Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09813/2017**

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On 28 September 2022	**On the 06 December 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T. Hussain, instructed on behalf of the appellant.
For the Respondent: Ms Z. Young, Senior Presenting Officer

DECISION AND REASONS

Introduction:
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings by UTJ Owen because the case involves the consideration of documents disclosed by the relevant local authority and in the light of the sensitive evidence relating to the children. Neither party sought for the direction to be discharged or sought to argue that it is inappropriate to continue the order. 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 and his family members. This direction applies both

to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. This is the remaking of the appellant's appeal following the decision of Upper Tribunal Judge Perkins promulgated on 1 October 2020 setting aside the decision of the First-tier Tribunal who had allowed the appeal, as involving the making of a material error of law.

2. On the September 2021 UTJ Perkins gave further directions for the appeal to be heard and for a further case management review hearing.

3. On 9 December 2021 and 10 February 2022 case management reviews were held which considered onward listing, permission for evidence to be disclosed to the Tribunal and the preparation of an independent social work report.

4. On the 1 July 2022, a transfer order was made as it was not practicable for the original tribunal to complete the hearing and directed that the appeal be heard by a differently constituted Tribunal.

The background:

5. The appellant is a national of China. The appellant claims to have entered the UK clandestinely on 25 April 2006. He was arrested on 16 March 2009 and was served with an IS151A as an illegal entrant. He claimed asylum which was refused on 11 August 2009.

6. The appellant's partner was also born in China and came to the UK in 2004. Shortly after the appellant's arrival, he met his partner and their relationship developed quickly and by the end of 2006 they were living together. During the course of the relationship they have had 2 children.

7. On 8 March 2011 the appellant, his partner and the children were granted indefinite leave to remain. In 2012 the appellant's partner and children were granted British citizenship.

8. On 17 July 2015 while working in the restaurant in view of others, the appellant picked up a 4-year-old child, pulled down the child's jogging bottoms and touched his penis. The appellant was charged with sexual assault on a male under 13. The appellant pleaded guilty, and he was sentenced to a period of 12 months imprisonment on 28 September 2015 and was placed on the Sex Offenders Register. A restraining order was made in respect of the victim and family. The Judge's sentencing remarks are set out in the respondent's bundle. The appellant completed his sentence on 29 April 2016 but was detained by the respondent under immigration powers. On 15 June 2017, the appellant was released on immigration bail. As a result of the offence he was not allowed to return to the family until an assessment was undertaken but the local authority

arranged for contact between the appellant and his children to be supervised every week.

9. On 28 January 2016, the respondent notified the appellant at section 32 (5) the UK Borders Act 2007 required a deportation order to be made against him and invited representations from him to demonstrate that he fell within any of the specified Exceptions set out in Section 33 of the Act. In response to that decision, representations were submitted on his behalf dated 16th February 2016 and 8 August 2016.

10. On 17 August 2016, the respondent signed and served a deportation order on the appellant alongside a notice of decision to refuse a human rights and protection claim which had been certified under section 94 (B) of the 2002 Act. Further representations were received from the appellant's legal representatives on 11 August 2016 requesting for the deportation order to be revoked. Those further representations were considered as a supplementary decision to coincide with the decision of 11 August 2017 which maintained the decision to deport him.

11. On 31 March 2017, the appellant submitted a judicial review application and following the judgement of the Supreme Court in Kiarie and Byndloss v SSHD [2017] U KSC 42, the decision of 11 August 2016 refusing the human rights protection claim and the certification under section 94 (B) was withdrawn. A decision to refuse a protection of human rights claim was issued by the respondent on 15 September 2017. The decision is set out in the respondent's bundle and reflects the evidence available at the time the decision was made on the 15 September 2017.

12. The appellant appealed that decision, and the appeal came before the First-tier Tribunal(Judge Cox) in April 2018. The FtTJ heard evidence from the appellant and his partner and had some evidence from the relevant local authority at that time. In a decision promulgated on 1 May 2018 the First-tier Tribunal Judge Cox allowed the appeal having found that the best interests of the children were best met by living with both parents and that it would be unduly harsh for the children to remain in the UK without the appellant.

13. Permission to appeal that decision was sought on 9 May 2018. On 6 April 2018 the permission application was considered by a First-tier Tribunal judge. The heading to the appeal was that "permission to appeal is refused" although the body of the decision appeared to be otherwise.

14. There was delay thereafter concerning the status of the appeal. It is unclear what happened after the decision was issued on 6 April 2018 but on 8 January 2020 the Secretary of State renewed the permission application out of time. UTJ Lane considered the application and found that the "egregious delay" in seeking permission had been a consequence of the error made by the FTT on the initial application. The UTJ therefore extended time and granted permission to appeal on 10 March 2020.

15. Following the grant of permission directions for the error of law hearing were issued by UTJ Perkins who considered that the appeal required an oral hearing which took place remotely on 28 September 2020.

16. In decision promulgated on the 2 October 2020 UTJ Perkins found an error of law in the decision of the FtTJ for the reasons set out in his decision as annexed to this decision. He set aside the decision and directed that the appeal be heard again in the Upper Tribunal.

17. Following that decision, on the September 2021 UTJ Perkins gave further directions for the appeal to be heard and for a further case management review hearing.

18. On 9 December 2021 and 10 February 2022 case management reviews were held which considered onward listing, permission for evidence to be disclosed to the Tribunal and the preparation of an independent social work report.

19. On the 1 July 2022, a transfer order was made as it was not practicable for the original tribunal to complete the hearing and directed that the appeal be heard by a differently constituted Tribunal.

20. The matter comes back before the Upper Tribunal now to remake the decision.

The resumed hearing:

21. The resumed hearing took place on 28 September 2022 by way of a hybrid hearing. The appellant was represented by Mr Hussain, Counsel who appeared by CVP and the respondent by Ms Young, Senior Presenting Officer.

22. There was a consolidated bundle filed on behalf of the appellant which included relevant evidence from the local authority involved and also an independent social work report ("ISW"). By way of an email, further documents were sent including a letter from the appellant's offender supervisor, and 2 letters one from each of the children. Mr Hussain also filed a skeleton argument.

23. The respondent relied upon the original Home Office bundle which included the decision letter from 2017 and the documentation sent to the respondent on behalf of the appellant. Ms Young also relied upon a position statement prepared by her colleague.

24. The appellant and his wife attended court to give evidence. Both gave evidence with the assistance of the court interpreter. There were no difficulties with the witnesses giving evidence or understanding the court interpreter. UTJ Owen had made an order on 9 December 2021 pursuant to rule 37 (2) of the Tribunal Procedure (Tribunal) Rules 2008 to ensure the confidentiality of the social work evidence.

25. The appellant confirmed his witness statement dated 10 April 2018 and 1 September 2021 and they were adopted as evidence in chief. He confirmed that he had been with the children since his release from prison for more than 5 years. He stated that the children were aware of his situation and thus the deportation proceedings. He was asked to explain how his partner had struggled to look after the children when he was unable to live with them. The appellant had stated the children needed their father in their lives and their education.

26. He said his partner would face many problems in his children had been discriminated against and there were a lot of difficulties in terms of their daily life. He said his wife had found it difficult to take them out and have leisure time. He had said that he would share the workload with her previously. He said that whilst he was in prison she had to look after children and work in the business and this had been "extremely difficult" and that before his sentence he had worked and also looked after children, but she had to do all of that herself.

27. The appellant gave evidence as to the working hours of the business and that it had been very hard for his wife to start work and deal with the children in his absence and that she would work also in the takeaway in the evening. He confirmed that after his return to the family home there was another business and that he did the breakfast and also took care of food preparation during the day. He said his wife also helped and they both "prepared together." He confirmed that it was he who prepared the breakfast for the children they went to school by foot. He said that he spent the rest of the time cooking for the children taking them out and for leisure activities.

28. In his evidence, the appellant said that the separation will be very difficult his children were born in the UK, and they have a circle of friends in the UK. He said that video call would mean that he could not have a proper relationship with his children and that he would not be able to do things for them. He said he wanted to experience his relationship with the children. He said he wished to stay with the children and that he had found it unbearable to be separated from the children and that "the children feel the same." The appellant stated that he felt remorse for his actions and stated that he would wish that they could stay together as a family. He stated that he knew that he had made a mistake which she would never do again and that he valued his family and being able to live together.

29. In cross-examination he was asked about when he moved back into the family home and confirmed that it was on 10 December 2020.

30. He was asked about the takeaway business and that there was 2nd business that started in April last year that was open from 5pm to 11pm. When asked if his wife worked a full shift, the appellant stated that it depended; if it were busy she worked for 4 hours if not she would work fewer hours. There were also some part-time workers. The business was

open 6 days a week and his wife worked for half of them (30 hours) across the days because he also worked there.

31. In terms of family in China, he stated that his father passed away a few years ago as had his mother in February 2022. He confirmed that he had a brother and sister in China and had "very rare" contact with them the last time was after his mother had passed away. He stated that he had not spoken to them since 2022.

32. He was asked about his involvement with the children when he was in prison, and he stated that it took place through his wife who would tell him about the children and that he would ask her about what was happening with the children and that his wife would talk to him about the children and how they were doing in school. The appellant stated that when she visited him in prison he asked about the children about whether they were missing him, about their studies and the results and whether they had been taken out for days and what they were doing.

33. In re-examination, he stated that he did make decisions for the children and that is partner would talk to him about the children every week she had visited, and he always asked about the children in their lives. He referred to an incident when the children went out with they were crying saying that others had a father but "I do not have one."

34. The appellant's partner gave evidence confirming her witness statements made in 2018 and 2021 which stood as evidence in chief. The appellant's partner in giving evidence was visibly upset when answering the questions. She was asked what it was like during the period where her partner was in custody and away from the family home. She said it was "very very, hard and tiring." She said she had to face many many, difficulties in many aspects- school, social workers police having to deal with the business, worrying about whether her partner would be deported and living in fear every day. She said she felt scared and worried when she thought of the "old days." She said she had to take care of the children and look after them. The children were unhappy about their father who was not at home, and they did not understand why. She said she had to support them emotionally by reassuring them and comforting them. She said it was very, very hard in managing the situation. Prior to the offence it had been both of them working together and leading a life together and suddenly she had to take over all the tasks herself on her own. She described that "suddenly I cannot even breathe it was so hard, looking after the children looking after the business, trying to look after the children well to make sure they were happy. When asked whether the children were happy when their father was in prison, she said they were unhappy and gave an example that when the children went to school they were asked by their friends whether father was that they had to keep the information to themselves because they did not want them to know that the father was not at home with them. When they came home she asked them why and they said "where is dad? Where has he been? And she had to reassure the children. The appellant's partner described the reactions of

children and that they were not told at the beginning about what had happened. In relation to the oldest child she said she was in tears and the appellant's partner tried to explain what had happened. In her evidence she said that the offence was well known in the community as it was reported. She did not know if the children (at school) knew but hat the parents were aware of it and that "it should not happen at school." When asked to explain, what the circumstances were like without her partner she stated, "I lived in hell."

35. When asked about the position after the appellant's release, she said it improved the situation because the children were able to see their father although contact was supervised by the social workers. She said the situation had further improved now he was at home. She said that whilst he was away from the home the children did not cope well emotionally, they were scared of expressing their emotions and feelings to others but now the children are able to speak with their father and see him they are very close. She stated that since he began living back with the family it had been a huge improvement for the children she could see smiles on the children's faces every day they enjoyed being with their father and cooking with them and enjoyed being spoiled by their father. He helps them with their studies and homework, and they went everywhere during the school holidays together. She said that if she were deported it would remind her of her life where it was "in hell." She said that it would be a big shock for the children would harm them "mentally." She said children are very happy compared to when their father was not with them. She said if you were to be deported the situation "will repeat and the children would not dare talk about the problems." She thought the impact upon the would be huge they would be unhappy would lose the support of their father in their education and it would have an effect upon the mental health.

36. In cross-examination, she was asked about making decisions and she confirmed that she had made decisions on her own because her partner was in prison and could not get in touch with him. She confirmed she did visit him in prison and that whilst he was in prison he would ask about the children and their well-being, their studies whether they were happy and if they missed their father.

37. In terms of arrangements for work, she confirmed she worked in the business and did so every day. She said she worked approximately 22 hours per week and that when working she would asked one of her friends to come over to help. She was asked if that friend would assist in the event of her partner's deportation. She stated that her friend had children and it was only when she went to work that her friend had helped her.

38. There was no re-examination. In answer to a question from the bench, she was asked to clarify her evidence about issues with the children where that they were bullied. She stated that when they were living in their previous area children had thrown eggs, stones and rubbish towards them and they could not carry on their life. She thought it had happened because something had been said about the children's father at school.

The submissions:

39. Ms Young made the following submissions on behalf of the respondent. She relied upon the decision letter dated 15th of September 2017 and also the position statement which she supplemented with her oral submissions.

40. She submitted that the issue was whether it would be unduly harsh for the children to remain in the UK without their father which she stated was a high test as set out in the Supreme Court decision in HA, RA and AA [2022] UKSC set out at paragraph 7 of the position statement. Ms Young submitted that the position statement addressed the unduly harsh test and that it was not met. In particular paragraphs 10 to 13 addressed the ISW report which was not accepted. She submitted that it had a different picture from the documents from the local authority and that the report was vague and did not go into detail of the lack of involvement or involvement with the children when he was released. Furthermore, paragraph 2.8 the report referred to him as carrying on parenting whilst in prison suggesting he was involved in day-to-day decisions however the documents suggest that the appellant was the sole primary carer and that important decisions were not passed by the appellant but that the appellant's partner dealt with them.

41. When looking at the ISW report, the author failed to take into account the network of support provided to the family whilst the appellant was in prison and living separately nor the historical use of indirect contact over the previous period as relevant to the family and the ability to cope in the event of deportation.

42. Ms Young referred to the skeleton argument filed on behalf of the appellant and paragraphs 16 and 18 dealing with the time the relationship was formed. Whilst the skeleton argument asserts the refusal decision is in error, when looking at the immigration history the decision letter is correct. The parties met in 2006 and the appellant did not have indefinite leave to remain in 2006 and it was not granted until 2011. Therefore the relationship was formed when the appellant was not lawfully in the UK was relevant to the consideration of paragraph 339 (b).

43. In summary Ms Young submitted that the circumstances of the appeal did not meet the elevated threshold set out therefore it would not be unduly harsh for the children to remain in the UK without their father in the event of his deportation. As to the issue of whether there were "very compelling circumstances," Ms Young submitted that she relied upon the matters set out in the original decision letter.

44. Mr Hussain relied upon the skeleton argument that he had filed for the hearing which addressed the issues relevant to the appeal.

45. In addition he provided oral submissions, summarised below in a different order, as follows.

46. Dealing with the issue of undue harshness, a submitted that this was not a narrow issue as shown by the evidence and that it demonstrated the importance of the appellant in their lives in the UK and that feeds into the weight as to why deportation was disproportionate.

47. As to the evidence in the ISW report and the social services evidence, it demonstrates the circumstances where the social services completed a report, and the appellant was discharged from supervision. The parents reported that the children were struggling in education at school and found the situation difficult. He submitted that what was beyond dispute and had not been subject cross-examination is the positive impact upon both the appellant and his wife and children experienced when the appellant returned to the family home. This was because the children benefited emotionally and psychologically from his father's return. The respondent's position statement ignores those critical facts, and the focus is on the offending behaviour with no consideration of the impact on these children.

48. He submitted that when looking at the position of the children, the social work report acknowledged that the appellant was estranged from the family for a period of time. Whilst the respondent submitted that the ISW report was not consistent with the social work evidence, the tribunal had not been taken to any particular parts of the ISW evidence. There was reference made to the children's education suffering and their emotional well-being and the positive reference made to the appellant's engagement in the lives of the children. Mr Hussain referred the tribunal to particular parts of the ISW report at paragraphs 13.5, 13.8, 14.6 and 14.10 and the children's response.

49. He invited the court to consider the letters from the children which sets out their position. He submitted it was moving testimony as to why they would wish for their father to remain in the family home and the importance of the relationship to them.

50. Returning to the ISW report, Mr Hussain submitted that it was well established and within judicial knowledge of the long-term effects of separation of parents and children which can cause difficulties into adult hood. He reminded the Tribunal of the decision in HA (Iraq) and in particular paragraphs 41 – 44 of that decision and that the Tribunal was required to undertake an evaluative assessment. In this case the elevated threshold had been met. He submitted harshness was to be considered in the context of the evidence and the best interests of the children. The children presented evidence of the court as to how they felt about the prospect of losing their father and the appellant's partner had given emotional testimony and the impact upon her previously described as a "living hell." He submitted that there had been a large amount of upheaval, stress and anxiety and there was now a period of stability in the family home, and they were able to live together and therefore the parties to be separated again because it is contact and would have an unduly harsh impact on the appellant's wife and children.

51. Mr Hussain relied upon his skeleton argument at paragraph 15 by reference to the decision letter at paragraph 61. He submitted that the respondent was incorrect in the assertion made that the offence was committed for the appellant's own sexual gratification and this was clear in the sentencing remarks at page 54 of the bundle. There was no evidence either to support the assertions made at paragraphs 62 - 63 of the decision letter .

52. Returning to the decision letter, he submitted that paragraph 51 was in error where it was asserted that the relationship was formed when the appellant's immigration status was precarious. He submitted that the appellant had been granted indefinite leave to remain since March 2021 although it was accepted that that was invalidated when the deportation order was signed. However at the time the offences committed he was living his wife and children and family life had not been extinguished as a result of any commission of the offence. In this regard he referred to the decision in CI (Nigeria) and the reference is made to social ties and integration. He submitted that the appellant had integrated in the UK demonstrated by his employment and his social identity. Thus the offending behaviour and imprisonment did not sever the social and cultural ties that he had built up in the UK, notwithstanding the submissions made on behalf of the respondent.

53. Dealing with issues of rehabilitation, Mr Hussain relied upon the decision in HA (Iraq). There was evidence now from the supervising officer who had been involved with the appellant which demonstrated a very positive and glowing reference that the appellant had cooperated with all necessary steps and that he was assessed as a low risk of reoffending. This was supported by the evidence and social services (page 100 – 103 AB).

54. As to the offence, the evidence demonstrated that the appellant was full of remorse for having committed the offence and this was set out in the appellant's statement and also the statement from the supervising officer. When looking at the seriousness of offence, the sentencing remarks set out the reasoning to why the starting point was 2 years, but the appellant's sentence was reduced to one of 12 months. He submitted that the length of sentence was the starting point and not the endpoint of judging the offence and the 12 month sentence reflected the scale of culpability, seriousness of the offence when looking at the wider public interest. This was not a case where the appellant had any history of offending and whilst it was one of a sexual nature it should be borne in mind it was not offence motivated by sexual gratification but an ill judged and idiotic offence which was an isolated incident and previously the appellant was of good character. It was an offence the lower end of the scale.

55. The children were carefully monitored by social services and the appellant have been fully cooperative was able to return home (page 96). His level of engagement was commendable (page 104) he fully engaged with the process and posed a low risk in the community. He submitted that the

appellant's unacceptable behaviour that had a catastrophic impact upon the appellant's wife and children. Mr Hussain submitted that when looking at all circumstances it was necessary to consider the impact upon the appellant's wife and children taking the facts it must be unduly harsh for the children to remain without the appellant in the UK, he invited the tribunal to allow the appeal.

The legal framework:

56. It is necessary to consider whether the appellant's deportation would be unlawful under section 6 of the Human Rights Act 1998 as being in breach of Article 8 of the ECHR .Any decision-maker considering the human rights issue is required to have proper regard to section 117 of the Nationality, Immigration Asylum Act 2002 and to adopt a structured approach to that question.

57. By section 117A(1), Part 5A of the 2002 Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts (such as a decision to deport a foreign criminal) would breach a person's right to respect for private and family life under article 8 ECHR. In such a case "the public interest question" is defined as being whether an interference with a person's right to respect for private and family life is justified under article 8(2) ECHR: see section 117A(3).

58. When considering that question, a court or tribunal "must (in particular) have regard" in "all cases" to the considerations in section 117B, and in "cases concerning the deportation of foreign criminals" to the considerations in section 117C: section 117A(2).

59. Section 117B provides that the maintenance of effective immigration controls is in the public interest (117B(1)); that it is in the public interest and in particular in the interests of the economic well-being of the United Kingdom that persons seeking to enter or remain in the United Kingdom are "able to speak English" (117B(2)) and are "financially independent" (117B(3)); and that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the UK "unlawfully" (117B(4)) or to a private life established by a person when the person's immigration status is "precarious" (117B(5)).

60. It has been held that a person is in the UK "unlawfully" if they are present there in breach of UK law - Akinyemi v Secretary of State for the Home Department [2017] EWCA Civ 236; [2017] 1 WLR 3118 at para 40. A person's immigration status is "precarious" if they do not have indefinite leave to remain - see Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58; [2018] 1 WLR 5536.

61. Given its importance to the appeal, section 117C will be set out in full. It provides:

> "117C Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where –
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (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."

62. The first question which arises is whether the appellant is a foreign criminal, as defined in section 117D(2) of the 2002 Act. There is no dispute that the appellant is not a British citizen and has been convicted in the United Kingdom offence and has been sentenced to a period of imprisonment of at least 12 months (he was sentenced to a period of 12 months imprisonment). He is therefore a "foreign criminal."

63. The central issue of the appeal concerns the issue of undue harshness. There has been a significant amount of case law concerning the unduly harsh test. In HA (Iraq) v SSHD (Rev 1) [2020] EWCA Civ 1176 the court gave further guidance on KO (Nigeria) & Ors v SSHD [2018] UKSC 53. This has now been endorsed by the Supreme Court in HA (Iraq) v SSHD [2022] UKSC 22

64. The Court of Appeal in HA 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.

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.

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value.

54. The Appellants of course accept that Lord Carnwath said what he said in the passages to which I have referred. But they contend that it is not a complete statement of the relevant law and/or that it is capable of being misunderstood. In their joint skeleton argument they refer to the statement in para. 23 of Lord Carnwath's judgment that 'one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent' and continue:

> 'This statement, taken in isolation, creates the opportunity for a court or tribunal to reach a conclusion on undue harshness without due regard to the section 55 duty or the best interests of the child and without careful analysis of all

> relevant factors specific to the child in any particular case. Instead, such considerations risk being 'swept up' under the general conclusion that the emotional and psychological impact on the child would not be anything other than that which is ordinarily expected by the deportation of a parent ... that cannot have been the intention of the Supreme Court in *KO (Nigeria)*, which would otherwise create an unreasonably high threshold'.

Mr de Mello and Mr Bazini developed that submission in their oral arguments. In fact it comprises two distinct, though possibly related, points. I take them in turn.

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.
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> 57. I make those points in response to the Appellants' submissions. But I am anxious to avoid setting off a further chain of exposition. Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50-53 above".

65. The SSHD appealed HA (Iraq) v Secretary of State [2020] EWCA Civ 1176. The Supreme Court, in HA (Iraq) v Secretary of State [2022] UKSC 22 endorsed the approach of Underhill J and rejected the SSHD's contention that Lord Carnwath was contemplating a notional comparator test in KO (Nigeria). Giving the lead judgement Lord Hamblen stated:

> 32. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:
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> > "... 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
>
> 33. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - i.e. it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).

> 34. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.
>
> 35. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.
>
> 36. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State.

66. If the Appellant is able to establish that the impact of deportation would be unduly harsh on his children his appeal falls to be allowed under Article 8. If he is not able to establish this he sought to rely on s.117C(6).

67. It is now well established that section 117C(6) applies to a so-called "medium offender", even though the drafting suggests that it applies only to a foreign criminal sentenced to a term of imprisonment of at least four years, so that such an offender might establish either section 117C(5) or section 117C(6): see *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at paragraphs 25 to 27.

68. Under section 117C(6) of the 2002 Act deportation may be avoided if it can be proved that there are “very compelling circumstances, over and above those described in Exceptions 1 and 2”.

69. The difference in approach under section 117C(6) as opposed to 117C(5) was conveniently summarised by Underhill LJ at para 29 of his judgment as follows:

> “(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
>
> (B) In cases where the two Exceptions do not apply - that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements - a full proportionality assessment is required, weighing the interference with the article 8 rights of the

> potential deportee and his family against the public interest in his deportation. In conducting that assessment the decisionmaker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."

Discussion and conclusions:

Exception 1: S117C(4):

70. Dealing with Exception 1, and the issue lawful residence, there is no dispute between the parties that the appellant has not spent most of his life lawfully in the UK on the basis of having entered the UK in 2006 aged 25 ½. The appellant remained without any valid leave to remain for 5 years. Whilst he was granted ILR in March 2011 as Mr Hussain accepts, it was invalidated on 10 August 2016 when the deportation order was signed.

71. As to S117C(4) (b) and whether he is socially and culturally integrated in the UK, the decision letter does not consider that substantively neither does the respondent's position statement. Mr Hussain on behalf of the appellant submits that the appellant is socially and culturally integrated by his length of residence and his family and his social ties and employment.

72. There has been little evidence led about this issue. However having considered the evidence in its totality, the appellant has been resident in the UK since 2006 and therefore has had a lengthy period of 16 years. During his residence he has formed a family life with his wife who is now a British citizen, and they have 2 British citizen children. There is no dispute that he has been engaged in employment and the evidence refers to businesses that he has built up along with his wife. The appellant has a number of social ties as evidenced in the local authority evidence comprising of the church and the fellowship he and his family members have with them. He is able to speak English as he has demonstrated, although not fluently. As Mr Hussain argues if the submission had been made that the appellant's criminal offending had ended his social integration, this would not be consistent with the evidence which shows that he has been so socially and culturally integrated in the UK. Since his release , he has continued to be in employment and has taken steps towards his rehabilitation as evidenced in the evidence from the local authority and his supervising officer. I accept the submissions made by Mr Hussain that the appellant has engaged with the assessments undertaken with the local authority and the evidence shows that the work was successful so that a phased return to the family home was completed with the local authority ceasing all involvement in March 2021. The supervising officer's evidence was that he had been present at the multiagency meetings, that the appellant had complied with the conditions and restrictions in place and that he had been assessed as a low risk of committing a further sexual offence. The letter refers to the appellant fully admitting his offence. He described the family from his own observations

of the 2 adults being hard-working everything they do revolves around the children". Based on the evidence and taking into account that he has had one period of imprisonment I do not find against the long period of residence and the other factors identified that this was sufficient to show that his integration was broken. I am satisfied that he is socially and culturally integrated.

73. Turning to the last subparagraph S117C (4) (c) and the issue of whether he would face very significant obstacles to integration to China, I remind myself that the test is a high threshold and that the meaning of "integration" involves a broad evaluative judgement of all relevant matters. As set out in the jurisprudence the question of whether the individual concerned will be enough of an "insider" such that in all the circumstances he would be able to develop and lead a reasonable life, bearing in mind the need to create social and economic ties in his country of origin. Mr Hussain submits that the appellant does meet the high threshold having left China in his early 20s and having no family and friends or little memory of the culture, and traditions.

74. Having considered the evidence, the appellant does not demonstrate that he meets the high threshold necessary to support a finding that there would be very significant obstacles to his integration to China. Contrary to the submissions made by Mr Hussain, the appellant came to the UK as an adult aged 25 ½ years and therefore his formative years and part of his adult hood was spent in China. He also has family remaining in China as stated in his oral evidence. Whilst his parents are no longer alive, the appellant has a sister and reference is made to a brother. He was last in contact with his sister in February 2022 and therefore he continues to retain some family ties in China. He has previously worked there and having worked in the UK he would be able to transfer those skills on return. He has retained his language skills and given the length of prior residence and his contact with the Chinese community; I am satisfied that he will be aware of the cultural aspects of life notwithstanding the length of absence. The test of "integration" calls for a "broad evaluative judgement made as to whether the individual will be another an insider in terms of understanding how life in the society and that other countries 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". Applying the dicta in Kamara v SSHD [2016] EWCA Civ 813 and having undertaken an evaluative assessment, the appellant has not demonstrated that he meets the test of showing that there are very significant obstacles to his reintegration to China.

75. In summary, the appellant has not met S117C(4) (a) and (c) and therefore is not able to establish Exception 1.

Exception 2: S117C(5):

76. The central feature of the appeal relates to the circumstances of the appellant's children and his partner in the event of the appellant's deportation. There are 2 relevant children who will be referred to as A1 and A2, both of whom are British citizens and are therefore qualifying children for the purposes of section 117D(1) of the 2002 Act. There is also no dispute that the appellant has a genuine and subsisting relationship with his partner who is a British citizen.

77. As can be seen from the chronology that has been a long period of delay from when the appeal was allowed in 2018 until the appeal has been listed in 2022. The original decision letter relied upon by the respondent for the hearing is dated 19 September 2017. There has been no amended decision issued on behalf of the respondent to deal with the change of circumstances and the children's lives since the decision letter was issued or since the decision of the FtTJ allowing the appeal in May 2018.

78. Paragraph 44 of the decision letter concerns the issue of whether it would be unduly harsh for the children to live in China. That paragraph appears to concede that it would be so unduly harsh. It has not been submitted on behalf of the respondent that stated position has changed and no questions were asked concerning that issue or submissions made on it.

79. The position statement submitted on behalf the respondent appears to submit that the appellant does not have a genuine, subsisting parental relationship with the children (see paragraph 13 of the decision letter). That submission was not explained further by Ms Young, and it is contrary to what is set out in the decision letter.

80. Furthermore based on the evidence before the Tribunal in the form of the evidence from social services involvement, the assessment made by the ISW and the evidence in the letters from the children, it overwhelmingly demonstrates that the appellant has a genuine, subsisting parental relationship with both children. When looking at the family history, the appellant and his partner have lived together as a family unit prior to his imprisonment. The evidence of the appellant, which I accept, is that they had a happy family relationship and that they lived together, and the evidence demonstrates that there are loving bonds between the father and children as described. I am therefore satisfied that the evidence in the ISW report which recounts and analyses conversations with both children, and based on observations made of the relationship, is that it is a positive and loving and close relationship between the children and their father (see 20.1 and 20.2), and he continues to play an important role in their upbringing (20.7 and 2.8 ISW). I am satisfied that both children are of an age where they are able to express their wishes, feelings and views and I am satisfied that they have been accurately portrayed in the ISW report based on the authors conversations with the children. Their responses in the report are entirely consistent with the letters written by them attesting to their close relationship with their father and the importance of him in their lives.

81. Dealing with the primary focus of the appeal whether the effect of the appellant's deportation would be unduly harsh on the children, I have undertaken an evaluation of the evidence. In undertaking that task I take into account that the question of unduly harsh is to be evaluated with reference to the children alone. To weigh the impact of deportation on a child against the criminality of the parent would be to offend against the 7th principle established in the decision of Zoumbas v SSHD [2013] UKSC 74, namely that a child cannot be blamed for matters for which they are not responsible.

82. The relevant law is set out earlier in this decision. I remind myself by applying the decision in HA (Iraq) v SSHD [2022]UKSC that unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. It poses a considerably more elevated threshold. "Harsh" in this context denotes something severe, bleak. The addition of the verb "unduly" raises an already elevated threshold higher.

83. I should consider the circumstances of the children from their point of view and the focus should be on the reality of their actual circumstances or situation including any impact of emotional harm on their future well-being.

84. Turning to the evidence, insofar as the respondent challenges the evidence of the appellant and his partner as unreliable and not credible (see position statement at paragraph 9), having had the opportunity to consider their oral evidence and having done so in the light of the documentary evidence, including the evidence from social services and the ISW report I find the appellant and his partner to be credible witnesses who gave their evidence in a straightforward way. I do not find their evidence to be inconsistent in its contents. Both gave oral evidence and the challenge made in cross-examination was extremely limited with no real inconsistencies being identified in the evidence.

85. I accept the appellant's partner's evidence as to the position and role of the appellant in the family prior to his offending and that is consistent with the evidence and the children set out in the ISW report.

86. I turn to the ISW report (page 106 AB). It is submitted on behalf of the respondent that the report should be given little or no weight as the Tribunal is not assisted by the report. This is because, it is submitted, that the contents of the report is inconsistent with the evidence from the local authority. For example, 14.7 – 14.10 refers to the children struggling in the absence of the appellant and that they were withdrawn and not eating. It is therefore submitted that the evidence is not reliable.

87. The Upper Tribunal is often required to consider evidence from a range of sources including evidence from qualified social workers in cases involving families and children. When providing expert evidence, a witness provides independent assistance to the court or tribunal by way of an objective, unbiased opinion in relation to matters within their expertise. It is well

established that it is for a court or a tribunal to consider what weight should properly be placed upon evidence and the approach to expert evidence is no different and it is a judicial decision as to whether opinion evidence can properly be considered “expert.”

88. When applying these general considerations to the report, I am satisfied that the subject matter of the opinion falls within the class of subjects upon which expert evidence is admissible. I am further satisfied that the ISW concerned and as identified in the appendix to the report, of her qualifications and experience as a social worker and I am satisfied that she has acquired by both her experience and study, good and sufficient knowledge of her subject to render the opinion of value in resolving the issues.

89. The matter of weight given to the report depends on a number of factors. When applied to the report, the ISW was not provided with copies of the social services documentation. The ISW was also not able to contact the children’s school although school reports are annexed to the report. Accordingly that does affect the weight that I give the report. However at paragraph 2.1 the author was aware of the conclusions of the local authority involvement and the unanimous decision made that the child protection plan would come to an end in March 2021 and that there was no more social work involvement in the family. Against that background the ISW was able to undertake an assessment based on her meeting with the adults involved and also with the children. She formed the view that the children were able to give independent evidence.

90. I have considered the contents of the ISW report alongside the other evidence available, including the letter from the original local authority involved in 2016 from the evidence of the social services, the evidence of the parents and the children themselves.

91. Having considered all of the evidence it is consistent as to the nature and strength of the appellant’s relationship with the children both prior to imprisonment and since his return to the family home. I am satisfied that the appellant was a part of the family dynamics and shared the parenting of the 2 children with his partner. The respondent submits that he did not make decisions in the children’s lives. When he was in custody, he was not in a position to actively care for the children and the evidence demonstrates that the appellant’s partner took on the parenting role. It was a difficult time for her and the children and the task of caring for the children and working on the business unaided led to the business closing in 2018. The family moved to a different area and a different local authority undertook the assessments of the family. The evidence speaks of a loving, caring and happy family and before and since his imprisonment he was and is now actively involved in their upbringing. I am satisfied that this is the case as this demonstrates the nature of the relationship and the close attachment both children are reported to have with their father. It is also said he meets the children’s cultural needs which is seen as important to the family in light of their cultural heritage (see 2.12 and 20.7).

92. As to the effect on the children of their father's imprisonment, it is submitted on behalf of the respondent that the evidence provided in the ISW report from the mother is not reliable and it is inconsistent with the social services evidence.

93. Having considered the evidence in the chronology of the background events, I reject the submission. The evidence from the appellant is that his imprisonment had a significant impact on children which caused them to struggle to cope with their emotions (13.6). The evidence of the appellant's partner was consistent in the description of the impact on the family. She described the children are struggling to cope with emotions due to the separation from their father who had been a constant and prominent feature in their lives and had never lived apart (see 14.16). She described noticing a change in their behaviour, they presented as withdrawn, not eating and finding it hard to concentrate at school when there was a significant drop in their grades. Her concern was both physical and emotional concerns; she described it as previously a happy house full of laughter but when he went to prison that change dramatically.

94. I accept the description in the appellant's partner's evidence as to the effect on the children as it is consistent with the evidence from the children themselves. At the time of the appellant's imprisonment the children were aged 6 and 7 and were used to their father playing a role in their lives and then faced with his absence. The children disclosed the ISW that they did not understand the implications of what was happening at the time when they realised he would not be home for some time and also when he was released; the children expressed their feelings as " low mood" and found it difficult to terms with the thought of the father not coming home.

95. A1 disclosed that when she was separated from her father she was unsure and lacking in confidence (see 15.7), she described the "atmosphere changing" (16.5). A2 stated that it was difficult not having her father there (16.1). The appellant's partner's evidence was that during the appellant's imprisonment "it was very hard" and she was trying to support children physically and emotionally. The evidence is consistent with her description of the effect on the children of having disturbed sleep, being anxious and finding it difficult to express themselves.

96. I do not accept the respondent's submission that the evidence is inconsistent with the evidence of the social services evidence. The period of time referred to in the ISW report covers the whole period from 2015, the position since his return to the family home and the present day. The evidence from the first local authority where they lived before their move, also supported likelihood of emotional harm to the children currently separated from their father (see letter in respondent's bundle dated 2016). The evidence provided in the recent social work involvement is dated 2020 and 2021. There is not a complete set of papers from them as there has been limited disclosure but the evidence that has been disclosed refers to the period where the local authority were actively assessing the family as

to whether they could be safely reunited and therefore was at a time when the appellant was playing a role in the family via a phased return. Since December 2020 he has been living back in the family home.

97. The references in the social work evidence to the school reporting that A1 is “extremely happy school since dad returned home” (page 103). It describes their confidence growing immensely and good positive friendships groups at school.” A2 was described as “quiet and shy”. The local authority evidence refers to the children needing support to get used to the change in the family structure and arrangements and their father returning to live with them.

98. When seen against that background I accept the evidence of the appellant and his partner as a reliable description of how the position change since the appellant was reunited with the family. The evidence is supported by the children’s recollection of events. The appellant’s partners evidence is that now he is back home the family once again happy, and the children are reaching academic targets (14.10, 14.11). A1 is described as progressing well at school (15.2) and she is happy that they are living as a family again. At 15.7 she sets out that when she was separated from the father she was unsure of herself and not confident that since he was back in the family home she has been more assertive happy and more adventurous. A1 states that if her father were returned to China she would “constantly worry about him” (15.10). A2 refers to the circumstances that since her father had returned the atmosphere has changed in the family home (16.5). She described it with it would be difficult not being able to have face-to-face meetings and miss having cuddles and maintaining a close bond (16.6) she said she would be devastated to be separated once again; she is now used to him being back in the family home and cannot imagine growing up without him (16.8).

99. Against that evidential background I turn to with the evaluation of the effect upon the children in the event of the appellant’s deportation.

100. The reasons set out earlier, I accept the evidence of the appellant and his partner as reliable evidence of the effect upon the children when he was absent from the family as it is consistent with the children’s perception and description of their own emotional well-being at that relevant time.

101. I am satisfied that he formed an important part of the family and currently enables the family to function as a unit for the children and his partner. I also accept the opinion of the ISW that his removal from the children now from their lives would be likely to have a significant impact on the children’s material well-being, emotional health and development (20.8). I accept the conclusion because of the background history. At a young age, 6 and 7, the children were parted from their father at a time when they had little understanding of the circumstances and the uncertainty of whether their father would be able to return which took a number of years to resolve. The social services evidence records that there had been a delay in the work as it needed a specialist assessment of risk. The level

and progress of contact was disrupted due to the covid lockdown and restrictions in place. Direct work was undertaken with the children with a plan of contact to reintroduce father to the home. There was also an in-depth assessment with the parents and the work was described as “very intensive” with both the appellant and his partner described as “working well through the process open and honestly.” Therefore over a long period of time the local authority undertook intensive work with the family members including the children which led to a phased return with the appellant being reunified with the family. The unanimous decision was that the child protection plan should end following a significant period of monitoring since his return (see report March 2021).

102. The ISW description of the children having been able to rebuild their relationship with their father due to the time lost during his absence is consistent with that background (see 20.2).

103. The risk of emotional harm to the children is also described that they would likely experience a feeling of loss of their relationship with their father was severed and likely to develop a feeling of abandonment (21.18). I accept the opinion of the ISW that the children have experienced a very challenging time; they have undertaken direct work with the local authority and were excited for their father to return home; they are now described as scared and apprehensive of their father being deported. The children have had to adjust to life without their father and now that he is back in their lives they are faced with having to consider the possibility of him leaving them again (21.24). The children are presently progressing well and described as “emotionally stable” and by being a family again has reduced the stress and anxiety.

104. I accept the submission made on behalf of the appellant that the importance of the relationship to the children was demonstrated by the social work involvement taking place with the family and to be reunited to live together and the likely result of the change in their lives is likely to affect and have an impact on their emotional well-being. Whilst I would accept the prediction of the consequences for the children from the parents evidence should be approached with caution, it is supported by the evidence of the ISW who is, I find, as a social worker able to provide an opinion as to the likely emotional impact of separation upon these children. I am satisfied that it is in the best interests of children for their father to remain in the UK and for them to continue rebuilding the family unit.

105. Whilst I do not attach significant weight to the practical difficulties that the appellant’s partner would have if the appellant were deported, such as childcare and work, the evidence demonstrates that she has been able to manage those problems albeit with some difficulty, I accept the appellant’s partner’s evidence that the period of time has been a “living hell” which was a description she used several times in her oral evidence.

106. Drawing those matters together, I accept the opinion of the ISW that there is a likelihood that the children's emotional health will be adversely impacted on by the long-term separation from their father. Whilst there is always likely to be an element of speculation, there is evidence as to the effect upon the children when they were not living together alongside the positive changes to their lives since their father's return. The current family arrangement has been in place since December 2020 which has not been an insignificant period for the children, and which would make a further change of circumstances to be potentially harmful. The children have enjoyed a period of stability following the local authority assessment and have again been used to having father in their lives as previously.

107. Therefore assessing the facts together holistically I am satisfied that there has been significant disruption to the children and there is likely to be if the appellant is deported. I further find that in the event of his deportation the children would lose their relationship with him. I do not consider that the relationship can be remedied by video contact as submitted on behalf the respondent.

108. Having considered the evidence, the elevated threshold is met by a number of factors taken together and for the reasons set out above I allow the appeal on the basis that the appellant's deportation to China and the children and his partner remaining in the UK would meet that elevated threshold. Having evaluated the likely effect of deportation on the children and his partner the effect is not merely harsh but unduly harsh applying the guidance in the relevant case law set out in this decision.

109. As set out in the applicable legislation, and case law, if the appellant meets Exception 2, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances the specified the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms. Thus if the Appellant is able to establish that the impact of deportation would be unduly harsh on his children and/or his partner his appeal falls to be allowed under Article 8.

110. I therefore allow the appellant's human rights appeal (Article 8) as he has met Exception 2. Having allowed the appeal on that basis, there is no requirement that I proceed to consider his Article 8 appeal under section 117C(6) of the 2002 Act.

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside; the appeal is to be remade as follows: the appeal is allowed on Article 8 grounds.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 21/11/22

Upper Tribunal Judge Reeds