IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005954

First-tier Tribunal No:
HU/00155/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10 August 2023

Before
UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

HARPREET SINGH RANDHAWA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel instructed by M & K Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on Tuesday 11 July 2023

DECISION AND REASONS

BACKGROUND

1. By a decision issued on 5 May 2023, the Tribunal (myself and Deputy Upper Tribunal Judge Holmes) found an error of law in the decision of First-tier Tribunal Aldridge itself promulgated on 30 November 2022, dismissing the Appellant's appeal against the Respondent's decision dated 18 June 2021 refusing his human rights claim. The Respondent's decision was made in the context of an order to deport the Appellant to India as a foreign national offender following his conviction on 7 October 2019 for conspiracy to defraud. The

Appellant was sentenced to five years in prison for that offence on 11 October 2019.

2. By reason of the one error which we found to be made out the Tribunal set aside Judge Aldridge's decision whilst preserving some of the findings made. The Tribunal also gave directions for the filing of further evidence if the Appellant wished to do so and for a resumed hearing before the same Tribunal. As it happened, Deputy Upper Tribunal Judge Holmes was not available for the hearing, and I therefore heard the appeal sitting alone.

3. I had before me the Appellant's bundle as before the First-tier Tribunal ([AB/xx]), the Appellant's supplementary bundle before that Tribunal ([ABS/xx]) and the Respondent's bundle before the First-tier Tribunal ([RB/xx]). I also had Mr Fripp's skeleton argument as filed for the First-tier Tribunal. In addition, I had handed to me at the outset of the hearing, a very neatly handwritten letter from the Appellant's daughter [J] which I have read particularly carefully given the issues which remain for my determination. I have read all the documents but refer only to those which are relevant to the issues I have to determine.

4. Although Mr Fripp suggested that I did not need to hear oral evidence, as I had preserved the part of the First-tier Tribunal's decision setting out the evidence given on that occasion, Mr Wain indicated that he had some questions for the witnesses. I also have to determine the appeal as at date of hearing and it was therefore appropriate for me to hear evidence. The Appellant and his wife, Harpreet Kaur Benipal, gave evidence without any difficulty of understanding via a Punjabi interpreter. Again, I have taken account of all that evidence but refer only to that which it is relevant to my assessment.

5. There is no need for an anonymity direction in this case. However, I have referred to the children by initial in order to protect their identities.

FACTUAL BACKGROUND

6. The Appellant is currently aged 48 years. He is a national of India. The Appellant says that he came to the UK in 1994 whereas the Respondent has recorded his date of entry as 1999. Since he came to the UK clandestinely, I rely on the date given by the Appellant. At that time, he would have been aged 18 or 19 years. When discovered by the police, in November 2001, he claimed asylum. His claim was rejected, and his appeal dismissed. His wife came to the UK in July 2007 seeking leave to enter for a short stay.

7. The Appellant met his wife in 2007. They entered into a religious marriage on 25 July 2007 and registered their marriage on 17 March 2018. Although I had originally thought that there was an error in the witness statements in this regard, the marriage certificate at [AB/93] confirms the date as 2018. However, nothing turns on that.

8. The Appellant and his wife have three children. As at the date of the hearing before me [J] was aged nearly 15 years, [H] was aged just over 12 years and [S] was aged just over 11 years.

9. The Appellant and his wife and children were granted discretionary leave to remain for 30 months expiring on 7 July 2018. The Appellant was refused further leave as a result of his offending. However, his wife was given leave to remain in July 2018 based on her relationship with their children. She currently has leave to remain to 2025 on the ten years' route. The Appellant's children are all British citizens.

10. The Appellant's wife suffered a transient ischaemic attack whilst the Appellant was in detention.

11. The Appellant has a number of convictions. On 19 November 2008, he was convicted of driving a motor vehicle with excessive alcohol and sentenced to a driving course. He was again convicted of another such offence and for failing to give his name and address after an incident for which he was remanded on unconditional bail. He was fined and disqualified from driving for three years.

12. The index offence is one of conspiracy to defraud for which the Appellant was sentenced on 11 October 2019 to a term of five years in prison. I will come to the details of this below. The Appellant was released on 22 April 2022 on immigration bail.

13. The Respondent made a deportation order against the Appellant on 7 June 2021 ([RB/68]) and refused his human rights claim on 8 June 2021 ([RB/73-84]).

LEGAL FRAMEWORK

14. Before turning to consider the issues that remain, it is appropriate to have regard to the legal framework which applies although I did not understand the principles to be disputed.

15. The legislative framework is set out in the Immigration Rules but in clearer form in section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C").

16. The latest judgment relating to the framework which applies is that of the Supreme Court in HA (Iraq), RA (Iraq), AA (Nigeria) v Secretary

of State for the Home Department [2022] UKSC 22 ("HA (Iraq)"). The framework is dealt with at [46] to [52] of the judgment. I summarise the principles there set out as follows (by reference to the relevant paragraph of the judgment):

(1) In the case of a serious offender to whom Section 117C (6) applies (as here), the Appellant is required to show that there are very compelling circumstances over and above the two exceptions set out in Section 117C (4) ("Exception 1") and Section 117C (5) ("Exception 2"). Whilst Exceptions 1 and 2 are considered and determined without reference to any balance between interference and public interest, Section 117C (6) requires a balancing assessment weighing the interference with the Article 8 rights of the person intended to be deported and his family against the public interest in his deportation ([47]).
(2) The test under Section 117C (6) involves "a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them" (per Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203 cited at [48]). There is no exceptionality test but "it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare" (per NA Pakistan v Secretary of State for the Home Department [2016] EWCA Civ 662 – "NA (Pakistan)" cited at [50]).
(3) If the intended deportee could only show a "bare case of the kind described in Exceptions 1 and 2" that could not be described as very compelling circumstances over and above those exceptions. "On the other hand if he 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 of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of article 8" (per NA (Pakistan) cited at [50]).
(4) When applying Section 117C (6), all relevant circumstances are to be balanced against the "very strong public interest in deportation" ([51]).
(5) Case-law of the European Court of Human Rights continues to be relevant to the factors which have to be considered ([51]). The Supreme Court referred in particular to the cases of Unuane v United Kingdom (2021) 72 EHRR 24, Boultif v Switzerland (2001) 33 EHRR 50 and Üner v The Netherlands. The relevant factors are as follows:
    (a) Nature and seriousness of the offence(s) committed by the intended deportee.

(b) Length of time that the intended deportee has remained in the UK.
(c) Time elapsed since the offending and conduct in that period.
(d) Nationalities of those affected by the decision.
(e) The family circumstances of the intended deportee.
(f) Whether a spousal relationship was formed at a time when the spouse was aware of the offending.
(g) Whether there are children of the marriage and their ages.
(h) Seriousness of the difficulties faced by the intended deportee in the country to which he/she would be expelled.
(i) Best interests and well-being of the children, in particular the seriousness of the difficulties which they would face in the country to which the intended deportee would be expelled.
(j) Extent of the intended deportee's social, cultural and family ties with the host country and country of destination.

17. It follows from the foregoing, that I must first decide whether Exceptions 1 and 2 are met. Whether or not I find that those are met, I will nonetheless have to go on to assess whether there are very compelling circumstances taken as a whole over and above those exceptions which outweigh the public interest. That is because the Appellant's sentence exceeded four years. He is in the language of the case-law, a "serious offender".

18. As the Tribunal preserved some of the First-tier Tribunal's decision, it is necessary for me to set out the findings which were preserved before moving on to the remaining issues. In particular, the Tribunal preserved findings at [30] to [32] of that decision. Paragraph [32] of that decision deals with Exception 1 relating to the Appellant's private life. Judge Aldridge found in that regard as follows:

> "**Exception 1 – 117C(4)**
> 32. In respect of Exception 1, the appellant falls at the first hurdle. Put quite simply, he has not been lawfully resident in the UK for most of his life. He arrived in the UK either in 1994 or 1999 clandestinely in September 2009 and he has remained in the UK unlawfully since that point apart from a brief period between 2015-2018. Whilst I note that there is some evidence of integration into society in the UK through running a business for a number of years and having a family here with the children attending school. I also find that it would not amount to very significant obstacles for the appellant to integrate into life in India. He would be familiar with the customs, culture and language in India. He spent many years living there including his formative years. I have no doubt that the appellant would have some continued connection and support network in India and note that both he and his wife visited there in 2018. Exception 1 does not apply. I shall not dwell on this point."

19. The second exception is the central one in this case, namely whether the Appellant's deportation would have an unduly harsh impact on

the Appellant's children. The Respondent has conceded in the decision under appeal that the Appellant's wife and children cannot be expected to go with the Appellant if he is deported ([RB/73-84]. The Appellant's wife is however not a qualifying partner for the purposes of the second exception as she does not have settled status. Under the heading of the second exception, I therefore have to consider only whether it would be unduly harsh for the Appellant's children to remain in the UK without him.

20. When considering the meaning of unduly harsh, I am guided by what is said in MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563, cited with approval in HA (Iraq) (amongst other cases) that "'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."

21. Having reached my findings in relation to the second exception, I then go on to balance the interference with the Appellant's family and private life and the lives of his wife and children against the public interest, following the balance sheet approach advocated in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. As noted above, in so doing, I am conducting the assessment required by Section 117C (6), in order to decide whether there are very compelling circumstances over and above the two exceptions.

THE EVIDENCE AND FINDINGS

22. The Appellant has provided two witness statements dated 30 August 2022 and 25 October 2022 at [AB/1-9] and [ABS/1-4] respectively. The Appellant's wife has provided a statement dated 30 August 2022 at [AB/10-15]. They gave evidence orally via a Punjabi interpreter. The Appellant's wife became visibly distressed on occasion during her evidence but confirmed that she did not wish to take a break.

23. Although Mr Fripp in his submissions suggested that I should find the evidence of the Appellant and his wife a frank acknowledgement of facts which are not helpful to the Appellant's case, I find quite the opposite. Those "unhelpful" facts should have been included in the witness statements and not left to be discovered by Mr Wain's skilful cross-examination and other questions asked by me and Mr Fripp. I found the Appellant in particular to be an unconvincing and unsatisfactory witness for reasons which I have set out below.

24. Before turning to the evidence of the Appellant and his wife, I consider the documentary evidence about the index offence. The details are set out in the sentencing remarks at [RB/36-41], the relevant parts of which are as follows:

> "Harpreet Randhawa …, you were convicted by the jury of conspiracy to defraud, involving five victims who paid £469,650.
> …
> By way of shorthand I will say, rather than deal with it individually, all of these defendants have either no relevant previous convictions or none at all.
>
> The conspiracy to defraud was a systematic and callous fraud on householders, often elderly, in their late-80s in some cases, who were persuaded to have roofing works done which were either unnecessary or shoddily done – meaning not to a professional standard – or both, and then, subsequently, they were browbeaten into payment of extortionate sums. I say browbeaten, this was by a combination of being made to feel insecure that their roof was not safe or weatherproof, or the work being half done and therefore feeling under compulsion to carry on to completion in some cases, or by unpleasant threats in others.
>
> I make it clear that I am not sentencing here on the basis of threats or violence, or other menace. It was never the Crown's case that these defendants were the ones on site, in communication with householders, and these defendants have never been charged with demanding money with menaces.
>
> What I am sentencing for is your role in a conspiracy to defraud, which, as the route to verdict which the jury returned verdicts on sets out, meant that the two defendants in the conspiracy to defraud (1) agreed to play their part in joining an agreement to approach householders and defraud them by persuading them that roofing works were need, whether or not they were, and (2) knowing that such works were to be used as an excuse to dishonestly extract as much money as possible from them.
>
> The effects on these people were dreadful. They used words like devastated to describe the impact; some of them lost life savings. Mr Moore, for example, aged 84 at the time of the fraud, paid over £308,000 of his savings for work which the Crown's expert put a real market value of of some £13,000.
>
> The individual defendants.
>
> Mr Randhawa, you were in charge of the men on the roofs in all five of these frauds and you carried out works on all of them. Sums being paid into your account totalled £71,650. It is impossible to quantify what your ultimate divide of the spoils was, but there was clear evidence of your involvement in the wider sums of money, over and above the sums paid into your account, for example, CCTV from the bank showing you paying in a cheque for £58,000 from Mr Vala[?], one of the victims, into an account of a company called Icarus Limited, which is one of the companies that laundered these fraudulent proceeds.
>
> Sentencing Guidelines.
>
> I assess you in the Sentencing Council Guideline as 2A. The size of the fraud exceeds the starting point figure in that guideline of £300,000 and it is true that there were substantial sums at risk beyond

> the sums actually paid over, because there were attempts to extract yet further sums from some of the householders.
>
> It is Category 2, because the actual sums paid over were £469,000-odd, and it is Culpability A because I assess you as having a leading role in this conspiracy, if not necessarily the leading role in this conspiracy. There may well have been others above you, but you had a leading role. Further, it involved significant planning and there was also deliberate targeting of vulnerable people, including people in their 80s who were manipulated and confused by the relentlessness of the scam and the barrage of ever-changing oral quotes and reassessments of the nature of the work that supposedly had to be done.
>
> I do not elevate you to Category 1 based on the victim impact because, in my view, that would involve a degree of double counting factors.
>
> I take into account your personal mitigation, which includes 18 years as a roofer, three young children, you being the sole breadwinner, as summarised in a moving letter from your wife about the impact on your children.
>
> The sentence in this case, bearing in mind all these factors, will be five years' imprisonment.
>
> ...
>
> Mr Randhawa, ... I disqualify from being a director of any company, under Section 2 of the Company Directors Disqualification Act 1986, for a period of eight years, starting from today.
>
> If the victim impact surcharge applies to these offences, it is to be drawn up in the appropriate amount.
>
> The defendants will serve one-half of their sentences before being released on licence.
>
> ..."

25. It is of note that of the defendants in the criminal trial, only one of the other defendants was given a longer sentence. The Appellant was said to be in a leadership role if not necessarily the leading role. This was not an offence involving violence but was one of significant dishonesty involving highly vulnerable victims. I was also told that the Appellant was sentenced to a confiscation order which his wife paid. He did not know the exact amount. She had paid the order by borrowing from friends and selling her jewellery.

26. I also take into account what is said about the offending in the OASys report which is at [ABS/6-45]. The assessment was completed on 12 May 2022. The report is dated 26 September 2022. The assessment is that the Appellant is at low risk of reoffending. However, the report records that the Appellant played a "significant part" in the offence. The particulars of the offending which took place over several months are set out in further detail at [2.1] and [6.1] of the report. I accept that the Appellant has complied with the terms of his licence since release in April 2022. There is nothing to suggest that he has committed any further offences.

27. The index offence is said to have had a financial motivation (amongst other factors). However, the Appellant is also recorded as saying that he "lived comfortably" prior to his conviction. It is assessed that "[h]is offence was financially motivated and not triggered by a perceived necessity or hardship but by greed". The Appellant has been disqualified from acting as a company director for eight years, which will prevent him from running his own business for several more years (until October 2027 by my calculation). The writer of the report expresses some concern about the Appellant's ability to obtain employment as he has always run his own business in the past and had indicated that he "had difficulty dealing with people in authority". The report records that the Appellant's roofing business is now closed.

28. At the time of the OASys report (less than one year ago). the Appellant also continued to protest his innocence. His continued denial is said to be "both frustrating and concerning". His unwillingness to accept responsibility for his offences extended also to his previous convictions for drink driving. The Appellant is also said to have lacked empathy for his victims. It is said that the Appellant "only seems to understand the impact on his family".

29. The Appellant says that he regrets his offences. He puts the earlier offences down to his youth and bad company. He was already in his thirties when he committed the first offence, and that explanation is therefore difficult to accept.

30. In relation to the index offence, the Appellant says in his first statement that he has "come to appreciate the severity of [his]actions", recognises the impact on his victims and will not reoffend. The Appellant also says in his second statement that he has "come to appreciate the severity of [his] actions", that he "totally accept[s] [his] responsibilities" and that he "recognise[s] the impact and consequences of [his] offences". He says that his actions were "reckless", that he was influenced by others and by greed and that he feels "bad and ashamed" for having preyed on vulnerable and elderly victims. Some of those sentiments stand in stark contrast to what is said in the OASys report (see above).

31. Although the OASys report is dated 26 September 2022, it is based on an assessment on 12 May 2022. The Appellant's first statement is dated 30 August 2022. His second statement is dated in October 2022 and therefore shortly after the OASys report. I therefore view with scepticism his recorded remorse at those stages. The assertions made in those statements are just that.

32. The Appellant's oral evidence at the hearing was also telling in this regard. The Appellant was asked what had changed between the OASys report and his statements. The focus of his response was the

impact which his incarceration had on his family. That is consistent with the view of the assessor in the OASys report. Whilst such concern is of course understandable, there was little if any recognition of the impact on his victims who were vulnerable and lost considerable amounts of money as a result of his actions. He said in re-examination that he did not know what he was doing, that it was all a "big mistake" and he apologised. However, there was still no empathy expressed for his victims.

33. Looking at the evidence as a whole, including the OASys report and the oral evidence, I do not accept that the Appellant is genuinely remorseful for his actions.

34. I deal first and shortly with the impact of deportation on the Appellant's private life. I have preserved the finding made by Judge Aldridge that the Appellant cannot meet Exception 1 not least because he has not lived in the UK lawfully for most of his life. Even accepting that the Appellant entered the UK in 1994, he did so unlawfully. He has had leave to remain only for three years in the thirty years that he has been here.

35. Judge Aldridge was prepared to accept that the Appellant has integrated to some extent in UK society through his self-employment, the formation of his family and the education of his children here. Judge Aldridge found however that there were no very significant obstacles to the Appellant's integration in India.

36. The Appellant said that he has no family remaining in India. I am prepared to accept that his parents have died. He said that his sisters live in Canada and the US. I have no reason to doubt that evidence which was unchallenged. I also accept from the Appellant's wife's evidence that she has no family remaining in India. Her father died in 2002 and her mother in 2014. As I will come to, her sister lives in the UK. I do note however that the Appellant and his wife travelled to India with their children for a visit in 2018. It is not clear what was the purpose of that visit.

37. When asked about any property interests in India, the Appellant admitted in his oral evidence that he had "something coming from the family". He said it "may be a house or a piece of land". I gained the impression that he was seeking to downplay this evidence on the basis that it might impact on his case as to ability to return to India. That impression was reinforced by his admission in cross-examination that he in fact had a small house in India. He said that it was looked after by neighbours and his cousin, who it was pointed out that he had failed to mention when first asked about family members. Although he sought again to downplay that evidence by saying that the cousin was on his grandfather's side and they were not that close, I do not accept that evidence. There is no reason why

the Appellant's cousin would look after the Appellant's property if they were distant relatives. The Appellant admitted that he had some family in India with whom he was in contact.

38. The Appellant was also asked about his employment prospects in India. Despite his evidence that he could do any job in the UK (within the limitations of his skills), the Appellant at first said it would be difficult because he was young when he left India (aged eighteen) and had only studied to year ten. He says in his first statement that he left school when he was sixteen. When pressed, the Appellant accepted that he would be able to get work in India.

39. I turn then to the evidence about the Appellant's family circumstances. There is no doubt that the Appellant has a genuine, subsisting and close relationship with his wife and three children.

40. The Appellant said in his evidence that his wife has a sister living in the UK. She used to live with her husband in Birmingham, but that relationship has soured, and she is now living with the Appellant and his family. His sister-in-law started living with his wife when the Appellant was in prison. He thought that she might get back together with her husband or might marry again. That latter answer was given in cross-examination and appeared to be something of an afterthought perhaps with a view to downplaying the assistance which she would be able to give if the Appellant were deported.

41. Similarly, the Appellant's wife sought to downplay this aspect of the family's circumstances. She said that her sister had come to help out when the Appellant was in prison and although she was still living with the family at the date of the hearing, the Appellant's wife expected her to move on as she would have future plans of her own to get re-married and have her own children. That may be so. However, at the present time, the Appellant's sister-in-law remains living with the family. Even if she did move out, she has been willing in the past to come to help her sister when needed and there is no reason to think that she would not do so again.

42. The Appellant's wife suffered a stroke when he was in prison. The Appellant said that she still struggles with her health. The stroke was in one eye, and she still has headaches. Whilst the documents at [AB/54-71] confirm the stroke and that the Appellant's wife continued to suffer blurred vision for some time thereafter, they indicate that she was discharged from care. The latest document dates to February 2022. The Appellant's wife has been prescribed blood thinners to manage her condition.

43. The Appellant was asked about his wife's ability to work and the family's financial circumstances. He said that she was only able to work "a bit". Although she supports him and the children financially,

he said that she could not support them “too much”. He said that they were in arrears of rent and overdrawn. She manages their finances with credit cards.

44. That evidence stood in stark contrast with that of his wife. When asked what work she does, she said that she had been a care worker previously but was now self-employed. She said that she did “roofing work” and “building work”. When asked what she meant by that, she said that she “looks at jobs” and sub-contracts the work because she has contacts who she knows can do the work. There are obvious concerns arising from those answers given the nature of the Appellant’s offences.

45. The Appellant’s wife was also asked what she earns from her business. She said that she earns £5,000 per month “sometimes less, sometimes more”. When asked to clarify whether that was turnover or profit, she confirmed it was profit. I do not therefore accept the Appellant’s evidence. It is clear from his wife’s evidence that the family income is not insignificant. Whilst I recognise that renting property and raising three children is not cheap, I am not satisfied that the Appellant’s wife would not be able to maintain the children financially if the Appellant were deported. As I have already noted, the Appellant accepted that he would be able to work in India.

46. The main focus of the Appellant’s case is the impact which his deportation would have on his children. He gave evidence that he plays with them, drops them off to and picks them up from school and takes them to the park. The children came to see him whilst he was in prison and were very upset. That is entirely understandable. He also said that the children need their father for things like parents’ evenings where other fathers would be present. Again, that is uncontroversial. I accept that the Appellant’s absence would be very upsetting for the children. The Appellant says in his first statement that he also cooks for the children and is their primary carer due to his wife’s stroke. I reject that evidence. The Appellant’s wife suffered her stroke in August 2021. The medical evidence indicates no ongoing issues beyond some blurred vision and there is no medical evidence after February 2022. The sick note at [AB/70] indicates that the Appellant’s wife was only signed off work for one month from 19 August 2021. The Appellant was not released from detention until April 2022.

47. When asked about the impact which deportation would have on his children, the Appellant said that it would break their hearts. He and his wife had not discussed what would happen, but he thought it would have a significant impact on the children’s education. The eldest is currently studying for her GCSEs. He mentioned that the youngest has had health problems. She vomits when she goes out. The doctors do not know why. She had stayed at home on the day of

the hearing (with the Appellant's sister-in-law) because she was sick. There is no medical evidence in that regard. It is not clear whether this is a physical ailment or due to fears about her father's situation. As noted below, the Appellant's wife said that this child had been sick when the Appellant was in prison. However, since the independent social worker said that the two younger children had not been told of their father's predicament, unless the child has discovered that her father might be deported since then, any continuing problem is more likely to be a physical health condition, the nature and extent of which is unclear due to lack of evidence. I cannot place any significant weight on this factor for that reason.

48. The Appellant's wife said that [J] had suffered at school when the Appellant was in prison. She was generally very good at school but had got behind. The problem was noticed by the school, and she was offered counselling. The other two children had also suffered which was reflected in their performance at school. The younger child had been sick. The Appellant's wife said that the children saw their father as a "superhero".

49. The support given by [J]'s school during her father's imprisonment is set out in a letter from Mr Michael Tottman, the Pastoral Support Lead dated 10 December 2021 ([AB/92]). He confirms having worked with [J] since December 2020. [J] "has consequently kept in touch with [him] for general Pastoral chats and support when needed throughout her School career". He says that "[b]eing estranged from Father has understandably impacted the family" and that pastoral support can continue "when needed".

50. Although the Appellant's wife's evidence about the impact of the Appellant's imprisonment on [J]'s education is confirmed to some extent by what [J] herself says in her letter, there is no evidence before me from the school. I accept that Mr Tottman might not be the relevant person to provide that evidence, but I note the omission of any other evidence from [J]'s teachers or in the form of school reports showing the negative impact. I accept as a matter of commonsense that there may have been some impact, particularly where the school had recognised a need for counselling but in the absence of corroborative evidence, I am not prepared to accept that this was as severe as suggested.

51. I also accept though that the impact of the Appellant's imprisonment might not be as severe as the impact of his deportation given that the children would expect their father to come home at the end of his sentence. The separation was therefore a temporary one.

52. In relation to the impact on the children, the Appellant relies on a report dated 30 August 2022 of Lynn Coates, an Independent Social Worker. She has been a qualified social worker for over thirty years

and has carried out independent social work assessments in family and immigration cases previously. I accept that she has relevant expertise in this area. She confirms that she has had "detailed discussions with the Appellant, his wife and the three children". She does not say whether those were conducted separately or together as a family. She does not say how long she spent with them.

53. Ms Coates' report is based largely on what she was told by the Appellant and his wife. The reporting is consistent to some extent with the evidence of the Appellant and his wife. There is though no mention of the involvement of the Appellant's sister-in-law in assisting with childcare. Ms Coates was given to understand that the Appellant's wife was unable to work whilst the Appellant was in prison which was contradicted by her evidence before me.

54. By August 2022, when Ms Coates wrote her report, there is no evidence that the Appellant's wife continued to receive regular follow-ups for her medical condition and yet Ms Coates says that she was. There is mention of depression. There is no medical evidence supporting that assertion. I accept that the Appellant's wife was distressed at the prospect of her husband being deported but there is no evidence that she has been formally diagnosed or even treated for depression. She says in her statement that she suffered "several breakdowns" but there is no corroborating evidence that she was treated for mental breakdowns nor that she was unable to work (beyond the one month when she was signed off after her stroke).

55. The Appellant's wife also expressed concern about being able to cope financially. Whilst at the time of Ms Coates' report the Appellant's wife was still apparently a care-worker, the evidence I had was that the Appellant's wife is now earning a not insubstantial profit from her business.

56. Insofar as what is recorded in Ms Coates' report differs from the evidence which I heard I prefer the direct evidence which I received, and which is in any event more recent.

57. Ms Coates expresses concerns about the impact of the Appellant's deportation on the children. However, only the eldest child was aware of that prospect. The younger two had not been told of this possibility.

58. In relation to the eldest, I accept what is said about the fears which [J] expressed if her father is deported. What is said in the report is consistent with what she says in her letter. She says that she was "mentally and physically broken" when he went to prison. She says that her dad "is literally [her] best friend". She says that her education suffered when he was in prison. As I have noted, that may be consistent with the evidence that she needed pastoral care.

There is however no evidence about the impact on her educational achievements and nothing to suggest that she was referred to mental health services as a result. I am for that reason less prepared to accept Ms Coates' view that her mental well-being would suffer to such an extent that she would need medical intervention.

59. [J] also expresses concerns about what would happen to her and her sisters in the event that her mother were to be taken ill and her father were to be in India. I have however noted the medical evidence relating to the Appellant's wife which is to the effect that she has been discharged from treatment and that her condition is being managed by medication.

60. Whilst I have no doubt that the views expressed by [J] in her letter are genuinely held, I have to consider them in the context of all the evidence. [J] is a teenage girl. I have no doubt that the prospect of her father leaving the family to live in India would frighten her. However, some of what she says is I find overstated (as might be expected from the emotional plea of a teenager). For example, there is no evidence to corroborate her assertion that she was "mentally and physically broken" when her father was in prison. However, I have already accepted as the Appellant's wife said that there is a difference between a short-term separation as when the Appellant was in prison (albeit that was for 2 ½ years) and a longer indefinite period.

61. In relation to the two younger children, as they have not been told of the prospect of their father's deportation, Ms Coates could only assess the impact based on what the children felt when the Appellant was in prison. [H] said that it was "really horrible" and that she and her sisters had cried a lot. Again, however, there is no evidence that their mental well-being was affected or that their education suffered.

62. I accept Ms Coates' view about the "warm and positive relationship" enjoyed by the Appellant with his children which is a reciprocal one. I also accept her view that electronic communication would not be a substitute for a physical presence. I have no difficulty in accepting her view that it is in the children's best interests that their father remain with them in the UK.

63. I am not however prepared to accept that the Appellant's wife and children would not be able to visit the Appellant in India given their circumstances. Their financial circumstances may have been difficult at the time of the report but have changed since.

64. Whilst I accept in general terms that a child's need for stability and security will be impacted by separation from one parent, and that

this can compromise or harm a child's mental and emotional well-being, Ms Coates' opinions regarding future impact are in general terms. In terms of what will happen to these children, the better evidence is what happened to them when the Appellant was in prison. There is no evidence of any social services' involvement in that period. The Appellant's wife was able to look after the children both financially and emotionally with some assistance in the case of [J] from the school and more generally from her sister. There is no corroborative evidence relating to any detrimental impact on the children's health or education save for that concerning the pastoral care given to [J] and the evidence of the Appellant and his wife which has to be treated with some caution given that the impact on the children is the core of their claim for the Appellant to remain in the UK and I have already commented on the omission of "unhelpful" facts in the witness evidence which emerged only when the witnesses were asked relevant questions.

DISCUSSION, FINDINGS AND CONCLUSIONS

65. I begin with Exception 1. I have preserved the finding that the Appellant cannot meet this exception. His case in relation to his private life does not come close to meeting even a bare case under this exception. That is not simply because he has not lived here lawfully for most of his life but also because there are no very significant obstacles to his integration in India. He has some albeit extended family members still living there. He has a property there. He would be able to work there.

66. For the purposes of the balance sheet assessment which I have to conduct following my consideration of the exceptions, however, I make the following findings in relation to the Appellant's private life.

67. The Appellant has lived in the UK for nearly thirty years (on his case). He left India aged about eighteen. He was educated there and would have grown up with an awareness of the society and culture in India. His wife was also born in India. They both speak Punjabi. They have returned to India most recently in 2018 for a visit.

68. Whilst I accept that the Appellant will have formed a private life in the UK in the nearly thirty years that he has lived in the UK, I have limited evidence about the substance of this outside his family unit. There is evidence that he had his own business but since that was linked to his offending, it is difficult to view that as a positive factor in his social and cultural integration in the UK.

69. I turn then to Exception 2. As I have already noted, the focus of the Appellant's case in this regard is the impact of deportation on his children. His wife is not a qualifying partner.

70. I accept that the Appellant's children will find separation from their father very difficult. There is evidence that they found the temporary separation caused by his imprisonment to be so. The impact of a more permanent separation will I accept be worse. I accept that their relationship with their father will have to be conducted remotely and by occasional visits. I have not accepted the evidence of the Appellant's wife that she would not be able to afford to visit the Appellant. In addition to her own earnings from the roofing/building contractor business, the Appellant would be able to work in India and is likely to be able to provide some financial support to her and the children.

71. Although I accept that the impact of a more permanent separation would be extremely distressing for the children and that the impact is likely to be worse than it was when the Appellant was in prison, I have to take into account what the evidence shows about what the impact was at that time as that informs the prediction for the future.

72. I have received a heartfelt plea in the form of a letter from [J] not to deport her father. I have accepted that her feelings are genuine but overstated. I do not accept that there was any significant impact on her education when her father was in prison. I have nothing from her school attesting to this. [J] was given pastoral care by her school which I accept shows that she was struggling when the Appellant was in prison. However, there is no evidence of any referral to mental health services resulting from that struggle. She was able to cope with the pastoral care from the school which Mr Tottman has confirmed would be offered to her again if needed.

73. There is limited evidence from the other two children. I accept that they are likely to have been distressed by their father's imprisonment as they say. It is more difficult to gauge how they would be affected by his deportation as they are unaware that this may occur. I accept however that they would be similarly upset if not more so given that this would not be a temporary separation. I have rejected the suggestion that the youngest child has been physically sick as a result of the prospect of deportation. There is no medical evidence to support a mental health link to her physical symptoms and no medical evidence regarding the nature and extent of any illness. She is also apparently unaware of the prospect of the Appellant's deportation. There is no evidence that either child's education was significantly affected by the Appellant's incarceration. [H] is due to move to the same school as [J] shortly. There is therefore pastoral support available at that school if needed.

74. I accept that both [J] and [H] are at pivotal points in their education. [J] is studying for her GCSEs. [H] is moving to secondary school. However, absent evidence about the impact of the Appellant's

imprisonment and therefore the potential impact of the Appellant's deportation on the education of any of the children, I am unable to accept that there has been any significant impact in that regard.

75. For similar reasons, I do not accept that the Appellant's imprisonment had any significant impact on the mental well-being of any of the children. They were naturally distressed and would be again if he were deported. However, there is no evidence of any mental health or social services intervention in relation to any of the children.

76. Whilst I give some weight to Ms Coates' report, I did not find her generalised assertions about the developmental impact on children of being raised by a single parent of assistance when conducting the exercise which I have to carry out which is to consider the impact on these children.

77. Whilst I accept that it is in the children's best interests to remain in the UK with both parents, given the high threshold that is implicit in the test of undue harshness, I am unable to find that the threshold is met. The Respondent has accepted that the children and the Appellant's wife cannot be expected to return to India with him. I find that it is not unduly harsh for them to remain in the UK without him. Exception 2 is not met.

78. Notwithstanding my findings that Exceptions 1 and 2 are not met, I have to go on to consider the impact of deportation on the family lives of the Appellant and his wife and children.

79. I have not until now considered the impact on the Appellant's wife. I accept that she will be extremely distressed by the Appellant's deportation. She was visibly distressed when giving her evidence. She coped without social services intervention when the Appellant was in prison. As with the children, I accept that a more permanent separation will be more difficult. However, she said in her statement that she coped for the children's sake, and I find that she will do so again.

80. The Appellant's sister-in-law still lives with the family. She helped her sister when the Appellant was in prison. I have no reason to doubt that she would do so again if the Appellant were deported. That would enable the Appellant's wife to work.

81. I accept that the Appellant's wife suffered a stroke whilst he was in prison. That may well have been caused by the stress of his imprisonment (although it did not occur until nearly two years after he was sentenced and followed a period of lockdown when the impact of separation from the Appellant and care for the children would have been more intense). However, there is no evidence of

any recurrence, and her condition appears to be managed by medication. Although the Appellant's wife talks of depression and breakdowns when the Appellant was in prison, I have not accepted her evidence in this regard due to lack of any medical evidence corroborating her statement.

82. The Appellant's wife now has her own business which is very similar in nature to that which the Appellant previously managed. I will come to that below. However, in relation to the family's financial circumstances, those are now improved from the date of Ms Coates' report. I have not accepted the Appellant's evidence that the family is struggling financially. The Appellant's wife is earning a not insubstantial profit from her business which ought to be sufficient to maintain a rented property and to provide care for her three children. As I have already indicated, the Appellant could also work in India to provide additional finance.

83. If the Appellant's wife had been a qualifying partner, I would have found that the impact of the Appellant's deportation would not be unduly harsh given the high threshold which applies. Had it not been for the children, I would also have found that she could return to India with him. She has only limited leave to remain in the UK. However, the Respondent has sensibly conceded that she cannot go to India due to the situation of the three children who are all in education in the UK. I find however that it would not be unduly harsh for the Appellant's wife to remain in the UK with the children and without the Appellant.

84. I accept that the Appellant, his wife and children have a strong, reciprocal family bond. I accept that the Appellant's deportation will be very distressing for all of them. The interference with their family life is not insignificant. It is a strong factor in the Appellant's favour. By contrast, the interference with his private life is a much lesser factor. The interference is limited for the reasons I have already set out. The Appellant has been in the UK for a significant period but there is limited evidence of his ties to the UK beyond his family life. I have found that he would not suffer any very significant obstacles to integration in India on return.

85. Against those factors, however, I have to set the public interest. Section 117C (1) provides that deportation of foreign criminals is in the public interest. That is the more so as the Appellant in this case is a serious offender. Section 117C (2) provides that the more serious the offence the greater the public interest in deportation.

86. The index offence took place over several months. The Appellant was said to have a leading role if not the leading role in the conspiracy. Whilst not an offence involving violence, this was a significant fraud affecting elderly and vulnerable victims who were

cheated in some cases out of life savings or significant amounts of money which they had put aside for other purposes. It was a serious offence as reflected in the sentence passed. I also take into account the Appellant's other previous offences which involved drink driving and other associated misdemeanours. Whilst of a much less serious nature, the Appellant did not learn his lesson from those earlier convictions. I have rejected his explanation for those offences said to be down to being young and influenced by bad company. The Appellant was in his thirties at the time of his first conviction. He was already in a relationship with his now wife.

87. I accept that the Appellant is said to be at low risk of reoffending. However, I have some concerns about the evidence I received that the Appellant's wife is now running a business which is very similar in nature to that operated previously by the Appellant. She is by her own admission using contacts made in the past. I have no evidence that those are contacts involved in the Appellant's previous offending. The Appellant has also been disqualified from acting as a director at the present time. However, I have concerns that the Appellant might become involved in the business were he to remain. The writer of the OASys report has clearly recorded that the Appellant's roofing business had closed. This is not the same business but is sufficiently closely aligned to cause me some concerns about the level of risk which the Appellant might pose in the future.

88. Notwithstanding those concerns, I have no evidence to underpin any different conclusion about the risk which the Appellant poses and I therefore proceed on the basis that the OASys report assessment still stands unchanged. However, that report also makes criticisms on several occasions of the Appellant's lack of acceptance for his offence and lack of empathy for his victims. Although the Appellant said that this has changed, I have not accepted his evidence in this regard. That is relevant to the risk he might pose in the future however low that risk is. Against that, I accept that the Appellant has not offended since his release and has not been detained now for over one year. He has complied with his licence conditions.

89. As Mr Wain pointed out, however, the public interest in the prevention of crime and disorder is not simply based on risk. It is also based on deterrence of others.

90. I have carefully balanced the interference with the private life of the Appellant and the family lives of the Appellant, his wife and his three children against the public interest. However, having reached the conclusion on the evidence that the impact of the Appellant's deportation would not be unduly harsh for the Appellant's children (or his wife if she otherwise met Exception 2), I have reached the conclusion that the decision to deport the Appellant is not

disproportionate. Put another way, I find that there are no very compelling circumstances over and above the two exceptions in Section 117C which outweigh the very strong public interest. I am fortified in this conclusion by the fact that Mr Fripp in his submissions very fairly accepted that this was likely to be the outcome if I rejected the Appellant's case under Exception 2.

91. For the foregoing reasons, the Appellant's appeal is dismissed. Deportation would not breach section 6 Human Rights Act 1998 in relation to the Article 8 rights of the Appellant or his family.

NOTICE OF DECISION

The Appellant's appeal is dismissed on human rights grounds (Article 8 ECHR)

L K Smith
Upper Tribunal Judge Lesley Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 July 2023

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005954

First-tier Tribunal No:
HU/00155/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before
UPPER TRIBUNAL JUDGE LESLEY SMITH
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

HARPREET SINGH RANDHAWA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel instructed by M & K Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 14 March 2023

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Aldridge promulgated on 30 November 2022 ("the Decision") dismissing his appeal against the Respondent's decision dated 18 June 2021 refusing his human rights claim. The Respondent's decision was made in the context of an order to deport the Appellant to India as a

foreign national offender following his conviction on 7 October 2019 for conspiracy to defraud. The Appellant was sentenced to five years in prison for that offence on 11 October 2019. As such, in order to succeed, he has to show that there are very compelling circumstances over and above the two exceptions set out in section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C").

2. The main focus of the Appellant's human rights claim and his appeal is his relationship with his wife and three children born between 2008 and 2012. The Appellant cannot succeed based on his private life not least because he has not lived in the UK lawfully for half his life. The Judge found at [32] of the Decision that the Appellant did not meet Exception 1 (Section 117C (4)). The Appellant has not challenged that finding. The Respondent accepted that it would be unduly harsh for the Appellant's wife and children to relocate with him to India. The children are all British citizens. The Judge found at [36] of the Decision that it would not be unduly harsh for the Appellant's wife and children to remain in the UK without him and that therefore Exception 2 (Section 117C(5)) was not met. Having carried out an assessment under Section 117C(6), the Judge concluded that there were not very compelling circumstances over and above the exceptions and therefore dismissed the appeal.

3. The Appellant appeals on four grounds as follows:

First ground: the Judge has wrongly applied a test of a "notional comparator" when considering whether it would be unduly harsh to expect the Appellant's children to go with the Appellant to India, having regard to what was said by the Court of Appeal in Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 ("PG (Jamaica)"). That is contrary to subsequent case-law disapproving that test, in particular HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 ("HA (Iraq)") and AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 ("AA (Nigeria)"). The Court of Appeal's judgment in HA (Iraq) was affirmed by the Supreme Court in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22. The error in this regard is said to have been repeated at [40] of the Decision when the Judge assessed the Appellant's case under Section 117C(6).

Second ground: the Judge made inconsistent findings at [38] of the Decision, having particular regard to what was said in the preceding paragraphs and when assessing the Appellant's case under Section 117C(6).

Third ground: when finding at [40] of the Decision that the Appellant could maintain contact with his children "through visits to India and modern means of communication", the Judge failed properly to evaluate the impact on the Appellant's children of the lack of direct contact and removal of the Appellant's support within the family unit.

Fourth ground: the Judge failed adequately to assess the impact of deportation on the children having regard to medical conditions suffered by the Appellant's wife in August 2021 and the lack of any alternative family support. In effect, this (and to some extent the third ground) are more properly complaints that the Judge failed to have regard to relevant considerations.

4. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on 30 December 2022 in the following terms so far as relevant:

> "..2. As to the substantive Grounds, notwithstanding that the FtT Judge does correctly set out the applicable tests to be applied, it is arguable that he then falls into error in their application by placing inappropriate focus on the concept of a notional comparator (particularly when carrying [out] the 'unduly harsh' assessment) and thereby failed to adopt the approach as set out in recent case law including that endorsed in HA (Iraq) v SSHD [2022] UKSC 22.
>
> Consequently, permission to appeal is granted. No restriction is placed on which of the grounds as pleaded may be advanced."

5. The appeal therefore comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we then have to decide whether the Decision ought to be set aside in whole or in part depending on the error found. If we set aside the Decision, we must either remit the appeal to the First-tier Tribunal for re-hearing or re-make the decision in this Tribunal.

6. We had before us a core bundle of documents relevant to the appeal, and the Respondent's and Appellant's bundles as before the First-tier Tribunal. Given the nature of the grounds, we do not need to refer to the documents. The Respondent filed a Rule 24 Reply dated 9 January 2023 to which we have had regard in what follows. Mr Fripp also provided us a copy of his skeleton argument before Judge Aldridge which we did not have in the bundles.

7. Having heard submissions from Mr Fripp and Mr Melvin, we indicated that we intended to reserve our decision and provide that in writing which we now turn to do.

DISCUSSION AND CONCLUSIONS

First Ground

8. We are satisfied that the Appellant has demonstrated an error of law in the Decision by his first ground for the reasons which follow.

9. The focus of the first ground is [36] of the Decision which reads as follows:

> "However, whilst I immediately accept, and note that the respondent has too, that it would be unduly harsh for the children to accompany him to India after being born and integrated into British society, I do not find that the effect of the deportation of the appellant on his partner and children, involving the appellant's deportation to India and his wife and children remaining in the UK amount to reasons which are unduly harsh. The reality in respect of this matter is that it appears likely to be that the mother and children would not choose to go to India. Ms Benipal indicated to the tribunal that she did not see how she could return to India with the children in education in the UK and speaking mostly English. The children have lived for a considerable period of the last three years separated from their father, due to his incarceration, with their mother. The appellant's removal would not cause any disruption of residence for the children and only limited effect on their domestic life. I accept that there would be some added difficulties for Ms Benipal as she explains that she has struggled with her health both physical and mental and has not described any family to help her in the UK. However, she appears to have managed successfully for the considerable time that the appellant spent in custody, and I do not accept that this amounts to undue hardship. I have conducted an assessment of the children's best interests in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. I find that there would be no unjustifiably harsh consequences if they remain at home with their mother in the UK if the appellant is removed. I look to the case of PG (Jamaica) [2019] EWCA Civ 1213. I have no doubt that these innocent children would be distressed with their father having to leave the UK. However, this is a consequence of being a foreign offender and I see no evidence that there will be undue harshness. Again, I confirm that I have considered the independent social workers report in this respect. I do not find that Exception 2 has been met."

[our emphasis]

10. Although the Supreme Court's judgment in HA (Iraq) is referred to in Mr Fripp's skeleton argument before Judge Aldridge we would not have found there to be an error for the Judge's failure to refer to that. As Mr Fripp accepted, the disapproval of the Court of Appeal's comments regarding a "notional comparator" in PG (Jamaica) were made first by the Court of Appeal in HA (Iraq) and AA (Nigeria). The Judge did refer to the Court of Appeal's judgment in HA (Iraq) at [35] of the Decision when referring to the threshold test of undue harshness. Mr Fripp submitted however that the reference to PG (Jamaica) at the end of [36] of the Decision could only mean that the Judge had failed to have regard to what was said about that case in HA (Iraq). Mr Fripp also accepted that the Judge was entitled to have regard to the judgment in PG (Jamaica) more widely (as he did at [7] of the Decision when referring to the "structured approach"). However, Mr Fripp submitted that the reference to PG (Jamaica) in the context of [36] could only mean that the Judge was considering the impact of deportation on the children from the perspective of a "notional comparator".

11. We accept as the Respondent says in her Rule 24 Reply that [36] of the Decision also considered the impact on these children. We did not understand Mr Fripp to submit that the Judge relied only on what would

be the position for any child. However, we do not accept that the taking into account of the impact on these children detracts from the very clear error made at the end of [36] when referring to the position for the children arising from the Appellant's situation as a foreign offender. That can only be read as the impermissible approach taken in PG (Jamaica) which was disapproved by the Court of Appeal in HA (Iraq) as upheld by the Supreme Court.

12. For the same reasons, we are unable to accept that the error in that regard is not material. As Mr Fripp submitted and we accept it is at least part of the reasoning given for the finding that deportation of the Appellant would not have an unduly harsh impact on his children and that Exception 2 is not met. The outcome of the Judge's assessment might have been different if he had not taken that into account. We put it no higher than that. However, we are satisfied that the error is material.

13. Of course, in this case, the Appellant had to show that there are very compelling circumstances over and above the two exceptions in Section 117C in order to succeed in his appeal. Mr Fripp referred us to [40] of the Decision which is part of the assessment under Section 117C(6) and where the Judge said that he could "find no cause to distinguish this matter on its own facts in any meaningful way from the adverse effects upon the family that will result from the removal of the appellant from those anticipated in cases of this type". Whilst at first blush that might appear to be an error of the same sort complained of in relation to [36] of the Decision we do not accept that this is an error. As Judge Holmes pointed out during the hearing, in order to succeed the Appellant has to point to some circumstance which is "very compelling". It is possible that the Judge at [40] of the Decision was simply looking for those sorts of circumstances.

14. We are however satisfied that the error which we have found to be established in relation to the assessment of Exception 2 has a knock-on effect on the overall assessment which the Judge was carrying out. If he had found that Exception 2 was satisfied, that would not be the end of the matter but it would potentially add on the Appellant's side to the balance to be carried out when assessing the case under Section 117C(6).

15. We are therefore satisfied that the error established by the first ground impacts on the Judge's overall assessment.

Second Ground

16. As is pointed out in the pleaded grounds, the Judge accepted that the Appellant's release from prison and return to his family had improved the family's circumstances ([35]). The Judge also accepted that the

Appellant was now an integral part of the family unit ([38]). However, the Judge went on at [38] of the Decision to say this:

> "However, the relationship between the appellant and his children and wife has been fractured by the significant period in custody as a result of his offending behaviour. I accept that he was visited by the family as often as practicable yet, inevitably, this would have eroded their natural bond. I do not find that there will be any loss that is sufficient to be very compelling…."

17. Mr Fripp in his grounds and oral submissions referred to the dictionary definition of "fracture" which he says "obviously suggests permanent breakage, correctable if at all only be lengthy healing". He submits that this is at odds with the findings to which we have referred about the Appellant's place within the family unit following his release from prison.

18. We consider this ground to be a matter of semantics which does not disclose any inconsistency. The Judge was entitled to find that the relationship between parent and child and even to a lesser extent between spouses would be inevitably weakened by a period of separation of the length which occurred whilst the Appellant was in custody. In any event, the word "fracture" does not necessarily mean that the relationship is permanently broken. Even in common parlance, it implies a break which can be fixed. The Judge was entitled to find though that a three years' separation between parent and child, particularly for a child in its formative years, would weaken the natural bond. The Judge was entitled to make that finding even if, as he says, the Appellant has reintegrated into the family unit since release. We therefore do not consider this ground to be made out.

Third ground

19. Relying also on the Judge's findings that the Appellant has reintegrated into the family unit and has a genuine and subsisting relationship with his children which has been re-formed since his release, the Appellant submits that the Judge was not entitled to conclude that the relationship could be continued via "modern means of communication". Reference is made in the pleaded grounds to case-law which expands upon the point that "modern means of communication" are not as effective as direct contact particularly as regards a parent/child relationship. We have no difficulty accepting that as a proposition even though, as the Respondent points out, those cases are concerned with the non-criminal deportation context. Those cases also pre-date the pandemic and the advances which have been made since then in the types of communication which are available.

20. The Judge dealt with the issue of the children's best interests of which these comments form part at [40] of the Decision as follows:

> "In respect of the best interests of the children, that is a matter that carries significant weight and is a primary consideration, I accept that the children's best interests are to be with both parents within a family unit, I accept that the children are British citizens and that none of the children have ever lived outside the UK. However, I do not accept that their likely separation from their father, as a consequence of his criminal conduct, are exceptional circumstances which outweigh the public interest in his deportation. Contact can be maintained through visits to India and modern means of communication. The children can remain in the UK with their mother who is able to provide support and nurture them whilst, herself, being on a route to settlement in the UK. Considering this case in the round, I can find no cause to distinguish this matter on its own facts in any meaningful way from the adverse effects upon the family that will result from the removal of the appellant from those anticipated in cases of this type. The weight of public interest is such that it cannot be said that there are very compelling circumstances, as required by section 117C (6), which would make deportation a disproportionate interference with the Article 8 rights of the appellant, his wife or their children."

21. We have already explained (when dealing with the first ground) why we do not regard the Judge's findings in that paragraph to be contrary to the case-law in relation to "notional comparators". We do not accept either that the Judge was not entitled to say what he did about the method in which the Appellant could retain contact with his children. We do not accept, as is pleaded by the Appellant, that this minimises the loss to the children of their father. As Judge Holmes pointed out, the reference in the pleaded ground to the Appellant being the "sole or main breadwinner" is somewhat misleading since the Appellant was not permitted to work lawfully for much of his stay in the UK and his self-employment was an intrinsic part of the crime for which he was convicted. As is recorded at [25] of the Decision, the Appellant is the subject of a substantial confiscation order which self-evidently impacts on his ability to provide financial support to his family following his release.

22. The way in which this ground was developed orally was not that the Judge was not entitled to have regard to the possibility of remote communication as a relevant consideration but rather that the Judge had failed to have regard also to how remote contact differs from direct contact. In the alternative, it is said that the Judge had given excessive weight to the possibility of remote communication. We do not agree that the Judge failed to have regard to the loss of direct contact. The Judge considered elsewhere in the Decision the nature of the relationship between the Appellant and his children now and the impact of deportation on that relationship. The Judge is simply pointing out at [40] that although there would self-evidently be a loss of the direct contact which the Appellant has with his children now, there would be a way of maintaining some contact with them if he were in India. Matters of weight are for the assessment by the Judge hearing the evidence. They do not generally constitute an error of law absent a misdirection or other public law failure.

23. For those reasons, we do not consider that the third ground is made out.

Fourth ground

24. As we have noted above, the fourth ground is also in essence a challenge to the Decision on the basis that the Judge has failed to have regard to relevant considerations, in particular the health of the Appellant's wife, the risk that she might fall ill again and the impact on the children if she were to do so, given that the Appellant's wife would be the sole carer for those children if the Appellant were deported.

25. We accept Mr Melvin's submission that this is all speculative. The Appellant's wife had health problems in August 2021 (when she suffered a stroke). The Judge has recorded at [36] of the Decision that the Appellant's wife struggled with her physical and mental health and apparently has no family to help her. He therefore clearly had regard to this. However, the Appellant's wife and children were able to cope for the period when the Appellant was in prison (for about three years) without the assistance of social services or other intervention. Accordingly, the Judge was entitled to find as he did that the Appellant's wife would manage if the Appellant were deported.

26. We do not consider that the fourth ground is made out.

Conclusion and Next Steps

27. For the reasons we have set out above, we consider that there is an error disclosed by the first ground when considering whether the Appellant's deportation would have unduly harsh consequences for, in particular, his children. That impacts not only on the assessment under Section 117C(5) but also on the wider assessment at Section 117C (6). Accordingly, we set aside the findings of the Judge at [33] onwards of the Decision. We preserve the findings at [30] to [32] of the Decision. There is no challenge to the assessment of the first exception (Section 117C (4)) in relation to the impact of deportation on the Appellant's private life. There is no challenge to the recitation of the core findings and the legal test which applies at [30] and [31] of the Decision.

28. Mr Fripp invited us to remit this appeal to the First-tier Tribunal if we were to find an error of law which is material. We decline to do so. Although there remain facts to be found on the issues which remain, we do not consider that there is much fact-finding to be carried out. Most of the facts are uncontroversial. This case turns on assessment rather than credibility. Following discussion, Mr Fripp accepted that the appeal could remain in the Upper Tribunal.

29. Although there has been no application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit further evidence, as we have to assess the issues at date of hearing, we have given limited directions to allow the submission of further evidence if the Appellant wishes to do this.

Notice of Decision

The decision of First-tier Tribunal Judge Aldridge promulgated on 30 November 2022 contains a material error of law. We set aside the decision whilst preserving [30] to [32] of that decision. We give the following directions for a resumed hearing in the Upper Tribunal:

1. **Within 28 days from the date when this decision is sent, the Appellant shall (if so advised) file with the Tribunal and serve on the Respondent any additional evidence on which he wishes to rely at the resumed hearing.**
2. **The appeal will be listed for a resumed hearing, face-to-face before UTJ Lesley Smith and DUTJ Holmes on the first available date after six weeks from the date when this decision is sent with a time estimate of ½ day. A Punjabi interpreter is to be booked for that hearing.**

L K Smith
Upper Tribunal Judge Lesley Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 March 2023