Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/12938/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2021	**On 24 February 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

AM (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Zane Malik QC, instructed by MT UK Solicitors
For the Respondent: Esen Tufan, Senior Presenting Officer

DECISION AND REASONS

1. On 15 November 2019, before the global pandemic began, I issued my first decision in this appeal. I held that the First-tier Tribunal (Judge Morris) had erred in law in its decision to dismiss the appellant's appeal. I set aside that decision in part and directed that the decision on the appeal would be remade in the Upper Tribunal.

2. There was a significant and regrettable delay in progressing the appeal after I reached my first decision. The remaking hearing was listed before me on 29 April 2020 but that listing was vacated as a result of the pandemic. The papers were placed before Judge Pickup on or about 4 April 2020. He was of the provisional view that the appeal might properly be determined remotely. In response to Judge Pickup's

directions, the respondent submitted that the appeal should instead be listed for a face-to-face hearing.

3. The appeal nevertheless came before me remotely on 17 June 2020. Mr Malik, then of counsel, represented the appellant. Ms Isherwood, a Senior Presenting Officer, represented the respondent. The advocates and the parties were all in remote attendance. The appellant and his partner were at home in Southampton. Mr Malik indicated that it was his intention to call them to give evidence. The nature of that evidence was not prefigured in their statements. They intended to state, I was told, that they had decided as a family to relocate to Afghanistan in the event that the appellant's appeal was unsuccessful. For reasons I gave in writing after that hearing, I was not satisfied that it was appropriate to hear such contentious evidence from two people in a domestic setting. I adjourned the appeal so that consideration could be given to alternative means of proceeding, including whether the appellant and his partner might give evidence remotely from the offices of his solicitor. Ultimately, however, it was decided that a face-to-face hearing was the appropriate method of determining a case of this nature. So it was that the appeal eventually returned before me on 6 December 2021.

Background

4. The appellant is an Afghan national who was born on 26 June 1982. In my first decision, I summarised the events preceding the appeal to the Upper Tribunal in the following way:

> [3] The appellant arrived in the United Kingdom sixteen years ago, on 7 August 1993. He was eleven years old and he entered with his mother and his sister. They entered unlawfully. They asked to be treated as dependents of the appellant's father, who had entered the UK in 1992 and claimed asylum. It is not clear to me whether they were permitted to do so. What is clear is that the appellant's mother claimed asylum in her own right in 1996. The appellant and his sister were dependent upon that claim. The claim was refused in February 1998 but the appellant, his mother and his sister were granted Exceptional Leave to Enter ("ELE") from March 1998 to February 1999.
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> [4] The appellant, his mother and his sister were subsequently granted further leave until February 2002. The entire family (including the appellant's father) were then granted Indefinite Leave to Remain on 11 July 2002. The appellant made applications for naturalisation in 2003 and (twice) in 2006. These were refused, although the appellant was granted a No Time Limit stamp in June 2007.
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> [5] The appellant has a number of convictions in the United Kingdom. The most serious of those convictions was for conspiracy to supply a class A drug. He was convicted of that offence on 22 May 2015. On 28 August 2015, he was sentenced by Mr Recorder Atkinson QC at the Crown Court at

> Southampton to 5 years and 4 months' imprisonment for that offence.
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> [6] Those events prompted the Secretary of State to take deportation action against the appellant. A decision to deport was sent on 24 February 2016. Representations against that decision were made on 17 March 2016. A decision refusing those representations on human rights grounds and certifying the appellant's human rights claim under s94B of the Nationality, Immigration and Asylum Act 2002 was made on 23 December 2016. On 2 June 2017, the appellant claimed asylum. On 14 June 2017, the Supreme Court gave judgment in Kiarie & Byndloss [2017] UKSC 42; [2017] 1 WLR 2380 and the certificate under s94B was withdrawn as a result of that decision. On 23 November 2017, the respondent issued a decision in which she refused the appellant's protection and human rights claim afresh. That decision carried a right of appeal to the FtT(IAC), which the appellant duly exercised.
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> [7] The appeal came before Judge Morris, sitting at Taylor House, on 26 March 2019. The appellant was represented by Mr Bilal Malik of counsel. The respondent was represented by a Presenting Officer. The appellant's case was, firstly, that he would be at risk in Afghanistan because of his father's political activity and his own Westernisation and, secondly, that his deportation would be in breach of Article 8 ECHR. The latter claim was based on the appellant's length of residence and his relationship with his British partner and their two British children, who were born on 19 May 2009 and 15 August 2010.
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> [8] Judge Morris reviewed the appellant's immigration and offending history at [20]-[24]. She considered at [25]-[29] that the appellant had failed to rebut the presumptions in section 72 NIAA 2002 and she dismissed his appeal on protection grounds accordingly. At [31]-[32], Judge Morris concluded that the appellant would not be at risk in Kabul in any event. At [33] *et seq*, she dismissed the appeal on Article 8 ECHR grounds. She reached that conclusion because she decided, having directed herself to KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273 that it would not be unduly harsh to expect the appellant's partner and children to remain in the UK whilst he was deported to Afghanistan. Nor did she accept that the appellant could show very compelling circumstances over and above those set out in the statutory exceptions to deportation such as to outweigh the public interest in deportation.

5. At [21]-[25] of my first decision, I held that the FtT had erred in failing to consider the extent to which the appellant would have been able to meet the first statutory exception to deportation had he not been a serious criminal. At [26], I noted that there had been no challenge to the judge's conclusions in relation to the second statutory exception to

deportation. With 'considerable hesitation', I nevertheless concluded at [27]-[28] that the FtT's error was material to the overall outcome of the appeal, and I set aside the decision in part. I preserved the findings that the appellant was unable to rebut the presumptions in section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"); that the appellant would not be at risk in Kabul; that it would be unduly harsh for the appellant's partner and children to go to Afghanistan; and that it would not be unduly harsh for them to remain in the UK without the appellant. The focus of the resumed hearing was therefore to be on the first statutory exception to deportation and the ultimate question posed by s117C(6) of the 2002 Act, of whether there are very compelling circumstances, over and above those in the statutory exceptions, which suffice to outweigh the significant public interest in the appellant's deportation.

The Resumed Hearing

6. At [4] of his skeleton argument for the resumed hearing, Mr Malik QC invited me to depart from the findings which I had preserved in November 2019. Whilst he accepted that there was no proper basis upon which to revisit the finding in relation to s72, he submitted that the FtT's assessment of the appellant's safety in Kabul and the effect of the appellant's deportation on his partner and children should not be preserved. The basis of that submission was simple and persuasive. In relation to the finding as to the appellant's safety in Kabul, the situation on the ground had changed with the resurgence of the Taliban. In relation to the FtT's assessment of 'undue harshness' under s117C(5) of the 2002 Act, the jurisprudential landscape had changed, particularly as a result of the Court of Appeal's decision in HA (Iraq) v SSHD [2020] EWCA Civ 1176; [2021] 1 WLR 1327.

7. Mr Tufan had had advance notice of this submission as a result of Mr Malik's skeleton having been filed and served three days in advance of the hearing. He did not object to the revisitation of the findings insofar as it was necessary as a result of the Taliban taking over Afghanistan but he submitted that it would be appropriate to retain the finding in relation to the effect of the appellant's deportation on the appellant's family. I did not accept the latter submission, and stated that I considered it appropriate, in light of the important clarification of the law provided in HA (Iraq), to consider for myself whether it would be unduly harsh on the appellant's partner and children to remain in the UK whilst the appellant was deported to Afghanistan.

8. Mr Tufan confirmed that he did not require additional time to recalibrate his case in response to that decision and I continued with the hearing.

9. I heard oral evidence from the appellant and his partner, AS. Neither required an interpreter. The appellant adopted the statement he had made on 29 November 2021 and was then cross-examined by Mr Tufan. He confirmed that he had arrived in the UK in August 1993. He thought he had arrived as an asylum seeker. Mr Tufan suggested to him that he might have arrived as a visitor. He stated that he had been a child, aged 10. He was not sure; they had left due to the war and he had

thought that they had sought asylum. He had not discussed it with his family. He knew that he had been granted ILR in 2002.

10. Ms Tufan asked whether the appellant had arrived via Moscow. He did not know. They were scared. They had lived in hostels for a time. Missiles had landed in the garden when they were in Afghanistan and then he was coming to the UK to join his father.

11. Mr Tufan asked whether the appellant was a Muslim. He said that his family was meant to be but his father was not religious. They drank alcohol and ate pork. In prison, he had pretended that he did not eat pork so that he did not get in trouble with the Muslim prisoners. He confirmed that he had spoken Dari till the age of ten and that he still conversed in Dari with his parents sixty or seventy per cent of the time. He had no family in Afghanistan; they had left before him.

12. The appellant stated that he had children, both of whom were of school age. They lived as a family. The appellant stated that his children were amazing. His son was top of his class in Mathematics; his daughter was really good at art. His wife was also amazing. She worked with children with special needs and was working with an autistic child at present. She was also able to help with the business to some extent. His father had started the business but he (the appellant) was now the general manager. He managed to make about £46,000 per annum. Mr Tufan asked whether his father was wealthy. The appellant stated that he had managed to take over a business in the lockdown and they were making 'good money' from it. His father did not have thousands of pounds in the bank, however. He had bought the business but he had not been able to manage it without the appellant's help. He was now 71 and suffered from serious illnesses, including type 2 diabetes and blackouts. The appellant's mother had suffered from cancer, which had been a 'big deal' for his father. They now spent most of their time together. His mother had been diagnosed six months or so before the hearing. They had all the documents. They had checked her diagnosis with a friend in Germany, who had confirmed that there was no treatment for her apart from pain relief.

13. There was no re-examination of the appellant by Mr Malik.

14. AS then adopted her statement, which she had made on 29 November 2021. Cross-examined by Mr Tufan, she confirmed that she and the children were living as a family unit with the appellant. Her son and daughter were both exceeding expectations at secondary school. Her daughter had a thyroid issue which was under control. She worked with children with special needs and was shortly to undertake a 'nurture' course. The appellant worked at a restaurant in the local area. They had eight employees. The appellant worked with his father. He 'carried on', although the appellant's mother's health was not good.

15. I asked some clarificatory questions of AS. She stated that she worked in a mainstream school, assigned to a particular child. She also did some outreach work when extra support was required. She worked Monday to Thursday. She also helped out at the family business on one day of the week but the new course would soon occupy that day. Her

work for the local council was currently virtual but it was all arranged by them.

16. AS stated that she had not managed at times when the appellant was in prison. It had been a 'massive struggle' but she had known at the back of her mind that it was a temporary state of affairs. She had been able to see him and speak to him and that had helped. He had been in prison in Oxford and they had travelled to see him every week.

17. Neither advocate had questions arising from mine. Mr Malik had no re-examination.

Submissions

18. Mr Tufan submitted that the ultimate issue was whether there were very compelling circumstances over and above those in the statutory exceptions which sufficed to outweigh the public interest in the appellant's deportation.

19. Focussing on exception 2, Mr Tufan noted that there were two children involved. They were in good health. The appellant's daughter's thyroid issue was controlled with medication. They were both doing well at school. The reality was that the appellant's partner had managed when the appellant was in prison. There was a family business. She was in a good job. Applying the approach at [23] of KO (Nigeria) v SSHD [2018] UKSC 53, [2018] 1 WLR 5273, it could not properly be said that the consequences of deportation would be unduly harsh. HA (Iraq) v SSHD took matters no further, in Mr Tufan's submission, because Underhill LJ had confirmed the ongoing endorsement of what had been said in MK (Sierra Leone) [2015] UKUT 223 (IAC); [2015] INLR 563. It was accepted that it was in the best interests of the appellant's children for him to remain in the UK but the assessment of undue harshness went far beyond that. Even if Mr Tufan was wrong in that submission, he reminded me that it was insufficient for the appellant to demonstrate undue harshness; he was also required to go further, and to satisfy the test in s117C(6) of the 2002 Act.

20. As for the first exception, Mr Tufan submitted that the appellant had applied for asylum as the dependent of his mother on 11 May 1996; there was nothing to rebut that assertion. Mr Tufan referred to [44] of CI (Nigeria) v SSHD [2019] EWCA Civ 2027 and submitted that the time that the appellant had spent in the UK awaiting the negative decision on his application for asylum did not count towards the accrual of lawful residence. The clock had only started in that respect, he submitted, upon the appellant being granted exceptional leave to remain ("ELR") on 24 March 1998. It had stopped on the signing of the deportation order, on 21 December 2016. This was in the region of eighteen years' lawful residence and did not suffice. If Mr Tufan was wrong in his submission about the period 1996-1998, he accepted that the addition of that period might just tip the balance in the appellant's favour.

21. Mr Tufan accepted, in light of [61]-[62] of CI (Nigeria) v SSHD, that the appellant was socially and culturally integrated to the UK. As for the

third requirement of the first exception (very significant obstacles to re-integration), Mr Tufan accepted that there was violence in Afghanistan as a whole but the focus was on the appellant in particular. He accepted that the appellant was heavily tattooed, including with a US dollar and a British pound sign on his forearm. The Tribunal would also take into account the fact that the appellant had been in the UK since he was ten years old. Nevertheless, considering what had been said by Sales LJ in Mwesezi v SSHD [2018] EWCA Civ 1104 and the return of millions of refugees to Afghanistan, Mr Tufan submitted that the appellant would not encounter very significant obstacles.

22. In the event that the section 117C(4) was satisfied, that did not mean that there would be very compelling circumstances which met s117C(6). The appellant is an Afghan national who speaks Farsi. It might be difficult for him in Afghanistan but there had been very serious and continuous offending which meant that the public interest in his deportation was significant. The rehabilitation on which the appellant relied took matters no further.

23. For the appellant, Mr Malik reminded me that the first part of the first exception required the appellant to have lived more than half his life lawfully in the UK. The period between 1996 and 1998 was in dispute. It was clear that there was a lengthy period after that which was not. Even if the respondent was correct, the period from 1998 sufficed when it was recalled that s79(4) of the 2002 Act served to ensure that the appellant's ILR was not invalidated by the making of the deportation order on 21 December 2016. The result of that provision was that the appellant continued to be in the UK lawfully. At the very least, therefore, his lawful residence was from 24 March 1998 to the present.

24. In any event, Mr Malik recalled what had been said at [54] of SSHD v SC (Jamaica) [2017] EWCA Civ 2112 about paragraph 276A(b) of the Immigration Rules. Lawful residence was there defined so as to include temporary admission where leave to remain was subsequently granted. It mattered not that the appellant had been refused asylum; he had been granted ELR. CI (Nigeria) was of no assistance in this regard.

25. It was accepted by the respondent that the appellant was socially and culturally integrated into the United Kingdom. As to the third limb of the exception, it was clear that the appellant's family would travel to Afghanistan with him in the event that his appeal was dismissed. That central assertion had not been challenged. Since the appellant would be accompanied to Afghanistan by his family, his integration would be impossible. It was fanciful to suggest that he could live as an 'insider' under the Taliban with his British wife and children. Professor Shah's report confirmed the position in that respect, which was quite clear even in 2018.

26. Even if the appellant was to return alone, it was impossible to see how he could integrate, given that he had no real knowledge of how to behave under Taliban rule. It was likely that he would have no real opportunity to participate in life there. Those submissions were supported by the respondent's Country Information and Policy Note, as reproduced in the appellant's bundle. The appellant had also

confirmed at the hearing that his name was not an Islamic name. In the circumstances, the first exception was clearly satisfied in all three parts.

27. As for the second exception, Mr Malik noted that he had distilled what had been said by Underhill LJ in HA (Iraq) in his skeleton argument. There was a similar distillation by Simler LJ in MI (Pakistan). It was clear that the appellant was heavily involved in his children's lives. The respondent had taken no issue with the evidence of the appellant or his partner and the expert evidence was unchallenged. The appellant's partner had explained that she was buoyed by the fact that the appellant's imprisonment was temporary, whereas his deportation would be permanent. The children would not be exposed to physical harm but mental anguish on their part may suffice to cross the threshold: MI (Pakistan) refers. On the basis of the unchallenged evidence, the appellant was unable to meet the second exception.

28. This was therefore a case of the type considered at [28]-[34] of NA (Pakistan) and [31] of HA (Iraq), in which the appellant (a serious offender) could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind, going well beyond what would be necessary to make out a bare case under those exceptions. The appellant had been in the UK for 28 years and had arrived when he was a child. It was accepted that he was socially and culturally integrated and there was a significant degree of integration on any proper view.

29. It was necessary to attach very significant weight to the public interest as a result of the appellant's offending. The appellant's Probation Officer had previously confirmed that his risk of reoffending was low, as had the Independent Social Worker. This was of some relevance in considering the public interest in the appellant's deportation. It was also necessary to bear in mind that the family's priority was to preserve the family unit and they were committed to going to Afghanistan in the event that the appellant was deported. Considering that unchallenged assertion alongside the other facts of the case, this was one of the rare cases in which s117C(6) was satisfied. The statutory exceptions to deportation would have been satisfied but for the length of the appellant's sentence and there was much more than that in the appellant's side of the balance.

30. I reserved my decision at the end of the submissions.

Statutory Framework

31. Part 13 of the Immigration Rules makes provision for deportation but it is to Part 5A of the 2002 Act that the Tribunal must turn on appeal. That is primary legislation which directly governs decision-making by courts and tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on Article 8 ECHR grounds. The provisions of that Part of the 2002 Act, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible

with Article 8: NE-A (Nigeria) v SSHD [2017] EWCA Civ 239; [2017] Imm AR 1077.

32. Section 117B contains public interest considerations applicable in all Article 8 ECHR cases. 117C of the 2002 Act provides the following 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.

Analysis

33. I state at the outset of my analysis that this appeal was argued on Article 8 ECHR grounds only. Despite the reference to 'risk' in Mr Malik's skeleton (as considered at [6]-[7] above), it was not submitted orally or in writing that the appellant would be at risk on return to Afghanistan of treatment contrary to Article 3 ECHR. The submissions which were made about the appellant's return to Kabul were directed purely to the question posed by s117C(4)(c) above. The analysis which follows therefore takes the qualified right as its sole focus.

34. As a serious offender (viz, one with a sentence of imprisonment of more than four years), the appellant is unable to satisfy the statutory exceptions to deportation. I was nevertheless invited, correctly, by both advocates to adopt the structured approach required by Part 5A of the 2002 Act. It is for that reason that I consider those exceptions first, before turning to what Mr Tufan described as the ultimate question in this appeal, as posed by s117C(6) of the Act.

Exception One – s177C(4)

35. I find that the appellant has been lawfully resident in the UK for most of his life, for the following reasons. I remind myself that 'most' in this context carries its natural meaning and should be construed simply to mean more than half: SC (Jamaica) v SSHD [2017] EWCA Civ 2112; [2018] 1 WLR 4004, at [53].

36. The appellant arrived in the UK with his mother and sister on 7 August 1993. It seems that they thought originally that they could be added as dependents to the appellant's father's pending claim for asylum and it was only on 11 May 1996 that the appellant's mother claimed asylum in her own right, naming the appellant and his sister as her dependents. They were ultimately refused asylum but granted ELR on 24 March 1998. It is not contended by Mr Malik that the interval between arrival and asylum claim counted towards the period required by s117C(4)(a). The first question which arises as a result of that stage of the chronology is whether the appellant accrued lawful residence between May 1996 and March 1998.

37. Mr Tufan submitted that this period did not count. He relied in support of that submission on what was said by Leggatt LJ, as he then was, at [44] of CI (Nigeria). In that paragraph, Leggatt LJ stated that SC (Jamaica) was not authority for the proposition that 'lawful residence' in s117C(4)(a) of the 2002 Act meant the same as it did in paragraph 276A of the Immigration Rules. Hickinbottom LJ and the Senior President of Tribunals agreed. For his part, Mr Malik submitted that the appellant must have had temporary admission throughout this period and that it should count because he was ultimately granted ELR.

38. In this respect, I prefer Mr Tufan's submission. Although I accept that the appellant would have been granted temporary admission when his mother applied for asylum, the fact that they were not ultimately granted asylum sets his case apart from SC (Jamaica) for the reasons given by Leggatt LJ in CI (Nigeria). To use the terminology at [47] of CI (Nigeria), the appellant did not satisfy the conditions for being granted leave to remain as a refugee at the end of that period and could have had no legitimate expectation to the contrary. The fact that he was granted ELR at the end of the period does not suffice to render it lawful for the purposes of s117C(4) because it would be inappropriate, in light of CI (Nigeria), to apply the definition of lawful residence in paragraph 276A of the Immigration Rules, which concerns a wholly different type of application to that which is under contemplation in this appeal.

39. That is not the end of the matter, however. Mr Malik was able to make a further submission about the extent of the appellant's lawful

residence. He submitted that the period of lawful residence had not ended with the making of the deportation order on 21 December 2016 and that the period had never actually come to an end. The appellant had, at the very latest, begun to accrue lawful residence on 24 March 1998. He had then been granted ILR in 2002 and nothing which had happened subsequently had served to invalidate that leave.

40. This submission was based on ss78-79 of the 2002 Act, which provide as follows:

Section 78 – No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be—
  (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
  (b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section *"pending"* has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending—
  (a) the giving of a direction for the appellant's removal from the United Kingdom,
  (b) the making of a deportation order in respect of the appellant (subject to section 79), or
  (c) the taking of any other interim or preparatory action.

(4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92.

Section 79 - Deportation order: appeal

(1) A deportation order may not be made in respect of a person while an appeal under section 82(1) that may be brought or continued from within the United Kingdom relating to the decision to make the order—
  (a) could be brought (ignoring any possibility of an appeal out of time with permission), or
  (b) is pending.

(2) In this section *"pending"* has the meaning given by section 104.

(3) This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007.

(4) But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies.

41. Mr Malik submitted clearly at [8] of his skeleton argument that s79(4) applied to the deportation order made against the appellant, and that

his ILR continued whilst his appeal against the refusal of his human rights claim was pending. Mr Tufan offered no response to that submission. In order to resolve it, it is necessary to return to the chronology which I set out at [4] above.

42. The deportation order and the first refusal of the appellant's human rights claim initially occurred on the same day: 21 December 2016. The latter decision was certified under s94B and the appellant was unable to appeal against it from within the United Kingdom. He did not do so, and instead he claimed asylum on 2 June 2017, thereby preventing his deportation on 7 June 2017. Days later, on 14 June 2017, the Supreme Court handed down judgment in Kiarie & Byndloss v SSHD [2017] UKSC 42; [2017] 1 WLR 2380 and the respondent notified the appellant that the refusal of the appellant's human rights claim and its certification under s94B had been withdrawn. It was only when the appellant received the new decision, on 23 November 2017, that he was able to bring an appeal whilst he was within the UK. In my judgment, the position is therefore as follows. The appellant initially had ILR. He made a human rights claim in response to the respondent's notice that she intended to remove him from the United Kingdom. That claim was pending from the date on which it was made (17 March 2016) until the date on which it was finally concluded (23 November 2017). The appellant then brought a timely appeal against that decision, and that appeal has been pending since then.

43. The deportation order states on its face that it was made under s32(5) of the UK Borders Act 2007, thereby engaging s79(3) of the 2002 Act. Given the chronology I have set out, the deportation order did not have the effect of invalidating the appellant's ILR under s5(1) of the Immigration Act 1971 because s79(4) of the 2002 Act applies. I therefore find that the appellant continues to enjoy ILR to the present day. In the circumstances, I find that the appellant has lived lawfully in the UK from the date on which he was granted ELR (24 March 1998) to the present. That amounts to very nearly 24 years. The appellant is currently 39 years old. I am satisfied that he meets the requirement in s117C(4) as he has been lawfully resident in the UK for most of his life.

44. Mr Tufan did not seek to suggest that the appellant was not socially and culturally integrated into the UK. That concession, which was clearly made in full knowledge of the authorities, was evidently correct on the facts of this case.

45. Mr Tufan did not accept that there would be very significant obstacles to the appellant's re-integration to Afghanistan. In evaluating the competing submissions, I have borne in mind what was said in SSHD v Kamara [2016] EWCA Civ 813; [2016] 4 WLR 152 about the concept of 'integration' and what was said in Parveen v SSHD [2018] EWCA Civ 932 about the threshold of 'very significant obstacles'. I note that what was said by Sales LJ (as he then was) in the former decision was cited with approval by the Supreme Court in Sanambar v SSHD [2021] UKSC 30; [2021] 1 WLR 3487.

46. Mr Malik relied on the appellant's long residence in the UK and the fact that he left Afghanistan as a child. Having had the opportunity to

hear the appellant give evidence about the country, I accept that he has limited memory of it. He referred to there having been missiles in the garden and to his memory of being on an aeroplane. These were the glimpsed memories that one would expect from a person who left a war-torn country at a young age. It is said far too frequently in this chamber that individuals have no real recollection of their country of nationality but there is a wholly proper basis for that submission in this appeal.

47. It is equally apparent that the appellant is not the type of individual who would readily adapt to life in Afghanistan. He gave unchallenged evidence about his lifestyle. I accept that he has for many years lived a life divorced from Islam. He told me that he eats pork and that he drinks alcohol. I considered his evidence about his time in prison to ring true; unprompted, he added that he had needed to keep his consumption of pork a secret in prison as he feared the reaction of other, more observant Muslim prisoners. I do not suggest for a moment (nor did Mr Malik) that the appellant would struggle to become an insider within a reasonable period of time because he would not have access to pork or alcohol. The point is, instead, that the appellant is not a man who has lived by the Islamic mores which are once again to the fore in Taliban-controlled Afghanistan. He does not attend the mosque in the UK and would not be familiar with the religious practices in that country. He is a person, in my judgment, who would be perceived to have transgressed cultural and social mores. That group, amongst others, is identified at 2.4.8 and 5.9 of the respondent's October 2021 Fear of the Taliban note as being potentially at risk.

48. It is also of some significance that the appellant is heavily tattooed. He has English words tattooed prominently on his forearms. Those tattoos include the symbols for the British pound and the American dollar. Mr Malik did not suggest that these would mark the appellant out for treatment contrary to Article 3 ECHR, although that submission might have been available to him. I am nevertheless satisfied that the appellant's tattoos would serve to underline his status as an outsider on return to his country of nationality.

49. The appellant did not attempt to suggest that he spoke none of the languages of Afghanistan. He stated that he spoke some Dari and that he continued to use that language some of the time when he spoke to his parents. I accept his evidence that he is not fluent in that language, however, as this is no more than one would expect. He has an English partner and children. He runs a business in an English city. He is clearly fluent in English and it is altogether unsurprising that his Dari is not as fluent as it would have been when he arrived in the UK.

50. In support of his submission that the appellant would encounter very significant obstacles to integration, Mr Malik also relied on a report from Professor Niaz Shah. Professor Shah is a Reader in Law at the University of Hull whose expert evidence was recently described as 'admirably clear' in SSHD v Tariq [2021] EWCA Civ 378. He is a native Pashtu speaker who has practised in law in Pakistan and the UK. He has worked for the UNHCR and provides comment for the media, including the BBC, on human rights issues in Pakistan and Afghanistan. Mr Tufan

did not suggest that he was unqualified to provide expert opinion on Afghanistan nor, realistically, could that submission have been made.

51. Professor Shah's opinion was written long before the resurgence of the Taliban. Even at that stage, however, he considered that the appellant would face serous difficulty in re-integrating to Afghanistan. He stated that the appellant would be seen as a Westerner and that it would be 'dangerous and risky' for the appellant if it came to be known that he had a non-Muslim wife. He stated that it would be impossible for him to take them to Afghanistan and that the whole family would be at risk.

52. The primary submission Mr Malik made in reliance on this evidence was that the appellant would encounter very significant obstacles to integration because his wife and children would return with him. I do not accept that I am required to consider the return of the appellant's wife and children to Afghanistan under s117C(4), however. It is clear from the subsection itself that the test is focused on the individual themselves, and not on the family as a whole. It is s117C(5) that is directed to consideration of an appellant's family. In my judgment, any additional difficulties which might be occasioned as a result of the appellant's family following him to Afghanistan are irrelevant to the exercise required by the first statutory exception to deportation.

53. Be that as it may, I consider that the appellant would encounter very significant obstacles to re-integration as a result of the other matters I have described above. He has very little memory of the country; he is no longer familiar with the religious practices there; his Dari is limited; and he has obviously Western, readily visible tattoos on his body. He has also some mental health problems, as discussed in further detail below. Although he spent the first decade of his life in Afghanistan, he has grown significantly apart from his country of nationality. He would not be an insider upon return nor would he be able within a reasonable time to become one.

54. It follows that I find that the appellant would be able to meet the requirements of Exception One, were he not a serious offender.

Exception Two – s117C(5)

55. In AA (Nigeria) v SSHD [2020] EWCA Civ 1296; [2020] 4 WLR 145, Popplewell LJ noted that there had been a proliferation of case law on the application of the unduly harsh test in s117C(5) of the 2002 Act: [9]. He suggested (and Baker and Moylan LJJ agreed) that it should usually be unnecessary to refer to authority beyond KO (Nigeria) v SSHD [2018] UKSC 53; [2018] 1 WLR 5273, R (Kiarie & Byndloss) v SSHD [2017] UKSC 42; [2017] 1 WLR 2380, NA (Pakistan) v SSHD [2016] EWCA Civ 62; [2017] 1 WLR 207 and HA (Iraq) v SSHD [2020] EWCA Civ 117; [2021] 1 WLR 1327. At [10], he noted that that the authoritative guidance was that given in KO (Nigeria) and HA (Iraq).

56. I have been particularly assisted by Mr Malik's summary of the guidance given by the Court of Appeal in HA (Iraq), which appears at [5] of his skeleton argument. I have taken that into account and intend

him no disrespect in my decision to cite, in full, Simler LJ's synopsis of that decision in MI (Pakistan) v SSHD [2021] EWCA Civ 1711. Having cited what was said by Lord Carnwath at [23] of KO (Nigeria), and the guidance given by the Upper Tribunal in MK (Sierra Leone) [2015] INLR 563, Simler LJ summarised the effect of HA (Iraq) in t his way:

> [21] First, [Underhill LJ] said that Lord Carnwath's reference to "*a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*" could not be read entirely literally since it was difficult to see how one would define the level of harshness that would "*necessarily*" be suffered by "*any*" child: see [44]. I agree. The cohort of children encompassed by this provision will all have a genuine and subsisting relationship with the parent in question but there will inevitably be a spectrum of infinitely differing relationships within that cohort. For example, as Underhill LJ said, the deportee parent might be living separately from the children (while still retaining a genuine and subsisting relationship with them), the child might be on the verge of leaving (or have left) the family home, or there might be a baby who does not know the parent. It simply cannot be assumed that the majority have a close bond with the deportee parent or that there is some objectively identifiable standard of closeness (reflecting an "ordinary degree of closeness") against which comparison might be made. As Peter Jackson LJ put it in his supporting judgment in *HA (Iraq)* at [157]:
>
> "For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent whose face-to-face contact cannot continue may be akin to a bereavement."
>
> [22] Instead, Underhill LJ held at [44], the underlying concept is
>
> "of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category"
>
> (i.e. those sentenced to a period of imprisonment of more than 12 months but less than four years)
>
> [23] 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. The question for the fact-finding tribunal is whether the harshness which deportation will cause for the children is of a sufficiently enhanced degree to outweigh that public interest – the essential point being that "*the criterion of undue harshness sets a bar which is* "*elevated*" *and carries a* "*much stronger emphasis*" *than mere undesirability*": see [51].

[24] Secondly, and plainly in light of the statutory provisions, "*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 .... and the (very high) level applying to serious offenders*": see [52]. Plainly, the threshold for medium offenders is not as stringent as that imposed by the "*very compelling circumstances*" test which applies to serious offenders: see [53].

[25] Thirdly, as Underhill LJ explained:

"There is no reason in principle why cases of "undue" harshness may not occur quite commonly ... 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"."

Because it is not possible to identify a baseline of normal or ordinary harm endured by a child in consequence of a parent's deportation against which to assess whether there is an enhanced level of harshness involved in a particular parent's deportation, and because such generalised comparisons may be dangerous, the decision maker should instead focus on the reality of the child's actual situation. By way of example, as Underhill LJ explained, factors that *might* affect the analysis include the child's age, whether the parent lives with the child, the degree of emotional and/or financial dependence, the availability of emotional and financial support from a remaining parent and/or other family members, the practicability of maintaining a relationship with the deported parent, and all the individual characteristics of the child (see [56]). I emphasise the word *might* because it would plainly be wrong to infer that a decision that does not address each of these factors is necessarily deficient. Given the infinitely variable range of circumstances that might apply in any given case, no universally applicable factors can be identified, and the weight of a particular factor in a particular case will be affected by the individual circumstances. In her respondent's notice in this case the SSHD challenges as perverse the FTT's asserted failure to have regard to a number of the factors identified by Underhill LJ. But as he explained at [57], a fact-finding tribunal will make no error of law if a careful evaluation of the likely effect of the parent's deportation on the particular child is conducted and a decision is then made as to whether that effect is not merely harsh but unduly harsh, applying *KO (Nigeria)* in accordance with the guidance in *HA (Iraq).*

[26] Fourthly, as Peter Jackson LJ emphasised, in considering harm, "*there is no hierarchy as between physical and non-physical harm*" (see [159]) and there can be no justification for treating emotional harm as intrinsically less significant

> than physical or other harm. A failure to appreciate this is likely to result in a failure to focus on the effect of a parent's deportation on the particular child.
>
> [27] Finally, referring to a number of earlier decisions of this court that followed *KO (Nigeria)*, including *PG (Jamaica) v SSHD* [2019] EWCA Civ 1213 and *KF (Nigeria)* [2019] EWCA Civ 2051, Underhill LJ found nothing in any of them inconsistent with what he had said in *HA (Iraq)*, in particular as summarised above: see [61].

57. With that overlong introduction to the authorities concluded, I turn back to the facts of this case. The appellant and his wife have been in a relationship since November 2005 and have been living together since 2006. They have two children, a son who was born in 2009 and a daughter who was born in 2010. They are 12 and 11 years old at present. They continue to live as a family unit. The appellant works at the family restaurant. The appellant's wife assists children with special needs and also helps out in the family business on her day off.

58. The children are doing well at school and there are no current concerns about them. The appellant's daughter has a thyroid problem which is under control with medication. They are said (without demur from Mr Tufan) to have a close bond with their father and AS describes them as 'idolising' him in her statement. She states that they were 'hugely affected' by his absence during his time in prison. She feels that they were reassured during that time by the fact that his absence was temporary, whereas that reassurance would not be present in the event of his deportation. She expresses serious concern in that statement about the family unit in the event of the appellant's deportation.

59. The appellant relies on further expert evidence in this connection. The report is from an Independent Social Worker, Alex Mthobi. Mr Mthobi obtained a diploma in Social Work in 1991, a degree in 1993, and a further qualification in 2005. He has worked all over the world and in various different parts of the UK in that field. He has provided assessments for the Family Court in various capacities, including as a Family Court Advisor. Mr Tufan said nothing to cast any doubt on his ability to provide expert evidence on the appellant's relationship with his wife and children or the consequences of his deportation upon them.

60. Mr Mthobi met the appellant and his family on 8 September 2018. Later that month, he also spoke with the Headteacher of the children's school in Southampton. The summary of conclusions which appears at [2.4]-[2.22] of the report is not particularly succinct and it suffices for present purposes to note the following. Mr Mthobi concluded that there was a strong attachment between the members of the family, who had continued to see the appellant, and to speak to him on the telephone, whilst he was in prison. There was evidence of 'the highest degree of involvement' in the children's lives and the headteacher had confirmed that the appellant's positive relationship with the children was having a positive impact on their performance at school. The appellant was said

to be a 'hands-on' father, who assisted the children with their homework and also helped out at the school. I note that the children were described 'clean, healthy and happy' and that their headteacher had said that they were amongst the brightest in the school. Both children told Mr Mthobi that they wanted to be teachers. The children were achieving well and had impeccable manners. Mr Mthobi concluded that separation of the appellant from the children 'will adversely affect their emotional wellbeing and in turn affect their academic achievement'.

61. I have also considered a report from a Consultant Psychiatrist, Dr Maryam Kashmiri, dated 10 June 2020. Dr Kashmiri has practised medicine for 25 years and has 17 years' experience in psychiatry. She is currently working for the NHS in Aylesbury and in private practice. Mr Tufan said nothing about her qualifications to provide expert evidence or, for that matter, about her report as a whole.

62. Dr Kashmiri spoke with the appellant and AS on 23 May 2020. She described the appellant's son as 'thoughtful, introspective and mature for his age' and the appellant's daughter as a 'happy child, loves life, people and her friends'. Dr Kashmiri noted how the children chose to spend time with the appellant whilst he delivered food from the restaurant because they enjoyed being with him. AS told Dr Kashmiri about the 'huge impact' which the appellant's imprisonment had had on their family. She expressed concern about the appellant's deportation having a detrimental effect on the children; they had a special bond and they had struggled with his absence during his imprisonment but they had known that he was coming back. She described the threat of deportation as like a cloud hanging over the family. Given the appellant's anxiety over the consequences of his deportation, Dr Kashmiri concluded that he met the diagnostic criteria for an anxiety disorder.

63. At section 16 of her report, Dr Kashmiri set out what she considered would be the impact of deportation on the appellant's family. She stated that his parents were elderly and infirm and counted on his support. The children had not known that he was in prison; they thought he was working at the place they had visited. They had struggled to come to terms with his time in prison and had displayed 'anger outbursts'. The appellant's son had also 'faced issues with attachment and anxiety'. There had been 'an immense change' since the appellant had returned. This section of the report concluded as follows:

> [16.8] Therefore, in my professional opinion I consider the decision to deport [AM] would be unduly harsh on his partner [AS] and his children […]. The trauma of separation at such a young age from their father is likely to have a detrimental effect on their emotional and psychological development. They would be unable to return to Afghanistan with [AM] where their lives would be in danger and put at risk. Thus I would request the Home Office to take into consideration the negative impact of returning [AM] to Afghanistan on his family life and keep this family together.

64. I have no doubt, as a result of Mr Mthobi's report and the essentially unchallenged evidence of the appellant and his partner, that it is in the best interests of the two children to continue to be raised by both of their parents. It is apparent from all of the evidence before me that they are thriving in the care of their parents and it is trite that it is generally in the best interests of a child for such a relationship to continue.

65. As is clear from the authorities cited above, however, the test in s117C(5) is not a best interests assessment. The focus must instead be on whether the degree of harshness which deportation will cause for the appellant's family is of a sufficiently enhanced degree to outweigh the strong public interest in deportation.

66. There can be no doubt that it would be unduly harsh on the appellant's wife and children for them to join the appellant in Afghanistan. So much was clear from Dr Shah's report and is all the clearer in the aftermath of the Taliban's resurgence. I note, for example, the restrictions on women and their education in the respondent's CPIN. Given the age of the appellant's British daughter, her relocation to Afghanistan would likely mark an end to her education. That in itself would be likely to render her relocation unduly harsh, without reference to the obvious language difficulties and the safety concerns expressed by Dr Shah.

67. The focus, therefore is on what has come to be called the 'stay scenario', of the appellant's family remaining in the UK without the appellant. In considering that question, I have taken account of the factors mentioned by Underhill LJ at [56] of HA (Iraq). I accept that these children, both of whom are approaching puberty, have a close bond with their father, who plays a full and meaningful role in their lives. I accept also that he and his wife are jointly responsible for the financial upkeep of the family. In the event of the appellant's deportation to Afghanistan, I accept that their relationship with him is likely to come to an end in everything but the most remote sense. It has often been said that 'modern means of communication', so frequently relied upon by the Secretary of State in such cases, is no substitute for the presence of a parent or partner. Whilst those dicta were, to my knowledge, all uttered before the pandemic and the age of the video call, I consider that they still hold good where young or comparatively young children are involved.

68. I had an opportunity to consider AS giving evidence before me, albeit comparatively briefly. She is an articulate woman and is said in Mr Mthobi's report to be an exemplary parent. I have no reason to doubt that assessment, which chimes with the remaining material before me. She has little family support around her and the additional burden of caring for the children in the event of the appellant's deportation would fall to her, as it did during the time of his imprisonment.

69. There is reference in the statements of the appellant and his wife to the family struggling whilst he was in prison. Similar concerns were expressed by Mr Mthobi and by Dr Kashmiri, as a result of what they

had been told by the appellant and AS. On analysis, however, there is little particularity to this assertion. I have already noted the assertion that there were outbursts of anger and issues with anxiety and attachment on the part of the children but there is no more detail in the reports. Nor is there anything from their school (or any other agency) which indicates any diminution in their performance or wellbeing at that time. The absence of any meaningful analysis of the family's ability to cope during the lengthy period that the appellant was in prison is a signal feature of both expert reports.

70. It was for that reason that I asked AS to explain to me how she had managed whilst the appellant was in prison. Her answer is recorded above and, again, it did not progress beyond an assertion that she had endured a 'massive struggle'. I do not suggest that it can have been easy for AS during this time. Nor could it be suggested on the evidence I have described above that the children found it easy to adapt to life without their father, who is clearly a significant and beneficial figure in their lives. But there is an absence of concrete evidence to show that either the children or the appellant's wife suffered 'harshness' of an enhanced degree during the appellant's imprisonment.

71. Whilst I accept that the appellant's family would miss him in the event of his deportation, I am unable to conclude on the evidence before me that the consequences of deportation would be anything more than harsh. These are healthy children with a strong mother and there is an absence of cogent evidence to support the assertion that she barely managed whilst the appellant was in prison. She was described by the appellant to Dr Kashmiri as being the 'true soldier' during that time and I consider that she and the children would manage without the appellant again.

72. Insofar as Dr Kashmiri and Mr Mthobi expressed a bleaker conclusion, I consider their opinions to be unduly speculative and rooted in theory, rather than a reasoned analysis of what occurred during the appellant's time in prison, which is the closest comparator available. I am unable, therefore, to conclude that the consequences of the appellant's separation from his family by deportation would give rise to unduly harsh consequences for the appellant's wife and children, bearing in mind the threshold described in MK (Sierra Leone).

73. In light of that conclusion, I do not accept the submission made by Mr Malik that this is a case in which the appellant would be able to meet both of the statutory exceptions to deportation in the event that he was a medium offender. My conclusion, instead, is that he would have been able to meet the first exception but not the second.

Very Compelling Circumstances – s117C(6)

74. It is with those conclusions in mind that I turn to the assessment required by s117C(6), of considering whether there are very compelling circumstances over and above those in the exceptions which suffice to outweigh the public interest in the appellant's deportation. I remind myself that this is a proportionality assessment undertaken within a statutory framework in which the scales are heavily weighted in favour

of deportation: MF (Nigeria) v SSHD [2013] EWCA Civ 1192; [2014] 1 WLR 544, cited alongside other authorities at [6]-[16] of SSHD v JG (Jamaica) [2019] EWCA Civ 982. What the appellant must show is that the circumstances are especially compelling in order to outweigh the strong and cogent public interest in his deportation.

75. In considering that question, the appropriate starting point is the best interests of the appellant's children. I have already concluded that it is in their best interests to remain in the UK with both of their parents. That is usually the case in such appeals. On the facts of this case, however, there is an additional dimension to the best interests assessment. It is said by the appellant and his wife that they have decided that they would relocate to Afghanistan, as a family, in the event of the appellant's deportation.

76. That assertion has not previously featured in my analysis. I declined to consider it as part of my assessment of the first statutory exception to deportation because that assessment is focused by its terms on the circumstances of the proposed deportee alone. Whilst I accepted that it would be unduly harsh for the appellant's wife and children to go to Afghanistan, that scenario was one of two halves of the unduly harsh analysis which I have conducted above. Because I held that it would not be unduly harsh for the appellant's family to remain in the United Kingdom without him, that sufficed to resolve the question posed by s117C(5) against the appellant: HA (Iraq) refers, at [73]-[79].

77. Mr Malik nevertheless submits that the "real world" assessment which I am required to undertake in respect of the appellant's children requires me to confront the assertion made by the appellant and his wife that they will take the children to Afghanistan. This claimed consequence, alongside the very significant difficulties that the appellant himself will face on return to his country of nationality, is said to justify a conclusion that there are very compelling circumstances over and above those in the statutory exceptions to deportation which suffice to outweigh the public interest.

78. This very assertion was canvassed by the Court of Appeal in HA (Iraq), however. At [75] of his judgment, Underhill LJ recorded that the court had canvassed with counsel for the Secretary of State 'the possibility of a situation where, although if the partner and child stayed in the UK the effect on them would not be unduly harsh, the established likelihood was that they would in fact not stay but would relocate with him and suffer an unduly harsh effect in consequence'. The submission made in response was as follows:

> [76] [Counsel for the Secretary of State's] response was that there was no warrant for departing from the clear intention of paragraph 399 (a) that the effect of deportation must be unduly harsh in both scenarios. That was not only what the words said, it made sense as a matter of policy and principle. The public interest in deportation should not be outweighed where there was a realistically available option in which the deportation would not have an unduly harsh effect. If the parents nevertheless chose an option which did have such

> an effect that ought not to be treated as resulting from the Secretary of State's decision. He added that if the law were otherwise there would be an obvious incentive on foreign criminals, and their partners, to claim, and perhaps even genuinely to intend, that the family would go with them if they were deported, however harsh the effect might be on the children: it would be very unsatisfactory for decision-makers to have to base their decisions on an assessment of whether such threats were genuine or tactical. He pointed out that the "real world" line of cases was concerned with different provisions of the Rules and directed to a different issue.

79. At [77], Underhill LJ stated that he was persuaded by these submissions. He noted, amongst other things, that the respondent 'cannot be said to be acting contrary to the best interests of the child in circumstances where an option was available which would not be unduly harsh for him or her, event if the parents decline to avail themselves of it.' In the circumstances, I decline to proceed on the basis suggested by Mr Malik. In the event of the appellant's deportation, it would be unduly harsh for the appellant's wife and children to follow him to Afghanistan but it would not be unduly harsh for them to remain in the UK without him. In the event that they choose the former course, that is the choice of the family as to their location; it cannot go to show that the respondent's decision to deport the appellant is a disproportionate one. The 'real world' line of authority was directed to a different issue, as counsel for the respondent submitted in HA (Iraq).

80. Whilst I accept, therefore, that the best interests of the appellant's children will be compromised by their remaining in the UK without the appellant, I do not accept that I should proceed on the basis that their wellbeing will be wholly compromised by their inevitable relocation to Afghanistan. They will miss their father, with whom they clearly have a close bond. There might also be additional financial pressure brought to bear as a result of the appellant's absence, although I note from Dr Kashmiri's report that financial assistance was previously available from the maternal and paternal grandparents. As I have noted above, however, the foundations of the conclusions reached by Mr Mthobi and Dr Kashmiri (such as 'long term emotional harm') have no proper foundation in the other evidence. This is not a case in which the best interests of the children press overwhelmingly in favour of the appellant remaining in the UK.

81. I find that the following factors must also be arranged on the appellant's side of the 'balance sheet' assessment required by s117C(6). There will be adverse consequences for him in the event that he is deported. I have already considered those consequences above. Those consequences were not said to contravene Article 3 ECHR but I have accepted that the appellant has been resident in the UK for many years and that he would face very significant obstacles to re-integration to Afghanistan.

82. The appellant's wife will lose her life partner in the event of his deportation. It will not be safe for her and the children to visit him in Afghanistan. He will not be able to visit them in the UK, at least for a number of years. Physical contact could only be in a third country. These are serious consequences for family members who were not involved in the appellant's offending.

83. I note that the appellant has other family members in the UK. I accept that his parents are of relatively advanced years but not that they are as unwell as has been claimed. Mr Tufan understandably made the point in his submissions that there is no supporting evidence of the health conditions from which they are said to suffer, or of the assistance which the appellant is said to provide. I note, in any event, that the appellant's sister lives in Southampton and might be able to assist their parents in the event of his deportation. There is certainly nothing before me from them, or from her, to suggest that she could not provide any assistance which might be required as a result of the appellant's departure.

84. Against the difficulties which would arise as a result of the appellant's deportation, I must balance the public interest in that course. There is, on any view, the most cogent public interest in deporting him. He has an unedifying criminal record, which was said by Prosecuting Counsel before Mr Recorder Atkinson on 8 June 2015, to comprise seven previous convictions encapsulating 12 offences, starting on 20 February 2002 for possession of an offensive weapon in public. There is a further weapons offence and an earlier drugs offence, also of Class A, for which the appellant received a suspended sentence of imprisonment. There are also convictions for violence and for possessing a fighting dog. A full account of his antecedents may be found at [23] of the FtT's decision.

85. The index offence was a conspiracy to supply cocaine which involved a significant quantity of that drug, which the appellant had seemingly bought from an Albanian gang for resale in the Southampton area. In sentencing the appellant, the starting point for his part in the conspiracy was one of eight years' imprisonment, which was reduced by one third to five years on account of his guilty plea. As a result of s117C(2), it is the length of the sentence which must inform the extent of the public interest in the appellant's deportation. As a sentence which is appreciably over the four year threshold for serious offenders, I consider there to be a very strong public interest in the appellant's deportation.

86. In light of HA (Iraq), at [132]-[143], I do not consider the public interest in the appellant's deportation to be reduced by any appreciable measure by the Probation Service's assessment that he currently presents a low risk of reoffending. Having heard the appellant give evidence, and having read the reports prepared by Dr Kashmiri and Mr Mthobi, I accept that assessment but this is not a matter which is capable of carrying great weight in the assessment of proportionality when set on the scales alongside the other matters considered above.

87. Having considered all the circumstances weighing in favour and against the appellant, as required by Unuane v The United Kingdom (80343/17); [2021] Imm AR 534, I come to the clear conclusion that there are not very compelling circumstances over and above those in the statutory exceptions to deportation which outweigh the public interest in the appellant's deportation. The appellant meets one of those exceptions. I accept that the appellant's deportation will cause great difficulty to him and to his family but not that the consequences of that course of action outweigh the very strong public interest in the deportation of a serious offender such as this. The very high threshold described at [24] of MI (Pakistan) v SSHD is not crossed. It follows that his appeal must be dismissed on human rights grounds.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by dismissed it on human rights grounds.

Anonymity Order

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family members without that individual's express consent. Failure to comply with this order could amount to a contempt of court. I make this order because the appeal has raised protection issues in the past.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 February 2022