Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07735/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 23 August 2022	**On the 13 September 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

T D H (VIETNAM)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Keith Gayle of Counsel, instructed by Elder Rahimi Solicitors
For the respondent: Mr David Clarke, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 1 June 2018 to deport her to Vietnam, her country of nationality, and to refuse her further leave to remain on human rights grounds, by reference to section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended).

2. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any member of her family. **Failure to comply with this order could amount to a contempt of court.**

3. **Mode of hearing.** The hearing today took place face to face.

Background

4. The appellant was born in Vietnam in 1976 and came to the UK in 2004 with entry clearance as the spouse of a British citizen. They have a daughter, Child A, born in 2004. In 2006, she was granted indefinite leave to remain.

5. The couple lived in Hartlepool, near her husband's parents. The appellant's husband began working abroad, while she remained in Hartlepool, working part-time as a cleaner and looking after their daughter. Her mother-in-law would have the child once a week, so that the appellant could work.

6. The appellant's husband continued to work abroad, and it turned out that he was having an affair. The marriage failed, and the appellant took Child A with her to live in London, staying with a high school friend of hers from Vietnam. However, when her husband returned to the UK, he insisted that she bring Child A back to Hartlepool, and the appellant agreed to his having custody of their daughter. The divorce became final in 2007.

7. The appellant's ex-husband returned to working abroad at some point, with his parents looking after Child A. He died suddenly in Singapore in 2015, after which her grandparents brought up Child A, with a court order giving them full parental rights. She was only 12 then and she refers to them as 'my parents'.

8. Meanwhile, the appellant had incurred substantial gambling debts and was in difficulty in London. In 2006, she met her current partner, a British citizen of Vietnamese origin. They have had an 'on and off' relationship since then, but have never married. They met in London, but her partner lived in Derby, where he was working as a bus driver. The appellant became pregnant with Child B, who was born in late 2007. She moved to live with her partner in Derby.

9. In July 2010, the appellant and her partner were arrested for cannabis growing and both pleaded guilty. The appellant was sentenced to 1 year in prison, and her partner to the lesser sentence of 9 months. Her partner's brother looked after Child B until he was released, and then her partner cared for the child for the rest of the appellant's 4½ month imprisonment, before she was released on licence.

10. The appellant did not appeal either the sentence or her conviction. On 15 December 2010, the appellant was notified of liability to automatic deportation. She was given a pre-deportation questionnaire to complete and on 21 February 2011, the Secretary of State decided not to pursue deportation. On 22 February 2011, the appellant was served with a deportation warning letter.

11. After completing her licence period, in 2012 the appellant moved back to London. She was gambling heavily, and working part time as a cleaner. The appellant was involved again in cannabis growing and supply, on an industrial scale, and on 10 April 2014 she was arrested, with five other men who were involved in the organisation. The appellant entered a very early guilty plea and was convicted on 19 August 2014 at Nottingham Magistrates' Court of conspiracy to supply a controlled Class B drug (cannabis).

12. The appellant's second son, Child C, was born in March 2014. Although he was very young, the appellant had to give him up at 30 days old, when she was arrested. During her imprisonment, her partner looked after both boys, with significant levels of support from Social Services, a single father's group, Child B's school and other parents.

13. In his sentencing remarks in March 2015, Judge Stokes QC found the appellant to have been at or close to the top of the cannabis production enterprise. He noted that she had an older daughter, whom she did not see, and two young sons aged 7 and 1, who were being looked after by a boyfriend.

14. The appellant had been travelling round the country with large sums of money, and gambling large amounts, mainly unsuccessfully. Even giving credit for her guilty plea, the Judge sentenced the appellant to 56 months' imprisonment (reduced from 7 years, aggravated by the 2011 conviction). He stated that the appellant's continued presence in the UK was not conducive to the public good.

15. On 6 May 2015, the appellant was issued with a decision to deport her. She submitted further representations, supported by a letter from the Mental Health Team at HMP Peterborough regarding her low mood. Other evidence and representations were submitted. A deportation order was signed on 11 August 2016.

16. The appellant's asylum and human rights claims were rejected on the same date, with a certificate giving her only an out of country right of appeal which was subsequently withdrawn, following the decision of the Supreme Court in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42. The appellant has, and exercised, an in country right of appeal. She has not offended again since her release from prison in 2016.

17. On 19 August 2016, the Salvation Army referred the appellant to the National Referral Mechanism on the grounds of possible modern slavery. Following a positive Reasonable Grounds decision, and further representations and investigation, on 28 March 2017 the respondent served a negative Conclusive Grounds decision. In her decision, the respondent conceded that the appellant might have entered into criminal behaviour to pay off debts incurred by taking loans to fund a gambling addiction.

18. Following further representations by Bail for Immigration Detainees and the appellant's current solicitors, when reporting on 20 June 2017, the appellant was served with the Conclusive Grounds decision, which she had earlier failed to collect.

19. On 5 October 2017, the respondent issued a notice pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 (as amended), giving the appellant 20 working days to rebut the presumption that her continued presence in the UK constituted a danger to the community. Her solicitors, Elder Rahimi, did not send a reply to that notice.

20. On 1 June 2018, the respondent refused the international protection and human rights claims.

21. The appellant appealed to the First-tier Tribunal on asylum and human rights grounds, and also sought to rebut the section 72 presumption.

First-tier Tribunal decision

22. After setting out the background, First-tier Judge Black found that the appellant had been convicted of an offence of conspiracy to supply a class B drug. She began by considering the section 72 certificate, as she is required to do. The First-tier Judge discharged the section 72 certificate, finding that the appellant had rebutted the presumption that she was a danger to the community of the UK now.

23. The First-tier Judge then considered the asylum claim. She found the appellant's evidence to be evasive and lacking in credibility. She noted the criminal Judge's sentencing remarks, 'that there was overwhelming evidence to show that the appellant played a major role in the supply of cannabis'. The Judge rejected the international protection account, concluding that:

> "22. … The appellant has not established a Convention reason. Having considered all the evidence in the round, I conclude that the appellant has failed to show that she faces any risk on return to Vietnam on protection or human rights grounds. The Article 3 claim on medical grounds fails to meet the high threshold, as there is evidence to show that the appellant would be able to receive appropriate treatment and care in Vietnam for her mental ill health. It was acknowledged by Mr Gayle that this aspect of the appeal was not strong."

Those findings were preserved in the error of law decision.

24. The Judge then considered Article 8 ECHR and the effect of removal on the appellant's children. She noted that the details of background and family history in the appellant's witness statement were undisputed, that she had lived in the UK for a long time and been granted indefinite leave to remain. Her partner, although of Vietnamese origin, was a British citizen, as were all three of her children. It would be unduly harsh for the appellant's partner and children to move to Vietnam, or to expect the children to go there with her.

25. The Judge considered the appellant's relationship with Child A, who was then 16 years old and living with her grandparents in a different city. Contact and communication was maintained by FaceTime and the Judge found that family life did not exist between mother and daughter.

26. The appellant's partner was said to have epilepsy and also breathing problems (sleep apnoea) requiring the use of a CPAP at night. He was taking no treatment for his epilepsy, and a June 2019 diagnosis of polycythaemia (raised levels of red blood cells in his blood) did not refer to any difficulties in his daily life or ability to work. The Article 3 ECHR threshold was not reached.

27. If the appellant were removed, the appellant's partner could care for the children, as he had when the appellant was in prison, perhaps with the help of his brother, who lived in London and had helped before.

28. The decision continued:

> "23. …I find that the appellant's partner has travelled to Vietnam in the last 10 years to visit family and/or for business, and there would remain a possibility of visits to see the appellant. There was no evidence from any independent social worker to show that there would be significant detriment to the children, beyond the normal level of hardship experienced by families in the event of a deportation. I fully accept that the children would suffer distress and emotional harm, but it is lessened by the fact that they have previously experienced her absence from the family home. The appellant was in a position to refrain from further offending since 2010 and she was fully aware of the warning from the respondent as to deportation. The children will remain with their father in the family home and will not face disruption to their lives in terms of education or social life. …"

29. The Judge found that it would not be unduly harsh for the children to remain in the UK without their mother. She had been sentenced on a second offence to 56 months for a serious offence relating to the supply of drugs, in which she played a major role. There was no evidence before the First-tier Tribunal to indicate that she had addressed her gambling problem, but the Judge accepted that the appellant presented a low risk of reoffending and was no danger to the public.

30. The Judge also accepted that the appellant was presently the primary carer for her younger two children, although her partner was working part time and could assist her with them. The appellant had not established

'very compelling circumstances' over and above the exceptions in section 117C of the 2002 Act, albeit referred to in the Judge's decision by reference to paragraphs 399 and 399A of the Immigration Rules HC 395 (as amended), which apply the same test.

31. The public interest in the appellant's deportation was not outweighed by the interference in her Article 8 ECHR rights, and the appeal was dismissed.

32. The appellant appealed to the Upper Tribunal.

Permission to appeal

33. There were two proposed grounds of appeal:

    (1) Flawed 'very compelling circumstances' analysis in Article 8 assessment; and

    (2) Erroneous adverse credibility findings.

34. Permission to appeal was granted by Upper Tribunal Judge Blundell on Ground 1 only:

> "The first ground is just arguable, having regard to the recent decision of the Court of Appeal in *HA (Iraq)* [2020] EWCA Civ 1176. It is arguable, in particular, that the Judge failed to consider the situations of the two children, aged 6 and 12, separately when concluding that they had experienced lengthy separation from their mother in the past. Whilst that conclusion was probably correct in respect of the older child, it was arguably flawed in respect of the younger one, who was very young indeed when the appellant was in prison.
>
> The first ground also asserts that the Judge failed to assess the weight of the public interest in the appellant's deportation, which is not a fixity. For my part, I doubt that the Judge should gauge the weight of the public interest in deportation by reference to anything other than the length of the sentence imposed. Were factors such as the decriminalisation of cannabis in other countries a permissible matter to consider, the task of the First-tier Tribunal would become impossibly difficult. It is nevertheless arguable that the Judge failed to consider what weight should be attached to the public interest in this particular case, as required by *MS (Philippines)* [2019] UKUT 122 (IAC) and it is appropriate, in the circumstances, to grant permission on ground one only."

35. Judge Blundell rejected Ground 2, which he considered amounted to nothing more than disagreement with the Judge's findings. The Judge's negative credibility finding therefore survives.

Rule 24 Reply

36. In her Rule 24 Reply, the respondent submitted that the First-tier Judge had considered properly the personal situation of all three children, in particular the younger two, their respective ages and the inevitable

adverse impact that the appellant's absence would have on them. The First-tier Judge had given cogent reasons for finding that any impact on the children was minimal, given the appellant's lengthy absence from her children.

37. As regards the Court of Appeal's decision on *HA (Iraq),* the facts of this appeal were distinguishable. The First-tier Tribunal's consideration of the unduly harsh test was sufficient and the grounds were no more than a disagreement with the outcome of the appeal.

Procedural history

38. Standard directions were issued by PRJ O'Connor on 9 November 2020.

39. By a decision sent to the parties on 9 April 2021, Upper Tribunal Judge Owens made an anonymity order to protect the children involved, and set aside the decision of the First-tier Judge at [23]-[25], relating to Article 8 ECHR private and family life and the deportation decision.

40. On 10 August 2021, the hearing was listed for substantive remaking but was adjourned at Mr Gayle's request, to enable him to obtain further evidence on the following matters:

    (1) Further medical evidence about Child A's mental health and self-harm, and copies of any relevant text messages or other communications between Child A and professionals;

    (2) Any relevant evidence from Child A's school about previous difficulties due to mental health;

    (3) Evidence in relation to Child A's role as a young carer and her grandparents' poor health (if obtainable);

    (4) More evidence on the chronology, history and frequency of contact between the appellant and Child A, including evidence of visits etc;

    (5) Further evidence from the appellant in relation to domestic violence, including a report from the Domestic Violence worker;

    (6) Reports/letters in support from any other professional who assists the appellant or the family;

    (7) Up-to-date medical evidence in relation to the appellant's partner's epilepsy and the effect on his ability to work;

    (8) Up-to-date evidence about the polycythaemia with which the appellant's partner had been diagnosed;

    (9) Evidence from the brother of the appellant's partner about his ability to assist in looking after Child B and Child C, including details of his family situation, employment and so on, with any supporting evidence.

41. By a direction on 30 May 2022, Acting Principal Resident Judge Kopieczek made a transfer order enabling the appeal to be heard by a different

judicial panel, as it was not practicable for the original Judge to complete the hearing or determine it without undue delay.

42. That is the basis on which this appeal came before the Upper Tribunal.

Evidence before the Upper Tribunal

43. We heard oral evidence from the appellant, her current partner, her daughter (Child A) and her older son (Child B). Child C was still too young to give evidence. We received a bundle of documents (the consolidated bundle), which included a skeleton argument on the appellant's behalf, and two supplementary bundles. Despite a direction to that effect, there was no skeleton argument for the respondent.

44. We have had regard to all the oral and documentary evidence which was adduced, in particular the evidence to which the parties referred during the hearing. Unfortunately, almost none of the additional material which on 10 August 2021 Mr Gayle told Judge Owens he could or would seek to obtain, and which was the reason for the adjournment on that day, had been obtained for the remaking hearing. In oral evidence, both the appellant and her partner denied being aware that it was needed.

45. We do not set out the school evidence, which is uncontentious: both boys are doing well at school now, and Child A is also making good progress. There is no current medical evidence about the appellant or her partner, and very little evidence overall about their health. We have considered the independent social worker's report below.

Independent social worker evidence

46. For the hearing today, there was an independent social worker report. Ms Nikki Austin conducted a remote video link assessment, with the appellant, her partner, and her three children on 11 July 2021 and her report is dated 26 July 2021. There was no interview with either of Child A's grandparents, with whom she was living, and who had full parental authority for her following a court order.

47. Ms Austin was tasked with assessing 'the family life, bonds and links' between the appellant and her three children, 'detailing the best interests of the children not to be separated from her, in the long-term, and the impact [her] removal from the UK will have upon her children's emotional wellbeing and development'.

48. The appellant's partner told Ms Austin that when the appellant was imprisoned for the second time, he needed help coping with the two boys. Social Services referred him to a support group for single fathers, who helped him to obtain benefits and housing, to access activities and groups for the children, and to make friends with other fathers and their children. The children's school staff and other parents were supportive, giving him toys for the boys, lifts to and from school, and arranging playdates at the park.

49. The appellant's partner appreciated all this support but the boys still really missed their mother, and cried a lot while she was in prison. Child B had difficulty sleeping and would constantly ask for his mother. The boy would try to contain these feelings, but the appellant's partner would find him crying privately in his room at night.

50. After setting out the history of the appellant, her families and her children, Ms Austin recorded the recent closeness between Child A and her mother, connecting her to her half-brothers and the appellant's present family group, and the extent to which Child B missed his mother when she was away. Child C was too young to contribute: he sat on his mother's lap and sometimes cried, particularly when he learned during the meeting (apparently for the first time) that his mother might be deported.

51. Child A had a particularly difficult time. In 2015, when her mother went to prison, her father, who was then living in Singapore, died suddenly. She was only 12 when these events happened. Child A would have been entering adolescence at the time. Her grandparents were caring for her but they offered no emotional support: they also prevented her from seeing her half-brothers and stepfather. Her grandfather had developed Alzheimer's disease, and her grandmother was having her memory tested, her mental health having been affected by the death of her son, Child A's father.

52. Child A's grandparents lived in Hartlepool, near Newcastle, and she experienced racist comments at school as the area was a deprived one, with a predominantly white ethnicity. She wanted to learn more about Vietnam and her mother's culture, listening to Vietnamese music to feel closer to the culture and her mother. She had no other contact in the Vietnamese community and felt she was losing half of her cultural heritage.

53. Three or four years after losing contact with both parents, Child A was experiencing depression and feeling very low at times. She tried to access counselling to help her deal with these events. The first two organisations to which she was referred were not helpful, and she stopped going after a while. She continued to look for counselling to support her: she had now been referred to Impact on Teesside, an organisation which provided 'life changing support and services to those struggling with depression, stress, anxiety and other mental health difficulties'.

54. Child A was worried about her grandparents. Her grandfather was 'very poorly' and she was worried that she might be prevented from seeing her family again. The only good thing in her life was her boyfriend. She wanted to be able to see her family more, as 'people disappear from her life and she wants to keep the relationships she has'. She wanted to be happy.

55. Child B worried that he might not be able to have fun or laugh, that he would wake up one day and not see the people he loved: he did not want

to relive that. He was enjoying 'waking up and living the day…eating as a family again…talking to my family and laughing again'. He looked forward to a fun job and fun chats with his family.

56. Children at school teased Child B about not having a mother, which naturally upset him. He became quiet and shy, and would play by himself, but now she was home, was more sociable with others at school. Child B blamed himself for what had happened and wanted to do all that he could to ensure that his mother did not leave the family again.

57. Child C just said he wanted his mother to stay and take care of him.

58. Ms Austin concluded that the removal of the appellant would have a severe impact on the quality of her relationship with her children: 'Although the children have [been] and are supported by extended family members in the UK, [the appellant's] absence is not mitigated by the presence of these extended family members'.

59. In her conclusions, Ms Austin said this:

> "The family is made up of mother, father, their two children and a child from a previous relationship. [Child A] is somewhat separated and isolated from her family, but she is just as emotionally invested. There are many layers in this case that work together to have an effect on the children's future emotional health and wellbeing. The factors at play are interwoven, such as [Child B's] feelings of guilt impacting his self-esteem, behaviour and in turn his education.
>
> I will start by saying that all three children have already suffered a series of [adverse childhood events] that place them in a vulnerable position in terms of their future development. It concerns me that [Child A] is a, soon to be young woman, who has experienced a great deal of trauma. She seems to have displayed a certain level of resilience to date, however she has vocalised her struggles and is asking for help. She has felt low in mood, depressed and at crisis point. It is my concern that the same trajectory could exist for [Child B and Child C] should their mother be deported. [Child B] is around the same age that [Child A] was when she experienced two life-changing events, the death of her father and her mother's incarceration.
>
> Should [the appellant] be deported, [Child A] would be left with very little family connections. Her grandparents are elderly and in poor health, should she lose them she will need the support of her maternal family, something that would be lacking in [the appellant's] absence. Additionally, should [the appellant] be deported, [Child A] loses the connect with her maternal family and risks further challenges with her identity.
>
> Both [Child A and Child B] were able to tell me how they felt, they both spoke about their love for their mother, the close bond they share with her, their anguish at being separated from her, and their fear of history repeating itself. Adolescence is an impressionable age and my concern for [Child B] would be that when he withdraws and internalises his feelings, he becomes vulnerable to contextual safeguarding difficulties outside of the home, formed at school, in the community, online, that can be negative, abusive, exploitive [sic].

> Should [the appellant] be deported, the people who lose out most are [Child A, Child B and Child C], the effect of which, research I have referred to in this report, informs us would likely last long into adulthood.
>
> It is evident that [the appellant's partner] struggled to care for his sons when [she] was in imprisoned [sic]. He relied on support from external agencies, and it is my assessment that this support, if still available, would be needed once more, but perhaps on a great scale. …
>
> Given what I have assessed, it is my assessment that it is not in the best interest of [Child A, Child B and Child C] to be separated from their mother once more. …it is my assessment that [they] will be significantly negatively affected by their mother's removal from the country. …"

Upper Tribunal hearing

60. At the beginning of the hearing, the parties agreed with the panel that, neither judge on the present panel having been present at the previous hearing, it would be appropriate to restart the hearing afresh, although it was previously part-heard before Judge Owens. We are seised only of Article 8 issues in relation to the three children.

61. In August 2021, Judge Owens ordered that the scope of the remaking should be dealt with as a preliminary issue on the next occasion. In the event, that was not necessary, given Mr Gayle's confirmation at the hearing that the international protection issues were not before us. The negative credibility finding in the First-tier Tribunal stands, subject to the evidence which the Tribunal heard when the witnesses gave their evidence.

Appellant's evidence

62. The appellant adopted her witness statements of 20 March 2020 and 26 July 2021. In her first statement she said that she used to work as a tour guide in Vietnam, which was where she met her husband, a British citizen. Her daughter from her marriage, Child A, was born in Vietnam in January 2004 and is now 18 years old. The younger two children, from her second relationship, were born in October 2007 and March 2014 and all are British citizens.

63. During her marriage, she stayed with her husband and looked after her daughter while her husband worked abroad. They lived in Hartlepool, near her parents-in-law. The appellant worked one day a week and her mother-in-law looked after Child A. She began to gamble and ran up debts, first from the people she worked with, and later from people in the casino. Her husband started seeing another woman from Malaysia or Indonesia and the marriage broke down. After that, she had difficulty making the loan repayments, and moved with her daughter to London.

64. The appellant confirmed the account of her first conviction, and her relationship with her current partner and their two children. Much of the rest of the account given in this statement was not believed and no

challenge to it is before us today. The appellant said that she would speak with Child A in Hartlepool, every day. She was the primary carer for her younger sons. Her partner had numerous, serious health problems and the boys would suffer terribly if the appellant were removed.

65. In her second statement, the appellant said that the thought of being separated from her sons was horrific for her. She referred to the many letters from Child B about the traumatic experience of separation from her. The youngest, Child C, had not been able to visit her in prison but had been very upset during the consultation with the independent social worker. She feared that her current partner might die in his sleep, given his epilepsy and sleep apnoea, as well as his recent diagnosis of polycythaemia, which she described as a type of blood cancer.

66. Child A, her daughter, was now of age. They spoke regularly on the telephone, and she often came to visit and stay with the family in London. Her paternal grandparents were increasingly frail, and her daughter worried that she would lose both them, and the appellant. Her current partner's health had deteriorated and he would have even more difficulty coping than he had when she was in prison before.

67. The appellant volunteered at the school of her youngest child and said that she was trying to get on with her life and be a good citizen and mother. The strain of her circumstances made her depressed and she was prescribed Mirtazapine to help with that. The appellant also had numerous physical health issues, caused by the stress she was under. If she were to be deported, her whole family would be turned upside down and it would not be fair to her children.

68. There were no supplementary questions and the appellant was tendered for cross-examination.

69. The appellant was asked about the stability of her relationship with her partner now, which had been described as 'on and off' in the past. She said that it had been stable for 5-6 years, after she came out of prison in 2016.

70. In response to questions about the support which could be expected from the appellant's partner's brother-in-law, who had been helpful when she was in prison in 2011, the appellant said that he would not help now: he had his own problems, and he now had three children. The independent social worker report referred to the brother-in-law's family visiting with his three children on special occasions, but the appellant denied that this happened now.

71. Her brother-in-law had moved 'very far away', but she was unable to say where, and had only visited his new home area once. She did not communicate with her brother-in-law and his family too much: she did not know whether his children had taken their 'A' levels and GCSEs yet.

72. Her brother-in-law worked hard. She did not know what his job was. She had heard that he was a pharmacist, but she really did not know. He had three children now, but he no longer brought them for visits. The appellant was not related to him and they did not communicate much: both families had children now and there was no time to do other things like socialise as a family. The brothers did care about each other, but were not really compatible.

73. Her brother-in-law's income was not too much and he was trying his best to support his own family. He lived too far away to come straight over and help her partner, because he now had three children, not one, and had his own wife and children to look after.

74. The brother-in-law had not provided a witness statement or attended the hearing. He was working, his wife was looking after their children, and she had not wanted to make him take the day off. Her brother-in-law and his family had a hard life, and a lot of difficulties. The Tribunal should ask her partner.

75. She was asked about her partner's work. She did not know how to describe it: he worked part time, finding shops for his company, an accountancy company. He was an employee, but she did not know the name of the company.

76. The appellant was asked to explain the absence of any evidence about her partner's epilepsy. She said she had asked him to deal with it, and he had gone to Kings Cross Hospital but been unable to get confirmatory evidence. Her partner was reluctant: his job involved driving and he needed a clear medical report to go to work. The appellant was asked how, given that her partner was said to have had epilepsy from childhood, he could have been working as a bus driver in Derby as he had been when she met him. She said that was what she had heard from his family. He was already a bus driver when she met him and she could not stop him doing his job.

77. She was asked about Child A's boyfriend: despite the regular contact which she asserted she had with her daughter, the appellant said that she had heard that her daughter had a boyfriend, but was not sure. She was then asked about the Alzheimer's and dementia diagnoses which Child A's grandparents were said to have. She said they had 'lost [their] memory completely' but that she did not have permission to get evidence from them. She had asked for it.

78. The appellant was taken to the grandmother's letter of support in the second supplementary bundle, which did not mention any ill health. The appellant said the letter had been written last year; the grandfather's problems were long-standing, but the grandmother's were recent. It was pointed out to the appellant that the letter, although undated, had been served in March 2022, but she said it was supposed to support the previous hearing.

79. The grandmother was too unwell to write a letter now. She could still take care of herself: she had support from Social Services. The appellant was asked whether Child A needed to provide care for her grandparents. Despite the question being repeated twice, she did not answer it. Instead, the appellant said that 'we need to arrange things, balance our life and our work'.

80. She had not asked the grandmother to give evidence at the hearing, or to provide any more information, because she believed it to be unnecessary, despite the directions given by the Tribunal in August 2021. Child A had been two years old when she began living with her grandparents, and had lived with them for 16 years.

81. Asked about her relationship with the grandmother, the appellant said they had a good relationship. There was a court direction limiting the contact between the appellant and Child A to 3-4 days a month. When Child A was younger, her grandmother would accompany her on visits to her mother, and the appellant made them very welcome on those occasions. However, when the appellant went there, the grandmother was not welcoming. The grandmother did not want the appellant to have a close relationship with Child A.

82. Now that Child A was of age, she came to visit by herself, visiting for a week, or two or three weeks, every two or three months, depending on her availability. She got on well with the appellant's partner, who considered her to be his daughter, but there would be practical difficulties in his looking after her. The appellant was a bridge, connecting all the children and her partner together. The mother's position in a family was very important, connecting all the family together.

83. The appellant was asked about two letters from the charity Refuge, on 20 November 2021 and 19 August 2022, referring to domestic violence from her current partner. She said that it had occurred in 2016, right after her release from prison, and again later, when they were both very stressed because they had no jobs. Her partner had a hot temper and could be violent, not physically but mentally. He was not normal: whatever she did, he was unhappy with it. He wanted the appellant to work, not play with the children or do sewing.

84. The appellant was asked about a reference in the August 2022 letter to a further referral to Refuge in June 2022, and why that evidence was not before the Tribunal. She said that she remembered that there was evidence: she had been extremely stressed at the time and the 'psychologist doctors' referred her. The mental health team were no longer able to support her. This latest referral to Refuge was not linked to domestic violence but just to that stress. The family had prepared for hearings on several occasions which were then cancelled, which had been a strain.

85. The appellant had produced letters indicating a referral for counselling in February 2022, but nothing about the outcome. She blamed her solicitors: she had sent the evidence to them. She had produced no recent evidence about her medication but said she was still taking Mirtazapine. She had provided evidence about her sciatica, but nothing about her mental health issues.

86. The appellant said that she really did not want to use the mental health evidence, the main reason she wanted to remain in the UK was to be with her children, and she wanted them to see her healthy. She 'really did not understand' what evidence the Tribunal was expecting.

87. Child B was doing well at school, despite his early trauma. He was not having any counselling or intervention in relation to her leaving the UK. In the appellant's family, they always avoided counselling: they did not want the children to feel that they had mental health problems arising out of separation from their mother. The youngest, Child C, was also doing well and requiring no intervention.

88. In answers to questions from the Tribunal, the appellant confirmed that the grandparents in Hartlepool had been looking after the Child A for 16 years. She was asked whether she might have made an error as to the date of the grandmother's letter of support, which mentioned 16 years: the appellant said she was sure it was written in 2021 (when the period would have been 15 years) and that the grandmother had lost her memory even then, which appeared to contradict her earlier evidence that the grandmother's problems were recent.

89. In re-examination, the appellant was asked whether her brother-in-law had helped care for the children during her second imprisonment from 2014-2016. She said no, his family had started having babies by then.

Partner's evidence

90. The appellant's partner adopted his witness statements of 20 March 2020 and 26 July 2021. In his first statement, the partner said he had been born in Ho Chi Minh City, Vietnam, in 1971 and was now a British citizen. He moved to the UK with his cousin, his younger brother and his grandmother, to join his aunt here.

91. He met the appellant at a friend's house in London in 2006. She was very unhappy: she was not living within the Vietnamese community: she told him about her first husband, who was British. He had told the appellant that he would let her go home to Vietnam once a year, and stop working overseas, but her partner felt she had been tricked because that did not happen.

92. The appellant moved to live with her partner in Derby, where he worked as a bus driver for 5 or 6 years. He owned his own house, and they lived together there. She became pregnant with Child B. One day in 2007, the

partner came home and found the cannabis farm in her home. The appellant cried as he destroyed everything. She told him about her gambling debts. He destroyed the crop twice, but she begged him to stop, saying that their lives and that of their child were at risk. He allowed the cannabis to be grown.

93. Three years later, the police discovered it and arrested them both. They were convicted and he begged his brother to look after Child B, which he did, for 10 weeks, albeit reluctantly. In March 2014, they had their second son, Child C.

94. The partner said he had epilepsy, and had done since childhood. He took no medication for it 'as it makes my head feel uncomfortable'. Sometimes he bit his tongue in his sleep. He would be tired, with very heavy limbs. He had seen doctors, who had tried to persuade him to take medication. He had been discharged by the clinic when the appellant was in prison because he could not attend the hospital appointments without bringing his children to the hospital. The GP had re-referred him. The partner was also awaiting investigations and treatment for his polycythaemia.

95. Social Services provided tickets to enable the family to visit the appellant in prison. He took both children and it was 'the best thing' for Child B, who was missing his mother badly. The journey took about 10 hours each time, and on one occasion, they arrived very late and were sent home. Child B was devastated. He had been through an awful lot for his young age, and Child C was also very attached to the appellant.

96. The appellant was 'the shell of the woman I met', with mental health problems, and often screaming at night. She struggled with not seeing her daughter and had a lot of fears related to her gambling debts and the criminal gang to whom she owed the money. Because of her partner's health, the appellant was the primary carer for the boys. His brother was not prepared to help again: he had his own life and a full time job, and had made that very clear.

97. In his updating statement in July 2021, the partner said that the appellant's second incarceration was an awful time for him. Child C was very young and not aware of what was happening, but Child B was very upset, missing his mother terribly. The stress on the partner affected the baby too.

98. Social Services helped him get some respite. They put him in touch with a charitable support group for single fathers, which helped. They organised activities for the children in the summer, and theatre trips at Christmas. He made friendships with some of the other fathers. He received financial help to enable him to take the boys to visit their mother in prison. The head teacher and the other teachers at Child B's school went out of their way to be supportive. Child C was at the same school now. He had some support from a food bank.

99. Child C was now aware that his mother might be deported and had become upset and clingy. When he discovered the situation during the independent social worker meeting, he was very upset. He could not speak and just kept crying.

100. The partner was tendered for cross-examination. He confirmed that his work was finding clients for an accountancy firm. He and the appellant shared the childcare: she had a lot of appointments to attend. The partner's income was their only income: he earned £658 in July 2022. He would like to work full time but the children were too young and he needed the appellant's support. He was not prepared to contemplate any other childcare arrangement, although the children were both at school now. He had never used after-school care, so he did not know how it worked.

101. The partner confirmed that while the appellant was in prison, he had been capable of looking after the children, both in 2011 and in 2014-2016. His brother was living in Finsbury Park in north London, but was quite busy with his job, so he did not visit them with his children now. The visits on special occasions no longer happened. The two brothers no longer communicated much, and after Covid-19, they hardly visited each other. His brother would not be able to help him this time.

102. The partner could not remember the ages of his brother's children. The eldest had just completed year 12, and the second was in year 12 now. The youngest was in year 6 or 7. The eldest was going to University. His brother had written a witness statement, but was not prepared to help again: they 'only care about ourselves independently'.

103. His brother had just opened a new business selling food and had not been able to take time off work to come to the hearing. He had finished with pharmacy work now.

104. The partner agreed that they had both been to prison for the cannabis production in their home, in 2010. He did not know of the activities which led to the 2014 imprisonment because they were not living together then. He had no idea who was looking after the children in 2014-2015.

105. The partner was reminded of the Judge's sentencing remarks, which described the appellant travelling around the country with large amounts of cash. He did not know how she managed her childcare: he was homeless at the time and they were not communicating, due to relationship problems. It was pointed out that Child C was born in 2014, suggesting that they were in contact in 2013.

106. The appellant's partner said they were 'on and off': he had been taking care of Child C since he was young, but was not sure if the boy was his biological son. When the appellant was arrested in 2014, and Child C was just 30 days old, she telephoned her partner and he took care of the baby. He had taken care of him from then to now. His name was not on Child C's

birth certificate but he had never had a DNA test: the appellant's partner did not know whether the younger boy was his own son.

107. The partner said that there was evidence about his epilepsy: he had been admitted to the Kensington and Chelsea Hospital after a fall, when he injured his head. He had been to King's Hospital 'so many times'. He could not remember when and did not know why the GP had not provided evidence or mentioned his epilepsy.

108. He had been able to work as a bus driver in Derby because his seizures came only at night, when he was sleeping, never during the day. He did not know he was supposed to provide more evidence about his health, in particular his polycythaemia. When asked whether he was able to work with the polycythaemia, the partner said 'I really don't know'. He had not been aware of his sleep apnoea until it was diagnosed, but now he had a CPAP machine, which showed that he stopped breathing 30 times a night. He was better now he had that device. Before the CPAP, he used to get daytime headaches, but now he did not.

109. In relation to Child A, the appellant's partner said they had a good relationship. Previously, he would pick her up any time grandmother allowed her to visit, but her grandmother did not like her visiting. Now she was an adult, the only problem was money. When he earned enough, he would buy Child A her ticket and she would visit.

110. Asked to confirm that he had no medical problems which would prevent him looking after the boys, the partner said 'I really don't know anything at the moment'. The boys' schools were 5-7 bus stops away. Child B travelled alone now: the partner accompanied Child C, who was too young to travel alone. Child B was much happier now his mother was home. At his previous school, he had been teased for having no mother, and would be very upset at night, crying all the time. He had been isolated at school, keeping to himself. Now he was studying much better, talking to his teacher and his friends, and much more confident.

111. A man raising children could never be as good as a woman, which was why a mother's function was so important. The single fathers' group which had helped the partner before was no longer operating, he did not know why. He had tried to go again, when Child B was still in a pushchair, but they said it was closed. In any case, they had not been much support: they 'took me to whatever, because I did not know anything. Ongoing support had been refused because of the prison sentence, he thought.

112. Social Services had closed his case and now would not answer the telephone to him, again, he did not know why. He was sure they would not help in future. That is what he had been told at the town hall, when the appellant was in prison.

113. Mr Clarke suggested that the appellant's partner had changed his story to assist her. He denied that.

114. In answer to questions from the Tribunal, the partner said that they had been in a relationship, on and off, for 16 years. In 2019, they were on. On paper, he was a single father, as they had never married.

115. In re-examination, the partner said that his brother had not helped him with the boys during the second sentence. They had their own lives. He had not had an interpreter when he saw the doctor in June 2019.

Child A's evidence

116. Child A adopted the letters she had written to the Tribunal at various times as her primary evidence. On 18 August 2020, she wrote to say that she was concerned about her mother. She was watching her health deteriorate and feared the worst. Family should help one another, and she would be unable to help her mother if she left. She was concerned also about her own health and that of her brothers. Robbed of their mother, they would have mental health issues. Her brothers were very young and did not deserve to have this happen.

117. She had lost many family and friends, beginning with her father's death. She feared her grandparents had limited time with her. Taking away her mother would deprive Child A of her last chance of a family and she would be left with virtually nobody. She would struggle substantially. She needed her remaining family.

118. Another letter, which was undated, but described Child A as 17 years old, must have been written in 2021. She recalled moving to England at her late father's request, when her mother would have been very vulnerable, moving to live with her father's family. Her mother did not know much English then and had never met them. Anyone would have found that unnerving. Her mother had to leave behind her family in Vietnam, her social beliefs and her way of life to a very different situation in England.

119. People in Vietnam would look down on her for marrying an English man. Child A understood that if the appellant returned, she would be isolated and treated differently. When they arrived in the UK, her late father was 'barely around' and when Child A was 2, her mother had given her to her grandparents to raise, which Child A now understood to have been her father's wish. Due to finance, and language barriers, her mother had been unable to fight for what she really wanted. There was a risk of not seeing her child again; when Child A spoke to her mother now, she could hear the pain in her voice from not being able to hold and spend time with her daughter.

120. Child A had her grandparents, but had lacked a real mother figure, or a father, as her father died when she was 11 years old. She had wished for her mother's love for many years, and been sad that she was not allowed to contact her. She had suffered deep depression and anxiety and never been given the correct treatment, being treated like a child and not taken seriously, despite the stress and trauma she had endured.

121. When her father died (the year her mother went to prison), Child A had travelled to Singapore to see him. He had been in a coma for about a year, and 'in a terrible state'. There was no money to provide for Child A after her father died, and no belongings by which to remember him. She had nothing of his. A great deal of money had been paid to solicitors.

122. Since regaining proper contact with her mother, she had been able to fill in the background of life before Child A was taken from her, and also to help her daughter financially. Now, she had a relationship with her mother and brothers which she did not have with her step-brother and step-sister from her father's previous relationship, because of 'personal problems from my stepmother'. There was another, older brother whom she never saw, as well as one in the Philippines, just two and a half months older than Child A, proof that her father had cheated on her mother.

123. Her young brothers by her mother's current relationship were 13 and 7, and Child A feared they would suffer the same fate as she had, if her mother were removed. Her own mental health had declined because of her mother's absence, and she wanted to protect her brothers from that. She knew that the family in London struggled and sometimes had to use food banks, which broke her heart. She was distraught and angry on their behalf and wanted to protect them. Deporting her would make life so much harder.

124. Child A wanted to help, but she had yet to find a job to support herself, never mind her brothers. She was living with 'elderly people' and taking a young carers' course online as she needed to help look after her grandparents, which added to her stress. She worried for her mother's health, both physical and mental. She felt disappointed and let down by the system, and asked that the court not make the situation any harder by sending her mother away. Child A apologised for any incoherence in her letter but had tried to express her thoughts in the best way possible. She asked the Tribunal to make the right decision.

125. In oral evidence, Child A adopted her letters and was tendered for cross-examination. She said she was now in her final year of college, studying for a BTec in performing arts and music technology. Her plan was to continue private singing tuition and to study for a London College of Music (LCM) Musical Theatre Diploma in Performance at Level 4, hoping to progress to an LCM Teaching Diploma. LCM sent examiners up to Hartlepool to assess the students. It was her intention to end up as a music teacher, not a performer, earning a living by giving private one-to-one lessons.

126. In Hartlepool, Child A had a boyfriend who was English, not Vietnamese. The relationship was serious and had lasted for about a year now.

127. Child A moved out of her grandparents' home in June 2022, just two months before the Upper Tribunal hearing, due to problems with her grandmother. Child A's grandmother had dementia and had been violent

towards her: the police had been involved when it happened, which was why she no longer lived at home. It was a very toxic environment and she needed to leave. The police had also tried to arrange for a residential home for her grandfather, but so far without success.

128. Child A did not consider coming to live in London with her mother: she was still in college and had started her other teaching. Her life and her friends were in Hartlepool, and she did not want to leave her grandfather, who was very ill at present. It had been very hard leaving her grandfather: both her grandparents were not safe alone, but it had been easier on Child A not living in their home. They now had daily carers, who came four times a day for half an hour each time, and security on the front door which sounded an alarm if anyone left the house after 10.30 p.m. That was necessary, because her grandfather was 'far on' with Alzheimer's and had a history of going missing.

129. Child A was coping on her own. After moving out, she lived at first with her boyfriend's family, but not for long, because they could not be expected to buy her food and so on. She had quickly been allocated a Council flat in her own name, despite being only just 18 years old: her circumstances placed her in Priority Band 1. Her mother had helped by providing her with pans for her new flat.

130. Child A still lived close by her grandparents' home in Hartlepool. Despite the difficulties with her grandmother, Child A continued to support her grandparents to the best of her ability. She would take them out, do the cleaning, help her grandfather to clean himself, and cook food for them, providing essential social interaction. Child A's mother gave her things to help her support them, and helped her with the food she had to buy for her grandparents, depending on how much she had to spend.

131. In addition, having not been able to see her mother for much of her childhood, Child A now visited her in London as much as she could, travelling down from Hartlepool every couple of months, in her college holidays. She would stay for a week or two each time. She had travelled down to London when allowed, even before her step-brothers were born.

132. Child A emphasised that the visits to London were specifically to her mother, rather than her stepfather and step-brothers. She was a lot closer to her mother than to her stepfather. He could not teach her much about her Vietnamese culture, to which she strongly wished to remain connected. Her brothers did not understand Vietnamese culture and barely understood the Vietnamese language.

133. Child A suffered with anxiety and depression, from multiple causes. She had been prescribed propranolol and sertraline. It was working, but after the experiences which led to her leaving home, she had to increase the dose.

134. Child A had been bullied at school and had been self-harming from year 7 (when she would have been about 11 years old) until her first year at College, about 5 years later. The school had contacted her parents (in context, her grandparents), but she had been unable to get evidence from the school.

135. Child A's grandmother had not been supportive about her mental health difficulties, and had refused to cooperate with a CAMHS reference because she 'did not believe in mental illness'.

136. When she was about 13, Child A self-referred herself for counselling. She went for a few sessions, then connected with IMPACT instead. Child A was justifiably proud of her progress: at the date of hearing, it had been 16 months since her last incident of self-harm.

137. After repeatedly contacting her GP recently, Child A had been given a telephone number to self-refer to MIND, because she was still having difficulty sleeping and having nightmares. That was when her medication was increased. She had not been able to telephone the number yet, because she was working at McDonalds to get money to live, and also studying for her London College of Music Diploma.

138. The prospect of her mother leaving was keeping her up at night, as she did not want to be without her mother again. Speaking about her younger brothers in London, Child A said that she would not want them to go through what she had experienced, and she would want to keep in contact with them, but it would be harder for transport for her to go down to see them, or them to visit her in Hartlepool. She felt really protective of her brothers. Child B relied on his mother for emotional support.

139. When Child A's father died and her mother went to prison, it had been very hard on her. She did not want her younger brothers to go through that: her priority was for them to be all right.

140. There was no re-examination.

Child B's evidence

141. Child B is the older of the two boys from the appellant's current relationship. He is 14 now. He adopted several letters he had written over the years as his evidence-in-chief. On 17 August 2020, when he was 12 years old, Child B wrote describing himself as 'the middle child of my family' and his mother as 'the heart that kept us intact throughout this troublesome time'. He was very worried about her health, as his mother had been visiting and telephoning the doctor frequently, and having 'an enormous amount of tests done'. The family were worried that the appellant might not have much time left, and if so, it would be better for her to spend it in the core of her loving family, rather than 'some dark lonely corner of Vietnam isolated'.

142. The appellant was very thin. Their father was also not very well, with many breathing problems, liver problems and memory loss. His younger brother could not look after himself yet: he was still too young. His mother's bad behaviour was in the past and he asked the Tribunal to make a judgment on the person she was now. She was making a community garden for herbs and very serious about making sure it was legal.

143. The following year, in an undated letter, Child B wrote again. He was 13 now. He said that he did not know what he would do without his mother. Their small family was having 'nothing if not exciting' now she was home again. She was the reason they were all mentally well and would brighten their day in 'any kind of way possible'. His little brother's face lit up joyously when he saw her every time.

144. The appellant's health remained fragile and he did not think she would survive alone in Vietnam. She had fainted many times, abruptly without warning, and his little brother had been rushed to the doctor because he reacted so strongly to that. His father remained in poor health and it was 'difficult for him to provide on his own, let alone take care of us'. The appellant had been able to help when their father could not. Their position had been made worse during Covid-19: they had all had to work harder. Removing his mother would 'endanger the future youth by making an unruly decision'. The academic progress both brothers had made was because they had their mother to support and guide them. She would make great food out of even the blandest of ingredients from the food bank.

145. Child B spoke of the bullying he received at school, being insulted for not having a mother. He could not deal with it and did not know how to stand up for himself. His little brother was now just at that age, and if the appellant were removed, he would experience the same pain. Occasionally, when he went out, Child B would see other children experiencing that pain and it would bring back bad memories. Their mother meant the 'absolute world to us and I believe her children mean the universe to her'.

146. Child B was tendered for cross-examination. He confirmed that he had been looked after by his paternal uncle when both his parents were in prison in 2010/2011. When his mother went to prison again, he had been looked after by his father. He was asked who had cared for him between 2011 and 2014. His first answer was that his father did so. At this point, the appellant interrupted in Vietnamese and Child B changed his account, saying that both his parents had looked after him. He had moved a lot when he was younger.

147. School was going well although adjusting to secondary school had been a bit hard, due to the problems at home. It was better when his mother came back. If his mother were to be removed, he would not get over it for a very long time. She had been a really big role model in his life and had helped him emotionally.

148. His relationship with his sister, Child A, was ‘quite close’ but Child B did not think she would stay in touch if his mother left. Child A and the appellant telephoned each other ‘every week or so’ and he would speak to her on that call.

Submissions

149. For the respondent, Mr Clarke relied on the refusal letter. The evidence before the Upper Tribunal did not reach the ‘very compelling circumstances’ or ‘unduly harsh’ standard.

150. He accepted that family life existed between Child A and the appellant, but the section 55 best interests test no longer applied to her. She was a reliable witness and her evidence should be taken at its highest. The same could not be said for the appellant or her partner, whose evidence had been contradictory and evasive.

151. Mr Clarke also accepted that the relationship between the appellant and her partner was subsisting at the date of hearing, whatever its status had been ‘on and off’ over the years.

152. Child A was now an adult, who had her own life, and her own home, in Hartlepool. She now came for longer visits, and the appellant and her partner were able to support her financially to some extent from time to time, sending her travel tickets. She had a boyfriend and was more independent of her grandparents, although she still supported them, alongside Social Services. She was receiving mental health support and had been proactive in seeking counselling. She was resilient.

153. There was tension in the evidence as to when the appellant and her current partner had been ‘on and off’. He had two children from an earlier relationship whom he also visited, and his brother lived in Hackney. The Tribunal should treat her oral evidence with scepticism, given the contrast between it and what she told the independent social worker.

154. The independent social worker’s report was limited to the evidence placed before her and a single remote interview and should not be given significant weight. Its weight was limited due to that compromised working practice. It was striking that Child C had not been told of the possibility of his mother’s removal until that interview. There was no evidence before the Upper Tribunal about how he dealt with it subsequently.

155. The appellant’s partner had returned to work, albeit part time, and Child B was able to take himself to school. Childcare for Child C had not been considered but could be organised. Social Services had been willing to support him before and would do so again. The school and parents had also been helpful. The boys were doing well at school, with 100% attendance records and were described as ‘highly engaged’. The

independent social worker did not consider that evidence, nor whether counselling in future would assist the children.

156. If the appellant were removed, the boys would still have their father and their uncle. The effect of her removal would be harsh, but not unduly harsh, and no very compelling circumstances had been shown.

157. There was some evidence of domestic violence by the appellant's partner in 2016 and 2018, albeit mental not physical violence. Refuge had closed their file on her at the end of 2021, and there was no corroborative evidence about why she had been re-referred in June 2022.

158. The evidence of the appellant's physical and mental health was historic, rather than recent, despite the opportunity the Tribunal had given for up-to-date medical evidence. The Tribunal had no medical confirmation that the appellant was taking Mirtazapine as she stated. There were appointments for talking therapies, but no indication that the appellant had attended them, nor any evidence that her back problems had required treatment in Vietnam.

159. There was also no evidence to support the partner's claimed epilepsy and it seemed unlikely given his work as a bus driver in Derby when the appellant met him. The Upper Tribunal should find that he did not have epilepsy. His sleep apnoea was being treated and did not affect him in the day time; there was no evidence of any adverse effect from his polycythaemia.

160. The issue of who cared for the boys from 2011-2014 was unresolved. The partner's evidence was that he was not living with the appellant then: the sentencing remarks assessed the appellant as travelling all over the country, with large amounts of cash. If they were living together, he must have known what she was doing.

161. There were no very compelling circumstances over and above the section 117C exceptions for which the appellant should be allowed to remain. The public interest was not outweighed here.

162. For the appellant, Mr Gayle relied on his skeleton argument. In that argument, he relied on the decision of the Supreme Court in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 at [10] in the opinion of Lord Hodge JSC, who gave the judgment of the Court. It was in the best interests of the children for their mother to remain in the UK: see report of Ms Austin, the independent social worker at [1.3].

163. As regards the very compelling circumstances test, the appellant relied on *MS (section 117C(6): 'very compelling circumstances') Philippines* [2019] UKUT 00122 (IAC) at [17] as to the proper approach to balancing the strength of the public interest against the foreign criminal's personal circumstances. The appellant's family life had been established when she was lawfully in the UK and removal would be both disproportionate and not

in the public interest. The appellant would also rely on *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223. The appeal should be allowed.

164. In oral submissions, Mr Gayle argued that significant weight should be given to the independent social worker report. Much of it was common sense, in particular the impact of the appellant's imprisonment on her children.

165. Child A, although now an adult, had experienced the loss of her father and her mother and the effect on her had been devastating. She depended on her mother for emotional support and was affected by the precariousness of her mother's situation. She also worried about her grandparents, whose young carer she was still, despite having left their home.

166. Child B's letters showed the devastating impact on him of his mother's absence. He was withdrawn at school and tearful at home, with a noticeable change when his mother returned to the family. Mr Gayle reminded us of Child B's evidence that his mother was the centre of the family, with a pivotal role in keeping everything together. His father's sleep apnoea made Child B fearful that he might die in the night.

167. Child C had been taken from her at 30 days old and the school and social worker's reports described him as 'clingy' now. Since their mother returned, both Child B and Child C were doing well at school.

168. The partner's health issues were established, with the exception of his epilepsy, for which there was no medical evidence. Mr Gayle accepted that there was no proper medical evidence about his mental health.

169. The test at [51] of *HA* was met, on the facts. This was a serious offence, but it was the appellant now presented a very low risk of reoffending, having not offended since her release in 2016, 6 years ago. It was not inevitable that her partner would have known of her criminal activity between 2011 and 2014: she probably did not tell him. The family was now a stable environment for their children, and it was in their best interests for her to continue to be able to look after them and keep the family together.

170. The appeal should be allowed.

171. We reserved our decision, which we now give.

Findings of fact and credibility

172. We approach the fact-finding in this appeal by considering what weight we can give to the evidence of each witness. As regards the evidence of the appellant and her partner, we found them to be evasive and unreliable. Save where their evidence is corroborated, we are unable to place much weight on it. We note the appellant's failure to provide any of the evidence for which Mr Gayle obtained an adjournment a year ago. We do

not consider it likely that Elder Rahimi, a firm of experienced immigration solicitors, would not have communicated what was required to their client, as both the appellant and her partner claimed.

173. We have considered what weight we can give to the independent social worker report. We bear in mind that the previous decision commented on the absence of such evidence. We note that the instruction was for her to detail 'the best interests of the children not to be separated from [the appellant]', and her report, based on a single video link session, seeks to do that. However, nothing identified in her report rises to the 'unduly harsh' or 'very compelling circumstances' standard as explained in *HA (Iraq)*.

174. The current financial position of the appellant and her partner is unclear. The partner works only part-time, finding clients for a firm of accountants, while she does not work. Child B described her ability to make good food from what they received from a food bank.

175. We do not accept that the appellant's partner has epilepsy: there is no medical evidence in relation to that and we consider it unlikely that he would have been able to drive a bus in Derby for several years if he was epileptic, even if the seizures were only at night. We do accept that he has sleep apnoea, treated with a CPAP at night, and also polycythaemia, for which he does not appear to be receiving treatment.

176. There was no medical evidence to confirm the appellant's mental health issues but both children gave evidence about that, which we treat as reliable.

177. We found the evidence of Child A to be compellingly truthful. We accept her account of her difficult childhood and her circumstances as a young adult. She is a very caring and responsible young woman, who takes care of her grandparents as best she can, despite her grandmother's treatment of her and her grandfather's difficulties. She is resilient and persistent in seeking help for herself, and has stayed in touch with her mother by telephone even when she was not able to see her. Her life is in Hartlepool, where she has a flat, a boyfriend, a music course and friends. We accept that if her mother were removed she would miss her.

178. Child A's concern for her brothers does her credit, but there was very little evidence of a direct relationship between the children, save that which went through their mother. She has a very complex family situation, with a half-sister in Singapore who is almost the same age, and two other older half-siblings whom she does not see, on her father's side.

179. Her relationship with her stepfather was not strong: Child A made it clear that it was her mother that she came south to visit, not him. It was her mother who gave her saucepans for her new flat and sends money when she can, to help Child A buy food for her former parents-in-law, even though she knows they dislike her.

180. Child B thought that Child A would probably not stay in touch if their mother was removed. We accept that Child B was deeply distressed by his mother's absence in prison. We noted that he changed his account of who looked after him between 2011 and 2014 after his mother interrupted. Taking that with the partner's evidence that he was not living with her during that period, we think it likely that Child B's first response was the right one and that during that period, he lived with his father, as he had done ever since his father came out of prison in 2011.

181. Child C was born just before the appellant was arrested in 2014 and despite his doubts about the child's parentage, the appellant's partner has cared for him, both when the appellant was in prison, and after that. We note the school reports that he clings to his mother: he is still very young. We also note that he was unaware that his mother might be deported until he learned it during the independent social worker interview. There is no evidence to assist us in understanding what impact that had on him afterwards. The appellant's partner has been involved with Child C all his life. He looked after him in very difficult circumstances in 2014, as Child C was just a month old. Both boys are now at school and doing well. We accept that they will miss their mother.

182. There appears to be no relationship between the three children and the two other children whom the appellant's partner had with another person. The timing and duration of that relationship has not been disclosed.

Analysis

183. In this appeal, the appellant has been lawfully in the UK throughout. This appellant is a serious, not a medium offender. Her sentence in 2014, her second prison sentence, was almost 5 years. We accept that it is in the younger children's section 55 best interests to have both parents with them, but that is not enough to outweigh the public interest in removing someone who has committed such serious offences.

184. We remind ourselves of the provisions of section 117C(1) and (2):

> "**117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) **Exception 1** applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) **Exception 2** applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

185. Neither Exception 1 nor Exception 2 can avail the appellant. Her sentence was longer than 4 years.

186. Even if it did apply, the appellant could not bring herself within either Exception. As regards Exception 1, she has not been lawfully resident in the UK for most of her life and she is not socially and culturally integrated in the UK. She interacts well with her children's school, and looks after her family, but there was no evidence before us of friendships here or other cultural ties.

187. The appellant is acting as a cultural reference point on the Vietnamese language and culture for Child A, which indicates that she does remain connected to her home culture. She spent the first 28 years of her life in Vietnam, and still has some family there: we are not satisfied that there would be very significant obstacles to her reintegration if she were returned to Vietnam.

188. As regards Exception 2, although the appellant does have a genuine and subsisting relationship with a qualifying partner and qualifying children, we are not satisfied that the effect of her deportation on them, although harsh, would reach the high hurdle required to show that it would be 'unduly harsh'.

189. Permission was granted in this appeal only in relation to section 117C(6) in relation to the children, and in particular Child B and Child C, who are minors still:

> "117C. …(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."

The *HA (Iraq)* guidance

190. The most recent and authoritative consideration of the application of section 117C and the combined operation of the 'unduly harsh' and 'very compelling circumstances' tests is in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, handed down on 20 July 2022. The opinion of Lord Hamblen JSC was the sole judgment, Lord Reed, Lord Leggatt, Lord Stephens and Lord Lloyd-Jones JJSC concurring.

191. Lord Hamblen explained the 'very compelling circumstances' test as requiring a full proportionality assessment:

> "3. Foreign criminals who have been sentenced to terms of imprisonment of at least four years (described in the authorities as "serious offenders") can avoid deportation if they establish that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" - see section 117C(6) of the 2002 Act ("the very compelling circumstances test"). As the very compelling circumstances must be "over and above" the exceptions, whether deportation would produce unduly harsh effects for a qualifying partner/child is relevant here too.
>
> 5. The very compelling circumstances test requires a full proportionality assessment to be carried out, weighing the interference with the rights of the potential deportee and his family to private and family life under article 8 of the European Convention on Human Rights ("ECHR") against the public interest in his deportation. …
>
> 6. The principal legal issue raised by these appeals in relation to the unduly harsh test is whether the Court of Appeal erred in its approach by failing to follow the guidance given by the Supreme Court in *KO (Nigeria)* and, in particular, by rejecting the approach of assessing the degree of harshness by reference to a comparison with that which would necessarily be involved for any child faced with the deportation of a parent.
>
> 7. The principal legal issues raised by these appeals in relation to the very compelling circumstances test are the relevance of and weight to be given to rehabilitation and the proper approach to assessing the seriousness of the offending."

192. The 'very compelling circumstances' test is a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of Article 8 to remove them: see *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803 and *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60.

193. The relevant factors are to be considered and weighed against the very strong public interest in deportation: see *Unuane v UK* [2021] 72 EHRR 24 and *Üner v the Netherlands* [2006] 45 EHRR 14. Rehabilitation is a relevant factor, but only one among many:

> "58. Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case. … In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending. …

> 39. The only caveat I would make is that the wider policy consideration of public concern may be open to question on the grounds that it is not relevant to the legitimate aim of the prevention of crime and disorder. …"

194. In relation to the 'unduly harsh' test, the Supreme Court rejected any concept of a 'notional comparator test' and approved the *MK* self-direction set out in *KO (Nigeria),* a highly elevated standard:

> "… '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."

It is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.

195. In *Unuane* at [72-73], the European Court of Human Rights drew together its existing jurisprudence and set out the following factors to be considered:

(1) The nature and seriousness of the appellant's offence;

(2) The length of her stay in the UK;

(3) The time elapsed since the offence was committed, and her conduct during that period;

(4) The nationalities of the various persons concerned;

(5) Her family situation, such as the length of marriage and 'other factors expressing the effectiveness of a couple's family life';

(6) Whether the spouse (or in this case, partner) knew about the offence when he entered into a family relationship;

(7) Whether there are children of the relationship, and if so, their ages; and

(8) The seriousness of the difficulties which the partner/children are likely to encounter in the country to which the appellant is to be expelled;

(9) The children's section 55 best interests; and

(10) The solidity of the appellant's social, cultural and family ties with the host and destination countries.

We approach the proportionality assessment in this appeal with those factors in mind.

196. The appellant has been in the UK since 2004, when she was 28 years old. She is 46 now. Her last offence was committed in 2014, and since her

release from prison in 2016, she has not been convicted again. She has done her best to look after her three children, despite difficulty in seeing her daughter, who was the subject of a court order giving full parental rights to her paternal grandparents, and very restrictive access to her mother. Since Child A became of age, there have been regular visits, whenever she had college holidays, but Child A's life is in Hartlepool, not London.

197. All three of the appellant's children, and her current partner, are British citizens. Her partner is of Vietnamese origin but is raising their sons with very little of the Vietnamese language or culture. Child A is strongly interested in understanding her culture and language.

198. The appellant's marriage failed in 2007, just three years after she came to the UK. It does not appear that her husband was resident in the UK for much of that time. She had already begun the 'on and off' relationship with her current partner, who was well aware of her drug production activities. He had another previous partner, with whom he has children, but we have not been made aware of the duration or timing of that relationship or how it affected the 'on and off' nature of the appellant's relationship with him.

199. The appellant and her partner have never married and did not begin to live together consistently until after the appellant came out of prison in 2016. The relationship is genuine and subsisting, and they are raising the two boys together. The three children are now aged 18, 14 and 8 years old. Neither the appellant's partner nor her children can be expected to return to Vietnam with her.

200. Child A has not had the opportunity to live with her mother since she was 12 years old and is now an adult. She is impressively resilient, and we have confidence that she will make a success of her life in Hartlepool.

201. The evidence of the appellant's rehabilitation is simply that she has not committed any further offences, and has undertaken some community gardening. That is not the powerful evidence of rehabilitation which is required to outweigh the public interest in rehabilitation.

202. Considering all of the *Unuane* factors, and the evidence before us as a whole, taken with the seriousness of the appellant's offences, we are not satisfied that there are very compelling circumstances in this appeal which outweigh the public interest in deportation, nor that it would be unduly harsh for her three children to remain in the UK without her. Child A has her life in Hartlepool, and the boys have a loving father who has coped with them in much more difficult circumstances during her imprisonment, and can access Social Services, and perhaps family support, should he need it.

203. The appeal is dismissed.

DECISION

204. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

The previous decision has been set aside and we remake the decision by dismissing the appeal.

Signed Judith AJC Gleeson Date: 30 August 2022

Upper Tribunal Judge Gleeson