Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00056/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On the 22 February 2022	**On the 23 March 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CMM
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Rutherford instructed by Cartwright King Solicitors.
For the Respondent: Mr C Bates, a Senior Home Office Presenting Officer.

DECISION AND REASONS

Background

1. The appellant, a citizen of Jamaica born on 18 September 1970, is the subject of an order for his deportation from the United Kingdom. There is a long procedural history to this matter.

2. The chronology provided by the appellant, which is not disputed, as in the following terms:

14 January 1968	appellant's wife is born in the United Kingdom.
18 September 1970	appellant is born in Jamaica.
Before 1998	appellant arrives in the UK on a visit visa.
20 March 1998	appellant convicted and sentenced to 4 years in prison in connection with possession of a Class A drug with intent to supply.
December 1999	appellant is returned to Jamaica.
22 November 2004	appellant applies for the 6 months visit visa to the United Kingdom and is invited to an interview. The application is rejected the same day.
4 May 2005	the appellant appeals the decision and the appeal is allowed.
1 August 2005	the appellant arrives into the United Kingdom.
8 September 2006	the appellant's daughter is born in the United Kingdom.
24 May 2007	the appellant married his wife, JC, in the UK.
11 June 2007	the appellant applied for a settlement Visa from Jamaica on the basis of his marriage.
16 October 2007	the appellant is interviewed by an Entry Clearance Office.
5 November 2007	appellant's application is refused.
10 July 2008	the appellant lodges an appeal and the appeal is allowed.
9 November 2008	the appellant re-enters the United Kingdom on a Spouse Visa.
13 April 2010	the appellant's son is born in the United Kingdom.
12 January 2011	the appellant makes an application for further leave to remain as the spouse of a British citizen.
9 March 2011	the application is returned on the basis that a card payment fee was declined.
14 March 2011	the appellant resubmits the application.
24 March 2011	the appellant is invited to enrol his biometrics.
24 August 2011	appellant's application is refused on the basis he did not have a valid leave on the time of the application although is granted a period of three-years discretionary leave expiring on 24 August 2014.
28 July 2014	the appellant through his previous legal representative submitted FLR(FP) application due to the breakdown of his marriage.
5 August 2014	Secretary of State acknowledges the application invites the appellant to enrol his biometric information.
26 January 2015	the appellant's previous representatives receive the decision and liability to deport notice, but they ceased trading.
1 April 2015	Secretary of State considers the appellant's implied human rights claim and refuses the same.
20 April 2015	appellant's solicitors lodge Notice and Grounds of Appeal.
12 June 2015	Case Management Review Hearing that IAC Stoke.
8 July 2015	appeal hearing at Nottingham Justice Centre.
17 July 2015	appeal dismissed.
30 July 2015	application for permission to appeal to the Upper Tribunal lodged.
28 October 2015	permission to appeal to the Upper Tribunal refused by FTT.
10 November 2015	application to the Upper Tribunal for permission to appeal directly.
23 November 2015	permission to appeal granted by the Upper Tribunal.
23 August 2016	the Family Court grants the appellant contact to his children.

2 September 2016	contact commences between the appellant and his children.
20 October 2016	appeal hearing before the Upper Tribunal.
November 2016	appellant leaves his employment with Servest as a cleaning manager.
10 November 2016	Upper Tribunal set aside decision of the FTT and remit the case back to that tribunal.
22 September 2017	hearing before the First-tier Tribunal sitting at Nottingham. Appeal allowed.
9 November 2017	granted permission to appeal to the Secretary of State.
16 October 2018	error of law found in decision of first-tier Tribunal allowing the appeal. Appeal retained within the Upper Tribunal.
18 February 2019	hearing before the Upper Tribunal to remake the decision adjourned as it is that a wholly new argument arose in this case following a new relationship entered into by the appellant with British citizen, T, who had given birth to a third child.
2 February 2021	supplementary refusal letter issued by the Secretary of State in light of the developments relating to the appellant circumstances.
22 February 2022	appeal listed for a Face-to-Face hearing before the Upper Tribunal.

3. Judicial transfer orders have been made as required.

The evidence

4. The appellant has filed a substantial bundle of written evidence containing, inter-alia, witness statements, letters from the appellant's employer back in 2017, financial documents, documents from the Family Court, letters from the children's school, evidence of contact between the appellant and the children, character references, evidence from Leicester County Council Social Services, all of which has been considered in detail but which is to lengthy to make specific reference to as a whole within this decision.

5. The appellant's most recent witness statement is dated 11 March 2021 in which he seeks to provide additional evidence following the supplementary refusal letter.

6. To place the evidence in context the Secretary of State's position set out in the supplementary letter of 21 February 2021 is in the following terms:

> It has been noted from your representations that you have since 2017 entered into a new relationship with Ms K (known as T) and you have a child together named J S born on 15 February 2019 aged one years. It is stated that the Child Protection Plan, that was in force in reference to your current family life/circumstances and in relation to concerns surrounding your ability to care for J due to consumption of drug substances and incidents of domestic abuse as signalled in the report dated 16 January 2020, ended on 16 January 2020. This was due to Social Services coming to the conclusion that you were considered to be both drug-free, enabling you both to concentrate on your daughter J and to be able to care adequately for your child.
>
> We accept that you have a genuine and subsisting relationship with your partner and daughter; however we dispute your claims that your presence is

essential in their lives. This is because in the Statement submitted from Ms K in support of you remaining in the UK dated 23 December 2020, she stated that despite the difficulties she has faced in the past to care for her own children (from her previous relationship)- *"she would be able to be the sole carer for J - she has done this before and managed"*.

It is submitted that she may feel anxious about being a single parent, it is nevertheless noted that she has the support of family as she did so from her sister in regard to her son. We also have taken into account your concerns about Ms K not being able to cope with parenting in your absence; equally it is submitted that in your absence she will continue to receive the same level of assistance and support from Social Services to ensure that she continues to exercise positive parenting skills. The fact that your partner could be left as a single parent, or is acknowledged by your partner that you are a good father to your daughter – *"he gets on with her, plays with her".;* these facts do not preclude or exempt you from the possibility without any other exceptional or compelling circumstances. This is not the case from the evidence submitted.

We also dispute the conclusion made in your representations that neither your partner nor child can relocate to Jamaica. Your daughter is of a very young age that will permit her to adapt with ease to a new country and culture; she has yet to establish deep root social relations in the UK as she is only one year old. Even though we acknowledge that the same standard of living and education might not be the same in Jamaica as in the UK, however with both your support and employability once in Jamaica (as you have ample working skills obtained in Jamaica and the UK to seek employment on your return), you will be able to provide your daughter with an acceptable level of education, as many other inhabitants/parents in Jamaica would do so. This would not be circumstances unique to you and your partner.

It is also acknowledged that your partner has a 14-year-old son, who currently lives with you both it is currently under Social Services supervision (as her child was previously in foster care, having deserted his foster carers had returned to his mother's sister's home where he was prior to joining his mother). It is also submitted that it would be Ms K's wish if she would want to take her son to Jamaica and enjoy family life with you as it has been stated by your partner that you get on well with her son. This is a decision for Ms K is subject to the consultation with Social Services if that would be in her son's interest to do so.

It is further affirmed that your presence is not crucial to the subsistence - either financially or emotionally, - of Ms K or your daughter. This is because your partner is a British citizen, entitled to be supported by the welfare system of the UK for financial assistance. It is noted that you do not work and do not provide her with financial assistance. As for her well-being and coping as a single parent, as previously mentioned, she will continue to have the support of Social Services and single parenting groups to assist her and advise her on how to cope being a single parent. This is not a unique situation, as there are many single parents in the UK and worldwide that simply have to find the mechanisms and disciple (sic) to cope with their child(ren) in the absence of the parent. As she has quoted in her representations: *"she would be able to be the sole carer for J - she has done this before and managed";* it denotes that she can continue to care for your daughter in your absence.

Ms K can remain in the UK and continue communication with you via the modern means of communication via Skype, telephone, video call etc. We rebut any assumption that the relationship with your partner or daughter will end as you leave the UK. This is because by having the means of modern communication available, your daughter will always recognise her father, as

you speak to her or she sees you via video call etc; it is also open to them to visit you in Jamaica. Even though you have mentioned in your representations that any visits to you in Jamaica could be costly and unable to afford, it is nevertheless submitted that you could help your partner with the costs of travelling expenses as you establish yourself in Jamaica and continue to provide financial assistance for your family from afar. Any type of emotional support is not subject to having your physical presence in their lives; it is believed that the best interest of your child rests entirely on the decision of both parents where family life can be enjoyed in other location/place and the maintenance of family unit is not necessarily solely subject to be enjoyed in the UK as a result of personal preference. You have not presented any exceptional circumstances to show that you cannot enjoy family life in Jamaica with your partner and child other than preference to remain in the UK.

In relation to your other two children - SM aged 14 and your son MM aged 10, who have submitted letters in support of you remaining in the UK, it is accepted that you have been present in their lives. However, it is disputed how consistent and present you have been throughout their lives to the point of establishing how vital your presence is needed in their lives and why they could not continue to enjoy a relationship with you if were to be deported from the UK. We made reference to the incident notes/report of 12 August 2016 and report dated 20 April 2017; these are shown that your claims as having been continuously in your children's lives since the separation from their mother in 2014 are not consistent with these reports. The incident that was documented on 12 August 2016 shows that the children were found to be on their own without a parent figure and it was stated then that *"the children were of a young age and relied on their mother to supervise them"* **-** this report did not mention a father figure in the lives of the children.

In 2014, there were also concerns raised by Social Services regarding the children's welfare as their mother seemed not to be able to look after their basic needs. This it is further noted that their dysfunctional family dynamics arose from having and living a chaotic home life. You are not present to supervise them and to ensure that although separated from their mother, they would have the support of their father.

It is noted that you have submitted photographs and documented the relationship you have with MM SM by spending time, going places and also by visits/stay overs at your place. They are of a more mature age now than at the time of our decision communication from both parents.

However, the report of 20 April 2017 stated that when SM was facing difficulties in school, these were as a result of *"overcrowding and chaotic home life";* moreover the report continues to state that *"someone always collect the children from school, however they do not always know who it will be."* You have now presented evidence that you are known to the school and you pick up the children although it is not known how often and how regularly you do so. The report has further mentioned that: *"SM was well presented when seen and appear to be brought a happy child" even though she was struggling at school due to overcrowding at home".* It is evident from this statement that SM still managed to maintain her independence in going to school on her own, or sometimes as the report stated – "*in the car with her mum*". Equally, as MM was going through difficult periods in school, their mother continued to work closely with Social Services and as stated by her *"I am able to implement boundaries and guidance to my children*". The family unit has continued to function despite inherent difficulties with overcrowding and the fragmented nature of the relationship you have had with your family in the past.

It is accepted that if you were deported from the UK, your children would be affected emotionally and particularly in the short term as a pattern of interaction with them has been established which they enjoy and they have expressed appreciation and affection for you in their letters. However, as previously stated, they are of a mature age able to assimilate and understand difficult situations in life with the guidance and emotional support of their parents and friends. It is also via this means of communication - phone calls, video calls etc - in which we express and exchange information; this is never more apparent than in the current situation with COVID-19. Your relationship with your children can be maintained using modern communication and with visits from them when they can make their own decisions about the nature of their relationship with you. There is no reason why this cannot continue with your children if you were to be deported to Jamaica.

It is submitted that those of your children would not be able to accompany you to Jamaica because you are no longer in a relationship with the mother of your children and it is considered unduly harsh for them to be separated from their mother who is their main carer. It will be the parents choice where they believe the best interest of the children lie. It is also open to them to visit you in Jamaica with the consent of their mother.

Your conviction of 20 March 1998 for possessing a controlled drug with intent to supply - Class A - Crack Cocaine for which you were sentenced to 4 years made you subject to deportation action. This is not the only offence you have committed. On 16 June 2005, you were convicted in Jamaica of foreign leg and possessing firearm without certificate and received a sentence of 5 years imprisonment of which 3 years were suspended. On 30 October 2020 you were found guilty and convicted in the UK of supplying controlled drug - Class A - Cocaine for which you are given a suspended imprisonment of 18 months wholly suspended for 24 months. This is an indication of your lack of integration into British society, having lived here for the past 12 years since your last arrival to the UK on 9 November 2008 by failing to observe and adhere to the British values/norms. You committed an offence which resulted in having a negative impact on British society, the community and especially the victims as Class A drugs are categorised as such because they have a detrimental impact on the health and well-being of those who become addicted to them and their adverse consequences are felt at all levels of society. Drug addiction affects not only on the drug users themselves, but also their families. Furthermore, since addicts are often driven to commit ancillary crimes in order to finance their habit, those involved in supplying drugs are involved in a process that has harmful consequences for society, destroying lives and creating havoc and insecurity in communities throughout the UK. The sentence that the sentencing judge imposed on you in 1998 and in 2010 - an indication of your lack of integration and depicts a fundamental long-term impact on the community and its victim (s). This puts the public at risk, and it will be in the public’s best interest for our continued consideration to deport you. It is maintained that your family and private life do not outweigh the public’s interest in seeing you deported from the UK.

We conclude that you have not demonstrated that there are very compelling circumstances over and above even though you have established family and private life in the UK. You have not shown that your presence is crucial to the welfare of your three children; their mothers are British citizens and have the means to support their children financially and emotionally. Your partner and your children are not reliant on you for either their daily subsistence and day-to-day care; their mothers are their main carers.

Your deportation is therefore not be contrary to our obligation under Article 8 of the ECHR for the reasons explained above. For the reasons given above, the

> Secretary of State is satisfied that the decision to refuse your Human Rights claim in view of the new representations submitted is appropriate the reasons contained in this letter and the letter dated 1 April 2015.

7. The connection between the appellant in the identity referred to above and the conviction and sentencing at the Kingston upon Thames Crown Court on 20 March 1998, to 4 years imprisonment for possession of Class A crack cocaine with intent to supply and that Courts recommendation for his deportation from the United Kingdom, is said by the Secretary of State to have come to light at the time of his application in April 2011 as a result of a biometric data match which matched the fingerprints provided by the appellant to those held on the Police National Computer, although it is accepted the case was not referred to the Criminal Casework Team by a representative of the Secretary of State at that time.

8. In his addendum witness statement dated the 21 March 2021 the appellant challenges the statement in the revised refusal letter that his presence is not essential for his daughter J and his partner T, claiming that if it was not for him she would not be able to have the baby. The appellant claims that if he had not “stood up” for T Social Services would have taken the child into care. The appellant claims that the comment made by T at the meeting with Social Services, that she will be able to be the sole carer for J as she has done that before and managed, was something she said to prevent them taking the child away from her as she already has had children taken from her; so as a couple, they were doing everything possible, to make sure that J stayed with them.

9. The appellant also claims that T is involved with Social Services for her other children and that they keep in touch with her by phone calls regarding her son and are not involved regarding their daughter. The appellant claims that T’s sisters are not living with her to support her and that he is the biggest support and that his role as J’s father cannot be replaced. The appellant claims it was accepted by Social Services that it was in the child’s best interests to be able to continue to see her father. The appellant claims his relationship with J is special in that she looks forward to seeing him and that he loves his daughter. He claims that if he was deported “my heart would break my daughter would end up back under Social Services involvement”.

10. The appellant states T and J are British citizens and that T has other children in the UK and would not be allowed to go to Jamaica as there are social care plans in place. The appellant claims that T would not allow J to move to Jamaica either. The appellant claims that he has nothing back in Jamaica.

11. The appellant refers to his having worked and supported his children since he came to the United Kingdom until 2019 since when he has had no right to work as a result of his immigration status. This appellant claims that he wants to be able to work.

12. In relation to his two older children, SM and MM, the appellant disputes the comments made in the supplementary refusal letter regarding his relationship with them claiming they visit him every

Monday after they have finished their schoolwork online and that at half term his son stays with him. The appellant claims that before his relationship with their mother ended he used to do the school runs. The relationship ended in 2014. As a result of difficulties in establishing contact after the breakdown the appellant applied to the Family Court and was able to secure overnight and shared visits.

13. The appellant claims that raising a child over Skype is not the right way to parent, commenting upon the unsatisfactory nature of contact restricted to telephone contact or the provisions of photographs. The appellant claims the children are used to having him in their lives and that physically removing him from the UK will affect them. He claims this will cause a breakdown in their lives both physically and mentally if he was to be deported with a detrimental effect on their schoolwork. The appellant states the older children are 14 and 11 years of age and their mother would not consent to them visiting him in Jamaica, claiming their mother holds a grudge against him.

14. The appellant in the statement sheds further light upon the events that occurred in Jamaica, referred to in the chronology above, when he was at the house when he claims a random search was made. The appellant took responsibility for it and it was dealt with by a suspended sentence as it was his first charge in Jamaica. The appellant refers to the 1998 offence being over 20 years ago and in relation to the more recent events, accepted wrongdoing.

15. At [11] of this witness statement the appellant claimed his relationship with T is not working out although he wants to be there for J. He does not want his daughter to go into care if he was not there to support her, claiming T will not be able to manage without him.

16. In rely to questions put in cross examination the appellant confirmed that his relationship with T had been “up and down” and that they had decided he would go his own way she would go her way although he claims to see her and the child J every day. When asked when the relationship finally broke down the appellant confirmed shortly after he filed a statement of 11 March 2021.

17. The appellant confirmed he takes J out for walks in the park and that they play and she is excited to see him. He repeated his concerns if he was to be deported in relation to J and his wish to be there for his daughter.

18. The evidence was that the appellant is involved in the schools and that T still has support from her own family.

19. There was no up-to-date letter of evidence from T made available for the purposes of the appeal.

20. In relation to the 2020 drug offence, the appellant claimed that he was helping somebody but when asked what he meant by this the appellant stated that when he lost his job in Tesco as his visa and ran out he was no longer entitled to work, he needed some ‘stuff’, so he committed the offence.

Discussion

21. The appellant was convicted and sentenced to a period of 4 years imprisonment meaning he falls within the higher category of those subject to a deportation order. It is not disputed that the appellant satisfies the definition of 'foreign criminal' found in s117D of the Nationality, Immigration Asylum Act 2002.

22. Section 117 A-C of the 2002 Act, in full, reads:

117AApplication of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117BArticle 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.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation

unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

23. The starting point in an appeal of this nature, when considering whether circumstances exist over and above those to be found in Exception 1 and Exception 2 (section 117C(6)), is to start with an analysis of whether those exceptions can be met.

24. In relation to Exception 1, the appellant entered the United Kingdom before 1998 as a visitor. He was convicted of the first offence drug related offence on 20 March 1998 and recommended for deportation and his chronology shows that in December 1999 he was returned to Jamaica. The appellant next entered the UK as a visitor after which he returned to Jamaica re-entering on 9 November 2008 on a spouse visa. His application for further leave to remain made on 12 January 2011 was refused as he did not have valid leave at the time of the application, indicating his earlier period of lawful leave would have expired towards the end of 2010/early 2011. An initial period of two years lawful leave was therefore added to by the grant of discretionary leave on 24th August 2011 valid until the 24 August 2014, although the appellant was made subject to the order of his deportation from the United Kingdom in 2015. The appellant has not established that he has been lawfully resident in the United Kingdom for most of his life. This is fatal to any claim to be able to rely on Exception 1.

25. For the sake of completeness, in relation to the question of whether the appellant is socially and culturally integrated into the United Kingdom, he has lived here for a period of 12 years, has formed relationships in the UK, worked when he has been permitted to do so, develop family life with his partners (when together) and children, and a private life. Against this are the issues raised in the refusal letter and supplementary refusal letter of the appellant's offending and disregard for the laws of the United Kingdom. On balance, although the appellant's offending does demonstrate a lack of regard for the cultural norms of the UK it is not made out that the integrative links had been formed during the time that he has been here have been broken, especially in light of the fact that his period of imprisonment was imposed in 1998.

26. Although the appellant claims that he has no ties within Jamaica I do not find he has established that it will be problematic and/or difficult for him to re-establish his life in his home country. In Kamara [2016] EWCA Civ 813 it was held that the concept of integration into a country was a broad one. It was not confined to the mere ability to find a job or sustain life whilst living in the other country. It would

usually be sufficient for a court or tribunal to direct itself in the terms Parliament had chosen to use. The idea of "integration" called for a broad evaluative judgment to be made as to whether the individual would be enough of an insider in terms of understanding how life in the society in that other country was 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.

27. The appellant lived in Jamaica between 1970 and 1998, a period of 28 years. He was therefore born, educated, and lived in that country throughout his developmental years and into adulthood. The appellant returned to Jamaica in 1999 and remained there until 1 August 2005 indicating further experience of living within that environment. The appellant is familiar with the language, English, has a good work ethic and a stated intention and desire to work, and comes across as a very personable individual who would have no problems in establishing friendships or relationships with others. It was not made out the appellant lacks the skills or qualifications, work experience, or that there is anything that will prevent him from being able to find employment in Jamaica from which he will be able to develop a private life in addition to providing for his material needs.

28. It has not been made out the appellant would not be able to function on a day-to-day basis within Jamaica or that he has established obstacles that could be classed as being insurmountable to his re-integration exist. Whilst the appellant makes reference to the crime rate in Jamaica, which is accepted as being high, there is no country guidance or authority referred to showing that an individual such as the appellant cannot be returned to Jamaica for this reason. There is no credible evidence of him being of adverse interest to anybody sufficient to prevent reintegration or to create a real risk entitling him to a grant of international protection.

29. Exception 1 is not satisfied.

30. In relation to Exception 2, it is not made out the appellant has a genuine and subsisting relationship with a qualifying partner. I accept the appellant has a genuine and subsisting parental relationship with a qualifying child, particular J but also his other two children although his role in that respect is limited to seeing the children rather than playing an active role in their lives as a result of the desire of the children's mother to have nothing further to do with the appellant following the breakdown of their relationship in 2014. The key question is whether the effect of deportation upon the children will be unduly harsh.

31. I accept it is no longer correct to say as in SSHD v PG (Jamaica) [2019] EWCA Civ 1213 that the 'commonplace' distress caused by separation from a parent or partner is insufficient to meet the test, as I accept it could be. The focus should be on the emotional impact on this child as

per HA(Iraq) [2020] EWCA Civ 1176 [Underhill LJ 44-56, Peter Jackson LJ 157-159].

32. It is not disputed that the impact of deporting the appellant upon the children will be harsh as the older children will not be able to see the appellant as they do currently or interact with him and J will no longer be able to grow up having physical contact and interaction with her father through her developmental stages and beyond, but that is not the required test. I have considered whether the higher threshold of undue harshness is reached in this matter by undertaking such evaluation only with reference to the children.

33. It is not suggested this is a case in which the children can be expected to leave the UK to go to living Jamaica. The children and their mothers are British citizens, none are subject to the deportation order, and although the supplementary refusal letter refers to parental choice, it is clearly not in the children's best interests to leave the UK with all its associated benefits to travel to Jamaica where there is no evidence of sufficient understanding of life there or a desire on behalf of any of the mothers to take their children there. This is therefore a family splitting case.

34. The MK (Sierra Leone) formulation "it is an elevated threshold denoting something severe or bleak" was approved in KO (Nigeria) but I note that in HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176 the court caution against conflating "undue harshness" with the far higher test of "very compelling circumstances". The underlying concept is of an "enhanced degree of harshness sufficient to outweigh the public interest in the medium offender category" [44-56]. In this case the appellant is not a medium category offender but in the higher category.

35. In HA (Iraq) it was held that in evaluating undue harshness for a child decision makers should take into account the Zoumbas principles, see Zoumbas v Secretary of State the Home Department [2013] UKSC 74 at [55, 84, 114, 153], the best interests of the child [55], emotional as well as physical harm [159], relationships with other family members in the UK [120] and where applicable "the very significant and weighty" benefits of British citizenship [112-116 cf. Patel (British citizen child - deportation) [2020] UKUT 45 (IAC)]. The focus must be wide – look not only at the particular relationship between parent and child but the domino effect that could ensue should that parent be removed, i.e. on the needs and responsibilities of other family members etc.

36. Whilst it is noted that the Secretary of State has applied for permission to Supreme Court in HA (Iraq), and a hearing has been listed for May 2022, I was not referred to any order of the Supreme Court staying the

decision of the Court of Appeal pending the outcome of their deliberations.

37. In Zoumbas at [10] Lord Hodge, who delivered the lead judgement to which the other Justices agreed, said:

> 10. In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely ZH (Tanzania) (above), H v Lord Advocate 2012 SC (UKSC) 308 and H(H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:
>
> (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
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> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

38. I accept that the best interests of the children will be to stay in the United Kingdom with both their parents and continue to be able to interact with them to maximise their emotional development and understanding of being loved and wanted within the family unit. I accept that the best interests are a primary consideration but in this case are not the only consideration and are not the determinative factor.

39. I do not treat any individual element of this case is being more significant than the best interests of the children.

40. What is clear from the evidence is that the children have loving and supporting mothers who do the best that they can to ensure that the children's needs are met. Whilst there has been Social Services

intervention in the past as a result of concerns flowing from T's ability to parent her son, the evidence clearly shows that Social Services no longer have concerns about her abilities or the risk of serious harm to any children T is responsible for looking after.

41. T told Social Services she could care for the child alone. If the appellant's claim this was only a statement that was made to prevent J being taken into care, as indicated at [3] of his addendum statement that "we were doing everything possible to make sure J stayed with us" was true, combined with his clear statement he does not believe T will be able to care for the child, this raises the question of whether the appellant and T have wilfully misled Social Services in relation to an issue concerning the welfare of a child. Social Services are aware of the history of this family unit and a claim made to serve their own ends which may be detrimental to the interests of the child is not acceptable. The evidence available to Social Services however shows the situation is not as the appellant suggests. It was as a result of a proper investigation by Social Services, including in relation to T's parenting abilities, that it was concluded there were no ongoing child protection issues warranting their further involvement. It is reasonable to assume that in the area of child protection social workers are very experienced at assessing the evidence that is genuine and that which is not. T's ability to care for the children now she is drug free was accepted as genuine.

42. The minutes of the Case Conference which decided to end Social Services intervention clearly show that the confidence the authorities have in T's ability is real, that she had made progress in dealing with points that originally resulted in their intervention, but that there is an awareness of what occurred in the past. It is not made out that if the appellant's removal from the United Kingdom resulted in T's standard parenting deteriorating to the point where further intervention by Social Services was required, such assistance will not be provided. The evidence suggests that the appellant's relationship with T broke down shortly after his supplementary statement had been signed by him and although he has maintained regular contact with J there is nothing in the evidence to suggest the need for intervention by the statutory services at this time. As stated, no doubt if the appellant is to be deported and there is evidence of such concern social services can be notified and they can undertake further investigations and supervision/assistance as required to meet the needs of J.

43. There is insufficient evidence from an independent social worker or any other source to show that the appellant's deportation from the United Kingdom will result in unduly harsh consequences for the children. The appellant's observations regarding the benefits of having a father in the lives of the children is not disputed but it is not made out that his deportation, with resulting contact having to be indirect contact only, will have an unduly harsh impact upon these children. It is clear the lives of the old children revolve around their school and home life with their mother and J is still a very young child.

44. I do not find the appellant has established that he is able to meet the requirements of Exception 2 of section 117 C (5) the 2002 Act either.

45. The issue in this case is whether the appellant can satisfy section 117B(6) which provides that 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.

46. This is not a case in which the appellant can claim a 'near miss' in relation to his ability to satisfy the exceptions. If this was a case in which he had been sentenced to between one year and four years his appeal fail as he will be unable to show that he can meet either of the exceptions.

47. The appellant was convicted of possession of Class A drugs with intent to supply. Supply of drugs is an offence that is committed if a person has sold or are found sharing drugs with others, even if they did not pay you for them. Possession with intent is committed if a person is in possession of controlled drugs, and either there is evidence that they were intending to supply those drugs, or they have more drugs than is consistent with personal use.

48. The appellant's argument in relation to this issue is based upon a submission that when the proper balance sheet approach is undertaken the very compelling circumstances he relies upon do outweigh the public interest in deportation.

49. It is not disputed the appellant has family life between his two eldest children and J recognised by article 8. It is not disputed the appellant has formed a private life in the United Kingdom during the 12 years he has been here and established links with the country as referred to in his evidence. As noted, it is accepted that deporting the appellant will effectively split up the current family arrangement meaning there is clear evidence of an interference with the protected rights.

50. The older children are teenagers and it is not made out that they could not use telephones or other means of social media to enable them to maintain contact with their father. The ability to maintain such communication has been amply demonstrated in the recent COVID pandemic where the Courts and Tribunal's have themselves demonstrated the ability to conduct hearings through such mechanisms and in interviews for reports written by experts in various fields, including those relating to children, have had to be undertake through Skype, Teams, or other social media. It is clear that the advances in technology are such that it cannot be said that digital media prevents such contact occurring, albeit that it is indirect contact, without the physical element that direct contact could provide. I accept the submission made by Ms Rutherford that such contact will not replicate the close relationships the children enjoy with the appellant and that he will be physically removed from their everyday lives, but it was not made out that having such contact as opposed to direct face-to-face contact will result in unduly harsh consequences for the children.

51. I accept the observation that it is unlikely the children will be permitted to travel to Jamaica at this stage although what they do in their adult life when they have the means and ability to do so may be different, as they will then not be dependant upon their mothers for assistance. It is not made out, however, that even if a face-to-face visit cannot occur it will result in unduly harsh consequences for the children sufficient to tip the balance in the appellant's favour.

52. It is accepted that T cannot be expected to take J to Jamaica as she has her 14-year-old son back living with her. As noted above, J is a British citizen entitled to grow up in the UK and to enjoy the benefit such citizenship brings to her. Even though she is a very young child and indirect contact may raise different issues for J than for the appellant's other children, I do not accept the submission made on the appellant's behalf that it will be meaningless. It is a fact of modern life that families move around the globe and many in the UK have relation as far abroad as Australia and New Zealand and only have the option of modern means of communication to maintain contact with grandchildren. The quality of modern media means that both visual and oral communication can occur enabling the child to see, hear, and learn to recognised relatives abroad. This will enable, with T's assistance, J to communicate with her father. Whilst I accept that such will not replicate the day-to-day contact and current relationship, that is the effective of a deportation order and physical separation. It has not been made out that the consequences of the same are sufficient to tip the scales in the appellant's favour.

53. It is asserted that the siblings will not be able to see each other if the appellant is deported but there is insufficient evidence to show that this would result in unduly harsh consequences or consequences that would be detrimental to the children. There was no evidence to show that sibling contact could not be re-established if the appellant was removed from the UK if the mothers of the children concerned wanted to ensure the same could happen for the benefit of the children. If such an issue arises and Social Services are involved T may be able to solicit their assistance in seeing whether they could facilitate such contact.

54. The statement in the original skeleton argument that the appellant is in a committed relationship with T is no longer applicable as they have separated. While T has in the past suffered with depression and struggled as a single parent it is clear that she has made progress to the extent that Social Services are happy with her ability to parent both in relation to her son who is back in her care, and in relation to J. There is no evidence that T is struggling as a parent which could have an adverse effect upon her ability to care for her children.

55. In relation to the re-offending, whilst is accepted the conviction leading to the deportation order is a very serious offence, for which the appellant was sentenced to 4 years imprisonment back in 1998, that was over twenty years ago. It is clear that prior to 2011 the appellant was able to re-enter the United Kingdom with no connection being made between him and the deportation order or earlier

conviction. It is not clear why this occurred but it is, unfortunately, not a unique situation when historical convictions are involved. Of more concern is that the Secretary of State was aware of that offence in 2011 but took no action, enabling the appellant to continue to strengthen his ties to the UK; including deepening and strengthening his family life with his children.

56. There are a number of authorities which are relevant to the impact of the delay in taking action by the Secretary of State including KD (Jamaica) [2016] EWCA Civ 418 in which the Jamaican appellant arrived here in 1999. In 2003 he was convicted of supplying class A drugs. Thereafter he committed two relatively minor offences. A deport order was signed in 2007 but he was not deported. It was held that the Secretary of State's delays and administrative failings in taking steps to deport the foreign national had given him time to achieve rehabilitation and form strong family bonds with his British-born children, which amounted to exceptional circumstances outweighing the high public interest in deporting foreign criminals.

57. Conversely in ZZ (Tanzania) v Secretary of State for the Home Department [2014] EWCA Civ 1404 when there was an extensive delay, the Court of Appeal took into account when dismissing the appeal that the Respondent was overworked and under-resourced.

58. In MN-T (Columbia) v Secretary of State for the Home Department [2106] EWCA Civ 893 the Court of Appeal held that the Upper Tribunal was entitled to find very compelling circumstances over and above the section 117C(4) exceptions in the case of a 48 year old Colombian woman who had lived in the UK since the age of 9 and had served eight years in prison for a drugs offence. Delay was a major reason for the court coming to that conclusion. The court explained the reasons why delay was significant – if the appellant became rehabilitated he no longer posed a danger to the public; the deterrent effect of the policy of deporting foreign criminals was weakened if the SSHD did not act promptly; it could not be said to express society's revulsion if there was a delay of many years.

59. It was held in RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 330 that in cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) of the ECHR.

60. Had this been a case where there was no further offending by the appellant, and evidence of total rehabilitation and low risk of reoffending, he may have had a very strong argument for why he should succeed on the basis that the family life he was seeking to rely upon was more than sufficient to outweigh the public interest which had been substantially reduced by the failure of the Secretary of State to take action even when the relationship between the appellant and earlier conviction had become clear in 2011.

61. I accept that a deportation order is not reduced as a result of the passage of time per say but it is the weight that can be given to the public interest, based on the facts, in the balancing exercise that is the issue in this appeal.

62. Whilst the period of delay is problematic for the Secretary of State what is problematic for the appellant is his further offending by committing drug-related offences leading to his conviction in 2020. The appellant in earlier proceedings challenging his removal from the United Kingdom claiming that he was reformed and did not pose a future threat to society of the United Kingdom by reoffending, yet committed another serious drug-related offence for personal financial gain. In relation to that Mr Rutherford writes in her original skeleton argument:-

> Whilst it has to be acknowledged that there has been a recent offence, that is an offence which, in the judgement of the Crown Court, did not merit an immediate custodial sentence and which would not of itself triggered deportation action. The circumstances of the offence also have to be considered and it appears that he pleaded guilty on the basis that he was simply carrying out of favour and was not dealing drugs. Whilst not minimising the offence, this is at the lower end of the scale of drug dealing offences as reflected by the sentence imposed by the Crown Court. This further offending, which dates back to November 2018, with some 21 years after he committed the early offence and as such should be seen in its proper context as an out of character incident rather than evidence of someone who is a persistent criminal.

63. I accept that the more recent offence was not part of a long history of offending indicative of persistent criminal but the attempt to minimise the impact of such offending is unwarranted. I set out above the definition of the criminal offences of possession and supply of drugs to which the appellant pleaded guilty. There is a clear contradiction between his guilty plea to the offences charged and his claim that he was not dealing drugs and was not involved in the process. He was culpable, was convicted, and sentenced.

64. I accept that had the appellant not been subject to a deportation order arising from his earlier offences that a suspended sentence would not of itself warrant an automatic deportation order although the Secretary of State always retains the power to use the conducive deportation powers if warranted, although I accept the likelihood is that for a person who had only received a suspended sentence on a first offence that such powers would not have been exercised. But the appellant is subject to a lawful order for his deportation from the United Kingdom as a result of his period of four years imprisonment. The significance of the more recent offence is that it demonstrates that the previous conviction has had little or no deterrent effect upon the appellant, risk factors based upon financial needs arise, and that the risk of further offending and danger to the public of involvement with drugs and all the damage that drugs do to society recorded in the supplementary refusal letter cannot be ignored, allowing the risk of reoffending and harm to be at the very least a medium risk.

65. A further consequence of the more recent offence is that the appellant has undermined any benefit he obtained as a result of the passage of time by showing that the decision to deport him from the United Kingdom is warranted on the basis of the prevention of crime, safety of the citizens of the United Kingdom, and the negative impact that drugs have upon the UK. It shows he is not fully rehabilitated.

66. "Very" imports a very high threshold. "Compelling" means circumstances which have a powerful, irresistible and convincing effect SSHD v Garzon [2018] EWCA Civ 1225

67. The public interest "almost always" outweighs countervailing considerations of private or family life in a case involving a 'serious offender' - see Hesham Ali at [46] and KE (Nigeria) at [34].

68. Having undertaken an holistic evaluation of all relevant factors, including those which have already been assessed in the context of the 'exceptions', when weighing up the competing interests in this case, giving the appellant the maximum weight that I can in relation to those points that stand in his favour, when considering on the other side of the scales the proper weight to be given to the public interest, and ensuring that this decision is compatible with article 8 ECHR and the relevant statutory provisions, I find that the Secretary of State has established that the decision is proportionate and that the appellant has failed to establish on the facts that there are very compelling circumstances over and above those set out in Exception 1 and Exception 2 section 117 C sufficient to outweigh the public interest in his deportation. Accordingly the appeal must fail.

Decision

69. **I dismiss the appeal.**

Anonymity.

70. The Upper Tribunal has made such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

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Signed…….
Upper Tribunal Judge Hanson

Dated 15 March 2022