Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07428/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Thursday 25 April 2019	**On Tuesday 21 May 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

AA
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made earlier in the proceedings. I continue the anonymity direction because the case involves a child. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:
For the Appellant: The Appellant appeared in person
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision dated 12 February 2019 ("the Decision"), I and Lord Beckett found an error of law in the decision of First-tier Tribunal Judge J K Swaney promulgated on 15 October 2018 allowing the Appellant's appeal. The Decision is annexed hereto for ease of reference. In light of our conclusions, we set aside the First-tier Tribunal's decision and gave directions for a resumed hearing before me.

2. At the hearing before me, the Appellant was no longer represented as he said that he could not afford a barrister. I explained the procedure for the hearing to him and he indicated that he was content to proceed. He was extremely well-prepared and read to me a prepared statement of his case to which I refer below so far as appropriate. He also gave evidence by way of his earlier written witness statements and orally in response to questions from Mr Tufan and some clarificatory questions from me. His evidence is also recorded below so far as necessary.

3. The history of the Appellant's case is adequately set out at [1] to [6] of the Decision and I do not repeat those matters. There is one additional factor which I need to take into account and that is the birth of the Appellant's third child, his second with his current partner. That is dealt with in a further statement dated 13 March 2019. His daughter was born on 17 February 2019. I refer to her hereafter as [D] to avoid confusion as she bears the same initial as her brother. I also received a further statement in the form of a letter from the Appellant's partner who I refer to hereafter as [C]. I did not hear evidence from her although she was at the hearing with both [A] and [D]. I will also need to refer to the Appellant's other child from a previous relationship, [K] and to her mother, [T] who is a British citizen.

4. Although I have set aside the First-tier Tribunal's decision, there is no factual dispute save on one issue which I mention below. Accordingly, it remains appropriate to have regard to the evidence which the Appellant gave in that appeal as recorded at [10] to [23] of that decision. It is also appropriate to have regard to what Judge Swaney said about the documentary evidence at [45] to [57] of her decision. However, it will be necessary for me to revisit the underlying documents in order to form my own assessment about what those show and the impact of them in relation to the central issues.

5. There is one additional factual matter which concerns the Appellant's entry into and residence in the UK. Mr Tufan sought to introduce in evidence two visa applications dated 16 September 2004 and 7 July 2005 respectively in the Appellant's name. The first of those applications (both for a multi visit visa) was granted on 17 September 2004 until 17 March 2005. The second was refused on 8 July 2005. Both bear a photograph of a child. Both make reference to a date of birth of 2 January 1988 (which is the Appellant's date of birth). Both bear the same details in relation to the names of the child's parents and the same passport number. A copy of the bio-data details is annexed to the second of the applications. The refusal of that application refers to it being made via the drop-box and being considered on the basis of the documents. The refusal is on the basis that the passport does not reflect the

applicant's true immigration history. I will come to the importance of that in due course. In response the Appellant produced a copy of a student card which does not provide details beyond a photograph and name. He also produced a letter from [A]'s school providing updated evidence as to the Appellant's son.

6. In addition to the above-mentioned evidence, I have and have had regard to the totality of the evidence contained in the bundle and supplementary bundle produced on behalf of the Appellant before the First-tier Tribunal. I have read all that evidence but refer only to that evidence relevant to the issues which I have to decide. When referring to the documents, I adopt the formulation [AB/xx] in relation to documents in the first of the Appellant's bundles and [SB/xx] in relation to documents in the supplementary bundle.

LEGAL FRAMEWORK

7. The factors relevant to the assessment of the Appellant's appeal are set out in summary form at [4] of the Decision. The Appellant was convicted on 29 November 2013 of two charges of conspiracy to supply controlled drugs for which he was sentenced to a term of imprisonment to 4 ½ years. As such, whether under the Immigration Rules ("the Rules") or in accordance with Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") the test is whether there are very compelling circumstances over and above the exceptions set out in the Rules or Section 117C. The relevant parts of the Rules and Section 117C are set out at [29] and [30] of the Decision and I do not need to set them out again.

8. In summary, in order to succeed, the Appellant needs to show that the factors in his case amount to very compelling circumstances over and above the exceptions in Section 117C and the Rules which would, if his sentence had been lower, permit him to succeed based on either or both of his private and family life.

9. However, it is also relevant to that question whether the Appellant could meet either of those exceptions if they did apply. The way in which the test operates was explained by the Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 as follows:

> "[29] In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, 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 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
> [30] 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 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."

10. Again, in short summary, the first of the exceptions referred to in that extract concerns private life. The Appellant would need to show that he had been lawfully resident in the UK for most of his life, that he is socially and culturally integrated in the UK and that there would be very significant obstacles to his integration in Nigeria. In terms of his family life, the Appellant would need to show that he has a genuine and subsisting relationship with a partner who is settled in the UK or British or with a child who is British or has lived in the UK for at least seven years and that in either event, that the effect of the Appellant's deportation would be unduly harsh for that partner or child.

11. The Supreme Court has recently provided guidance in relation to the way in which the test of "unduly harsh" is to apply in order to meet the second exception in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53. Indeed, we found in the Decision that the way in which Judge Swaney had applied the test was contrary to that guidance (although unsurprisingly since her decision pre-dated the Supreme Court's judgment). The Supreme Court concluded that the question whether the effect was unduly harsh was an assessment which had to be made based solely on the impact on either the partner or child, taking no account of the public interest in deportation which was already built in to the exception. However, the Supreme Court drew attention to the high level of impact required to satisfy the test as follows:

> "23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.

…

27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:

"By way of self-direction, we are mindful 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."

On the facts of that particular case, the Upper Tribunal held that the test was satisfied:

> "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that cruel."

This view was based simply on the wording of the subsection, and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial."

12. In the context of considering whether the impact of the Appellant's deportation on his children would be unduly harsh, I must of course have regard to section 55 Borders, Citizenship and Immigration Act 2009 ("Section 55") concerning what the best interests of those children require. In so doing, I note that, whilst the best interests of the child must be a primary consideration, they are not the only primary consideration – see what is said in Zoumbas v Secretary of State for the Home Department [2013] I WLR 3690. That is particularly important in a deportation case where the public interest in removal is higher. A child's best interests are considerations which still have to be weighed in the balance against other competing interests.

13. Furthermore, as I have already observed, the Appellant cannot succeed simply on the basis of satisfying either or both of the exceptions and I have to consider whether there are very compelling circumstances over and above the exceptions. That assessment does import wider public interest considerations as is explained in the Presidential decision of this Tribunal in MS (s.117C (6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) ("MS"), the headnote to which reads as follows:

> *"(1) In determining pursuant to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 in subsections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more*

than 4 years. Nothing in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 demands a contrary conclusion."

14. The second paragraph of the headnote in MS refers to what is said by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 ("Hesham Ali"). Although, as the Tribunal notes in MS, the judgment in Hesham Ali pre-dates the introduction of Part 5A of the 2002 Act which includes, inter alia, Section 117C, that judgment is still helpful for what it has to say about the public interest in deportation and the way in which the proportionality assessment in deportation cases should be approached, in particular at [50] and [82] to [83] where Lords Reed and Thomas advocated the following approach:

> "50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed."
>
> …
>
> 82. I agree with the judgment of Lord Reed and in particular the matters he sets out at paras 37-38, 46 and 50. I add three paragraphs of my own simply to emphasise the importance of the structure of judgments of the First-tier Tribunal in decisions where article 8 is engaged. Judges should, after making their factual determinations, set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed at paras 37-38, 46 and 50. It should generally not be necessary to refer to any further authority in cases involving the deportation of foreign offenders.
>
> 83. One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

15. As is made clear in Hesham Ali and also in the Tribunal's decisions in MS and RA (s.117C: "unduly harsh"; offence; seriousness) Iraq [2019] UKUT 00123 (IAC) ("RA"), the public interest in deportation includes not only the reduction of risk to the public but also factors such as deterrence and the public's view of particular crimes. Although, as noted at [49] of the decision in MS, Lord Wilson, in Hesham Ali resiled from his comment made in an earlier case that the public interest in deportation includes the "expression of societal revulsion" of particular crimes, he did so only in the context of comments made at [69] and [70] of the judgment which

underlined the continued importance of deterrence and departed from the earlier comment only on the basis that it was "on reflection, too emotive a concept to figure in this analysis". The point is also made in RA, as reflected in the headnote in that case, that "[r]ehabilitation will not ordinarily bear material weight in favour of a foreign criminal."

THE EVIDENCE

The Evidence of the Appellant

16. The Appellant has provided three written statements dated 17 May 2017 ([AB/53-60], 1 October 2018 ([SB/1-5]) and 13 March 2019 (to which I have already referred). He also answered questions at the hearing from Mr Tufan and from me. In addition, because he was not represented, his oral submissions tended to be focussed on the evidential aspect of his case rather than the law. I obviously intend no criticism of him in that regard, but it is therefore appropriate for me to consider those submissions as part of his evidence.

17. The Appellant came to the UK in 1999 with his mother. He was aged ten years. His mother left him here with his aunt and never returned. He does not know where his mother is or what has happened to her. His aunt has since died. The Appellant continued to live with his aunt. Her partner did not like the Appellant living with them and their child and mistreated the Appellant, sometimes locking him out of the home. The Appellant was not given money for lunch at school and was not entitled to free lunches. He worked after school to earn some money but returned home late and found himself locked out and sleeping in the basement of the flats where they lived.

18. On one occasion, the Appellant was approached by a man, [M], who invited him to play for a football team which [M] coached. He did so although was not always able to attend as he had to babysit his aunt's child. The Appellant finally disclosed his circumstances to [M]. [M] invited the Appellant to go and stay with him if he found himself locked out of his aunt's flat. He did that on three occasions. [M] abused the Appellant on the third occasion (although it appears from his statement that the Appellant was concerned about [M]'s intentions on the second occasion also). The Appellant has never reported this to the authorities as [M] said that the Appellant would not be believed and would get his aunt into trouble due to the Appellant's irregular immigration status. The Appellant left the football club. These events occurred, it appears, in about 2001.

19. The Appellant left school in 2003 with five GCSEs at Grades B and C. He decided to go to college. He enrolled first at John Ruskin college in 2004. However, he still had to work to pay his fees and as a result his education suffered. He failed his two years of college as a result.

20. The Appellant then enrolled at Coulsdon College and was able to obtain the grades necessary to secure a place at university. In 2007, the Appellant completed a foundation course in law and then started a law degree course in Coventry in 2008.

21. Whilst at college, the Appellant's daughter, [K] had been born to [T] in April 2006. She is now aged thirteen years. [K] and [T] lived in London. The Appellant did not live with them. He met and married a Portuguese national, [L], in May 2009. As a result of this marriage, the Appellant was given a residence card from 7 July 2010 to 7 July 2015, having made an application on that basis in February 2010. The Appellant was living and studying in Coventry but commuting back and forth to London to visit his daughter. As a result, he says, he failed the first year of his degree.

22. It is unclear when the Appellant's marriage to [L] came to an end. He told me that the relationship broke down because [L] knew that his immigration status was uncertain and that therefore she had a hold over him. She therefore acted in a "condescending" and "patronising" manner towards him. He even went so far as to assert in his submissions that she physically and verbally abused him. That is not mentioned in his statements.

23. Whatever the position in relation to that marriage, the Appellant says that, having failed the first year of his degree, he decided that he should "take some steps to improve [his] life circumstance and hopefully become a bit more settled". He therefore applied to the Nigerian High Commission for a passport. He says that one was issued but with a wrong date of birth. A date of birth of 31 December 1985 was entered. He says he queried the error, but the authorities refused to change the details, and so he decided to keep the passport. Little turns on that error. It appears that it was this passport which was used to support the residence card application.

24. By 2010, the Appellant had moved to London. He enrolled at BPP law school in London. He then became associated with someone he had known from school, [MO]. He and [MO] trained together at the gym. [MO] asked the Appellant if he could stay with him because he had an altercation with his partner. The Appellant came to know that [MO] was a notorious drug dealer. He asked [MO] to leave but [MO] refused to do so. He and his henchmen threatened the Appellant and [K], his daughter with harm if the Appellant refused to deal drugs for [MO]. He was advised by another friend to do as [MO] said and not to go to the police. So it was, the Appellant says, that he became involved with the behaviour which led to his conviction which is the index offence in relation to deportation. The conviction was in November 2013.

25. The Appellant says that he claimed in defence of the drug dealing charge that he was acting under duress due to the circumstances which I have outlined above. He told me that his representatives had failed to mention these in his mitigation. He says in his statement that the prosecution had argued that the Appellant had a lead role and he was found guilty in spite of the plea. The Appellant says that he is ashamed about this offending and remorseful. He says in his statement that he was "so stupid and

naïve" and "should have dealt with the situation a lot more responsibly". I will come on to the Judge's sentencing remarks for that offence in due course.

26. It is appropriate to mention at this juncture that the index offence is not the only offence of which the Appellant has been convicted albeit it is the only one which has led to a term of imprisonment. The Appellant admitted during cross-examination that he had been cautioned in 2005 for possession of cannabis but said that this was only for personal use. He also admitted that he was convicted of driving offences in 2011 for which he had served a community sentence.

27. The Appellant was released from prison in August 2015. He says that he has learned his lesson following his sentence. He completed a number of courses during his sentence. He has learnt "how to be more assertive in making decisions and deciding the best and positive options for whatever situation [he] finds [himself]". He has avoided involvement with anyone other than his family since release. The Appellant's probation officer has provided a letter confirming that she had no concerns about his lifestyle and associates, that the Appellant was fully aware of the impact of his offending behaviour and had been able to address the triggers and to avoid situations which might lead to those triggers. The letter is undated but must have been written prior to May 2017 as it refers to the letter being provided for representations due on 23 May. The period of supervision was due to last until November 2017. There is no update from that source but equally nothing to suggest that the Appellant has committed any offences since the index offence.

28. The Appellant says that, if he were allowed to remain, he would like to act as a mentor for other young people at danger of becoming involved in crime to stop them making the same mistakes that he had made. He also wants to be a role model to his children to ensure that they grow up to be the best they can.

29. The Appellant met [C] whilst awaiting his criminal trial. During that period, she became pregnant and [A] was born in February 2014. He is now aged five years. [C] is a British citizen and therefore [A] is also a British citizen. [A] was born after the Appellant was imprisoned but [C] and [A] visited the Appellant in prison on a regular basis. I note from the evidence of those visits that, on many occasions, [C] and [A] were accompanied by [C]'s mother with whom, it appears, they may have been living at that time. [K] did not visit the Appellant but corresponded with him by letter.

30. The main factor on which the Appellant relies is his relationship with his children, [K], [A] and now [D]. In fact, in his submissions, he went so far as to say that "he would have faced up to [deportation]" if it had not been for his children and the impact that his removal would have on them.

31. The Appellant is mainly responsible for [A]'s daily care. [C] works as a nurse and has to leave home usually at about 7.30am returning at 5pm. She would not be able to drop [A] off and pick him up from school. [A] is having some problems with being bullied at school and is naturally therefore reluctant to attend. The school is

said to be addressing the issue, but the Appellant says that it is he who is responsible for encouraging [A] to go to school. The Appellant says that [A] is heavily reliant on him. He gave me an example of [A]'s reaction when the Appellant had hidden behind a hedge on their way to school and [A] had turned round, and thought his father was not there. The Appellant says that [A]'s "life nearly crumbled".

32. The Appellant also takes [A] to the park and plays football with him. The Appellant taught [A] to ride his bike. He helps [A] with reading and writing.

33. Although the Appellant does not live with [K] and [T] (and it is not clear to me from the evidence that he ever has), he also enjoys a close bond with his daughter. He goes to collect her at weekends and she spends the weekend with the Appellant, [C] and [A]. They go out together as a family. The Appellant also picks [K] up from school when [T] is unable to do so. He attends [K]'s parent evenings at school (with [T]) and helps [K] with homework. He provides here with guidance and emotional support. He says that she was "devastated" when he was in prison. The Appellant says that he has a strong bond with [K] and that she also has a strong bond with her half-brother [A]. The Appellant says that the relationship between [K] and [A] would not be able to continue if he were deported. He told me that, although [T] had never been obstructive about him seeing [K], the visits would not continue if he were not there as he is the common link and it "wouldn't work with these two women".

34. The Appellant says that [K], [A] and [D] are all at critical points in their development and that his removal would have a detrimental impact on them all. [K] is a teenager at secondary school working towards her exams. [A] has just started primary school. [D] has just been born and has yet to form a bond with the Appellant. The Appellant admitted that none of the children has any health problems. It was suggested at an earlier stage that [A] was autistic but the Appellant confirmed that, following a referral, that was found not to be the case. He does though have some learning and development problems for which he is receiving additional assistance. Although he accepted that his children could remain in contact via Skype etc, and, at least in the case of [A] and [D], by visits to see him in Nigeria (although he did not know where they would visit as he did not know where he would live), he said that this would be no substitute for the close bond they currently enjoy.

35. The Appellant's case in relation to his family life is also that [C] would not cope in his absence as he provides the main care for [A] (and [D] once [C]'s maternity leave is over). She would not be able to work and provide childcare.

36. Although, as I have noted above, the Appellant accepts that the main factor on which he relies is the position of his children, he also points out that he has not been to Nigeria since he was a young child. He does not know anyone there. He does not know where his mother is. Although the Appellant accepted what we had to say in the Decision about the relevance of his abuse to his offending in terms of the time lag, he submitted that this and his background as a child was something which had to be taken into account when assessing the proportionality of deportation as the circumstances in which he grew up were a contributing factor to his offending and,

having recognised his mistake and the impact of it, there was not a risk that he would reoffend.

Evidence of [C]

37. [C] has provided a letter dated "2017" ([AB/63-64]), a statement dated 1 October 2018 ([SB/7-10]) and a letter dated 12 March 2019 which was provided at the hearing. Although [C] was present at the hearing, she had both children with her, and Mr Tufan having indicated that he had no questions to ask her, I did not consider it necessary to hear from her.

38. I do not repeat those parts of [C]'s evidence which overlap with that of the Appellant. She deals with the problems she faced when the Appellant was in prison. She was twenty-five weeks' pregnant with [A] when the Appellant was sent to prison. She gave birth by caesarean section. Notwithstanding those difficult circumstances, she ensured that she took [A] to see the Appellant regularly from very shortly after his birth so that father and son could form a bond. She continued to visit at least every two weeks. They also attended a family day in prison.

39. [C] says that she found it very difficult to cope in the Appellant's absence. She cried frequently and was depressed. However, she says that she managed to get through because she knew that he would eventually be released from prison.

40. [C] was diagnosed with IBS in 2016. She is in great pain when her symptoms flare up. Although she accepts that medication has alleviated the problems to some extent, she says that she still gets bouts of symptoms on frequent occasions.

41. [C] has also been diagnosed with "adenomysis" which gives her significant pain for at least two weeks per month during menstruation. She is given medication to help with the pain but has been told that her condition will continue unless she has a hysterectomy which she is reluctant to do.

42. [C] says that when her medical conditions give her pain, the Appellant is able to help by caring for the children. She says in her most recent letter that, were it not for the Appellant's assistance with childcare, she "most likely" would also be unable to work which would have a negative, financial impact on the family and on the stability which she and the Appellant can offer the children.

43. I noted above that, on a number of occasions when the Appellant was in prison, [C]'s mother visited with [C] and [A]. [C]'s letter in 2017 refers to living in temporary accommodation due to a breakdown in the relationship between mother and daughter. It is not clear when that occurred nor whether it is irreconcilable. However, to the extent that [C] relied on support from that quarter when the Appellant was in prison, it may no longer be available.

44. It is fair to observe, however, that the main content of [C]'s evidence is concerned with the impact of the Appellant's deportation on the children either directly or indirectly due to his absence for support like childcare. [C] says in her statement that

"if [the Appellant] was not here to watch his son grow up then this would be extremely detrimental to his development and feeling of stability. [The Appellant] is [A]'s world and he looks up to him with a sparkle in his eye. From birth [the Appellant] has been [A]'s protector and has given him an abundance of love and laughter. He strives to bring only complete happiness into his life. [A] has just started Reception school and if his dad was not there to run to at the end of his day to tell him how school was it would devastate him utterly." She ends her statement as follows:

> "I sincerely plead that my Son's world and heart is not broken at the innocent age of 4 years old. I desperately plead that his hero is not taken away from him with an explanation that he cannot possibly understand, without feeling that his father has abandoned him. I also ask that our second child's best interest is also considered."

Evidence of [T]

45. [T] is the mother of [K]. She has provided a statement dated 15 September 2018. Although [T] says in her statement that she and the Appellant were in a romantic relationship for "quite some time", she does not say when that was, and that relationship does not figure in the Appellant's evidence save insofar as [T] gave birth to his daughter and that he has maintained that relationship. For that reason, and understandably, [T]'s statement focusses on the impact on [K] of the Appellant's deportation. She says that "her father means the world to her" and that [K]'s social and emotional development is extremely dependent on her father".

46. [T] puts those comments in context when describing the impact on [K] of the Appellant's imprisonment. She would have been aged about seven years at that time. According to [T], the Appellant's conviction and imprisonment caused [K] to become withdrawn and she struggled with her confidence. She is said to have needed extra tuition and comfort ate. Her school identified problems with [K]'s weight and her speech and language development. Although the school apparently arranged additional support, [T] says that the problems have gone away since the Appellant's release.

47. [T] also identifies the problems which she will face if the Appellant is removed. She works although at the time of her statement was on maternity leave looking after her six months' old child. It is not clear whether she has the support of that child's father. She says that she also has to look after her own grandmother. There is no updating statement from [T]. [T] also says that [K] has "massively struggled to adjust to the new addition to our family but spending time with her father and brother away from home helps to reduce any tensions". Although she says that the Appellant is "definitely the glue" between [K] and [A], the sentence I have quoted suggests that [T] would be supportive of [K] maintaining the relationship with her half-brother if the Appellant were deported. Although [T] says that the deportation of the Appellant would deny [K] the possibility of developing a stronger bond with [A], that assertion appears predicated on an assumption that [A] would go with the Appellant and [C] to Nigeria.

Report of Julie Meek, Independent Social Worker

48. Ms Meek is an independent social worker qualified in 2006 and who has worked within Children's Services for twelve years. She has prepared a report dated 27 September 2018 following two home visits with the Appellant, [C], [A] and on the second occasion [K] also. She has also spoken on the phone on six occasions with the Appellant and [C].

49. Ms Meek reports the Appellant's description of [A] as "a fantastic outgoing child" which is somewhat at odds with the evidence which the Appellant and [C] provide to this Tribunal. He also describes [K] as "kind, caring, loving and a clever daughter" and says that she has a "wonderful character". [C] refers to [A] as being "a little hyper" if the Appellant is not there. [A] will not settle if his father is not there.

50. The Appellant describes his relationship with [C] to Ms Meek as being a "strong union". He says that she is "a great person, loving, caring, supportive, she means a lot, life without her would be unbearable". [C] for her part admitted that the Appellant's immigration problems had caused some stress for the relationship, but they were still together. She described the Appellant as "very caring, supportive and understanding, he just wants to do the best for his family and wants better for them all."

51. Ms Meek met with [K] on one occasion. Since I have no evidence from [K] herself, I have regard to what Ms Meek says about [K]'s relationship with the Appellant. [K] told Ms Meek that her father is "really funny sometimes and he is quite energetic". She describes the activities which they do together and confirms that he father picks her up from school. She says that "it would be weird if he was not there with her". She enjoys spending time also with [A]. Ms Meek observed the close relationship between father and daughter and between [K] and [A] at first hand.

52. Ms Meek describes [A] as "very shy". He did not really want to talk to her. However, the Appellant phoned Ms Meek after the first home visit and [A] spoke to her about the things which he does with his father which are as described in the evidence of the Appellant to which I have already referred.

53. Unsurprisingly, Ms Meek concludes that both children have "an attachment" with their father. The Appellant is [A]'s main carer and continues to have regular and frequent contact with [K]. Ms Meek says that "separation anxiety" is a normal part of childhood development which usually disappears around the age of two. It is not clear from her report that she is saying that either of the two children suffers from such anxiety. She concludes that both [K] and [A] are able to draw on the support from their father and that the time spent with their father gives them confidence to try out new things in the knowledge that she will help them if they make mistakes. She does not provide any comment about the availability of such support from the mothers of the two children in the event that the Appellant was not physically able to be with the children.

54. Ms Meek's conclusions in relation to [K] are somewhat difficult to reconcile with the facts. She says that "all [K] has ever known is her father being there with her". However, the Appellant was in prison for about two years during which time [K] did not visit him. There is no evidence that the Appellant has ever lived with [K] and [T] as a family unit. In any event, [K]'s only comment to Ms Meek is that she would find it "weird" if her father were not there. As such, it is difficult to see how Ms Meek then reaches the conclusion that the Appellant's deportation "could impact on [K] emotionally, physically as well as on her development and learning within education" which "could then continue into her adult life and future relationship". She refers to research about the impact on teenage girls of growing up without a father in their lives. However, that research article is not produced and therefore I cannot read what Ms Meek says in context. I cannot accept without some underlying evidence that all teenage girls who grow up without a father in their lives are affected in the way which Ms Meek describes based on the one article on which she relies.

55. I accept as a possibility that [K] could develop emotional and physical effects if the Appellant is deported. [T]'s statement suggests that she did experience some problems when the Appellant was in prison (to which Ms Meek does not refer) but I do not have any medical evidence or evidence from [K]'s school about the impacts. In any event, [K] is now much older. It is not clear whether [K]'s reaction would be greater or lesser as a result of that age difference. I am not much assisted in this regard by Ms Meek's evidence.

56. Ms Meek says that [C] and [A] would not be able to return to Nigeria with the Appellant because they do not have accommodation and the Appellant would not be able to support them. I accept of course that they cannot be required to go with the Appellant and, certainly in the short term, given the Appellant's lack of familiarity with Nigeria, I accept it might be difficult for the family to relocate there. I also accept that the Appellant and [C] would probably prefer their children to be educated in the UK. I therefore proceed on the assumption that if the Appellant were deported, [C], [A] and now [D] would remain in the UK.

57. Ms Meek says that the prospect of the Appellant's deportation is having an emotional impact on [C]. I do not doubt that this is a stressful time for [C]. However, there is no medical evidence to support any suggestion that [C] is not emotionally stable as Ms Meek appears to suggest might be the position if the Appellant were deported. Although [C] says she was depressed when the Appellant was in prison, there is no evidence of any medical intervention in that regard. Assumptions about [C]'s mental state are beyond the competence of Ms Meek who has no medical qualification and what she says about those implications is speculative in the extreme.

58. I accept that [C] found the Appellant's absence stressful when he was in prison and that the position is likely to be worse if there is no potential end date as there was then. I accept also that the stress of separation from the Appellant may well exacerbate her physical illness, particularly her IBS. However, I reiterate that there is

no medical evidence to support a suggestion that [C] was emotionally unstable when the Appellant was in prison nor that she was not able to care for [A] for that reason. I have already noted that [C] may at that time have had support from her mother then which may not be available now but that is not mentioned either by Ms Meek. I can therefore give little weight to Ms Meek's conclusions about [C]'s ability to look after [A] (and [D]) if the Appellant were deported.

59. Ms Meek's conclusions about the impact on [K] and [A] of a severing of the bond between them depends whether [A] would remain in the UK if the Appellant were deported as I have assumed would be the case. I have already referred to [T]'s evidence which does not support a conclusion that the relationship between [K] and [A] would not continue if the Appellant were deported, provided of course that [C] and [A] remain in the UK.

60. I give no weight to what Ms Meek says about the risks to the Appellant in Nigeria or the family's concerns about kidnapping. Ms Meek does not refer to any evidence in support and whilst I am prepared to accept that kidnappings do take place in some parts of Nigeria, it is beyond Ms Meek's expertise to comment on those matters. I accept of course that [C] and the children might worry about what might happen to the Appellant in Nigeria and that is a factor which I take into consideration.

61. Ms Meek's concluding paragraph reads as follows:

> "6.8 Should [the Appellant] be deported to Nigeria it is the professional opinion of the author of this report that this will have a detrimental emotional impact on his son [A]. Should [the Appellant] be deported this will also have a detrimental emotional impact on his daughter [K] as well as a detrimental physical impact on [K]. [The Appellant]'s absence will also have a significant emotional and physical impact on his partner [C] which in turn will also impact emotionally and physically on their son [A]. It is therefore in the best interests of his children that [A] remains in this country with his family."

62. I have no problem accepting that the Appellant's deportation would have a detrimental emotional impact on [C] and the children. However, I can give little weight to Ms Meek's other conclusions. I have already noted that Ms Meek has no medical qualifications and it is beyond her expertise to offer an opinion on mental and physical health impacts as to which there is limited evidence (except in relation to the effect of stress on [C]'s IBS – which is very limited - and [T]'s evidence about the impact on [K] when her father was in prison which is unsupported by any medical opinion). Moreover, Ms Meek moves from an opinion expressed within the report that the Appellant's deportation "could" have these effects to a categoric assertion that they will which is unsupported by the body of her report. I should say though that I have no difficulty accepting that it is in the best interests of the children that the Appellant remain in the UK with them. I will come on to that again below.

Letter from [A]'s school

63. The Appellant produced at the hearing a letter from [A]'s school dated 12 March 2019. That is written by the Assistant Head Teacher. It reads as follows:

> "Thank you for your letter and for meeting me yesterday. It was helpful to hear your concerns about [A].
> I did speak with [A] today who told me that he sometimes likes school and he spoke positively about three friends in particular whom he plays with. He did comment on a child who makes bad choices and likes to play fight and he could tell me what he should do if anything did happen. He confirmed that he should tell an adult and could name adults that he felt he could talk to. I did ask him whether anything had happened recently and he told me that it hadn't.
> We also discussed that if you were worried or had concerns about [A], to talk directly to the staff rather than approach parents themselves.
> As agreed, I did discuss your concerns with the reception staff team who are going to be keeping a close eye on him. The staff do see [A] playing with one or two friends and said that he appears happy in his play and at school.
> I will talk to [A] again in a few days to check in with him and have asked his teacher to do the same.
> Please do come and talk to me or Jade if you have any further concerns."

64. This letter is not particularly supportive of the Appellant's case. It suggests that the Appellant may be exaggerating the problems which [A] has encountered at school. It also indicates that the school is able to support [A] and that [A] himself knows what to do if he is worried. It further suggests that the Appellant has intervened in the situation inappropriately by speaking to other parents rather than the school. I do not seek to criticise him for that. He is worried about his son and no doubt thinks he is doing the right thing by intervening on the child's behalf. However, the letter does not provide evidential support for the Appellant's case that the effect of deportation on [A] would be unduly harsh because of the problems which [A] is experiencing at school albeit that is an additional factor to be weighed in the balance.

The Appellant's Offence

65. I have already summarised the index offence and the Appellant's evidence in relation to that offence. It is also appropriate however to have regard to the Judge's sentencing remarks which cast a different impression of the role which the Appellant played and the reasons behind it. Those read as follows:

> "…Would you stand up please, [AA] and [MK]. In both your cases I have read the pre-sentence reports and noted their contents. I treat both of you as men of good character before the jury found you guilty. As far as you [AA] I have also read a number of letters from two members of your family, your manager, Mr Saidu, and from a fourth person [KF]. I note their contents, but given the sentencing guidelines which I am obliged to follow, I am afraid that I can do very little to fulfil the wishes of the writers.
> Both of you acted as willing runners for [MO]. I am satisfied both of you did so in the hope of substantial financial gain. I am also satisfied that on the evidence I have heard that to some extent, both of you knew the scale of the operation and you played a vital

> part in the actual supply of drugs, and the taking of payment. Thus so far as the law is concerned, your part in the running of that business was a significant one. I also note that neither of you claims then or now to be a drug user or let alone an addict. You were caught on camera on a very limited basis in both cases.
> However, in my view, having watched the footage more than once, both of you look to me to be entirely comfortable in your surroundings, and that is not consistent with you being novices. From that I infer you both acted as agents for [MO] more often than the films showed.
> I am confirmed in that view by other evidence. You, [AA], were able to pay off substantial rent arrears in a short period of time between August and December 2012, and the sum involved was about £3000. You could have not afforded that without earnings from the drugs trade.
> …
> I treat both of you as assistants to a dealer who you knew to be in a substantial way of business, but not quite how substantial it turned out to be.
> For the reasons already given your roles must be considered significant ones. Your cases both belong in the third category of seriousness, identified by the sentencing guidelines, which I am obliged to follow, and do. It follows from that that the sentencing range is three and a half to seven years, with a starting point of four and a half years. Both of you contested these matters and therefore can have no credit for a guilty plea.
> You, [AA], are aged 25. In your case, the sentence on each of these counts is one of four and a half years imprisonment, and the qualifying curfew will mean that 176 days will be counted towards that sentence.
> …
> In practical terms what that means is that you will serve half of the sentences that I have passed, and you will then be released. Stay out of trouble until the expiry of the two periods and you will hear no more of this matter. Get into trouble again, especially in relation to Class A drugs and the chances are that you will be recalled to serve some or all of the outstanding balance."

66. I appreciate that the sentence passed was one towards the lower end of the available scale. Nonetheless, the Court did not accept on the evidence that the Appellant's role was other than significant and also did not accept that the motivation was other than financial gain, contrary to the case which the Appellant has put forward. I also note that, although the Appellant was released from prison in August 2015, he has remained on licence until more recently (November 2017) and has moreover been aware throughout that time that he faced the prospect of deportation which has provided a very significant incentive not to reoffend. On the other hand, he says, and I accept that he has not offended since (as confirmed by his probation officer). I do not have any evidence that he is seen as posing any or any significant future risk to the public. However, as I come to below, this was an offence concerning Class A drugs. There are also other aspects to the public interest beyond simply a continuing risk to the public.

DISCUSSION AND CONCLUSIONS

67. As I observe at [7] above, although the Appellant cannot benefit from the exceptions in Section 117C due to the length of his sentence, nonetheless it is relevant to consider whether he could meet those if they did apply.

Private Life

68. As I understand the Appellant's case, he does not rely on his private life as being reason why he cannot be deported. Indeed, he said that, were it not for his children, he would accept deportation to his home country. It is however relevant to the overall proportionality of the deportation decision to consider his background.

69. I begin by accepting that the Appellant came to the UK in 1999 with his mother as he says and that he was abandoned by her here in the care of his aunt. There is evidence in the bundles that the Appellant was in education here from 2001 to 2004 and some documents thereafter which show academic achievements between 2005 and 2010. I accept as genuine the applications which the Respondent has produced. However, I do not accept that those show that the Appellant must have been in Nigeria when those applications were made. It appears that the first application in 2004 (which led to the grant of a visit visa) was made online and no address is given in Nigeria. There is no documentation to show that the visa was used. The second which was refused indicates that the application was submitted via the drop box. It may well be that the Appellant's mother was responsible for making these applications in an effort to regularise the Appellant's stay. On any view, however, the Appellant was only a teenager at the time and there is no indication that he was responsible for making the applications. Even if the applications were not legitimate, therefore, the evidence does not show that he was involved in their making. I also observe in passing that I do not consider as relevant the difficulties the Appellant had when applying for a Nigerian passport and, in particular, I accept that he has the date of birth which he says he has and was the age he claims to be when he arrived in the UK.

70. The Appellant has therefore been in the UK since the age of ten years and for about twenty years. He is now aged thirty-one years. He has therefore been in the UK for over half his life. However, the only status which he has ever been given in the UK was between 2010 and 2015 when he was given a residence permit as the spouse of an EEA national. I have no evidence as to when the marriage came to an end nor whether he remains married to his EEA partner (or where she is living now). It is not suggested that the Appellant retains any EU law rights as the family member of an EEA national. Indeed, the Appellant has expressly disavowed any knowledge of applications made to the Respondent in September 2014 and March 2015 for permanent residence on this basis. The first of those applications gave rise to a right of appeal which was heard in June 2015 and allowed on 12 June 2015 on the basis of retained rights of residence. The Appellant says that his identity was used by another individual on that occasion and says that he could not have been the author of these applications or this appeal as he was in prison at the time. The skeleton

argument produced for the previous Upper Tribunal hearing asserts that the marriage came to an end in 2014.

71. The Appellant probably had leave to enter the UK as a visitor in 1999 (although no evidence is produced of that) and had a five-year residence permit but on any view has not been lawfully resident for half his life.

72. I accept that the Appellant is socially and culturally integrated in the UK. He was educated in the UK. There is no evidence that he has worked here as he was studying before his conviction and has been unable to work since due to his immigration status. He is in a relationship with a British citizen. She was born in the UK. His children are all British citizens.

73. I do not however accept that there are very significant obstacles to the Appellant's integration in Nigeria. He was brought up by his aunt. I have little information about her and she has since died. However, I assume that she too was Nigerian by birth and may have passed on some of the culture to the Appellant (albeit I accept the Appellant's evidence that she did not parent him as well as she might have done). Furthermore, the Appellant was born and lived in Nigeria until he was aged ten years. He can be expected therefore to have some familiarity with the customs of that country. English is widely spoken there. I accept that he will never have worked in Nigeria (although I have also noted that he has not worked in the UK either). However, he has educational qualifications which will stand him in good stead to obtain employment, albeit his conviction may present some obstacles to him obtaining certain jobs including as a lawyer which was obviously his intended career when he was younger. It would also do so though in the UK. As I have already noted, the Appellant himself said that, were it not for his children, he would have accepted deportation.

74. I accept that the Appellant had a very difficult upbringing. I accept as true what he said happened to him when he was a child. I accept that he will have found it very difficult growing up in a foreign country with little support of a parental nature and in the knowledge that his mother had abandoned him. I accept his account of being abused by a man who was in a position of trust and that this will have had an impact on him emotionally.

75. To his credit, though, the evidence shows that, before the conviction, the Appellant was taking steps to turn his life around. He studied and whilst his studies were not perhaps as successful as they might have been because of his circumstances, he has obtained qualifications and was on track to qualify as a lawyer.

76. I do not accept what the Appellant says about the reasons for his offending which led to the conviction for the index offence. I have set out the Judge's sentencing remarks which set out the view of the Court about the Appellant's motivation for his crime. That differs to the Appellant's account. The Appellant's defence of having committed the crime under duress was not accepted. The Appellant's blaming of his schoolfriend [MO] for having involved him in drug dealing is another example of the

Appellant blaming others for his problems (for example that his solicitors failed to mention [MO]'s threats to his family in mitigation of his crime and that he failed at college because of the problems with his marriage to [L] and having to commute constantly between Coventry and London to see [K]).

Family Life

77. The Appellant is in a genuine and subsisting relationship with [C]. Although, as I have observed, much of [C]'s evidence about the effect of the Appellant's deportation is focussed on the children, I accept that the couple are committed to each other. I accept that, as a British citizen, [C] cannot be obliged to return to Nigeria. As I have already indicated, I do not expect that she would go with him if he were deported (at least not in the short term) because of her concern about the children.

78. There is limited evidence about [C]'s medical conditions. I accept that she has some physical illnesses which, at times, she finds it difficult to manage. At the very least her IBS is exacerbated by stress. I also accept that she is assisted when ill by the Appellant's support, particularly in caring for the children. She coped when he was in prison, but she may not have the same support network now. I accept as true that her relationship with her mother has broken down and that she was apparently living with her mother when the Appellant was in prison. That evidence is not challenged. I also accept that she will find it more difficult if the Appellant is deported because there will be no end date to the separation.

79. I also accept that [C] will find it difficult to juggle the demands of working full-time with the care of two young children. [A] is now at school but [D] is new born and, once [C]'s maternity leave comes to an end, she may well only be able to return to work on a part-time basis if at all. She may have to depend on childcare arrangements or even give up work altogether with the consequences that will have for the family finances. However, once the Appellant finds work in Nigeria (which I find he will be able to do – see above), he will be able to provide some financial contribution to the family. I do not know if [C]'s relationship with her mother is capable of being reinstated. If it can be, [C]'s mother may be able to help.

80. However, taking all those factors together, and even if the deportation of the Appellant to Nigeria were to bring to an end the relationship between the Appellant and [C], I do not accept that the effect on [C] is unduly harsh. That is a very high threshold. She can maintain contact with the Appellant at a distance and there is nothing to stop her from visiting him there. The impact on [C] will, I accept, be harsh and possibly very harsh but I do not accept that the effects meet the threshold of being unduly harsh.

81. The focus of the Appellant's case is in any event on the effect on his children. I have already set out the evidence about them and I do not repeat what I have already said. I find as a starting point that the best interests of all three children are to remain in the UK and for their father to remain here with them. Whilst that is a primary consideration, it is not the only consideration and not paramount. I do though give that factor weight when considering the impact on [K], [A] and [D].

82. I also accept that the children could not be expected to go to Nigeria with the Appellant. In the case of [K], she does not live with the Appellant and her mother, [T], is not in a relationship with the Appellant. If she went to Nigeria with the Appellant, that would separate her from her mother. It would be unduly harsh for her to go to Nigeria. The position is less clear-cut in relation to [A] and [D] as whether it would be unduly harsh for them to leave with the Appellant would depend on the choices made by their parents in particular [C]. However, as I have already indicated, I would not expect [C] to go with the Appellant at least in the short term. She is British and apparently not even of Nigerian descent. Further, the children are both British and I have found that it would be in their best interests to remain in the UK. I note also that the Respondent conceded before Judge Swaney that it would be unduly harsh for the children to go to Nigeria with the Appellant and I therefore proceed on the basis that they would remain in the UK without him if he is deported.

83. There is no evidence that the Appellant has lived on a full-time basis with [K]. I have already explained why I cannot accept some of what Ms Meek says about the impact on [K] including because it misapprehends the factual position. Nonetheless, I accept that [K] has a strong bond with her father and sees him regularly and frequently. Although she did not see him during the time when he was in prison, I have noted [T]'s evidence about the impact which [K]'s separation from her father had at that time. However, that evidence is not supported by any medical evidence that the problems were particularly acute and could not be managed with appropriate support from [T] and [K]'s school.

84. Probably the greatest impact is likely to be on [A] for whom the Appellant acts as a full-time carer (when [A] is not at school). I accept that [A] has a very strong bond with the Appellant as a result. The Appellant was able to give me examples of the anxiety caused to [A] has when the Appellant is not there. [C] says that she finds it difficult to settle [A] in the Appellant's absence. Nonetheless, there is no evidence that [A] was significantly impacted by the Appellant's imprisonment. I appreciate that he was younger then and was not used to living with his father. There is no doubt that separation will be more difficult for him as a result of having had his father in his life. I take into account what Ms Meek says about the support [A] derives from his father. I also accept that it is the Appellant rather than [C] who is involved in activities with [A] because [C] works. However, [A] will continue to have his mother's support. I have already observed that the Appellant's account of the problems which [A] is having at school is undermined to some extent by the school's letter. In any event, it is clear from that letter that [A]'s school is also supportive of him and will be willing and able to assist in supporting him through a difficult time.

85. In relation to [D], I had very limited evidence beyond the fact of her birth and the complications of that birth. That is unsurprising given her age. She will not yet be as aware as [A] of her parents. I accept though that deportation of the Appellant would effectively mean that she would be unable to build a close relationship with her

father. I have already noted that [C] is likely to find it difficult to manage with childcare also in his absence.

86. One of the factors on which reliance has been placed by the Appellant is the breakdown of the relationship between [K] and her half-siblings if he is deported. He says that he is the common link and that the children's mothers would have no incentive to maintain that contact if he were not present. I do not accept that. [T]'s evidence recognises the value to [K] of continuing the relationship with her half-brother. [C] has been willing to accept [K]'s regular weekend visits notwithstanding she is not [C]'s child. The Appellant says that the contact would not be retained if he were not there to go and collect [K] but I was told that [T] and [K] live about thirty minutes away by bus from the home where [C] and the Appellant live. [K] is now aged thirteen and could probably travel alone if there were logistical problems with picking her up.

87. Taking all of the above factors together, and taking into account my finding as to what is in the best interests of the children, I am not satisfied that there is sufficient evidence that the effect of the Appellant's deportation will be unduly harsh. The children will remain in the UK with their respective mothers. Their separation from the Appellant will undoubtedly be harsh. It may even be very harsh. However, the factors relied upon are no more than those which would be involved for any child faced with deportation of a parent. I do not accept that the evidence shows that the very high threshold which applies is met (see KO (Nigeria)).

Very Compelling Circumstances Over and Above the Exceptions

88. As I have already noted, it would be insufficient, in any event, for the Appellant to meet the exceptions. Taking into account my conclusions as to those exceptions, therefore, I move on to consider whether there are very compelling circumstances over and above those exceptions which would render the decision to deport the Appellant disproportionate. In so doing, I look at all the factors both for and against the Appellant adopting the balance sheet approach advocated in Hesham Ali.

Factors for the Appellant

89. Although I have found that there are no very significant obstacles for the Appellant to his integration in Nigeria, there is no doubt that he will find it difficult to adjust to life there. He has been away from the country for twenty years. He has never lived there as an adult. I accept he has no family or friends there and will, in effect, have to start his life over. Those are hardships which it is appropriate for me to take into account. Although I have very limited evidence about the Appellant's life in the UK beyond his family life and the educational achievements which he has made, there is undoubtedly interference also with his private life built up here.

90. When looking at his private life, it is also appropriate for me to take into account the Appellant's background when growing up which he says is relevant to the reasons for him making bad choices leading to his offending. I have already dealt with this and I do not repeat what I have said. I accept that his background and difficult

upbringing may have had some impact on his offending and may go some way to explaining it, but that consideration is limited by the fact that the Appellant was showing signs of having turned his life around before he committed the index offence. I can give this factor some weight but not a significant amount of weight.

91. In relation to the Appellant's family life, this is where the greatest interference arises. Although I have not accepted that the effect of deportation will be unduly harsh for either [C] or his children, I have already set out the hardship which the Appellant's deportation will cause. I do not repeat the evidence or my findings in that regard. Those effects are as I have accepted harsh, even very harsh, particularly in relation to the children. I have accepted that the children's best interests are to have their father with them in the UK.

The Public Interest

92. On the other side of the equation lies the public interest in deportation. I have accepted that the Appellant has not reoffended since his release from prison in August 2015. That though can only take him so far. First, he was on licence for part of the period since then and, even after his licence expired, he was aware of the Respondent's intention to deport him and therefore had every incentive not to reoffend. I do not suggest that he is likely to do so again in the future. I have no evidence to that effect.

93. However, second, and in any event, the risk of reoffending is only one facet of the public interest in deportation. I have to take account also of the deterrent effect of deportation and the expectation of the public that foreign criminals will be dealt with appropriately. That is the more so in relation to crimes involving the supply of Class A drugs which have a significant impact on society, in particular on the young and other vulnerable persons who become addicted to them.

94. The Appellant sought to mitigate his responsibility for the offence by suggesting that he was the subject of influence and duress from [MO]. As I have already observed, that part of his case is undermined by the Judge's sentencing remarks. The evidence shows that the motivation behind the Appellant's offence was personal, financial gain, that he was a willing participant and was involved in a substantial business dealing drugs; also, that he was not a novice. This was a serious offence as reflected in the sentence.

95. The Appellant has expressed remorse for his offending. He says in his statement at [SB/4] that he has learned about the impacts of selling drugs not just for the user but also for society as a whole. However, his remorse also has to be considered in the context of him blaming others for his commission of the crime, particularly [MO]. He said to me in his submissions that he was "stupid to fall for it" ([MO] taking advantage as he saw it). Whilst I accept therefore that he is remorseful, it is still unclear that he accepts the attribution of his responsibility for the supply of drugs which emerges from the sentencing remarks.

Balancing Assessment

96. I take together all of the factors in the Appellant's favour. I have particular regard to my finding that the Appellant's deportation on his family will have harsh and even very harsh effects on them. I also take into account my finding that it is in the children's best interests that the Appellant be allowed to remain with them in the UK. However, the Appellant's offence was a serious one involving the dealing of Class A drugs. The Judge's sentencing remarks reflect the Appellant's involvement in that offence. Although he is remorseful, he continues to blame others for involving him in the offence and it is not clear that, even now, he fully accepts his role in that offence. Whilst accepting that the Appellant has not reoffended since his release from prison and that there is no evidence that he is likely to do so in future, bearing in mind the other facets of the public interest to which I have referred, the nature and seriousness of the offence and the Appellant's role in it, when the public interest in deportation is balanced against the impacts on the Appellant's private and family life and that of his family members, I conclude that the decision to deport is not disproportionate. There are no very compelling circumstances, over and above the exceptions in Section 117C, such as to outweigh the public interest in the Appellant's deportation.

DECISION

The Appellant's appeal is dismissed

Signed  Dated: 17 May 2019

Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07428/2017

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 29 January 2019

Decision & Reasons Promulgated

……

Before

LORD BECKETT SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA
ANONYMITY DIRECTION MADE

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Whilst no anonymity direction was made earlier in the proceedings, we now make an anonymity direction because the case involves a child. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Symes, Counsel instructed by Westkin Associates

DECISION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (FtT) on 12 October 2018 to uphold AA's (the claimant's) appeal, on human rights grounds, against the Secretary of State's decision of 16 June 2017 to refuse his human rights claim and to deport him.

2. The Secretary of State seeks to deport the claimant on the basis that he is a foreign criminal within the meaning of UK Borders Act 2007 section 32 and liable to automatic deportation.

3. The claimant is a national of Nigeria born in January 1988 who entered the UK in 1999 with his mother. She quickly abandoned him, left the UK and he has no contact with her. In February 2010 he was granted a five years' residence card on the basis of his marriage to an EEA national.

4. On 29 November 2013 he was convicted of two charges of conspiracy to supply controlled drugs and sentenced to 4 ½ years' imprisonment for offences committed in 2012.

5. The claimant's further applications for a permanent residence card were unsuccessful and on 21 April 2017 he was notified of a decision to deport him in relation to which his representations were rejected on 16 June 2017.

6. The claimant has two children who are British citizens: a daughter K aged 12, who lives with his former partner, and a son A aged 4. The claimant lives with A and A's mother C who is expecting another child by the claimant.

The Determination of 12 October 2018

7. The First-tier Tribunal Judge (FTTJ) summarises the Secretary of State's decision at para 8 before summarising the evidence given by the claimant and his partner at the hearing between paras 11 and 22. She summarises the competing submissions she heard at paras 23 to 38 and at paras 39 to 43 sets out the relevant immigration rules and their effect. She summarises further documentary evidence at paras 45-57 which included: favourable prison records; a report by independent social worker Julie Meek of 27 September 2018; and some documentary evidence supporting the claimant having been at school in the UK from at least 2001 and having successfully completed a law related university foundation course in 2008. Between paras 58 and 81 the FtTJ set out her findings and reasons.

8. The FtTJ noted positive reports about the claimant's engagement, conduct and progress on courses he undertook in prison with a view to addressing his offending behaviour and improving his prospects of employment. At para 47 she accepted information from his probation officer to the effect that he had addressed his offending behaviour, recognised his triggers and high-risk situations. The claimant

had expressed remorse to his probation officer who had no concerns about his lifestyle or associates.

9. At paras 48-55 the FtTJ considered in some detail an independent social work report from Ms Meek who found that both of the claimant's children have an attachment to him. His son was brought to visit the claimant in prison from two weeks after his birth. The claimant's absence could impact on his daughter emotionally, physically and educationally. She noted the importance of the presence of a father during the early years, particularly for a boy, and she did not consider that Skype contact could permit the same quality of contact currently enjoyed. Ms Meek concluded that deportation would have a detrimental emotional impact on his daughter and on his son and the impact on the son would be exacerbated by the emotional and physical impact on his mother of the absence of her partner.

10. At paras 61-62 the FtTJ identified the public interest in the claimant's deportation, noting that he had been convicted of conspiracy to supply the class A drugs crack cocaine and heroin. She recognised the harmful consequences of supplying such drugs, that the claimant's sentence was at the level which means that he is liable to deportation unless there are very compelling circumstances over and above the private and family life exceptions in section 117 C, although she also noted that there was not a pattern of such offending. At para 63 she gave little weight to the Secretary of State's delay in seeking deportation, noting departmental unawareness of his situation to which the claimant may have contributed by obtaining a Nigerian passport with the wrong date of birth on it. She concluded at para 64 that she was required to place significant weight on the public interest in deportation in all the circumstances.

11. At paras 65-68 there is a discussion of the claimant's credibility, but we say no more about it because there is no ground of appeal in that regard.

12. It was not in dispute before the FtTJ that it would be unduly harsh for the claimant's children and partner to accompany him to Nigeria as the FtTJ noted at para 69.

13. At para 70 the FtTJ concluded that it would be in the best interests of the children to continue to enjoy their relationship with their father and it would be unduly harsh for them to remain here without him. K is on the cusp of adolescence at the age of 12 with implications for her development should her father be deported as Ms Meek had explained. At para 71 she noted Ms Meek's views on the impact on the 4 year-old A. At para 72 she gave significant weight to the relationship between the claimant's children which would be lost in his absence and concluded that it was in their best interests that it should continue. At para 73 she observes that C might have to give up work as a nurse if the claimant cannot provide child care for A. At para 74 she noted the claimant's contribution to his son's education and activities. In the absence of the claimant this may undermine A's ability to participate in some of his activities. At para 75 she considered C's medical condition which can at times undermine her ability to care for her son, and noted that the situation would become more difficult when her baby is born.

14. At para 76 the FtTJ noted C's low mood when the claimant was in prison and when she now contemplates a life without him. C feels that her mood will prejudice her daily functioning so that she may be unable to meet the needs of her son consequent on the loss of his father. The boy will suffer a considerable loss and will need considerable emotional support. For these reasons, the FtTJ concluded that it would be unduly harsh for C to remain in the UK without the claimant.

15. At para 77, the FtTJ found that the claimant cannot meet Exception 1 based on his private life.

16. The FtTJ accepted the claimant's evidence that he had been raped by a football coach which contributed to his marriage to an EEA national being short and unhappy. The FtTJ considered this to have had a huge impact on him as she explained in para 78. At para 12 she gives the impression that this may have occurred around 2010, but the claimant's statement of 17 May 2017 suggested that it was in or before 2003.

17. At para 79 she accepted the claimant's account of the circumstances including that he was vulnerable when he committed the drugs offences and susceptible to the bad influence of an associate.

18. Para 80 is in these terms:

> "80. The claimant's conduct in prison and since his release has been positive and the evidence demonstrates that he engaged with his sentence plan and took steps to address his offending behaviour and to obtain skills he could use in the community after release. He talks about learning how to make better decisions and to be more assertive, two key factors in his offending. He also described how a drug awareness course taught him about the wider impacts of drug dealing within the community. The claimant has not re-offended and his personal circumstances are now significantly different to what they were when he committed the offence. The claimant is now living with his partner and son and his partner is pregnant with their second child. His partner is employed as a nurse and he enjoys a stable family life. This contrasts significantly with the life he was leading at the time of his offending. I accept the claimant has taken positive steps to reduce his risk of reoffending and that it is unlikely that he will reoffend in the future."

At para 81, which we reproduce in full at our para 48 below, the FtTJ gave particular weight to the findings that Exception 2 was met, the likely loss of relationship between the claimant's children, the contribution made by the claimant's background to his offending, the steps he had taken to address his offending and changes in his circumstances which she deemed to reduce the risk of his reoffending. It was these considerations which the FtTJ determined amounted to very compelling circumstances over and above the exceptions so as to outweigh the public interest in deportation.

The challenge

19. Within 11 enumerated paragraphs it seems to us that there are four grounds of appeal, set out in paras 5-8 of the application for permission to appeal.

- It is said that the FtTJ erred by giving weight to her assessment that Exception 2 in section 117C (or Immigration Rule 399(a) and (b)) could be met. The suggestion is that since the exceptions cannot apply where the sentence is in excess of 4 years then the only relevant issue was whether there were very compelling reasons over and above the exceptions in section 117C with reference to NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662;

- secondly, that the FtTJ failed to have adequate regard to the very considerable weight accorded by Parliament to the public interest in the claimant's deportation and that findings on the issue of undue harshness for the claimant's partner and children had "infected" the decision as to whether there were exceptional circumstances over and above the exceptions and there had been a failure to consider state support which may alleviate the circumstances. This somewhat discursive ground of appeal contains two sentences which may be significant:

  > "It is submitted that the FtTJ's error and findings as to whether the claimant's deportation would be unduly harsh for the claimant's partner and children has infected [her] subsequent findings in respect to whether there are very compelling circumstances over and above the exceptions, paragraph 398 (c). In any event it is submitted that the FtTJ has erred in finding that it would be unduly harsh under either 399(a) or (b) for the claimant to be deported even if his sentence had fallen below the four year threshold as the reasons stated at [70] to [76] would apply in almost every case."

- thirdly, the Secretary of State contends that the FtTJ erred in taking account of the claimant's personal background when he offended, on the basis that historical circumstances were not in the scope of the material which might give rise to very compelling circumstances and fell to be considered only in the criminal proceedings. Only current circumstances can be relevant.

- fourthly, the judge had erred as there was no foundation in the evidence for concluding that on the claimant's deportation his children by different mothers would not have contact with each other; this could not amount to very compelling circumstances; no evidence was available to support suggestions that the claimant's partner and son suffered medical conditions; regard had been had to the claimant addressing his offending but it was not clear how this could amount to very compelling circumstances.

Submissions for the Secretary of State

20. Mr Tufan submitted that since the sentence was of 4 ½ years, there required to be very compelling circumstances if the appeal to the FtT was to succeed. Thereafter, his submissions were not entirely faithful to the grounds of appeal but, as we understood his position, he contended that weight had been given to perfectly

ordinary circumstances which, given what was said in the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, at para 27, were not capable of amounting to undue harshness, still less very compelling circumstances over and above that exception.

21. There was no diagnosis of autism in respect of the claimant's son and even if there was, such a condition is nothing out of the ordinary. If the claimant contributed to his children's education, that was just normal parenting and nothing extraordinary. There was nothing which amounted to undue harshness, let alone very compelling circumstances.

22. The Secretary of State's essential point, to be found within the second ground of appeal as we have described it above, seemed to be that the FtTJ had erred in finding that it would be unduly harsh for the partner and children to remain in the UK without the claimant and this had a material impact on the conclusion reached that there were very compelling circumstances so that the error was material.

Submissions for the claimant

23. Mr Symes adopted his skeleton argument. In response to the first ground, he submitted that the Secretary of State misunderstood what was said by the Court of Appeal in *NA (Pakistan).* Properly understood, the Court of Appeal's judgment supported the approach taken by the FtTJ.

24. The FtTJ had conducted a careful analysis of all of the facts and had properly reached a conclusion as to where the best interests of the children lay. It was perfectly clear that the FtTJ had understood the nature and gravity of the offence and the weight given to a sentence of such a length in the 2002 Act and associated rules.

25. There was nothing in the "social services" point because it was authoritatively recognised that state support is not a substitute for care within a family: R (on the application of HH) v Westminster City Magistrates' Court [2012] 1 AC 338 at para 69.

26. There was no temporal restriction on the circumstances which can be considered in the context of section 117C (6) and Immigration Rule 398 (c).

27. There is an evidential basis for the conclusion reached that the half-siblings would lose contact if the claimant is deported.

28. In reality, the Secretary of State's approach was to mount a disguised irrationality argument.

Analysis

29. The 2002 Act provides in section 117 C:

> "**117C Article 8: additional considerations in cases involving foreign criminals**
> (1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

30. Immigration Rules 398, 399 and 399A now provide:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 … and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
399. This paragraph applies where paragraph 398 (b) or (c) applies if –
(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(b) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(c) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
(d) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.
399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

31. In *NA (Pakistan)* the Court of Appeal explained how the exception in 117C (6) can work at paras 29 and 30 of its opinion. The context to this passage is that the Court of Appeal considered that the very compelling circumstances exception ought to be applied equally to those in the medium bracket if the facts fell outside those exceptions, but the exceptions were relevant also to consideration of the level of compelling circumstances for the most serious offenders:

> "29……The phrase used in section 117C (6), in paragraph 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, 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 (and in paragraphs 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those exceptions and those paragraphs, which made his claim based on article 8 especially strong.
>
> 30. 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 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 essentially 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."

32. The claimant was entitled to rely either on features which may fall within the exceptions, or features beyond their scope, or both. Accordingly, we do not consider that the FtTJ made the error proposed in the first ground of appeal.

33. Turning to the third ground of appeal which contends that the FtTJ erred by taking account of circumstances which may have contributed to the claimant offending, we do not consider that the terms of section 117 C or rule 398(c) preclude taking account of such considerations. We note one example where it can be relevant with reference to R (Kiarie) v Secretary of State for the Home Department [2017] UKSC 42 at para 55, where Lord Wilson indicated that it would be legitimate to consider the risk of re-offending amongst other factors when considering the issue of very compelling circumstances. In so far as the FtTJ may have taken account of the claimant having been raped and this being part of the context in which he offended we consider that, in principle, she was entitled to take this into account when considering the risk of reoffending. Whilst it may be of limited weight given the multi-dimensional aspects to the public interest in deporting foreign criminals, low risk is relevant to one of those aspects; the protection of the public from further offending by the person concerned. Accordingly, we do not consider the FtTJ necessarily to have erred in this respect.

34. However, we also consider that only very limited weight could attach to the appellant's vulnerability insofar as based on his having been raped whether that occurred in or before 2003 or in 2010. His qualifying offences were not crimes of violence against his attacker but involvement in drug supplying years later, each of the two offences occurring over almost four months between August and December 2012. Insofar as the claimant may have been influenced by another person into assisting him to supply drugs it could have little weight as the sentencing judge accepted that the claimant had been running drugs for someone else. The judge also noted that the claimant must have known the scale of the operation he was involved in and made a substantial amount of money in doing so.

35. So far as the fourth ground of appeal is concerned, we do not consider that the FtTJ meant that the general desirability of two half-siblings continuing to develop a relationship, and that the likelihood of the relationship disintegrating in the claimant's absence was of itself a compelling circumstance. It was a factor she was entitled to take into account in assessing the best interests of children and add into the overall assessment for what it was worth. Whilst we may not have accorded as much weight to this consideration as it appears that the FtTJ did, it cannot be said that it was of no weight in the overall assessment. There was evidence in the claimant's statement that in his absence their relationship was bound to collapse. It could in any event be legitimately inferred that in the absence of the claimant, who was the common denominator between an otherwise unconnected partner and ex-partner who were the respective mothers of the children, arrangements would not be made for the children to see each other.

36. There was also evidence in the statement of the claimant's current partner C that she has been diagnosed with irritable bowel syndrome and adenomysis, both of which she describes as being painful and debilitating. The Secretary of State's refusal letter accepted evidence that a medical investigation was ongoing as to whether his son A has autism, albeit the view was expressed that even in the event of a diagnosis, this would not be considered material on the question of very compelling circumstances. Accordingly, we do not find ground 4 to demonstrate any material error.

37. Before turning to ground of appeal 2, we acknowledge that there is some force in counsel's submission that the Secretary of State's approach seems to be that the decision reached was one which could not reasonably have been reached on the facts, without the foundation of a ground of appeal to that effect.

38. On ground 2, we reject the contention that the FtTJ failed to have due regard to the weight of the public interest in deportation in this case having regard to the terms of those parts of her determination which we have summarised at para 10 above.

39. It is self-evident that state support cannot substitute for family support of the kind which existed between the claimant, his partner C and his son A, but its potential mitigation would have been a relevant consideration in evaluating whether the deportation of the claimant would be unduly harsh for his partner and son and we do not consider that the sentence seized on by Mr Symes from *HH* demonstrates otherwise. However, we do not consider this omission to have great materiality.

40. Within ground 2 there is said to have been an error of law, namely determining that it would be unduly harsh on his children and his partner, in the circumstances found by the FtTJ, to deport the claimant.

41. Taking the circumstances at their highest, the situation was that the claimant has a daughter aged 12 by a former partner and he is involved in his daughter's life and makes a positive contribution. He lives with a partner who is a British citizen and they have a son aged 4 with a baby expected. His partner has IBS and adenomysis and felt low when he was in prison as she could be expected to be on the claimant's deportation which would have implications for their son. However, she is able to work as a nurse, albeit the claimant facilitates her doing so by taking their son to and from school, and his absence could mean that she would have to give up work. We note, at para 4.5 of Ms Meek's report, that C told the social worker that she could not go to Nigeria as her family is here. The claimant is involved in his son's life and supports him in his activities and education and the absence of the claimant would have a negative impact. Ms Meek found that both children have an attachment with their father. Should he be deported his absence could impact on his daughter emotionally, physically as well as on her development and education. It would have a detrimental emotional impact on his son and it would have a detrimental emotional impact on his daughter, and in her case a physical impact which Ms Meek does not justify. All of which led Ms Meek to conclude, as the FtTJ did, that it is in the best interests of the children for the claimant to remain.

42. We note the judgment of the Supreme Court in *KO (Nigeria)* where Lord Carnwath observed at para 23 that "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent" and at para 27 he endorsed judicial commentary on Exception 2 in 117 C (5):

> "27 Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] INLR 563 , para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
>
> > "By way of self-direction, we are mindful 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.
>
> …"

43. We accept that on the analysis of the Court of Appeal in *NA (Pakistan)* it would be possible to meet the very compelling circumstance without meeting the tests in Exception 1 and 2. However, in this case the FtTJ's approach was first to consider Exception 2 and she found that it was met in the case of both his children and his partner. It was to the claimant's credit that he took advantage of the resources in prison, behaved well and the FtTJ considered him to present low risk of reoffending. However, such circumstances would not of themselves have taken the claimant very far.

44. Accordingly, we see some force in the Secretary of State's contention that if the finding on Exception 2 was erroneous it was indeed material albeit the ground of appeal uses somewhat different terminology, namely that the finding infected all further consideration.

45. We go on to note what the Judge herself records as the Appellant's submissions about the very compelling circumstances which arise in this case at [34] to [37] of the decision:

> "[34] The very compelling circumstances on which it is relied are set out in the skeleton argument. In particular, the likelihood that the relationship the appellant's two children currently have with each other would break down in the appellant's absence was significant. It is the appellant who is the common factor in the half brother and sister having a relationship. Their mothers have no relationship with each other and if the appellant were not in the United Kingdom would have no interest in ensuring the children could remain in contact. In addition, the children would be without any means of finding out about their Nigerian background. The appellant does not have any other family members in the United Kingdom who could fill this gap for them in his absence. The report of the independent social worker highlights the potential detriment to the children if the appellant is not present in their lives.

> [35] The appellant's personal history including physical abuse by his uncle and sexual abuse by his football coach are significant and compelling.
>
> [36] Mr Symes relied on the respondent's delay in initiating deportation proceedings pointing out that it was not until four years after his conviction. The delay has permitted the appellant's family ties to become stronger and he has not reoffended. Moreover, he has distanced himself from the life he was leading prior to his conviction. Mr Symes submitted that the delay is capable of reducing the public interest in deportation.
>
> [37] In respect of the appellant's offence Mr Symes acknowledged that a sentence of more than four years puts him in the most serious category, however, submitted that his sentence puts him just over the four-year threshold.
>
> [38] Mr Symes submitted that taken together the appellant's circumstances can properly be described as very compelling and asked me to allow the appeal."

46. Notwithstanding that the sentence was not much more than 4 years, the claimant still required to meet the criteria in section 117C (6) as it has been judicially interpreted. The Judge gave "little weight" to the delay because she accepted that the respondent may have been unaware of the appellant's conviction due to the identity issue ([63]). We have already dealt with the relevance of the personal history of the appellant, the salient features of which had arisen a number of years before and were unconnected with the offending.

47. Although of course the Judge was entitled to take into account factors such as the lack of reoffending since release, as the Judge herself observes at [62], there are other considerations which weigh in favour of the public interest such as the nature of the offence and the harm caused to society by drugs.

48. The remaining factors bearing on the Article 8 assessment in the appellant's favour are therefore the impacts on the family as the appellant's representative had submitted and the Judge accepted. Without finding that Exception 2 was met, we do not consider that it was open to the FtTJ to find that there were, in this case, very compelling circumstances over and above. We are reinforced in that view by what is said by the Judge at [81] of the decision as follows:

> "Having considered all the factors above I find that the appellant's particular circumstances are very compelling over and above the exceptions to deportation and that they outweigh the significant public interest in deportation. I have placed particular weight on my findings that the appellant would have satisfied paragraph 399(a) and (b) had those provisions applied; the impact on the ability of the appellant's children to continue to have a relationship with each other in the appellant's absence; the appellant's personal background and the contribution made to his offending; the steps the appellant has taken to address his offending and the fact that his circumstances have changed significantly since his offending meaning any further offences are in my view most unlikely."

49. Accordingly, the finding that it would be unduly harsh on the claimant's partner and children for them to remain in the UK on his deportation was of critical importance.

50. The deportation of the claimant would certainly be difficult, inconvenient, undesirable and perhaps harsh for his partner and his children and it would not be in the children's best interests. We recognise that to the extent that it was necessary to determine it, the judgement of whether the situation met the standard of being unduly harsh was primarily a matter for the FtTJ to determine, and she did so before the correct approach to section 117C (5) was clarified by the Supreme Court in *KO (Nigeria)*. However, having considered all of the circumstances considered by the FtTJ we are unable to identify a basis on which it could be said that the circumstances which the FtTJ determined would pertain if the claimant is deported can be said to be unduly harsh for the children or C.

51. For these reasons we find there to have been a material error of law and allow the Secretary of State's appeal.

52. Parties were agreed that in the event that we allowed the Secretary of State's appeal we should remake the decision in the Upper Tribunal on the basis of the facts found by the FtTJ. We consider however that it is appropriate to hear oral evidence from the claimant and any other witnesses he wishes to tender before re-making that decision. Accordingly, we have given directions below for a further hearing before UTJ Smith in due course.

DECISION

We are satisfied that the Decision contains a material error of law. We set aside the decision of First-tier Tribunal Judge J K Swaney promulgated on 15 October 2018. We give the following directions for the re-making of the decision:

DIRECTIONS

53. Within 28 days from the date when this decision is promulgated, the Appellant (AA) shall file with the Tribunal and serve on the Respondent any further evidence on which he relies.

54. The appeal will be re-listed before UTJ Smith on the first available date after six weeks from the date when this decision is promulgated with a time estimate of three hours.

Signed Dated: 12 February 2019

pp Lord Beckett