov*, the Grand Chamber set out its guidance regarding general principles in relation to the deportation of foreign criminals at paras. [68]-[76]. The case concerned a young man from Bulgaria who faced deportation there by reason of a series of offences, principally in the nature of gang-related burglaries, committed when he was a child aged between about 15 and 17. The relevant decisions to deport him were taken when he was still a minor, and they became final when the applicant had just turned 18, and was still living with his parents, upon the decision of the Austrian Constitutional Court not to intervene. At para. [71] the Grand Chamber said:
>
> "In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are:
>
> - the nature and seriousness of the offence committed by the applicant;
> - the length of the applicant's stay in the country from which he or she is to be expelled;
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
> - the solidity of social, cultural and family ties with the host country and with the country of destination."
>
> 12. Although these factors will also be relevant in relation to an older adult, like the appellant, who has come to the host country as a young child, it is relevant to observe that the Grand Chamber here had a particular focus on the circumstances of the specific case before it. As I have noted, that case concerned an applicant who was a child when the relevant offences were committed and had only just turned 18 by the time of the final relevant decision in his case. Unlike in the present case, there was no suggestion that the applicant was of an age and maturity to be able to start a new life for himself in Bulgaria without family support there. Accordingly, it is not surprising that the Grand Chamber did not refer to this as a potentially relevant factor in that case.

52. On the particular facts of this case the index offence leading to the decision to deport was committed by the appellant when he was an adult unlike in the case of Maslov v Austria where the appellant had offended as a juvenile. In this appeal the crimes the appellant has been convicted of cannot be regarded as mere acts of juvenile delinquency. That is important as Maslov is a case about juvenile delinquency and the weight to be given to whether it is proportionate to deport a person in such circumstances rather than one specifically focusing upon length of time in the United Kingdom.

53. It is clear from the skeleton argument above that all the issues identified by the Upper Tribunal in the determination set aside by the Court of Appeal remain live issues before us; as was agreed in an earlier CMR before Upper Tribunal

Judge Blundell on 25 May 2021. Those issues can be distilled into the following four questions:

a) would there be very significant obstacles to ZK's integration into Pakistan for the purposes of Exception 1(c) of section 117C(4) of the 2002 Act? If not;
b) would it be unduly harsh for the qualifying children and MI to live in Pakistan for the purposes of Exception 2 of section 117 C(5) of the 2002 Act? If yes:
c) would it be unduly harsh for the qualifying children and MI to remain in the UK without ZK for the purposes of Exception 2 of section 117 C (5) of the 2002 Act? If not:
d) are there very compelling circumstances, over and above those described in Exception 1 and 2, the purposes of section 117 C (6) of the 2002 Act?

54. It follows from the manner in which we have set out the four questions that if the answer to a), b), or c) is in the positive the appeal will have to be allowed on article 8 ECHR grounds, but that if all the answers are in the negative then it will be necessary to address d).

55. In relation to the first question, that of very significant obstacles, we note the appellant's assertion that he is suffering mental health issues arising from the stress of the situation in which he finds himself. We are not unsympathetic to his evidence in relation to this issue but despite there having been ample time, as noted above, for additional evidence concerning this aspect to have been provided, there is nothing before us to show that the appellant's physical or mental health needs are sufficient to establish very significant obstacles to his reintegration into Pakistan.

56. We note that the appellant is integrated into life in the United Kingdom and that he will be required to leave that life behind if he is deported. There is no evidence before us, however, to show that if the appellant required support from his brother and sister in the United Kingdom it would not be provided whilst he establishes himself back in Pakistan or to show that MI's family members in Lahore would not be able to provide the appellant with help during any settling in period. It is also relevant to note that ZK is of Pakistani nationality and origin, he speaks Urdu and English, and bar his evidence relating to the effect of stress is otherwise in good health, has benefitted from work experience he obtained in the UK, and fails to establish why he could or would not work in Pakistan.

57. The Secretary of State in the reasons for refusal letter in relation to the first issue wrote:

> "As elaborated above, it is not accepted that there would be very significant obstacles to your integration into the country to which it is proposed to deport you. This is because you lived in Pakistan until the age of 7 before travelling to the UK. It is considered that you would have been partially educated in Pakistan and would have a good awareness of the culture, traditions and societal norms of your country of origin. It is considered that any educational work skills you have acquired in the UK can be used to assist you in gaining employment in Pakistan.

It is also considered that you are familiar with the culture of Pakistan as you were raised by your parents/relatives in Pakistan for the first 7 years of your life. It is therefore considered that having been born to Pakistani parents, having arrived here, aged, 7, and having lived here with the appellant has been your mother, you would have continued to be exposed to the culture of Pakistan and its customs. In your representations you have indicated that you have no one to go back to in Pakistan, as all your family reside here. However, it is believed that your father and other family members may still reside in Pakistan, therefore this claim is not accepted. Even if we are wrong in our assumption, we are satisfied that the skills and experiences you have acquired while living in the UK will assist you in your attempts to re-establish yourself in Pakistan, enabling you to financially provide for yourself and live an independent life in Pakistan.

It is believed that you still have ties to your country of origin through family and friends. Even if it were accepted that you have no ties to Pakistan, there is no evidence to suggest that you are estranged from life there. If our assertion that there is a network of family support available to you upon your return to Pakistan is accurate, we would further consider that they may be able to offer a means of support to you. Even if we are wrong in that assumption, as a fit and healthy adult. It is reasonable to expect you to be able to support yourself there…."

58. The appellant has been aware of the case against him in relation to this aspect of the appeal for some time but has failed to adduce sufficient evidence to enable us to find that there are very significant obstacles to his integration into Pakistan. We accept that the appellant may face difficulties and have therefore undertaken the required "broad evaluative judgment" as to whether he will be "enough of an insider in terms of understanding how life in the society in that other country is carried on". In reaching our assessment we have taken into account the guidance provided by the Court of Appeal in Kamara v Secretary of State the Home Department [2016] EWCA Civ 813 where at [14] it is written:

> 14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. 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.

59. Although the Reasons for Refusal letter refers to specific assumptions made by the decision-maker in evaluating whether the appellant can sufficiently integrate we have not adopted this approach and only assess the answer to this question on the basis of the hard evidence before us.

60. We accept that whilst the appellant was born and brought up in Pakistan, where he was educated, he has not lived there since the age of seven and has since that time lived in the United Kingdom. It was not made out before us that

the appellant has not been lawfully present in the UK for most of his life and it is accepted he is socially and culturally integrated into the UK on the facts.

61. We accept that it will be difficult to adjust to life in Pakistan, although we do not accept the language issue that he raised warrants the weight being given to it that the appellant has invited us to place upon it. The appellant has obtained school and college qualifications and employment experience in the United Kingdom, and even if his claim not to be able to read and write Urdu is correct, he can speak this language and will be able to communicate verbally. It is also relevant that society in Pakistan functions with a very high rate of illiteracy, that being defined as those who cannot read and write Urdu, which is over 40% of the population. It is therefore a society which functions adequately for some only through the spoken word.

62. The appellant also speaks and is able to read and write in English which is also relevant as English is widely spoken throughout Pakistan, mainly because it is actually the official language of the government of the country.

63. We find the appellant has not established that he is a complete stranger to the culture and reality of life in Pakistan. We note, for example, that he lives in the extended family home with his mother, who had she turned up required an Urdu interpreter and find that he does live in a Pakistani/heritage large household in Manchester. It is also the case that not only the appellant but also his wife and her family were born and brought up in Pakistan.

64. The appellant has failed to establish that he has no extended family members, either on his or his wife's side who would not be able to assist with reintegration despite this being an issue raised in the refusal letter.

65. We conclude therefore that the appellant had not established very significant obstacles to his integration into Pakistan within a reasonable period of time and has not established an entitlement to rely on Exception 1 of section 117C(4) of the 2002 Act.

66. In relation to the second question, the "Undue Harshness" Assessment: section 117C(5), when considering the question of whether that be unduly harsh for the children to live in Pakistan or to remain in the United Kingdom the focus is entirely on the impact on the child with nothing else being relevant.

67. We accept for the purpose of this assessment the definition of the term 'unduly harsh' in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), in which the Upper Tribunal directed itself as follows (at para. 46):

> "… '[U]nduly 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."

subject to two passages from the judgment of Underhill LJ in HA (Iraq) at [51-52] where it is written:

> "51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord

> Carnwath's judgment, approving the UT's self-direction in MK (Sierra Leone), and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.
>
> 52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving IT (Jamaica), if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context ... The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders."

68. We accept that the eldest child ZO has now commenced education in the United Kingdom and that the children were upset whilst the appellant was imprisoned.

69. We note with interest the evidence of MI set out in her original witness statement where she initially stated that she would have to go to live in Pakistan with the children if MK is deported although referring to practical problems if this course of action is taken.

70. We have treated the children's best interests as a primary consideration and noted the fact they are all British citizens. The third child is a baby attached to her parents with no knowledge or connection yet with the United Kingdom. The second child is still young, with a focus upon the family, including her parents and extended family in the United Kingdom, with only the eldest child having recently started education where in addition to her family she will have a wider private life, including friendship groups and within her school.

71. All the children have the benefit of parents who were born and brought up within the Pakistan community who could help them with the reasonable adjustments that will be required to start life in a country and society which is alien to them.

72. We have considered the medical evidence relied upon by the appellant but were not shown anything sufficient to warrant a finding being made that any treatment required to meet the medical needs of this family unit will be unavailable or unaffordable in Pakistan. The only finding we can realistically make on the basis of the country material showing the availability of medical treatment in Pakistan for problems with ears and eyes, is that the children will have access to the medical treatment they require in Pakistan and that it has not been made out that the cost of any such medication could not be met as a result of their parent's employment or support from extended family members.

73. We accept that there will have to be a period of readjustment and that it may result in experiences that could properly be described as being harsh, but we do not find the appellant has established that it would be unduly harsh for MI and the children to go to live in Pakistan with him.

74. MI and the children are, however, British citizens and may not wish to live in Pakistan but prefer to stay in the United Kingdom and benefit from their rights of citizenship. If this is the case the family will be separated. If it had been found that it would be unduly harsh for MI and the children to travel to Pakistan with ZK it would have been necessary for us to consider whether it will be unduly harsh for the children and MI to remain in the United Kingdom without ZK. For the sake of completeness, we have gone on to undertake this assessment.

75. MI will remain in the family home with extended family members, where she and the children live at the moment. It is noted that MI's GP refers to the impact upon MI of her husband not being present and requirement for a prescription of antidepressants, but it is not made out that MI, who is clearly a devoted and loving mother to the children, would not be able to look after her children, or that the impact upon the children will be such as to require any statutory intervention from Social Services. It is not made out that assistance will not be available within the extended family home as it is at the moment. It is not made out MI, even if she requires a period of readjustment, will not be able to cope adequately without her husband. The fact MI may not be able to continue with her part-time work as she could not cope with employment and childcare may be her belief at this time, but even so, it has not been made out the choice of having to cope with childcare and to rely on any benefits to which she should be entitled as a British citizen will make the decision unduly harsh.

76. It was not made out on the evidence before us that MI and the children would not be able to cope given time, the support of the extended family, and others. Whilst it is accepted the effect of separation upon the children who are close to their father may mean they are emotionally upset, it is not made out that there will not be sufficient support available through the school, family, or NHS to provide appropriate assistance and counselling to deal with the effect of the appellant having been removed.

77. We find on the basis of the evidence that although it may be harsh upon MI and the children if the appellant is deported, it is not made out the higher threshold of it being unduly harsh has been established on the evidence.

78. We therefore find the appellant has not established he is entitled to rely upon Exception to section 117C(5) of the 2002 Act.

79. We move on to consider whether there are very compelling circumstances over and above those described in Exceptions 1 and 2, the fourth of the questions we pose above, following it being found in NA (Pakistan) [2016] EWCA Civ 662 at [25-27] that section 117C(6) is a 'fallback' for those sentenced between 1-4 years, but who cannot fit within the exceptions under sections 117C(4) or 117C(5).

80. The "very compelling circumstances" test requires a wide-ranging assessment of all of the facts of the case in order to achieve an outcome that is compatible with Article 8 ECHR, which we have undertaken.

81. We accept that the best interests of the children are to remain in the United Kingdom with their parents and for the status quo to be preserved, but we do not find this to be the determinative factor.
82. We have taken into account the evidence relating to the appellant's personal circumstances, including those in his favour, which include the fact his offending is at the lower end of the scale for medium offenders, having been sentenced to 12 months in the 12 to 48 months range, and at the lower end of the range of seriousness for offences of this nature; although that is counted to a certain extent by the fact the index offence is a serious one which included an aggravating feature of dishonesty and fraud, resulting in theft of monies from a severely disabled vulnerable adult who the appellant was entrusted to care for, for what appear to be solely for his financial gain.
83. We accept from the evidence provided that the appellant's risk of reoffending has been assessed as being low but that does not mean there is no risk of reoffending. We note the appellant was initially sentenced for stealing money from customers in his employment at a phone shop for which he received a suspended sentence but then went on to commit the index offence. We note that the appellant has not offended further but do not find that any rehabilitation on the facts makes a significant contribution to establishing a compelling case sufficient to outweigh the public interest in deportation on the facts of this appeal.
84. We accept in the appellant's favour that his immediate and extended family members are in the United Kingdom, with whom he lives, but whether they represent sufficiently adequate protective factors to prevent further offending is questionable when they were present when the initial offending occurred. The appellant's claim, made at the hearing, that the family was unaware of his offending is noted as is the fact the appellant spent a considerable sum of money entertaining a large group of individuals at a restaurant. It appears questionable that nobody who was aware of the appellant's employment status at that time would not have raised questions as to where the cost of such extravagance came from. This matter could not be explored with other family members as none of them attended the hearing.
85. We note the appellant has claimed that he will not offend again in the future and that he has rebuilt his life and committed to his family but that is not the determinative factor.
86. We note, as set out above, that the appellant claims he may face difficulties in adapting to life in Pakistan but we have dealt with that argument above and do not find that the degree of any difficulties encountered will be insurmountable obstacles individually or cumulatively in turning the outcome of the balancing assessment in the appellant's favour. The appellant's wife left Pakistan in 2009 at a much older age than the appellant and will therefore have greater experience and knowledge of life in Pakistan, albeit only as a child and teenager.
87. We take into account the family life enjoyed not only with the appellant's wife and the children, but the wider family with whom they live. That forms part of the private lives of each of them and the family lives of each other. There is

within that family, a nephew of the appellant who views the appellant as a father figure according to the evidence, and it may be in this child's best interests if the appellant were to be able to remain, but this is a young child who has other relatives within the family home and it was not made out that this child's wish for the appellant to remain is the determinative factor. Nor has it been made out that the rights of the remaining family members who would not be removed from the United Kingdom are the determinative factor.

88. The finding it would not be unduly harsh for the family to move to Pakistan or for the appellant to go there alone with the other family members remaining in the United Kingdom, the findings in relation to the use of English and potential to be financially dependent, are also relevant parts of the balancing exercise.

89. In the above factors we have considered the guidance of the Supreme Court in R (Kiarie and Byndloss) v SSHD [2017] UKSC 42 in which it was found the factors relevant to the "very compelling circumstances" assessment include:

(a) the depth of the appellant's integration in UK society in terms of family, employment and otherwise;

(b) the quality of his relationship with any child, partner or other family member in the UK;

(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 UK;

(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 re-offending in the UK, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.

90. We do not find the appellant has established any factors that warrant a reduction in the weight to be given to the public interest.

91. We note the deportation of foreign criminals is in the public interest according to section 117C(3) of the 2002 Act and that the importance of ascribing proper weight to the public interest has been repeatedly emphasised by the higher courts (see in particular Laws LJ in SS (Nigeria) [2014] 1 WLR 998; and Hesham Ali [2016] UKSC 60, para 38).

92. Undertaking the necessary holistic assessment, we do not find that the appellant has established that his claim is one which is sufficiently strong to outweigh the public interest. We find the appellant has failed to establish on the

evidence that there are very compelling circumstances sufficient to outweigh the public interest in his deportation.

93. We find that the Secretary of State has established that the deportation of the appellant will be proportionate to any interference in a protected right and that the appellant has not established that there are very compelling reasons to prevent it. We find there is substantial material to support the view that the interference with the appellant's private and family life or any other member of this family or extended family unit impacted by the decision to deport, is outweighed by the public interest in the prevention of crime. The appellant has adduced insufficient evidence to warrant a finding in the alternative.

Decision

94. **We dismiss the appeal.**

Anonymity.

95. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated: 3 November 2021