Neutral Citation Number: [2024] EWCA Civ 74

Case No: CA-2023-000606

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Stephen Smith
UI-2022-000281

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE KING
and
LORD JUSTICE WARBY

- -

Between :

ENGIN YALCIN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik KC and **Arif Rehman** (instructed by **Acharyas Solicitors**) for the **Appellant**
Amy Mannion (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 21 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. The Appellant is a Turkish national, of Kurdish ethnicity, born on 15 January 1988. He first came to the UK in 2003 as an asylum seeker but his claim was refused and he was eventually removed in 2010. Later in 2010 he married a British national in Turkey, and in 2011 he returned to the UK on a spouse visa. He was granted indefinite leave to remain in 2013 and has two sons – K, born in February 2013, and D, born in February 2014: both are British citizens.

2. On 4 March 2016 the Appellant pleaded guilty to possessing a prohibited weapon, namely a Glock 17 semi-automatic pistol, and possessing that firearm without a certificate. He was sentenced to a total of five years and four months in prison.

3. On the basis of that conviction and sentence, on 19 December 2016 the Secretary of State notified the Appellant of her intention to deport him pursuant to section 32 of the UK Borders Act 2007. He made a human rights claim resisting deportation, which was refused by a decision dated 9 August 2017. He appealed to the First-tier Tribunal ("the FTT"). That appeal was not heard until March 2021. The reason for the delay is not clear, but it may be that it was thought necessary to await the result of a further asylum claim which the Appellant made in June 2018 and which was refused only in January 2021.

4. The Appellant's appeal, together with an appeal against the refusal of his asylum claim, was heard by First-tier Tribunal Judge Cohen on 17 March 2021. By a decision promulgated on 19 October 2021 he dismissed the appeal as regards the asylum claim but allowed it as regards the human rights claim. It is surprising that seven months elapsed between the hearing and the decision, but counsel were not aware of any explanation for the delay and no point was taken about it.

5. The Secretary of State appealed against the decision of the FTT. On 23 August 2022 Upper Tribunal Judge Stephen Smith held that the decision should be set aside for error of law. He directed that it be re-made at a further hearing of the Upper Tribunal ("the UT"), with no retained findings of fact. That hearing took place on 2 November 2022. By a decision promulgated on 1 February 2023 the Secretary of State's appeal was allowed.

6. The Appellant sought permission to appeal against both the original decision of the UT setting aside the decision of the FTT and, if that appeal were unsuccessful, its decision to re-make the decision rather than remit to the FTT. (There was no challenge to the UT's substantive decision if those challenges were unsuccessful.) Andrews LJ gave permission only as regards the first challenge. That means that the only issue for us is whether the FTT did indeed err in law in the respects found by the UT.

7. The Appellant has been represented before us by Mr Zane Malik KC leading Mr Arif Rehman, and the Secretary of State by Ms Amy Mannion, none of whom appeared below. The case was very well argued on both sides.

THE BACKGROUND LAW

8. Section 32 (4) of the 2007 Act provides that "the deportation of a foreign criminal is conducive to the public good". Subsection (5) requires the Secretary of State to make a deportation order in respect of a "foreign criminal", defined (so far as relevant for our purposes) as a person who is not a British citizen and who is convicted in the UK of a criminal offence for which they are sentenced to a period of imprisonment of at least twelve months. That obligation is subject to various exceptions set out in section 33. We are concerned only with the exception in section 33 (2) (a), which applies "where removal of the foreign criminal in pursuance of the deportation order would breach … a person's Convention rights". The Convention rights in question are of course rights under the European Convention on Human Rights ("the ECHR"): the relevant right in most cases is the right to respect for private and family life accorded by article 8.

9. In a case where the removal of a person from the UK, including by way of deportation, would interfere with their article 8 rights, article 8 (2) requires the Secretary of State to show that that interference is justified. That entails a proportionality assessment in which the effect of the interference is weighed against the public interest in removal. There is a good deal of Strasbourg case-law about the proper approach to such an assessment, which is authoritatively reviewed in the judgment of Lord Reed in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, at paras 24-35.

10. Part 5A of the Nationality, Immigration and Asylum Act 2002 was introduced by the Immigration Act 2014. It is headed "Article 8 of the ECHR: public interest considerations". Its purpose, in general terms, is "to promote consistency, predictability and transparency in decision making and to reflect … Parliament's view of how as a matter of public policy, [the proportionality balance] should be struck", and more particularly "to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute": see the judgment of Lord Carnwath in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273, at paras. 12 and 15. Unfortunately, Part 5A is not very well drafted, and its provisions have required a good deal of judicial exposition.

11. Part 5A comprises four sections, 117A-117D. I need only set out sections 117A and 117C.

12. Section 117A provides, so far as material for our purposes, that in considering whether the interference with a potential deportee's right to respect for their private and family life is justified (defined as "the public interest question")

> "the court or tribunal must (in particular) have regard —
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C."

13. Section 117C reads, so far as material:

> "(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 term "qualifying child" is defined in section 117D (1) in terms that include a child who is a British citizen.

14. At the risk of spelling out the obvious, the effect of section 117C is to prescribe different approaches to the public interest question by reference to the length of the sentence imposed. Specifically:

(1) In the case of those sentenced to imprisonment for at least twelve months but less than four years (described in the case-law as "medium offenders"), the effect of subsection (3) is that deportation will not be justified if either of the two Exceptions identified in subsections (4) and (5) applies – Exception 1 being concerned with private life and Exception 2 with family life with a partner and/or with children.

(2) Where the potential deportee, to whom I will refer as "the claimant", has been sentenced to more than four years' imprisonment (a "serious offender"), those Exceptions are not available and subsection (6) provides that in considering the public interest question deportation will be justified unless there are "very compelling circumstances, *over and above those described in Exceptions 1 and 2*". The italicised words ("the over-and-above requirement") are central to the main issue on this appeal: I will come back to them later.

(There is a rather fuller summary at para. 53 below.) I will sometimes for convenience refer to the proportionality assessment in cases where the Exceptions do not apply as being "required by", or "under", subsection (6), although that is not strictly accurate since the assessment is required by article 8 itself.

15. It should be noted that, although the circumstances described in Exceptions 1 and 2 represent common circumstances in which a claimant's private or family life may be engaged, they do not cover all circumstances on which a medium offender might wish to rely. For example, he or she may well have a private life that would be interfered with by deportation even if they have lived in the UK for less than half their life; or they may enjoy a family life in the UK with parents or siblings rather than (or as well as) a partner or children.

16. The provisions of Part 5A were at the material time reproduced in substantially identical terms (so far as material for present purposes) in Part 13 of the Immigration Rules, at paragraphs 398-399D. The equivalent to section 117C (6) formed part of paragraph 398 and the equivalents to Exceptions 1 and 2 appear under paragraphs 399 and 399A respectively.[1]

17. In taking any immigration decision the best interests of any child affected by it must be treated as a primary consideration: see section 55 of the Borders, Citizenship and Immigration Act 2009.

18. At the time of the argument and decision in the FTT the most recent authorities on the effect of the provisions summarised above were the decisions of this Court in *HA (Iraq) v Secretary of State for the Home Department* and *RA (Iraq) v Secretary of State for the Home Department*, [2020] EWCA Civ 1176, [2021] 1 WLR 1327, which were heard together and to which I will refer as *HA (Iraq)*; and *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296, [2020] 4 WLR 145. The two *HA (Iraq)* cases concerned medium offenders, but *AA (Nigeria)* concerned a serious offender. All three decisions were subsequently upheld, and (so far as relevant to the issues on this appeal) their reasoning approved, by the Supreme Court under the name of *HA (Iraq)* [2022] UKSC 22, [2022] 1 WLR 3784: the only judgment was given by Lord Hamblen. The analysis in both *HA (Iraq)* and *AA (Nigeria)* was to a considerable extent based on the important judgment of this Court, given by Jackson LJ, in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207.

19. I will return in due course to the particular points established by those authorities which are material to the issues on this appeal. It is sufficient at this stage to quote Lord

[1] Part 13 has been recast with effect from 12 April 2023, but it contains provisions which appear to be to substantially the same effect.

Hamblen's summary, at para. 51 of his judgment in *HA*, of the correct approach to the proportionality assessment in a case to which the Exceptions do not apply:

> "When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ('ECtHR') as being relevant to the article 8 proportionality assessment."

He goes on to reproduce the lengthy summary of potentially relevant factors given by the ECtHR in *Unuane v United Kingdom* (2021) 72 EHRR 24, but I need not quote that here: the important point is that what is involved is a broad holistic assessment. Lord Hamblen's description of the public interest in the deportation of foreign criminals as "very strong" derives from a long line of authorities which, again, it is unnecessary to cite here. It is of course because the public interest is so strong that very compelling circumstances are required to outweigh it; and at para. 33 of his judgment Lord Hamblen quotes with approval an observation in *NA (Pakistan)* that such cases would be rare.

THE FACTS

20. Given the limited nature of the issue before this Court, there is no need to set out the facts in any detail. I have already given the essentials of the Appellant's immigration history. I need only say a little more about the offence for which he was imprisoned and about his family circumstances.

21. As to the offence, the essential facts are as follows. The Appellant had arranged to purchase the firearm online. In fact, the sale had been conducted pursuant to an undercover police operation, and when he arrived at the pre-arranged meeting point he was arrested as soon as he had taken possession of the gun. It does not appear to have been established what particular purpose he had in mind in obtaining it, but the sentencing judge found that his intention had been that it would be used for criminal purposes of some kind by himself or others.

22. As to his family circumstances, the Appellant separated from his wife in 2015. He was in prison or detained, initially on remand and then following his conviction and until the grant of immigration bail, between 21 December 2015 and 9 September 2018. During that time his wife, who is estranged from her own family, had to bring up K and D on her own, although she received some support from the Appellant's brother. Following his release the Appellant returned to live near his wife, although not with her, and continued to be involved in the upbringing of the children: the depth of the relationship is a matter about which the FTT made findings to which I will come later. He has two hairdressing businesses. His wife does not work and receives universal credit.

THE FTT's REASONS

INTRODUCTION AND THE FACTS

23. Paras. 1-13 of the FTT's Reasons set out the procedural background, including a summary of the Secretary of State's reasons for refusing the Appellant's human rights claim.

24. At paras. 14-20 the FTT summarises the Appellant's case on the appeal and the contents of his witness statements. I need not set out those paragraphs in full. His broad case was that his deportation would be disproportionate in view of his long residence in this country and his family life with his wife and in particular his children, one of whom, D, had serious difficulties. He expressed deep remorse for the offence which he had committed. He exhibited prison reports showing that he had a good record in prison and was at low risk of reoffending. He had his own business and was able to and did provide significant financial support to his wife and children. He was well integrated in the community and supplied character references from friends and family. As regards the children, his wife did not have a partner and was, as I have said, estranged from her own family. She was said to be dependent on the Appellant's involvement in the care of the children at weekends and in school holidays and on financial support from him supplementing her benefit income.

25. For the purpose of this appeal the FTT's summary of what is said in the witness statements about D, the younger child, is particularly important. Specifically:

(1) Para. 15 begins:

> "Amongst further evidence supporting the appellant's appeal was a witness statement from the appellant together with a witness statement from the appellant's ex-partner (sponsor)[2]; evidence in respect of [D] indicating that he has speech and language and behavioural disabilities and that an EHCP [Education Health and Care Plan][3] is in place for him and that he is in receipt of DLA [Disability Living Allowance]. There is evidence indicating that there is a very strong bond between the appellant and his children, particularly [D] who amongst other things he has taken to Euro Disney in the past. [D] struggled during COVID restrictions."

(2) Para. 17 includes the following passage:

> "[D] has significant learning difficulties and [the Appellant] has a strong bond with him. He had been particularly involved in the children's lives during lockdown. The sponsor relies on him

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[2] Although the FTT uses this language, it was common ground before us that the Appellant and his wife were legally married (and have not been divorced).

[3] An EHCP is defined on the gov.uk webpage *Children with special educational needs and disabilities* as being "for children and young people aged up to 25 who need more support than is available through special educational needs support".

> significantly. ... If he is deported from the UK they will suffer enormously as will their health."

(3) Para. 20 records evidence that while the Appellant was in prison D had been physically aggressive towards his brother K and that he has been referred to the local Child and Adolescent Mental Health Services ("CAMHS") team.

26. At paras. 21-28 of the Reasons the FTT summarises the evidence at the hearing. The Appellant, his wife and his brother all gave oral evidence consistent with and amplifying the evidence in their witness statements. Again, I need not quote these paragraphs in full. However, I should note two points relating to D. The Appellant gave evidence that D has "1-2-1 support" at school (para. 25). His wife gave evidence that D's relationship with the Appellant was "very close", that D "struggled greatly and his behaviour deteriorated significantly whilst the appellant was in prison", and that if the Appellant were deported it would have an enormous detrimental emotional effect on him (para. 27).

"DECISION"

27. Paras. 31-47 of the Reasons are headed "Decision". I need to analyse these in some detail. The exercise is not entirely straightforward: apart from some particular problems which I will have to address, it is unhelpful that there are no headings, or equivalent signposts, identifying the structure of the reasoning. I will in the course of my analysis refer to some secondary criticisms made by the UT, but I will deal separately later with the principal points which were held to constitute errors of law.

28. Paras. 31-32 of the Reasons are introductory. Paras. 33-36 appear to be intended as the judge's self-direction on the applicable law. They read as follows:

> "34. I have regard to paragraphs A362 and 398 to 399D in respect of the appellant's human rights claim.
>
> 34. I have also considered whether the appellant's removal from the United Kingdom would breach his human rights. In so doing, I note the questions that must be addressed as outlined in *Razgar*.
>
> 35. The appellant has been convicted of a particularly serious offence in respect of seeking to obtain a firearm. He was sentenced to 5 years and four months imprisonment. There is a presumption towards deportation. The appellant's deportation is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of imprisonment of at least 4 years or more. The public interest requires the appellant's deportation unless there are very compelling circumstances over and above those described in the exceptions to deportation set out in paragraphs 399 and 399A of the Immigration Rules.
>
> 36. The exceptions to deportation do not apply to the appellant. He has been convicted of serious offences and sentenced to a

> term of 5+ years imprisonment in the UK including for firearms."

29. I have the following observations about that self-direction:

(1) The judge does not refer to the provisions of Part 5A of the 2002 Act but only to the corresponding provisions of the Immigration Rules. This omission is criticised by the UT, though it accepts that it did not amount to an error of law. I agree with the UT that it is good practice for tribunals to refer to the statutory provisions, since that entails a specific recognition that the principles stated in the Rules are not merely a matter of policy but are mandated by Parliament. But I also agree that since the Rules are to identical effect it is not an error of law to refer only to them.

(2) It is surprising to see no reference to the extensive case-law referred to above specifically concerned with the deportation of foreign criminals – most obviously *Hesham Ali* and the decisions of this Court in *NA (Pakistan)*, *HA (Iraq)* and *AA (Nigeria)*. (*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, which is the only authority referred to, is not entirely irrelevant but it is not concerned with deportation.) However, at a later point in the Reasons the judge does refer to *AA (Nigeria)* and to other authorities which cover the main principles – see para. 37 below.

(3) The final sentence of para. 35 accurately states the approach required by section 117C (6) (albeit by reference to the corresponding Rule) – that is, that the public interest required the Appellant's deportation unless there were very compelling circumstances over and above those described in the Exceptions under subsections (4) and (5).

(4) Para. 36 correctly states that the Exceptions do not apply, because the Appellant is a serious offender; and no further reference is made to them. That might seem unexceptionable; but, as will appear, there is an issue about whether the FTT was in fact obliged to consider them expressly because of the over-and-above requirement in subsection (6).

30. At paras. 37-43 and 45-47 of the Reasons the FTT conducts the proportionality assessment under subsection (6). Those two groups of paragraphs are separated by para. 44 (which considers and rejects the asylum appeal and with which we are not concerned on his appeal), and the intended relationship between them is not immediately apparent. I take them in turn.

<u>Paras. 37-43</u>

31. Paras. 37-39 are apparently intended to identify the aspects of the Appellant's private and family life which engage article 8. Para. 37 reads:

> "The appellant has not lived in the UK for 20 years or more. He has lived in the UK for 18+ years. He is not a child. The appellant does not have a partner but does have children in the UK."

Para. 38 starts by rejecting a contention by the Secretary of State that the Appellant was not the father of D and K. It continues:

> "38. … I accept that the appellant has joint responsibility for raising his children. His son, D, has speech and language and behavioural issues and I accept that he is particularly close to the appellant who provides a calming and guiding influence to him. I note that D has been referred to CAMHS in respect of his identified issues.
>
> 39. I must consider the best interests of the appellant's children and the effect of the appellant's removal on his remaining family members in the UK. I note that D's issues are significant and that he has been awarded DLA and provided with one-to-one teaching support at school. I have received evidence that his behaviour deteriorated whilst the appellant was in prison and this evidence is confirmed by his school. I accept that the appellant's relationship with D is particularly strong in [*sic*: this must be a slip for "and"][4] extends beyond normal familial ties."

32. I have the following observations on those paragraphs:

(1) The first three sentences of para. 37 are puzzling. They appear to be directed to establishing that the Appellant does not satisfy two particular criteria relating to his private life – that is, that he has not lived in the UK for twenty years and he is not a child – but the criteria in question are not those in Exception 1 (I think they derive from paragraph 276 ADE of the Rules). Fortunately, however, the question why the FTT referred to them does not need to be resolved.

(2) The rest of the passage is concerned with the family life of the Appellant and his children. The focus is clearly on the interference with the article 8 rights of D, and the judge rightly reminds himself of the obligation under section 55 of the 2009 Act. Paras. 38 and 39 identify D's problems, and his dependence on the Appellant, only in summary terms, but it is clear that the judge accepted the evidence set out more fully in the earlier part of the Reasons (see paras. 25-26 above).

(3) The UT points out that the phrase "normal familial ties" is typically deployed in the case-law about relationships between adult family members: see para. 44 below. However, it is in my view clear that in this context the judge is intending to make the point that the extent of D's emotional dependence on the Appellant is exceptional. To put it another way, he is finding that the relationship went beyond what Jackson LJ in *NA (Pakistan)* (see paras. 34 and 35) referred to as "the natural love between parents and children" and "the desirability of children being with both parents" and which he said would not constitute sufficiently compelling circumstances for the purpose of section 117C (6).

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[4] I have only resorted to "*sic*" where the passage in question is significant: other typographical errors in the Reasons I have silently corrected.

33. Paras. 40-43 contain what appears to be the core of the FTT's reasoning. They read as follows:

> "40. The appellant was convicted of a particularly serious offence. However, this was apparently a one-off offence and the appellant has had no other interaction with the police, no other arrests or convictions. He has spent 2+ years out of prison and during that time has had no further convictions. The appellant is industrious and has established two businesses in the UK. He creates employment. I have received consistent evidence that there are no other family members remaining in the UK who may assist the sponsor in raising her children. The appellant's brother stepped in whilst the appellant was in prison, but he has now relocated outside of London and is no longer in a position to help. He has responsibilities with his own family. The sponsor is estranged from her own family members. This evidence was consistently given to me by all three witnesses. I accept the same.
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> 41. I acknowledge the public interest in deporting the appellant. However, there is also a public interest in keeping the appellant in the UK in order to provide extremely valuable support both financially and emotionally in raising his children, particularly in respect of D noting his significant issues. If the appellant was deported from the UK, there would be a considerable additional drain on the public purse. In considering the appellant's strong relationship with his family members, I have regard to appropriate case law including *Ghising* and *Beoku-Betts*.
>
> 42. Another issue in respect of the appellant's case is that there has been a delay on the part of the respondent in considering the appellant's human rights and Refugee Convention applications. The application was made on 26 June 2018 but not decided until 14 January 2021. I find this to be indicative of the fact that the appellant's removal from the UK was not a priority for the respondent. His parole documentation and reports indicate that he poses a low risk of reoffending. He has been in the community for almost 3 years since his discharge from prison and during that time has cemented his family and private life in this country.
>
> 43. I accept that the appellant has a strong family life with his children in the UK. In considering the strength of the appellant's family life in the UK and noting the particular significant circumstances arising out of his relationship with D and noting D's significant learning and behavioural issues, and noting the best interests of the appellant's children, I find that the appellant's removal from the UK would be disproportionate in all the circumstances."

(Although the judge does not say for what purpose he refers in para. 41 to the cases of *Ghising* ([2012] UKUT 160 (IAC)) and *Beoku-Betts* ([2008] UKHL 39, [2009] 1 AC 115), both are authorities which make clear that it is necessary to take into account not simply the impact on the claimant of losing his or her family life with the relevant family members but also the impact on the family members themselves.)

34. In these paragraphs the FTT is engaged in weighing the public interest in the Appellant's deportation against the interference with his family life which it would entail. The judge explicitly acknowledges the seriousness of the Appellant's offending and the public interest in his deportation – see the beginnings of both para. 40 and para. 41 – but he sets out various factors that weigh against it. In reaching the conclusion at para. 43 that the Appellant's deportation would be disproportionate it is clear that the factor to which he attaches decisive weight is its impact on D. Other factors are referred to – in summary, his rehabilitation (in the broad sense) (first part of para. 40); financial considerations (para. 41); and delay (para. 42) – but these are plainly secondary.

Paras. 45-47

35. This second group of paragraphs reads as follows:

> "45. In respect of the appellant's private life, I acknowledge that the appellant had spent a significant period of time in the UK. He arrived in the UK aged 15 years old. He has lived here since that time being approximately 18 years. The appellant has settled well in the UK, he has established two hairdressing businesses. The appellant submitted a substantial amount of character references and witness statements from friends in support of his appeal. They will attest to his good character other than his one issue of offending behaviour. I do not find that the appellant's removal would be disproportionate on the basis of his private life alone.
>
> 46. I note the public interest criteria. I have regard to appropriate case law in this respect, including *Binloss* [*sic*], *AA Nigeria, LC China (CA)* and *MA (Somalia)*. The appellant in this case, as in those, has a particularly strong family life in the UK. I note the strong public interest in maintaining law and order and public protection, but in the light of the fact that the appellant has been convicted of one serious offence, is assessed as posing a low risk of reoffending and noting the significant length of time that he has spent in the UK and strong links [*sic*] he has a particularly the family life with his children and noting [D's] significant issues, I find that the appellant's deportation is neither justified nor proportionate in all the circumstances. The appellant has demonstrated a family life in the UK meeting the threshold for deeming his deportation disproportionate.
>
> 47. In the light of my findings above, I find that the appellant's appeal succeeds on human rights grounds."

36. The intended role of these paragraphs needs to be identified. The FTT had already in para. 43 concluded that the Appellant's deportation would be disproportionate, essentially because of the impact on D; and it might be thought that no more needed to be said. However, the position of para. 46 at the end of the Reasons suggests that it is intended to provide a definitive summary of the reasons for the finding (in the following paragraph) that the appeal succeeded. Although, like para. 43, it focuses primarily on the impact of the Appellant's deportation on D, it goes beyond the previous reasoning, both because it identifies what is said to be relevant case-law and because it refers to "the significant length of time that he has spent in the UK", which is a factor going to his private life rather than his family life[5]. I should say something more about both points.

37. As to the authorities, those referred to in para. 46 are: *AA (Nigeria)*, to which I have already referred; *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380; *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310; and *Secretary of State for the Home Department v MA (Somalia)* [2015] EWCA Civ 48.[6] It is unsatisfactory that the judge does not identify specifically what guidance he draws from these cases, beyond noting that in all of them the claimant had "a particularly strong family life in the UK". However, each does in fact contain substantial guidance as to the correct approach to the proportionality assessment. In particular, paras. 9-14 of Popplewell LJ's judgment in *AA (Nigeria)*, which was the most recent authority in this area at the time of the decision, contain a clear summary of the applicable law. That summary includes (at para. 13) two extracts from the judgment of Lord Wilson in *Byndloss* about the meaning of "very compelling circumstances": this is itself based partly on Lord Reed's seminal judgment in *Hesham Ali* and emphasises the strength of the public interest in deportation of foreign criminals and the consequent height of the threshold required to satisfy section 117C (6). Popplewell LJ also quotes (at para. 14) most of paras. 29-38 of the judgment of the Court in *NA (Pakistan)*, to which I will have to refer in detail below.

38. As to the reference to the Appellant's private life, although what is said in para. 46 itself is very summary it has to be read with para. 45, which sets out a number of points about the depth and value of his private life in the UK. Although the judge concludes that the Appellant's deportation would not be disproportionate "on the basis of his private life *alone* [my italics]", that way of putting it suggests, consistently with the reference in para. 46, that he had taken his private life into account as part of the overall proportionality assessment.

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5 It seems that the judge in fact intended to refer to some further aspect of the Appellant's private life since some words appear to be missing after "strong links". I suspect that the intended reference was to links with the local community, which would be supported by the findings in para. 45; but it is impossible to be sure.

6 I should say that it was bad practice not to give full citations for these authorities, and also those referred to in para. 41. In the cases of *AA (Nigeria)*, *MA (Somalia)* and *Ghising* an online search comes up with more than one authority with those names; and *Binloss* would come up with nothing because it is mis-spelt. Although it was not difficult for the Court, with the assistance of counsel, to identify the correct cases, that would not be so for all readers.

Overview

39. The circumstances on which the FTT relied in concluding that the Appellant's deportation would be disproportionate have to be gleaned both from paras. 37-43 and from paras. 45-47, but with particular reference to para. 46 as the final summary. It is clear from that paragraph that the predominant circumstance was the impact that being deprived of his father's support would have on D because of his particular problems. However, the judge also took into account some other circumstances as part of the overall assessment. These include the Appellant's rehabilitation (referred to in paras. 40 and 46) and his long private life in the UK (referred to in paras. 45 and 46). In making the proportionality assessment the judge quoted the correct statutory test (albeit by reference to paragraph 398 of the Immigration Rules rather than section 117C (6)). He also referred in para. 46 to authorities which contained the relevant guidance as to the application of that test, although he did not quote from them or attempt to summarise their effect.

40. The UT, as we know, reached a different conclusion about proportionality when it came to re-make the decision, and it might be thought that the way that the FTT struck the balance in this case was generous to the Appellant. However, that in itself cannot constitute an error of law unless its conclusion can be characterised as perverse, which neither the UT nor the Secretary of State has suggested: this point is made in several authorities – for a recent summary see para. 36 of Popplewell LJ's judgment in *AA (Nigeria).* It inevitable that decision-takers will sometimes differ in their assessment of the same facts – see, again, *AA (Nigeria),* at para. 41. I would add that it is in any event not possible to form a reliable view of the strength or otherwise of the Appellant's article 8 case without sight of the underlying evidence. We have not ourselves seen that evidence – perfectly properly, since there is no perversity challenge. It can at least be said that the facts that D has an EHCP (including a requirement for one-to-one teaching), qualifies for DLA and has been referred to the CAMHS suggest that his problems are substantial.

THE DECISION OF THE UT

41. The UT's finding that the FTT had erred in law is at paras. 31-42 of the Reasons. Para. 33 makes the preliminary observation that the judge "did not expressly conduct his analysis pursuant to the structure and statutory considerations established by Part 5A of the 2002 Act". The UT judge acknowledges that, since the FTT did nevertheless explicitly state the correct statutory test, that might be thought to be a criticism of form rather than substance. But he continues, at para. 34:

> "However, in this case, I consider that the judge's failure to approach his reasoning expressly pursuant to the statutory framework established by section 117C meant that he omitted key considerations and failed to address material considerations. In turn, that led to the judge taking into account immaterial considerations, and impermissibly downgrading the public interest in the claimant's deportation, for the reasons set out below."

There appear to be two "reasons set out below", the first being expounded in paras. 35-39 and the second in para. 40. I take them in turn.

42. As to the first, paras. 35 and 36 and the first part of para. 37 read as follows:

> "35. First, since the claimant had been sentenced to a term of imprisonment that exceeded four years, section 117C(6) of the 2002 Act was engaged, requiring the judge to determine whether there were any 'very compelling circumstances' over and above the statutory Exceptions to deportation. What amounts to 'very compelling circumstances' is an assessment that must be informed by the extent to which the claimed very compelling circumstances exceed the factors set out in the statutory Exceptions to deportation. The judge did not address the substance of either statutory Exception. He simply stated at paragraph 36 that:
>
> > 'The exceptions to deportation do not apply to the [claimant]. He has been convicted of serious offences and sentenced to a term of 5+ years imprisonment in the UK including for firearms.'
>
> 36. Since any assessment of 'very compelling circumstances' must be conducted by reference to the extent to which the appellant meets the substance of Exception 1 or 2, even if neither exception was capable of being engaged on account of the seriousness of the foreign criminal's offending, it was incumbent upon the judge expressly to consider those exceptions in any event, to address the extent to which they could be met. So much is clear from *NA (Pakistan)* at [37]:
>
> > [The judge quotes para. 37 of the judgment in *NA (Pakistan)*, but I omit it since I set it out at para. 56 below.]
>
> 37. It follows that it was incumbent upon the judge to address the substance of the relevant Exception, namely Exception 2 (see section 117C(5)) and to determine whether the appellant's deportation would be 'unduly harsh' on K and D. In turn, that assessment would inform the 'very compelling circumstances' assessment, consistent with *NA*."

The judge then sets out the well-known gloss on the term "unduly harsh" from para. 46 of the decision of the Upper Tribunal in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), and notes that it was endorsed by the Supreme Court in *HA (Iraq)*.

43. At para. 38 the UT judge finds that the FTT did not follow the approach so identified. He says:

> "While the judge recorded the Secretary of State's case in relation to the unduly harsh test at paragraphs 8 and 10 of his decision, he did not in terms address it during his operative reasoning. The judge observed at paragraph 38 that the claimant had a calming and guiding influence on D. At paragraph 39 he

> observed that D had a number of behavioural and other conditions that had resulted in the family being awarded the Disability Living Allowance, and that D's relationship with the claimant 'is particularly strong in [sic] extends beyond normal familial ties'. However, what the judge did not do as part of this analysis was consider (i) whether those factors were 'unduly harsh' and (ii) if they were, what the factors were of particular significance in that assessment that meant that they took the case into the territory of 'very compelling circumstances', since this claimant was a serious offender."

44. Para. 39 says that the FTT's use of the phrase "extends beyond normal familial ties" does not remedy the deficiency. He notes that the language derives from the case-law about dependency between adults and continues:

> "If the judge meant that the ties between the claimant and D were stronger than those ordinarily found between a father and a son, that would have meant, presumably, that the judge had in mind some form of notional father/son comparator, by which to calibrate such an assessment. The test the judge should have applied was the unduly harsh test, which he failed to do."

45. As to the second reason, para. 40 reads as follows:

> "Secondly, while the judge correctly noted that the claimant's deportation was in the public interest at paragraphs 35 and 46, at paragraph 41 he impermissibly held that there was 'a public interest in keeping the [claimant] in the UK' due to the impact on public funds that the judge thought there would be if the claimant were deported. The public interest factors to which the judge should have had regard are those set out in Part 5A of the 2002 Act, in particular, section 117C. Section 117C(1) provides that '[t]he deportation of foreign criminals is in the public interest'. Since the claimant had been sentenced to a term of imprisonment greater than four years, 'the public interest requires deportation' unless there are very compelling circumstances over and above the exceptions to deportation (section 117C(6)). The potential burden on public funds through an individual being deported is not a factor to which Parliament has ascribed any significance. It was an error for the judge to seek to redefine the public interest in that way."

46. Those two reasons are followed by para. 41, which reads:

> "As I conclude, it is necessary to address the judge's remarks that claimant's 'removal from the UK was not a priority' for the Secretary of State, at paragraph 42. I consider this criticism to be inappropriate, especially in light of the timing of the asylum claim and the time taken to process such claims.".

Ms Mannion submitted that in that paragraph the judge was intending to identify a further and distinct error of law by the FTT, beyond the two which I have set out above. I can see that the introductory words might suggest that, but I do not believe that it is correct. Although the original (very diffusely pleaded) application for permission to appeal to the UT did contain a criticism of what the FTT said about delay, it is far from clear that this was intended as a distinct ground of appeal, and it is not identified in the Reasons given by UTJ Pickup when he granted permission. The judge's reference at para. 34 to the FTT "taking into account immaterial considerations, and impermissibly downgrading the public interest in the claimant's deportation" suggests two reasons, which would correspond to his use of "First" and "Secondly" when beginning paras. 35 and 40. If the judge was treating what the FTT said about delay as a distinct error of law, I do not believe that he would have described it as no more than "inappropriate", and he would certainly have explained his reasoning more fully. The paragraph reads to me as simply, as King LJ observed in the course of the argument, a "postscript".[7]

47. That being so, I need not consider para. 41 further. But for what it is worth I would agree with the UT that such delays as occurred in deciding the Appellant's human rights and asylum claims cannot be treated as evidence that the Secretary of State regarded his deportation as low-priority: delay is alas endemic in the system. Having said that, I do not think that the FTT judge's observation to that effect played a significant part in his reasoning. His main point, rather, appears to have been the conventional one that the delay tended to "cement" the relationships that were the basis of the Appellant's family life case.

48. The UT concludes, at para. 42:

> "These errors are such that it is necessary for the judge's decision to be set aside; they go to the heart of the assessment of the proportionality of the claimant's deportation."

THE ISSUES ON THIS APPEAL

49. The question in this appeal is whether the two reasons given by the UT for finding that the FTT erred in law are well-founded. There is no Respondent's Notice from the Secretary of State seeking to uphold the UT's decision on other grounds: in particular, as already noted, it is not contended that the decision of the FTT was perverse.

50. I consider the UT's two reasons in turn. But before doing so I should recapitulate the approach that should be taken in considering whether the FTT made an error of law. At para. 72 of his judgment in *HA (Iraq)* (but with reference to the appeal in *AA (Nigeria)*) Lord Hamblen said:

> "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:

[7] It did indeed occur to me that "necessary" might have been a slip for "unnecessary", which would make the first sentence read rather more naturally; but I do not base my reasoning on that.

> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently – see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
>
> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account – see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
>
> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out – see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."

51. Mr Malik relied on that passage but added some further points by way of amplification. The only one that I need mention is that in *AA (Nigeria)* in this Court Popplewell LJ said, at para. 34:

> "Experienced judges in this specialised tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so."

52. There was some discussion before us about whether this Court should take the same cautious approach to interfering with a decision of the UT, which is itself a specialist tribunal. In my view it is clear that that the two situations are not comparable – see per Popplewell LJ in para. 41 of his judgment in *AA (Nigeria)* – and that it is for this Court to reach its own conclusion on whether the FTT made an error of law, which is of its nature a question to which there can be only one right answer. Having said that, it is of course right that we give careful consideration to the reasons for finding that it did so given by an experienced UT judge.

(1) FAILURE TO APPLY "UNDULY HARSH" TEST

53. The starting-point is to identify the basic structure of the law in this area. At para. 47 of his judgment in *HA (Iraq)* Lord Hamblen approved the summary which I gave at para. 29 of my judgment in this Court:

> "(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the

> circumstances there specified the public interest in the deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
>
> (B) In cases where the two Exceptions do not apply – that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements – a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C (6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."

54. It might be thought to follow from the fact that the Exceptions are a "self-contained" short-cut they have no role to play where a full proportionality assessment is required, and that accordingly in the present case the FTT was right to make no reference to them. But the complicating factor is the requirement in section 117C (6) that the public interest requires deportation unless "there are very compelling circumstances *over and above those described in Exceptions 1 and 2*". The effect of those words was considered in *NA (Pakistan)*. I need to consider with some care what the Court said in that case.

55. The most relevant part of Jackson LJ's judgment is at paras. 28-32, though it is also necessary to consider para. 37. He was considering in particular a submission that the effect of the over-and-above requirement was that circumstances of the kind mentioned in the two Exceptions – which I will call "Exception-specified circumstances"[8] – had to be excluded from any proportionality assessment under section 117C (6). That submission was rejected, but his reasoning involved explaining more generally the effect of the requirement. At para. 29 he said:

> "… [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 …, *or features falling outside the circumstances described in those Exceptions* [my italics] …, which made his claim based on Article 8 especially strong."

He went on at para. 30 to illustrate what that meant in the case of a serious offender. He said:

> "In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case

[8] I apologise for this ugly piece of jargon, but it saves a great deal of wordage.

> of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, 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* [my italics]."

That passage was quoted with approval by Lord Hamblen in *HA (Iraq)* – see para. 50 of his judgment.

56. Jackson LJ goes on to amplify the point, and deal with some other aspects of the test, at paras. 31-34. At para. 35 he says, on the basis of the previous paragraphs, that the scheme of the Act provided "the following structure for deciding whether a foreign criminal can resist deportation on article 8 grounds". Para. 37 (which is the paragraph quoted at para. 36 of the UT's Reasons) reads:

> "In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2 both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

57. *NA (Pakistan)* thus establishes that the effect of the over-and-above requirement is that, in a case where the "very compelling circumstances" on which a claimant relies under section 117C (6) include an Exception-specified circumstance ("an Exception-overlap case")[9], it is necessary that there be something substantially more than the minimum that would be necessary to qualify for the relevant Exception under subsection (4) or (5): as Jackson LJ puts it at para. 29, the article 8 case must be "especially strong". That higher threshold may be reached <u>either</u> because the circumstance in question is present to a degree which is "well beyond" what would be sufficient to establish a "bare case", <u>or</u> – as shown by the phrases which I have italicised in paras. 29 and 30 – because it is complemented by other relevant circumstances, <u>or</u> because of a combination of both. I will refer to those considerations, of whichever kind, as "something more". To take a concrete example, if the Exception-related circumstance is the impact of the claimant's deportation on a child (Exception 2) the something more will have to be either that the

[9] At the risk of repetition, not every case under subsection (6) will be an Exception-overlap case: see para. 15 above. On the face of it, it is hard to see that the words "over and above those described in Exceptions 1 and 2" have any function in a case where the claimant is not relying on circumstances falling within either Exception. But, as I have already observed, these provisions are not well-drafted.

undue harshness would be of an elevated degree ("unduly unduly harsh"?) or that it was complemented by another factor or factors – perhaps very long residence in this country (even if Exception 1 is not satisfied) – to a sufficient extent to meet the higher threshold; or, as I have said, a combination of the two.

58. There is nothing at all surprising about this, at least in the case of a serious offender. Even if the over-and-above requirement were not explicit, it is in my view inherent in the structure of section 117C that a serious offender will need to meet a higher threshold than a medium offender in order to satisfy the test in subsection (6).

59. The UT held that it followed from the judgment in *NA (Pakistan)* that the FTT was obliged, apparently as a matter of law, to consider "expressly" (i) whether the impact of the Appellant's deportation on his family – in practice on D – was unduly harsh, and (ii), if it was, to identify what was the something more which meant that the higher threshold under subsection (6) was met; and that he failed to do so. That appears from para. 36 of its Reasons, but more particularly from para. 38, which, as Ms Mannion correctly observed, encapsulates the essence of the error of law which the UT found.

60. Ms Mannion argued cogently in support of the UT's conclusion, but after careful consideration I do not believe it is correct. That is, I do not believe that it is necessary as a matter of law for a tribunal in a serious offender case to make explicit findings in the claimant's favour on the questions enumerated by the UT as (i) and (ii). I take them in turn.

61. As for (i), if in an Exception-overlap case – say, a case where the circumstance in question is impact on family members – a tribunal finds explicitly that subsection (6) is satisfied, and has fully identified the particular facts relied on, it adds nothing for it to spell out that that means that the impact in question is unduly harsh, since that is logically inherent in the overall finding. There is no need for additional reasoning or fact-finding, because the facts about that impact will have been found and assessed in any event as part of the reasoning on the subsection (6) issue.

62. As for (ii), it is also logically inherent in such a case that the tribunal will have found the "something more" which is necessary to satisfy the higher threshold under subsection (6): see para. 57 above. I agree that it would in principle conduce to transparent decision-making if the tribunal identified with precision in every case what the something more consisted of; but that will not always be straightforward. The proportionality assessment is generally multi-factorial and requires a holistic approach. A tribunal must of course in its reasons identify the factors to which it has given significant weight in reaching its overall conclusion. It is no doubt also desirable that it should indicate the relative importance of those factors, but there are limits to the extent to which that is practically possible: the factors in play are of their nature incommensurable, and calibrating their relative weights will often be an artificial exercise. It would in my view place an unrealistic burden on tribunals for them to have to decide, and specify, in every case whether the something more consists of the Exception-specific circumstance being present to an elevated degree, or of some other circumstance or circumstances, or a combination of the two. There may be cases where for some reason peculiar to the case this degree of specificity is necessary; but I do not believe that there is any universal rule. We should not make decision-making in this area more complicated than it regrettably already is.

63. I do not believe that that approach is inconsistent with para. 37 of the judgment in *NA (Pakistan)*, on which the UT particularly relied. Ms Mannion submitted that that paragraph operated as a "funnel": the effect of the first sentence was that a tribunal should start by identifying whether an Exception-specific circumstance was being relied on, and, if it was, the effect of the second sentence was that it was "necessary" for it to decide whether the required something more was present. As a matter simply of language, there are difficulties about this submission. The first sentence says only that it will "often be sensible" to consider whether the claimant's case involves an Exception-specific circumstance; and the reason that it gives is that such consideration may encourage a focus on "particularly significant factors" bearing on private or family life and thus provide "a helpful basis" for the application of the test under section 117C (6). None of that is the language of legal obligation. Although the word "necessary" appears in the second sentence, that applies only if the tribunal has chosen to take the course suggested in the first. But I do not in fact think that the answer needs to depend on this kind of detailed verbal analysis. It is important to focus on the substance of the point that Jackson LJ was making – namely, as he says in the second sentence of para. 37 (consistently with paras. 29 and 30) that in an Exception-overlap case subsection (6) requires something more over and above the minimum required to satisfy the Exception in question. It does not follow, and he does not say, that a tribunal is in every case obliged to make an explicit and particularised finding as to how that something more is made up.

64. Mr Malik referred us to para. 60 of my judgment in *HA (Iraq)*, where I said (in the context of a medium-offender case):

> "There may be cases where a tribunal is satisfied that there is a combination of circumstances, including but not limited to the harsh effect of the appellant's deportation on his family, which together constitute very compelling reasons sufficient to outweigh the strong public interest in deportation, but where it may be debatable whether the effect on the family *taken on its own* (as section 117C (5) requires) is unduly harsh. … In such a case, although the tribunal will inevitably have considered whether the relevant Exception has been satisfied, it is unnecessary for it to cudgel its brains into making a definitive finding. The Exceptions are, as I have said, designed to provide a shortcut for appellants in particular cases, and it is not compulsory to take that shortcut if proceeding directly to the proportionality assessment required by article 8 produces a clear answer in the appellant's favour."

The effect of the over-and-above requirement was not the subject of argument in *HA (Iraq)*, and in any event the point being made in this passage is not exactly the same as the point which I have just been considering. But the spirit of it does seem to me to be to the same effect, namely that the focus must be on the conclusion under subsection (6), and that explicit findings on particular matters feeding into that conclusion are not in all cases required as a matter of law.

65. I should emphasise that I do not disagree in any way with what Jackson LJ says in para. 37 of the judgment in *NA (Pakistan)*. On the contrary, I would encourage tribunals to follow the course he suggests, which is likely to help focus the mind on the key considerations. But I am at this stage only concerned with whether there is a rule that

a tribunal must in all cases explicitly address points (i) and (ii) identified by the UT, so that any failure to do so is necessarily an error of law.

66. That disposes of the UT's reasoning as expressed. But I do not think that it would be right to treat the judge's criticism of the FTT as being limited to that specific point. It is clear that his underlying concern was that, given the absence of any real exposition by the FTT, based on the authorities, of what the test under subsection (6) entails and of any clear structure to the Reasons, the judge did not in truth appreciate the height of the necessary threshold or apply it to the facts of this case. I believe I should address that concern.

67. I am bound to say that I have not found this question entirely easy. The FTT's decision could certainly have been better expressed and structured. However, it is important to bear in mind the principles summarised at paras. 50-51 above: the focus should be on the way the judge performed the essence of the task required. As to that, he considered the factors that would have been relevant to an assessment of undue harshness under section 117C (5), and it is in my view obvious that he did regard the effect on D of the Appellant's deportation as unduly harsh, although he did not use that actual phrase. It is also, I think, adequately clear that he understood that the threshold required by subsection (6), whose terms he had correctly set out in para. 35 of the Reasons, was substantially higher than that required by subsection (5). As I have observed, that is in truth self-evident in the case of a serious offender, even apart from the language of the over-and-above requirement; and the height of the applicable threshold is repeatedly emphasised in the well-known authorities with which it should be assumed, in the absence of evidence to the contrary, that he was familiar (and to some of which he referred, albeit only by their names). It is clear from para. 46 of the Reasons that he took into account other factors, relating to the Appellant's private life, over and above the impact of his deportation on D. He does not say whether it was those, or a sufficiently elevated degree of undue harshness, or (as seems most likely) a combination of the two, which lifted the case to the level required by subsection (6); but for the reasons that I have given above I do not believe that he was obliged to do so. Taking all that into account, I do not feel able to say – using the language of point (i) in Lord Hamblen's guidance quoted at para. 50 above – that it is quite clear that the FTT misdirected itself.

68. For those reasons I do not believe that the FTT erred in law in the first respect identified by the UT.

(2) UNJUSTIFIED REDEFINITION OF THE PUBLIC INTEREST

69. The UT held that it was wrong for the FTT in para. 41 of its Reasons to refer to a "public interest in keeping the appellant in the UK" so that he could provide financial and emotional support to his children, thereby preventing a "considerable additional drain on the public purse". His point, as supported before us by Ms Mannion, is that for the purpose of Part 5A of the 2002 Act the public interest is comprehensively stated as being that foreign criminals should be deported (see not only section 117C but also section 32 (4) of the 2007 Act); and that that precludes the FTT from bringing into the proportionality balance a supposed countervailing public interest of any kind.

70. I am prepared to accept – though, as will appear, I need not definitively decide – that the FTT did indeed err in law in this respect. It may be debatable whether the statutory

statement of the public interest is intended to be wholly comprehensive: some factors which would appear to go to the public interest are commonly included in the proportionality assessment, such as particular benefits that the claimant confers on the community. But it is hard to think that a public benefit of the highly general nature referred to, which would apply in every case where deportation deprived a family of its breadwinner, should be treated as diminishing the public interest in deportation declared by the statute.

71. The question then is whether that error of law was material to the FTT's conclusion. I do not believe that it was. The starting-point is that the loss to the Appellant's children, and particularly D, of the financial support that he had been providing was clearly an admissible consideration in the proportionality assessment: it would interfere, directly or indirectly, with their article 8 rights and affect their best interests. The FTT was wrong to classify it as a consideration as going to the *public* interest, but that by itself is no more than a mis-classification. It does not mean that the effect on the children of being deprived of the Appellant's financial support should not have gone into the balance at all, and there is no reason to suppose that the judge gave it additional weight because of the wrong label he attached to it.

72. The problem, however, is the explicit reference to a "saving to the public purse". That goes further than saying simply that it was in the public interest for the children to receive financial support from the Appellant: it is of its nature a consideration going specifically to the public interest. It cannot to that extent be defended on the basis that it was an admissible consideration which had simply been given the wrong label. However, this aspect of what the judge said does not appear, on a fair reading, to be a material part of his reasoning: I note in particular that he does not mention it in para. 46, which is the authoritative summary of his reasons for finding that the Appellant's deportation would be disproportionate. In my view, it is no more than an (ill-judged) rhetorical embellishment of his real point, made in the previous sentence, that it was important not to deprive the children of the Appellant's financial support.

73. I accordingly do not accept that this part of the FTT's apparent reasoning vitiated its overall conclusion.

CONCLUSION

74. For those reasons I would allow this appeal and restore the decision of the FTT. The FTT's Reasons can indeed be criticised in various respects, and I can understand why the UT came to the conclusion that it did. But in the end I do not believe that the shortcomings in question justify the conclusion that the FTT erred in law in finding that the Appellant's deportation would be disproportionate.

King LJ:

75. I agree.

Warby LJ:

76. I also agree.