



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/05166/2015
HU/08939/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5 November 2019

Decision & Reasons Promulgated
On 18 November 2019

Before

HHJ STACEY
UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Smyth, solicitor, Kesar & Co
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we have maintained the anonymity order which remains in place since this decision refers to the circumstances of young children. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction

applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. In an 'error of law' decision promulgated on 27 November 2018, Andrews J and UTJ Plimmer set aside a decision of the First-tier Tribunal ('FTT') (Judge Beach) issued on 16 December 2017, which allowed MJ's appeal on Article 8 ECHR grounds and ordered the decision to be re-made by the Upper Tribunal ('UT').
2. We now re-make the substantive decision whether MJ's appeal against the Secretary of State for the Home Department's ('SSHD') decision issued on 16 December 2017 should be allowed or dismissed on human rights grounds. MJ's asylum application is no longer pursued and his appeal against the refusal of his asylum claim is formally dismissed.

Preliminary Issues

3. The UT previously directed that up to date expert evidence in relation to the matters set out below should be served by 25 October 2019:
 - (i) MJ's partner's (AJ) current mental health, treatment and the likely impact of MJ's deportation on her mental health and her ability to care for her children; and
 - (ii) An assessment of the children's current circumstances by an independent social worker ('ISW') addressing in particular the history of and current extent of the family and other support available to AJ to assist her generally and in caring for her children (in particular including interviewing AJ's mother regarding the history of and current arrangements for helping with the children).
4. Whilst the ISW's report was served in time in compliance with directions, the report of Dr Halari was served the day before the hearing on 4 November 2019. Mr Smyth explained that Dr Halari had been delayed in completing her report as she had been on holiday but his firm had been diligent in chasing the doctor for the completed report. It had been forwarded to the SSHD as soon as it had been received in his office yesterday. He apologised for the delay and sought an extension of time pursuant to rules 5(3)(a) and 15 of the Tribunal (UT) Procedure Rules 2008 (as amended). Ms Everett had no objection to the extension of time requested to comply with the order. She explained that the SSHD was not prejudiced by the late service of the report and she needed no adjournment or further time to consider it. In the circumstances, we granted MJ permission to rely upon the medical report of Dr Halari.

Background history

5. The background is succinctly set out in paragraphs 2-7 of the 'error of law' decision. MJ, an Afghani national, who's date of birth is 2 January 1992, arrived in the UK as an unaccompanied minor on 1 November 2006 aged 14 and claimed asylum the next day. He was granted discretionary leave to remain ('DL') until January 2010 (given

his status as a minor) and his immigration status has been precarious at best thereafter.

6. MJ was granted DL following a human rights application, on the basis that he had formed a relationship with a young woman British national, AJ, with whom he has a child J-MJ (born in 2011). This DL expired on 2 March 2014. AJ has another child, E-RJ (born in 2013) for whom MJ has accepted parental responsibility since her birth.
7. MJ was convicted of battery and sentenced to a community order which expired on 26 September 2013. On 18 March 2014 he was convicted of harassment in the Magistrates Court and received a further community order and was made subject to a restraining order. Both offences were connected with AJ. He failed to comply with aspects of his community order and was sentenced to 50 days imprisonment on 17 June 2014.
8. MJ's application for further leave to remain was refused by the SSHD on 11 March 2015 and his appeal to the FTT dismissed, but on appeal to the UT he was successful in so far as the matter was remitted to the FTT.
9. Meanwhile however MJ pleaded guilty to offences of possession with intent to supply class A (cocaine) and class B (cannabis) drugs and was sentenced to an immediate custodial sentence of 20 months at Canterbury Crown Court in August 2016.
10. Following a hearing in the UT on 19 June 2017, the UT directed that in the light of new evidence produced by MJ and bearing in mind that he was now potentially subject to deportation, the matter be remitted for re-hearing before the FTT, which is how the matter came before Judge Beach. MJ was issued with a deportation order in accordance with s. 32(5) UK Borders Act 2007 as a foreign criminal sentenced to a custodial sentence of more than 12 months which was served at the same time as the decision dated 8 August 2017 refusing his human rights claim.
11. Judge Beach dismissed the appeal on Article 3 grounds, but allowed it on Article 8 grounds. She held, having weighed all the evidence, that the effect of MJ's deportation would be unduly harsh on the children: both J-MJ and E-RJ. The FTT was particularly concerned about AJ's mental health condition and her ability to cope with the children if MJ were to be deported and the absence of support networks to assist her.
12. The SSHD's appeal against the finding of undue harshness was successful. In its error of law decision the UT concluded that there was insufficient information for the FTT to have concluded, as it did, that AJ's support networks would not still be available were MJ to leave the jurisdiction and the FTT had failed to take into account material considerations and weigh them in the balance.

Issues in dispute

13. It was common ground that MJ and AJ have a genuine and subsisting, albeit somewhat volatile, relationship and that AJ is a qualifying partner (as defined in s.117D(1) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act')), and that J-MJ and E-RJ are both qualifying children as defined in that section.
14. It was conceded by the SSHD that it would be unduly harsh to expect AJ and the children to emigrate to Afghanistan. The issue was therefore narrowed to s.117C(5) of the 2002 Act and Immigration Rule paragraph 399(b) and the assessment of whether it would be unduly harsh for the children to remain in the UK without MJ. It is only if the answer to this issue is resolved against MJ that we need to consider whether the effect of MJ's deportation would be unduly harsh upon AJ and alternatively s. 117C(6).
15. Although not expressly stated, it is apparent from the UT judgment that the underlying facts found by the FTT were preserved. The material error of law was limited to the FTT's conclusion that support networks that were available to AJ whilst MJ was in prison, would no longer be available were he to be deported, without a sufficient evidential basis for reaching that conclusion. The UT judgment did not disturb the findings of fact made by the FTT. Ms Everett did not seek to re-open the previous findings.
16. It is now exactly 2 years since the FTT decision was heard on 7 November 2017 (the decision being promulgated on 4 January 2018). The re-making of the decision will therefore require findings of fact to be made on the fresh evidence to ascertain the current position and the consideration of the extent of the current support network available to AJ, if MJ is deported to Afghanistan.

The legal framework

17. MJ is a foreign criminal sentenced to a period of imprisonment of 12 months or more. This requires a consideration of paragraphs 398, 399 and 399A of the Immigration Rules. These are reflected within section 117C of the 2002 Act, which states as follows:
 - (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 –
 - (5) (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (6) (b) C is socially and culturally integrated in the United Kingdom, and
 - (7) (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

- (8) 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.
 - (9) 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."
18. The relevant test of "undue harshness" as set out in Exception 2 above is broken down into two parts in paragraph 399(a)(ii), so that it applies where:
 - "(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported."
19. In light of the SSHD's concession that it would be unduly harsh for AJ and the children to relocate to Afghanistan, only the second limb of 399 set out at (b) above, as reflected in s. 117C(5), requires consideration, as far as the children are concerned.
20. KO (Nigeria) v SSHD [2018] UKSC 53 sets out the correct approach to 399(b) and s. 117C(5). In the only judgment Lord Carnwath said this at [23]:

"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 the length of sentence."
21. Lord Carnwath also approved of the guidance given regarding the term unduly harsh in MK Sierra Leone v SSHD [2015] UKUT 223 (IAC). In that case the then President said this.

"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."
22. It is therefore now clear from KO that the assessment of "unduly harsh" does not require a balancing of the relative level of severity of the parent's offence. The assessment solely requires a careful consideration of whether the elevated threshold is reached from the point of view of either the child or partner. If that threshold is met then deportation would be a breach of Article 8 of the ECHR and no further analysis is required.
23. In BL (Jamaica) v SSHD [2016] EWCA Civ 357 the Court of Appeal concluded that the Tribunal did not undertake a sufficient inquiry into whether there was any other family member who could be able to care for his children and emphasised the need to consider the extent to which social services would be able to assist in reducing the adverse impact of the children losing their father to deportation at [53].

“What the UT did in the course of their detailed and no doubt conscientious decision was to accept KS's son's evidence that KS could not manage her money and drank more that was good for her and made the inference that without BL the family would descend into poverty and require the support of social services. As against this, however, KS had looked after the family while BL was in prison or immigration detention and the UT had not made any findings that the family had then descended into poverty or required the support of social services, or that if that were to happen, there would not be adequate support services for these children. The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant. The Secretary of State had made the point in the decision letter that there was no satisfactory evidence that KS had not coped with the children's upbringing in BL's absence and so the UT were aware that this point was in issue. KS's son's evidence was an insufficient evidential basis for the UT's conclusion on this point. His evidence was in reality uncorroborated and self-serving hearsay on this issue.”

24. It is for the MJ to prove that it would be unduly harsh for his children to remain in the UK without him and thereby in breach of their Article 8 rights. In a case such as this, it is conducive to the public good and in the public interest for foreign criminals to be deported unless the high test of undue hardship is met, as far as Exception 2 is concerned. If, after a careful evaluation of the consequences for the children, MJ can establish that the elevated threshold in Exception 2 is met, his appeal must be allowed on Article 8 grounds.
25. In the re-making of a decision our task is to consider the circumstances as at the date of the hearing.

The hearing

26. At the beginning of the hearing both parties agreed that AJ should be treated as a vulnerable witness in the light of Dr Halari's report, which we refer to in more detail below.
27. We had before us a consolidated bundle, a supplementary bundle and the medical report of Dr Halari dated 2 November 2019, following an assessment on 19 October 2019 and the expert reports of the ISW Mrs Sue Justice dated respectively 10 June 2019 and 9 October 2019. Witness statements from MJ, AJ and AJ's sister NJ were before us. MJ and AJ both gave evidence, and both confirmed the accuracy of their witness statements of 28 February 2019 and 24 October 2019 (MJ) and 19 February and 23 October 2019 (AJ). They were both carefully cross examined by Ms Everett. Neither was in the hearing room when the other gave evidence. MJ consented to the proceedings continuing in his absence while AJ gave evidence so that he could look after the children outside the hearing room and AJ was with the children outside the hearing for the duration of the hearing apart from when giving evidence.
28. Mr Smyth for the Appellant relied on his written skeleton argument and oral submissions. The Respondent accepted that the facts had changed considerably from the SSHD's decision letter of 8 August 2017, but submitted that it remained relevant and she also made oral submissions.

29. We reserved our decision, which we now give with reasons.

Submissions

30. The SSHD continued to rely on her decision letter. Ms Everett accepted that the relationship between AJ and MJ is genuine, but referred to the evidence of the volatility in the relationship. Although MJ is fully involved in family life, insufficient detail was provided to meet the high threshold of undue hardship. MJ had little detailed knowledge of, for example, the name of J-MJ's teacher at school and lacked focus as a parent. Dr Halari 's report was holistic, rather than providing specific details and did not address the effect of the volatility of the relationship. In summary notwithstanding the impact MJ's absence will have, the elevated threshold was not met. Ms H whilst not supporting AJ's relationship with MJ, would support her daughter if needed in emergencies.
31. Mr Smyth submitted that there would be tremendous adversity if MJ was deported. Both experts' clear and unambiguous professional opinions in 2019 were that the impact on AJ's ability to care for the children in the absence of MJ was serious, which was also consistent with the experts instructed previously in 2017. AJ's fragile mental health meant that in MJ's absence she would not cope and the effect of the subsequent shortcomings in her parenting would be serious indeed, through no fault of her own. The elevated threshold had been met.
32. He also argued that there were additional factors in the event that s. 117C(5) was not met and he was required to rely on very compelling circumstances pursuant to s.117C(6).

Evidence

33. We note that the factual matrix up to November 2017 is as set out in the FTT judgment. Since then, the relationship between AJ and MJ has continued and she is now pregnant expecting her third child on 13 November 2019. She has obtained a housing association flat in Kemsley, near Sittingbourne, Kent which the family moved into from their previous address in Canterbury in December 2018, 25 miles away. J-MJ moved to the infant school in the village. E-RJ has not yet obtained a school place, although should be in Year 1 and is therefore having to be home educated by AJ and MJ while a place becomes available. J-MJ has behavioural and mental well-being issues that are being diagnosed. She was accepted for referral to the Kent Children and Young People's Mental Health Services (CYPMHS) in October 2018 and she was passed to the ADHD screening team. There was delay in the screening assessment following the family's move to Kemsley which took place in October 2019 and is awaited.
34. The move to Kemsley means that AJ is now 30 minutes' drive away from her maternal grandparents in Canterbury, who previously provided considerable support and who were closely involved in AJ's own upbringing. However she is closer to Ms H, her mother's house. Ms H does not get on with MJ, but she seeks to preserve a relationship with her daughter and grandchildren and AJ and the children

visit Ms H most weekends. Ms H, still works full time and also cares for her husband who has recently undergone spinal surgery and needs considerable care at home.

35. Dr Rozmin Halari, consultant clinical psychologist, BSc, MSc, PhD, C.Psychol, DClinPsych, DClinHyp, AFBPS, examined AJ on 19 October 2019 and, separately, interviewed MJ. We accepted her findings which were broadly consistent with the opinions of the other expert witnesses in this case. She noted that AJ remains under the care of the Swale community mental health team and agreed with the diagnosis of emotionally unstable personality disorder/borderline personality disorder. Using the standardised assessment (the Hamilton depression and anxiety rating scale) she found that AJ currently also fulfils the diagnostic criteria for moderate to severe depression. She is said to be extremely vulnerable at present because she is not taking any medication for her mental health because of her pregnancy and is displaying symptoms of increased tearfulness, poor sleep, poor appetite, negative thinking and constant rumination about the current situation. She is also assessed at being at risk of experiencing a further period of postnatal depression following the birth of her newborn child.
36. Dr Halari concluded that AJ is highly reliant on MJ for support and assistance in managing both her mental health symptoms and also with care for the children. AJ described MJ as “brilliant” with the children and in particular is able to manage the extreme mood swings of J-MJ who is currently awaiting the outcome of an ADHD assessment. MJ has a close and positive bond with both children and provides considerable emotional support.
37. Dr Halari noted that AJ is very fearful indeed of how she will cope if MJ leaves the jurisdiction. AJ described to Dr Halari that being with MJ has provided with stability previously unknown to her and that if he left she would break down and self-harm. She describes him as the only person that understands her and without him would find it still harder to manage her emotions. Dr Halari considers that AJ’s fear that she would not be able to care for the children alone is accurate. A deterioration in AJ’s mental health is likely to be precipitated by feelings of loneliness, rejection and abandonment which would occur if MJ were to be deported. She would find it very difficult to cope mentally, emotionally and psychologically. MJ has the ability to develop a good understanding of AJ’s difficulties and when she displays low mood or mood swings or personality difficulties he has developed appropriate and positive ways of managing this, for example, by giving her space, taking care of the children and providing her with emotional support.
38. The positive relationship which is characterised by mutual understanding and respect has enabled AJ to develop an appropriate and therapeutic level of insight into her difficulties which in turn is aiding her psychological recovery. Disrupting this stable system is likely to have a significant detrimental impact on AJ and her relationship with the children. Dr Halari concludes that the relationship is serving as a protective factor for AJ but that she would experience a significant deterioration in her mental health were he to be removed from the jurisdiction, her symptoms of depression and anxiety are likely to worsen and she would be at moderate to high

risk of self harm and destruction. Dr Halari was concerned about the impact this would have on the quality of the parenting that AJ would be able to provide to her children. The exposure of the children to their mother's poor mental health combined with their own inevitable significant distress due to the absence of their father and the change in parenting, would result in significant distress for the children.

39. AJ's half-sister, NJ remains supportive of her sister and this appeal. NJ confirmed that MJ provides considerable help to AJ and he looks after the children, for example taking them to the park and the beach, in order to give AJ a rest and he helps around the home. NJ observed that MJ is the only one who can calm down J-MJ when she gets upset. In her further statement of 5 March 2019 she states that when MJ was in prison AJ found it very difficult to raise the children, was extremely stressed and found it difficult to cope. She is concerned that MJ's deportation would have a serious effect on her sister's mental health and she noted the positive change in mood when MJ returned to the family home after being released from prison. AJ relies on MJ to help with the children and NJ considers that MJ is genuine about the children. NJ is now living in London at university and unable to provide the level of support to her sister that she previously provided when she was at school and living nearby.
40. The ISW, Mrs Sue Justice, interviewed AJ, MJ and NJ separately in face to face meetings and spoke to AJ's mother MSH over the telephone. She also spent time observing MJ with the two children. Her assessment of AJ is that she is currently feeling very stressed and under considerable pressure due to a combination of factors, including being pregnant with her third child, the financial worries of managing on just benefits and the uncertainty caused by MJ's immigration status and the Tribunal proceedings. This is compounded by needing to home educate E-RJ whilst she awaits a school place. She noted that following the move to Kemsley, AJ no longer has her maternal grandparents upon whom she relies considerably nearby and that her main support is now from MJ. Like Dr Halari, Mrs Justice also considers that AJ would be very significantly affected if MJ were to be removed from the jurisdiction and her ability to care for the two children and the new baby when born is likely to be compromised. She concluded that AJ has very limited support available due to her mother working full time and her sister being in London at University. Her opinion is that MJ's absence would have an impact on AJ's ability to care for the children.
41. Mrs Justice considered that MJ has struggled in the past in knowing how to be a parent, but is currently doing his best to be supportive of AJ and helps out in practical ways such as cooking and taking the children out.
42. The assessment of Mrs Justice is that both the girls would be adversely affected if MJ were to leave the jurisdiction. She believes they would experience great distress and sadness at not seeing him and they have a deep, close and loving relationship. They were distressed when separated from him when he was in prison, but AJ took them to visit him twice weekly which mitigated the effects of the separation.

43. Mrs Justice considered that AJ would require a much higher level of practical and emotional support than the family would be able to provide in MJ's absence. AJ's mother, Mrs H works full-time, NJ is now away at university and the maternal grandparents are further away in Canterbury. She considered that the letters of Dr Ana Draper of 12th of September 2016 and Dr James Hinksman of 6 September 2016 which also concluded that AJ's mental health would be negatively impacted by MJ's absence remained true today. AJ would be deprived of a practical source of support at a particularly important time with the impending arrival of her third child.
44. Following completion of Mrs Justice's initial report on 10th of June 2019, Mrs Justice spoke to Ms H, AJ's mother, by telephone. Ms H stated she stood by her original letter and spoke of the volatility of the relationship between AJ and MJ. She described them as always arguing and bickering and referred back to the pilgrimage that MJ had undertaken shortly after J-MJ was born. She described a further incident of domestic violence in February 2019 when AJ had called her saying MJ was trying to get back into the house after he had left. She said that MJ was hardly ever at home and she did not believe that he helped AJ when he was there, so that 80-90% of the time AJ was looking after the children on her own. She said that she had always provided support to her daughter and that included AJ and J-MJ living with her when J-MJ was very young. Although working full time she would be able to respond to requests for help when she was not working, were MJ to leave the jurisdiction. She did not mention her caring obligations for her husband.
45. Mrs Justice had a follow-up interview over the telephone with AJ in light of the information provided by her mother. AJ explained that the pilgrimage in 2011 had been planned for a long time and it was purely bad timing that it happened when J-MJ was very young and she had supported MJ's pilgrimage. She confirmed that they had had a big argument in January 2019 which was due to how AJ was feeling at the time and the pressure she felt because of the continuing immigration proceedings and all the uncertainty. There was no physical violence between them and the police were not involved. They have been together for a long time and wish to be together and be parents to the two children and the new baby. MJ does play football and goes to Canterbury to see his friends and sometimes he stays over with them. It suits AJ, as she wants time to herself which is helpful with her struggles with her moods. She was very content with the arrangements between herself and MJ. She confirmed that she visits her mother weekly and MJ does not go with her. Her mother would help if she had to, but she has a full time job. AJ does not feel supported by her mother in the same way emotionally and practically as she is by MJ.
46. In light of the further information, from Ms H and AJ, Mrs Justice reconsidered her earlier report, but stated that her conclusions remained the same: she remained very concerned about the impact on AJ's mental health and ability to cope with the care of three children if MJ were to be removed from the jurisdiction and she did not consider that Ms H would be able to provide the level of support that AJ may need.
47. In AJ's further statement she described her precarious and fragile mental health and explained that the only reason why she considers she is coping well is because she

had MJ with her most of the time and that he provides the kind of support that cannot be replaced by occasional, short visits or telephone calls from family. She reiterated her anxiety about the impending birth of her child and her ability to cope without him. She also referred to her mother's own caring duties for her husband (AJ's stepfather) who is recovering from major neck surgery and is extremely frail.

48. MJ's further witness statements reinforced a picture of a loving and supportive partner who has a close bond with the children. In cross-examination MJ provided further detail of the assistance he provides at home doing all the cooking, especially now that AJ is pregnant and the smell of food makes her nauseous. There is a routine in place whereby AJ takes J-MJ to school while he stays at home looking after E-RJ. He helps with the home schooling of E-RJ with online educational computer games. Notwithstanding Ms Everett's probing cross-examination, we accept that MJ is clearly fully involved in all aspects of the children's lives and household tasks. He was familiar with the names of J-MJ's friends and spoke of trips, for example to Howlett's zoo with the children. He was diffident and anxious as a witness but became more relaxed and animated when talking about the children, and was able to describe in detail the home routine in which he is fully involved, down to M-JM's preference for packed lunches made by AJ because of the way she cuts the bread. As the experts had noted, he lit up when he spoke of the children.
49. AJ confirmed the extent of the help provided at home by MJ – the cooking (apart from J-MJ's school packed lunches), washing up, hoovering, sorting the children out and taking them out. She confirmed he played football and went to see friends in Canterbury and sometimes stayed over but she enjoyed the time to herself and space, especially since they spend so much time together at home since he is prohibited from working and finances are very tight.
50. In terms of support networks her mother is unable to provide day-to-day help because of her full-time job and need to care for her husband, her sister is now at university and unable to visit weekly as before and since the family moved to Kemsley, Sittingbourne, she is now 30 minutes drive away from her maternal grandmother who is less able to drive than before.

Discussion and conclusions: Evidential dispute

51. There is a dispute of fact between the evidence of Ms H as against the evidence of AJ, MJ and NJ as to the extent of MJ's assistance with the children and the quality of the relationship between AJ and MJ. Ms H is a lone voice, whose evidence ran counter to that of all the other witnesses who had first-hand knowledge of MJ's involvement with the children. NJ, who we accept was unable to attend the hearing today because of her university commitments, gives a clear and measured independent account in her statement. She frankly explains that she tries not to have too much of an opinion on MJ, so her first hand evidence that MJ is genuine about the children and the reliance her sister places on MJ for help look after the children is all the more powerful. She is also well placed to make the assessment having spent so much time with the family over a number of years.

52. Ms H, on the other hand, does not see MJ with the children, but only sees AJ when she takes the children to see her. Ms H therefore has therefore had limited opportunity to see AJ and MJ functioning as a family together with their children or the couple's relationship together.
53. Ms H, for whatever reason, does not like her daughter's partner, and it is noteworthy that in her telephone conversation with Mrs Justice she chose to refer again to MJ's pilgrimage some 7-8 years ago, and she has been selective in the examples she has provided which we do not find portray an objectively accurate picture of the relationship over the last few years. AJ's detailed account of the row the couple had had in January as only a row, was convincing and we did not accept that it was violent, as alleged by Ms H who was not a witness to the incident. NJ makes no mention of it in her statement, although was present according to Ms H. We do not accept Ms H's characterisation of it as accurate.
54. We found AJ to be an honest and genuine witness, She agreed that the relationship with MJ was sometimes rocky and could be volatile, but she has also consistently described it as supportive and stable and that they are devoted to each other and the children and are both doing their best and are largely succeeding. The common assault and harassment conviction of 2012 and 2013 is of course concerning, but we accept that this type of behaviour has not been repeated, although they do still argue and have rows from time to time. The two experts were fully aware of MJ's criminal history and his common assault of AJ from the information contained in their letters of instruction. They have not drawn attention to any concerns in this regard. We agree with the FTT's observations that MJ had been able to reflect on his offending and the impact it had on others, social services had no concerns and there had been no suggestion of any further domestic abuse incidents. MJ has impressed the prison and probation services with his progress in rehabilitation terms. The OASys assessment of minimal risk of re-offending in the pre-sentence report has been borne out by events. MJ's motivation to remain drug free and not to offend together with his insight into the reasons for his offending have been maintained. Having considered all the evidence in the round, including MJ's offending against AJ in the past, we accept that he has demonstrated over a lengthy period since that time, that he is a devoted father to and very positive influence upon the two children and his partner to AJ.
55. MJ and NJ's evidence was consistent with that of AJ and the opinion of the experts. We also note that the three combined factors of the uncertainty surrounding MJ's status and the lengthy immigration proceedings; AJ's pregnancy; and their straitened financial circumstances and MJ's frustration at not presently being able to provide for the family financially, will have placed additional strain on the relationship. The relationship has been able to withstand these additional pressures over an extended period and the relationship has lasted for a decade.
56. We therefore reject Ms H's assertion that MJ is rarely at home and her account of a dysfunctional relationship between AJ and MJ. We do not accept Ms H's contention that that he does not support AJ or help with the children. NJ's account of the change

in her sister and the effect on her when MJ was in prison was compelling. We accept the expert evidence from Dr Halari and the Mrs Justice (ISW) and AJ's own evidence that AJ's mental health is such that her ability to care for the children is significantly improved by his presence at home. The fresh evidence before us was also consistent with the evidence before the FTT.

57. We accept that Ms H seeks to be supportive of her grandchildren and daughter (notwithstanding her views of MJ), but the constraints of her full time job and the poor health of her husband (which it is interesting to note she did not mention to Mrs Justice) mean that she has very limited capacity to help. We therefore accept that for varying reasons there is no member of AJ's family able to provide the necessary support to either her or the children to enable her to continue to parent them effectively.

Discussion and conclusion: evaluative exercise

58. It goes without saying that where, as here, AJ and MJ and the children function well as a family unit and both girls have a close and significant relationship with MJ, that the best interests of the children will be for their father to remain a part of the family in the UK. But that is clearly not enough to establish undue hardship: and it is by no means determinative, see KO. More is required, something beyond what would necessarily be involved for any child faced with the deportation of a parent. The grief and loss at being separated from their father (in E-RJ's case not her biological father, but for all intents and purposes treated as her father and she believes he is her father) will be accompanied by being looked after by a mother whose mental health is likely significantly to deteriorate. We note that AJ will be entitled to assistance from social services, but this is not a case in which social services can provide any obvious or easily implementable support in order to obviate the likely significant deterioration in AJ's mental health, in the absence of MJ.
59. Even with the support of social services, the children are likely to be caused significant upset and suffering as a result of the combination of the absence of their father and their mother's mental health deterioration. In this case it is not just that MJ is the provider of stability, security, emotional support to both children and AJ, but that without him being present, AJ's ability to care for the children will be very seriously compromised.
60. The expert reports of Dr Halari and Mrs Justice are united in their opinion that the impact on the children of MJ's removal in the particular and unusual circumstances of the case because of AJ's fragile mental health and her extensive reliance on him for emotional and practical support, and the consequent deterioration of her mental health that would follow if he were deported would be devastating.
61. AJ has a lack of sufficient and viable support networks, and there is less help available now than the support available when MJ was in custody for a number of reasons. Firstly the ill-health of her step-father has further limited the availability of her mother Ms H, secondly the absence of NJ now away at university and, thirdly, the reduced availability of support from AJ's maternal grandparents following the

family's move to Kemsley. Previously, the tri-partite assistance provided by the three generations of family members together with the frequent prison visits and knowledge that MJ would be released after serving up to 10 months of his sentence, provided sufficient support for AJ to continue caring for her children during the period of MJ's incarceration. The support network available previously has therefore deteriorated markedly since 2017.

62. The difficulties will be compounded by the arrival of a third child due on 13 November 2019, when AJ will be the mother of three children under the age of 9. A further relevant factor is the challenging behavioural needs of J-MJ and MJ's skill at managing her suspected ADHD and anxiety.
63. We also find the effect on AJ would be unduly harsh. The likely significant deterioration in her mental health will be increased by the stress and anxiety of parenting on her own. We also note that given the evidence Ms H has provided in these proceedings the relationship between mother and daughter will become more strained, just at a time when AJ will most need help. AJ will also endure seeing the suffering of the elder children that will affect her further at a time when her attention to them will be being shared with the new baby.
64. Our primary focus however is the devastating effect upon AJ's ability to care for the children if MJ is deported, which will be far above and beyond the obvious distress caused by the break up of a family. Mrs Justice explains that as with any young children, the loss of their father with whom they have very strong emotional bonds will likely lead to their feeling abandoned or deserted and that he no longer loves them as they are too young fully to understand what is happening and AJ and MJ have been careful to shield them and not tell them about these proceedings. But in this case, that would be compounded by the highly likely significant deterioration of AJ's mental health which would result in her ability to care for her children being severely compromised, at a time both when her support networks are considerably diminished and she will have just given birth.
65. Balancing and carefully weighing all the relevant factors, we conclude that the effect of MJ's deportation on the children is likely to be unduly severe and bleak and reaches the elevated threshold demanded by the unduly harsh test.
66. In the light of our conclusion on s.117C(5) of the 2002 Act, there is no need to consider the matters raised by Mr Smyth in relation to s.117C(6).
67. We allow the appeal pursuant to Article 8 of the ECHR.

Notice of Decision

We re-make the decision by allowing the appeal on human rights grounds.

Signed:
HHJ Stacey

Date: 13 November 2019