IAC-AH-KRL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03953/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 February 2022	**25 March 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

AAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: unrepresented
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellant is a citizen of Nigeria. Her date of birth is 12 February 1980. She has four children, E (date of birth 22 July 1999), D (date of birth December 2006), J (date of birth 9 November 2012) and R (date of birth 12 July 2016). I have anonymised the Appellant and the father of the youngest two children ("AA") in order to protect the identity of their children, having considered the Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private. [1]

2. The Appellant's human rights claim was refused by the SSHD in a decision of 28 January 2016. This is the decision that is the subject of this appeal. The Appellant's appeal against the decision of 28 January 2016 was allowed by the First-tier Tribunal (Judge Herbert) in 2017. That decision was found by the Upper Tribunal to contain a material error and set aside. The appeal was remitted to the First-tier Tribunal. The First-tier Tribunal (Judge Paul) allowed the Appellant's appeal. Upper Tribunal Judge Rintoul found that Judge Paul had materially erred and set aside the decision on 19 February 2020.

3. The SSHD wants to deport the Appellant. There is a signed deportation order dated of 26 January 2016. The Appellant is a foreign criminal having been convicted at Inner London Crown Court on 22 March 2012, of two offences involving conspiracy to breach the United Kingdom's immigration laws by arranging sham marriages. She was sentenced to three years' imprisonment and eighteen months' imprisonment to run concurrently. At this point it is worth noting the comments of the sentencing judge as follows.

> "Your part have been labelled by prosecution as a marriage fixer. You were involved in the detail of the arrangements: books booking the flights, paying for them in some respects into United Kingdom of those involved in marriages. You were concerned with gathering together the necessary documentation, some it bogus. You were involved in the wedding planning for the couples.
>
> I am prepared and I do accept that to some extent you were adversely influenced by your husband and his friends or colleagues, but your role was far from a minor role in this conspiracy. I accept that you were not playing a leading role. You were, if you like, equivalent to middle management and your sentence reflects your lesser role. You did not plead guilty and therefore you get no credit. You are sorry for the situation that you find yourself in but you have not accepted your responsibility for this serious offence nor have you shown remorse. I take into account in your favour the fact that you have no previous

[1] Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private in respect of children states;

33. The names of children, whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. Such good reasons will normally exist if a criminal court has, unusually, directed that the identity of a child offender be disclosed.

34. Where the identity of a child is not to be revealed the name and address of a parent other than the appellant may also need to be withheld to preserve the anonymity of a child.

> criminal convictions but you have breached the United Kingdom's immigration control more than once. I have regard to the sad state of your relationship with your children and the effect on them of a prison sentence. … you are entitled to full credit under Section 240 for the time you have spent in custody".

4. The Appellant has a chequered immigration history. I will not set this out in full. I will summarise it as follows. She entered the UK and returned to Nigeria on a number of occasions in 2004 and 2005 with a visit visa. On 6 March 2005 she was refused leave to enter because she was unable to account for various identity documents in her possession. She appealed against this decision and her appeal was dismissed. The Appellant made applications to enter the UK using two different identities in 2006. Both applications were refused. She made another application using a false identity which was granted. She used a false identity to enter the UK with her son E on 10 August 2006. On 18 January 2007 she made an application for indefinite leave to remain (ILR) on the basis of long residence, claiming that she had been here in excess of ten years. This application was refused in 2008.

5. The local authority was granted full care of the Appellant's sons E and D on 29 September 2012. The Appellant was released from custody on 10 October 2012. Her son, J was born in the UK on 9 November 2012.

6. On 13 February 2013 the Appellant's representatives made submissions to the SSHD that the Appellant had been physically, verbally and sexually abused by family in Nigeria. She had been forced to work as a prostitute. She also claimed to have suffered sexual abuse in the UK. She did not make an application on protection grounds.

7. On 7 March 2014 the Appellant was arrested in relation to an assault on her partner. No further action was taken against her. The Appellant subsequently made the application (that gave rise to the decision which is the subject of this appeal) on the basis of her relationship with a British citizen partner (AA) and that her youngest son J is a British citizen.

8. The salient parts of Judge Rintoul's decision (the "error of law" decision) read as follows:-

> "8. I conclude that in this case the reasoning is with regard to whether the impact on the children of the deportation of Respondent would be unduly harsh is flawed. The judge has failed to make relevant findings regarding the current whereabouts of the father that it is whether he lives within the family home, what level of support he currently gives to the family, what other commitments he has and whether to what extent what he said in his letter of 13 March 2019 could be relied upon. In the circumstances, the finding of undue harshness is insufficiently reasoned.
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> 9. Further, there appears to have been little or consideration of the impact on to very vulnerable children of separation from their mother. It is worrying in the context of a child who is not capable

of verbal communication that no findings were made as to how he would cope with that situation. In all the circumstances I consider that there has been a failure properly to make findings of fact and consequently a lack of proper reasoning in the conclusion that it would be unduly harsh on the children for their mother to be deported and for these reasons I set aside the decision.

10. I preserve the finding that it would be unduly harsh to expect the children to go to Nigeria but remaking the decision will require the Upper Tribunal to make findings of fact with regard to the position of the father, the current circumstances, the needs of the children and if possible the extent to which they have any understanding about what would happen and/or what the impact would be on them of removal from their mother given the consequent difficulties there would be in continuing communication by any means at all".

9. Upper Tribunal Judge Rintoul decided that the matter should be remade in the Upper Tribunal and made directions relating to further evidence concerning the children. Following Judge Rintoul's decision on 27 May 2021 Upper Tribunal Judge Allen made directions for the Appellant to provide a witness statement setting out the current circumstances of the family, including the whereabouts of the children's father, support provided to the children and travel arrangements for them to attend school and the daily routine of both children. The Appellant was directed to provide an expert report from a child psychologist on J and R addressing the effect on both of them of separation from her and the extent to which they could understand that. The Appellant was directed to provide any other relevant information on the two children.

10. On 8 October 2021 Upper Tribunal Judge Perkins, concerned because the Appellant was by this time a litigant in person, recorded and directed as follows:-

"1. I am concerned about the children in this case and concerned that their interests may not be addressed adequately by their mother, the Appellant, Ms Ladipo.

2. The Appellant says that she has tried to instruct a social worker but the required fees are beyond her means.

3. She has produced evidence showing that her children aged nearly 9 and 5, have special educational needs.

4. I direct the Secretary of State to consider commissioning an independent social worker's report into their welfare and to indicate if such a report will be commissioned not later than the next Case Management Review hearing.

5. There will be a Case Management Review hearing on the first open date on or after Monday 1 November 2021 at a time convenient to me and to Mr Whitwell. If I am not already sitting I will interrupt my other duties to hear the Case Management Review. No interpreter is needed. Time estimate is 30 minutes.

6. No adverse inference will be drawn if [the Appellant] does not attend but she should notify the Tribunal if she does not intend to attend".

CMHR 13 December 2021

11. The matter came before myself and Deputy Upper Tribunal Judge Jarvis on 13 December 2021 when it was listed for a CMHR. On that occasion Mr Whitwell represented the SSHD.

12. Mr Whitwell relied on an e-mail he sent on 11 November 2021 to the UT in response to Upper Tribunal Judge Perkins' directions. This explained that the SSHD did not intend to commission an independent expert. However in order to advance the overriding objective the Respondent had written to (i) the Disabled Children's Team at Kent County Council (KCC) and (ii) children's services at KCC. Mr Whitwell relied on the responses received from KCC. He appeared to accept that the responses were far reaching; however, he made clear that the SSHD still intended to deport the Appellant.

13. It is necessary to set out the responses from KCC. The response from Ms Ivory of 27 October 2021 of the Disabled Children's' Team reads as follows:-

> "… I am writing in response to your e-mail sent on 21 October 2020, [the Appellant's] son [J] has been open to the Disabled Children's Team since September 2020 as a child in need due to being a disabled child under Section 17 of the Children Act 1989.
>
> [J] has complex needs associated with his diagnosis of autism, severe learning disability, severe speech and language delay (whereby he has very limited speech) and a severe sleep disorder. He is fully dependent on his carers to help him carry out his personal care tasks and to stay safe in the home and community. Based on [J's] assessed needs, he receives a series of short breaks that support him to access further social opportunities outside the home and provides his family with a break from the demanding care role for [J].
>
> [the Appellant] is currently residing in the home with [AA], [J] and [R]. [The Appellant] reports that she and [AA] have been separated since 2019, however, they remain living together. A judge has placed a hold on the property allowing [the Appellant] and the children to remain living there and prevents [AA] from selling the property or evicting them. [the Appellant] is not eligible for public funds and therefore cannot afford to live independently with the children.
>
> [The Appellant] is the primary carer for the children, fulfilling all their needs when in the home, including washing, dressing, feeding, personal care, playtime, supervision and extra education sessions after school. [The Appellant] shares a bed with [J] as he is unable to sleep without her next to him, often cuddling her. On a good night, [J] will sleep for roughly four/five hours and then be awake for the remainder of the night. Due to [J's] additional needs and the risks involved with his challenging behaviours, he is unable to be unsupervised at any time, meaning [the Appellant] has to be awake with [J] most of the night. [AA] sleeps in a separate bedroom and

does not support when [J] is awake at all. [The Appellant] attends all health appointments with both [J] and [R], whereby [AA] has not attended a single medical appointment for them. [The Appellant] liaises with school, [J's] personal assistant and Disabled Children's Team in order to ensure [J's] wellbeing. Previous records show that [AA] has had very little communication with workers from the Disabled Children's Team.

[The Appellant] reports that [AA] usually works Monday-Saturday and is therefore only at home in the evenings and on a Sunday. When he is at home, he does not provide any support for the children in any way, other than financial support whereby he pays for their food and nappies each month as well as the house bills. [The Appellant's] only source of income is disability living allowance for both [J] and [R], whereby this money is used in a number of ways including paying for transport to and from medical appointments for the children, paying for her own food and clothing and repaying her loan that she took out with PayPal to cover these ongoing court fees.

[The Appellant] reported that [J] does not like to go near [AA], and when encouraged to 'cuddle daddy' he will shout 'no!' and keep his distance. He will, however, sit on [The Appellant's] lap and wave to [AA] from across the room. [The Appellant] has reported that [J] has witnessed domestic violence in the home which was perpetrated from father to her in 2019.

[The Appellant] is the main carer for [J], she has an exceptional understanding of his needs and is an integral part of his life, keeping him safe and providing him with security. He is fully dependent on her and has limited understanding about the challenges that his mother is facing in relation to the threat of being deported. He relies on her fully to take care of him.

If [the Appellant] was to be deported, she would no longer be able to be [J's] or [R's] full-time carer and alternative care would need to be sought for them both. [The Appellant] reported that there are no other family members living in the UK and therefore as there are no suitable family members that could care for the children, they would be at risk of being children in care. This is clearly not in his best interests as he would be confused by the situation, he would likely want to continue living with his mother and miss her. His world would be turned upside down and there would not be any consistency or familiarity for him any longer.

It is unclear what [AA's] views are in relation to caring for the children in the UK should [the Appellant] be deported, however should he do this it would cause further unsettledness for [J] as his mother is his main carer. He again would miss his mother and would become confused about the situation. It is not clear where the father would be able to meet [J's] complex needs on a long-term basis either. He has shown limited interest in working with the network around his son which is an integral part of supporting [J] due to his communication difficulties, furthermore it would enable [AA] to have a better understanding of [J's] needs. Both scenarios are likely to have an impact on [J's] emotional wellbeing and could lead to his needs being neglected.

It is not possible for [the Appellant] to return to Nigeria with [J] and [R] due to them both having a diagnosis of autism and some of the cultural views of this in Nigeria. [The Appellant] reported that autism is seen as 'witchcraft' and is if they are in a cult, with the majority of people being diagnosed with

> autism being killed as a result. It is evident if the children did return to Nigeria that they would be at risk of significant harm or even death and is therefore not a viable or safe option.
>
> If [J] was able to tell us what he wanted, I think he would say that he wants to remain living with his mother in a home that is free from and tension, arguments, or violence between the adults. He is observed to be comfortable and happy in his mother's presence and [the Appellant] shows great understanding about his needs and how best to support him. I therefore ask that serious consideration is given to the decision regarding her being deported as this will have huge consequences on her children's lives.
>
> If [the Appellant] was granted indefinite leave to remain would need to be supported to have financial independence and find a suitable home for her and the children as she says they cannot continue to live in an abusive environment with [AA] …".

14. There is an e-mail of 26 October 2021 from Dominique Cook, who is described as an experienced social worker from Front Door Integrated Children's Services at KCC. It reads as follows.

> "Whilst the local authority are not working with [J] and [R], these are children who live in a hostile environment where there have been concerns historically around domestic abuse, perpetrated by father.
>
> In the event that Mum is deported a subsequent referral would need to be made in order for us to assess what happens beyond this for the children".

The Issues

15. Section 32 of the UK Borders Act 2007 ("the 2007 Act") states in summary that the SSHD must make a deportation order in respect of a foreign criminal subject to exceptions set out in s.33. The Appellant states that deportation breaches her rights under the ECHR which is one of the exceptions. Her case is that deportation is unlawful because it breaches her rights under Article 8 of ECHR.

16. The issue in this appeal is whether the Appellant's deportation would breach her right to private and family life under Article 8. The applicable statutory framework is contained in s.117A-D of the Nationality Immigration and Asylum Act 2002 (the 2002 Act). Of particular importance to this appeal is s.117C which reads as follows.

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

17. The Appellant is a foreign criminal and a medium offender, having been sentenced to between twelve and four years' imprisonment. In order to succeed the Appellant must establish that Exception 2 (s.117C (5)) applies. It is not in issue that the Appellant has a genuine and subsisting relationship with two qualifying children. There is a preserved finding that it would be unduly harsh for the children to return to Nigeria. The issue for me is whether it is unduly harsh for the Appellant to return to Nigeria and for the children to remain here without her. We know from KO (Nigeria) and what Lord Carnwath said when considering the language of s.117C that exception 2 is "self-contained". It does not import a requirement to consider the severity of the parent's offence. In respect of the meaning of "unduly harsh" Underhill LJ considered KO in HA (Iraq) v Secretary of State [2020] EWCA Civ 1176 and stated as follows:

> "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.
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> 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 (I have already made this point – see para. 34 above). 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.

55. The first is that what Lord Carnwath says in the relevant parts of his judgment in *KO* makes no reference to the requirements of section 55 of the 2009 Act and is likely to lead tribunals to fail to treat the best interests of any affected child as a primary consideration. As to that, it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55: see para. 15 of his judgment, quoted at para. 41 above. The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test. It was not necessary for Lord Carnwath to spell out that in the application of Exception 2 in any particular case there will need to be "a careful analysis of all relevant factors specific to the child"; but I am happy to confirm that that is so, as Lord Hodge makes clear in his sixth proposition in *Zoumbas*.

56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an "ordinary" level of harshness and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of

> harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

18. I must carefully assess the likely effect of the Appellant's deportation on her children and decide whether it is unduly harsh applying KO and the guidance given in HA (Iraq). If I decide that the impact of deportation on the children is unduly harsh the appeal is to be allowed under Article 8. If I find that the impact does not meet the elevated test, I will go on to consider whether there are very compelling circumstances in the context of s.117C(6) of the 2002 Act in which case it will be necessary to conduct a full Article 8 proportionality assessment and the public interest in deportation will only be outweighed in very compelling circumstances. In this respect, I have taken into account what the Court of Appeal said in NA v SSHD (Pakistan) [2016] EWCA Civ 662, in particular at paras 32 -34 and 36 with reference to medium offenders. I must look at the matters relied on collectively to determine whether there are sufficiently compelling circumstances to outweigh the high public interest in deportation. Those matters may be of the kind described in Exceptions 1 and 2. There is no exceptionality requirement and the commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children will not be sufficient. The best interests of children carry great weight: Lord Kerr in HA and Deputy Prosecutor of the Italian Republic [2012] UKSC 25; [2013] 1 AC 338. It is a consequence of criminal conduct that offenders may be separated from their children for many years contrary to the best interests of those children.

The hearing before First-tier Tribunal Judge Paul

19. At the hearing before Judge Paul there was evidence from AA in the form of a letter dated 13 March 2019. He stated that the family was no longer living together and that he was pursuing an injunction against the Appellant for harassment. He stated that he did not support the Appellant's appeal and claimed that he could look after the children in her absence.

20. The Appellant relied on a witness statement of 7 November 2019 and Judge Paul summarised her evidence at para.10 of his decision as follows.

> "10. The Appellant has provided an updated witness statement, dated 7 November 2019, along with a number of documents. The first is a letter from the Bright Beginnings Day Nursery and Preschool, dated 17 May 2019. This consists of an age/stage report for [R]. It observes that [R's] development has been tracked as being between 16 and 26 months, whereas for her age she should be completing 22-36 months of age. There is then a report from the Kent Community Health Trust dated 16 May 2018 relating to [J]. This refers to his diagnosis for autism spectrum disorder; severely delayed disorder of speech and language skills; severe sleep difficulties; and concerns about bruising. The report from a community paediatrician says that [J] is doing well at school against those backdrops. There is also a medical report dated 28 October 2019 from the Kent Community Trust relating to [R]. The report is based on concerns in a referral that she has communication difficulties. The problems appear to be speech and language development delay and social communication and interaction problems. The detailed report, based on an examination of [R] – in relation to the various tests and analysis of her language and speech development, and including the family history of autism – concludes that the examination was unremarkable. She is recorded as having scored low in visual skills, hearing and language, as well as speech and language skills. Against this backdrop it is considered that she may be exhibiting some features of autism which will require further assessment.
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> 11. Also included with the Appellant's documents is a supervised family contact schedule which appears to relate to the Appellant's second son, [D]".

21. The Appellant gave evidence at the hearing before Judge Paul. Her evidence can be summarised. Her relationship with AA came to an end in February 2019. Her evidence was that he was abusive to her which led to him being arrested by the police, however she did not support a prosecution. The charges were dropped as a result of his health condition. She claimed that she was threatened by AA and his partner. As a result they were cautioned by the police. AA owns the property where the Appellant and children live. Her eldest son E has mental health problems. He has independent accommodation supported by a social worker. D, the Appellant's second son is in the care of Lambeth Social Services and the Appellant has supervised visits four times a year. J is autistic and suffers from insomnia. R does not talk or communicate and is autistic. The Appellant said that she was the sole carer of J and R who are both British citizens. Judge Paul recorded the Respondent's submissions. It was conceded that J has severe autism and there are concerns relating to R, however the Respondent's position was that given the breakdown of the relationship of the parents it was feasible for the two youngest children to remain with their father who was currently coparenting the children in the family home which he owns. There was thus a secure environment and

with the assistance of Social Services there would be no detrimental impact on the children.

22. Judge Paul took into account that AA did not attend the hearing to give evidence and therefore was not cross-examined about the assertions that he made in his letter. Judge Paul found that,

> "… , the background material shows that, from the time they started living together in 2012, they were able as parents to support their children and the position seems to be that – he is still actively involved, albeit against the complicated background set out above".

The resumed hearing

23. The thrust of Mr Clarke's submissions was that the Appellant is not credible. He drew my attention to discrepancies in her evidence. He asked me to attach weight to the absence of evidence from AA. Mr Clarke made reasonable submissions, in the light of the evidence, however, despite issues regarding the Appellant's credibility, having focussed on the impact of deportation on the two children, I am in no doubt that it would meet the elevated test to satisfied the unduly harsh test (s.117C (5)). It follows that I allow the appeal on Article 8 grounds. I communicated my decision orally to the parties.

24. It is not challenged that the Appellant's youngest children are unwell. There is further evidence before me that was not before Judge Paul. J has been diagnosed as having autistic spectrum disorder (ASD), severely delayed /disordered speech and language skills, severe sleep difficulties and there are concerns about bruising (letter from Gravesham Community Hospital dated 16 May 2019). There is a letter from the same hospital dated 18 August 2020 concerning R. She too has been diagnosed as having ASD (non-verbal), language and communication needs, impacted on her understanding and use of language and social communication difficulties and developmental delay. The letter concerning R states she, " has a higher than normal level of needs and it seems undoubtful that without considerable and longstanding additional support that her needs will be able to be met by her parents only".

25. It is not challenged that the Appellant and AA are no longer in a relationship, however, following a court order she is allowed, for now at least, to remain in the house which he owns. There is no copy of the court order, but it accepted that an order was made. It can be reasonably inferred from the court order that AA does not want the Appellant to live with him in the family home which he owns.

26. There was a statement from AA before the First-tier Tribunal in 2016. His evidence was that he had been unwell having been diagnosed with cancer. At that time he said he could not look after the children in the absence of the Appellant. He supported the Appellant's appeal. However, following the court order and undertaking his position had changed. In 2019 he no

longer supported the Appellant's appeal. He claimed to be the victim of domestic violence.

27. AA's evidence in 2019 was that he has maintained the responsibility for the care, welfare and finances of the children and significantly that he is capable for caring for them without the Appellant. He asserts that the Appellant is using the children to help her appeal and that she does not really care for them. He claims to be the children's primary care. Despite the far reaching assertions he did not attend the hearing in 2019 or the hearing before me.

28. Mr Clarke submitted that I should attach weight to the evidence of AA in 2019. He asked me not to attach weight to the evidence that Mr Whitwell submitted in response to Judge Perkins' directions in the light of an assessment prepared by KCC on 2 November 2020 (the assessment). The assessment was prepared by the council at the request of the Appellant and AA for J to be assessed for support from the Disabled Children's Team and a Care package. I am not going to quote from the assessment; however, I accept that the parents cooperated with it. It supports that they were united in respect of care for J. It discloses that in 2020 both parents were involved in caring for the children. It supports that AA was working and paying the bills and the Appellant had hands on practical care for the children.

29. The assessment does not reveal problems with AA's parenting which is in contrast the assertions made by the same department in the letter the dated 27 October 2021. Mr Clarke expressed concern about the latter. He submitted that it relies on the Appellant's self reporting and does not engage with the assessment which paints a different picture.

30. I accept that there are credibility issues arising from the Appellant's evidence. I am satisfied that she has exaggerated the inability and unwillingness of AA to care for his children. However, this is not determinative of the appeal. It is clear from the evidence that at the time of the assessment the parents were working together to care for the children and AA had at that time a genuine and subsisting parental relationship with the children. It is reported in the assessment that J was loved by both parents.

31. A closer reading of the assessment discloses concerns about the family generally. It reports that since September 2016 there have been five "episodes of early help involvement". It documents referrals to the social services made by J's school, the police (domestic violence in 2016), the Appellant's GP (raising a concern that the Appellant is not able to cope) and A&E (domestic violence in 2019). What is disclosed in the assessment is that the Appellant and AA at this time had a co-parenting agreement which was working. However, the author of the assessment expressed concern that the children may become frightened in the house because of the fractious relationship between their parents. The report states that J has lived in the same family home since 2013 and has both of his parents

who contribute towards his care and upbringing. However, it is stated that, "J was observed going to his mother for cuddles and comfort, giving him a secure base from which to explore his environment. However, [the Appellant's] immigration case is delayed due to Covid-19, so the outcome of her appeal hearing … is still unknown. This is a concern for [J's] stability and wellbeing because of the loss and grief he would experience in the bond with his mother were broken". The assessment discloses that both parents raise concerns about the other's mental health and allege domestic abuse. It states that the family situation has been volatile in the past and that J and his sister has witnessed this. The author of the assessment expresses worry about J's complex needs and states that he requires constant supervision and monitoring at home and that this responsibility falls mainly on the Appellant who is feeling overwhelmed. J is non-verbal and only his mother understands the sounds that he uses to communicates.

32. The Appellant's evidence (witness statement of 1 February 2022) is that AA is violent to her. He continues to abuse her in the home and at times has changed the locks so that she and the children have been stranded outside the property. He is not interested in the children, and he is barely around. She is the primary carer of the children. This accords with the evidence she gave to the First-tier Tribunal 2019.

33. The evidence supports that the Appellant is a victim of domestic abuse. Throughout the documents there is reference to domestic abuse by AA. I reasonably infer from the court order and the undertaking that AA has been hostile to the Appellant. There is no court order supporting his allegations in 2019. I do not rule out that this Appellant has also been violent to AA, but I accept, having heard oral evidence that she is fearful of him. She is in a precarious situation. Because of her status she must live with AA in the home which he owns. She described treading on eggshells. While the Tribunal would have been assisted by up to date evidence from AA, it is unreasonable to have expected her to obtain this directly from him, in the absence of legal representation.

34. I do not accept that AA is not interested in his children. I note that throughout the evidence from third parties there is reference to the children's parents and not just the Appellant. It is clear that the Appellant does the bulk if not all of the hands-on practical care for the children, while AA pays the bills and other outgoings. It may be that he does not give the Appellant sufficient funds to cover her outgoings.

35. What concerns me about AA is that it is very clearly the case that the children's best interests are served by their mother remaining in the United Kingdom to care for them. This was not challenged by Mr Clarke. This can only be achieved should the Appellant's appeal be allowed. I therefore question his motivation in adopting a position in 2019 which is contrary to his children's best interests. I do not accept his evidence in 2019 that the Appellant does not care for the children and is using them to support her appeal. There is nothing in the evidence from the social

services that would support this. If this were the case, I am in no doubt that AA would have attended the hearing or at least provided an up to date witness statement.

36. I accept that in the Appellant's absence, AA would attempt to care for them and he would wish to; however, I have no evidence to explain how he would intend to do this. I accept that he is the breadwinner and he has not engaged in the children's day to day care. While I do not necessarily accept that they would end up as looked after children (I note that there is no evidence that he has aimed violence/threats towards them), I am in no doubt that there would be very real and practical problems arising should the children be left in his care. I accept that he works full-time and he has another son from a previous relationship. However, regardless of the input from AA, I am in no doubt that the loss of their mother would be a terrible blow to these two highly dependent children with significant and onerous care needs, the eldest of whom can communicate in a way which only his mother can understand. Both children are described as non-verbal.

37. I take Mr Clarke's point about the letter from KCC dated 27 October 2021. I am satisfied that what has been written in that letter about AA is an account that has been given by the author by the Appellant. Moreover, there is no reference to a change in circumstances since only one year before. However, closer reading of the assessment discloses problems with the relationship and much of the content of the letter of 27 October is supported by documentary evidence or uncontroversial so far as it relates the children's care needs.

38. I am satisfied that the evidence before me establishes the following.

    a. The children's best interests are served by the Appellant remaining in the United Kingdom to continue to care for them

    b. Both children are extremely vulnerable. They are disabled and have significant practical care needs

    c. The Appellant is the children's main carer

    d. The impact of separation from their mother would be catastrophic for the children

    e. The children have a genuine and subsisting relationship with their father

    f. The children's father has been violent to the Appellant in their presence

    g. The Appellant fears the children's father

    h. Despite the significant bond the children have with their mother, in 2019 their father indicated that he would not support her appeal. This is an action that is contrary to their best interests. He has chosen not to take part in these proceedings.

    i. There is no evidence that the SSHD has approached AA to establish his current position regarding the children.

39. For the above reasons, I conclude that the impact of deportation would be unduly harsh on the Appellant's children. The consequences of separation in my view would be so catastrophic for the two children that the test would be met, regardless of the level of care available from their father. It is the loss of their mother that would meet the elevated test. The appeal is allowed under Article 8

40. Having found that this Appellant meets Exception 2, there is no need for me to go on and consider whether or not there are very compelling circumstances in the context of s.117C(6) of the 2002 Act. Such an assessment would require me to take into account the public interest in deportation and the seriousness of the Appellant's offending.

41. In response to the directions of UTJ Perkins, Mr Whitwell submitted at the CMHR that the SSHD did not propose to commission an independent report to identify the children's best interests. However, he submitted documents from KCC on which the Respondent (at that point in the proceedings) relied which provide overwhelming support that it is in the children's best interests for the Appellant to remain to continue to care for them. The evidence obtained taken at face value, would have made it very difficult for the Respondent to succeed.

42. However, Mr Clarke did not rely on the documents from KCC. He sought to argue that they were not reliable. I did not understand that his case was that the best interests' position had changed, only that the impact of separation was not as grave as that put forward by the Appellant because the children could be cared for by AA. Mr Clarke helpfully pointed out to me the discrepancies between the Appellant's evidence and the assessment to support his submissions. He relied on the most recent letter from AA in 2019. However, it was not suggested at any time by Mr Clarke that the Appellant's affection for her children was contrived to bolster her case or that she does not properly care for them or worse.

43. . There was sufficient evidence before me to make a decision as to the best interests of the children and the likely impact on them of being separated from their mother. I am in no doubt that it is in their best interests to remain in the UK and continue to be cared for by their mother and separation meets the elevated test.

44. The SSHD's case as advanced before me was that it AA could look after the children. Throughout the proceedings there has been concern expressed by judges concerning the lack of evidence relating AA. There was no up to date evidence from him. As I have stated in the circumstances it was not reasonable to expect the unrepresented Appellant to obtain evidence from AA. AA could have made contact with the SSHD if he wished to give evidence. UTJ Perkins' directions sought to address the absence of evidence from AA. The SSHD chose not to instruct an independent expert. She instead relied on letters from KCC which while in theory are sufficient to discharge the SSHD's statutory obligations, I was asked not to rely on them.

45. While there was no issue in respect of the children's best interests, were the children not so dependent on their mother and if the assessment of unduly harsh depended on the role their father could play in her absence, I would have needed further evidence concerning AA and the children. This case falls into the exceptional category (with reference to paras 127 and 128 of Arturas (child's best interests: NI appeals) [2021] UKUT 00237). The Respondent relied on AA being able to care for the children despite a lack of engagement by him in these proceedings and clear evidence of a history of domestic violence. His evidence was historic (2019) and inconsistent (with his evidence in 2016). While the burden of proof is on the Appellant, the evidence disclosed potential problems in obtaining evidence from AA who is the perpetrator of domestic violence against her. The Respondent has statutory obligations, which in my view she has not complied with. While I was able to remake the appeal on the evidence before me because the evidence established that the impact of separation on the children, through the loss of their mother as primary carer, would meet the elevated test notwithstanding that they have a relationship with their father, the Respondent should have in this case taken the unusual step of instructing an independent expert if seriously proposing that the children could be cared for by their father in the absence of the Appellant so as to mitigate the consequences of separation.

46. I allow the appeal on Article 8 grounds.

No anonymity direction is made.

Signed Joanna McWilliam Date 23 February 2022

Upper Tribunal Judge McWilliam