Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05350/2018

THE IMMIGRATION ACTS

Heard at Field House
On 2nd November 2021

Decision & Reasons Promulgated
On 8th December 2021

Addendum inserted on 1st December 2021

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE MALIK QC

Between

MR FAHAM JAFFER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr R Sharma*, instructed by Thompson & Co Solicitors
For the Respondent: *Mr T Lindsay*, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of human rights claim, in the context of a deportation order having been made against him.

2. The background to this appeal is the appellant is a foreign criminal, as defined by section 117D of the Nationality, Immigration and Asylum Act 2002. The appellant was sentenced to two years' imprisonment following his conviction on 1st June 2016 for sexual activity (penetration) with a vulnerable child (as described by the sentencing judge). The deportation order was made against him, and the appellant claimed asylum, and also that his return to Pakistan, his country of origin, would breach his rights under articles 3 and 8 of the ECHR. It is unnecessary to rehearse in detail the protection or article 3 claims as these were dismissed and are not the subject of a further appeal, following the error of law decision of Upper Tribunal Judge Jackson promulgated on 5 October 2020, a copy of which is annexed to these reasons. The sole appeal is on the basis of article 8 ECHR, specifically on the basis of right to respect for the appellant's family and private life. He has a relationship with a dual British/Finnish partner, whom it is unnecessary to name. He asserts that the effect of his deportation on her would be unduly harsh for the purposes of 'Exception 2', section 117C(5) of the Nationality, Immigration and Asylum Act 2002. The respondent accepts that the scenario of the appellant's partner returning with him to Pakistan, his country of origin, would be unduly harsh, but she does not accept that it would be unduly harsh for the appellant's partner to remain in the UK without the appellant – the so-called 'stay' scenario. The respondent further concluded that there were no very compelling circumstances to outweigh the significant public interest in the appellant's deportation, either in respect of his family or private life.

3. The First-tier Tribunal Judge, Judge Hanley had allowed the appellant's appeal on article 8 grounds, but Upper Tribunal Judge Jackson concluded that her decision contained errors of law. She set aside Judge Hanley's findings and conclusions. She directed that the remaking of the appellant's appeal be retained in the Upper Tribunal.

The issues in this appeal

4. We discussed and agreed with the parties that the issues in remaking the judge's decision, are:

   a. Whether the effect of the appellant's deportation, specifically his separation from his partner, while she remains in the UK, would be unduly harsh on her ("Exception 2")

   b. Whether there are very compelling circumstances over and above Exception 2.

   c. In relation to private life, Mr Sharma accepted that 'Exception 1' (section 117C(4)) is not met but sought nevertheless to argue that there were very compelling circumstances in relation to private life, by virtue of the period of time that the appellant had lived in the UK, his employment history and lack of family support in Pakistan. We discussed with Mr Sharma that he was not seeking to revisit the article 3 findings that the

appellant continues to be welcome by his family in Pakistan and has not been disowned (§112 of Judge Hanley's decision); has not renounced his Muslim faith; and is not at risk because of his "westernised" lifestyle (§§113 and 114).

The gist of the respondent's refusal

5. The core points taken against the appellant are as follows. The respondent accepts that the appellant has a genuine and subsisting relationship with his partner and that she is a qualifying British citizen. The respondent also accepts that their relationship was formed when the appellant was in the UK lawfully, with indefinite leave to remain. However, the respondent does not accept that it would be unduly harsh for the partner to remain in the UK without the appellant. While the appellant was in prison for a year from 2016 to 2017, his partner had been able to live independently and had adapted to life without his physical presence. Before meeting him, she had been able to live independently since coming to the UK in 2000, and her relationship with the appellant had only started in 2015.

The hearing before us

6. In terms of documents, the respondent provided a bundle. The appellant provided four bundles, including earlier versions of the bundle before Judge Hanley. We make the preliminary observations that the appellant's reliance on four different bundles did not assist the Tribunal. It would have been helpful to have had a consolidated bundle, not least because Mr Sharma only referred to a small number of documents in the bundles. We also emphasised to the representatives the importance of referring us to documents in the bundles which they regarded as relevant, as we made clear that they should not assume that we would read all of the documents in each of the bundles, many of which were duplicates. In making these comment we do not seek to criticise Mr Sharma himself in any way, rather we do so to remind his instructing solicitors of their obligation to assist this Tribunal.

7. As a second preliminary issue, when the appellant began to give oral evidence, he touched upon his own mental health illness, as discussed in an earlier expert report. We asked Mr Sharma whether he was asking us to treat the appellant himself, in addition to his partner, as a vulnerable adult for the purposes of the Joint Presidential Guidance Note No 2 of 2010. Mr Sharma confirmed that the appellant was not a vulnerable adult. His mental health had significantly improved since the earlier report. We make this observation first, to distinguish him from his partner, whom it was said is a vulnerable adult and whom we treated as such, and second, because in oral evidence when discussing the viability of return to his country of origin, the appellant indicated that if he were returned to Pakistan, he would contemplate suicide. We come on to discuss generally our findings in relation to any obstacles to his integration in Pakistan but there is not before us, nor is it contended that

there was any medical evidence that would contextualise such an assertion of suicidal ideation and, as already identified, the article 3 claim has previously been dismissed.

8. In relation to the appellant's partner, who has recently been assessed as autistic, Mr Sharma indicated that the impact of her autism could cause her difficulties in engaging in social situations. When she suffers from anxiety, she can sometimes freeze or have a panic attack. Mr Sharma was content that when she gave evidence, he and we should monitor the situation to check the appellant's partner's understanding of any questions. If she were either not able to understand a question or to suffer any panic attack or freeze during evidence, we would intervene, and Mr Sharma was at liberty to do so. We explained to the partner when she gave evidence that if she did not understand any question she was asked, or if she was not able to answer for any reason, she should let us know straightaway, if she was able. We monitored the situation throughout the hearing. It never became necessary for us or Mr Sharma to intervene. We were satisfied that the appellant's partner was able to participate fully and effectively in the hearing. She checked her understanding of questions on occasion but in response to those questions she gave detailed and considered answers. Mr Lindsay was careful to ask focussed, relevant questions. We are satisfied in that context that the partner's vulnerability did not affect her ability to give evidence before us and that there has been a fair hearing.

The witness evidence

9. The appellant and his partner gave evidence separately, each adopting two witness statements in separate bundles and each giving additional oral evidence in response to examination-in-chief by Mr Sharma, and cross-examination by Mr Lindsay. We summarise their evidence below, although we have considered their witness statements in full.

The appellant

10. In his written witness statements, the appellant confirmed that he was born on 28th May 1982 in Pakistan, where he had grown up with his parents and spent the entirety of his childhood. He described suffering sexual abuse whilst in Pakistan, but not from immediate family members. He studied for A level qualifications in Pakistan as well as a college diploma in computer sciences and then obtained a student visa to enter the UK in 2004. In the UK, he studied for and completed an MSc. He obtained a post-study work visa in 2008 and eventually obtained work in the UK with the NHS. He was later granted indefinite leave to remain. He was dismissed from his NHS employment following his criminal conviction for sexual activity with a child. He currently works in a residential letting and sales role, a role he has been carrying out since his release from prison in 2017.

11. The appellant committed the index offence on 30th December 2014, shortly before he met his partner. He expressed remorse and "bad judgment" in relation to his actions and his shame in having committed the offence. He was subsequently arrested in March 2015 by the police, who also had found text messages from his victim. He was bailed for 14 months and in the meantime, started to work for the NHS. He was charged in October 2015 and the NHS dismissed him in December 2015. On 1st June 2016, he was sentenced to two years' imprisonment. He spent one year in prison. He was released on 17th July 2017 and was on licence for a further year. It is unclear whether he remains on the Sex Offenders Register. He was then served with a deportation order and claimed asylum. We do not repeat the nature of the asylum claim, which was refused, and his appeal dismissed.

12. On 14th February 2015, namely shortly after the index offence, the appellant entered into a relationship with his current partner. She is aware of his offence; visited him in prison and they began to cohabit in 2017, shortly after his release from prison. They hope to get married one day and have children together.

13. The appellant asserted that having lived for 15 years in the UK, his way of life was different from how he had lived in Pakistan. His way of life was incompatible with Pakistani culture, for example in living with his partner without marrying her. He had fully integrated into the UK, socially and culturally, having lived for the majority of his adult life in the UK. He also gave the example of enjoying an alcoholic drink every weekend, which was not possible in an Islamic country. While his mental health had improved, if he were returned to Pakistan, he might kill himself.

14. The appellant had complied with all instructions and licence requirements of the Probation Service and had kept out of trouble. He had volunteered to attend a sex offenders' course, at his own expense, with a specialist charity, the Lucy Faithfull Foundation. His family had not initially been aware of his conviction and had only later become aware, at which stage, he claimed, they had asked him not to return to Pakistan, because of how conservative they were.

15. Having begun to co-habit in 2017, as a result of the Covid pandemic and the lockdown requirements, the appellant and his partner had spent 24 hours together every day. His employment situation had remained the same. He is still employed by an estate agency. His partner has her own business on a self-employed basis, making clothes, although it did not make much money because of Covid. He had been supportive of his partner from the very first day of their relationship in her business and he had banned her during the pandemic from using the underground. Instead, he drove her to her business premises in Brixton. He had suspected that she had autism because of particular behavioural traits, including rapid walking, being strict in her routines, becoming upset and irritable and not understanding during

meetings with new people, conversations or tones such as sarcasm. He had also referred to her as having panic attacks and having been taken advantage of in the past, in particular being "scammed". She had no relatives and few friends in the UK.

16. In oral evidence, the appellant was asked why neither he nor the partner had referred to the partner's autism in the previous hearing before Judge Hanley. He disputed that they had only raised the issue now to bolster a weak family life claim, following the weaknesses in the claim identified by Upper Tribunal Judge Jackson in her error of law decision. However, he accepted that he was aware of her condition at the time of the hearing before Judge Hanley and had never referred to it. He explained that he had not done so because it was private to her, and she was embarrassed in discussing it. He had since discussed with her that if they did not share the full facts with the Tribunal, his appeal might not succeed, and they would never have the chance to raise the issue again.

17. The appellant denied that he or his partner were exaggerating the effects of her autism. He provided 24-hour care for her, seven days a week, despite working himself. He paid for all of the bills, including rent and food.

18. In relation to his ability to return to Pakistan, he said that since the last hearing before Judge Hanley, his father had died in December 2020. Despite Judge Hanley's findings, he maintained that he had been ostracised by his family, who themselves had been threatened. When it was put to him that at §6.9 of an OASys report, (page [69] of the main bundle), it recorded him as saying that he did not have any problems with his family, he said that this was because his family had not learned of his conviction until later.

19. Mr Lindsay also put to him that there was a possible discrepancy as to why his partner did not use the underground. The expert report of Dr Suleman, at §7, had referred to his partner struggling to use public transport at all because of her autism and he drove her everywhere, whereas at §10 of his second witness statement, he had indicated that he had banned her from using public transport because of the pandemic. He responded by saying that he had not "banned" her, despite the reference in his statement. Regardless of Covid, she had struggled to use public transport, because she was not good with directions, and before the pandemic, he had taken her to new places or if she was carrying heavy equipment. She had used public transport before the pandemic, before they lived together, but now he cared for her, and he was able to drive her around whenever she needed.

20. The appellant confirmed that his partner had started her business in the UK, he thought in 2007, having been here since 2000, years before he had met her. She had had no-one in the UK to support her and instead, her father in Finland had supported her to build up her business, including speaking to her regularly by phone. When asked why the couple could not live together in

Finland, he said that he did not speak Finnish and despite the fact that his partner's business was not prospering, she had spent many years trying to develop it and did not want to abandon it.

21. The appellant further confirmed that despite claiming to provide care for his partner 24 hours a day, seven days a week, she had never applied for Carer's allowance. The reason she had not was because it had given him a lot of satisfaction to care for her. They had never looked into whether she could claim Carer's allowance. He was unaware of whether she had ever claimed state benefits because of illness although as far as he was aware there had been periods of time when she had been unable to work through ill-health. He disputed that the reduction in her income, if he were deported, could be mitigated through her receiving extra benefits (as she had done in the past) or support from her family as she was entirely reliant financially on him alone. It was not practical for her father to continue to support her, as he also had a form of autism.

The appellant's partner's evidence

22. The appellant's partner adopted her two written witness statements. She confirmed the genuineness of their relationship; when it began; the desire of the couple to marry in the future and have children and their committed relationship for four years. She had suffered from anxiety as to what was going to happen to the couple. His conviction had had an impact on their life because when he was released on licence, he was tagged electronically, which meant that they had to cut short any socialising outside the family home and return home in the evening. The appellant provided a significant level of support to her in her business, as she was a sole trader, without employees. He had helped her re-organise and redecorate her rented studio; and transport her merchandise and clothes rails and fixtures (she had previously set up "pop-up" shops).

23. Before she and the appellant began their relationship, his partner had claimed tax credits, but had stopped claiming credits since they had cohabited in 2017. She had visited him regularly when he was in prison, in Kent, travelling there from London by public transport, although it had not been easy. The couple wanted to marry in the future and have children, which was in the context of the partner now being a woman aged 39. The relationship could not continue via electronic means such as 'Skype'. She would be unable to live in Pakistan and he could not live in Finland because he did not speak Finnish and it would be difficult for him to get a job there. She said she would not be able to cope without him in the UK because it would dramatically affect her life emotionally, financially and physically.

24. The appellant's partner described aspects of her autism including verbal skills, her obsessive nature, and clumsiness. She also suffered panic attacks which had had happened a lot in her life. When she was in a "panic mode", the

appellant was able to calm and re-assure her. The appellant had been of enormous support to her and provided her with a strong platform. They had lived together for over three years and been in a relationship for over five years. The couple wanted to get married and have children. All of her friends were settled with children, and she wished to have that opportunity with the appellant. She had no family in the UK nor any friends on whom she could rely.

25. In oral evidence, the partner said that she had struggled on her own before she had met the appellant, carrying everything for work purposes and having to take cabs (she had a driver's licence but was not confident in driving in London). She had had previous partners in the UK before meeting the appellant. She would be devastated emotionally if the appellant were not allowed to remain in the UK. She would find it very hard as he was very supportive. Prior to her relationship with the appellant there was only so much support that could be provided, which her father had provided from Finland. She would often panic and because he also had autism, her father would panic. She was asked, in oral examination-in-chief, how frequently she had panic attacks, she said not regularly, but it happened last week. When it was asked whether it was every week or less frequently, she said it was probably every week. When asked how the appellant supported her when she was not suffering from a panic attack, the partner explained he supported her financially, paying their rent and food. He also supported her practically. She had always struggled with her autism. She had not discussed it before because she was embarrassed.

26. When asked whether he provided 24-hour care, seven days a week, the partner said "no," but then clarified that he did provide a caring role for her 24-hours a day, seven days a week. She added that he had to work as well, but that he brought her food and "everything".

27. The partner confirmed that she had been in the UK since 2000 and said she had started her the business in 2010. She was asked whether her symptoms had got worse over the years, and she said no, it was easier for her with age and experience, but she still suffered from panic attacks. The appellant had also made her life easier, and he also helped her, driving her to work as she did not like using public transport. When she was asked about the public transport issue and whether he had "banned" her, she added that the appellant did not like her to use public transport and she did not particularly wish to use it either. She denied exaggerating her symptoms.

28. The partner was asked, and in response, indicated that if the couple lived in Finland, she did not think that the appellant would be able to find work and they would have no income to support themselves. She also said that she had never applied for any UK benefits because of her autism and had never thought about the possibility of doing so.

Closing submissions

The respondent

29. Mr Lindsay relied upon the respondent's refusal decision. The "stay" option was not the only option and in fact the couple could live in Finland. The Finnish language barrier was not something that rendered it unduly harsh for the couple to relocate there. Moreover, as the appellant had candidly accepted, the only reason now for his partner's autism being raised was because of the weakness of the appeal. Before Judge Hanley, the partner had merely referred to anxiety and trouble sleeping. In terms of Dr Suleman's report, whilst his expertise was not challenged, noting the authority of JL (medical reports-credibility) China [2013] UKUT 00145 (IAC), his report should carry less weight because it was not based on independent clinical features. There was no medical documentation, prior to his assessment of autism, and the level of support which it was said that the appellant provided was based largely on the couple's account. Most of the symptoms had not been mentioned in evidence before Judge Hanley in 2019. There were concerns that the effect on the partner may be exaggerated, and the example given was in relation to the reason for her lack of use of public transport. Dr Suleman had suggested that the partner was unable to use public transport because of her condition whereas it was in the context of COVID and the appellant's desire to ensure that only he provided that transport. This was all in the context that the partner had plainly lived an independent life for 20 years in the UK, having been able to establish a business, including using public transport (even visiting the appellant in prison by public transport). Her evidence was that the effects of her condition had not worsened. Even taking the partner's case at its highest, her autism was not enough to make the effect of the appellant's deportation unduly harsh. The effect may be in the category of being undesirable and inconvenient, but not bleak or severe (see KO (Nigeria) & Ors v SSHD [2018] UKSC 53).

30. In terms of very compelling circumstances, for the purpose of family life, there was nothing else that did not fall within the rubric of whether the effect was "unduly harsh". In relation to private life, limited weight should be applied to the appellant's private life where Judge Hanley had rejected the appellant's previous claims to have been disowned by his family; or to have abandoned his Muslim faith. The fact that he was willing to be untruthful was relevant to his general credibility. There were no obstacles to the appellant's integration into Pakistan where he had family who could assist him, and he could obtain work and re-establish interpersonal ties. Critically in this case, Judge Hanley's finding that certification under section 72 of the Nationality, Immigration and Asylum Act 2002, namely that he had been convicted of a particularly serious crime and constituted a danger to the community of the UK, remained. The OASys report indicated that the appellant remained a medium risk of serious harm to children. That was a real risk, even if not a high one, and there was a real public interest in effective immigration control and deterrence of foreign

nationals in committing serious crimes. Consequently, the respondent's refusal of his human rights claim, whether by reference to right to respect for his family or private life, was proportionate.

The appellant's closing submissions

31. First, the scenario posited that the couple could relocate to Finland was not in accordance with paragraph 399(b)(ii) of the Immigration Rules as opposed to section 117C of the Nationality, Immigration and Asylum Act 2002 (the former referred to undue harshness for the partner to remain in the UK without the appellant, without consideration if they could relocate to Finland). In any event, if she had wished to pursue this argument, it was incumbent on the respondent to show that the appellant would be granted leave to enter Finland, despite his conviction for sexual activity with a child. The respondent had adduced no such evidence. We should therefore only consider the "stay option". Whilst it may have been the view of Upper Tribunal Judge Jackson that all the issues that have previously been raised, when taken together, may not have been sufficient to meet the "unduly harsh" test, circumstances had changed, or as Mr Sharma clarified, the circumstances had not changed, but the appellant had disclosed them in full.

32. Mr Sharma referred to passages of Dr Suleman's report, which we have considered in full, but cite here the paragraphs focussed on by Mr Sharma in his submissions. At §4.3.3 of his report, Dr Suleman had referred to the kind of support the appellant provided to his partner, in terms of driving her, helping her with business decisions, and paying for all their living costs. Dr Suleman discussed the partner's social isolation and lack of friends at §5.4; and her need for routine at §5.10. At §5.13, he described the effect of her autism on her and, as a consequence, needing support from the appellant, for example in double-checking emails. Dr Suleman formally diagnosed the partner as autistic and referred, at §7.10, to her having been exploited or "scammed" in the past. She would sometimes go into shutdown or panic modes and the appellant's help was crucial when she did (§7.12). She was at risk of an anxiety disorder (§7.16), if the appellant was not part of her life.

33. Any suggestion that the partner or the appellant were exaggerating was answered by the fact that Dr Suleman was an expert, who had signed a statement of compliance with his duties to this Tribunal and could be expected to assess exaggerated narratives. The only suggestion of exaggeration put by Mr Lindsay was on the single issue of public transport and in fact, that was no exaggeration at all. The appellant's concern that she should not travel because of the pandemic was equally consistent with her also not travelling because of her autism. Dr Suleman's assessment had not been based solely on the appellant's or partner's accounts but also on those of her father and friend. Whilst the issue of the partner's autism had been raised at a late stage, it was true, and so relevant. Finally, in relation to article 8 private life, there was a real strength of the appellant's private life in the UK.

There was a low risk of reoffending, as confirmed in an earlier expert report referred to by Judge Hanley.

The Law

34. The relevant parts of section 117C of the Nationality, Immigration and Asylum Act 2002 state:

> "17C 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.
>
> …
>
> (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.

35. We do not add any gloss to these statutory provisions. We are reminded by the authority of HA (Iraq) v SSHD [2020] EWCA Civ 1176, that what is "unduly harsh" must be considered in the context that the starting point is the public interest in the deportation of foreign criminals. The underlying question is whether the harshness which the deportation will cause to the appellant's partner is of a sufficiently elevated degree to outweigh that public interest in the so-called "stay" scenario, where the appellant is deported but his partner remains in the UK. The respondent accepts that the alternative "go" scenario of the partner moving with the appellant to his country of origin, Pakistan, would be unduly harsh. There is no requirement of exceptionality in the test of 'unduly harsh.' Our focus is on the loss to the appellant's partner in the event of the appellant's deportation, rather than consideration of a "norm" in the case of any separation. It is accepted that in relation to the wider issue of very compelling circumstances, we may consider

the appellant's offending, including the nature and date of the offence and the extent of the appellant's rehabilitation.

Findings of fact

36. We considered all the evidence to which we have been referred, whether we refer to it specifically in these findings or not.

37. We remind ourselves that we should not take the expert report out of isolation and that it is necessary to consider all the evidence in the round. In particular, we should not fall into the trap of discounting expert evidence, following an impermissibly isolated assessment of the appellant's or partner's credibility. Nevertheless, it is necessary to start somewhere, and we take as our starting point only, while considering the evidence in the round, the expert report of Dr Suleman. He is a consultant psychiatrist, and his expertise is unchallenged. In his report, he has signed a statement of compliance confirming his duties as an expert witness to this Tribunal. He has referred to having relevant documentation before him, including the decisions of Judges Hanley and Jackson.

38. We are also conscious that notwithstanding the authority of JL, experts may necessarily have to rely, even if in part, on a narrative of events provided to them by the people in respect of whom they are providing a report. In these circumstances, such experts can be expected to have considered whether the effects of a condition have been exaggerated.

39. Dr Suleman discussed with the partner her family history including the period in which she had grown up in Finland and had then come to the UK to live in 2000. He discussed her limited friendships when growing up in Finland and when studying at university in the period up to 2006, before she continued her studies in London. She attended a lot of parties and drank a lot of alcohol, particularly after she and her boyfriend, with whom she had been in a relation for five and half years since she was 17, separated. Having moved to London to study, she obtained a master's degree in 2010. She struggled to get a job and so had started up her own business with support from her parents. Whether that support included financial support is not specified, although it is noteworthy that she was able to finance studies, to post-graduate level, until aged 30. She had another relationship with a man in 2007, which ended in the context of his ill-health. She met the appellant in a club in 2015. They began to cohabit in 2017, after his release from prison. Dr Suleman described the partner at §4.3.3 as saying that she was dependent on the appellant for specific things, such as being driven to places as she had struggled to use public transport and does not drive in UK. The appellant also helped his partner in making various business decisions, although again these are not specified. She was described as struggling to know other people's intentions and was therefore vulnerable to exploitation. For example, she received offers from people to represent her business for a fee and she struggled to know if they

were fake or real offers. She was reported as saying that in the past, she was deceived by people on a few occasions, although once again, no further details were provided. Although the partner has a Finnish driving licence, she was reported as being too scared to drive in London, as she is clumsy. She was also recorded as claiming to be financially dependent on the appellant "to an extent" (how much is not specified), as she was not making enough money through her business.

40. Dr Suleman went on to diagnose the partner as having autism spectrum disorder, by reference to a standard diagnostic framework for autism. Her medical records were unremarkable, although they indicated that her GP had referred her for an assessment, after she completed a self-assessment and approached her GP in June 2020 (all after Judge Hanley's decision in 2019). In diagnosing the partner's autism, Dr Suleman referred to his discussions with the appellant's father (§§5.5 and 5.8) and a friend (§5.8). The effects of her condition include struggles with small talk or social chitchat (§5.7); silence during discussions, appearing rude; difficulties in communicating in a group setting; a struggle to understand vague or complex instructions; a struggle to make friends; a need for her to plan her day, with lists (§5.10); obsessive pre-occupations, including in relation to crystals and a tendency to hoard; and an inability to plan underground routes to new places. At §5.13, Dr Suleman reported that the partner's father had discussed the partner as requiring help from the appellant with daily activities (not all activities) as she found it hard to make decisions on her own and required either her father or the appellant's input. She could not recognise scam emails and took them seriously and would often ask her father if an email she wanted to send was appropriate. She lacked self-confidence and required frequent reassurance. She struggled to find her way and could not use public transport. She still struggled to know which underground train to catch, to visit places. While she was of normal intelligence and independent with her basic daily living skills, she required help with her activities, including understanding other's intentions. Dr Suleman assessed the partner as being reliant on the appellant for "some aspects" of her daily life, including transport, help with business decisions, financial and emotional support. He took care of the partner when she went into "shut down mode", which are panic attacks. His support was a buffer, preventing her from developing an anxiety disorder if the appellant was no longer in her life. (§§7.10 and 7.16).

41. We accept that Dr Suleman will have been alive to the risk of exaggeration. His credentials and expertise are unquestioned, and he has confirmed his duty to this Tribunal to be independent. He was also careful to attempt, where possible, to corroborate the partner's recital of the effects of her condition, with a friend who lives in Finland but who has visited London and her father, who also lives in Finland. Dr Suleman made the assessment by reference to standardised diagnostic criteria. We accept Mr Sharma's submission that the failure of the appellant and his partner to refer to her condition before Judge Hanley was explained not only by the partner's personal embarrassment, but

also by the practical point that the partner was without any diagnosis, or even a referral for an assessment for autism, at the time of the hearing in 2019. The appellant's reliance on the issue now was explained by the appellant's candid admission that if partner's autism were not discussed now, it might weaken the appellant's appeal. Neither detract from Dr Suleman's expertise and diagnosis of autism.

42. What is equally clear is that Dr Suleman's report contains caveats and nuances, which are not reflected in the more generalised evidence of the appellant and his partner, which we have considered in the round. In particular, the appellant's assertion that he is responsible for the care of the appellant, 24 hours a day, seven days a week, is potentially misleading, (whether the intention is to mislead or not). Dr Suleman has made clear that the partner has normal intelligence and "is independent with basic her [sic] daily living skills" (§7.5). This is consistent with the fact that the appellant works; that the partner has lived in the UK since 2000 and was apparently able to live independently before she met the appellant in 2015, and when he was in prison from 2016 to 2017, before their co-habitation. Her ability to live independently from 2000 to 2017 was all in the context of her condition not having worsened in recent years, as she accepted in her own evidence.

43. Dr Suleman's assessment not only describes the impact of the partner's autism now, but also the impact and context over her whole life. This includes a history of limited friendships, but also her ability to socialise to some extent and form previous relationships. She has been able to pursue academic studies, successfully enough to obtain a master's degree over a 10-year period between 2000 and 2010, and to finance those studies. Since 2010, she has set up and maintained her own business, with her parents' support, including her description of a "pop-up" shop. This is all years before she met the appellant. While the precise nature of support from her parents is unspecified, Dr Suleman recorded that even now, she requires help not only from her partner, to help her make decisions, but her father, in Finland (§7.5). This is consistent with Dr Suleman's observation that her father helps with daily activities; she requires his input, and her father describes being asked to check her emails (§5.13). While the support from her father does not detract from the appellant, what is clear is that the appellant's coping strategy, no doubt developed over many years, is to ask for her father's support with daily activities. He does so "remotely," in the sense of doing so from Finland, and this has ranged from helping her to set up her business, to being aware of, and helping her, in her daily activities.

44. Dr Suleman was careful to assess the impact on the appellant's partner if the appellant were no longer in her life. The description of the enduring support provided by the appellant's father, while he lives in Finland, is testament to the ability of the appellant to access support from those she loves and trusts, via means of remote communications. This is even down to the level of checking emails which the appellant proposes to send. The likelihood of the

partner suffering from an anxiety disorder was premised, at least in part, on the appellant playing no part in her life. While we accept that the appellant and his partner would be unable to marry or have children in the "stay" scenario, there is no suggestion or evidence that in the event of the appellant's deportation to Pakistan, ongoing, regular contact and support, of a kind typified by the partner's father, could not or would not continue between the appellant and his partner. He could remain a part of her life. That represents a substantial mitigating factor to the risk of the partner suffering an anxiety disorder. There is also no reason to suppose that the partner's father will not continue to provide a substantial level of support, also remotely, to the appellant, as he has done for many years.

45. Dr Suleman also posited a number of other practical difficulties that the partner might face in the event of the appellant's deportation. The first was in relation to financial support, given the difficulties her business has faced during the pandemic. The second is her vulnerability to exploitation, because of an inability to understand others. The third is the impact on her ability to travel. For completeness, we add a fourth, her ability to have children with the appellant, which the partner reiterated in oral evidence, given her age.

46. In assessing these factors, we (1) do not do so in isolation; and (2) do not do so by reference to a "norm." In relation to (1), we accept that the distress which is likely to result from the appellant's deportation is likely to place additional pressures on the partner's father, to provide her with support.

47. Taking the last point first, while the issue was raised briefly in witness statements and re-iterated by the partner, who referred to "all [my] friends are settled with kids and I want to have this opportunity" (§20 of her supplementary statement), no details have been provided of whether the couple have already attempted to have children and if not, what has prevented them from doing so already. We assess this as an aspiration or possibility which is not matured into concrete plans, beyond generalised assertions. We place limited weight on such a generalised assertion, when considering the effect of deportation on the partner.

48. Taking the issue of financial support, Dr Suleman has understandably taken the couple at their word that the appellant pays the rent and all the couple's bills. What he was unable to opine on (nor would we expect him to) is how the partner managed her financial affairs and financed her living costs from 2000 to 2017 in the UK. We are aware that she was in receipt of housing benefits and tax credits before moving in with him and in the appellant's own evidence, he suggested that his partner's business had always struggled, when he discussed why she might consider stopping the business (she was unwilling to do so). We find that just as she was able to be financially independent of a partner before 2017, for 17 years, with state support where necessary (and unspecified support from her family) she would continue to be able to do so in the future. This is notwithstanding the effect of the pandemic

on her business, on a temporary basis. We also find that she would be able to continue to run her business effectively, taking appropriate decisions with the remote advice and support of her father, in conjunction with the appellant. As a vulnerable person, the partner may be the target of attempts at exploitation in the future, but the same support network of her father and the appellant will remain available.

49. In relation to travel, we accept that the partner finds it both difficult and unpleasant to use public transport. We put it no higher than that. Her condition has never prevented her from using public transport. She did so to visit the appellant regularly during the year he was in prison, and she previously took taxis when she needed to for business purposes.

50. The final practical aspect is in relation to when the partner suffers panic attacks, the effect of that separation from the appellant will have on her, as he plays an important role in caring for her in these circumstances. The stark gap in the evidence is what support the partner was able to access between 2000 and 2017, when she had panic attacks. While she told Dr Suleman that her panic attacks have increased during the pandemic (§7.12) he described such attacks were very common for people with autism. Put another way, the partner does not suggest that she did not suffer panic attacks before 2017, so the question is what coping strategy, if any, she deployed before 2017. It is reasonable to assume that her father provided at least some level of remote reassurance and support, even if limited. There is no evidence that the partner was unable to manage her panic attacks prior to 2017, unpleasant and distressing though they may have been. It is also noteworthy that while the partner was not diagnosed before 2020, she now has a diagnosis and the potential for access to medical treatment for panic attacks, something she may not have been able to access before her diagnosis.

51. We have considered the partner's circumstances in the round. We accept Dr Suleman's assessment that the partner is currently dependent on the appellant in certain aspects of her life. We are conscious that the test is not whether she can "cope", but whether the effect of deportation on her will be unduly harsh, taking the starting point that the appellant's deportation is in the public interest. We conclude that the effect would not be unduly harsh. We have no doubt that the partner will be distressed. She will have the enduring and practically meaningful support of her father and, remotely, the appellant; access to state financial assistance; and has a track record of living in the UK independently, successfully completing her studies and developing her business, for most of the last 20 years in the UK. While we do not belittle her vulnerability, she has access to adequate support to mitigate the risks to her resulting from the appellant's deportation. The effect does not begin to amount to being unduly harsh, bleak or severe.

52. In the circumstances, the appellant does not meet Exception 2, namely section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

53. We have considered whether there are very compelling circumstances over and above Exceptions 1 and 2 in relation to right to respect for family life, or in relation to private life. It is at this stage that we are permitted to consider the appellant's index offence and his claimed rehabilitation since then. On the one hand, his sentence was at the relatively lower end, namely two years in prison. On the other hand, we conclude that there is no reason to depart from Judge Hanley's conclusion to uphold the respondent's certification of the appellant under section 72 of the Nationality, Immigration and Asylum Act 2002. The appellant had not rebutted the presumption that he was convicted of a particularly serious crime and constituted a danger to the community of the UK. In reaching that conclusion, Judge Hanley considered precisely the same evidence (a psychiatrist report of Dr Sahota dated 14th March 2019) to which we have been referred. Judge Hanley's findings are at §§100 to 104:

"100. I am not persuaded that the appellant has rebutted the presumption arising from the conviction. The OASys assessment of risk in the community to children is ranked as medium [82 first bundle]. That is an OASys report dated 4 April 2017 and a very similar report appears in the respondent's bundle [FF8], which appears to be dated 23 May 2017. That is a report that was compiled towards the end of the appellant's sentence. He was released in July 2017. Since release he was on licence for a year, but there is a dearth of any information relating to his contact with the probation service during that time. His movement has been significantly restricted by the conditions attached to his immigration bail, which includes electronic tagging which imposes a night time curfew.

101. I take into account the cohabitation with his girlfriend since October 2017 and the favourable evidence of Mr Wade. I also take into account the psychiatric report produced for the purposes of the hearing and dated 14 March 2019. The psychiatrist forms a view that the appellant has a low risk of reoffending [page 16 in bundle 3], and goes on to say, "*the appellant's risk may increase if he does not address stress management, trauma, anxiety, depression, alcohol and peer influence as part of the rehabilitation process*". I take into account the evidence from the Lucy Faithfull Foundation dated 6 December 2018 [13 – 14, first bundle], it has been signed by a practitioner at the foundation. It is not clear whether the psychiatrist has seen the letter, because he does not refer to it in his report. Accepting what was written by the Lucy Faithfull Foundation the appellant has had some counselling and intervention for which he has paid for himself (£1,080) [13]. That there is a current need to address various aspects of mental ill health and behaviour is identified in his conclusion.

102. The psychiatrist also recommends a referral for psychological treatment to address the appellant's sexual trauma, which has only recently been disclosed (save for the appellant's claim to have had private discussions with his criminal defence team). There is a clear statement of the appellant's medication is at [10, third bundle] (paragraph 3.3.16). However, in the immediately preceding paragraph, there was also reference to the appellant being reviewed by a psychiatrist on 13 June 2018 and being discharged and a statement that he did not wish to take medication and EIS psychological treatment was not felt to be beneficial. It is not clear whether the referral to Merton INPT concluded on the same day, i.e. 13 June 2018.

103. I also bear in mind the sentencing remarks in their entirety and when assessing the appellant's remorse I have specific regard to the following from the Crown Court sentencing judge, who have the benefit of observing the appellant throughout that long trial:

> "But bearing in mind your previous good character, sadly, you have not said sorry, but except, of course, the regret you feel once it comes to the trial process".

104. The evidence in connection with the appellant's attitude to the offence, remorse and insight is mixed. Whilst the appellant repeatedly refers to the offence as the gravest mistake of his life, see, particularly, the long-handwritten statement at N1 and his characterisation of what happened is how "trouble found me", [see N1]. However, the appellant pleaded not guilty and there was a long trial. The sentencing remarks are damning in respect of remorse. The OASys report contains little acknowledgement of culpability, for example:

> "Mr Jaffer appears to have issues with recognising problems and being able to solve it. He stated that he did not want to have sex with the victim, however when asked why he did not leave, he stated that he did not think of that. Conversely, it could be that Mr Jaffer wanted to have sex with the victim, but did not consider the consequences of his actions and believed that he would not be arrested and convicted" [70]

And also see:

> "however, he does struggle with his motivation for offending, as he stated that he did not know she was underage and blamed his co-defendant and being under the influence of alcohol and drugs" [71].

105. For the above reasons I am not satisfied that the appellant has discharged the burden which lies on him to rebut the statutory presumption that he is a danger to the community."

54. Whilst we appreciate that the issue of certification under section 72 is in a different context from section 117C, Judge Hanley had made a detailed analysis of the danger posed by the appellant to the community of the UK. Whilst the decision was promulgated in July 2019 and the appellant has not offended since that date, other than the passage of time and the lack of offending, as to which we attach limited weight in the context of him being tagged electronically and subject to a curfew, we see no reason to depart from Judge Hanley's finding that the appellant continues to constitute a danger to the community of the UK. If the risk materialises, it is of serious harm to children (page 30 of the OASys report), in light of his crime against a vulnerable child. We balance against that the genuineness of his relationship with his partner, who herself may be described as vulnerable; and the fact that when they began their relationship, the appellant had indefinite leave to remain. However, even though the appellant had ILR, shortly after they began their relationship, the appellant was charged with the offence for which he was later convicted and given its seriousness, it is reasonable to assume

that the couple must have known that the appellant's right to remain the UK may be reviewed. Indeed, the sentencing judge remarked, in June 2016 (page J8 of the respondent's bundle): "Your continuing presence in this country is a matter for the immigration authorities, and not for me."

55. We do not repeat the factors we have considered in relation to whether the effect on the appellant's partner would be unduly harsh. We conclude, for the same reasons, taking into account the appellant's offence and the risk posed by the appellant; weighed against the family life which has endured since 2015 and the effect on his partner, that there are no very compelling circumstances over and above Exception 2, in respect of the appellant's family life. Having considered the wider article 8 factors under section 117B of the Nationality, Immigration and Asylum Act 2002, we accept the neutral factors of the appellant's ability to speak English and his financial independence. However, we conclude that the public interest in the appellant's deportation is overwhelming, when considering the proportionality of the decision in respect of his family life. It is unnecessary for us to consider whether it would be unduly harsh to expect the appellant and his partner to relocate to Finland.

56. For the purposes of very compelling circumstances in relation to private life, the difficulty for the appellant is that his submissions largely seek to go behind the findings of Judge Hanley in relation to the article 3 findings. He reiterated allegations previously rejected by Judge Hanley as to the ostracism he would face from his own family; the threats to the family in Pakistan; his claim to have lapsed from his Muslim faith and his western lifestyle. There was no appeal from Judge Hanley's findings on those issues and there is no reason to depart from them. The appellant cannot benefit from Exception 1, section 117C(4) of the Nationality, Immigration and Asylum Act 2002, as he has not lived in the UK for most of his life, lawfully otherwise, having arrived in the UK aged 21 and now aged 39. Even if we accept that he remains socially and culturally integrated in the UK (he continues to work and has a network of friends and supporters in the UK) we conclude, without hesitation, that there are not very significant obstacles to his integration in Pakistan. Judge Hanley had recorded, at §128, his private life appeal as being based on long residence, his immigration history, his lifestyle, his relationship and his employment.

57. We note his claim that the obstacles relate to the fact that he has not lived in Pakistan for so many years. We have considered whether the appellant would be able to integrate into Pakistan as an "insider", (see SSHD v Kamara [2016] EWCA Civ 813), on a broad evaluative assessment. He is not estranged from family members there, including his brother. He is educated, with an employment history in the UK. He has supporters in the UK who have been willing to attest to his hard work. He will not suffer any ostracism, when he returns to the family setting in Pakistan, because of his conviction, western lifestyle, or claimed lapse in his Muslim faith. We conclude that

notwithstanding not having lived in Pakistan for so long, on that broad evaluative assessment, there are not very significant obstacles.

58. There are also not very compelling circumstances in respect of the appellant's private life. We accept that it has developed over many years, lawfully, in the UK. He has a consistent work history, UK supporters willing to testify as to his hard work and friends who have been willing to stand by him, despite his conviction. However, once again, considering his offence (including the relative brevity of his sentence); the risk he poses to children, when weighed against his private life, there are not very compelling circumstances. Considering a proportionality assessment, by reference to section 117C(6), the public interest in the appellant's deportation is overwhelming. The respondent's decision is proportionate, in respect of the appellant's private life.

59. For completeness, we also considered whether, cumulatively, right to respect for the appellant's family and private life, interlinked as they were, constituted very compelling circumstances. We considered the combination of the length of time spent by the appellant in the UK lawfully; his connections and friendships; work history; absence from Pakistan; his relationship with his dependent, vulnerable partner since 2015 and the effect of deportation on her; his relatively short prison sentence and lack of reoffending since then. Against that, we take into account the nature of the offence and that he continues to constitute a danger to the community of the UK, in particular, children; his ability to continue to remain as part of his partner's life and be part of her support network, even after deportation, along with her father; and his ability to integrate into Pakistan as an insider. When considered cumulatively, we do not regard the circumstances as very compelling, and on a wider article 8 assessment, deportation remains proportionate.

60. For the reasons set out above, on the facts established in this appeal, there are no grounds for believing that the appellant's removal from the UK would result in a breach of his rights or the rights of his partner under article 8 ECHR.

Decision

61. The appellant's appeal on human rights grounds is dismissed.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **17th November 2021**

TO THE RESPONDENT
FEE AWARD

The appeal has failed and so there can be no fee award.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **17th November 2021**

Addendum – application for anonymity direction

62. Following promulgation of our decision, on 24th November 2021, this Tribunal received an application from the appellant, asserting that the anonymity direction made by the First-tier Tribunal had been revoked and requesting that it be reinstated on the basis that it would protect the appellant's partner's right to respect for her private life by reference to her diagnosis, as referred to in Dr Suleman's expert report. The application submitted that any publication of her name or that of her partner would bring to light confidential information about her medical condition and relationship to the public domain. The application referred to the Supreme Court case of A v BBC [2014] UKSC 25 and in particular, §25, which referred to anonymity in certain cases being necessary in view of the risks to safety of a witness. The application asked for reconsideration of this Tribunal's decision to revoke anonymity as it could have a potentially drastic impact on the lives of the appellant and his partner.

63. Contrary to the application, there was no express discharge by this Tribunal of the anonymity order previously made by the First-tier Tribunal. Instead, as will be apparent from the error-of-law decision of Upper Tribunal Judge Jackson, she proceeded on the basis that no anonymity direction in this Tribunal was necessary, bearing in mind that the appellant's protection claim had failed. There was no challenge to her decision dated 21st September 2020. The matter was not raised before us again in the remaking hearing, over a year later. We have nevertheless considered the application afresh.

64. We have considered the recent Upper Tribunal decision of Cokaj (anonymity orders: jurisdiction and ambit) [2021] UKUT 00202 (IAC); and the Upper Tribunal's Guidance Note 2013 No 1: Anonymity Orders. The right of the appellant and his partner to respect for their private lives under article 8 ECHR needs to be balanced by the article 10 ECHR consideration and the ability of the press, in the public interest, to report freely to the public on matters of genuine concern (see §39 of Cokaj). The appellant's case had at the time of his conviction received significant press attention. While she is a

vulnerable adult, there is no evidence that the appellant's partner suffered any adverse attention from any third parties, or that the previous publication of his name and the fact of his conviction worsened her condition, from which she has always suffered.

65. Whilst the appellant's partner has now been candid about her condition, which has caused her embarrassment to discuss and she may be prone to exploitation, there is no suggestion that her friends or social network are unaware of her condition. She is not named in our judgment and does not share a common name with the appellant. It does not follow that the appellant's naming will result in her condition becoming known to those beyond her social network.

66. Even if the appellant's partner's condition were to become more widely known, we conclude that the publication of the appellant's name is, on balance, proportionate. Whilst the appellant's partner regards her condition is private, there is no evidence that wider knowledge of it would exacerbate her condition, or place her at additional risk, beyond any risk which already existed when the appellant's name was previously published. We have already previously set out how risks to the partner could be mitigated, in the event of the appellant's deportation.

67. The nature of the appellant's offence, and the open justice principle, in all the circumstances, outweigh any article 8 considerations in this case – see SSHD v Deon Starkey [2021] EWCA Civ 421, §§97-98.

68. As our decision not to make an anonymity order is an ancillary decision made in relation to an appeal under section 82 of the 2002 Act, it is an excluded decision by reason of article 3(m) of the Appeals (Excluded Decisions) Order 2009 and, thus, challengeable only by means of judicial review.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: 1st December 2021

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05350/2018(V)

THE IMMIGRATION ACTS

Heard at Field House (remotely via Skype)
On 17th September 2020

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

FAHAM JAFFER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma of Counsel, instructed by Thompson & Co Solicitors

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face-to-face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The documents were available in paper format on the

court file with additional documents available electronically at the end of the hearing.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Hanley promulgated on 10th July 2019, in which Mr Jaffer's appeal against the decision to refuse his protection and human rights claims, in the context of deportation dated 10 April 2018 was allowed (on human rights grounds only). For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Jaffer as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Pakistan who first arrived in the United Kingdom on 24th January 2004 with valid entry clearance as a student, with extended leave to remain to 31st January 2009. He then made an application for leave to remain as a post study worker which was initially refused but ultimately reconsidered with leave to remain granted to 26 April 2013. The Appellant was granted further leave to remain as a student to 30 June 2014, however this was curtailed to expire on 5 November 2013 following the revocation of his sponsors licence. The Appellant was granted indefinite leave to remain on 23 February 2014 basis of 10 years' continuous lawful residence in the United Kingdom.

4. On 1 June 2016, the Appellant was convicted of sexual activity with a minor and sentenced to 2 years' imprisonment. He then made a protection claim on the basis that he feared being killed on return to Pakistan by extremists because of his conviction and because he was no longer a practising Muslim. The Respondent issued a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002 in relation to the claim on the basis that the Appellant had been convicted of a particularly serious crime continued to pose a risk in the future.

5. The Respondent refused the application the basis that the Appellant would not be at risk on return to Pakistan for the reasons claimed and in any event there would be a sufficiency of protection and option of internal relocation available to him in Pakistan. The protection claim was therefore refused on asylum and humanitarian protection grounds and in part due to the section 72 certificate. The Appellant's medical claim was considered but the Respondent did not accept that it reached the very high threshold for breach of Article 3 of the European Convention on Human Rights. In relation to the Appellant's claimed private and family life, it was accepted that he was in a genuine and subsisting relationship with his partner, who was a British Citizen and that he had established a private life in the United Kingdom. The Respondent accepted that it would be unduly harsh for the Appellant's partner to relocate with him to Pakistan but it was not accepted that it would be unduly harsh on her to remain in the United Kingdom without him. The exceptions to deportation on private life were not met either and there were no very compelling circumstances to outweigh the significant public interest in deportation.

6. Judge Hanley dismissed the appeal on protection grounds but allowed it on Article 8 grounds in a decision promulgated on 10 July 2019. No more need to be said about the protection aspect of this claim which was dismissed and upon which there has

been no cross-appeal by the Appellant. In relation to the human rights aspects, the First-tier Tribunal found that the Appellant met the family life exception to deportation because the effect of his deportation on his partner remaining in the United Kingdom would be unduly harsh and the Respondent had already accepted that it would be unduly harsh for her to relocate to Pakistan with him. I return below to the reasons given for that finding.

The appeal

7. The Respondent appeals on two grounds. First, that the First-tier Tribunal materially misdirected itself in law, failing to recognise the elevated test and high threshold to be met for a finding that the impact of deportation would be unduly harsh on a partner. Secondly, that the First-tier Tribunal fails to give adequate reasons for finding this Appellant's deportation would be unduly harsh on his partner remaining in the United Kingdom.

8. As to the first ground of appeal, Mr Whitwell on behalf of the Respondent stated that although the First-tier Tribunal refers to there being an elevated threshold for the requirement of deportation being unduly harsh and correctly refers to the Supreme Court's decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; paragraph 123 contains an express self-direction which only refers to unduly harsh as being something more than undesirable or unreasonable and it was submitted that this significantly underplays the applicable test. It was further submitted that the Court of Appeal's decision in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 did not undermine the ground of appeal or the submissions made in relation to it, with the continued emphasis on them being a considerably more elevated threshold in the unduly harsh test, which is a much stronger emphasis than mere undesirability.

9. As to the second ground of appeal, it was submitted on behalf of the Respondent that the only reasons for the finding that the Appellant's deportation would be unduly harsh on his partner are contained in paragraph 124 of the First-tier Tribunal's decision. This contains four reasons, first that the Appellant was settled in the United Kingdom, secondly, that he was cohabiting with his partner; thirdly, that the couple were economically interdependent; and fourthly that the Appellant's partner was a sincere and truthful witness. These reasons are wholly inadequate to support the finding made. In particular, the rules for family life exceptions to deportation do not make any distinction as to whether a person is a settled migrant or not; the fact that the couple cohabit adds little if anything to the Respondent's acceptance that there was a genuine and subsisting relationship and is a requirement to meet the definition of a partner in any event; and it is hard to see why the credibility of the Appellant's partner is relevant to the test at all. Mr Whitwell suggested that the findings made by the First-tier Tribunal came very close to being perverse on the facts. The First-tier Tribunal's decision fails to identify any actual consequences of deportation on the Appellant's partner remaining in the United Kingdom, referring only to the fact that she would be devastated. There is no reference to any evidence

before the First-tier Tribunal of the Appellant being integral to his partner's business, in which she had been self-employed prior to the commencement of the relationship.

10. On behalf of the Appellant on the first ground of appeal, Mr Sharma identifies multiple references within the decision of the First-tier Tribunal to the elevated threshold for the unduly harsh test between paragraphs 122 and 126, with at least three references. The First-tier Tribunal has correctly identified the elevated threshold applicable and in substance applied it. The Appellant's rule 24 response continued to be relied upon.

11. As to the second ground of appeal, on behalf of the Appellant it was submitted that there was sufficient evidence before the First-tier Tribunal to show gravity of an impact which is sufficient to meet the elevated threshold of being unduly harsh, with the First-tier Tribunal making rational findings that were open to it on that evidence, with sufficient reasons being given. It is accepted that paragraph 124 of the decision sets out the majority of the reasons relied upon and Mr Sharma highlighted in particular the economic dependency of the Appellant's partner on him. Specifically, that the Appellant's partner no longer seeks recourse to public funds in the form of housing and council tax benefit following cohabitation with the Appellant and by implication she would need to return to seeking additional financial support if no longer cohabiting with the Appellant.

12. Mr Sharma referred to the written and oral evidence of the Appellant's partner before the First-tier Tribunal which gave details of the couple's relationship, the difficulties that she has found during and after his time in prison and which sets out the practical and financial support from the Appellant. The Appellant's partner stated that the Appellant's deportation would have significant effects on their relationship, their ability to start a family and would have an adverse emotional, financial and physical impact upon her.

Findings and reasons

13. The First-tier Tribunal sets out the legal framework for deportation in a section after paragraph 94 the decision, with reference expressly to section 117C of the Nationality, Immigration and Asylum Act 2002 and paragraphs 398 and following of the Immigration Rules. The relevant test for the purposes of this appeal, as to whether the Appellant's deportation would be unduly harsh on his partner, either by remaining in the United Kingdom without him or relocating to Pakistan with him to set out primarily in paragraphs 122 and 123 of the decision as follows:

"122. The issue in respect of paragraph 399(b) is whether it would be unduly harsh for the partner to remain in the UK without the appellant. The word "unduly" is required to be given its ordinary meaning and rule requires the appellant to establish something beyond what has been described as a "due level of harshness" (see both KO (Nigeria) esp at para 23 and MM (Uganda) esp at paragraph 24 which states:

> *"This steers the tribunal and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public*

interest in his removal, the harder it will be to show that the effect on his or her partner will be unduly harsh. Any other approach in my judgement dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation the particular case. In that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child a partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history."

123. I self-direct that "Unduly harsh" is something more than undesirable or unreasonable."

14. Whilst the reference to paragraph 23 of the Supreme Court's decision in KO (Nigeria) is correct, applicable and related to what is said by the First-tier Tribunal in paragraph 122 (albeit only referred to in part in this paragraph), the reference to paragraph 24 of MM (Uganda) is not, it having been expressly overturned by the Supreme Court given its reference to the assessment of whether something is unduly harsh by considering all relevant circumstances, including a person's criminal and immigration history. The reliance on and quote of this particular paragraph is an error of law and it is entirely unclear to what extent, if any, the First-tier Tribunal has relied on or applied this. There is no further express assessment of the wider circumstances or consideration of the specific offence committed by this Appellant, but it is of significant concern that the law is not clearly set out and express reference is made to a decision overturned by the Supreme Court, which cast significant doubt on whether the First-tier Tribunal understood the correct test to be applied and in fact applied it in this case.

15. Aside from the inclusion of an incorrect passage as to the test to be applied, it is a further error of law for the First-tier Tribunal not to expressly set out anywhere the actual test for whether the impact on a partner is unduly harsh, nor is there any clear or express reference to this being an elevated threshold. The First-tier Tribunal refer to giving the word unduly its ordinary meaning, beyond something described as the due level of harshness (which is as close as the Judge comes to specifically referring to an elevated threshold) and something more than undesirable or unreasonable. These references do not properly equate to the test approved by the Supreme Court in KO (Nigeria) (or as later explained by the Court of Appeal in HA (Iraq)). The self-direction in paragraph 123 in particular is closer to the meaning of "harsh" but not of "unduly harsh" and is not sufficient compared to the meaning approved by the Supreme Court in KO (Nigeria) set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) as follows:

"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."

16. For these reasons, the First-tier Tribunal materially erred in law by misdirecting itself as to the correct test for whether the consequences of the Appellant's deportation would be unduly harsh on his partner remaining in the United Kingdom (it already having been accepted by the Respondent would be unduly harsh to relocate to Pakistan). For this reason alone, the decision of the First-tier Tribunal must be set aside on Article 8 grounds (the decision on protection and Article 3 being unchallenged and being preserved), but in any event I also find an error of law on the second ground of appeal for the reasons set out below, which reinforces the lack of proper direction in law as to the test to be applied and its application on the facts of this case.

17. The only reasons given by the First-tier Tribunal when concluding that it would be unduly harsh for the Appellant's partner to remain in the United Kingdom without him are contained in paragraph 124 as follows:

"124. In my judgement, when all the evidence before me in the round and bearing in mind the more serious the offence the greater the public interest in the appellant's removal I have reached the conclusion that it would be unduly harsh for [the Appellant's partner] to remain in the UK without the appellant because the appellant is a settled migrant, and because he was settled at the time of their original meeting and because at no time during their relationship has his status been precarious and because the couple have lived together since October 2017 and because they are economically interdependent and because I regard [the Appellant's partner] to be an entirely genuine and sincere and truthful witness. As a result of their cohabitation [the Appellant's partner] has been able to terminate her housing benefit and tax credits claims and the couple support themselves without recourse to public funds. The appellant is involved in supporting his partner in a business. I have no doubt that the appellant is also an excellent employee in the estate agency which he works full time I found the evidence of [his employer] to be impressive. The appellant's employment has been entirely lawful because he is a settled migrant and the employer has stuck by him throughout the criminal proceedings and imprisonment. I have no doubt that the appellant and [his partner] genuinely intend to marry and that the impact of the appellant's removal on [her] would be devastating. I found [the Appellant's partner] to be a credible witness and I accept her account, because it was given with the ring of truth, because no inconsistencies emerged under cross examination and the very statements and records which she has produced consistently corroborate a picture of a committed relationship."

18. In the following paragraph the First-tier Tribunal refers to the Respondent's policy "Criminality: Article 8 ECHR cases version 8.0" published on 13 May 2019 which refers to it usually being more difficult for a foreign criminal to show that the effect of deportation on the partner would be unduly harsh if the relationship was formed while the foreign criminal was in the UK unlawfully or with precarious immigration status. In paragraph 127 the final sentence states that "the appellant is a settled migrant and the balancing exercise tips in his favour".

19. The First-tier Tribunal appear to have attached significant weight to the fact that the Appellant's relationship was formed at a time when he had settled status in the United Kingdom, by reference in particular to the Respondent's policy. There is no reference within section 117C of the Nationality, Immigration and Asylum Act 2002

to a person's immigration status for the purposes of the test in unduly harsh, although it is expressly part of paragraph 399(b)(i) that it is a requirement that the relationship with a partner was formed at a time when the deportee was in the UK lawfully and their immigration status was not precarious. In other situations, it has been consistently held that this part of the Immigration Rules and the statutory scheme are designed to mirror each other in substance, even though there are differences in wording. On this basis, the First-tier Tribunal's reliance on the Appellant's status at the time the relationship started goes no further than the basic requirements set out in paragraph 399(b)(i) of the Immigration Rules.

20. Further, the First-tier Tribunal relies on the Respondent's guidance about a person's status when the relationship was formed, which, in the context of what follows after the quote relied upon by the First-tier Tribunal, is a reference back to the factors in section 117B of the Nationality, Immigration and Asylum Act 2002. However, neither the statutory scheme the guidance gives any positive weight to such factors on behalf of an individual, to the contrary these are many factors which if not present (for example by a person not having settled status at the time of relationship was formed, not being able to begin not being financially independent) count against an individual by reducing the weight to be attached to family or private life, adding more weight to the public interest in removal or deportation. The First-tier Tribunal appear to have gone further and attached not only positive weight to the Appellant's settled status, but also significant weight to it when finding that the impact of deportation would be unduly harsh. There is no rational basis for doing so.

21. The second reason given by the First-tier Tribunal for the finding of deportation being unduly harsh is that the Appellant has been cohabiting with his partner since his release from prison. Although not expressly defined within the deportation provisions in the Immigration Rules or within the statutory scheme in section 117C of the Nationality, Immigration and Asylum Act 2002; a partner is routinely defined within the immigration context and for example within Appendix FM of the Immigration Rules, as a spouse, civil partner or a person who has been living together with another for at least two years prior to the date of application. The concept of cohabitation is to some extent inbuilt within the definition of partner. Against this backdrop, it is difficult to see how the fact that the Appellant and his partner cohabit is itself a reason why the consequences of deportation would be unduly harsh, at best only going to describe the nature or potentially the strength of the relationship. Even in the absence of a definition of partner including cohabitation for the purposes of section 117C of the Nationality, Immigration and Asylum Act 2002 specifically, there is no explanation as to why this means that the effect of deportation would be unduly harsh.

22. The third reason given by the First-tier Tribunal for the finding of deportation being unduly harsh is the economic interdependence of the Appellant and his partner, specifically by reference to the fact that she no longer claims state benefits for housing purposes. Even if, as Mr Sharma suggests, it can be inferred from the First-tier Tribunal's reasoning that the Appellant's partner would again have to have recourse to public funds if she no longer cohabited with the Appellant (upon which

there was no evidence before the First-tier Tribunal of her financial circumstances as at the date of hearing to support this) it is entirely unexplained as to why this of itself would result in consequences which are harsh on the Appellant's partner, let alone unduly harsh. The fact that public financial support is available would necessarily mitigate against a loss of joint household income resulting from the Appellant's deportation and only return the Appellant's partner to the position that she was in prior to cohabitation.

23. The fourth reason given by the First-tier Tribunal for finding that the Appellant's deportation is unduly harsh is that the Appellant's partner was a credible and truthful witness. That however offers no explanation as to the impact on her of the Appellant's deportation, whether this would be harsh or as required, unduly harsh. Even if this statement could be taken as a complete acceptance of the Appellant's partner's evidence to the First-tier Tribunal (which, at least as far as her written statement goes, has not been set out in the decision), that evidence does not go beyond assertion that the impact on her would be devastating, affecting her financially, physically and emotionally. There is no further explanation or identification more specifically of the impact on her, either in her own evidence, or more importantly, by the First-tier Tribunal.

24. Overall, the First-tier Tribunal fails to identify the impact on the Appellant's partner if she were to remain in the United Kingdom without the Appellant and offers no rational explanation as to why the impact would be harsh, let alone unduly harsh on the evidence before it or on the correct application of the test set out within the Immigration Rules and the statutory scheme which provides for an exception to deportation on family life grounds. The four reasons identified by the First-tier Tribunal include matters given significant weight when at best they are neutral or requirements of the exception itself; are not clearly relevant or reasons at all and when taken individually or cumulatively do not provide adequate or rational reasons for the finding of unduly harsh on the facts of this case.

25. For these additional reasons I find an error of law in the application of the test of unduly harsh consequences for the purposes of the family life exception to deportation and find that the First-tier Tribunal has failed to give adequate reasons for the conclusion reached. For these reasons it is also necessary to set aside the decision of the First-tier Tribunal on Article 8 grounds, with no preserved findings of fact in relation to Article 8 of the European Convention on Human Rights. As above, the First-tier Tribunal dismissed the protection and Article 3 claims, against which there has been no cross-appeal by the Appellant and those findings are preserved, the appeals remaining dismissed on protection grounds.

26. On 19 May 2020, the Appellant made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on further and updated evidence that the hearing before the First-tier Tribunal. That application was not relevant to any of the error of law issues raised, but contains documents which update previous evidence, and/or include evidence not previously available as it had been misplaced, and is therefore relevant to the remaking of the appeal to be

considered by the Tribunal. There was no objection to the application by the Respondent and the application to rely on this further material in the bundle accompanying the application, which extends to 118 pages is granted.

27. In all of the circumstances, there is detailed evidence available to the Tribunal in preparation for re--making this appeal and upon which only relatively limited further findings of fact are required in relation to the Appellant's private and family life and specifically on the issue of whether the impact of his deportation would be unduly harsh on his partner remaining in the United Kingdom. For these reasons it is appropriate to retain the appeal in the Upper Tribunal for re-making.

28. In light of the present need to take precautions against spread of Covid-19 and the overriding objective expressed in the Procedure Rules[1], I have considered the form in which it would be appropriate to list the further hearing. In anticipation of oral evidence from the Appellant, his partner and potentially other third parties (as was the case before the First-tier Tribunal), this case is more suitable for listing for a face-to-face hearing rather than a hearing by remote video means and I include listing directions on this basis below. If however there is any particular reason why a hybrid or remote hearing is required by the parties (for example because of any health or other vulnerabilities related to attendance during the outbreak of Covid-19), an application may be made for the same to the Upper Tribunal, accompanied by written reasons, which shall be determined and if necessary further listing directions given.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law on Article 8 grounds. As such it is necessary to set aside the decision on Article 8 grounds.

I set aside the decision of the First-tier Tribunal on Article 8 grounds only. The decision of the First-tier Tribunal on protection grounds and on Article 3 grounds is confirmed.

Listing Directions

(i) The appeal to be listed before any UTJ on the first available date on or after 1 November 2020, for a face to face hearing, with a time estimate of 2.5 hours.

(ii) Any further evidence the Appellant wishes to rely on is to be filed and served no later than 14 days prior to the relisted hearing.

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

(iii) Any further evidence the Respondent wishes to rely on is to be filed and served no later than 14 days prior to the relisted hearing.

(iv) The parties are at liberty, but are not required to file a skeleton argument, no later than 7 days prior to the relisted hearing.

No anonymity direction is made.

Signed *G Jackson* Date 21st September 2020

Upper Tribunal Judge Jackson